

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

Filing details

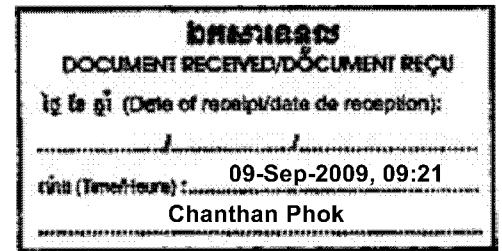
Case File No.: 002/19-09-2007-ECCC-OCIJ/PTC24

Party filing: Defence of Mr KHIEU Samphan

Filed before: The Pre-Trial Chamber

Original language: FRENCH

Date of document: 24 August 2009



Classification

Classification of the document suggested by the filing party: PUBLIC

Classification by the Pre-Trial Chamber: PUBLIC

Classification status: Confirmed

Review of interim classification:

Name of Records Officer:

Signature:



DEFENCE POSITION ON THE ADMISSIBILITY OF THEIR APPEAL AGAINST
THE "ORDER ON THE REQUEST FOR INVESTIGATIVE ACTION TO SEEK
EXCULPATORY EVIDENCE IN THE SMD"

Filed by:

Lawyers for the Defence of Mr KHIEU
Samphan
SA Sovan
Jacques VERGÈS

Before:

The Pre-Trial Chamber
Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

Assisted by:

SENG Socheata
Charlotte MOREAU
Uldis KRASTINS

The Co-Prosecutors

SI CHEA Leang
Robert PETIT

Civil Party Lawyers and Unrepresented
Civil Parties

002/19-09-2007-EEEC-OCIJ/PTC 24

1. By Decision dated 20 August 2009, the Pre-Trial Chamber decided it would not hold a hearing to consider the “Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009”, as had been expressly requested by the Co-Lawyers for the Defence of Ms IENG Thirith, Mr NUON Chea and Mr KHIEU Samphan.¹ The Pre-Trial Chamber thereupon directed the Co-Lawyers to reply to the Co-Prosecutors’ Response within the time limit provided for in Practice Direction No. ECCC/01/2007/Rev 4.²
2. The Co-Lawyers for the Defence of Mr KHIEU Samphan have requested the Pre-Trial Chamber to reverse the said Decision and to re-examine the possibility of holding a hearing. This request was filed today within the time limit provided for in the Practice Direction;³ depending on the Pre-Trial Chamber’s decision, and, if necessary, the Co-Lawyers for the Defence reserve the right to reply as to the merits of the Co-Prosecutors’ Response.
3. For now, they will confine themselves to responding to the Pre-Trial Chamber’s invitation to state their position on the Co-Prosecutor’s specific argument regarding the admissibility of their appeal.⁴ This, in fact, is a threshold issue to be determined before any consideration on the merits, which does not affect the other aspects of the proceedings.
4. In view of the time limit imposed, the Defence will not provide a procedural and factual background. It will simply state the Co-Prosecutors’ submissions and its responses thereto.
5. In their Response, and without actually taking a position on the matter at hand, the

¹ Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 July 2009, 24 July 2009, *Court Document D164/4/1* (“Defence Appeal”).

² Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009, *Court Document D164/4/3*.

³ Request to Reconsider the “Decision on Request for an Oral Hearing on the Appeals PTC 24 and 25”, 24 August 2009, *Court Document not yet referenced*.

⁴ Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 20 August 2009, *Court Document D164/4/3, D164/4/3*, para. 7.

002/19-09-2007-EEEC-OCIJ/PTC 24

Co-Prosecutors submit that “the Pre-Trial Chamber may consider that Khieu Samphan does not have standing to appeal the Order as he was not one of the original moving parties and is arguably not directly affected by the Order”.⁵

6. This statement has no basis in law and is wrong in fact. Mr KHIEU Samphan has the right to appeal all orders refusing requests for investigative action and his ability to fully and freely enjoy it should not be fettered. In any event, Mr KHIEU Samphan is directly affected by the Co-Investigating Judges’ order under appeal, and his appeal is unquestionably admissible.

II- Relevant Legal Provisions

7. As recalled by the Co-Prosecutors, “Rule 55(10) states that an order refusing a request for investigative action ‘shall be notified to the parties’ and ‘shall be subject to appeal’” and Rule 74 “permits all parties to appeal orders in this category.”⁶

III- Submissions

A. Mr KHIEU Samphan has the right to appeal all orders refusing requests for investigative action

- i. Mr KHIEU Samphan has a limited right to appeal orders of the Co-Investigating Judges

8. Unlike the Co-Prosecutors, who may appeal against any order during the judicial investigation, the Charged Persons only have a limited right to appeal. Rule 74 enumerates the orders against which the Charged Person may appeal and the list is deemed exhaustive.⁷ Accordingly, Mr KHIEU Samphan has a limited right to appeal.

⁵ Co-Prosecutors’ Combined Response to the Appeals by IENG Thirith, NUON Chea, KHIEU Samphan and IENG Sary against the Co-Investigating Judges’ Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, *Court Document D164/4/2*, (“Co-Prosecutors’ Combined Response”), para. 8.

⁶ Co-Prosecutors’ Combined Response, para. 8, see *mutatis mutandis*, Article 267 of the CCP.

⁷ Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, para. 33.

002/19-09-2007-EEEC-OCIJ/PTC 24

- ii. Mr KHIEU Samphan has an unfettered right to appeal against orders refusing requests for investigative action
9. Internal Rule 74 is abundantly clear on this point. It allows – to use the Co-Prosecutors’ own words – “any party to appeal all rejections of investigative requests.”⁸ There is no restriction of the right to appeal; for such orders, the mere fact of being a charged person is prima facie proof of standing.
10. According to the Co-Prosecutors, “Rule 74 [could not have been] intended to enable parties to appeal orders by which they are not directly affected”⁹ and “generally, orders refusing investigative requests may only be appealed by the moving parties”;¹⁰ alternatively, the party would have to “show that they are affected by the order they are appealing”.¹¹
11. These criteria are not mentioned anywhere in the applicable legal provisions and are contrary to the letter of Rule 74. They are also contrary to the interpretation adopted by the Pre-Trial Chamber, which systematically examines “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 during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties”.¹²
12. In this case, it is therefore equally important to adopt the interpretation that will be most favourable to the Charged Person.

B. Mr KHIEU Samphan is entitled to fully and freely exercise his rights on appeal

⁸ Co-Prosecutors’ Response, para. 10.

⁹ Co-Prosecutors’ Combined Response, para. 9.

¹⁰ Co-Prosecutors’ Combined Response, para. 8.

¹¹ Co-Prosecutors’ Combined Response, para. 10.

¹² *Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties*, para. 36.

002/19-09-2007-EEEC-OCIJ/PTC 24

13. According to the Co-Prosecutors, the strict interpretation of Rule 74, which is a requirement in criminal law, is to be adopted “[only] theoretically”,¹³ and “such an interpretation could not have been intended by the drafters of the Internal Rules”.¹⁴ They argue that in practice, such an interpretation would lead to a “widening of appellate possibilities”, and [thus] have a “detrimental effect (...) on the efficient and fair conduct of the proceedings”.¹⁵
14. In this connection, it is worth noting that the wording of the Internal Rules is similar to that of the Code of Criminal Procedure. The Defence has no access to the travaux préparatoires of the Rules, but it is certain that had the drafters actually intended to restrict the rights of charged persons to appeal and to amend the applicable law on this specific point, they would have stated so explicitly. This is clearly not the case. In any event, it would be for the Pre-Trial Chamber to interpret the law in a manner that most favours the Charged Person, in accordance with the general legal principle in this regard.
15. It appears that, on the contrary, and again under the guise of guaranteeing Mr KHIEU Samphan’s right to efficient and fair proceedings, the Co-Prosecutors are actually proposing to restrict the Charged Person’s full and free exercise of his rights during the judicial investigation. This solution is also aimed at closing the door [to] “[TRANSLATION] abuse”¹⁶... that door that, in the eyes of the Co-Prosecutors, seems to open whenever the defence exercises its rights!
16. Although convenient, this interpretation is inconsistent with the duty of judicial authorities to ensure that the rights of the Charged Person are not illusory or futile. It also shows some form of contempt vis-à-vis the Defence, in that the Defence is more or less presumed to act in bad faith.

¹³ Co-Prosecutors’ Combined Response, footnote 6.

¹⁴ Co-Prosecutors’ Combined Response, para. 10.

¹⁵ Co-Prosecutors’ Combined Response, para. 10.

¹⁶ Co-Prosecutors’ Combined Response, footnote 6.

002/19-09-2007-EEEC-OCIJ/PTC 24

17. In reality, the logical consequence of Internal Rule 21 and Article 33 new of the Law on the Establishment of the ECCC is certainly not what the Co-Prosecutors claim, that “there are circumstances” in which the Pre-Trial Chamber entertains “(...) appeals by other parties provided that they are directly affected by an order”,¹⁷ but rather, that the Pre-Trial Chamber should ensure that charged persons can fully and freely exercise their rights, as clearly and expressly provided for under the law.

C. In any event, Mr KHIEU Samphan is directly affected by the impugned order

- i. Being party to the original Request is not a pre-condition for having an interest and standing

18. The fact that Mr KHIEU Samphan did not join in “the original request [which] sought to initiate actions to identify exculpatory materials relating to the moving parties”,¹⁸ as the Co-Prosecutors fault him, has no bearing on his standing and interest. Quite to the contrary. If the Co-Investigating Judges had effectively decided to grant the parties’ Request, they would have had to do likewise for Mr KHIEU Samphan, unless they considered that he was in a class separate and apart from the moving parties. This is clearly not the case, considering the requests for investigative action which were made.

19. The reality is that the reason why Mr KHIEU Samphan only belatedly joined in the original request was entirely practical, because when the Request was filed, it was written in English and translated into Khmer only, and it was not notified to Mr KHIEU Samphan in French. He finally received the Co-Investigating Judges’ order translated into French (in part) at the same time as the other parties, and this is when he decided to join in the proceedings by signing the Joint Defence Appeal, which he duly filed in Khmer and in French.¹⁹

20. Accordingly, this did not come as a surprise to the Office of the Co-Prosecutors, and Mr KHIEU Samphan’s team continues to maintain that they cannot participate in the

¹⁷ Co-Prosecutors’ Combined Response, para. 8.

¹⁸ Co-Prosecutors’ Combined Response, para. 9.

¹⁹ Defence Appeal, *ERN 351611-00351623 [D164/4/1]*.

002/19-09-2007-EEEC-OCIJ/PTC 24

proceedings unless all documents are translated into French.

- ii. The order deals with the scope of the investigation and affects all parties to the proceedings

21. As stated in support of the Defence's original Request, "[i]t may be reasonably concluded from the nature of the documents made available by the Office of the Co-Prosecutors ("OCP") through the "Shared Materials Drive" ("SMD") that they include exculpatory evidence".²¹ The Co-Investigating Judges' order refusing the Defence request "to analyse the said documents in order to identify potential exculpatory evidence" therefore violates the right to a fair trial and affects all the charged persons, including Mr KHIEU Samphan.

22. In sum, it is certain that "the scope of the OCIJ's investigations is an issue that lies at the heart of the proceedings of the ECCC"²² and that the decision whose effect will be to define its contours affects Mr KHIEU Samphan in the same manner as any other party to the proceedings.

For these reasons,

23. The Co-Lawyers for the Defence invite the Pre-Trial Chamber:

- To confirm that Mr KHIEU Samphan has an unfettered right to appeal against the orders provided for under Rule 74;
- To declare that Mr KHIEU Samphan's appeal against the "Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD" is ADMISSIBLE.

²¹ Urgent Joint Defence Request for investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive. ERN 00355938-0039559348, para.1.

²² Defence Appeal, para.8.

002/19-09-2007-EEEC-OCIJ/PTC 24

**WITHOUT PREJUDICE,
AND JUSTICE SHALL BE DONE**

	SA Sovan	Phnom Penh	
	Jacques VERGÈS	Paris	
Date	Name	Place	Signature