



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

A190/I/14

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File No. 002/19-09-2007-ECCC (PTC11)

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REPORT OF EXAMINATION (PUBLIC VERSION)

- I- Proceedings
- II- Examination of the case by the co-rapporteurs

ឯកសារចម្លងបញ្ជាក់ដោយមន្ត្រីទទួលបន្ទុកឯកសារ
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I- PROCEEDINGS

A) Introduction

Pursuant to Rule 77(10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“Internal Rules”), the President of the Pre-Trial Chamber has assigned Judges **NEY Thol** and **Katinka LAHUIS** to set out the details of the decision of the Co-Investigating Judges to issue the Order on Translation Rights and Obligations of the Parties, against which the present appeal is lodged, and of the relevant facts of Case File No. 002/19-09-2007-ECCC (PTC11).

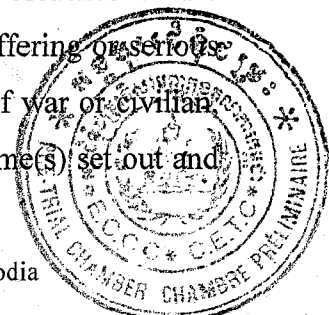
Identification of the Charged Person

KHIEU Samphan, alias Hem, male, born on 27 July 1931, at Commune of Rom Chek, District of Rom Duol, Province of Svay Rieng, Cambodia, pre-arrest address village of KonKhlong Sangkat Otavao, Khan Pailin, Pailin City, father’s name **KHIEU Long** (deceased), mother’s name **POR Kong** (deceased), spouse’s name **SO Socheat**, with four children.

Khieu Samphan is represented by Co-Lawyers Mr. **SA Sovan** and Mr. **Jacques VERGÈS**.

Charges

KHIEU Samphan is under investigation for crimes against humanity (murder, extermination, imprisonment, persecution and other inhuman acts) and grave breaches of the Geneva Conventions of 12 August 1949 (wilful killing, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial of a prisoner of war or civilian, unlawful deportation or transfer or unlawful confinement of a civilian), being crimes set out and



punishable under articles 5, 6, 29(new) and 39(new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004 ("ECCC Law").

Purpose of this report

This report of the co-rapporteurs sets out the details of the decision appealed against and the facts at issue before this court.

B) Co-Investigating Judges' Order on Translation Rights and Obligations of the Parties

On 19 June 2008, the Co-Investigating Judges issued the Order on Translation Rights and Obligations of the Parties ("Translation Order") addressed to all of the charged persons and parties in the case file, amongst them Khieu Samphan.¹

In this order, the Co-Investigating Judges noted three occasions in which the Co-Lawyers of the Charged Person requested that documents in his case file be translated and in particular, requested translation into the language of the Charged Person's international co-lawyer, French.²

The Co-Investigating Judges considered that:

"On the one hand, account must be taken of the right of the charged person to a fair trial, which includes the right to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against him or her; to have adequate time and facilities for the preparation of their defence; right to *equality of arms* and, notably, to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them; finally to have the free assistance of an interpreter if the charged person cannot understand or does not speak the language used in the court.

"On the other hand, the right to a trial within a reasonable period of time would be seriously undermined by any requirement for full translation of all documents on the case file into the three official working languages of the ECCC."³

In their view, a requirement can be derived from Article 21(3) of the 2003 Agreement Between the United Nations and the Royal Government of Cambodia ("Agreement") and Rules 11(4) and 22(1) of the Internal Rules that the Parties must contribute to the resolution of their own

¹ Office of Co-Investigating Judges, "Order on Translation Rights and Obligations of the Parties", 19 June 2008, A190.

² Declaration of the international co-lawyer for Khieu Samphan to the Co-Investigating Judges, 14 February 2008, D75; Declaration of the international co-lawyer for Khieu Samphan before the Pre-Trial Chamber, 23 April 2008; Letter from the Defence Team of Khieu Samphan to the Tony Kranh, Chief of CMS, 5 June 2008.

³ Order on Translation Rights and Obligations of the Parties, para. A3.



language needs by using the linguistic capacity of their own teams and the Defence Support Section (“DSS”), and by collaborating with the Court Management Section (“CMS”) to coordinate their translation needs and priorities.⁴

The Co-Investigating Judges decided that:

“[...] a charged person is entitled to the translation into Khmer of any Indictment of the Co-Investigating Judges under rule 67(1) of the IR, since that constitutes the final characterization and founding of the charges on which a charged person is sent forward for trial. In addition, a charged person is entitled to translation into Khmer of the elements of proof on which any such Indictment would rely.

The charged person is also entitled to translation into Khmer of the IS (Introductory Submission) and the Final Submissions of the Co-Prosecutors, as well as of all footnotes and indexes of the factual elements on which those Submissions rely.”⁵

In addition, the Parties are required to provide CMS with a list of the precise case file documents which they require to be translated as a matter of priority and any request to alter prior translation requests.⁶ The defence teams must also include whether full or partial translation is required, the number of pages to be translated, the desired language of translation, the priority of the request, and the reasons for the translation request.⁷

CMS will then provide the Co-Investigating Judges and the Parties a complete index of all pending translation requests with projected completion dates considering the resources available and CMS will retain a Register of the Parties’ translation requests.⁸ In addition:

“CMS and the Parties must strive to achieve consensus on any overlapping priorities and, if this is not possible, CMS shall report to the Co-Investigating Judges [...] who will resolve the dispute by, *inter alia*, fixing specific priorities and, if necessary, translation quotas.”⁹

Lastly, each defence team must indicate their language preference among the official working languages so that the Office of Administration can appoint a translator to them. The Office

⁴ Order on Translation Rights and Obligations of the Parties, para. A4.

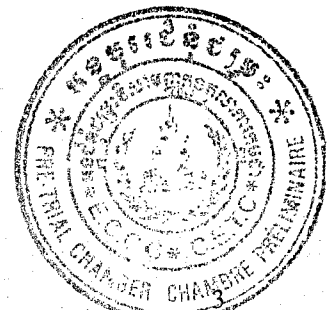
⁵ Order on Translation Rights and Obligations of the Parties, para. B4.

⁶ Order on Translation Rights and Obligations of the Parties, p. 7, para. 2.

⁷ Order on Translation Rights and Obligations of the Parties, p. 7, para. 2.

⁸ Order on Translation Rights and Obligations of the Parties, p. 7, paras. 1-3.

⁹ Order on Translation Rights and Obligations of the Parties, p. 7, para. 4.



of Administration will appoint a full-time translator to each of the defence teams free of charge for renewable periods of two months¹⁰ in order to:

“ensure that the charged persons and the defence teams can have certain documents translated as required, to assess the teams translation requirements for transmission to CMS and to assist the teams’ collaboration with CMS.”¹¹

Any extensions for such appointments will be determined by the Office of Administration in consultation with the Co-Investigating Judges.¹²

C) **Khieu Samphan’s appeal against the Co-Investigating Judges’ Translation Order**

On 30 June 2008, the Co-Lawyers of the Charged Person filed a Notice of Appeal¹³ and on 22 July 2008, filed their brief entitled “Defence Appeal against the Decision to Deny the Request for Translation of Khieu Samphan’s Case File” (“Appeal Brief”).¹⁴

The Co-Lawyers of the Charged Person request that the Pre-Trial Chamber: 1) set aside the Co-Investigating Judges’ decision denying the request for translation of the case file, 2) note the violations of the Charged Person’s rights as a result of the absence of translation and 3) immediately and unconditionally release the Charged Person.¹⁵ They do so on the grounds that the Co-Investigating Judges’ decision lacks a legal basis and that the Charged Person’s rights have been violated to such an extent that it is no longer possible to uphold his right to a fair trial.¹⁶

D) **Response of the Co-Prosecutors**

On 28 August 2008, the Co-Prosecutors filed their response to the Appeal Brief in which they argue that the present appeal is inadmissible because the court’s governing laws do not provide for appeals relating to issues of translation. In their view, the appeal is substantively devoid of merit and the Co-Investigating Judges’ Translation Order does not violate any fair trial rights of the Charged Person. The Charged Person is not entitled to any consequential relief including release.¹⁷

¹⁰ Order on Translation Rights and Obligations of the Parties, p8, para. 6.

¹¹ Order on Translation Rights and Obligations of the Parties, para. E3.

¹² Order on Translation Rights and Obligations of the Parties, p. 8, para. 6.

¹³ Register of Appeals, A190/I/1.

¹⁴ Appeal Brief, 22 July 2008, A190/I/1

¹⁵ Appeal Brief, para. 80.

¹⁶ Appeal Brief, para. 75-76.

¹⁷ Office of the Co-Prosecutors, “Co-Prosecutors’ Response to Khieu Samphan’s Appeal on Translation Rights and Obligations of the Parties”, 28 August 2008, (“OCP Response”), para. 47



E) Response of the Civil Parties

The Co-Lawyers of the Civil Parties did not file any responses.

II- EXAMINATION BY THE CO-RAPPORTEURS**Particular Arguments of the Parties****A) Admissibility of the Appeal**

The Co-Prosecutors submit that the Charged Person's appeal is inadmissible since: "Rule 74(3) exhaustively enumerates the types of orders against which a charged person may appeal to the Pre-Trial Chamber. This rule does not include appeals relating to requests for translation."¹⁸

The Co-Lawyers of the Charged Person do not address the issue of admissibility of the appeal.

B) Jurisdiction of the Co-Investigating Judges to Issue the Translation Order

The Co-Lawyers of the Charged Person submit that the statutory bases on the issue of translation are clear. The ordinary meaning of Article 26(2) of the Agreement and Article 45 new of the ECCC Law establish that the ECCC is intended to function in three languages, namely Khmer, English and French such that the Co-Investigating Judges issuance of the Translation Order is without a legal basis.¹⁹

The Co-Prosecutors, on the other hand, submit that translation issues fall within the decision-making powers of the Co-Investigating Judges and are a matter of judicial administration.²⁰

C) The Specificity of the ECCC

The Co-Lawyers of the Charged Person submit that the Translation Order fails to take account of the specificity of the ECCC and that:

"It is important to bear in mind that the ECCC is the first hybrid or international court that is not based on common law. It is based on a non-adversarial civil law system comprising a distinct investigation phase. [...]"

¹⁸ OCP Response, para. 26.

¹⁹ Appeal Brief, para. 29-31.

²⁰ OCP Response, para. 29.



“During the investigation phase, and in order to safeguard the rights of the defence, [civil law systems] provide for counsel’s right to examine the investigation file, of course, in a language counsel understands. It is the language of counsel that takes precedence, and not that of the accused.”²¹

The Co-Prosecutors respond that:

“[...] while there may be systemic differences [between the ECCC and the other international criminal tribunals], the remedy tailored by the Rules, and confirmed by the Translation [Order], make those differences, if any, inconsequential. While it is true that immediately after joining the judicial investigation, a defendant is called upon to make substantive evidentiary submissions during the adversarial hearing his access to the documents can be facilitated by collaboration within his legal team and with the assistance from the Defence Support Section.”²²

D) The Fair Trial Rights of the Charged Person

The Co-Lawyers of the Charged Person submit that the absence of translation and the measures ordered by the Co-Investigating Judges seriously impair the rights of the Charged Person. They argue generally that the Translation Order violates the Charged Person’s right to participate in the proceedings, right to equality of arms, right to adequate time and facilities to prepare a defence and right to trial within a reasonable period of time.²³

The Co-Prosecutors respond that the Translation Order does not undermine any of the Charged Person’s fair trial rights.²⁴

“The fair trial requirements for provision of documents in the language that a defendant understands are amply met by recourse to the full linguistic capacities of the defence team, resources of the Defence Support Section, the full-time translator assigned by the Translation [Order] and the efforts of Court Management Section to provide timely translation services.”²⁵

Translation of documents into the language of the Charged Person’s lawyer

The Co-Lawyers of the Charged Person emphasize in particular that the Translation Order violates the Charged Person’s right to effective legal assistance. Article 35 new of the ECCC Law and Rule 22 (1) of the Internal Rules entitle the Charged Person to choose to be defended by a

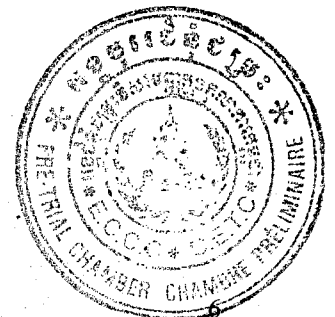
²¹ Appeal Brief, paras. 33-35.

²² OCP Response, para. 38.

²³ Appeal Brief, paras. 56-71.

²⁴ OCP Response, para. 36.

²⁵ OCP Response, para. 39.



national lawyer or a foreign lawyer in collaboration with a national lawyer.²⁶ The Translation Order does not provide for the translation of the case file into a language that the Charged Person's international co-lawyer understands. The Charged Person's international co-lawyer cannot participate in the defence of the Charged Person and this means that Khieu Samphan is denied his right to the assistance of both his lawyers.²⁷

In addition, they state that the ECCC's hybrid nature: "is aimed at ensuring respect for international standards, while at the same time preserving Cambodia's sovereignty over the ongoing trials. It is effectively applied in the Office of the Co-Prosecutors and was also taken into account when appointing the Judges. The situation should not be different with regard to the Defence, in that Khieu Samphan is entitled to the full assistance of both his lawyers, and to benefit from their concerted work."²⁸

The Co-Prosecutors respond that: "There is virtually no international instrument that guarantees all documents on a defendant's case file to be translated into the language of the defence counsel. [...] The Co-Prosecutors, accordingly, submit that as no such right inheres in the Appellant, he cannot invoke it to claim ineffective legal representation."²⁹ Moreover, the Translation Order protects the Charged Person's right to effective representation:

"Despite the lack of a recognized right to have documents in the language of the international counsel [...], the Translation [Order] has attempted to create a mechanism for the defence team to receive translations of documents into non-Khmer languages promptly. The [Translation Order] provides for additional staffing dedicated to ensure that any documents requiring immediate or unexpected translation could be available in-house with the assistance of the free-of-charge in-house translators."³⁰

E) Types of documents to be translated

Although the Co-Lawyers of the Charged Person and the Co-Prosecutors agree that the Charged Person has some right to receive translations of documents, they disagree on what documents must be translated and into what language. The Co-Lawyers emphasize that the Charged Person is entitled to full translation of the case file into the language of his international lawyer³¹,

²⁶ Appeal Brief, paras. 56 & 59. Citing the Code of Ethics of Lawyers Licensed with the Bar Association of the Kingdom of Cambodia and HRC case, *Pinto v. Trinidad and Tobago*, No. 232/1987.

²⁷ Appeal Brief, paras. 59-60.

²⁸ Appeal Brief, para. 57.

²⁹ OCP Response, para. 40.

³⁰ OCP Response, para. 42.

³¹ Appeal Brief, para. 59.



whereas the Co-Prosecutors argue that some but not all documents on the case file must be translated and that they must only be translated into the language of the Charged Person.³²

Exculpatory Material

The Co-Lawyers of the Charged Person argue specifically that: "There is no assurance that the exculpatory evidence contained in the investigation file will actually be updated and examined."³³

The Co-Prosecutors do not respond directly to this issue but submit that: "the documents already available in Khmer, and those ordered to be provided in Khmer in the Translation [Order] reflect the most liberal regime of disclosure adopted by the ICTY and ICTR."³⁴

F) Obligation for the Parties to Collaborate in the Translation Process

The Co-Lawyers of the Charged Person also dispute the requirement in the Translation Order that the Defence must cooperate usefully with the translation process. In their view, there is no legal basis for imposing such an obligation on the Defence and the measures set forth in the Translation Order violate the counsels' duty to maintain professional confidentiality.³⁵

"Transmitting to the CMS (and if this is not possible, the Co-Investigating Judges) a list of documents the Defence requires to be translated as a matter of priority accompanied with the reasons for the translation request and, in particular, the priority accorded amounts to a violation of this duty and of the inviolability of all the documents relating to his functions as counsel."³⁶

The Co-Prosecutors do not respond directly to this issue but submit that the Translation Order provides for translation of a core set of documents consistent with those required to be translated at the other international criminal tribunals.³⁷ The measures in the Translation Order allow the defence teams to request further translations beyond this core set of documents on the basis of a common list and prioritisation of documents.³⁸

³² OCP Response, paras. 31.

³³ Appeal Brief, para. 63.

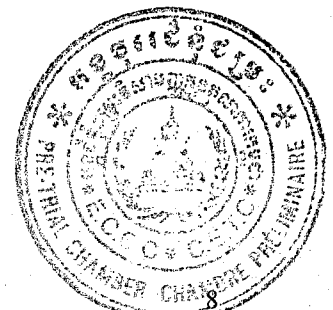
³⁴ OCP Response, para. 36.

³⁵ Appeal Brief, para. 41-42.

³⁶ Appeal Brief, para. 42. Internal quotations omitted.

³⁷ OCP Response, para. 37.

³⁸ OCP Response, para. 37.



G) Release of the Charged Person

The Co-Lawyers of the Charged Person submit in closing that the abuse of process doctrine is applicable in Khieu Samphan's situation. The Charged Person has suffered multiple violations of his rights such that it is no longer possible to uphold his right to a fair trial and he should be released immediately and unconditionally.³⁹

The Co-Prosecutors respond that since the Translation Order does not violate any fair trial rights of the Charged Person, there has been no abuse of process and the Charged Person is not entitled to release.⁴⁰

Phnom Penh, 2 December 2008

CO-RAPPORTEURS
Judge NEY Thol
Judge Katinka LAHUIS

³⁹ Appeal Brief, paras. 75, 80.

⁴⁰ OCP Response, para. 47.

