



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

D.55/I/13

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° 002/19-09-2007-ECCC-OCIJ (PTC06)

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

Date: 25 February 2009

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PUBLIC

DECISION ON CIVIL PARTY CO-LAWYERS' JOINT REQUEST FOR RECONSIDERATION

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

Charged Person

NUON Chea

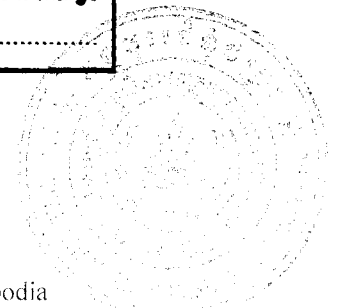
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Co-Lawyers for the Defence

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ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ បញ្ជាក់ (Certified Date/Date de certification):	26 / 02 / 2009
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1. **THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)** is seized of the “Civil Party Co-Lawyers’ Joint Request for Reconsideration of the Pre-Trial Chamber’s Assessment of the Legal Status of the Internal Rules in the Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment”, filed on 13 October 2008 (“Request for Reconsideration”).

I. PROCEDURAL BACKGROUND

2. On 13 October 2008, the Co-Lawyers for the Civil Parties filed their Request for Reconsideration.
3. On 24 October 2008, the Co-Prosecutors submitted their Observations on the Civil Parties’ Request for Reconsideration.
4. On 28 October 2008, the Co-Lawyers for the Charged Person (“Defence”) submitted their Response to the Request for Reconsideration.

II. SUBMISSIONS OF THE PARTIES

5. The Co-Lawyers for the Civil Parties request the Pre-Trial Chamber (i) to reconsider its determination concerning the relationship between the Internal Rules and the Criminal Procedure Code of Cambodia (“CPC”) made in the Decision on Nuon Chea’s Appeal against the Order Refusing Request for Annulment dated 26 August 2008 (“Annulment Decision”); and (ii) “in the case that the Internal Rules are held valid, to determine in accordance with the relevant law that the CPC prevails over the Internal Rules in the case of any conflict or difference between them.”¹ The Co-Lawyers state that:

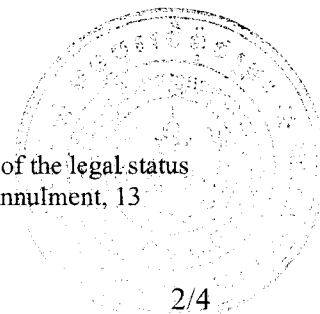
“This request is limited to the PTC [Pre-Trial Chamber]’s determinations related to:

- (i) the characterization of the Internal Rules as a procedural law;
- (ii) their relation to the CPC; and
- (iii) the conclusion that the Internal Rules are the primary instrument in case of a difference between the CPC and the Internal Rules.

The decision itself is not requested to be reconsidered by the PTC.”²

¹ Civil Party Co-Lawyers’ Joint Request for Reconsideration of the Pre-Trial Chamber’s assessment of the legal status of the Internal Rules in the Decision On Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 13 October 2008, D55/I/9 (“Request for Reconsideration”), p. 12.

² Request for Reconsideration, para. 9.



6. The Co-Lawyers for the Civil Parties submit that reconsideration is appropriate and necessary as
- “(i) one party did not file a submission on the substance of the appeal [and]
- (ii) the decision of the PTC has a major impact on the right of civil parties and governs a fundamental issue for the whole proceedings, namely the general relationship between the Internal Rules (“IR”) and the Criminal Procedure Code of Cambodia (“CPC”).”³
7. The Co-Prosecutors submit that the applicants were parties to the proceedings that led to the Annulment Decision but they did not contest them or file pleadings. They submit that the Pre-Trial Chamber should not consider *ex post facto* objections of parties that elect not to participate in proceedings and then seek a remedy only after a final decision is rendered.⁴ They further add that the Request for Reconsideration does not meet criteria for reconsideration of a decision as it “(a) does not identify any material change of circumstance, or (b) does not demonstrate that the Decision was erroneous, or (c) that it has caused any injustice.”⁵
8. In their Response, the Defence adopts by reference the Civil Parties’ submissions in relation to the admissibility of the Request for Reconsideration.⁶ They add that the Pre-Trial Chamber should either revise its previous decision in accordance with the position advanced by the Civil Parties or refer the matter to the Constitutional Council for an authoritative determination.

III. CONSIDERATIONS

9. In its “Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person”, the Pre-Trial Chamber stated that an application for reconsideration “may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decision”.⁷ It further found, on the basis of the jurisprudence of the international tribunals, that it has an inherent power to reconsider a decision it has previously made because of a change of circumstances or when it realises that the previous decision was erroneous or that it has caused an injustice.⁸

³ Request for Reconsideration, para. 8.

⁴ Co-Prosecutors’ Observations on Civil Parties’ Request for Reconsideration of the Annulment Appeal Decision, 24 October 2008, D55/I/10 (“Co-Prosecutors’ Observations”), para 2(a).

⁵ Co-Prosecutors’ Observations, D55/I/10, para 2(b).


⁶ Response to Joint Civil Party Request for Reconsideration of the Annulment Decision, 28 October 2008, D55/I/11 (“The Defence’s Response”), para 4.

⁷ Case File 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68 (Decision of 28 August 2008), para. 25.

⁸ Decision of 28 August 2008, para. 25.

10. The Pre-Trial Chamber notes that the Co-Lawyers for the Civil Parties are not asking the Pre-Trial Chamber to reconsider the conclusions of the Annulment Decision but rather seek to modify a legal reasoning. The Co-Lawyers do not contend that the decision itself is erroneous or unjust. On the contrary, they agree with the conclusions of the Annulment Decision.
11. The jurisprudence of international courts on reconsideration is solely dealing with reconsidering the outcome of a decision. The background for reconsideration of the outcome of a decision is the principle of *res judicata* which can lead to the execution of an erroneous or unjust decision where there is no right of further appeal or review. The reasoning of a decision is not subject to the principle of *res judicata*⁹ as the reasoning itself cannot be executed or enforced.
12. The Pre-Trial Chamber determines each case upon its merits and the issues raised therein. The Civil Parties are thus allowed to raise the issue of the applicability of the Internal Rules whenever they deem it necessary to do so.
13. The Co-Lawyers for the Civil Parties have not demonstrated that the Annulment Decision is erroneous or leads to injustice. Considering the above-mentioned, the Request will be refused.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Request for Reconsideration filed by the Co-Lawyers for the Civil Parties is dismissed. 

Phnom Penh, 25 February 2009

Pre-Trial Chamber

President

 **Rowan DOWNING**  **NEY Thol**  **Katinka LAHUIS**  **HUOT Vuthy**  **PRAK Kimsan**

⁹ Ian Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 Australian Yearbook of International Law, 2000, p. 299; *Barcelona Transaction case (Belgium v Spain) second phase, Separate Opinion of Judge Gros*, ICJ Reports, 1970, p. 267.