



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

DIS 8/5/4/14  
ព្រះរាជាណាចក្រកម្ពុជា

**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King

Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.*

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

Before: Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

Date: 25 August 2009

<b>ឯកសារដើម</b>
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**PUBLIC**

**DECISION ON THE APPEAL OF THE CHARGED PERSON AGAINST THE CO-INVESTIGATING JUDGES' ORDER ON NUON CHEA'S ELEVENTH REQUEST FOR INVESTIGATIVE ACTION**

**Co-Prosecutors**

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Anees AHMED

**Charged Person**

Ieng Thirith

**Lawyers for the Civil Parties**

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CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ធ្វើការបញ្ជាក់ (Certified Date/Date de certification): ..... 26 / 08 / 2009 .....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: JANN RADA



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of an “Appeal against the Office of the Co-Investigating Judges’ in respect of an Order on Request for Investigative Action of 3 April 2009” (“the Appeal”)<sup>1</sup> filed by the Co-Lawyers for Ieng Thirith (the “Charged Person”) on 4 May 2009.

## I. PROCEDURAL BACKGROUND

1. On 27 March 2009, the Co-Lawyers for Nuon Chea filed before the Co-Investigating Judges their “Eleventh Request for Investigative Action” (the “Eleventh Request”)<sup>2</sup> seeking that the Co-Investigating Judges investigate allegations of corruption at the ECCC.<sup>3</sup>
2. On 27 March 2009, the Co-Lawyers for Ieng Thirith filed before the Co-Investigating Judges a “Motion in Support of Nuon Chea’s Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents (‘Ieng Thirith’s Motion in Support of the Eleventh Request’).<sup>4</sup>
3. On 3 April 2009, the Co-Investigating Judges issued an “Order on [Nuon Chea’s Eleventh] Request for Investigative Action” (the “Order”) noting the motion filed by the Co-Lawyers for the Charged Person, Ieng Thirith. In their Order the Co-Investigating Judges determined that they lacked the necessary jurisdiction to undertake the requested investigative action and that a request for an administrative inquiry would be “superfluous”.<sup>5</sup>
4. On 3 April 2009, the Order was notified to the Charged Person.

<sup>1</sup> Ieng Thirith’s “Appeal against Office of the Co-Investigating Judges’ ‘Order on Request for Investigative Action’ of 3 April 2009”, 4 May 2009, D158/5/4/1 (the “Appeal”).

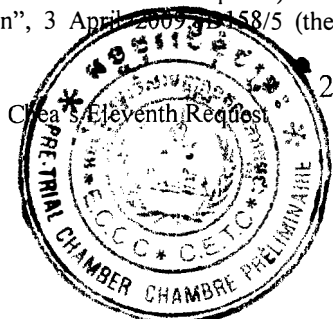
<sup>2</sup> Nuon Chea’s Eleventh Request for Investigative Action, 27 March 2009, D158 (the “Eleventh Request”).

<sup>3</sup> The Eleventh Request, para. 17.

<sup>4</sup> Ieng Thirith’s “Motion in Support of Nuon Chea’s Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents”, 27 March 2009, D158/3 (“Ieng Thirith’s Motion in Support of the Eleventh Request”).

<sup>5</sup> The Co-Investigating Judges “Order on Nuon Chea’s Request for Investigative Action”, 3 April 2009, D158/5 (the “Order”), paras 10, 13.

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5. On 20 April 2009, the Co-Lawyers for the Charged Person filed a Notice of Appeal against the Order, and on 4 May 2009 the International Co-Lawyer filed the Appeal.
6. On 6 May 2009, the Co-Prosecutors submitted an Application for time and page limit extensions in order to file a Response to the Appeal.<sup>6</sup> The Co-Lawyers for the Charged Person did not submit a Response to the Co-Prosecutors' Application.
7. The Lawyers for the Civil Parties filed their Response to the Appeal (the "Civil Parties' Response") on 20 May 2009.<sup>7</sup> Noting the Lawyers for the Civil Parties' Request for an extension of the time limit to file their Response to the Appeal<sup>8</sup> on 21 May 2009, the Pre-Trial Chamber accepted the late filing of the Civil Parties' Response pursuant to Rule 39(4) of the Internal Rules and Article 9 of the ECCC Practice Direction on the Filing of Documents.<sup>9</sup>
8. On 22 May 2009, the Pre-Trial Chamber rejected the Co-Prosecutors' Application for an extension of page limit and granted their Application for extension of the time limit to file a Response, extending the deadline to 29 May 2009.<sup>10</sup>
9. The Co-Prosecutors submitted their Response to the Appeal (the "Co-Prosecutors Response") on 29 May 2009.<sup>11</sup>
10. On 16 June 2009, the Pre-Trial Chamber issued Directions to the Co-Lawyers for the Charged Person inviting them to make submissions in reply to the Co-Prosecutors' arguments in respect of the admissibility of the Appeal.<sup>12</sup>

<sup>6</sup> Co-Prosecutors' Application for Extension of Page and Time Limits to File their Joint Response to the Appeals Against the Corruption Order, 6 May 2009, D158/5/4/2.

<sup>7</sup> Response of the Lawyers for Civil Parties on the Appeals by Charged Persons Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Co-Investigating Judges Order on Eleventh Request for Investigative Action, 19 May 2009, D158/5/4/9 (the "Civil Parties' Response").

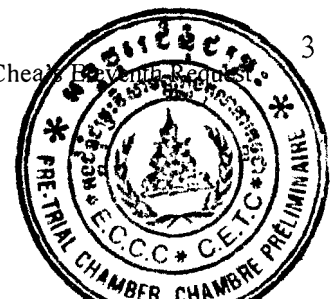
<sup>8</sup> Co-Lawyers for Civil Parties' Request for Extension of Time Limit to File a Response to Defence' Appeals Against the OCIJ-Order on Corruption, 18 May 2009, D158/5/4/4.

<sup>9</sup> Ruling on the Acceptance of the Late Filing of the Lawyers for the Civil Parties' Response, 21 May 2009, D158/5/4/6.

<sup>10</sup> Decision on Co-Prosecutors' Application for Extension of Page and Time Limits to File their Joint Response to the Appeals Against the Corruption Order, 22 May 2009, D158/5/4/8.

<sup>11</sup> Co-Prosecutors' Joint Response to Defence Appeals Against the Co-Investigating Judges' Order Denying Request for Investigative Action Regarding Allegations of Administrative Corruption, 29 May 2009, D158/5/4/10 (the "Co-Prosecutors' Response").

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11. The Co-Lawyers for the Charged Person submitted their Reply to the Pre-Trial Chamber's Directions on 23 June 2009.<sup>13</sup>
12. Upon notice of the Appeal, the Pre-Trial Chamber received the case file, which was updated. For the purposes of considering this Appeal, the Pre-Trial Chamber reviewed the documents in the case file and all the evidence submitted further until the date when the Charged Person was permitted to file a reply to the Co-Prosecutors' Response, which is the last day when the Parties could comment upon anything or submit evidence to their advantage.

## II. RELEVANT LAW

13. Reference is made to Internal Rules 21(1), 35, 55(10), 58(6), 73 and 74(3)(b).

## III. ADMISSIBILITY OF THE APPEAL

14. On 3 April 2009, the Co-Investigating Judges issued the Order on the Eleventh Request. The Order was notified to the Charged Person on the same day. On 20 April 2009 the Co-Lawyers for the Charged Person filed a Notice of Appeal. The Appeal was filed on 4 May 2009 and within the time limit provided for in Internal Rule 75(3).
15. The International Co-Lawyer for the Charged Person submits in the Appeal that the Appellant adopts the arguments set out in "Nuon Chea's Appeal against the Order on the Eleventh Request for Investigative Action".<sup>14</sup> The Co-Lawyers further submit that the admissibility of the Appeal is not denied by the Co-Prosecutors, which, according to them, provides a compelling reason to regard the Appeal as admissible.

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<sup>12</sup> Directions to the Co-Lawyers for the Charged Person concerning Co-Prosecutors' Response, 16 June 2009, D158/5/4/11 (the "Pre-Trial Chamber Directions").

<sup>13</sup> The Co-Lawyers for the Charged Person's Reply to the Pre-Trial Chamber Directions of 16 June 2009, 23 June 2009, D158/5/4/12.

<sup>14</sup> The Appeal, para. 6.



16. The Pre-Trial Chamber shall consider the admissibility of this Appeal by referring to the arguments put forward by the Co-Lawyers for Nuon Chea in his Appeal against the Co-Investigating Judges' Order on Eleventh Request for Investigative Action.<sup>15</sup> The Pre-Trial Chamber notes that the Co-Prosecutors have denied that jurisdiction exists.

17. The Co-Lawyers for the Charged Person filed the Appeal pursuant to Internal Rules 73, 74 and 75.<sup>16</sup> In this respect, the Co-Lawyers for the Charged Person submit as follows:

“[Internal] Rule 73 vests [the Pre-Trial] Chamber with sole jurisdiction over appeals against decisions of the Co-Investigating Judges, as provided in [Internal] Rule 74. Pursuant to [Internal] Rule 74(3)(b) a charged person may appeal against any order of the Co-Investigating Judges refusing requests for investigative action allowed under the [Internal] Rules.”<sup>17</sup>

18. The Co-Lawyers for the Charged Person argue that the ECCC has the inherent power to deal with conduct interfering with the administration of justice.<sup>18</sup> They argue that a “court must satisfy itself that the proceedings as a whole are fair, having regard to any possible irregularities before the case was brought, including the way in which the evidence was dealt with”.<sup>19</sup>

19. The Co-Lawyers further submit that Internal Rule 35 empowers the ECCC to sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice.<sup>20</sup>

20. In their Response to the Appeal, the Co-Prosecutors do not question the admissibility of the Appeal in its form.<sup>21</sup>

<sup>15</sup> The Appeal of the Co-Lawyers Nuon Chea against the Order on Eleventh Request for Investigative Action (“Nuon Chea’s Appeal”), 4 May 2009, D158/5/1/1.

<sup>16</sup> Nuon Chea’s Appeal, para. 1.

<sup>17</sup> Nuon Chea’s Appeal, para. 7.

<sup>18</sup> Nuon Chea’s Appeal, paras. 10-12.

<sup>19</sup> Nuon Chea’s Appeal, para. 13.

<sup>20</sup> Nuon Chea’s Appeal, para. 20.

<sup>21</sup> The Co-Prosecutors’ Response, para. 14.



21. The Co-Prosecutors submit in their Response that the Eleventh Request does not fall within the statutory jurisdiction of the Co-Investigating Judges<sup>22</sup> and that interference in the administration of justice is not established.<sup>23</sup> The Co-Prosecutors also argue that the Eleventh Request does not fall within the inherent jurisdiction of the Court.<sup>24</sup>
22. The Co-Lawyers for the Charged Person in their Reply to the Pre-Trial Chamber Directions of 16 June 2009 did not provide comments on the Response of the Co-Prosecutors.
23. The Civil Party Lawyers in their Response to the Appeal submit that they fully support the Eleventh Request for “further investigation by ECCC concerning the matter of corruption” and that the “ECCC, specifically the Co-Investigating Judges, have jurisdiction to conduct investigative action upon this matter”.<sup>25</sup> They argue that “as the ECCC is run on the basis of judicial independence and impartiality [...], it is within the scope of the ECCC to deal with this problem, no matter how distasteful”.<sup>26</sup> They further submit that “there is little doubt that investigating this matter is within the scope of [Internal] Rule 35”<sup>27</sup> and that “inherent powers require tribunals to deal with conduct which interferes with [their] administration of justice”.<sup>28</sup> According to the Civil Party Lawyers, the inherent powers “along with the mandate under [Internal] Rule 35, create jurisdiction for ECCC to deal with the corruption issue and to conduct further investigation concerning it”.<sup>29</sup>

### Considerations of the Pre-Trial Chamber

24. The Pre-Trial Chamber notes that pursuant to Internal Rule 73 it has jurisdiction over appeals filed against such categories of decisions of the Co-Investigating Judges “as provided for in Internal Rule 74”. Internal Rule 74(3)(b) grants to the Charged Person the right to file appeals against such

<sup>22</sup> The Co-Prosecutors’ Response, paras. 54-57.

<sup>23</sup> The Co-Prosecutors’ Response, paras. 60 and 61.

<sup>24</sup> The Co-Prosecutors’ Response, paras. 62-64.

<sup>25</sup> Civil Party Lawyers’ Response, para. 4.

<sup>26</sup> Civil Party Lawyers’ Response, paras. 5-10.

<sup>27</sup> Civil Party Lawyers’ Response, para. 11.

<sup>28</sup> Civil Party Lawyers’ Response, para. 13.

<sup>29</sup> Civil Party Lawyers’ Response, para. 14.



orders of the Co-Investigating Judges that refuse “requests for investigative actions allowed under these Internal Rules”. The phrase “as provided in Rule 74” used in Internal Rule 73(a), read in conjunction with the contents of Internal Rule 74(3)(b), provides that two prerequisites have to be fulfilled for Internal Rule 73(a) to become operative. First, there must be a request which is “allowed under the Internal Rules” and second, such request has to have been “refused” by the Co-Investigating Judges. In the instant case, the core of the issue of admissibility of the Appeal is whether the Eleventh Request is “allowed under the Internal Rules”.

25. The Eleventh Request which was adopted by the Co-Lawyers for the Charged Person seeks to obtain information that could suggest “institutional corruption” at the ECCC. The legal grounds on which the Eleventh Request is based include Internal Rules 21(1), 55(10) and 58(6).
26. The Co-Lawyers for the Charged Person in their Appeal and in their Reply to the Pre-Trial Chamber Directions of 16 June 2009, do not provide an explanation of how a request to obtain information on such allegations may fit under the meaning of the term “request for investigative action allowed under these Internal Rules” as provided in Internal Rule 74(3)(b). They merely assert that “[Internal] Rule 73 vests [the Pre-Trial] Chamber with sole jurisdiction over appeals against decisions of the Co-Investigating Judges, as provided in [Internal] Rule 74”.
27. According to the Internal Rules, permitted requests for investigative action include requests submitted to the Co-Investigating Judges pursuant to Internal Rules 55(10) and 58(6). The Eleventh Request is asserted to be based on such legal grounds. It may thus appear as the Eleventh Request falls under the category of requests “allowed under the Internal Rules” when viewed in this manner. Contrary to these assertions of the Charged Person, the Pre-Trial Chamber finds that the alleged factual situation the Charged Person seeks to address by means of the Eleventh Request does not fall within the scope of Internal Rules 55(10) and 58(6). The alleged factual situation the Charged Person seeks to address is one that may suggest “interference with the administration of justice” or “corruption” in the ECCC. Internal Rules 55(10) and 58(6) may be employed to address only such alleged factual situations that correspond to acts “within the jurisdiction of ECCC”. Rules 55(10) and 58(6) must be read in conjunction with sub-rule 1 of Internal Rule 55, which provides:

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“A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”

28. The Pre-Trial Chamber notes that the jurisdiction of the ECCC comes from the Agreement and the Law on the Establishment of the ECCC,<sup>30</sup> being the instruments that instituted the ECCC. Such instruments refer only to the “Crimes Committed during the Period of Democratic Kampuchea”. The Agreement or the Law on the Establishment of the ECCC do not refer anywhere to “acts” that would constitute “interference in the administration of justice” or “corruption,” as suggested.

29. The Pre-Trial Chamber further notes that “acts” that would constitute “interference in the administration of justice” are considered in Internal Rule 35. According to the Preamble of the Internal Rules, their purpose is not to define the powers of the ECCC, but rather to:

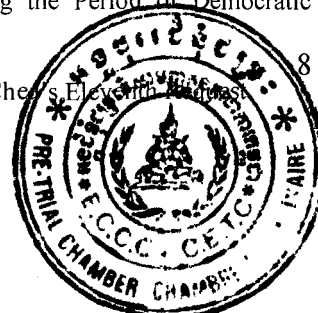
“consolidate applicable Cambodian procedure for proceedings before the ECCC and [...] to adopt additional rules where the existing procedures do not deal with a particular matter.”

30. Internal Rule 35 provides that the ECCC “may sanction or refer to the appropriate authorities” those who “interfere with the administration of justice”. This represents an effort to address a “particular matter”, as provided for in the Preamble of the Internal Rules, in order to safeguard the procedures before the ECCC from inappropriate action that may call into question the fairness of the proceedings. Internal Rule 35 does not establish an additional primary jurisdiction for the ECCC, which would clearly be beyond the scope of the Internal Rules. The power given to Co-Investigating Judges or Chambers to deal with acts that may constitute “interference with the administration of justice” clearly represents a form of ancillary jurisdiction for the ECCC which is not related to that referred to in Internal Rules 55(10) and 58(6).

31. In this context, the Eleventh Request represents an incorrect mixture of the alleged factual situation and the legal provisions upon which the Co-Lawyers rely to establish jurisdiction for the Eleventh

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<sup>30</sup> See Articles 2(1) and 9 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 (“the Agreement”) as read in conjunction with Articles 3, 4, 5, 6, 7 and 8 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“The Law on the Establishment of the ECCC”).





Request. Internal Rules 55(10) and 58(6) may not be used as legal basis for a request for investigative action on a factual situation that may suggest interference with the administration of justice or corruption in ECCC. Under these circumstances, the Pre-Trial Chamber finds that the Eleventh Request does not fall under the category of “request(s) for investigative action allowed under these Internal Rules”.

32. As far as Internal Rule 35 is concerned, the Co-Lawyers for the Charged Person indirectly refer to it in their Appeal, stating that this rule empowers the ECCC to investigate actions that represent “interference with the administration of justice”.<sup>31</sup> The Pre-Trial Chamber notes that this Internal Rule does not provide for the initiation of investigative action upon request by a party. It rather leaves the matter under the discretion of the Co-Investigating Judges or the Chambers. Consequently Internal Rule 35 cannot provide a basis for the requested investigative action and therefore for the appeal lodged under 74(3)(b). The Pre-Trial Chamber further observes that the matter is before the appropriate authorities of the Kingdom of Cambodia and the United Nations.

### **The right to an independent and impartial tribunal**

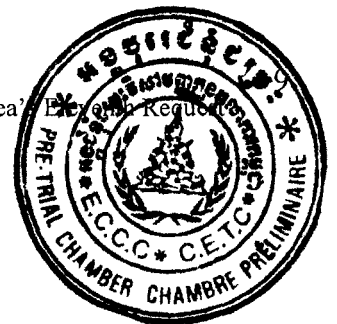
33. The Pre-Trial Chamber notes that the Co-Lawyers are concerned that alleged widespread institutional corruption may threaten the Charged Person’s right to an independent and impartial prosecution, investigation and trial. They argue that if staff members entrusted with sensitive tasks are willing to engage in graft, then those individuals may be equally willing to follow improper instructions, such as manipulation of evidence in order to support a preordained political outcome. They maintain that the primary purpose of the Eleventh Request is to assure the Charged Person and the public that the ECCC’s judges, prosecutors, administrators and support staff meet the standards of integrity and freedom from undue political influence.<sup>32</sup>

34. The Co-Lawyers further submit that they have exhausted their “local remedies” before attempting to bring the matter before the ECCC’s judicial authorities and that it would be futile to await resolution of the matter by the Royal Government of Cambodia or the United Nations (“UN”).

<sup>31</sup> Nuon Chea’s Appeal, para 20.

<sup>32</sup> Nuon Chea’s Appeal, para 23 and the Eleventh Request, paras. 18-21.

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They argue that “because exposures of the alleged scheme would likely discredit senior CPP officials and embarrass the UN, neither institution possesses the requisite impartiality to deal with the matter”.<sup>33</sup>

35. In relation to these issues raised by the Co-Lawyers, Internal Rule 21 reads:

“1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]”

36. The Pre-Trial Chamber will examine whether Internal Rule 21 requires that it adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the interests of the Charged Person for legal certainty, transparency and fairness of proceedings are safeguarded.

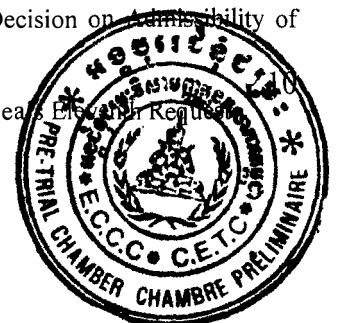
37. The Pre-Trial Chamber observes that the Internal Rules give the Charged Person the ability to address any concerns related to irregularity of proceedings in handling evidence by means of provisions on the annulment procedure during the investigative stage of the proceedings and objection to admissibility of evidence during the trial stage. Reference is made to Internal Rules 48, 76 and 87.<sup>34</sup>

38. Pursuant to these Internal Rules, irregularly obtained evidence can be excluded from the case file where a procedural defect has been identified in relation to the way evidence has been obtained or

<sup>33</sup> Nuon Chea’s Appeal, paras. 31-33.

<sup>34</sup> For a better understanding of the provisions of Internal Rule 87, see Trial Chamber’s Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, paras. 5-7.

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handled and where it is established that such defect infringes the rights of a party to the proceedings, including the Charged Person.

39. Internal Rule 76(2) provides that the party applying for annulment of any part of the proceedings must submit a “reasoned” application to the Co-Investigating Judges, requesting them to seize the Pre-Trial Chamber with an application for annulment. Internal Rule 76(4) provides that the Chamber may declare such application admissible if it sets out “sufficient reasons for annulment”. According to these sub-rules, the existence of “sufficient reasons” is a prerequisite for the admission and processing of a request for annulment. While the Internal Rules do not elaborate on the meaning of “sufficient reasons for annulment”, the Pre-Trial Chamber has previously explained this in more detail, concluding that an applicant for annulment is obliged to state which part of the proceedings is null and void and provide reasons for such an assertion.<sup>35</sup>
40. In addition, the Charged Person may, during trial proceedings, ask for cross-examination of witnesses if they have serious concerns regarding written evidence.<sup>36</sup> When deciding on the admissibility of evidence before it, each Chamber has the inherent power to carry out additional investigation where issues of fair trial arise in relation to any piece of evidence.<sup>37</sup> Further, the Supreme Court Chamber may revise a final judgment on the grounds that “it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified”.<sup>38</sup>
41. The Pre-Trial Chamber further notes that the Co-Lawyers for the Charged Person Nuon Chea have requested the Royal Prosecutor in Phnom Penh to investigate the alleged corruption. It is not clear to the Pre-Trial Chamber the basis upon which this request was made. The Pre-Trial Chamber notes that this request was rejected at first instance, but is the subject of an appeal before the Prosecutor General.

<sup>35</sup> Pre-Trial Chamber’s Decision on Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, paras. 32-42.

<sup>36</sup> See Internal Rule 87(3).

<sup>37</sup> See Article 38 of the Statute of the International Court of Justice; *Prosecutor v. Tadic*, IT-94-1-A, “Judgment”, 15 July 1999, para. 322; *United States of America on Behalf of Lehigh Railroad Company v. Germany*, U.S. – German Mixed Claims Commission, reprinted in 34 AM. J.I.L. 151, (1940).

<sup>38</sup> See Internal Rule 112(1)(b).

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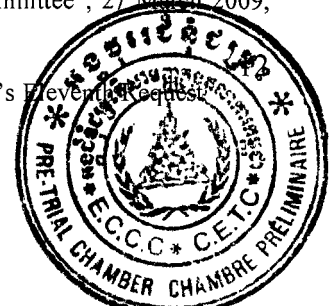
42. Specifically in this case, where no reasons for the decision in the first instance of the local authorities have been provided to the Pre-Trial Chamber and the local appellate body is currently seized of the matter which is substantially the subject matter of the Eleventh Request adopted by the Charged Person, it cannot be concluded, in the absence of stated facts, that local institutions do not possess the required capacity or impartiality to deal with the matter.
43. The Pre-Trial Chamber notes that the standard set at the international level for finding national remedies ineffective is rigorous. While the rules or jurisprudence of the *ad hoc* tribunals or the International Criminal Court do not provide much guidance in this respect, given that they have primary jurisdiction in relation to the respective national jurisdictions, the case law of the United Nations Human Rights Committee (UN HRC) can be used as guidance.
44. Where a domestic procedure is still pending, the UN HRC will either suspend its admissibility procedure or declare the communication inadmissible.<sup>39</sup> With respect to the burden of proof in such cases, if an applicant submits that certain remedies are ineffective or futile or would be unreasonably long, then he must provide *prima facie* evidence to sustain his/her allegations.<sup>40</sup> The UN HRC has noted that “mere doubts as to the effectiveness of remedies do not absolve the authors from the obligation to exhaust them”, and that the applicants must submit sufficient or relevant information concerning the case law of the court which is alleged to represent an ineffective remedy in order to enable the Committee to consider and conclude on the matter.<sup>41</sup>
45. The Pre-Trial Chamber notes that nowhere in the Eleventh Request or the Appeal have the Co-Lawyers for the Charged Person provided information, either directly or by adoption, which would confirm to such level the assumptions about the effectiveness or behaviour of the local authorities currently reviewing their request or that of the United Nations. The fact that Nuon Chea’s motion is still to be decided by the Prosecutor General is contrary to these assumptions.

<sup>39</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg: 1993, p. 704.

<sup>40</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg: 1993, p. 706.

<sup>41</sup> *Garcia Perea v. Spain*, Communication No. 1511/2006, “Decision of the Human Rights Committee”, 27 March 2009, para. 6.2.

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46. The Pre-Trial Chamber finds that the other possibilities of complaint or remedy available to the Co-Lawyers under the Internal Rules and Cambodian law sufficiently safeguard the interests of the Charged Person.

47. In addition, the right of the Charged Person to an independent and impartial tribunal, the Pre-Trial Chamber notes, is guaranteed in the ECCC establishing instruments, the Internal Rules and in the international Instruments to which the Royal Cambodian Government is a party.

48. Article 12 of the Agreement provides as follows:

“The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. [...]”

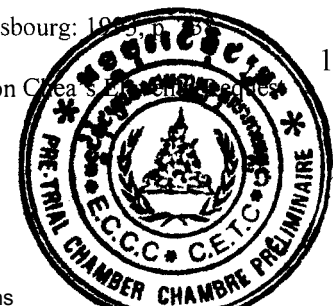
49. Article 14 of the International Covenant on Civil and Political Rights (the “ICCPR”) obliges States Parties to set up independent, impartial courts and to give them such an institutional and financial structure that they are able to conduct at all times a fair trial of criminal matters and to accord all accused persons the minimum rights guaranteed in Articles 14(2)-(7).<sup>42</sup>

50. As far as impartiality of the ECCC judges is concerned, the Pre-Trial Chamber notes that Internal Rule 34 is available to the parties to address any concerns related to the specific holding or bias of certain Judges on a case by case basis.

51. As far as independence of the ECCC judges is concerned, reference is made to Article 3 of the Agreement and Article 11 new of the ECCC Law. The Agreement and ECCC law refer to the Supreme Council of Magistracy and the Secretary-General of the United Nations as appointing and nominating bodies for the ECCC Judges. The submissions advanced by the Co-Lawyers of the Charged Person suggest that the possible existence of a “kickback scheme” casts a shadow on the way ECCC Judges are appointed and therefore calls into question their independence from the

<sup>42</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg: 1993, p. 31.

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administrative. The Co-Lawyers for the Charged Person further argue that if ECCC staff members entrusted with sensitive tasks are willing to engage in graft, then those individuals may be equally willing to follow improper instructions and endanger the integrity of judicial proceedings.

52. The Pre-Trial Chamber finds that the allegation that staff members possibly have paid money to a superior cannot lead to the conclusion that these staff members can influence the Judges to manipulate the outcome of the procedure, and therefore affect the independence and impartiality of the court or the judges. The nature of the allegation is too remote to draw such a conclusion without additional facts.
53. The Pre-Trial Chamber finds that the Charged Person's rights provided for in Internal Rule 21 are sufficiently safeguarded by the existing legal framework, as reasoned above. The Pre-Trial Chamber therefore finds that Internal Rule 21 does not oblige it to interpret the Internal Rules in such a way that the Appeal should be declared admissible.

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:**


The Appeal is inadmissible.

In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

**Phnom Penh, 25 August 2009**

**Pre-Trial Chamber**

**President**

  
Rowan DOWNING

  
NEY Thol

  
Katinka LAHUIS

  
HUOT Vuthy

