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ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux judiciaires khmères

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អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

0197/5/8

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 (PTC30)

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

ឯកសារប្រាកដថា គឺជាច្រើនតាមច្បាប់
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Date: 4 May 2010

PUBLIC

DECISION ON KHIEU SAMPHAN'S APPEAL AGAINST THE ORDER ON THE REQUEST FOR ANNULMENT FOR ABUSE OF PROCESS

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Charged Person

KHIEU Samphan

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Mr. KONG Pisey
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1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Appeal against the Order on the Request for Annulment for Abuse of Process” filed by the Co-Lawyers for the Charged Person, Khieu Samphan, on 30 October 2009 (“Appeal”).¹

I. PROCEDURAL BACKGROUND

2. On 8 October 2009, the Co-Lawyers for the Charged Person filed a Notice of Appeal and, on 30 October 2009, they filed their Appeal against the Order of the Co-Investigating Judges on their Request for Annulment for Abuse of Process (the “Order”).²
3. The Appeal was notified in English on 27 November 2009. On 11 December 2009, the Co-Prosecutors submitted their Response to the Appeal (“Co-Prosecutors’ Response”).³ The Response was notified in English and Khmer on 15 December 2009.
4. The Civil Parties did not file a response.
5. On 27 January 2010, the Pre-Trial Chamber decided that the Appeal would be determined solely on the basis of the written submissions of the Parties and allowed the Co-Lawyers for Khieu Samphan to file a reply to the Co-Prosecutors’ Response within five days.⁴ On 1 February 2010 the Co-Lawyers filed a Request for Reconsideration of this Decision requesting the Pre-Trial Chamber to set a date for a public hearing, or in the alternative, to allow the Charged Person five days from notification of the Co-Prosecutors’ Response in French to submit a reply.⁵



¹ Appeal against the Order on the Request for Annulment for Abuse of Process, 29 October 2009, D197/5/1.

² Co-Investigating Judges “Order on the ‘Request for Annulment for Abuse of Process’”, 29 September 2009, D197/4.

³ Co-Prosecutors’ Response to Khieu Samphan’s Appeal against the Order on the Request for Annulment for Abuse of Process, 11 December 2009, D197/5/2.

⁴ Decision to Determine the Appeal on Written Submissions and Direction for a Reply, 27 January 2010, D197/5/3.

⁵ «Demande de Réconsideration de la «Décision sur l’Opportunité de Trancher l’Appel Interjeté sur la Seule Base des Observations Écrites des Parties et Instructions Relatives au Dépôt d’une Réplique,» 1 February 2010, D197/5/4.

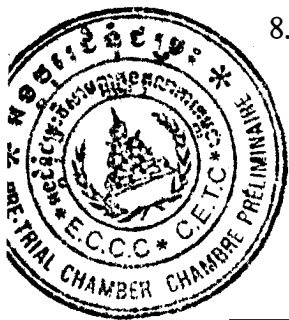
6. On 22 February 2010 the Pre-Trial Chamber rejected the Request for Reconsideration and confirmed that the deadline for filing a reply starts to run upon notification of the Co-Prosecutors' Response in the nominated language of the party that has the right to reply.⁶ The Co-Prosecutors' Response was notified to the Parties in French on 10 February 2010. Considering technical problems in the notification of the Pre-Trial Chamber's Decision of 22 February 2010, the Pre-Trial Chamber on 18 March 2010 decided to allow the Co-Lawyers to file a late reply.⁷ The Co-Lawyers filed their Reply to the Co-Prosecutors' Response, as directed by the Pre-Trial Chamber, on 25 March 2010.

General observations of the Pre-Trial Chamber:

7. In its Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment ("Nuon Chea Decision"),⁸ the Pre-Trial Chamber interpreted the grounds for annulment as defined by the Internal Rules and international law.⁹ The Pre-Trial Chamber notes that none of the parties have raised any objections against those observations and as the Pre-Trial Chamber has not reconsidered those observations, it will examine the current Appeal in accordance with those observations without specifically repeating them.

II. ADMISSIBILITY OF THE APPEAL

8. The Order was issued on 29 September 2009 and notified to the Parties in French and Khmer on 30 September 2009. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 8 October 2009, in accordance with Internal Rule 75. The Appeal was filed on 30 October 2009. The Pre-Trial Chamber notes that the last filing day was 29 October 2009, which was a public holiday for Cambodian staff, rendering filing on



⁶ Decision on Request to Reconsider the Decision to Determine the Appeal on Written Submissions and Directions for a Reply, 22 February 2010, D197/5/5.

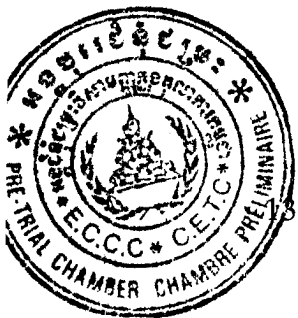
⁷ Decision for the Filing of a Reply Following the Decision on the Request to Reconsider the Decision to Determine the Appeal on Written Submissions, 18 March 2010, D197/5/6.

⁸ Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8.

⁹ Nuon Chea Decision, paras 32-42.

that date impossible. The Pre-Trial Chamber therefore finds the Appeal to be filed on time. The Pre-Trial Chamber notes in addition that no action has taken place under Article 9 of the Practice Directions in respect of late filing of documents before the ECCC.

9. In the Nuon Chea Decision, the Pre-Trial Chamber found that an application for annulment may be declared inadmissible where the application i) does not set out sufficient reasons, ii) relates to an order which is open to appeal or iii) is manifestly unfounded.¹⁰
10. In their Request for Annulment for Abuse of Process (“Application”),¹¹ the Co-Lawyers for the Charged Person submit that the Order on Translation Rights and Obligations of the Parties (“Translation Order”)¹² is moot and accordingly they have requested the Co-Investigating Judges to seize the Pre-Trial Chamber with a view to annulment of the judicial investigation and the prosecution for abuse of process.
11. In the Application, the Co-Lawyers refer to the arguments they have raised in their Appeal against the Translation Order. In addition, they raised new arguments which will be summarized later in this decision. For the purpose of deciding on the admissibility of the Appeal, the Pre-Trial Chamber notes that the Application is sufficiently reasoned and is not manifestly unfounded.
12. The Pre-Trial Chamber finds that the Application is related to an order of the Co-Investigating Judges which is not open to appeal as was extensively reasoned in the Pre-Trial Chamber’s Decision on Khieu Samphan’s Appeal against the Translation Order (the “Decision on Appeal against Translation Order”).¹³
13. The Co-Prosecutors submitted that the Decision on the Appeal against the Translation Order is subject to *res judicata* and its substance can therefore not be subject to a



¹⁰ Nuon Chea Decision, paras 24 and 25.

¹¹ Request for Annulment for Abuse of Process, 27 August 2009, D197, para 57.

¹² Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190.

¹³ Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20.

request for annulment as submitted by the Co-Lawyers of the Charged Person. The Pre-Trial Chamber notes that in dealing with the admissibility of the Appeal against the Translation Order, it examined whether the Translation Order violated any interests protected by Internal Rule 21 in order to identify whether the Pre-Trial Chamber would be compelled to declare the appeal admissible under the Rule. The Pre-Trial Chamber therefore did not give any final decision on the Translation Order itself which would be subject to *res judicata*. It merely concluded that the appeal is inadmissible and the Translation Order in any event is not subject to appeal even when applying Internal Rule 21. This decision of the Pre-Trial Chamber therefore does not affect the admissibility of the current Application for Annulment.

III. GROUNDS ON WHICH THE ANNULMENT WAS REQUESTED

a. Submissions of the Parties

14. The Co-Lawyers for the Charged Person appeal the Co-Investigating Judges' Order denying their request for annulment and request that the Pre-Trial Chamber 1) declare the Order on Translation Rights and Obligations of the Parties null and void, 2) annul the investigation and prosecutorial actions for abuse of process and 3) order the immediate release of the Charged Person.¹⁴ They do so on the grounds that the requirements for annulment from Internal Rule 48 and Article 252 of the Cambodian Code of Criminal Procedure are met:¹⁵ a procedural defect is present, and the defect infringes the rights of the Charged Person.¹⁶
15. The Co-Lawyers submit that the Translation Order gives rise to a substantial procedural defect because it allows for portions of the entire case file to remain untranslated.¹⁷ They submit that the Trial Chamber's Oral Decision on Translation related to Case 001 ("Trial Chamber's Decision") affirms their position.¹⁸ To support

¹⁴ Appeal, para. 51.

¹⁵ Appeal, para. 9.

¹⁶ Appeal, para. 10.

¹⁷ Appeal, paras 20-22.

¹⁸ Appeal, para. 15.



their claim of procedural defect, the Co-Lawyers submit that many of the case file documents are only available in Khmer and/or English,¹⁹ and that translation of documents is neither systematic nor timely, and in some cases must be initiated by the parties.²⁰

16. The Co-Lawyers also submit that this procedural defect infringes upon the Charged Person's right to be defended by a lawyer of his choice, the lawyer's right to have access to the case file, the Charged Person's right to effective representation, the principle of equality of arms and the duty of judicial authorities to ensure the Charged Person's rights.²¹
17. The Co-Lawyers also make reference to international jurisprudence, submitting that circumstances of impropriety or misconduct at the pre-trial stage of the proceedings can give rise to annulment under the abuse of process doctrine.²²
18. The Co-Prosecutors submit that the appeal is inadmissible because it is barred by *res judicata* as the issues raised in the present appeal relate to the translation rights of the Charged Person, which were already thoroughly analyzed by the Pre-Trial Chamber's Decision on Appeal against Translation Order.²³ They also submit that no new facts have come to light to warrant re-hearing those same issues.²⁴
19. The Co-Prosecutors submit that the Trial Chamber's Decision has no bearing on the investigative stage of the proceedings, but is nonetheless compatible with the Co-Investigating Judges' Translation Order.²⁵ They also submit that the Trial Chamber has no authority to overrule the Pre-Trial Chamber's decision upholding the Translation Order.²⁶

¹⁹ Appeal, para. 20.

²⁰ Appeal, paras 36-48.

²¹ Appeal para. 7.

²² Appeal Brief, para. 50.

²³ Co-Prosecutors' Response, paras 19-20.

²⁴ Co-Prosecutors' Response, paras 21-23.

²⁵ Co-Prosecutors' Response, paras 24-29.

²⁶ Co-Prosecutors' Response, paras 30-32.



20. The Co-Prosecutors submit that no procedural defect as defined by Rule 21 infringes on the rights of the Charged Person.²⁷ Specifically, they refer to the Pre-Trial Chamber's Decision on Appeal against Translation Order to support their submission that the Charged Person's right to a fair trial does not include translation of the entire case file.²⁸ They submit that the Charged Person could have taken steps to alleviate the translation issue, but has instead chosen not to utilize available resources and opportunities.²⁹ The Co-Prosecutors also submit that, because the Charged Person's fair trial rights are not egregiously violated by the translation practices of the Co-Investigating Judges, the investigation cannot be annulled on the basis of abuse of process.³⁰

b. Considerations of the Pre-Trial Chamber

21. The Pre-Trial Chamber upholds its reasoning in the Decision on the Appeal against Translation Order, finding that the Order of the Co-Investigating Judges is in accordance with international standards in respect of translation rights.³¹
22. The Pre-Trial Chamber observes that this finding was made specifically regarding translation rights during the pre-trial stage of the proceedings. Whatever was raised from the Co-Lawyers of the Charged Person regarding translation rights during other stages of the proceedings cannot lead to other findings, as the requirements during the pre-trial phase are of a different nature specifically regarding translation rights. As far as the Application addresses whether the rights during the trial phase can be applied during the pre-trial phase, the Pre-Trial Chamber does not find it fit to examine this further as the order subject to the requested annulment is only addressing the issue of translation during the pre-trial phase.



²⁷ Co-Prosecutors' Response, paras 33-34.

²⁸ Co-Prosecutors' Response, para. 35.

²⁹ Co-Prosecutors' Response, para. 38-39.

³⁰ Co-Prosecutors' Response, para. 41.

³¹ Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, paras 34-50.

23. The Pre-Trial Chamber notes that the Co-Lawyers for the Charged Person have submitted that the Charged Person has the right to be defended by a lawyer of his or her choice, the right for the lawyer of the Charged Person's choice, the right to have access to the judicial investigation case file and the right to effective representation. They have also invoked the principles of equality of arms and the duty of the judicial authorities to ensure the Charged Person's rights. It is observed that the Co-Lawyers limit their submissions in the appeal to the effects of the Translation Order and fail to explain how the other enumerated rights have been affected. The Pre-Trial Chamber therefore finds by upholding the reasoning as mentioned in para 21 of this decision the issue is sufficiently addressed.
24. The requested annulment, in accordance with the relevant Rules, appears to be primarily directed at the Translation Order. The Co-Lawyers further submit that annulment of the Translation Order would give rise to annulment of all investigative and prosecutorial actions under the abuse of process doctrine. However, the Co-Lawyers fail to make reasoned submissions as to how the doctrine might apply in this instance, merely stating that the doctrine applies "where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct".³² It goes without further reasoning that the annulment procedure, as applied in the Nuon Chea Decision, is not designed to nullify investigations in general, as requested in the Appeal, but is designed to nullify those portions of the proceedings that harm the Charged Person's interests which have to be specified.³³ Where the Appeal seeks the annulment in general of all investigative and prosecutorial actions it is therefore denied. Accordingly, the request for immediate release based on the purportedly pervasive nature of the procedural defect will be rejected.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1. The Appeal is admissible;

³² Appeal, para. 50.

³³ Nuon Chea Decision, para. 35.



- 2. The Appeal is dismissed;
- 3. The request for release is rejected.

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

Phnom Penh, 4 May 2010

Pre-Trial Chamber



[Handwritten signatures]
Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Wathay PRAK Kimsan
President