



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

D130/9/21
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 26)

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

Date: 18 December 2009

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 18 / 12 / 2009
ម៉ោង (Time/Heure) : 11:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: C.A. Fey

PUBLIC

DECISION ON ADMISSIBILITY OF THE APPEAL AGAINST CO-INVESTIGATING JUDGES' ORDER ON USE OF STATEMENTS WHICH WERE OR MAY HAVE BEEN OBTAINED BY TORTURE

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CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date /Date de certification) 18 / 12 / 2009
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Appeal Against [Co-Investigating Judges’] Order on Use of Statements Which Were or May Have Been Obtained by Torture” filed by the Co-Lawyers for the Charged Person Ieng Thirith (“Defence”) on 10 September 2009 (“Appeal”).¹

I. PROCEDURAL BACKGROUND

1. On 11 February 2009, the Defence filed a Request with the Co-Investigating Judges for the exclusion of evidence obtained by torture from Case-File 002 (“Request”).² The Defence requested that the Co-Investigating Judges treat such evidence as inadmissible, except to show that a statement under torture was made, and only against the alleged torturer.
2. On 30 April 2009, the Co-Prosecutors filed a Response to the Defence request for exclusion of evidence obtained by torture.³ The Co-Prosecutors requested the Co-Investigating Judges to entirely reject the Request, to maintain in the case-file 002 the evidence disputed, and to continue to admit such evidence in the future.
3. On 18 May 2009, the Defence filed the “Defence Reply to Co-Prosecutors’ Response to Ieng Thirith’s Defence Request for Exclusion of Evidence Obtained by Torture”.⁴ In this document, the Defence maintained its request and sought the exclusion of additional documents from the case file.
4. On 28 July 2009, the Co-Investigating Judges issued the “Order on Use of Statements Which Were or May Have Been Obtained by Torture” (“Order”) dismissing the Defence Request.⁵
5. On 30 July 2009, the Defence filed a “Notice of Appeal” against the Order.⁶
6. On 31 July 2009, the Defence filed an “Urgent Defence Request for Extension of the Time Limit to file an Appeal Against ‘Order on Use of Statements Which Were or May Have Been

¹ Co-Lawyers for Ieng Thirith Appeal against Co-Investigating Judges’ ‘Order on the Use of Statements Which Were or May Have Been Obtained by Torture’ 10 September 2009, D130/9/6 (“Appeal”).

² Defence Request for Exclusion of Evidence Obtained by Torture, 11 February 2009, D130/9/2 (“Request”).

³ Co-Prosecutors’ Response to Ieng Thirith’s Defence Request for Exclusion of Evidence Obtained by Torture, 30 April 2009, D130/5.

⁴ Defence Reply to “Co-Prosecutors’ Response to Ieng Thirith’s Defence Request for Exclusion of Evidence Obtained by Torture, 18 May 2009, D130/6.

⁵ Order on Use of Statements Which Were or May have been Obtained by Torture, 28 July 2009, D130/8 (“Order”).

⁶ Ieng Thirith Defence Notice of Appeal Against Co-Investigating Judges’ Order on Use of Statements Which Were or May Have Been Obtained by Torture, 30 July 2009, D130/9.



Obtained by Torture”⁷. The Pre-Trial Chamber granted the Defence an extension of time to file the Appeal until 10 September 2009.⁸

7. On 10 September 2009, the Defence for Ieng Thirith filed the Appeal.
8. On 11 September 2009, the Co-Prosecutors filed an “Urgent Application for Extension of Time to File a Joint Response to Charged Persons Ieng Thirith and Khieu Samphan’s Appeals Against Order on Use of Statements Which Were or May Have Been Obtained by Torture”.⁹ The Pre-Trial Chamber granted the Co-Prosecutors an extension of time to file a response until 12 October 2009.¹⁰
9. On 12 October 2009, the Co-Prosecutors filed the “Co-Prosecutor’s Joint Response to Ieng Thirith and Khieu Samphan’s Appeals Against the ‘Order on the Use of Statements which Were or May Have Been Obtained by Torture’” (“Co-Prosecutors’ Joint Response”).¹¹ In their Response, the Co-Prosecutors raised issues related to the admissibility of Appeal.¹²
10. On 27 October 2009, the Pre-Trial Chamber directed the Defence to express their views in relation to the admissibility issues raised by the Co-Prosecutors in their Joint Response (“Pre-Trial Chamber Directions”).¹³ On 6 November 2009, the Defence submitted their comments pursuant to the Pre-Trial Chamber Directions.¹⁴

II. SUBMISSION OF THE PARTIES

11. In their Appeal, the Defence for the Charged Person request the Pre-Trial Chamber to (i) quash the Order, (ii) order the Co-Investigating Judges instead to “treat as inadmissible any

⁷ Urgent Defence Request for Extension of Time Limit to file Appeal Against the ‘Order on Use of Statements Which Were or May Have Been Obtained by Torture’, 31 July 2009, D130/9/1.

⁸ Decision on the Defence Application for Extension of Time Limit to file Appeal Against the ‘Order on Use of Statements Which Were or May Have Been Obtained by Torture’, 18 August 2009, D130/9/2.

⁹ Co-Prosecutors’ Urgent Application for Extension of Time to File a Joint Response to Charged Persons Ieng Thirith and Khieu Samphan’s Appeals Against Order on Use of Statements Which Were or May Have Been Obtained by Torture, 11 September 2009, D130/9/7.

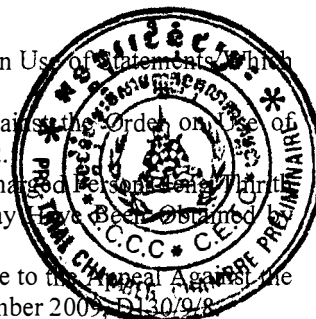
¹⁰ Decision on the Co-Prosecutors’ Application for Extension of Time to File their Response to the Appeal Against the Order on Use of Statements Which Were or May Have Been Obtained by Torture, 17 September 2009, D130/9/8.

¹¹ Co-Prosecutors’ Joint Response to Ieng Thirith and Khieu Samphan’s Appeals Against the ‘Order on the Use of Statements which Were or May Have Been Obtained by Torture’, 12 October 2009, D130/9/13 (“Co-Prosecutors’ Joint Response”).

¹² Co-Prosecutors’ Joint Response, para. 7.

¹³ Directions to Co-Lawyers for Ieng Thirith and Khieu Samphan for Comments on Admissibility Issues raised by the Co-Prosecutors in their Joint Response to the Appeals, 27 October 2009, (“Pre-Trial Chamber Directions”) D130/9/16.

¹⁴ Ieng Thirith Defence Comments on “Directions to Co-Lawyers for Ieng Thirith and Khieu Samphan for Comments on Admissibility Issues raised by the Co-Prosecutors in their Joint Response to the Appeals”, 6 November 2009, D130/9/17 (“Defence Reply on Admissibility Issues”).



evidence or other material which was or may have been obtained by the use of torture, other than to show that a certain statement was made under torture and solely against the torturer [...], and (iii) to order the Co-Investigating Judges to refrain from using such statements in any other way".¹⁵

12. The Defence filed the Appeal pursuant to Internal Rules 55(10) and 74(3)(b), and with regard to the fundamental principles contained within Internal Rule 21.¹⁶ They argue that Internal Rule 55(10) should be interpreted in such a way that it “provides for the right to interlocutory appeal against rejection of both general requests and requests for investigative action”¹⁷ While the Defence acknowledge Internal Rule 74(3)(b) limiting the right of interlocutory appeal to orders refusing investigative actions, they argue that to avoid inconsistency, Internal Rule 55(10) should prevail in accordance with the principle of *in dubio pro reo*.¹⁸ The Defence submit that other grounds for admissibility of the Appeal are: 1) fair trial infringement; and 2) expeditious conduct of the proceedings.¹⁹

13. In their Joint Response, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeal. They submit that “[the Appeal does] not arise out of a refusal of a request for investigative action by the Co-Investigating Judges and, as such, [is] inadmissible”.²⁰ The Co-Prosecutors further submit that if the appeals are deemed as requests for annulment then they are procedurally and substantively defective.

14. In their reply to Pre-Trial Chamber Directions the Defence refer to their arguments raised in the Appeal and further submit that the underlying argument for admissibility of the Appeal is that, while this issue is recently solved by the Trial Chamber, “the controversy around the use of torture-tainted evidence needs to be solved at the pre-trial stage also in order to determine the limits of the investigative powers of the [Co-Investigating Judges]”.²¹

III. RELEVANT LAW

¹⁵ Appeal, para. 124.

¹⁶ Appeal, para. 10.

¹⁷ The Defence interpretation of their term “general request” is “orders to cease or limit the conduct of the investigation” and of the term “requests for investigative action” is “investigative action necessary for the conduct of the investigation”; See Appeal, para. 12.

¹⁸ Appeal, para. 15. The Pre-Trial Chamber notes that this Latin expression, *in dubio pro reo* is translated as “When there may be a doubt, act in favor of the accused”.

¹⁹ Appeal, paras 16-22.

²⁰ Co-Prosecutors’ Joint Response, para. 7.

²¹ Defence Reply on Admissibility Issues, paras 10 and 13.



15. Reference is made to Internal Rules 21, 55(10), 73, 74(3) and 75.

IV. ADMISSIBILITY

16. On 28 July 2009, the Co-Investigating Judges issued the Order, which was notified to the Parties on 30 July 2009. The Defence for the Charged Person filed a Notice of Appeal on 30 July 2009. The Appeal Brief was filed on 10 September 2009 in accordance with the extension of time granted by the Pre-Trial Chamber.

17. To determine whether it has jurisdiction over the Appeal, the Pre-Trial Chamber shall start with an examination of the nature of the related Defence Request. The Pre-Trial Chamber notes that the Defence submitted the Request to the Co-Investigating Judge pursuant to Internal Rule 55(10) “which provides that at any time during an investigation a Charged Person may request the [Co-Investigating Judges] to make such orders as they consider necessary for the conduct of the investigation”.²² In the conclusion of the Request the Defence asked the Co-Investigating Judges to:

- (i) “Treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture [...]
- (ii) Refrain from using such statements in any other way [...]

18. The Pre-Trial Chamber observes that, taking into account its purpose, the Request is not a “request for investigative action” within the ambit of Internal Rule 74(3)(b) and as defined by the Pre-Trial Chamber in its Decision on Khieu Samphan’s Translation Appeal²³ as requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.

19. The Pre-Trial Chamber further observes that the possibility to appeal from orders of the Co-Investigating Judges is limited for the Charged Person whereas the Co-Prosecutors can appeal all such orders.²⁴ Any inconsistency that may derive from a suggested general possibility to appeal under Internal Rule 55(10) and the limited possibility to appeal for the Charged Person under Internal Rule 74 (3)(b) cannot lead to conclusions as drawn by the Defence on the admissibility of this Appeal.

²² Request, para. 3.

²³ Decision on Khieu Samphan’s appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, para.28. A190/I/20.

²⁴ Internal Rule 74(2).



20. The Pre-Trial Chamber further notes that it has, in general, no jurisdiction to review matters related to admissibility of evidence as such. According to the Internal Rules, the matter of admissibility of evidence arises at the trial stage of the criminal proceedings.²⁵ Similarly, the Cambodian Code of Criminal Procedure provides very few rules regarding admissibility of evidence and these concern the trial stage of the proceedings when the trial judges are given broad discretion in deciding whether or not to admit evidence.²⁶
21. The Pre-Trial Chamber finds for these reasons that the appeal cannot be declared admissible while applying Internal Rules 55 and 74.
22. The Pre-Trial Chamber notes that Internal Rule 76 provides an opportunity for a party to request the Co-Investigating Judges to annul an investigative action. It is further noted that this provision is aimed to exclude the evidence in its totality. The Request made to the Co-Investigating Judges is aimed to exclude only for a part as far as the evidence is used otherwise than as allowed under the Convention Against Torture (the “CAT”). The suggestion made by the Co-Prosecutors that this procedure should have been used by the Defence is therefore without legal basis.
23. The Pre-Trial Chamber further notes that the Defence submit that other grounds for admissibility of the Appeal are: 1) fair trial infringement; and 2) expeditious conduct of the proceedings.
24. In this respect, Internal Rule 21 provides:

“Rule 21. Fundamental Principles

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. [...]

4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

²⁵ Internal Rule 87.

²⁶ Article 321, Cambodian Code of Criminal Procedure:



25. The Pre-Trial Chamber shall examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person's rights to appeal in order to ensure that proceedings are fair and expeditious.
26. The Pre-Trial Chamber observes that the Internal Rules give to the Charged Person the possibility to object to the admissibility of evidence during the trial stage. Reference is made to Internal Rule 87.²⁷
27. The Pre-Trial Chamber further notes that the established procedure before the Trial Chamber for evaluation of evidence for trial is in accordance with the international standards of law and safeguards the fair trial rights of the Charged Person. Similar to the discretion granted to judges in other international tribunals,²⁸ the Trial Chamber of the ECCC is granted the discretion to reject requests for evidence (analogous to excluding evidence presented) when such is "not allowed under the law".²⁹ The "law" applicable in Cambodia includes international instruments such as the Convention Against Torture.³⁰
28. The Pre-Trial Chamber observes that the action taken by the Defence is seeking to exclude evidence to the extent consistent with Article 15 of the CAT, which provides:
- "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"
29. On 28 October 2009 the Trial Chamber noted in a decision in the case of KAING Guek Eav "Duch", in respect of documents obtained by torture:
- "The relevance of these documents is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents".³¹
30. Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order,³² Article 15 of the CAT is to be strictly applied. There is no room for a determination

²⁷ For a better understanding of the provisions of Internal Rule 87, see Trial Chamber Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, paras 5-7.

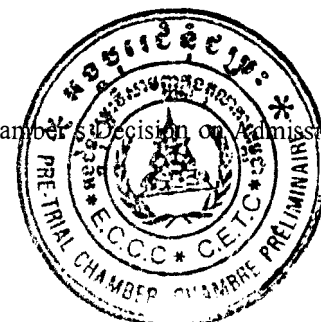
²⁸ Rule 95 of the Rules of Procedure and Evidence of ICTY and ICTR.

²⁹ Internal Rule 87(3)(d).

³⁰ Cambodia ratified the Convention Against Torture on 15 October 1992.

³¹ See Trial Chamber Decision, 28 October 2009, E176, para. 8.

³² Order, para.28.



of the truth or for use otherwise of any statement obtained through torture.³³ The Pre-Trial Chamber observes that, at the time it was seized of this Appeal, the original and two translated versions of the Order were inconsistent with each other in particular in regard to paragraph 28³⁴ which was specifically commented in the Appeal. The Pre-Trial Chamber further observes that due to this inconsistency, the application of Article 15 of the CAT in relation to the evidence in question as discussed in the Order was unclear.

31. 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:


The Appeal is inadmissible.

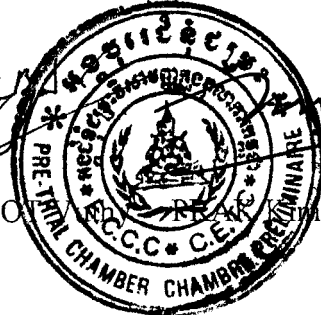
In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

Phnom Penh, 18 December 2009 *ch.*

Pre-Trial Chamber

President


Rowan DOWNING NEY Thol Katinka LAHUIS HUONG Trasan



³³ The drafting history of Article 15 of the CAT makes this clear. See: UN Doc E/CN.4/1285, 18 January 1978; Summary Prepared by the UN SG in Accordance with Commission Res'n 18 (XXXIV), UN Doc. E/CN.4/1314, 19 December 1978, 22.; UN Doc. E/CN.4/WG/1/WP.1, 16 February 1979; UN Doc. E/CN.4/NGO/213, 15 January 1978; Commission on Human Rights, decision 1 (XXXVI) at its 1526th meeting on 5 February 1980; Commission on Human Rights, Report of Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1367, 5 March 1980, para 82. Reproduced in the Commission on Human Rights, Report on the Thirty-Sixth Session of 4 February to 14 March 1980, UN Doc. E/1980/13, E/CN.4/1408, para.205, pp. 52-73, para.83.

³⁴ The Pre-Trial Chamber notes that this has since been corrected in the Zylab but not yet in the public ECCC website.