

**PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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du dossier: SANN RADA

**DEFENCE REPLY ON THE
NEED FOR A PUBLIC HEARING**

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MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. INTRODUCTION

1. By refusing to order translation of the KHIEU Samphan Case File into French – the only language his international lawyer, Mr Jacques VERGÈS, understands, and also an official language of the ECCC – the Co-Investigating Judges have reduced KHIEU Samphan to voicelessness and his Defence to impotence.
2. This decision raises fundamental questions of equity: in terms of the powers of the Co-Investigating Judges regarding the conduct of the judicial investigation; the rights of the Defence; the role of the Lawyers; who has the responsibility to uphold these rights; and, in concrete terms, whether KHIEU Samphan's rights been breached. Whether he should be released.
3. The Defence and the Co-Prosecutors hold opposing views regarding these questions. It is now for the Pre-Trial Chamber to settle this complex disagreement. The Chamber is squarely at the centre of the debate on the right to a fair trial, a critical debate in terms of the ECCC's legitimacy and credibility. This is why the Defence filed a request for a public hearing.²
4. The Co-Prosecutors are opposed to holding a public hearing, and have requested the Pre-Trial Chamber not to hold one, thereby positioning themselves in the gray area between the law and subjective interpretation thereof.
5. In fact, there no valid reason for the Appeal to be decided without oral pleadings. Both the applicable statutory provisions and practice of the Pre-Trial Chamber with regard to such matters suggest otherwise. Moreover, KHIEU Samphan's situation is unique, and his Appeal may bring an end to the case. To the extent that this Appeal – more than any other – calls into question the ECCC's legitimacy, it requires a public hearing.
6. This is why the Defence hereby requests the Pre-Trial Chamber to schedule a public hearing.

² Request for a Public Hearing on the Appeal Against the Decision to Deny Translation of KHIEU Samphan's Case File, *Court Document No. A190/I/2*.

⁴ Order on Provisional Detention, 19 November 2007, *Court Document No. C26*.

II. FACTUAL AND PROCEDURAL BACKGROUND

7. KHIEU Samphan was placed under provisional detention pursuant to the Co-Investigating Judges' Order dated 19 November 2008.⁴
8. On 21 December 2007, the Co-Lawyers for the Defence appealed the Order.⁵
9. A hearing on the Appeal was held on 23 April 2008. Owing to the absence of translation of the *KHIEU Samphan* Criminal Case File, Mr. Jacques VERGES could not participate in the proceedings, and the hearing was adjourned "to a date to be advised". Since then, it has not been possible to schedule a hearing.⁶
10. On 16 August 2008, the Pre-Trial Chamber directed the Defence to provide its observations on this *de facto* situation.⁷ On 21 August, the Defence reiterated its position on the need for translation of the KHIEU Samphan case file.⁸
11. In a related development, on 19 June 2008, the Co-Investigating Judges issued an "Order on the Rights and Obligations of the Parties Regarding Translation".⁹ This Order *de facto* denied the request for translation of the *KHIEU Samphan* case file.
12. The Co-Lawyers for the Defence immediately appealed the Order, and requested the Pre-Trial Chamber to set aside the Co-Investigating Judges' Order for lack of legal basis, to note the grave breach of KHIEU Samphan's rights and to order his immediate and unconditional release owing to procedural irregularities.¹⁰
13. On 11 August 2008, the Co-Lawyers also filed a Request for the appeal to be examined in a public hearing, as it could have major implications for the case as a whole.¹¹
14. On 22 August 2008, the Co-Prosecutors filed their Response to KHIEU Samphan's appeal, in which they requested the Pre-Trial Chamber to "dismiss the Appeal as procedurally

⁴ Appeal Brief Against the Provisional Detention Order of 19 November 2007, 21 December 2007, *Court Document No. C26/I/3*.

⁵ Decision on Appeal to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, *Court Document No. C26/I/25*.

⁶ Public Direction to the Defence Concerning the Appeal Against Provisional Detention Order, *Court Document No. C26/I/27*.

⁷ Notification of the Defence's Position Concerning KHIEU Samphan's Appeal Against Provisional Detention Order, *Court Document No. C26/I/28*.

⁸ Order on Translation Rights and Obligations of the Parties, 19 June 2008, *Court Document No. A190*.

⁹ Defence Appeal Against the Decision to Deny Request for Translation of KHIEU Samphan's Case File, 22 July 2008, *Court Document No. A190/I/1*.

¹⁰ Request for a Public Hearing on the Appeal Against the Decision to Deny the Request for Translation of KHIEU Samphan's Case File, 11 August 2008, *Court Document No. A190/I/2*.

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inadmissible and substantially devoid of merit.”¹²

15. In their preliminary requests, the Co-Prosecutors also oppose holding a hearing on the appeal. They request the Pre-Trial Chamber to determine the Appeal on written pleadings alone, together with the appeal filed by IENG Sary.¹³
16. On 16 September 2008, the Pre-Trial Chamber directed “the Co-Lawyers for the Charged Person to file a reply, if any, to paragraphs 4 and 5 of the Co-Prosecutors’ Response within seven (7) days of notification of these Directions.”
17. The paragraphs in question read as follows:

An oral Hearing is Not Required

4. The Prosecutors submit that an oral hearing is not required as the parties have sufficiently briefed the Pre-Trial Chamber on the factual and legal issues relevant to this Appeal. They request that the Pre-Trial Chamber determine this Appeal on written pleadings alone. The Practice Direction on the Filing of Documents (“Practice Direction”) and the practice of the Pre-Trial Chamber in such cases permit this disposal.
5. The Co-Prosecutors request that, in the interest of judicial economy, this Appeal be decided together with the Appeal filed by IENG Sary that also challenges the Translation decision. Both appeals raise similar issues of law and fact.

18. On 22 September 2008, the Defence filed the present Reply.

III. APPLICABLE LAW

19. Rule 77(3) of the Internal Rules provides that “[T]he President of the Pre-Trial Chamber shall (...) set a hearing date. The Greffier of the Chambers shall notify the Co-Investigating Judges, the parties and their lawyers.”¹⁴
20. Rule 77(6) of the Internal Rules provides that “the Chamber may, at the request of any judge

¹² Co-Prosecutors’ Response to Khieu Samphan’s Appeal on Translation Rights and Obligations of the Parties, (“Co-Prosecutors’ Response”) 22 August 2008, served to the Parties in French on 15 September 2008, *Court Document No. A190/I/4*.

¹³ Co-Prosecutors’ Response, paras. 4 and 5.

¹⁴ See *mutatis mutandis*, Article 258 of the Code of Criminal Procedure of the Kingdom of Cambodia.

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or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court.”

21. Rule 8.4 of Practice Directive 01/2007/Rev.2 of 5 October 2007 (“Practice Direction”) provides that “a response shall only be permitted where there is to be no oral argument on the request.”
22. Lastly, Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR), which is directly applicable in national courts, provides that “[I]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁵

IV. ARGUMENTS IN REPLY

23. In their Response, the Co-Prosecutors move that the appeal be decided on the basis of written pleadings together with the appeal filed by IENG Sary. The Defence considers this proposition to be matter of expediency, and to be unwarranted.
24. First, the Co-Prosecutors argue that “the Practice Direction on the Filing of Documents (“Practice Direction”) and the practice of the Pre-Trial Chamber in such cases permits this disposal.” According to them, “an oral hearing is not required as the parties have sufficiently briefed on the factual and legal issues relevant to this Appeal.”¹⁶
25. It is clear that neither the applicable ECCC statutory provisions nor the practice of the Pre-Trial Chamber with regard to such matters support this proposition.

1) The applicable statutory provisions provide for a hearing

26. At the time of the filing of the Defence Request and the Co-Prosecutors’ Response, Rule 77(3) of the Internal Rules and Article 258 of the Code of Criminal Procedure of the Kingdom of Cambodia both specifically provide for a hearing on appeal.¹⁷ Pursuant to these

¹⁵ See also Article 6.1 of the European Convention on Human Rights (ECHR), pursuant to which “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.”

¹⁶ Prosecutors’ Response, para. 4.

¹⁷ Article 8.4 of the Practice Direction, which is cited by the Co-Prosecutors, provides that “A reply to a response shall only be permitted where there is to be no oral argument on the request”. However, there is no indication as to whether this provision is applicable before the Pre-Trial Chamber or in which instances oral pleadings are necessary.

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provisions, when an appeal has been lodged before the Pre-Trial Chamber, the Pre-Trial Chamber must therefore, and in principle, schedule a hearing.

27. However, in practice, the Pre-Trial Chamber has decided – where it has deemed it appropriate – to decide on the basis of written pleadings alone. This practice is reflected in the new Rule 77(3) of the Internal Rules, which entered into force on 5 September 2008, in that the Pre-Trial Chamber “may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only.”
28. However, as the Pre-Trial Chamber is well aware, such decisions have been on taken within a specific set of circumstances, which, in reality, underscore the need for a hearing on the Appeal at hand.

2) The practice suggests holding a hearing

29. In opposing the holding of a hearing, the Co-Prosecutors invoke the practice of the Pre-Trial Chamber. They contend that “a hearing is not required” as “the parties have sufficiently briefed the Pre-Trial Chamber on the factual and legal issues”.
30. This may be the Co-Prosecutors’ only argument, since they fail to explain how the Pre-Trial Chamber could consider itself sufficiently briefed or why a hearing is not required based on this consideration only.
31. According to the Co-Prosecutors, the mere filing by the parties of their respective written submissions (which, a priori, is always the case) would suffice for the Chamber to consider that it is sufficiently briefed and thus not require to hear the parties’ pleadings. This proposition relies on a minimalist view of the importance of pleadings at a hearing, and is inconsistent with the Chamber’s decisions on such matters.
32. Needless to say, in deciding to determine an appeal without a hearing, the Chamber would have to deem itself sufficiently briefed. How could it proceed otherwise? However, its decisions guarantee respect for the Charged Person’s right to a fair, public trial. As far as the Defence knows, the Pre-Trial Chamber has always decided to determine the appeals it is seized of on the basis of written submissions only at the express request of the charged person,¹⁸ and, at the very least, with the consent of both parties.¹⁹

¹⁸ See for example, Decision to Determine IENG Sary’s Appeal on the Basis of Written Submissions Only,

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33. Where the Co-Prosecutors have made the request, the Pre-Trial Chamber has always taken due account of whether the Charged Person was not opposed to such a request.²⁰ Moreover, in those instances, the stakes were low. In the Decision cited by the Co-Prosecutors, for example, the Pre-Trial Chamber specifically recalled that “although they [did] not agree with the legal and factual arguments put forward by the Co-Lawyers”, fundamentally, the Co-Prosecutors “[did] not oppose the appeal” of the Defence. It also mentioned that no response was filed by the Civil Parties.²¹
34. So, in practice, the Pre-Trial Chamber has not denied a party a hearing, especially where such a party was a charged person. Therefore, the Chamber is faced with a new situation, which is unlike the earlier ones cited.
35. The circumstances of the appeal at hand are very different, and the stakes are high. KHIEU Samphan has specifically requested the Pre-Trial Chamber to hold a hearing. He has also invited the Pre-Trial Chamber to consider the exceptional nature of the appeal in requesting that it to be litigated in a public hearing. As to substance, there is clearly disagreement between the parties.
36. In the final analysis, the Co-Prosecutors invoke the practice of the Pre-Trial Chamber, not because it is relevant to the matter at hand, but because they have no valid reason whatsoever to request that the appeal be determined on the basis of written submissions. And it is easy to understand why.

3) KHIEU Samphan’s request for a public hearing has legal basis

37. As stated in the Defence Request for a public hearing, KHIEU Samphan’s appeal fits squarely within the provisions of Rule 77(6) of the Internal Rules. On this point, the Co-Lawyers for the Defence wish to refer the Pre-Trial Chamber to the arguments they put

10 September 2008, *Court Document No. A190/II/7*; Decision to Determine NUON Chea’s Appeal on Conditions of Detention on the Basis of Written Submissions Only, 7 August 2008, *Court Document No. C33/II/15*; Decision Concerning the Scheduling of a Hearing on 20 May 2008, *Court Document No. D55/II/6*.

¹⁹ See, for example, Decision to Determine NUON Chea’s Appeal on Appointment of Experts on the Basis of Written Submissions Only, 7 August 2008, *Court Document No. D54/IV/4*.

²⁰ This applies to the cases cited by the Co-Prosecutors: Decision on Appeal Concerning Contacts Between the Charged Person and His Wife, 30 April 2008, *Court Document No. A104/II/7*, and others; see for example, Decision on the Request to Determine IENG Sary’s Appeal on the Basis of Written Submissions Only, 4 August 2008, *Court Document No. A162/III/5*.

²¹ Decision on Appeal Concerning Contacts Between the Charged Person and His Wife, 30 April 2008, *Court Document No. A104/II/7*, paras. 6 and 7.

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forward in their Request.²²

38. Conversely, the Co-Prosecutors' argument that "in the interest of judicial economy (...), this Appeal be decided together with the Appeal filed by IENG Sary that also challenges the Translation decision" is without legal basis.
39. KHIEU Samphan has requested a hearing, whereas IENG Sary elected to request that the Chamber determine his appeal on the basis of written pleadings alone, which request was granted.²⁴ If, as the Co-Prosecutors claim, these appeals raise similar issues, doesn't the principle of equity require that whatever is granted to one party also be granted to the other party? Why is IENG Sary's request for his appeal to be determined on the basis of written pleadings only more legitimate than KHIEU Samphan's request for a public hearing? Must we once again allow budgetary considerations to take precedence over the fundamental principles underpinning the judicial process?
40. The Defence does not believe so. Especially because it considers it incorrect to argue that "both Charged Persons have raised similar issues of fact and law."
41. If indeed these two cases are identical in every respect, the obvious question is why did the Co-Prosecutors see the need to file two responses? Of course, while the Charged Persons are asserting the same rights – which is only logical – their situations are very different.
42. KHIEU Samphan was denied due process in his appeal against provisional detention. Owing to the absence of translation of the case file, Mr. VERGÈS could not participate in the appeal hearing held on 23 April, and up to now, he cannot examine the evidentiary materials contained in the judicial investigation file. KHIEU Samphan has now been in provisional detention for nearly 11 months pursuant to an Order whose legality is yet to be established. Such is not the case with IENG Sary. Also, KHIEU Samphan has requested the Pre-Trial Chamber to order his immediate release owing to procedural irregularities. However, IENG Sary has not made such a request.
43. KHIEU Samphan's situation is unique, and his Appeal raises crucial questions. IENG Sary has elected not to appear before the Judges; that is his free choice. There is no good reason

²² Request for a Public Hearing on the Appeal Against the Decision to Deny the Request for Translation of KHIEU Samphan's Case File, 11 August 2008, *Court Document No. A190/I/2*.

²⁴ Decision to Determine IENG Sary's Appeal on the Basis of Written Submissions Only, 10 September 2008, *Court Document No. A190/II/7*.

why his choice should affect KHIEU Samphan's case.

4) KHIEU Samphan's request for a public hearing is legally sound

44. Unlike the Co-Prosecutors, the Co-Lawyers for the Defence attach a great deal of importance to holding a public hearing on the Appeal at hand, but also in a broader sense, before the ECCC.²⁵
45. The Co-Lawyers hold the view that "the right of an accused person to a public hearing is not simply an additional guarantee of the endeavour to ascertain the truth: it also contributes to assuring the accused that he was tried by an a court whose independence and impartiality he could monitor. Public proceedings before the judicial organs protect the persons subject to trial from secret justice, which escapes public scrutiny, and also a means of maintaining trust in courts and tribunals. Transparency of the judicial process helps achieve the purpose of Article 6.1 [of the ECHR], which provides for a fair trial, which is among the guiding principles of all democratic societies within the meaning of the Convention (...) [unofficial translation]."²⁶
46. As the Co-Lawyers recall in the Introduction, KHIEU Samphan's Appeal goes to the heart of the debate about a fair trial. According to the experts "trials of the Khmer Rouge leaders must observe the maxim that justice not only be done, but be seen to be done. To serve the purposes of criminal justice outlined in the introduction to our report, the Cambodian people must have confidence in the fairness of the process. Otherwise, they will regard this as a partisan political process. Moreover, the possibility of any of the lessons to be gained from fair and impartial trials being absorbed by the Cambodian public is diminished if the population does not believe in the process."²⁷
47. At a time when the Cambodian people are questioning the ECCC's credibility and legitimacy there is a even greater need to hold public hearings. The Co-Lawyers for the Defence have no doubt that with regard to this issue, the Pre-Trial Chamber will correctly assess the impact of its decision.

²⁵ The Co-Prosecutors' request to post "[the Pre-Trial Chamber Decision] on the ECCC website along with other filings related to this Appeal" is clearly insufficient (para. 6).

²⁶ European Commission on Human Rights, *Roberto Marra et Paola Gabrielli contre Saint-Marin*, Commission Report adopted on 30 November 1998, paras. 49 and 50.

²⁷ Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, annexed to document A/53/850-S/1999/231, 18 February 1999, para. 134.

IV) RELIEF SOUGHT

48. For these reasons, the Co-Lawyers for the Defence hereby request the Pre-Trial Chamber:

- To determine the IENG Sary Appeal and the KHIEU Samphan Appeal separately;
- To join the Defence in considering that the KHIEU Samphan Appeal requires a public hearing;
- To set a hearing date that guarantees the Defence full and effective participation.

For the Co-Lawyers for the Defence

(Signed)

SA Sovan