



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King

Royaume du Cambodge  
Nation Religion Roi

D 427/4/11

**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 No: 002/19-09-2007-ECCC-PTC/OCIJ (PTC 104)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Catherine MARCHI-UHEL  
Judge HUOT Vuthy

**Date:** 21 January 2011

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
21 / 01 / 2011	
ម៉ោង (Time/Heure):	
15:30	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
Uch Arun	

**PUBLIC**

**DECISION ON KHIEU SAMPHAN'S APPEAL AGAINST THE CLOSING ORDER**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Accused**  
KHIEU Samphan

**The Co-Investigating Judges**  
YOU Bun Leng  
Siegfried BLUNK

**Co-Lawyers for the Accused**  
SA Sovan  
Jacques VERGÈS

**Lawyers for the Civil Parties**  
LOR Chhunthy  
Kong Pisey  
HONG Kim Suon  
YUNG Phanit  
KIM Mengkhy  
MOCH Sovannary  
SIN Soworn  
PICH Ang  
CHET Vannly  
VEN Pov  
TY Srinna  
Martine JACQUIN  
Philippe CANONNE



Elizabeth RABESANDRATANA  
Mahdev MOHAN  
Olivier BAHOUgne  
Silke STUDZINSKY  
Annie DELAHAIE  
Fabienne TRUSSES-NAPROUS  
Patrick BAUDOUIN  
Marie GUIRAUD  
Lyma NGUYEN  
Laure DESFORGES  
Isabelle DURAND  
Francoise GAUTRY  
Christine MARTINEAU  
Pascal AUBOIN  
Ferdinand DJAMMEN-NZEP  
Emmanuel ALTIT  
Emmanuel JACOMY  
Julien RIVET  
Barnabe NEKUIE  
Nicole DUMAS  
Daniel LOSQ



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the "Chamber" and the "ECCC") is seised of the "Appeal against the Closing Order", filed by KHIEU Samphan on 18 October 2010 ("the Appeal" and "the Appellant") against the Co-Investigating Judges' Indictment, dated 15 September 2001.<sup>1</sup>

1. On 13 January 2011, the Pre-Trial Chamber has pronounced the final disposition of the Appeal and announced that the reasons for this decision shall follow in due course.

2. In particular, the Pre-Trial Chamber has unanimously decided:

- 1) The Appeal is inadmissible;
- 2) The Accused is indicted and ordered to be sent for trial as provided in the Closing Order which shall be read in conjunction with the Decision on IENG Thirith's and NUON Chea's Appeals against the Closing Order<sup>2</sup> and the Decision on IENG Sary's against the Closing Order<sup>3</sup> issued on this day by the Pre-Trial Chamber and applying to all accused in this case, whereby the Closing Order has been amended as follows:

1. The "existence of a nexus between the underlying acts and the armed conflict" is added to the "Chapeau" requirements in Chapter IV(A) of Part III of the Closing Order.

2. The Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g)) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that "the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts."

- 3) The provisional detention of the Accused is ordered to continue until he is brought before the Trial Chamber.

<sup>1</sup> Closing Order, dated 15 September 2010, filed on 16 September 2010, D 427 (the "Indictment").

<sup>2</sup> Decision on IENG Thirith's and NUON Chea's Appeals against the Closing Order, 13 January 2011 (PTC 145 and 146).

<sup>3</sup> Decision on IENG Sary's against the Closing Order, 13 January 2011.



3. The Pre-Trial Chamber hereby provides the reasons for its decision.

### REASONS FOR THE DECISION:

#### I. PROCEDURAL BACKGROUND AND BRIEF SUMMARY OF THE APPEAL

4. The Appeal was filed in the context of the judicial investigation against NUON Chea, IENG Sary, IENG Thirith and KHIEU Samphan who are indicted with crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949, genocide, murder, torture, religious persecution, offences defined in Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC Law”) and 209, 210, 500, 501, 503 to 508 of the 1956 Penal Code. More precisely, the Appeal was filed against the Indictment, dated 15 September 2010, issued by the Co-Investigating Judges at the conclusion of the judicial investigation.

5. The Appellant requests the Pre-Trial Chamber to find that the Indictment infringes the rules governing judicial investigations and prematurely concludes an investigation that is incomplete and was limited to inculpatory circumstances.<sup>4</sup> He alleges generally that the Indictment was not preceded by any adversarial debate, that it does not address the scope of any potential link between him and the facts under investigation, that it did not make it possible to ascertain the truth and that further investigations must be conducted in order to ensure a genuine trial.<sup>5</sup>

6. He raises two grounds of appeal. The first argues that there was no adversarial debate<sup>6</sup> on account of (1) the denial of the right to respond to the Co-Prosecutors’ Final Submission,<sup>7</sup> (2) that evidence is not available in French and Khmer<sup>8</sup> and (3) that the conduct

<sup>4</sup> Appeal, para. 1.

<sup>5</sup> Appeal, para. 2.

<sup>6</sup> Appeal, paras. 62-84.

<sup>7</sup> Appeal, paras. 63-68.

<sup>8</sup> Appeal, paras. 69-73.



of the investigation by the Co-Investigating Judges lacked transparency. The second ground of appeal alleges that the investigation is incomplete, biased, and even *dangerous*.

7. The Appellant requests a hearing, which, according to him, is the rule, and considers that it is in the interests of a proper administration of justice that the hearing be held in public.<sup>9</sup>

8. In response, the Co-Prosecutors argue that there is no basis for holding an oral hearing in this case.<sup>10</sup> They request the Pre-Trial Chamber to dismiss the Appeal as being procedurally barred and devoid of merit.<sup>11</sup> They also request the Pre-Trial Chamber to forward the Indictment to the Trial Chamber as soon as practicable and to maintain the Appellant in provisional detention pending his appearance before the Trial Chamber.<sup>12</sup>

9. The *Avocats sans frontières France* group<sup>13</sup> and the Co-Lawyers for the Civil Parties group represented by Messrs CHET, TY and Ven<sup>14</sup> requested that the Appeal be dismissed for inadmissibility as it raises grounds of appeal that are outside the scope of Internal Rule 74(3), and, in the alternative, that the Indictment be affirmed.

10. The Pre-Trial Chamber finds that an oral hearing is not required, as all the matters at issue can be determined on the basis of the detailed filings of the parties.

## II. ADMISSIBILITY OF THE APPEAL

11. The Appellant submits that the Appeal is admissible under Internal Rule 74(3)(a) because the Indictment recognises the jurisdiction of the ECCC, and also under Internal Rule 21(1), because it infringes the rules governing judicial investigations the purpose of which is

<sup>9</sup> Appeal, paras. 58-60, referring in particular to Rule 77(6) of the Internal Rules.

<sup>10</sup> Co-Prosecutors' Response to Khieu Samphan's Appeal against the Closing Order, 15 November 2010, D427/4/7, ("Co-Prosecutors' Response"), para. 27.

<sup>11</sup> Co-Prosecutors' Response, para. 31.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Avocats Sans Frontières France* Co-Lawyers for the Group 3 Civil Parties' Brief in Response to Khieu Samphan's Appeal against the Closing Order, 17 November 2010, D427/4/8.

<sup>14</sup> Observations by Civil Party Co-Lawyers Regarding Khieu Samphan's Appeal against the Closing Order, 24 November 2010, D427/4/10.



to ensure the right to a fair trial.<sup>15</sup>

12. The Co-Prosecutors submit that the Appeal is inadmissible because it raises no jurisdictional issues. They add in substance that the Pre-Trial Chamber cannot extend the scope of its jurisdiction as delineated by Internal Rule 74, under which, in this case, only an order of the Co-Investigating Judges “confirming the jurisdiction of the ECCC” can be appealed.<sup>16</sup> With respect to the notion of jurisdiction, which is not defined in the Internal Rules, the Co-Prosecutors invite the Pre-Trial Chamber to be guided by Rule 72(D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia which defines “jurisdictional challenge” precisely as a motion that challenges an indictment on the ground that it does not relate to the personal, territorial or temporal jurisdiction of the Tribunal or any legal violations specified in the Statute.<sup>17</sup> According to the Co-Prosecutors, jurisdictional issues do not extend to allegations of defects in the form of the indictment or to procedural defects in the conduct of the investigation.<sup>18</sup> The Co-Prosecutors further submit a finding of admissibility of the Appeal cannot be grounded on Internal Rule 21.<sup>19</sup> Finally, the Co-Prosecutors submit that the issues raised in some of the grounds of appeal are *res judicata*.<sup>20</sup>

13. Regarding the first ground advanced in support of admissibility, the Appellant contends that although the right to appeal an indictment is not specified in the Internal Rules, Internal Rule 74(3)(a) provides that the Charged Person or the Accused may appeal against orders or decisions of the Co-Investigating Judges confirming the jurisdiction of the ECCC.<sup>21</sup> He submits that, in the instant case, the Closing Order is an indictment, that in it, the Co-Investigating Judges specify the crimes and modes of liability applicable to him, thereby confirming as a whole the ECCC Trial Chamber’s jurisdiction to try him. Therefore,

<sup>15</sup> Appeal, para. 50.

<sup>16</sup> Co-Prosecutors’ Response, para. 5.

<sup>17</sup> Co-Prosecutors’ Response, para. 7.

<sup>18</sup> Co-Prosecutors’ Response, paras. 7-17.

<sup>19</sup> Co-Prosecutors’ Response, paras. 18-19.

<sup>20</sup> Co-Prosecutors’ Response, paras. 20-26. According to the Co-Prosecutors, the translation rights of the Appellant, the opportunity to interview former US officials, the inclusion on the Case File of documents relating to his “real activity” during the Democratic Kampuchea regime, the use of statements which may have been obtained by torture and the impartiality of the international Co-Investigating Judge, have all been litigated before the Pre-Trial Chamber and settled by the Chamber, and therefore cannot be challenged again.

<sup>21</sup> Appeal, para. 51.



according to him, he has the right to appeal against the Indictment “in its entirety”.<sup>22</sup> A review of the arguments on the merits of the Appeal shows that all but one<sup>23</sup> do not, as such, go to the substance of the Indictment nor allege any errors of law or fact by the Co-Investigating Judges in the Indictment itself. The Pre-Trial Chamber therefore understands that in addition to the right to appeal against the Indictment “in its entirety”, the Appellant considers that since the Co-Investigating Judges have confirmed the Trial Chamber’s jurisdiction to try him, he is therefore entitled to appeal on account of what he deems are irregularities in the judicial investigation. Both grounds of appeal and all of the Appellant’s arguments in support thereof, with the exception of those set out hereinafter,<sup>24</sup> are in support of this proposition.

14. The Pre-Trial Chamber notes that according to Internal Rule 74, not all orders of the Co-Investigating Judges can be appealed by all of the parties. Indeed, while the Co-Prosecutors may, under Internal Rule 74(2), appeal against all orders issued by the Co-Investigating Judges, the Charged Persons or the Accused may appeal only those orders and decisions enumerated under Internal Rule 74(3). An indictment is not on that list. Nevertheless, the Pre-Trial Chamber notes that Internal Rule 74(3)(a) provides that:

The Charged Person and the Accused may appeal against orders or decisions of the Co-Investigating Judges:

a) confirming the jurisdiction of the ECCC.

Consequently, although the Accused may not appeal against the indictment itself, the Pre-Trial Chamber is of the view that, to the extent that it confirms the jurisdiction of the ECCC, it is clearly subject to appeal on jurisdictional issues decided by the Co-Investigating Judges.<sup>25</sup> Therefore, the question for the Pre-Trial Chamber is to determine whether, as

<sup>22</sup> Appeal, para. 52.

<sup>23</sup> Third prong of ground 2, alleging that the investigation is dangerous and invoking (1) the absence of any response in the Closing Order, despite the Co-Investigating Judges’ commitment on this point, regarding requests for information and clarification on the use of evidence which was or may have been obtained by torture (Appeal, paras. 110-112) and (2), reliance by the Co-Investigating Judges on a confession obtained by torture in concluding at paragraph 1188 of the Closing Order that he “witnessed the arrest of Vorn Vet on 2 November 1978 as it occurred at the headquarters of the Standing Committee”

<sup>24</sup> *Ibid.*

<sup>25</sup> In this connection, see Decision on Ieng Sary’s Appeal Against Co-Investigating Judges’ Order on Ieng Sary’s Motion Against the Application of Command Responsibility, June 2010, D345/11.



submitted by the Appellant, he also has the right to appeal against the Indictment “in its entirety”, given that the Indictment generally confirms the ECCC Trial Chamber’s jurisdiction to try him. This would amount to adding the indictment to the list of appealable Co-Investigating Judges’ orders and decisions enumerated in the Internal Rules. Clearly, such an interpretation is not consistent with the approach adopted by the Internal Rules on this point. Quite clearly, Internal Rule 74(3)(a) also does not allow the Appellant to appeal against procedural irregularities in the investigation.

15. Finally, the Appellant’s submission that in criminal proceedings under French law, an accused may now appeal against an indictment since the enactment of the Law of 15 June 2000 reinforcing the protection of the presumption of innocence<sup>26</sup> cannot justify a departure from the clearly defined appealable matters set out in Internal Rule 74(3)(a).

16. The Pre-Trial Chamber therefore finds that the Appeal is not admissible under Internal Rule 74(3)(a). The Pre-Trial Chamber will now turn to the second ground advanced by Appellant in support of admissibility.

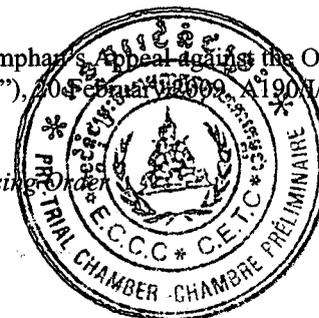
17. The Appellant invites the Pre-Trial Chamber to determine whether, in light of Internal Rule 21(1), it should adopt a broader view of the Charged Person’s rights of appeal in order to ensure that the judicial investigation proceedings are fair and adversarial and that a balance is preserved between the rights of the Parties.<sup>27</sup> He contends that this is the case insofar as the Indictment was clearly issued in violation of the rules governing judicial investigations, in particular the need to hear him concerning the Final Submission and to provide him with all the investigative materials to enable him to prepare his defence.<sup>28</sup>

18. Internal Rule 21, which sets out fundamental principles, provides, *inter alia*, that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of (...), Accused; and (...) to ensure legal certainty and transparency of proceedings, in light of the inherent

<sup>26</sup> Appeal, para. 52.

<sup>27</sup> Appeal, para. 53, referring to Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties (“Decision on Translation”), 20 February 2009, A190/N/20, para. 36.

<sup>28</sup> Appeal, para. 54.



specificity of the ECCC”<sup>29</sup> and, in this regard, that “ECCC proceedings shall be fair and adversarial”<sup>30</sup> and that “[e]very person suspected or prosecuted (...) has the right to be informed of any charges brought against him/her”.<sup>31</sup> The Pre-Trial Chamber will determine whether the facts and circumstances of the Appeals require that it adopt a broader interpretation of the Charged Person’s right of appeal in order to ensure the fairness of the proceedings.

19. The Chamber notes that the part of the Appeal regarding its admissibility only states that the Appellant was not heard concerning the Final Submission, but fails to explain why this warrants the adoption of a broader interpretation of the Accused’s right to appeal against the Indictment.<sup>32</sup> Nonetheless, the Chamber will assess the impact of the Appellant’s arguments on the merits in this regard which it deems relevant to the admissibility of the Appeal. The Appellant relies primarily on the Decision on the Appeal against the Refusal to Accept Ieng Sary’s Response to the Final Submission.<sup>33</sup> The Pre-Trial Chamber points out that, like Article 246 of the Code of Criminal Procedure of the Kingdom of Cambodia (“Cambodian CPC”), the Internal Rules do not specifically grant a charged person the right to respond to the Co-Prosecutors’ final submission.<sup>34</sup> In its Decision on the Appeal against the Refusal to Accept Ieng Sary’s Response to the Final Submission, the Pre-Trial Chamber noted that the traditionally inquisitorial French civil law system, which served as a model for the Cambodian CPC, had since been amended in 2007 in order to allow for more balance between the parties at the investigative stage. The Chamber also considered that, despite the absence of an express grant of the right for a charged person to respond to the Co-Prosecutors’ final submission, to the extent that the Co-Investigating Judges are bound by the above-noted Internal Rules 21(1)(a) and (b), their decision to accept Charged Person KANG Guek Eav’s Response to the Co-Prosecutors’ Final Submission in Case 001 was not

<sup>29</sup> Internal Rule 21(1).

<sup>30</sup> Internal Rule 21(1)(a).

<sup>31</sup> Internal Rule 21(1)(d).

<sup>32</sup> Appeal, para. 54.

<sup>33</sup> Appeal, paras. 54 and 63-65, referring, *inter alia*, to the Decision on Ieng Sary’s Appeal Against Co-Investigating Judges’ Decision Refusing to Accept the Filing of Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, D390/1/2/4, (“Decision on the Appeal against the Refusal to Accept Ieng Sary’s Response to the Final Submission”), para. 23,

<sup>34</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary’s Response to the Final Submission, para. 16.



erroneous.<sup>35</sup> It further considered that in instructing their Greffiers to reject Ieng Sary's Response to the Co-Prosecutors' Final Submission, the Co-Investigating Judges failed to respect the guarantee to the Charged Person of the right to equality of arms with the prosecution and the right to equality treatment before the law.<sup>36</sup>

20. It is worth noting that the Appellant's situation is distinguishable from that of his Co-Accused IENG Sary on this point, to the extent that the Appellant's Co-Lawyers failed to act with the same diligence as IENG Sary's Co-Lawyers. In the absence of any rule specifically authorising them to respond to the Final Submission, on the day following the filing of the Co-Prosecutors' Final Submission, the Co-Lawyers for IENG Sary gave notice of their intent to file such a response and filed an expedited request with the Co-Investigating Judges for extension of page and time limits; when the request was denied by the Co-Investigating Judges, notably on the ground that nothing in the Internal Rules provides for a right to respond to the final submission,<sup>37</sup> they nonetheless prepared their response, in an effort to avoid delaying the proceedings,<sup>38</sup> and attempted to file it invoking the precedent set by the Co-Investigating Judges' acceptance of a similar response by the Charged Person in Case 001.<sup>39</sup> Finally, they appealed against the Co-Investigating Judges' instructions to reject the filing of the said response.<sup>40</sup>

21. In contrast, prior to the issuance of the Indictment, the Co-Lawyers for the Appellant took no action to preserve their rights. The consequences of their failure to act must be assessed in light of the context in which it occurred, that is the impending Indictment of which they could hardly have been unaware; the fact that the Internal Rules do not provide for a right to respond to the Final Submission and that the Order on Translation, which recognises the right of a Charged Person to receive the translation of the Final Submission, sets no applicable time limits.<sup>41</sup> They failed to notify the Co-Investigating Judges of their

<sup>35</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, paras. 16-17.

<sup>36</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, para. 23.

<sup>37</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, para. 3.

<sup>38</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, para. 22.

<sup>39</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, para. 4.

<sup>40</sup> Decision on the Appeal against the Refusal to Accept Ieng Sary's Response to the Final Submission, para. 6.

<sup>41</sup> Order on Translation Rights and Obligations of the Parties, 19 June 2008 ("Order on Translation"), Sections B and C.



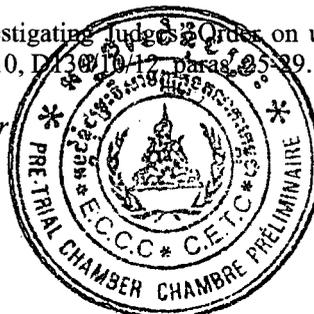
intention to file a response. They failed to invoke their right to receive a French translation of the Final Submission, and to request the Co-Investigating Judges to defer issuing the Indictment pending the filing of the French version of the Final Submission and to request time to file their response. Moreover, they did not use the linguistic resources within their own team in an effort to respond on the basis of the Khmer version of the Final Submission. In view of all the foregoing, the Pre-Trial Chamber is of the view that, now that the Indictment has been issued, it ill behoves the Appellant's Co-Lawyers to invoke the infringement of their right to respond to the Final Submission in requesting that the Pre-Trial Chamber adopt a broad interpretation of their right to appeal against it so as to ensure the fairness of the proceedings. Despite the Co-Lawyers' lack of diligence, if the Pre-Trial Chamber were satisfied that the Appellant's fair trial right might be jeopardised by the dismissal of the Appeal, it would accept to consider the Appeal admissible based on a broad interpretation of Internal Rule 21(1) and would proceed to consider it on the merits. That is not so. For the reasons stated below, the Chamber is not satisfied that the Appeal demands such an interpretation.

22. Firstly, the Pre-Trial Chamber reiterates that, with one exception,<sup>42</sup> the Appeal, as such, does not concern the substance of the Indictment. The Chamber notes that, with respect to the exception, in its Decision on admissibility of the Appeal against the Co-Investigating Judges' Order on use of statements which were or may have been obtained by torture, the Chamber satisfied itself that the applicable procedure before the Trial Chamber and the decisions of the Trial Chamber, according to which documents obtained by torture are relevant to the extent that they were prepared under torture and may thus constitute evidence thereof, but they "are not admitted for the truth of their contents"<sup>43</sup> enabled the Charged Person's rights under Internal Rule 21 to be sufficiently safeguarded.<sup>44</sup> Assuming that having

<sup>42</sup> Third prong of ground 2, alleging that the investigation is dangerous and invoking (1) the absence of any response in the Closing Order, despite the Co-Investigating Judges' commitment on this point, regarding requests for information and clarification on the use of evidence which was or may have been obtained by torture (Appeal, paras. 110-112) and (2), reliance by the Co-Investigating Judges on a confession obtained by torture in concluding at paragraph 1188 of the Closing Order that he "witnessed the arrest of Vorn Vet on 2 November 1978 as it occurred at the headquarters of the Standing Committee".

<sup>43</sup> See *KAING Guek Eav alias Duch*, Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), 28 October 2009, E176, para. 8.

<sup>44</sup> Decision on admissibility of the Appeal against the Co-Investigating Judges' Order on use of statements which were or may have been obtained by torture, 27 January 2010, D130/10/17, paras. 25-29.



had the opportunity to respond to the Final Submission and to alert the Co-Investigating Judges of any inappropriate references to confessions in the Final Submission, the Appellant could have persuaded the Co-Investigating Judges to exclude such references from the Indictment, the Pre-Trial Chamber notes that the Appellant's rights are safeguarded in that he will have the benefit of that established precedent at trial.

23. Turning to the impact of the absence of a response by the Appellant to the Final Submission on the integrity of the conduct of the judicial investigation in a broad sense, the Chamber notes that, as its title indicates, the Closing Order marks the conclusion of the judicial investigation. In order to assess the fairness of this pre-trial procedure, the various investigative actions cannot be viewed only in isolation, but rather against the backdrop of the proceedings in their entirety. An adversarial debate is possible at various stages of the proceedings including in inquisitorial systems, such as the Cambodian CPC and the Internal Rules. The fact that the Indictment was issued without the Appellant responding to the Final Submission clearly means that the final part of the procedure was not entirely adversarial in his case, but does not mean that the Indictment was not preceded by any adversarial hearing as stated by the Appellant. The various appeals by the parties have enabled the Chamber to ensure that all parties, including the Appellant, were heard on numerous issues of law and fact during the judicial investigation. Thus, the fact that the Appellant was not able to respond to the Final Submission does mean that the investigation was unfair. Finally, the procedure governing the upcoming trial phase is entirely adversarial.

24. The Chamber shall now turn to the Appellant's second ground for requesting that the Chamber adopt a broad interpretation of his right to appeal against the Indictment. The Chamber observes that that part of the Appeal dealing with its admissibility merely contends that he was not provided with all the investigative materials to enable him to prepare his defence<sup>45</sup> but does not explain why this warrants the adoption of a broader interpretation of his right to appeal the Indictment. As noted earlier, the Chamber will nevertheless assess the impact of the Appellant's arguments on the merits on this point that it deems relevant to the admissibility of the Appeal. The Appellant invokes infringement of his right to receive a

---

<sup>45</sup> Appeal, para. 54.



French translation of the Indictment, noting that the 337 pages of footnotes of the French translation are only available in English, as well as the evidence in support of the charges contained the Indictment. He contends that the Chamber recognised his right to receive a translation, thereby confirming the Order on Translation.<sup>46</sup> The Chamber observes that while it did not formally confirm the said Order, it took its contents into consideration in finding the appeal against it inadmissible. The regime deriving from the Order on Translation distinguishes between documents which must be translated without a request from the Co-Lawyers and other documents on the case file, for which the Co-Lawyers are expected to use the linguistic resources within their own team, which are made available to them<sup>47</sup> and, where necessary, to identify any documents for which they require translation.<sup>48</sup> The Chamber notes, however, that neither the Order on Translation nor the Decision on Translation set the time limit in which the French translation of the Indictment and the evidence in support of the charges contained therein is to be filed.

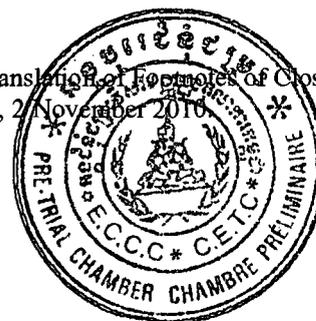
25. Regarding the translation into French of the Indictment, the Chamber is of the view that it must necessarily include the footnotes. As for the time frame in which the translation must be provided to the Defence, it must be such as to allow the Appellant to effectively exercise his right to appeal. It must be observed that that is not what happened in this instance. Having noted with concern that the French version of the Indictment contains 5419 footnotes, all of which were in English, the Chamber ordered the Interpretation and Translation Unit to translate them into French and to make them available to the Appellant's Co-Lawyers by 18 November 2010, and granted the Appellant 15 calendar days to make any additional arguments that are expressly permitted by Rule 74 3) a) of the Internal Rules that he would like to submit.<sup>49</sup> The Appellant made no additional submissions within the permitted 15 day period, or at all. The Chamber is not satisfied, at this stage that, in addition to the measures set out above, the circumstances are such as to require it to broaden the Appellant's right to appeal against the Indictment beyond the jurisdictional issues decided by the Indictment.

<sup>46</sup> Appeal, para. 69, referring to the Decision on Translation.

<sup>47</sup> Decision on Translation, paras. 46-47.

<sup>48</sup> Decision on Translation, paras. 48.

<sup>49</sup> Order to Interpretation and Translation Unit (ITU) Concerning Translation of Footnotes of Closing Order into the French Language and Direction to Defence of KHIEU Samphan, 2 November 2010.



26. As for the evidence underpinning the Indictment, the Chamber notes that while the body of the Indictment sometimes quotes or paraphrases such evidence, it often refers to the full documents or to passages of documents by means of footnotes. Ideally, translation into French of all those documents or passages of documents referenced in the Indictment should be available at the same time as the Indictment itself. This is not possible owing to the sheer size of the case file, and the Chamber is of the view that owing to the limited scope of the Pre-Trial Chamber's jurisdiction, this requirement cannot be warranted. The Appeal does not explain whether the fact that it does not allege that the Co-Investigating Judges' findings on the jurisdiction of the ECCC were erroneous resulted from a deliberate choice or was the consequence of the absence of translations into French of the documents or passages of documents referenced in the section of the Indictment on jurisdiction..

27. The Pre-Trial Chamber has dealt with and rejected the Appellant's argument that for the sake of fairness, it must broaden the scope of its jurisdiction on account of the absence of a French translation of the footnotes in the Indictment and of the evidence underpinning it. It also found the Appeal inadmissible on the basis of Internal Rule 74(3)(a). The Chamber observes that the Appellant raises no other argument concerning the admissibility of the third prong of his first ground of appeal, namely, the lack of transparency of the Co-Investigating Judges' conduct of the judicial investigation, and of his entire second ground of appeal, which alleges that the investigation is incomplete, limited to inculpatory circumstances, and dangerous. The Chamber notes, in any event, that these grounds seek the same result as the *Demande incidente aux fins d'interruption définitive et immédiate de la procédure intentée contre M. KHIEU Samphan pour abus de procédure*, that is, that the Indictment be quashed. Moreover, the request also alleges that the Indictment is in patent violation of the rules governing judicial investigations and that the judicial investigation was limited to inculpatory circumstances.<sup>50</sup>

<sup>50</sup> *Demande incidente aux fins d'interruption définitive et immédiate de la procédure intentée contre M. KHIEU Samphan pour abus de procédure*, 21 October 2010, para. 1.



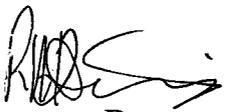
### III. MAINTENANCE OF THE ACCUSED IN PROVISIONAL DETENTION

28. Pursuant to sub-rule 68(2), once an appeal is lodged against the Indictment, no matter what the nature of the appeal is, “the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber.”

29. The Accused have not lodged an appeal against the detention order of the Co-Investigating Judges issued within their Closing Order. There is no new circumstance except the confirmation of the indictment by the Pre-Trial Chamber, which reinforces the well founded reasons to believe that the Accused may have committed the crimes charged in the indictment and the necessity to maintain him in provisional detention in order to ensure his presence at trial, protect his security, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released.<sup>51</sup> The Pre-Trial Chamber considers that the reasons given by the Co-Investigating Judges to order that the Accused remain in provisional detention, which it adopts, justify that it orders that the provisional detention of the Accused pursuant to Internal Rule 68(3) continue until he is brought before the Trial Chamber.

Phnom Penh, 21 January 2011

Pre-Trial Chamber

  
Rowan  
DOWNING

  
NEY Thol

  
Catherine  
MARCHI-UHEL

  
HUOT Vuthy

  
RIAK Kimsan

President  
Pre-Trial Chamber  
E.C.C.C. \* C.E.V.C. \*  
CHAMBER CHANGES PREMIER

<sup>51</sup> Internal Rule 63(3)(a) and b) i) to v).