



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C26/5/5

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC15)

Before: Judge PRAK Kimsan, President

Date: 24 December 2008

<p>ឯកសារព្រឹត្តិបត្រត្រឹមត្រូវតាមច្បាប់ដើម CERTIFIED COPY/COPIE CERTIFIEE CONFORME</p> <p>ថ្ងៃ ខែ ឆ្នាំ ផែការបញ្ជាក់ (Certified Date/Date de certification): <u>24 / 12 / 2008</u></p> <p>មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: <u>SANN RADA</u></p>
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PUBLIC

DECISION ON KHIEU SAMPHAN'S SUPPLEMENTAL APPLICATION FOR RELEASE

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Robert PETIT
YET Chakriya
William SMITH
PICH Sambath
Vincent de WILDE d'ESTMAEL

Charged Person

KHIEU Samphan

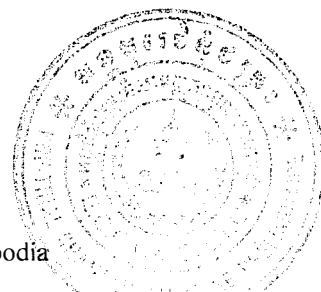
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1. **THE PRESIDENT OF THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Extremely Urgent Supplemental Application for Release” filed on 4 December 2008 by the Co-Lawyers for Khieu Samphan (“Application”).

I- INTRODUCTION

2. The Application is filed within the Charged Person’s Appeal against the Order for Extension of Provisional Detention, which was filed on 4 December 2008.
3. On 12 December 2008, the President directed the Parties to file any responses to the Application by 16 December at 4:00 pm.
4. The Co-Prosecutors filed a response on 16 December 2008. No response was received from the Civil Parties.

II- SUBMISSIONS OF THE PARTIES

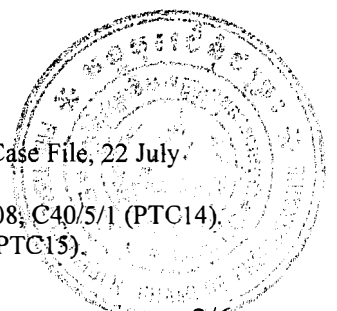
5. Arguing that the Charged Person “is being held arbitrarily, based on a non-existent juridical act [*titre inexistent*], and whereas proceedings are dogged by delays”¹, the Co-Lawyers ask, as a precautionary and preventive measure, that the Charged Person be released on bail until the delivery of the decisions on the three following appeals pending before the Pre-Trial Chamber: Defence Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan’s Case File², Appeal Against Order Refusing Request for Release³ and Appeal Against Order on Extension of Provisional Detention⁴. The Application is addressed to “the President of the Pre-Trial Chamber, in his capacity as representative of the judiciary and by virtue of his powers within the Pre-Trial Chamber” and is based on Article 283 of the Code of Criminal Procedure of the Kingdom of Cambodia (“CPC”). The Co-Lawyers also refer, *inter alia*, to Articles 32, 38, 109 (now Article 128(new)) and 110 (now Article 129(new)) of the Constitution of the Kingdom of Cambodia (“Constitution”) and to Article 9(4) of the International Covenant on Civil and Political Rights (“ICCPR”).
6. The Co-Prosecutors submit that the Application should be dismissed as:

¹ Extremely Urgent Supplemental Application for Release, 4 December 2008, C26/5/2, para. 6.

² Defence Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan’s Case File, 22 July 2008, A190/I/1 (PTC11).

³ Appeal Brief Against Order Refusing Request for Release of 28 October 2008, 27 November 2008; C40/5/1 (PTC14).

⁴ Appeal Brief Against Order on Extension of Provisional Detention, 4 December 2008, C26/5/1 (PTC15).



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- (a) “The ECCC Internal Rules, which supersede the CPC, do not allow such application before the PTC or PTC President and the Urgent Application is therefore inadmissible.
- (b) Alternatively, Article 283 of the CPC on which this Application is based is misinterpreted by the Defence as it does not allow the parties to seize the President of the Investigation Chamber (and *a fortiori* the PTC) of such Urgent Application nor grant the President the power to order any provisional release.”

III- LEGAL PROVISIONS

a. The provisions relied upon by the Defence

7. Article 283 of the CPC provides:

“The President of the Investigation Chamber shall guarantee the proper functioning of the office of the investigating judges. The President shall verify the conditions for implementing the provisions concerning provisional detention, court orders, rogatory letters and forensic experts.

The President of the Investigation Chamber shall supervise that there be no undue delay in the implementation of proceedings.

The President of the Investigation Chamber may inspect the office of the investigating judges.”

8. Articles 32, 38, 128(new) and 129(new) of the Constitution of Cambodia provide, respectively:

“Article 32:

Every Khmer citizen shall have the right to life, personal freedom, and security.

[...]”

“Article 38:

[...]

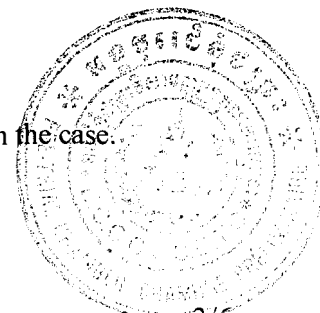
The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.

[...]

Any case of doubt, it shall be resolved in favor of the accused.

The accused shall be considered innocent until the court has judged finally on the case.

Every citizen shall enjoy the right to defense through judicial recourse.”



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“Article 128- New (Previously Article 109):

The Judicial power shall be an independent power.

The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.

The Judiciary shall cover all lawsuits including administrative ones.

The authority of the Judiciary shall be granted to the Supreme Court and to the lower courts of all sectors and levels.”

“Article 129- New (Previously Article 110):

Trials shall be conducted in the name of Khmer citizens in accordance with the legal procedures and laws in force.

Only judges shall have the right to adjudicate. A judge shall fulfil this duty with strict respect for the laws, wholeheartedly, and conscientiously.”

9. Article 9(4) of the ICCPR provides:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings to challenge the lawfulness of his detention and order his release if the detention is not lawful.”

b. The Internal Rules

10. Internal Rule 64(2) provides:

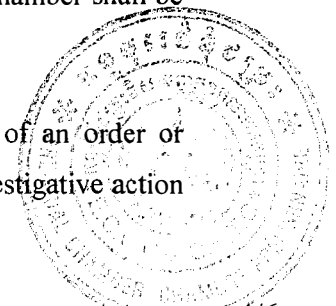
“At any moment during the period of the Provisional Detention, the Charged Person or his or her lawyer may submit an application for release to the Co-Investigating Judges. [...] Subject to the provisions of Rule 72(2), the Co-Investigating Judges shall issue a reasoned decision within 5 (five) days from receipt of the Co-Prosecutors’ opinion. All such orders are open to appeal.”

11. Internal Rules 77(11) and (13) provide, respectively:

“11. Pending the outcome of proceedings before the Chamber under this Rule, and unless the Chamber orders otherwise, the Co-Investigating Judges may continue their investigation, where applicable.”

“13. A decision of the Chamber requires the affirmative vote of a least 4 (four) judges. [...] If the required majority is not attained, the default decision of the Chamber shall be as follows:

- a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand. [...]”



IV- CONSIDERATIONS

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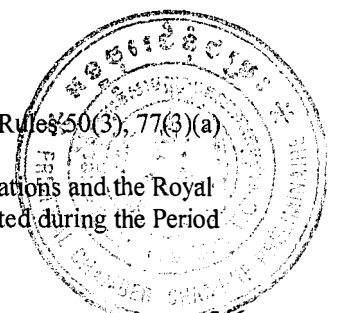
12. Pursuant to Internal Rule 64(2), applications for release shall be filed to the Co-Investigating Judges and are subject to appeal before the Pre-Trial Chamber.
13. The Internal Rules provide that decisions on pre-trial appeals and applications shall be made by the Pre-Trial Chamber as a whole. The President observes that pursuant to Internal Rule 77(13), an order of the Co-Investigating Judges can only be annulled or overturned by an affirmative decision of four judges of the Pre-Trial Chamber.
14. The Internal Rules do not grant the President of the Pre-Trial Chamber jurisdiction to provisionally release a charged person⁵.
15. The Internal Rules quoted above clearly reflect the Agreement between the United Nations and the Government of Cambodia where, as a response to the request of the Cambodian Government for assistance in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979, it is envisaged that decisions will be made by a forum of national and international judges⁶.
16. In its “Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment”, the Pre-Trial Chamber found:

“14. The Internal Rules therefore form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.

15. Provisions of the CPC should only be applied where a question arises which is not addressed by the Internal Rules.”

⁵ The only special powers granted to the President by the Internal Rules can be found in Internal Rules 50(3), 77(3)(a) and 77(15).

⁶ See paras 3 and 4 of the Preamble and Articles 3 and 4 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003.



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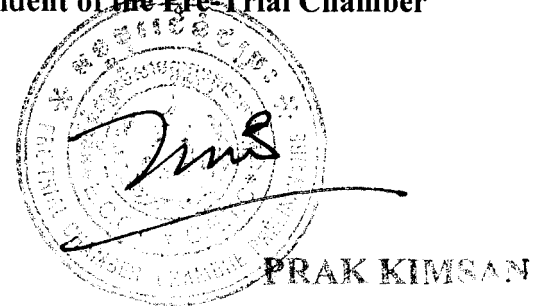
17. On the basis of these considerations, the President finds that the provisions of the CPC are not applicable as the Internal Rules clearly address the issue of the jurisdiction on applications for provisional release.
18. At the International Criminal Court (“ICC”), the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), any decision on provisional release must come from the Pre-Trial⁷ or the Trial Chamber⁸ as a whole. The President finds that the procedure on provisional release provided for by the Internal Rules is in accordance with the procedural rules of international courts. International standards therefore do not require the inclusion of other possibilities for the Charged Person to request provisional release.
19. The President finds that he has no jurisdiction to decide on the Application and will therefore declare it inadmissible.

**THEREFORE, THE PRESIDENT OF THE PRE-TRIAL CHAMBER HEREBY
DECIDES:**

The Application is inadmissible. mw

Phnom Penh, 24 December 2008

President of the Pre-Trial Chamber



⁷ Rule 118 of the ICC Rules of Procedure and Evidence.

⁸ Rule 65(A) of the ICTY Rules of Procedure and Evidence. Rule 65(A) of the ICTR Rules of Procedure and Evidence.