



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (HTC24)

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

Date: 22 September 2009

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PUBLIC

DECISION ON THE ADMISSIBILITY OF THE APPEAL LODGED BY KHIEU SAMPHAN AND DIRECTIONS TO THE CO-PROSECUTORS

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

Charged Persons

KHIEU Samphan
IENG Thirith
NUON Chea

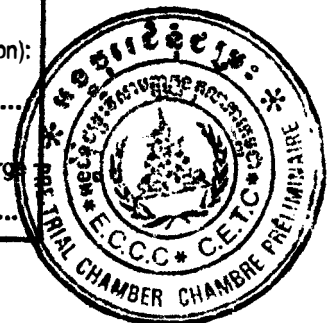
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009” filed by Charged Persons Ieng Thirith, Nuon Chea and Khieu Samphan on 24 July 2009 (the “Appeal”).

I- PROCEDURAL BACKGROUND

1. On 20 April 2009, the Co-Lawyers for Ieng Thirith, Ieng Sary and Nuon Chea filed before the Co-Investigating Judges a “Joint Request for Investigative Action to Seek Exculpatory Evidence in the Shared Material Drive” (“Request”).¹
2. On 19 June 2009, the Co-Investigating Judges issued an Order dismissing the Request.² This Order was notified to the Parties on 23 June 2009.
3. On 3 July 2009, the Co-Lawyers for Ieng Thirith, Nuon Chea and Khieu Samphan filed notices of appeal.³ They filed their Joint Appeal Brief on 24 July 2009, in which they requested an oral hearing.⁴
4. On 10 August 2009, the Co-Prosecutors filed their Response.⁵ They requested that the Pre-Trial Chamber determine the Appeal on the basis of written submissions alone⁶ and raised the issue of the standing of Khieu Samphan to bring an appeal against an order to which he was not a moving party.⁷
5. On 20 August 2009, the Pre-Trial Chamber rejected the request to determine the Appeal on the basis of an oral hearing.⁸ In its decision, the Pre-Trial Chamber further directed the Co-Lawyers for Khieu Samphan to file submissions in relation to the admissibility of their

¹ Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Material Drive, 20 April 2009, D164 (“Request”).

² Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2 (“Order”).

³ Record of Appeals, 3 July 2009, D164/6; Record of Appeals, 3 July 2009, D164/4; Record of Appeals, 3 July 2009, D164/5.

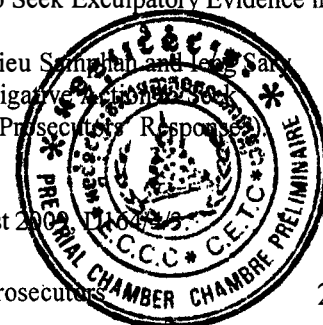
⁴ Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 24 July 2009, D164/4/1 (“Appeal”), para. 8.

⁵ Co-Prosecutors’ Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary against the Co-Investigating Judges’ Order denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, D164/4/2 (“Co-Prosecutors’ Response”).

⁶ Response, paras 12-16.

⁷ Response, paras 8-11.

⁸ Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009.



appeal within the deadlines provided for in Article 8.4 of the Practice Direction ECCC/01/2007/Rev.4.

6. On 24 August 2009, the Co-Lawyers for Khieu Samphan filed their “Defence Position on the Admissibility of their Appeal against the ‘Order on the Request for Investigative Action to Seek Exculpatory Evidence on the SMD’”.⁹ On the same day, they also filed a “Request to Reconsider the ‘Decision on Request for an Oral Hearing on the Appeals PTC24 and 25’” (the “Request for Reconsideration”).¹⁰

II- ADMISSIBILITY OF THE APPEAL LODGED BY KHIEU SAMPHAN

7. The Co-Prosecutors submit that “[t]he Pre-Trial Chamber may dismiss the Appeal in part as inadmissible, in so far as it is filed by the Charged Person Khieu Samphan.” They assert that “[t]he Charged Person was not one of the parties who made the original request which is the subject of the Order, is not directly affected by it and therefore may not have standing to appeal the Order.”¹¹
8. The Co-Lawyers for Khieu Samphan respond that Internal Rule 74 permits all parties to appeal any rejection of requests for investigative actions.¹² They conclude that the Charged Person has an unfettered right to appeal against all orders refusing requests for investigative actions and that he is allowed to fully and freely exercise this right.¹³ In any event, should the right to appeal be limited as submitted by the Co-Prosecutors, the Co-Lawyers assert that the Charged Person Kieu Samphan is directly affected by the impugned order and, as such, is entitled to lodge an appeal against it. In their views, being a party to a decision is not a pre-condition for having an interest and the Order deals with the scope of the investigation and affects all parties to the proceedings.¹⁴
9. The Pre-Trial Chamber notes that Internal Rule 55(10), dealing with requests for investigative actions, provides:

⁹ Defence Position on the Admissibility of their Appeal against the ‘Order on the Request for Investigative Action to Seek Exculpatory Evidence on the SMD’, 24 August 2009, D164/4/5 (“Defence Position on Admissibility”).

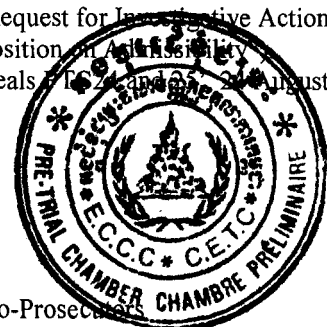
¹⁰ Request to Reconsider the ‘Decision on Request for an Oral Hearing on the Appeals PTC24 and 25’, 24 August 2009, D164/4/6.

¹¹ Response, para. 3.

¹² Defence Position on Admissibility, para. 9.

¹³ Defence Position on Admissibility, para. 17.

¹⁴ Defence Position on Admissibility, paras 21-22.



“10. At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.”

10. Internal Rule 58(6) dealing more specifically with requests for investigative actions by Charged Persons provide:

“6. At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber.”

11. Internal Rule 74(3), on Grounds for Pre-Trial Appeals, provides:

The Charged Person may appeal against the following orders of the Co-Investigating Judges:

[...]

b) refusing requests for investigative action allowed under these IRs;”

12. The Pre-Trial Chamber observes that the arguments raised in the Appeal are essentially aimed at challenging principles set forth in the Order on the basis of which the Co-Investigating Judges have reached their finding that they have no obligation to undertake the requested search. In the Order, the Co-Investigating Judges have not provided any specific reasoning or findings related to the different Charged Persons who filed the initiating Request. The Order rather appears to be of general application.

13. It is apparent to the Pre-Trial Chamber that should the current Charged Person be declared inadmissible for the reasons submitted he could file before the Co-Investigating Judges a request similar to the one he filed



by the other Charged Persons in the current Appeal. This may lead to a similar order of the Co-Investigating Judges and to an appeal similar to that currently before the Pre-Trial Chamber.

14. In these circumstances, the Pre-Trial Chamber finds, for reasons of procedural economy and considering the appropriateness of receiving views from all parties on the matter at the same time, that the Appeal by the Charged Person should not be declared inadmissible as requested by the Co-Prosecutors. The Charged Person Khieu Samphan will therefore be allowed to further join in the Appeal.

III- DIRECTIONS TO THE CO-PROSECUTORS REGARDING REQUEST FOR RECONSIDERATION

15. In accordance with Article 8.3 of the Practice Direction ECCC/01/2007/Rev.4, the Co-Prosecutors are allowed to respond within five days to the Request for Reconsideration filed by the Charged Person in the Appeal.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

- 1) **ALLOWS** the Charged Person to further join in the Appeal;
- 2) **DIRECTS** the Co-Prosecutors to file any response to the Request for Reconsideration within 5 working days of the notification of this decision.

Phnom Penh, 22 September 2009

President of the Pre-Trial Chamber

