



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

D130/10/12
ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

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 27)

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

Date: 27 January 2010

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du dossier:.....C.A. វណ្ណ.....

PUBLIC

**DECISION ON ADMISSIBILITY OF THE APPEAL AGAINST CO-INVESTIGATING JUDGES'
ORDER ON USE OF STATEMENTS WHICH WERE OR MAY HAVE BEEN OBTAINED BY
TORTURE**

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Khieu Samphan

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Unrepresented Civil Parties



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of Khieu Samphan’s (the “Charged Person”) Appeal Against the [Co-Investigating Judges’] Order on Use of Statements Which Were or May Have Been Obtained by Torture filed by the Co-Lawyers of the Charged Person on 27 August 2009 (“Appeal”).¹

I. PROCEDURAL BACKGROUND

1. On 8 August 2009, the Co-Lawyers of the Charged Person filed a “Notice of Appeal” against the Co-Investigating Judges “Order on Use of Statements Which Were or May Have Been Obtained by Torture” (“Order”)² which dismissed Ieng Thirith’s Request for the exclusion of evidence obtained by torture from Case-File 002 (“Ieng Thirith’s Request”)³.
2. On 27 August 2009, the Co-Lawyers of the Charged Person filed the Appeal. In the Appeal the Co-Lawyers of the Charged Person “adopted: in advance, in its entirety and unconditionally, the appeal brief of counsel for Ms. Ieng Thirith against the Order”.⁴ The Co-Lawyers of Ieng Thirith filed their Appeal Against the Order on 10 September 2009 (“Ieng Thirith’s Appeal”).⁵
3. On 11 September 2009, the Co-Prosecutors filed an “Urgent Application for Extension of Time to File a Joint Response to Charged Persons Ieng Thirith and Khieu Samphan’s Appeals Against Order on Use of Statements Which Were or May Have Been Obtained by Torture”.⁶ The Pre-Trial Chamber granted the Co-Prosecutors an extension of time to file a response until 12 October 2009.⁷
4. On 12 October 2009, the Co-Prosecutors filed the “Co-Prosecutor’s Joint Response to Ieng Thirith and Khieu Samphan’s Appeals Against the ‘Order on the Use of Statements which

¹ Co-Lawyers for Khieu Samphan Appeal against Co-Investigating Judges’ ‘Order on the Use of Statements Which Were or May Have Been Obtained by Torture’ 27 August 2009, D130/10/1 (“Appeal”).

² Order on Use of Statements Which Were or May have been Obtained by Torture, 28 July 2009, D130/8 (“Order”).

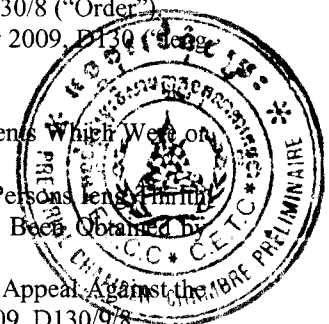
³ Co-Lawyers for Ieng Thirith Request for Exclusion of Evidence Obtained by Torture, 11 February 2009, D130/8 (“Ieng Thirith’s Request”).

⁴ Appeal para.6.

⁵ Co-Lawyers for Ieng Thirith Appeal against Co-Investigating Judges’ ‘Order on the Use of Statements Which Were or May Have Been Obtained by Torture’ 10 September 2009, D130/9/6 (“Ieng Thirith’s Appeal”).

⁶ Co-Prosecutors’ Urgent Application for Extension of Time to File a Joint Response to Charged Persons Ieng Thirith and Khieu Samphan’s Appeals Against Order on Use of Statements Which Were or May Have Been Obtained by Torture, 11 September 2009, D130/9/7.

⁷ Decision on the Co-Prosecutors’ Application for Extension of Time to File their Response to the Appeal Against the Order on Use of Statements Which Were or May Have Been Obtained by Torture, 17 September 2009, D130/9/8.



Were or May Have Been Obtained by Torture” (“Co-Prosecutors’ Joint Response”).⁸ In their Response, the Co-Prosecutors raised issues related to the admissibility of Appeals.⁹

5. On 27 October 2009, the Pre-Trial Chamber directed the Co-Lawyers of the Charged Person to express their views in relation to the admissibility issues raised by the Co-Prosecutors in their Joint Response (“Pre-Trial Chamber Directions”).¹⁰ The Co-Lawyers of the Charged Person submitted no comments pursuant to the Pre-Trial Chamber Directions.
6. On 6 November 2009, the Co-Lawyers of the Charged Person filed a “Note” in relation to the Pre-Trial Directions.¹¹ On 18 November 2009 the Pre-Trial Chamber decided to reject the requests in the Charged Person’s Note.¹²

II. SUBMISSION OF THE PARTIES

7. In their Appeal, the Co-Lawyers of Ieng Thirith request the Pre-Trial Chamber to (i) quash the Order, (ii) order the Co-Investigating Judges instead to “treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture, other than to show that a certain statement was made under torture and solely against the torturer [...], and (iii) to order the Co-Investigating Judges to refrain from using such statements in any other way”.¹³ The Co-Lawyers of the Charged Person in the conclusion of their Appeal similarly request the Pre-Trial Chamber to 1) Reverse the Co-Investigating Judges’ Order and 2) To order that all the prohibited evidence be definitively withdrawn from the proceedings.¹⁴
8. The Co-Lawyers of Ieng Thirith filed the Appeal pursuant to Internal Rules 55(10) and 74(3)(b), and with regard to the fundamental principles contained within Internal Rule 21.¹⁵ They agree that Internal Rule 55(10) should be interpreted in such a way that it “provides for

⁸ Co-Prosecutors’ Joint Response to Ieng Thirith and Khieu Samphan’s Appeals Against the ‘Order on the Use of Statements which Were or May Have Been Obtained by Torture’, 12 October 2009, D130/9/13 (“Co-Prosecutors’ Joint Response”).

⁹ Co-Prosecutors’ Joint Response, paras. 7, 8 and 9.

¹⁰ Directions to Co-Lawyers of Ieng Thirith and Khieu Samphan for Comments on Admissibility Issues raised by the Co-Prosecutors in their Joint Response to the Appeals, 27 October 2009, (“Pre-Trial Chamber Directions”) D130/9/16.

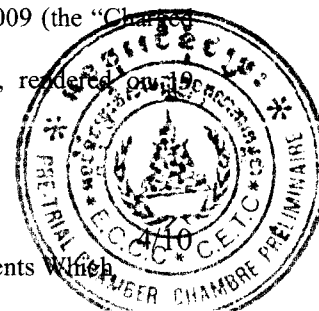
¹¹ Khieu Samphan’s Note to the Pre-Trial Chamber Concerning Proceedings D130, 6 November 2009 (the “Charged Person’s Note”), D130/10/8.

¹² Decision on Khieu Samphan’s Note to the Pre-Trial Chamber Concerning Proceedings 130, rendered 18 November 2009, D130/10/9.

¹³ Ieng Thirith’s Appeal, para. 124.

¹⁴ Appeal, para 7.

¹⁵ Ieng Thirith’s Appeal, para. 10.



the right to interlocutory appeal against rejection of both general requests and requests for investigative action”¹⁶ While the Co-Lawyers of Ieng Thirith acknowledge Internal Rule 74(3)(b) limiting the right of interlocutory appeal to orders refusing investigative actions, they argue that to avoid inconsistency, Internal Rule 55(10) should prevail in accordance with the principle of *in dubio pro reo*.¹⁷ The Co-Lawyers of Ieng Thirith submit that other grounds for admissibility of the Appeal are: 1) fair trial infringement; and 2) expeditious conduct of the proceedings.¹⁸ The Co-Lawyers of the Charged Person add to the arguments of the Co-Lawyers of Ieng Thirith that “if the Internal Rules do not expressly provide for the right to appeal against such an order, it is simply because it should never have been issued; that the said decision is a discredit to Cambodian and international justice; and that the judges of the Pre-Trial Chamber have an absolute duty to enter upon this appeal.”¹⁹

9. In their Joint Response, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeal. They submit that “[the Appeal does] not arise out of a refusal of a request for investigative action by the Co-Investigating Judges and, as such, [is] inadmissible”.²⁰ The Co-Prosecutors further submit that if the appeals are deemed as requests for annulment then they are procedurally and substantively defective. Particularly in relation to the Charged Person’s Appeal, the Co-Prosecutors ask the Pre-Trial Chamber to declare it inadmissible for lack of legal basis.
10. The Co-Lawyers of the Charged Person did not submit any comments in relation to the admissibility issues raised by the Co-Prosecutors in their Joint Response to the Appeals.

III. RELEVANT LAW

11. Reference is made to Internal Rules 21, 55(10), 73, 74(3) and 75.

¹⁶ The Co-Lawyers of Ieng Thirith interpretation of their term “general request” is “orders necessary for the conduct of the investigation” and of the term “requests for investigative action” is “investigative action necessary for the conduct of the investigation”; See Ieng Thirith’s Appeal, para. 12.

¹⁷ Ieng Thirith’s Appeal, para. 15. The Pre-Trial Chamber notes that this Latin expression, *in dubio pro reo*, is translated as “When there may be a doubt, act in favor of the accused”.

¹⁸ Ieng Thirith’s Appeal, paras 16-22.

¹⁹ Appeal, para 3.

²⁰ Co-Prosecutors’ Joint Response, para. 7.



IV. ADMISSIBILITY

12. On 28 July 2009, the Co-Investigating Judges issued the Order, which was notified to the Parties on 29 July 2009. The Co-Lawyers of the Charged Person filed a Notice of Appeal on 8 August 2009. The Appeal was filed on 27 August 2009 in accordance with the requirements of Internal Rule 75(3).

13. The Pre-Trial Chamber observes in relation to the Co-Prosecutors concerns raised about the admissibility of the Appeal, that the Co-Lawyers of the Charged Person adopted in advance, in its entirety and unconditionally, Ieng Thirith's Appeal. The legal basis for the Appeal of the Charged Person is therefore that mentioned in Ieng Thirith's Appeal, which fact is sufficient for the Pre-Trial Chamber to consider that the Co-Lawyers of the Charged Person fulfilled their obligation of mentioning the legal basis.

14. To determine whether it has jurisdiction over the Appeal, the Pre-Trial Chamber shall start with an examination of the nature of the related Request. Before such examination, the Pre-Trial Chamber makes a preliminary observation that although the Charged Person was not one of the parties that made or joined in the Request, due to its general nature, the related Order equally affects the position of the Charged Person who is therefore entitled to appeal it.²¹

15. The Pre-Trial Chamber notes that the Co-Lawyers of Ieng Thirith submitted the Request to the Co-Investigating Judge pursuant to Internal Rule 55(10) "which provides that at any time during an investigation a Charged Person may request the [Co-Investigating Judges] to make such orders as they consider necessary for the conduct of the investigation".²² In the conclusion of the Request the Co-Lawyers of Ieng Thirith asked the Co-Investigating Judges to:

- (i) "Treat as inadmissible any evidence or other material which was or may have been obtained by the use of torture [...]"
- (ii) Refrain from using such statements in any other way [...]"

16. The Pre-Trial Chamber observes that, taking into account its purpose, the Request is not a "request for investigative action" within the ambit of Internal Rule 74(3)(b) and as defined

²¹ See "Decision on the Admissibility of the Appeal Lodged by Khieu Samphan and Directions to the Co-Prosecutors" 22 September 2009, D164/4/7 (PTC24), paras. 7-14.

²² Ieng Thirith's Request, para. 3.



by the Pre-Trial Chamber in its Decision on Khieu Samphan's Translation Appeal²³ as requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.

17. The Pre-Trial Chamber further observes that the possibility to appeal from orders of the Co-Investigating Judges is limited for the Charged Person whereas the Co-Prosecutors can appeal all such orders.²⁴ Any inconsistency that may derive from a suggested general possibility to appeal under Internal Rule 55(10) and the limited possibility to appeal for the Charged Person under Internal Rule 74 (3)(b) cannot lead to conclusions as drawn by the Co-Lawyers on the admissibility of this Appeal.
18. The Pre-Trial Chamber further notes that it has, in general, no jurisdiction to review matters related to admissibility of evidence as such. According to the Internal Rules, the matter of admissibility of evidence arises at the trial stage of the criminal proceedings.²⁵ Similarly, the Cambodian Code of Criminal Procedure provides very few rules regarding admissibility of evidence and these concern the trial stage of the proceedings when the trial judges are given broad discretion in deciding whether or not to admit evidence.²⁶
19. The Pre-Trial Chamber finds for these reasons that the appeal cannot be declared admissible while applying Internal Rules 55 and 74.
20. The Pre-Trial Chamber notes that Internal Rule 76 provides an opportunity for a party to request the Co-Investigating Judges to annul an investigative action. It is further noted that this provision is aimed to exclude the evidence in its totality. The Request made to the Co-Investigating Judges is aimed to exclude only for a part as far as the evidence is used otherwise than as allowed under the Convention Against Torture (the "CAT"). The suggestion made by the Co-Prosecutors that this procedure should have been used by the Co-Lawyers is therefore without legal basis.

²³ Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations February 2009, para.28. A190/I/20.

²⁴ Internal Rule 74(2).

²⁵ Internal Rule 87.

²⁶ Article 321, Cambodian Code of Criminal Procedure.



21. The Pre-Trial Chamber further notes that the Co-Lawyers submit that other grounds for admissibility of the Appeal are: 1) fair trial infringement; and 2) expeditious conduct of the proceedings.

22. In this respect, Internal Rule 21 provides:

“Rule 21. Fundamental Principles

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]

4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.”

23. The Pre-Trial Chamber shall examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person’s rights to appeal in order to ensure that proceedings are fair and expeditious.

24. The Pre-Trial Chamber observes that the Internal Rules give to the Charged Person the possibility to object to the admissibility of evidence during the trial stage. Reference is made to Internal Rule 87.²⁷

25. The Pre-Trial Chamber further notes that the established procedure before the Trial Chamber for evaluation of evidence for trial is in accordance with the international standards of law and safeguards the fair trial rights of the Charged Person. Similar to the discretion granted to judges in other international tribunals,²⁸ the Trial Chamber of the ECCC is granted the discretion to reject requests for evidence (analogous to excluding evidence presented) when such is “not allowed under the law”.²⁹ The “law” applicable in Cambodia includes international instruments such as the Convention Against Torture.³⁰



²⁷ For a better understanding of the provisions of Internal Rule 87, see Trial Chamber’s Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, paras 5-7.

²⁸ Rule 95 of the Rules of Procedure and Evidence of ICTY and ICTR.

²⁹ Internal Rule 87(3)(d).

³⁰ Cambodia ratified the Convention Against Torture on 15 October 1992.

26. The Pre-Trial Chamber observes that the action taken by the Co-Lawyers is seeking to exclude evidence to the extent consistent with Article 15 of the CAT, which provides:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”

27. On 28 October 2009 the Trial Chamber noted in a decision in the case of KAING Guek Eav “Duch”, in respect of documents obtained by torture:

“The relevance of these documents is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents”.³¹

28. Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order,³² Article 15 of the CAT is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.³³ The Pre-Trial Chamber observes that, at the time it was seized of this Appeal, the original and two translated versions of the Order were inconsistent with each other in particular in regard to paragraph 28³⁴ which was specifically commented in the Appeal. The Pre-Trial Chamber further observes that due to this inconsistency, the application of Article 15 of the CAT in relation to the evidence in question as discussed in the Order was unclear.

29. The Pre-Trial Chamber finds that the Charged Person’s rights provided for in Internal Rule 21 are sufficiently safeguarded by the existing legal framework, as reasoned above. The Pre-Trial Chamber therefore finds that Internal Rule 21 does not oblige it to interpret the Internal Rules in such a way that the Appeal should be declared admissible.



³¹ See Trial Chamber Decision, 28 October 2009, E176, para. 8.

³² Order, para.28.

³³ The drafting history of Article 15 of the CAT makes this clear. See: UN Doc E/CN.4/1285, 18 January 1978; Summary Prepared by the UN SG in Accordance with Commission Res’n 18 (XXXIV), UN Doc. E/CN.4/1314, 19 December 1978, 22.; UN Doc. E/CN.4/WG.1/WP.1, 16 February 1979; UN Doc. E/CN.4/NGO/213, 15 January 1978; Commission on Human Rights, decision I (XXXVI) at its 1526th meeting on 5 February 1980; Commission on Human Rights, Report of Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1367, 5 March 1980, para 82. Reproduced in the Commission on Human Rights, Report on the Thirty-Sixth Session of 4 February to 14 March 1980, UN Doc. E/1980/13, E/CN.4/1408, para.205, pp. 52-73, para.83.

³⁴ The Pre-Trial Chamber notes that this has since been corrected in the Zylab but not yet in the public ECCC website.

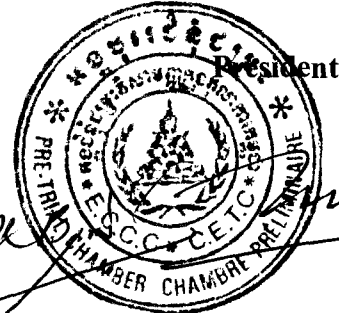
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES:

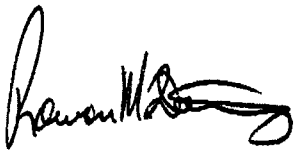
The Appeal is inadmissible.


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

Phnom Penh, 27 January 2009 CR

Pre-Trial Chamber






Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Vuthy PRAK Kimsan