



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះនិជាឈរាច្យក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

**Kingdom of Cambodia
Nation Religion King**

**Royaume du Cambodge
Nation Religion Roi**

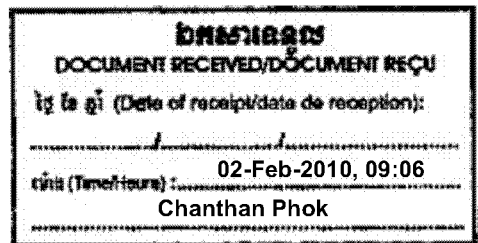
Case File No: 002/19-09-2007-ECCC-OCIJ

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges

Bureau des co-juges d'instruction

Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE
Date: **29 September 2009**
Original: **Khmer/French**
Classification: **Public**



**ORDER ON THE
“REQUEST FOR ANNULMENT FOR ABUSE OF PROCESS”**

Co-Prosecutors

CHEA Leang
William Smith

Charged Person

KHIEU Samphan

Lawyers for the Civil Parties

NY Chanday
LOR Chunthy
KONG Pisey
HONG Kim Suon
YUNG Phanit
KIM Mengkhy
MOCH Sovannary
SIN Soworn
Silke STUDZINSKY
Philippe CANONNE
Elizabeth RABESANDRATANA
Pierre-Olivier SUR

Mahdev MOHAN
Olivier BAHUGNE
David BLACKMAN
Martine JACQUIN
Annie DELAHAIE
Fabienne TRUSSES-NAPROUS
Patrick BAUDOIN
Lyma Thuy NGUYEN
Marie GUIRAUD

Lawyers for the Defence

SA Sovan
Jacques VERGÈS



Original: FRENCH: 00381106-00381110

Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel:+855(0)23 218914 Fax: +855(0) 23 218941.

We, **You Bunleng** (ឃុំ ប៊ុនហ្គេង) and **Marcel Lemonde**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);

Noting Rules 48 and 76 of the ECCC Internal Rules (the “Internal Rules”);

Noting the ongoing judicial investigation against **KHIEU Samphan** (ខៀវ សំផន) and **other Charged Persons**, relating to charges of **Crimes against humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, Genocide, Murder, Torture and Religious persecution**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law;

Noting our *Order on Translation Rights and Obligations of the Parties*, dated 19 June 2008 (A190),

Noting the Pre-Trial Chamber *Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties* (A190/I/20),

Noting the “Request for Annulment for Abuse of Process” filed by Mr Khieu Samphan’s Defence (“the Defence”) on 28 August 2009 (D197),

PROCEDURAL HISTORY AND DEFENCE ARGUMENTS

1. On 19 June 2008, the Co-Investigating Judges issued an order setting out the translation rights and obligations of the parties.¹
2. In a decision dated 20 February 2009, the Pre-Trial Chamber declared Mr Khieu Samphan’s appeal of the order “inadmissible”, on the ground that the Co-Investigating Judges’ order had not infringed any of the charged person’s rights under Rule 21 of the Internal Rules.²
3. On 19 May 2009, at the trial of Kaing Eav Eav alias Duch (Case File 001/18-07-2007/ECCC-TC), the Trial Chamber issued an *Oral Decision on Translation*.³
4. On 28 August 2009, Mr Khieu Samphan’s Co-Lawyers filed a “Request for Annulment for Abuse of Process” on the basis of Rules 48 and 76(2) of the Internal Rules.⁴

¹ *Order on Translation Rights and Obligations of the Parties*, 19 June 2008, A190.

² Pre-Trial Chamber *Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, A190/I/20.

³ P. 34, Trial Chamber, Transcript, 19 May 2009, E1/21.1.

⁴ Request for Annulment for Abuse of Process, 27 August 2009, D197.

5. In support of their request, they quoted from the Trial Chamber's 19 May 2009 oral decision.⁸ They submitted that this decision governs translation matters at all stages of the proceedings and not only at the trial stage. It was argued that by reason of that Trial Chamber decision, the Co-Investigating Judges' *Order on Translation Rights and Obligations of the Parties* was moot. Accordingly, it was the Co-Lawyers contention that placing untranslated documents on the judicial investigation case file was a procedural defect.⁹
6. It is alleged that the Co-Investigating Judges' current practice with respect to translation infringes the right to be defended before the courts by a lawyer of one's own choosing, the right of the lawyer of one's own choosing to have access to the judicial investigation case file and to represent his or her client effectively, and the principle of equality of arms between the parties.¹⁰ Finally, according to the Defence, this infringement is so far-reaching that it renders null and void not only the acts it affects, but the procedural acts in their entirety.¹¹
7. On the basis of the foregoing, the Co-Lawyers invited the Co-Investigating Judges :

To declare the Order on Translation Rights and Obligations of the Parties moot;

To seize the Pre-Trial Chamber with the view to annulment of the judicial investigation and the prosecution for abuse of process;

*To order the immediate and unconditional release of Mr KHIEU Samphan for abuse of process.*¹²

REASONS FOR THE DECISION

8. In support of their request, the Co-Lawyers only quoted a short extract from the 19 May 2009 Trial Chamber oral decision, which does not properly reflect the actual content of the entire decision. It is thus necessary to quote the decision in its entirety:

The general rule is that documents should be available in all three languages of the Court in order to be put before the Chamber. However, the Trial Chamber will accept reference to documents which are available in Khmer and one other language of the Court. The reasons:

- A. *There are Khmer speakers representing all parties and in the Trial Chamber.*
- B. *Translation resources are limited and the material in the case file is extensive.*
- C. *According to Rule 21, the Trial Chamber has the duty to conduct a fair trial within a reasonable time.*

⁸ P. 34, Trial Chamber, Transcript, 19 May 2009, E1/21.1.

⁹ Paras. 39-44, Request for Annulment for Abuse of Process, 27 August 2009, D197.

¹⁰ Paras. 45-52, Request for Annulment for Abuse of Process, 27 August 2009, D197.

¹¹ Paras. 53-56, Request for Annulment for Abuse of Process, 27 August 2009, D197

¹² Para. 57, Request for Annulment for Abuse of Process, 27 August 2009, D197.

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There will be exceptions to this Rule, one of which is where a document is referred to and no prior notice has been given. Any party may object to its admissibility or seek more time to give it further consideration.

*Any translation will be accepted by the Court unless there are objections concerning accuracy or inconsistencies between various versions. Such objections must specify concrete examples. The Court wishes to remind the parties that documents, including those referred to by experts, must be read out or summarized in order to be considered put before the Chamber's disposition.*¹³

9. The Co-Investigating Judges note that the decision merely governs the issue of the translation of documents in Trial Chamber proceedings. Thus, it is not applicable at the judicial investigation stage. Conversely, the Co-Investigating Judges specified in their *Order on Translation Rights and Obligations of the Parties* that the order only covered translation matters at the judicial investigation stage and that “it [was] for the Trial Chamber, once seized of the case file, to manage the translation requirements of any trial, as the interests of the proper administration of justice and of the right to a fair trial dictate.”¹⁴
10. The two decisions (which, by the way take similar approaches) therefore complement each other in that they are meant to govern two different stages in the proceedings and that the Co-Investigating Judges’ order on translation is the only one that applies at the judicial investigation stage.
11. It remains to be determined whether, as argued by the Defence, the current situation with regard to translation at the judicial investigation stage as defined by the said order, constitutes a procedural defect.
12. On this point, the Co-Investigating Judges can only but reiterate the principles set down by Rule 48 of the Internal Rules, which states that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”. Accordingly, when considering a request for annulment, the Co-Investigating Judges must (1) determine whether there had been a procedural defect (2) and, if so, whether it infringes the rights of the party making the application. Apart from the case where failure to comply with an express requirement imposed by an applicable provision entails nullity, a procedural defect arises where there has been an infringement of the rights of the Defence such as those under the International Covenant on Civil and Political Rights (ICCPR).¹⁵ These rights are also laid out in Rule 21 of the Internal Rules.
13. While considering this matter on appeal, the Pre-Trial Chamber conducted a detailed analysis of the *Order on Translation Rights and Obligations of the Parties*,¹⁶ following which, it held that there had been no infringement of the charged person’s rights under Rule 21 of the Internal Rules. Since that decision

¹³ Oral decision on translation (Transcript), 19 May 2009, Judicial Document EI/21.1, p. 34.

¹⁴ P. 7, *Order on Translation Rights and Obligations of the Parties*, 19 June 2008, A190.

¹⁵ Paras. 34-41, Pre-Trial Chamber *Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment*, 26 August 2008, D55/I/8.

¹⁶ Pre-Trial Chamber *Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, A190/I/20.

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was rendered, there has been no notable change, it being understood that documents which are required to be translated under that order and which have not yet been translated are in the course of being translated. Accordingly, the *Order on Translation Rights and Obligations of the Parties* does not infringe any of the rights of the Defence under the International Covenant on Civil and Political Rights or under Rule 21 of the Internal Rules. Absent any procedural defect, the request to seize the Pre-Trial Chamber with the view to annulment of the proceedings cannot be entertained and the request must be dismissed.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

REJECT the request to seize the Pre-Trial Chamber with the view to annulment of the proceedings, dated 28 August 2009.

Done in Phnom Penh, on 29 September 2009.

សហចៅក្រមស៊ើបអង្កេត

**Co-Investigating Judges
Co-juges d'instruction**

[signed]

Marcel LEMONDE

[signed]

ឃុំ ប៊ុនឡាង