



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩កញ្ញា២០០៧/អវតក/អជសដ
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Before: Judge NIL Nonn, President
Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

Date: 29 September 2014
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**DECISION ON DEFENCE PRELIMINARY OBJECTION REGARDING
JURISDICTION OVER THE CRIME AGAINST HUMANITY OF DEPORTATION**

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Accused
NUON Chea
KHIEU Samphan

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1. INTRODUCTION

1. On 24 February 2011, the IENG Sary Defence filed a motion to strike portions of the Closing Order.¹ The Office of the Co-Prosecutors (“OCP”) responded on 16 March 2011.² On 12 September 2011, the Trial Chamber addressed the motion in part but did not rule on IENG Sary’s submission that paragraphs 1397-1401 of the Closing Order alleging deportation of Vietnamese nationals “in Prey Veng, Svay Rieng and in the Tram Kok Cooperatives” are defective.³ On 25 April 2014, the Chamber invited the remaining parties to indicate whether they adhere to the objections raised by the IENG Sary Defence.⁴ Both Defence teams filed submissions on 20 May 2014⁵ and the Office of the Co-Prosecutors (“OCP”) filed its response on 2 June 2014.⁶

2. SUBMISSIONS

2. The KHIEU Samphan Defence submits that the Chamber has no jurisdiction over the crime against humanity of deportation in the instant case.⁷ It bases this submission on Internal Rule 55(2), which states that the Co-Investigating Judges shall only investigate the facts set

¹ “IENG Sary’s Motion to Strike Portions of the Closing Order due to Defects”, E58, dated 24 January 2011, filed 24 February 2011 (“IENG Sary’s Motion to Strike Portions of the Closing Order”).

² “Co-Prosecutor’s Response to IENG Sary’s Motion to Strike Portions of the Closing Order due to Defects”, E58/1, 16 March 2011.

³ Decision on the Applicability of Joint Criminal Enterprise, E100/6, 12 September 2011 (deciding that the basic and systematic forms of joint criminal enterprise are applicable to Case 002 and finding that the extended form of joint criminal enterprise did not form part of customary international law and was not a general principle of law at the time relevant to Case 002); Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 (deciding that the Trial Chamber was not validly seised of the offences contained in the Criminal Code of the Kingdom of Cambodia dated 1956 as listed in the dispositive paragraph 1613 of the Closing Order). *See also* IENG Sary’s Motion to Strike Portions of the Closing Order, para. 11 (“The OCIJ had no jurisdiction to investigate the alleged deportation of the Vietnamese in Prey Veng, Svay Rieng and in the Tram Kok Cooperatives and paragraphs 1397-1401 of the Closing Order must be struck out accordingly.”).

⁴ Trial Chamber Memorandum entitled “Further Information Regarding Remaining Preliminary Objections”, E306, 25 April 2014 (“Memorandum dated 25 April 2014”). In its Memorandum dated 25 April 2014, the Chamber decided to address two preliminary objections: the statute of limitations for grave breaches of the Geneva Conventions and jurisdiction over the crime against humanity of deportation. The Chamber will address the submissions of the parties on the statute of limitations for grave breaches of the Geneva Conventions separately.

⁵ *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n’a pas encore statué*, E306/2, 20 May 2014 (“KHIEU Samphan Submissions”); “Position on remaining objections raised by the IENG Sary Defence team”, E306/1, 20 May 2014 (“NUON Chea Submissions”).

⁶ “Co-Prosecutors’ Joint Response to NUON Chea and KHIEU Samphan’s submissions concerning preliminary objections”, E306/4, 2 June 2014 (“OCP Response”).

⁷ KHIEU Samphan Submissions, para. 21.

out in the Introductory Submission.⁸ It submits that the alleged deportation of Vietnamese nationals from Prey Veng, Svay Rieng and from Tram Kok cooperatives was not included in the Introductory Submission: forcible transfer was alleged with respect to the population as a whole rather than the Vietnamese specifically, and did not concern population movements to Vietnam.⁹ Accordingly, the KHIEU Samphan Defence submits that the Co-Investigating Judges were not allowed to investigate these facts and that their subsequent introduction in paragraphs 1397-1401 of the Closing Order should be declared void.¹⁰

3. The NUON Chea Defence does not maintain its preliminary objection regarding the Trial Chamber's jurisdiction over the crime against humanity of deportation.¹¹

4. The OCP responds that the Co-Investigating Judges did have jurisdiction over the relevant facts concerning the crime against humanity of deportation in connection with the forced movement of population from Prey Veng, Svay Rieng and the Tram Kok cooperatives,¹² and that neither the OCP nor the Co-Investigating Judges considered that these forced movements of population were "new facts" in terms of Internal Rule 55(3) read with Article 125 of the Cambodian Code of Criminal Procedure.¹³ It further submits that litigation at trial concerning alleged procedural defects in the Closing Order is expressly barred by Internal Rule 76(7).¹⁴

3. FINDINGS

5. Rule 76(7) provides that "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber."¹⁵ Pursuant to this

⁸ KHIEU Samphan Submissions, para. 19.

⁹ KHIEU Samphan Submissions, paras. 16-18. The Chamber notes that KHIEU Samphan refers to "[...] la troisième phase de déplacement de la population de Prey Veng et de Svay Rieng [...]". KHIEU Samphan Submissions, para. 16. However, KHIEU Samphan later refers to "[...] déportation alléguée de Vietnamiens à Prey Veng, Svay Reng et dans les coopératives de Tram Kok[...]". KHIEU Samphan Submissions, para. 18. The Chamber observes that the submissions are unclear as to whether the Defence is referring to an alleged deportation from, to or within those places but interprets the above-mentioned submissions as referring to an alleged deportation from those places.

¹⁰ KHIEU Samphan Submissions, paras. 14, 18, 20.

¹¹ NUON Chea Submissions, para. 1.

¹² OCP Response, para. 2b.

¹³ OCP Response, para. 6.

¹⁴ *Ibid.*

¹⁵ See also, Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), Supreme Court Chamber, E116/1/7, para. 31.

rule, the challenge now raised by the KHIEU Samphan Defence should have been brought during the investigation phase before either the Co-Investigating Judges or the Pre-Trial Chamber.

6. However, the Chamber has, in very limited circumstances, considered specific and reasoned procedural challenges related to alleged irregularities occurring during the pre-trial phase where the parties can demonstrate that they did not have an opportunity to detect, before the opening of the trial, the alleged distortion in the nature of an individual's statements as reflected in their written record of interview from the investigative phase or if it appears necessary to safeguard the fairness of trial proceedings.¹⁶

7. The Chamber notes that the KHIEU Samphan Defence had access to the whole case-file and received notification of both the Introductory Submission and the Closing Order in Case 002. From the very beginning of the case and in particular since the beginning of the judicial investigation, the Introductory Submission authorised the Co-Investigating Judges to investigate deportation as a crime against humanity.¹⁷ At the time of the respective initial appearances of KHIEU Samphan and NUON Chea before the Co-Investigating Judges, both of them were officially informed that the acts set out in the Introductory Submission were open to legal characterisation as, *inter alia*, "crimes against humanity [of] deportation [...]".¹⁸

8. The Chamber notes that the OCP clearly referred in its Final Submission to the deportation of Vietnamese.¹⁹ Further, a review of the Closing Order shows that the Accused are charged with the crime against humanity of deportation in relation to three identified locations: Prey Veng, Svay Rieng as well as the Tram Kok Cooperatives. The Closing Order specifically states that "a large number of Vietnamese living in Cambodia were forced to leave the place where they had been residing legally and to cross the Vietnamese border".²⁰ The Chamber is therefore satisfied that the Accused had notice of the scope of the judicial

¹⁶ Decision on Nuon Chea's Request For a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, E142/3, 13 March 2012, para. 7.

¹⁷ Introductory Submission, para. 122(c) referring to paras. 37-42.

¹⁸ NUON Chea Written Record of Initial Appearance, 19 September 2007, E3/54, KHIEU Samphan Written Record of Initial Appearance, D42, 19 November 2007.

¹⁹ Co-Prosecutor's Rule 66 Final Submission, D390, 16 August 2010, paras. 788, 790, 798, 808, 814, 944, 1263, 1353, 1361 (referring to people of Vietnamese ancestry living in the Prey Veng and Svay Rieng provinces and in Kampong Leang district who were forced to move to Vietnam, and to a change in the CPK policy against Vietnamese moving from mass deportation to their total physical destruction, stating that deportation and transfer of persons within state or across national borders as constituting "persecutory acts").

²⁰ Closing Order, para. 1398. *See also* Closing Order, para. 320.

investigation and specifically that the crime of deportation of Vietnamese people to Vietnam was within this scope.

9. Therefore KHIEU Samphan had the opportunity to detect the alleged irregularity here at issue. Had the scope of the judicial investigation been a matter of controversy, this should have been raised before the opening of the trial. The Chamber is seized of the Closing Order which, according to Internal Rule 76(7), shall cure any procedural defects in the judicial investigation.

10. KHIEU Samphan Defence has not demonstrated any additional fair trial issue warranting the intervention of the Chamber at this stage.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the KHIEU Samphan Submissions.

Phnom Penh, 29 September 2014
President of the Trial Chamber



Nil Nonu