ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

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: **002/21-10-2010-ECCC-PTC (15)**

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

Date: **12 January 2011**

PUBLIC

DECISION ON KHIEU SAMPHAN'S INTERLOCUTORY APPLICATION FOR AN IMMEDIATE AND FINAL STAY OF PROCEEDINGS FOR ABUSE OF PROCESS

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
KHIEU Samphan

Co-Investigating Judges
Judge YOU Bunleng
Judge Siegried BLUNK

Co-Lawyers for the Defence
SA Sovan
Jacques VERGÈS

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "Chamber" and the "ECCC") is seised of KHIEU Samphan's "Interlocutory Application for Immediate and Final Stay of the Proceedings against Mr Khieu Samphan for Abuse of Process" (the "Application"), dated 18 October 2010.[1]

I. BRIEF OVERVIEW OF THE APPLICATION

1. The Application was filed concurrently with KHIEU Samphan's appeal, dated 18 October 2010, against the Co-Investigating Judges' Closing Order, dated 15 September 2010 (the "Appeal").[2] Invoking the abuse of process doctrine, KHIEU Samphan asks the Chamber to note the alleged instances of abuse of process, not to forward his case file as is to the Trial Chamber, to stay the proceedings and to order his release.[3] None of the other parties responded to the Application.

2. The Application is based on three main arguments. First, KHIEU Samphan submits that he is the victim of ongoing miscarriage of justice with respect to translation, because of (1) the absence of translations of certain documents, and (2) the poor quality of the translations and the absence of quality control. He also alleges that he is a victim of the systematic and systemic violation of the rights of the defence as a result of (1) the lack of physical access to the case file and (2) the alleged infringement of the principle of legality. Finally, the Application alleges that it is *impossible* to administer justice, owing to (1) unreasonable and unjustified delays and (2) a public presumption of guilt. KHIEU Samphan concludes that he has suffered demonstrable and irreparable harm.

3. Having requested that his Appeal be heard in public, KHIEU Samphan requests that the submissions contained in the Application be taken into consideration in the hearing on the Appeal.

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[1] Interlocutory Application for Immediate and Final Stay of Proceedings against Khieu Samphan for Abuse of Process, 18 October 2010, Doc. 1 (the "Application").
[2] Appeal against the Closing Order, 18 October 2010, D427/4/3 (the "Appeal"); Closing Order, 15 September 2010, filed on 16 September 2010, Doc. No. D427.
[3] Application, para. 5.

II. JURISDICTION OF THE CHAMBER AND ADMISSIBILITY OF THE APPLICATION

4. KHIEU Samphan relies on Article 33 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC Law") and Rule 21(1)(a) of the Internal Rules to invoke the original jurisdiction of the Pre-Trial Chamber. In support of his Application, he submits that the Chamber to which the case file has been forwarded has sole jurisdiction to entertain the Defence submissions at first instance and on appeal. He submits further that under Rule 79(1) of the Internal Rules, the Chamber has sole jurisdiction over the continuation or stay of the proceedings. Finally, he submits that the Chamber has both the inherent power and the duty to determine the Application.[4]

5. The Chamber notes that the Application is not an appeal or a request for annulment, over which it would have had jurisdiction under Rule 73 of the Internal Rules. However, Rule 21(1)(a) of the Internal Rules provides that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties". The Chamber also recalls its earlier Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order rejecting the request for stay of proceedings on the basis of abuse of process ("Decision on IENG Thirith's Appeal").[5] In that Decision, "[n]oting that Cambodian law does not provide for an abuse of procedure mechanism" and relying on international practice, the Chamber held that "[t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceeding". The Chamber held that it had jurisdiction to consider the appeal as it raised a serious issue of fairness, and considered it as though it had been directly seised thereof at first instance.[6]

6. In this case, the Chamber notes that having issued the Closing Order, the Co-Investigating Judges are no longer seised of the case file, and that seised of the appeals against the Closing Order, the Pre-Trial Chamber has sole jurisdiction to deal with the case file at this stage of the proceedings, and to consider applications such as the present

[4] Application, paras. 18-20.
[5] Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order rejecting the request for stay of proceedings on the basis of abuse of process, 10 August 2010, D264/2/6.
[6] Decision on IENG Thirith's Appeal, paras. 14, 17 and 18.

Application. Deciding whether the Chamber has jurisdiction to consider the Application means determining if the Application raises serious issues of fairness which must be addressed in order to guarantee the right to a fair trial under Rule 21(1)(a) of the Internal Rules and in respect of which there would be no other course of redress. The Chamber considers this issue to be closely related to the admissibility of the Application, and will therefore consider it in that context.

7. In its Decision on IENG Thirith's Appeal, the Chamber reviewed international standards to determine the applicable standard of review when considering applications for stay of proceedings for abuse of process.[7] It held that "in order to invoke the abuse of process doctrine, it needs to be clear that the rights of the Accused have been egregiously violated" and that "the power to stay proceedings on that basis is a discretionary power involving the judicial assessment that the violations of the rights of the charged person or the accused are of such an egregious nature as to impede the exercise of jurisdiction".[8] It also noted that "[t]he stay of the proceedings, which is an extreme measure, should indeed apply only to an exceptional and very serious case of violations of the rights of the Charged Person which cannot be rectified or contravene the court's sense of justice. It is only in exceptional cases of egregious violations where such remedy could be deemed proportionate".[9] The Chamber therefore used a particularly high threshold in determining whether the Appellant had suffered a serious mistreatment or whether there was any other egregious violation of his rights.[10]

8. Before turning to the merits of the allegations in the Application, the Chamber must, assuming the allegations have merit, determine whether the alleged violations could raise

[7] Decision on IENG Thirith's Appeal, paras. 19-28.
[8] Decision on IENG Thirith's Appeal, para. 26. See also *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06(OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, para. 28; *Case against Florence Hartman*, IT-02-54-R77.5, Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, ICTY Special Chamber, 3 February 2009, para. 4; *Prosecutor v. Dragan Nikolić*, IT-94-5-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Trial Chamber, 9 October 2002, para. 111, referring to *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Appeal Judgement, ICTR Appeals Chamber, 3 November 1999, paras. 73 and 77, and *Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, Decision on Motion to Dismiss for Abuse of Process, ICTY Trial Chamber, 12 May 2009, para. 9.
[9] Decision on IENG Thirith's Appeal, para. 28.
[10] Decision on IENG Thirith's Appeal, paras. 27 and 28.

issues of fairness of a sufficiently serious and egregious nature as to warrant a stay of the proceedings for abuse of process. If it turned out that such is not the case, it would not be necessary to consider the allegations on the merits.

9. The Chamber notes that a number of the Defence arguments are either vague or insufficiently substantiated. The Chamber is under no obligation to respond to such arguments, as it is for KHIEU Samphan to make out his case.

10. KHIEU Samphan submits that he is the victim of an ongoing miscarriage of justice with respect to translation. He avers that he has not received the French translation of the footnotes of the Closing Order (335 pages) and some of the evidentiary material, the Final Submission, 232 decisions and 3,850 documents by the parties, and only belatedly received the translation of the Introductory Submission, despite the fact that, according to him, all these documents had to be translated into French.[11] He therefore takes the view that he "[TRANSLATION] has been deprived of his right to participate in the proceedings and of his right to make full answer and defence".[12]

11. The Chamber recalls its Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties (the "Decision on Translation"), in which it held that there is no absolute right to receive French translations of all documents.[13] It also recalls the Order on Translation Rights and Obligations of the Parties ("Order on Translation"), according to which French translations must be provided for the following: the Closing Order, the evidentiary material in support thereof, the Introductory Submission and Final Submission, and all judicial decisions and orders.[14] With respect to the translation of evidentiary materials, the Chamber recalls its Decision on the Request for Translation of All Documents Used in Support of the Closing Order, which clarifies the rules applicable the for

[11] Decision on IENG Thirith's Appeal, paras. 25 and 27; Case File 002 Statistics as per 20th September 2010, filed by the Record and Archive Section, 27 September 2010, ERN 00617348.
[12] Application, para. 29.
[13] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20 (the "Decision on Translation"), paras. 40-42.
[14] Order on Translation Rights and Obligations of the Parties, 19 June 2008 (the "Order on Translation"), A190, para. B4 and C1-C3; see also Decision on Translation, para. 37.

translation of such materials.[15] Finally, the Chamber observes that the Order on Translation sets no time limits for translations.

12. The Chamber has reviewed the list of documents identified by the Defence as not having been translated into French. Apart from the Closing Order and the Final Submission, the full French translations of which are now available, the Chamber has found no documents on the list for which the absence of French translations at this stage of the proceedings ("temporary absence of translations") could impair KHIEU Samphan's right to a fair trial.[16] The Chamber wishes to add that the right to French translations of all party submissions, as mentioned in the Order on Translation and the Decision on Translation,[17] is limited to those submissions which pertain to requests and appeals directly concerning the defence team which has requested to receive documents in that language. It does not apply to all "documents filed by the parties". Therefore, KHIEU Samphan cannot invoke the absence of translation of 3,850 documents filed by the parties, of which only 96 are party submissions in the case files before the ECCC, without specifying which items he did not receive, as the basis of his claim to be a victim of serious violations of his rights.

13. The Chamber observes that the temporary absence of translations can be resolved, on the one hand, by using the linguistic resources within each team, at least one member of which speaks Khmer, the language in which most of the documents are available. On the other hand, KHIEU Samphan's defence team can avail itself of the services of a translator, as contemplated in the Order on Translation. Finally, his team can request that untranslated documents which it identifies as essential for its work be translated on a priority basis. In this context, KHIEU Samphan has failed to explain how the temporary absence of translations has occasioned a serious and egregious violation of his rights.

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[15] Decision on Request for Translation of All Documents Used in Support of the Closing Order, 15 December 2010, Doc. No. 2 (CP16), paras. 10 and 11.
[16] Out of the 232 judicial decisions and orders identified by the Defence, 213 have not yet been translated into French thus far. They are mostly decisions on requests or appeals filed by other parties that do not concern KHIEU Samphan, scheduling orders, written versions of oral decisions issued in court (therefore interpreted into French), orders to bring other Charged Persons before the Court and decisions on assignment of Civil Party lawyers.
[17] Order on Translation, para. B2; Decision on Translation, para. 37.

14. In view of the foregoing, the Chamber finds that, with the exception of the Closing Order and the Final Submission, which have now been translated, the temporary absence of translations of any documents identified by the Co-Investigating Judges as requiring translation would not, were it to be established, amount to a sufficiently serious or egregious violation of KHIEU Samphan's rights as to warrant a stay of the proceedings.

15. KHIEU Samphan also alleges that his right to translation is "vain and illusory" in that, according to him, the translations do not convey "[Translation] genuine, real and authentic information within a reasonable time frame for the Defence to use it to good effect". He claims that there is no quality control system and that the translations contain errors because there is no glossary of Cambodian legal terminology, no studies on the vocabulary used during the period of Democratic Kampuchea and no translation and interpretation school in Cambodia. Finally, he questions the impartiality of the people who have translated certain documents, by reason of their connection with the Office of the Co-Investigating Judges or the Documentation Centre of Cambodia (DC-Cam).[18]

16. The Chamber notes that the Defence argument is general in nature and that it fails to identify any particular translation errors which may have resulted in serious or egregious violation of his rights. The Chamber further notes that where specific translation issues are identified, they could be raised on a case-by-case basis in the course of the trial. Moreover, it is open to the Defence to request the validation of any translations it considers erroneous. The Chamber concludes that the mere possibility that there would be translation errors, which can easily be resolved through a request to the Translation Unit, is not sufficiently serious as to amount to an egregious violation of KHIEU Samphan's rights that would warrant a stay of the proceedings.

17. KHIEU Samphan also alleges that there is a "systematic and systemic" violation of the rights of the defence. In support of this, he relies firstly on material circumstances related to his access to the case file, owing to the fact that only four drawers have been made available to him at the Detention Centre to store the documents necessary for his defence. The Chamber notes that KHIEU Samphan has not appealed the Order on Access to the Case

[18] Application, paras. 31-40.

File by Detainees[19] and that he has therefore not exhausted the means of redress available to him in this regard. Accordingly, he can no longer invoke his alleged inability to access the case file as a ground to seek termination of the proceedings, now that the time limit for appeal has elapsed. It ill behoves him to now complain when he had such appeal right.

18. KHIEU Samphan also invokes the principle of legality in arguing that applying international law instead of Cambodian law violates the *nullum crimen sine lege* principle to the detriment of the foreseeability of the charges and potential penalty.[20] He also alleges that his rights have been violated because of the application of the Internal Rules rather than the Code of Criminal Procedure of Cambodia, which, he alleges, has deprived him of legal certainty, in violation of the *nullum judicium sine lege* principle, as recognised in a judgement of the European Court of Human Rights (ECHR).[21]

19. As to the foreseeablity of the charges and potential penalty, the Pre-Trial Chamber notes that KHIEU Samphan argues that the Co-Investigating Judges have violated the principle "nullum crimen sine lege" on the sole basis that they had applied international law, without explaining how this would, in and of itself, amount to a violation of the principle of legality and would constitute an abuse of process. The Chamber further notes that it has been seized of the issue of the alleged violation of the principle of legality in the course of the appeals against the Closing Order lodged by the other three accused in this case, whom have developed detailed arguments in support of their positions in this regard.[22] It will therefore address this issue in the upcoming decision on these appeals, recalling that any decision on this issue would in any event benefit to all accused in this case.

20. As to foreseeability of criminal procedure, the Chamber refers to its Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, in which it held that "the Internal Rules [...] form a self-contained regime of procedural law related to the unique

[19] Order on Access to the Case File by Detainees, 23 January 2009, D127, paras. 15-17.
[20] Application, paras. 50-53.
[21] Application, paras. 54-58.
[22] IENG Sary's Appeal agains the Closing Order, 25 October 2010, D427/1/6 (CP75); IENG Thirith's Appeal agains the Closing Order, 28 October 2010, D427/2/1 (CP145) and NUON Chea's Appeal agains the Closing Order, 18 October 2010, D427/3/1 (CP146).

circumstances of the ECCC".[23] Unlike the situation in *Coëme and others v. Belgium*,[24] which is cited by the Defence, the applicable procedural law at the ECCC is not inexistent. It is indeed quite the opposite. Moreover, the Internal Rules were adopted prior to the commencement of the proceedings, and were therefore foreseeable. At any rate, KHIEU Samphan has failed to substantiate his contention that he has been prejudiced by the application of the Internal Rules, that the application of the Internal Rules would deprive him of a fair trial or has resulted in an egregious violation of his rights.

21. In requesting a stay of the proceedings, KHIEU Samphan also invokes errors committed by the Chamber, which has not used its powers to sanction the abuse of process he claims to have suffered. The Chamber finds that he has failed to properly support the alleged errors and has failed to substantiate his argument. The Pre-Trial Chamber thus cannot consider this issue on the merits.

22. The Defence claims that KHIEU Samphan's right to be tried within a reasonable time has been used as a justification to deprive him of his rights and that the time it takes to issue certain decisions constitutes a violation of his right to be tried within a reasonable time. Even though the Accused does indeed have the right to be tried within a reasonable time, the Judges are still duty bound to ensure, at the various stages of the proceedings, that the proceedings are not slowed down by any delay that is not warranted by procedural requirements or the exercise of the respective rights of the parties. The Chamber notes that, here again, it has not been established how the alleged delays would be unreasonable, and that, at any rate, taking three years altogether to complete the judicial investigation in such an extensive case is not excessive. The alleged violations are therefore not sufficiently serious or egregious to warrant a stay of the proceedings.

23. KHIEU Samphan requests a stay of the proceedings on the alleged ground that there is a public presumption of his culpability created by the Office of Administration because of the publication of a "Case Information Sheet" on the ECCC website, where he is identified as

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[23] Decision Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, paras. 12-15.

[24] *Coëme and others v. Belgium*, Judgement, ECHR (Application N[os] 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 22 June 2000, paras. 96-103.

a leader within Office 870, and an "[TRANSLATION] all-out propaganda for the ECCC and against the Charged Persons". Even if those allegations were well-founded, they would have no bearing on the judicial proceedings and would not in any way constitute such serious and egregious violations of the rights of the defence as to warrant a stay of the proceedings.

24. The Chamber concludes that none of the allegations that KHIEU Samphan's rights have been violated raises serious issues of fairness or is sufficiently egregious or serious to warrant a stay of the proceedings for abuse of process, even if they were well-founded. Therefore, there is no need to consider those allegations on the merits.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER HEREBY:

FINDS the Application inadmissible.

Phnom Penh, 12 January 2011

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Catherine MARCHI-UHEL** **HUOT Vuthy** **PRAK Kimsan**