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Nation Religion King

Royauté du Cambodge

Nation Religion Roi

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

៤៣១/No: ០២៦៤/២/៦

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 42)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 10 August 2010

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PUBLIC

DECISION ON IENG THIRITH'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER REJECTING THE REQUEST FOR STAY OF PROCEEDINGS ON THE BASIS OF ABUSE OF PROCESS (D264/1)

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Andrew CAYLEY

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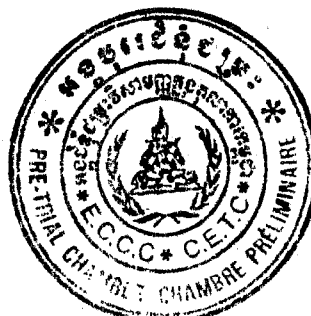
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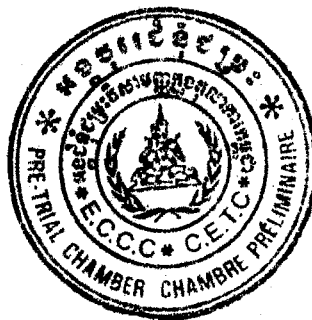
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of a “Defence Appeal against Order Rejecting the Request for Annulment and the Request for Stay of the Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith,”¹ (the “Annulment Appeal” and the “Abuse of Process Appeal” jointly referred to as the “Appeals”) filed on 2 February 2010 by the Co-Lawyers of the charged person Ieng Thirith against the Co-Investigating Judges’ (“CIJs”) “Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith,”² (the “Impugned Annulment Order” and the “Impugned Abuse of Process Order” jointly referred to as the “Impugned Orders”) dated 31 December 2009 and notified on 4 January 2010.

I. PRELIMINARY CONSIDERATION

1. The Pre-Trial Chamber observes that the Office of the Co-Investigating Judges issued a single decision in both the Impugned Annulment Order and in the Impugned Abuse of Process Order, which has resulted in both Impugned Orders being treated together in subsequent submissions before the Pre-Trial Chamber. The Pre-Trial Chamber has decided that the Appeals will be determined in separate decisions in order to avoid confusion. This decision covers only the Pre-Trial Chamber’s determination of the Abuse of Process Appeal.³

¹ Defence Appeal against ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’ (D263/1) of 31 December 2009, 2 February 2010, D263/2/1 (“Annulment Appeal”) and Defence Appeal against ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’ (D264/1) of 31 December 2009, 2 February 2010, D264/2/1 (“Abuse of Process Appeal”) (jointly referred to as the “Appeals”).

² Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, dated 31 December 2009 and notified 4 January 2010, D263/1 (“Impugned Annulment Order”) and Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, dated 31 December 2009 and notified 4 January 2010, D264/1 (“Impugned Abuse of Process Order”) (jointly referred to as the “Impugned Orders”).

³ Public Decision on Ieng Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, ,002/19-09-2007-ECCC/OCIJ(PTC41), D263/2/6 (“Decision on the Annulment Request”).

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II. PROCEDURAL BACKGROUND

2. On 7 December 2009 the Co-Lawyers of the Charged Person Ieng Thirith (“Charged Person” or “Appellant”) filed two requests: (i) the “Request to the Co-Investigating Judges to Seise the Pre-Trial Chamber with a view to Annulment of All Investigations” (the “Annulment Request”);⁴ and (ii) the “Defence Request for Stay of Proceedings on the Basis of Abuse of Process” (the “Abuse of Process Request”).⁵ The Abuse of Process Request sought a stay of the proceedings on the basis that the abuse of the Court’s processes has resulted in the Charged Person no longer being able to receive a fair trial. The Co-Lawyers base this argument on a number of factors, namely:

[A] lack of impartiality within the Office of the Co-Investigating Judges (OCIJ); the OCIJ’s lack of independence from the Office of the Co-Prosecutor (OCP); serious procedural irregularities in the investigation by the OCIJ; and an overarching lack of transparency and reliability in the practices of the OCIJ.⁶

3. On 4 January 2010 the CIJs issued the identical Impugned Orders, which declared there was “nothing to justify” either an annulment of proceedings or a stay of the judicial investigation because there was no “procedural defect” or “infringement of any of the rights of the Defence”.⁷ The Impugned Abuse of Process Order rejected the grounds raised by the Abuse of Process Request on that basis that:

- (i) the appraisal of a staff member “in no way concerns the rights of the parties” as it was a performance appraisal by the international CIJ as “head of the service” and the “charge of ‘interference’ is therefore baseless”;⁸

⁴ Request to the Co-Investigating Judges to Seise the Pre Trial Chamber with a view to Annulment of All Investigations, 7 December 2009, D263, (the “Annulment Request”).

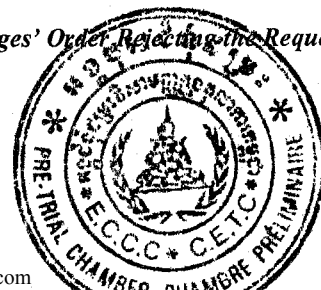
⁵ Defence Request for Stay of Proceedings on the Basis of Abuse of Process, 7 December 2009, D264, (the “Abuse of Process Request”).

⁶ Abuse of Process Request, para. 1.

⁷ Impugned Abuse of Process Order, para. 42.

⁸ Impugned Abuse of Process Order, para. 37.

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- (ii) the Co-Lawyers are unable to demonstrate that the Prime Minister's speeches have impacted "decisions or action by the Judges... that might be open to criticism in a strictly judicial perspective";⁹
 - (iii) the Co-Lawyers have misconstrued the CIJ's SMD decision regarding the "principle of sufficiency of the evidence"¹⁰ and;
 - (iv) the order on the extension of provisional detention contains an "opinion on the weight of the evidence" that is not prohibited by the Judge's impartiality.¹¹
4. On 2 February 2010 the Co-Lawyers for the Charged Person filed the Appeals. The Abuse of Process Appeal raises seven grounds of appeal against the Impugned Abuse of Process Order, namely that:
- (i) the CIJs erred in their interpretation of the law by citing an ICC decision as an authority and ignoring a Pre-Trial Chamber decision that takes precedence;¹²
 - (ii) the CIJs wrongly applied the standard of proof for disqualification applications to the application for a stay of proceedings on the basis of abuse of process;¹³
 - (iii) the CIJs failed to address the detailed arguments presented by the Co-Lawyers in the Request;¹⁴
 - (iv) the CIJs erroneously interpreted Internal Rule 56;¹⁵
 - (v) the CIJs failed to address the Co-Lawyers' argument that the "film crew had surreptitiously filmed insider witnesses"

⁹ Impugned Abuse of Process Order, para. 38.

¹⁰ Impugned Abuse of Process Order, paras 39-40.

¹¹ Impugned Abuse of Process Order, para. 41.

¹² Abuse of Process Appeal, para. 15.

¹³ Abuse of Process Appeal, para. 18.

¹⁴ Abuse of Process Appeal, para. 27.

¹⁵ Abuse of Process Appeal, para. 39.



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which “further presents an erroneous interpretation of Internal Rule 56(2)(b)”;¹⁶

- (vi) the CIJs fail to deny receipt of a document from an investigator in the OCP¹⁷ and;
 - (vii) paragraph 20 of the Impugned Abuse of Process Order contains a consideration made by the International CIJ without the corroboration of the National CIJ.¹⁸
5. The Abuse of Process Appeal asks the Pre-Trial Chamber to quash the Impugned Abuse of Process Order and conduct an oral hearing to hear submissions and take evidence to “verify the statements made by Mr Bastin and Judge Lemonde”.¹⁹
6. On 19 February 2010 the Co-Prosecutors filed their “Co-Prosecutors’ Combined Response to Defence’s Appeals Against the ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’” (the “Co-Prosecutors’ Response”),²⁰ which was intended to be equally applicable in both the Annulment Appeal and the Abuse of Process Appeal.²¹ The Co-Prosecutors request that the Pre-Trial Chamber dismiss both appeals and confirm the CIJ’s Impugned Orders, as both appeals and underlying motions:
- (i) provide evidence that is unconvincing, does not substantiate what they purport to prove, and/or do not show a violation of the Charged Person’s rights; (ii) fail to satisfy the very high burden of the abuse of process doctrine and the standard for the annulment of all investigations, which are extreme judicial remedies reserved for the most severe of circumstances; (iii) raise unfounded suggestions regarding the lack of cooperation between the International and National CIJs, which are irrelevant, inconsequential, or, at best, more appropriately handled by

¹⁶ Abuse of Process Appeal, paras 48 & 52.

¹⁷ Abuse of Process Appeal, para. 54.

¹⁸ Abuse of Process Appeal, para. 61.

¹⁹ Abuse of Process Appeal, para. 80.

²⁰ Co-Prosecutors’ Combined Response to Defence’s Appeals against the ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis on Abuse of Process Filed by Ieng Thirith’ (D263/1 and D264/1) of 31 December 2009, 19 February 2010, D264/2/2 (the “Co-Prosecutors’ Response”).

²¹ Co Prosecutors’ Response, para. 4

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the dispute resolution mechanism available to the CIJs under Internal Rule 72; and (iv) fail to prove that the CIJs incorrectly applied governing law in making its Order.²²

7. On 15 March 2010 the Pre-Trial Chamber issued its “Decision to Determine the Appeal on Written Submissions and Direction for Reply”²³ denying the Co-Lawyers for the Charged Person’s request for a public hearing and directing the Co-Lawyers to reply to the Co-Prosecutors’ Response within the time limit specified by Article 8.4 of the Practice Direction on Filing Documents.²⁴
8. On 19 March 2010 the Co-Lawyers filed an identical “Defence Reply to Joint Co-Prosecutors’ Response to Defence Appeals against the Orders on Abuse of Process and Annulment” (the “Defence Reply”).²⁵ The Defence Reply maintains that: (i) all investigations must be annulled because the defects have tainted the whole investigation,²⁶ and the Co-Prosecutors have confused “the reliefs requested in the two defence Appeals”;²⁷ (ii) the CIJs fail to sufficiently reason the Impugned Orders, which breaches the Charged Person’s right to a fair trial;²⁸ (iii) the Co-Prosecutors failed to deny that a document was exchanged between the OCP and the OCIJ;²⁹ and (iv) the OCIJ did not exercise ‘strict control’ over the documentary film crew.³⁰
9. On 11 June 2010, the Pre-Trial Chamber announced its determination of the final disposition of the Appeal indicating that “a reasoned decision in respect of the Appeal shall follow in due course.

²² Co-Prosecutors’ Response, para. 3.

²³ Decision to Determine the Appeal on Written Submissions and Direction for Reply, 15 March 2010, D264/2/3.

²⁴ Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev. 4, Article 8.4.

²⁵ Defence Reply to Joint Co-Prosecutors’ Response to Defence Appeals against Orders on Abuse of Process and Annulment, 19 March 2010, D263/2/4 (the “Defence Reply”).

²⁶ Defence Reply, para. 5.

²⁷ Defence Reply, para. 12.

²⁸ Defence Reply, paras 13-15.

²⁹ Defence Reply, paras 16-17.

³⁰ Defence Reply, paras 18-20.

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

DECIDES that the Abuse of Process Appeal is admissible.

DECIDES that the matter will be determined on the grounds set out in the Abuse of Process Request.

DISMISSES the Abuse of Process Request.”³¹

REASONS FOR THE DECISION

III. ADMISSIBILITY OF THE APPEAL

10. The Abuse of Process Request and the Abuse of Process Appeal are based upon the inherent jurisdiction of the Court to ensure a person is accorded a fair trial. The doctrine of abuse of process, originating within the common law system, is now accepted as part of international law and practice in order to ensure that the most serious violations of conduct or procedures, being entirely improper or illegal, are not permitted to negate the fair trial rights given to a charged person or accused before a court.³²
11. The Co-Investigating Judges do not consider the issue of jurisdiction in the Order and are taken by the Pre-Trial Chamber to have assumed jurisdiction to consider the request.
12. It is noted that the Request for Stay of Proceedings could be considered as a request for an “Order” under Internal Rule 55(10), as it is a request for an order in respect of the “conduct of the proceedings”,³³ adopting the broadest understanding of the word “conduct”. The Pre-Trial Chamber has already ruled on a possible

³¹ Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 11 June 2010, D264/2/5.

³² *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, “Decision”, Appeals Chamber, 3 November 1999, (“*Barayagwiza Appeal Decision*”), para. 4..

³³ Internal Rule (Rev. 5) 55(10).

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inconsistency between Internal Rules 74(3)(b)³⁴ and 55(10)³⁵, and such a request would therefore not be open to appeal by the Charged Person.

13. It would have been equally open to the Co-Investigating Judges to consider the “Request for the Stay of Proceedings” within the general ambit of an application falling within Article 33 New of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, which relevantly provides that “trials are fair” and conducted “with full respect for the rights of the accused....”³⁶ For the purposes of this court the provisions of Articles 14 and 15 of the International Covenant on Civil and Political Rights (the “ICCPR”)³⁷ are applicable at all stages of proceedings before the ECCC. Further, Article 14 of the ICCPR provides for overriding rights which will transcend local procedures declared and followed. The provisions of Articles 14 and 15 of the ICCPR are also reflected in Internal Rule 21.
14. Noting that Cambodian law does not provide for an abuse of procedure mechanism, the Pre-Trial Chamber is bound to follow international practice, relevant treaties and conventions of application. The Pre-Trial Chamber will therefore examine whether the facts and circumstances of the Appeal require adopting a broad interpretation of Internal Rule 74(3) in light of the right of the Charged Person to a fair trial. The overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a). The Pre-Trial

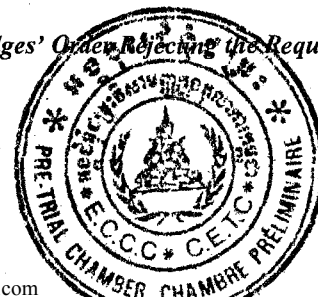
³⁴ Internal Rule 74(3)(b) limits the possibility for the Charged Person to appeal before the Pre-Trial Chamber orders from the OCIJ refusing requests for investigative action.

³⁵ Public Redacted Decision on Appeal against OCIJ Order on Nuon Chea’s Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 9 quoting Decision on Admissibility of the Appeal Against Co-Investigating Judges’ Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 January 2010, D/130/10/12, para. 17.

³⁶ 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 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 33 New.

³⁷ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A [XXI], 16 December 1966, (“ICCPR”) Articles 14 and 15.

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Chamber notes that this appeal raises a serious issue of fairness and the Pre-Trial Chamber therefore has jurisdiction to consider it.

15. The Order was notified on 4 January 2010. The Notice of Appeal was filed on 14 January 2010,³⁸ with the Appeal Brief being filed on 2 February 2010. The Appeal has been commenced in a timely manner.
16. The Abuse of Process Appeal is filed pursuant to Internal Rule 75 and is admissible.

V. PRELIMINARY OBSERVATIONS

17. It is to be noted that in the present case, there is an inherent systemic conflict, given that the Co-Investigating Judges are determining allegations concerning the conduct of either or both of them. In addition, there is no discretionary issue involved and the parties are contesting a judicial determination made by the Co-Investigating Judges.
18. The Pre-Trial Chamber finds that, on a matter of fairness to redress any adverse perceptions from the systemic conflict, such matters shall be considered afresh. As a consequence, it is appropriate to proceed as though the appellant directly seised the Pre-Trial Chamber with the Abuse of Process Request with its supporting material at first instance.



³⁸ Appeal Register of Ieng Thirith's Lawyer Order Rejecting Request for Annulment and the Stay of Proceedings on the Basis of Abuse of Process Filed By Ieng Thirith, 14 January 2010, D264/2.

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VI. STANDARD OF REVIEW

19. The Co-Lawyers for the Charged Person submit in the Abuse of Process Request that “[i]t is for the defence to establish on the balance of probabilities that there has been an abuse.”³⁹
20. Under Articles 33 new and 35 new of the Law on the Establishment of the ECCC, and Internal Rule 21, the Charged Person is entitled to a number of guarantees, including the right to a fair trial. As stated above,⁴⁰ no disposition of the Internal Rules, or of the Cambodian Criminal Procedural Code, explicitly foresees the possibility to stay judicial proceedings where the violation of an accused or a charged person’s rights is so serious as to jeopardize the integrity of the judicial proceedings. The Pre-Trial Chamber will thus turn to international standards to determine the standard of review applicable when examining whether there is an abuse of process.
21. This Chamber is not only duty bound to respect the rights laid down in Internal Rule 21 but it also attaches great importance to the respect of human rights and to proceedings that fully respect proper processes of the law. The Pre-Trial Chamber concurs with the views expressed in other tribunals according to which “the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the accused” and also includes, in particular, “how the Parties have been conducting themselves in the context of a particular case.”⁴¹
22. According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda, the abuse of process doctrine is a “process by which Judges may decline to exercise the court’s jurisdiction in cases where to

³⁹ Abuse of Process Request, para. 13.

⁴⁰ See para. 14.

⁴¹ *Prosecutor v. Dragan Nikolić*, IT-94-5-PT, “Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal”, Trial Chamber, 9 October 2002, (“*Nikolić Decision*”), para. 111.

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exercise that discretion in light of *serious* and *egregious* violations of the accused's rights would prove detrimental to the court's integrity" (emphasis added).⁴² The doctrine of abuse of process may be invoked as a matter of discretion, and judges may find there has been an abuse of process and decline to exercise their jurisdiction by permanently staying, thus effectively terminating, the proceedings without adjudication.⁴³

23. In the case of *The Prosecutor v. Radovan Karadžić*, the Appeals Chamber referred to its previous jurisprudence in the *Barayagwiza* case and found that only two situations may be considered as constituting a serious and egregious violation of the accused's rights: (i) where a fair trial for the accused is impossible, usually for reasons of delay; and (ii) 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. The Appeals Chamber then stated that "[t]he applicable standard was further clarified by stating that a court may discretionally decline to exercise jurisdiction 'where to exercise that jurisdiction in light of *serious and egregious violations of the accused's rights* would prove detrimental to the court's integrity'."⁴⁴
24. A particularly high threshold is used when determining whether violations of the rights of the defence may be considered sufficiently serious to allow the Chamber to use its discretionary power to terminate proceedings.⁴⁵ This has been recalled by the Appeals Chamber of the *ad hoc* tribunals in the *Karadžić* case where it held that the correct standard of review, as previously established by the Appeals Chamber,

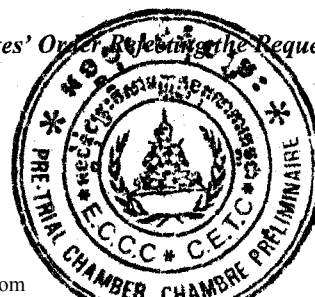
⁴² *Barayawiza* Appeal Decision, para. 74.

⁴³ *Barayawiza* Appeal Decision, para. 75 (citing *Bell v. DPP of Jamaica*, [1985] AC 937): "under the abuse of process doctrine, courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay".

⁴⁴ *Prosecutor v. Radovan Karadžić*, IT-95-5/18-AR73.4, "Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement", Appeals Chamber, 12 October 2009, ("*Karadžić* Appeal Decision"), para. 45. See also *Barayagwiza* Appeal Decision, paras 74, 77.

⁴⁵ *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, "Decision on Oral Request of the Accused for Abuse of Process", Trial Chamber, dated 10 February 2010 and filed on 19 February 2010, para. 22.

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involved “considering whether the Appellant suffered a *serious mistreatment* or if there was *any other egregious violation* of his rights” (emphasis added)⁴⁶ The Appeals Chamber then recalled that its jurisprudence “does not allow the abuse of process doctrine to deploy a standard lower than this, irrespective of the author of the alleged misconduct.”⁴⁷

25. Consequent upon this, the Pre-Trial Chamber does not share the Co-Lawyers’ contention that the standard of proof applicable when arguing the abuse of process doctrine imposes on the appellant the burden to “establish on the balance of probabilities that there has been an abuse,” a standard that would be met only when the proposition is merely more *likely* to be true than not true, which is lower than the one established by the international jurisprudence.⁴⁸
26. Moreover, the Pre-Trial Chamber agrees with previous international jurisprudence according to which in order to invoke the abuse of process doctrine, “it needs to be clear that the rights of the Accused have been egregiously violated.”⁴⁹ The Pre-Trial Chamber is cognisant of the fact that in cases containing allegations of violations that result mainly from a lack of impartiality or integrity of a Judge or his office, such as the one it is seised of, no direct evidence may be available, especially when it comes to prove the intention of the author of such a violation. The assertions by the Appellant may be thus impossible to prove absent an admission by the person said to be biased, or reliance on circumstantial evidence. Any inference made on circumstantial evidence, as to the judge’s intent, must be the only possible conclusion arising from the evidence presented. Ultimately, the

⁴⁶ Karadžić Appeal Decision, para. 47.

⁴⁷ Karadžić Appeal Decision, para. 47.

⁴⁸ Lord Denning, in *Miller v. Minister of Pensions*, described it simply as “more probable than not” *Miller v. Minister of Pensions* [1947] 2 All ER 372.

⁴⁹ *In the case against Florence Hartman*, IT-02-54-R77.5, “Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process,” Specially Appointed Chamber, 3 February 2009, para. 4. See also *Nikolić* Decision, para. 111 recalling the *Barayagwiza* Decision, paras 73 and 77, and the *Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, “Decision on Motion to Dismiss for Abuse of Process,” Trial Chamber, 12 May 2009, para. 9.

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power to stay proceedings on that basis is a discretionary power involving the judicial assessment that the violations of the rights of the charged person or the accused are of such an egregious nature as to impede the exercise of jurisdiction.⁵⁰

27. Taking this into account, the Pre-Trial Chamber will have to consider whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights. The Pre-Trial Chamber will need to be satisfied that the alleged misconduct results in a violation of the Charged Person's rights to a fair trial and that this violation is of such an egregious nature that the Pre-Trial Chamber must permanently stay the proceedings.
28. A Trial Chamber of the ICTY considered that the mistreatment of an accused was not of such an egregious nature as to impede the exercise of jurisdiction.⁵¹ The stay of the proceedings, which is an extreme measure, should indeed apply only to an exceptional and very serious case of violations of the rights of the Charged Person which cannot be rectified or contravene the court's sense of justice. It is only in

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06(OA4), "Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006", Appeals Chamber, 14 December 2006, para. 28. On 8 July 2010, the Trial Chamber seized of that case decided to impose an unconditional stay of the proceedings and ordered the release of the accused (see *In the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, "Public Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", Trial Chamber, 8 July 2010). This order may however be subject to appeal. On 15 July 2010, the Trial Chamber granted the Prosecutor's application for leave to appeal the decision to stay the proceedings, (see *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-314, "Trial Transcript", 15 July 2010, p. 15 lines 15 – 22). For an example of a violation leading to a stay of proceedings due to egregious violations of the rights of the accused, see the decision of the Cour d'appel de Paris, Chambre d'Accusation, 5 October 1983, 1944/83 (also known as "L'affaire des Irlandais de Vincennes" available from the ECCC library) whereby the Court annulled the procedure and stayed the case considering the gravity and seriousness of the procedural defects identified (for a distinction of the procedure for annulment based on procedural defect and request for stay of proceedings based on the abuse of process doctrine see Decision on the Annulment Request, paras 26-27).

⁵¹ *Nikolić* Decision, para. 114. The conclusion of the Trial Chamber was confirmed on appeal, see *Prosecutor v. Dragan Nikolić*, IT-94-2-AR73, "Decision on Interlocutory Appeal concerning Legality of Arrest," Appeal Chamber, 5 June 2003, (*Nikolić* Appeal Decision"), para. 31. See also, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, "Decision on Motion for Stay of Proceedings," Trial Chamber, 8 April 2010, para. 3, where the Trial Chamber considered that "even if the Accused's factual allegations were proved, they would not trigger the doctrine of abuse of process, justifying a stay of proceedings against him."

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exceptional cases of *egregious violations* where such remedy could be deemed proportionate; this is the reason why a particularly high threshold is used when determining whether the alleged violations exist and whether it can be considered sufficiently serious to warrant such remedy.⁵² In that regard and in the context of the ECCC, the Pre-Trial Chamber has a discretionary power to strike a correct balance between the fundamental rights of the Charged Person and the interests of the international and national communities in the prosecution of persons charged with serious violations of international humanitarian law and national law.

V. THE MERITS

29. The Pre-Trial Chamber observes at the outset, that the allegations raised in the Abuse of Process Request are identical with those that have been argued by the Co-Lawyers for the Charged Person in earlier applications for disqualification and a motion for annulment. These allegations have thereafter already been considered and decided upon by the Pre-Trial Chamber in these contexts.⁵³

⁵² The ICTY Appeals Chamber held “[a]lthough the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. *Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber’s view, usually be disproportionate.* The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law” (emphasis added), *Nikolić* Appeal Decision, para. 30 (footnote omitted). See also the decision of the Appeals Chamber of the International Criminal Court in the *Lubanga* case where the Appeals Chamber held that “[n]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify a stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial” (para. 30).

⁵³ Decision on the Annulment Request; Decision on Ieng Sary’s Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, 002/20-10-2009-ECCC/OCIJ(PTC03), Doc. No. 5, ERN 00404595-00404601 (“Decision on Appropriate Measures”); Decision on Nuon Chea’s Application for Disqualification of Judge Marcel Lemonde, 23 March 2010, 002/29-10-2009-ECCC/(PTC04), Doc. No. 4, ERN 00485317-00485329 (“Decision on Nuon Chea’s Application to Disqualify”); Decision on Ieng Sary’s and Ieng Thirith’s Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, 15 June 2010, 002/07-12-2009-ECCC/(PTC05&07), Doc. No. 8 & 5 respectively, ERN 00520708-00520708 (“Decision of Ieng Sary’s and Ieng Thirith’s Application to Disqualify”).

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30. As in their previous motions and applications, the Co-Lawyers for the Charged Person argue that there were “many irregularities and violations that have contributed” to the investigations conducted by the OCIJ not being viewed as “fair, impartial and unbiased”.⁵⁴ The Co-Lawyers are seeking to have the Pre-Trial Chamber consider the cumulative effect of these grounds by alleging that the “nature and extent of the violations and irregularities viewed together are so extensive and serious to be incapable of rectification.”⁵⁵
31. The Pre-Trial Chamber notes that the Co-Lawyers seek a stay of proceedings on the basis of the abuse of process doctrine, although they repeatedly state that proceedings should be stayed “unless or until such lack of impartiality and independence and procedural irregularities *have been repaired*”⁵⁶ (emphasis added). Reparation of procedural irregularities calls for annulment procedure, not a stay of proceedings on the basis of the abuse of process doctrine as it is requested in the present case. In view of the above, the Pre-Trial Chamber understands that the alleged violations raised in the Abuse of Process Request are, for the Co-Lawyers, a basis for the requested stay of proceedings due to abuse of process. The Pre-Trial Chamber will therefore apply the standard of proof set out in this decision and consider whether the Appellant suffered a serious mistreatment or if there was any other egregious violation of his rights.
32. The Co-Lawyers submit that “[f]or the purposes of this request the *truth of the allegations contained within both statements of Mr Bastin will be presumed*” (emphasis added).⁵⁷ The Co-Lawyers indeed mainly rely on two statements provided by former OCIJ staff member Mr Bastin on 8 October 2009 and 2 December 2009 to argue the various allegations contained therein amount to

⁵⁴ Abuse of Process Request, para. 58.

⁵⁵ Abuse of Process Request, para. 61.

⁵⁶ Abuse of Process Request, paras 37; 42 and 60.

⁵⁷ Abuse of Process Request, para. 5.

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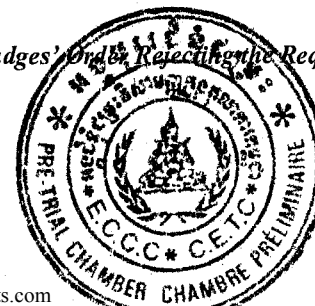


violations of the rights of the Charged Person to a fair trial, and as such result in an abuse of process so egregious as to warrant a stay of the proceedings.

33. As stated above, only a proven case of egregious violations could form a basis for an assessment by the Pre-Trial Chamber of the need to stay proceedings for abuse of process, not the *presumed* truth of allegations made by a former staff member of the Court that are considered by the Co-Lawyers to amount to a violation of the rights of the Charged Person that can justify such an extreme remedy as a stay of proceedings.
34. The Co-Lawyers submit that Judge Lemonde's statement and conduct amount to a serious violation of the Charged Person's right to a fair trial which itself amounts to an abuse of process. The Appellant, however, does not produce any evidence other than statements which are *presumed to be true*, in support of their claim that the alleged misconduct is established.
35. Moreover, as stated above, the Pre-Trial Chamber has already decided upon those allegations in its decision on the Co-Lawyers' request for annulment and application for disqualification. With regard to the allegations of partiality of Judge Lemonde based on the statements of Mr Bastin as well as the allegations regarding the order on extension of provisional detention and the order on the share material drive, the Pre-Trial Chamber has dismissed the Co-Lawyers' appeals on the basis of a lack of evidence that did not satisfy the particularly high threshold to reverse the presumption of impartiality derived from Internal Rules 34, or to warrant the annulment procedure envisaged in Internal Rule 76(2).⁵⁸ The Pre-Trial Chamber has found that the allegations contained in one of the statements of Mr Bastin are merely assertions and the Co-Lawyers have failed to adduce enough evidence to prove the *existence* of a lack of independence, impartiality or integrity which would

⁵⁸ Decision on Annulment Request, paras. 29-56; Decision of Ieng Sary's and Ieng Thirith's Application to Disqualify, paras 40-66.

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be the basis for the Appellant to claim that the Charged Person's right to a fair trial has been violated, warranting the application of the doctrine of abuse of process.⁵⁹

36. The identical evidence adduced in the present case in support of the same allegations does not further satisfy the particularly high threshold that applies in reviewing allegations of abuse of process. No new matters have been raised and the Pre-Trial Chamber will not reconsider its earlier decisions.
37. With respect to the allegations of violations of the rights of the Charged Person based on the alleged interference with the administration of justice resulting from the Prime Minister's speech, the Co-Lawyers submitted that it is impossible to have confidence that the Charged Person's fair trial rights are being respected, or that all relevant evidence will be placed before the Trial Chamber in accordance with Internal Rule 21 and Article 13 of the Agreement.
38. The Pre-Trial Chamber has also decided upon this matter in a previous decision, where it held that statements of a person as quoted by the press do not amount to reliable evidence and dismissed a request for disqualification based on this evidence.⁶⁰ As the appropriate mechanisms for dealing with an interference in the administration of justice are proscribed by Internal Rule 35, the Pre-Trial Chamber notes such an interference could only lead to a stay of proceedings for abuse of process if it was so egregious that it could not be remedied by the provisions established in Rule 35(2). Furthermore, the Co-Lawyers contend that the statements of the Prime Minister "must be *presumed* to be reliable" (emphasis added).⁶¹ The Pre-Trial Chamber is therefore not satisfied that the alleged interference is proven, and that it would amount to a violation of the rights of the Charged Person's which would warrant the application of the doctrine of abuse of process.

⁵⁹ Decision on Annulment Request, paras. 40-41.

⁶⁰ Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, 002/13-10-2009-ECCC/(PTC 02), Do. No. 7, para. 30.

⁶¹ Abuse of Process Request, para. 47.

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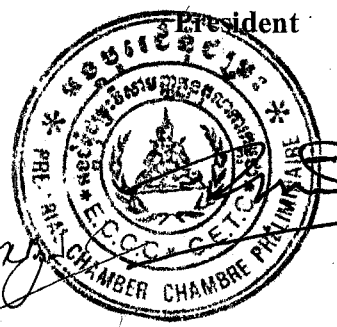
39. Upon reviewing all the facts presented by the Charged Person in support of the Abuse of Process Request, the Pre-Trial Chamber finds that there is no evidence of violations of the human rights of the Charged Person and no evidence that there was a violation of the fundamental principle of the proper processes of the law. Nothing alleged in the Abuse of Process Request demonstrates that an abuse of the process has occurred in the present case. There is therefore, no question of egregious violations of the Charged Person's rights such that the abuse of process doctrine could be invoked to stay the proceedings. The Pre-Trial Chamber finds that the arguments raised by the Co-Lawyers in their Abuse of Process Request, individually or collectively, do not amount to abuse of process.

For all the abovementioned reasons, the Pre-Trial Chamber decided as announced in its determination on 11 June 2010.

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

Phnom Penh, 10 August 2010 ^{ca}

Pre-Trial Chamber

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan

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