

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

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REPLY TO THE CO-PROSECUTORS' RESPONSE

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Before:

The Pre-Trial Chamber

Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Catherine MARCHI-UHEL

Judge Rowan DOWNING

Co-Prosecutors

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MAY IT PLEASE THE PRE-TRIAL CHAMBER

I- INTRODUCTION

1. According to Article 8.4 of the Practice Direction on the Filing of Documents and the instructions of the Pre-Trial Chamber,¹ Mr KHIEU Samphan hereby replies to the Co-Prosecutors' Response to his Appeal Against the Closing Order ("the Response")² and to the first seventeen paragraphs of the Co-Prosecutors' combined response to the appeals of Nuon Chea, Ieng Sary and Ieng Thirith.³
2. Under the predominantly inquisitorial civil law system – which forms the foundation of Cambodian law – proceedings before the ECCC comprise two stages: the judicial investigation "*compulsory for crimes within the jurisdiction of the ECCC*"⁴ and the trial proper conducted, as appropriate, in accordance with the scope of the investigation. It is, therefore, the preliminary investigation that "*lays the foundation for proceedings, defines the scope, delineates the confines of the trial*".⁵ The Co-Investigating Judges **shall** conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.⁶ It is the judicial investigation which guarantees fair proceedings, a condition *sine qua non* of proceedings before the ECCC. In order for the trial on the merits to be fair, it is necessary to strike a balance between those two exigencies. The Closing Order, which concludes the investigation⁷ and seises the Trial Chamber of the case,⁸ must take account of those exigencies.
3. Rule 2 of the ECCC Internal Rules sets out the applicable procedure where the existing procedure in case of lacuna in the Internal Rules. According to the ECCC Law, because of the **hybrid nature** of the Extraordinary Chambers, "*the procedure shall be in accordance with Cambodian law*".⁹ It is only in the circumstance where the existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with

¹ "Instructions of the Pre-Trial Chamber to the Defence Team of Khieu Samphan", email dated 2 December 2010, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC104).

² Co-Prosecutors' Response to Khieu Samphan's Appeal against the Closing Order, 29 November 2010, D427/4/7.

³ *Réponse unique des co-procureurs aux appels interjetés par Nuon Chea, Ieng Sary et Ieng Thirith contre l'ordonnance de clôture*, 8 December 2009, D427/4/12.

⁴ Rule 55(1) of the Internal Rules.

⁵ Appeal against the Closing Order, 28 October 2010, D427/4/3, para. 15.

⁶ Rule 55(5) of the Internal Rules.

⁷ Rules 67(1) and 76(7) of the Internal Rules.

⁸ Rules 79(1) and 98(2) of the Internal Rules.

⁹ Article 12 of the Agreement Between the United Nations and the Royal Government of Cambodia.

international standard that guidance may be sought in procedural rules established at the international level.¹⁰ As the Co-Prosecutors recognised in their Response, “*the ECCC Rules create a sui generis procedural system for this Court based on its unique circumstances and reflects the drafter*” and there should be no exception to this rule (paragraph 18).

4. This Court – established by the Law of 27 October 2004 promulgating the Agreement Between the United Nations and the Royal Government of Cambodia dated 6 June 2003 – instituted a hybrid judicial system couched in the national judicial system, and quite different from the other international tribunals, notably the International Criminal Tribunal for the former Yugoslavia (ICTY), the Tribunal International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court. This deliberate choice by the founders of the Extraordinary Chambers must be strictly adhered to, and so must the spirit of the drafters of the Internal Rules, who were mindful of respect for the applicable Cambodian law to the circumstances of the instant case.
5. The Response reveals that the Co-Prosecutors are not conversant with civil law and do not quite understand the implications of the conclusion of the investigation. This is demonstrated by their patently erroneous characterisation of the Appeal, their reliance exclusively on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) which is predominantly couched in common law, and their erroneous use of the jurisprudence of the Pre-Trial Chamber.
6. Accordingly, Mr KHIEU Samphan reiterates the submissions contained in the Appeal against the Closing Order¹¹ in inviting the Pre-Trial Chamber to:
 - REJECT the Co-Prosecutors’ arguments;
 - DECIDE that his appeal is admissible and meritorious.
7. And therefore to:
 - SET ASIDE the Closing Order;¹²
 - ORDER his release;
 - ORDER the continuation of the investigation.
8. At any rate, to:
 - DECIDE that his case file cannot be forwarded to the Trial Chamber in its current state.

¹⁰ Article 33 new of the ECCC Law.

¹¹ Appeal against the Closing Order, 28 October 2010, D427/4/3.

¹² Closing Order, 15 September 2010, D427.

II- ARGUMENT

1. The Co-Prosecutors manifest error in the assessment of evidence

9. In their Response, the Co-Prosecutors submit that the Appeal simply invoke “*defects in the form of the Closing Order and other defects arising during the course of the judicial investigation*” (paragraphs 3 and 4), whereas the Appeal highlights the fact that the Closing Order (“the Order”) prematurely terminates an incomplete investigation which elicited inculpatory evidence only, in violation of Mr KHIEU Samphan’s right to a fair trial. By merely challenging the admissibility of the Defence’s submissions, the Co-Prosecutors deliberately reduce the scope of the debate to a bare minimum so as to avoid any discussion on the merits, thereby exhibiting utter disregard for the fundamental rights of the Accused.
10. Hannah Arendt, an informed observer of the Eichmann trial, described the dangers of such manipulation as follows “[TRANSLATION] *The trial inevitably engenders a political debate which is manipulated by the accusing party*” so as to convict the accused person swiftly for the sake of **political expediency**, and to hamper any legal debate in genuinely adversarial fashion. She further asserts in her writings that: “[TRANSLATION] *to the extent that the prosecution focused mainly on the suffering of the Jewish people and the genocide they had encountered, it was logical to start here, and then see how much this unmitigated hell could be blamed upon the accused*”.
11. The Co-Prosecutors’ assertion that “*the Appellant is asking the Pre-Trial Chamber to quash the Closing Order*” is also erroneous (paragraphs 1 and 13). As stated in the prayers in the Appeal, Mr KHIEU Samphan is asking the Chamber to set aside the Order, in other words, “*set aside the closing order re-opening the trial preparation phase*”.¹³ He is thus demanding that the investigation be continued, as it is impossible to send him to the Trial Chamber for trial with his case file in its current state.
12. Again contrary to the Co-Prosecutors’ allegations, Mr KHIEU Samphan is not requesting annulment under Rule 76 of the Rules (paragraphs 12 and 13). Moreover, he filed two distinct motions – the Appeal against the Order and a supplemental motion based on abuse of process,¹⁴ which complement and substitute for each other, and did

¹³ CORNU (G.), *Vocabulaire Juridique*, Presses universitaires de France, “*révocation*”, p. 800 (annexed hereto).

¹⁴ *Demande incidente aux fins d’interruption définitive et immédiate de la procédure intentée contre M. Khieu*

not conflate “a request for stay of proceedings and a request for annulment” (paragraph 14). It is the Co-Prosecutors who are utterly confused about motions and their meaning, and especially about the spirit of the fair and adversarial trial, the essence of civil law.

2. The Appeal is admissible

13. Under Rule 67(5) of the Rules, the order is subject to appeal as provided in Rule 74, which gives a detailed list but not exhaustive list of decisions that may be appealed before the Pre-Trial Chamber. At any rate, to interpret this Rule any other way would be contrary to the equality of arms principle. According to Rule 74(3)(a) of the Rules, “*the Charged Person or the Accused may appeal against (...) orders or decisions of the Co-Investigating Judges confirming the jurisdiction of the ECCC*”.
14. As KHIEU Samphan emphasises in his appeal, the Closing Order is a “*decision confirming the jurisdiction of the ECCC*” within the meaning of Rule 74(3)(a),¹⁵ seising the Pre-Trial Chamber once definitive.¹⁶ This has been affirmed by the Pre-Trial Chamber¹⁷ and recalled by the Co-Investigating Judges in the Order. In the Order, they affirm “*the ECCC’s jurisdiction to prosecute such crimes*”, set out the various forms of criminal liability along with the applicable legal characterisations, and their discretion to “*[interpret] the law governing their own jurisdiction*”.¹⁸ Therefore, the Appeal is admissible according to Rules 67(5) and 74(3)(a) of the Rules.
15. Moreover, as emphasised in the Appeal and as recognised by the Co-Prosecutors (paragraph 18), the Pre-Trial Chamber considers that “*Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance*”.¹⁹ However, the Order is in violation of the rules governing the judicial investigation, the fair trial rights, and KHIEU Samphan

Samphan pour abus de procédure, 18 October 2010, Case File No. 002/21-10-2010-ECCC/PTC15), Document 1.

¹⁵ Closing Order, paras. 50-51.

¹⁶ Rule 79 of the Internal Rules.

¹⁷ Decision on Ieng Sary’s Appeal against the Decision on Ieng Sary’s Motion against the Application of Command Responsibility, 9 June 2010, *D345/5/11*, para. 11.

¹⁸ Closing Order, 15 September 2010. paras. 1301, 1302 and 1308.

¹⁹ 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, (...), 20 September 2010, *D390/1/2/4*, para. 13.

requests the Pre-Trial Chamber, by virtue of its discretionary power, to find that the appeal is admissible pursuant to Rule 21(1).²⁰

16. In this context, the applicant must be afforded effective means of redress to challenge the lawfulness of the Order, to the extent that the judicial investigation was incomplete and partial.²¹ In the *Case of Walchli v. France*, the European Court of Human Rights considered that the impossibility for the applicant to challenge the lawfulness of the proceedings in their entirety amounted to depriving him of his right to a tribunal, and therefore of his right to a fair trial, under Article 6§1. *“In the light of the consequences of his application’s inadmissibility for the applicant - who, (...) had never been able to challenge the disputed procedural acts before the investigating judicial authorities and the trial courts, the Court considered that the applicant had been made to bear a disproportionate burden which had upset the fair balance that was to be struck between the legitimate concern to ensure that the formal procedure for applying to the courts was complied with and the right of access to a court (...)”*.²²

3. Erroneous application of investigation rules

17. First, the Co-Prosecutors’ numerous references to the practice at the ICTY are not cogent. This is because the ICTY operates predominantly on the basis of common law, under which **there is no investigation stage**. It is therefore quite surprising to rely on such rules, since they are quite distinct from the traditions in Cambodia. So, by forcing the Chamber to not determine the matter, the Co-Prosecutors manipulate the jurisprudence of the ICTY in invoking the limited appellate powers of the Trial Chamber (paragraph 6).
18. Moreover, the Co-Prosecutors reference only Rule 72(D) of the ICTY Rules of Procedure in offering a very restrictive definition of the notion of jurisprudence (paragraph 7). Yet, they recognise that *“the Rules do not define the meaning of ‘jurisdiction’”* (paragraph 7). In the absence of a definition in the ECCC Internal Rules and in Cambodian law – given that the Code of Criminal Procedure of Cambodia only enumerates appealable decisions by the examining judge²³ – the Pre-Trial Chamber must, by virtue of its discretionary power, develop its own jurisprudence and not allow

²⁰ Appeal Against the Closing Order, paras. 53 and 54.

²¹ Appeal Against the Closing Order, paras. 85-109.

²² ECHR, *Case of Walchli v. France*, 26 July 2007, Application No. 35787/03, paras. 36 and 37 (annexed hereto).

²³ Article 267 of the Code of Criminal Procedure of Cambodia.

itself to be led astray by common law, as it is ill-adapted and entirely extraneous to the matter at hand.

19. In that sense, in his appeal, Mr KHIEU Samphan invites the Chamber to be guided by Article 186 of the French Penal Code – very similar to the Code of Criminal Procedure of Cambodia that is predominantly couched civil law.²⁴ Indeed, with the enactment of the Law of 15 June 2000 reinforcing protection for the presumption of innocence and victims’ rights in criminal cases, it is open to the accused to appeal the closing order of the examining judge. According to the circular relating to this change in legislation, “[TRANSLATION] *this right to appeal was deemed necessary, owing to the many issues related to legal characterisations, in order to allow for **oversight by the examining chamber** over the sufficiency of charges against the accused, **both in terms of facts** – the oversight being based on the chamber’s discretion – **and in law** – assessment of the legal characterisation adopted, in case of appeal, to the oversight of the criminal chamber or that of the court of cassation*”.²⁵
20. Second, while Rule 87 of the Rules and Article 321 of the Code of Criminal Procedure of Cambodia provide that the Trial Chamber must base its decision only on evidence that has been put to adversarial debate by the parties (paragraph 9), the evidence underpinning the Order is crucial in that “*the Trial Chamber is seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber*”²⁶ and “*shall be limited to the facts set out in the Indictment*”.²⁷ Again, the Co-Prosecutors are unacquainted with the specific civil law system and the crucial role of the judicial investigation stage.
21. Third, the Closing Order, the final stage of the investigation affords the Defence the opportunity to raise its arguments. Once the Closing Order is issued, it covers any defects in the judicial investigation.²⁸ Wherefore, contrary to the Co-Prosecutors’ submission (paragraphs 20 to 23), the Accused is allowed to raise any issues relating to the investigation, and the Appeal cannot be considered as “*an attempt to litigate matters which [Khieu Samphan’s Defence] failed to challenge on time*” (paragraph 17). Whereas some of the violations alleged in the Appeal have been addressed in previous motions and separate decisions, the accumulation of such multiple defects adversely

²⁴ Appeal against the Closing Order, para. 52.

²⁵ *Circulaire CRIM 00-14 F1 du 11 décembre 2000, présentant les dispositions de la loi du 15 juin 2000 renforçant la protection de la présomption d’innocence et les droits des victimes concernant la procédure criminelle*, 1.3.1 (annexed hereto).

²⁶ Rule 79(1) of the Rules.

²⁷ Rule 98(2) of the Rules.

²⁸ Rule 76(7) of the Rules.

affects fairness of the proceedings and makes it impossible to indict Mr KHIEU Samphan. This has been highlighted by all the experts commissioned to assess the investigation, including Professor Bernard BRANCHET (Metz), Professor Mathieu GUIDÈRE (Geneva), and academicians Elena GRASSO (Turin) and Sylvie MONTJEAN-DECAUDIN (Paris Ouest).²⁹

4. Failure to comply with the Pre-Trial Chamber's decisions

22. Contrary to the Co-Prosecutors' claims (paragraph 10), the Pre-Trial Chamber has recognised Mr KHIEU Samphan's right to receive a French Translation of the Closing Order, the elements of proof on which the Closing Order relies, the Introductory Submission and the Co-Prosecutors' Introductory Submissions and Final Submissions, the footnotes in all judicial decisions and orders, and filings by the parties.³⁰ Moreover, the Pre-Trial Chamber has ordered that all the footnotes in the Closing Order must be translated³¹ by 18 November 2010.³² Inviting the Pre-Trial Chamber to apply its decision on translation in its entirety,³³ Mr KHIEU Samphan requested it to promptly issue an order for translation into French of all the documents used in support of the Order, because mere translation of the footnotes is unacceptable and could influence the judgement to be issued, as the judgement will not rely on the content of the supporting documents.
23. As to the right to respond to the Final Submission, the Co-Prosecutors are wrong in asserting that "*the Appellant failed to claim this right at the proper time*" (paragraph 15) given that was not until 19 November 2010 that Mr KHIEU Samphan received notification of the French version of the Final Submission³⁴ - which was **after** the Co-Prosecutors had filed their Response – in violation of his right to translation.

²⁹ BRANCHET (B.), *Analyse critique de l'instruction préparatoire et contribution au respect d'un procès équitable*, D427/4/3.1.22; GRASSO (E.), *Critique de la traduction devant les juridictions pénales internationales*, Case File No. 002/21-10-2010-ECCC/PTC(15), 1.1.18; GUIDERE (M.), *Les problèmes de traduction et les risques de désinformation*, Case File No. 002/21-10-2010-ECCC/PTC(15), 1.1.19; MONJEAU-DECAUDIN (S.), *Les problèmes de traduction dans le dossier de Khieu Samphan et ses conséquences sur la décision judiciaire à intervenir*, Case File No. 002/21-10-2010-ECCC/PTC(15), 1.1.20.

³⁰ Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20.

³¹ 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, ERN 00618772.

³² Email dated 18 November 2010 on the filing of the Amended Closing Order, D427.

³³ Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20.

³⁴ Email dated 19 November 2010 on the filing of the Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390.

24. Pretending to urge the Chamber not to rule on the merits, the Co-Prosecutors assert that the Chamber cannot replace its view for that of the Co-Investigating Judges (paragraph 16). Yet, as Mr. KHIEU Samphan has recalled, the Pre-Trial Chamber **has the duty to determine whether the proper procedure has been followed** and the power to modify the legal characterization chosen by the Co-Investigating Judges.³⁵ The Pre-Chamber ought to set aside the Closing Order. The Co-Investigating Judges included only inculpatory elements, while refusing to include any exculpatory elements. The Order reveals a flagrant and objectionable double-standards due to the partiality of Judge Marcel LEMONDE, who has been criticised by all parties and at international scientific fora his poor performance vis-à-vis the Accused.³⁶ The Pre-Trial Chamber has jurisdiction to consider Mr KHIEU Samphan's arguments on the merits, as they are conducive to ascertaining the truth.

FOR THESE REASONS

25. Mr KHIEU Samphan herewith requests the Pre-Trial Chamber to:

- REJECT the Co-Prosecutors' arguments;
- DECIDE that the Appeal is admissible and meritorious.

26. And therefore:

- SET ASIDE the Closing Order;
- ORDER his release;
- ORDER continuation of the investigations.

27. In any event, to:

- FIND that he cannot be sent before the Trial Chamber with the case file in its current state.

³⁵ Appeal against the Closing Order, paras. 55-57.

³⁶ VERGÈS (J.), *Une justice internationale ?*, *Gazette du Palais, Justice pénale internationale et européenne*, n°330-331, 26-27 novembre 2010.

**WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE**

| | | | |
|------|---|--------------------------------------|-----------|
| | SA Sovan Jacques VERGÈS Philippe GRÉCIANO | Phnom Penh Paris Paris | |
| Date | Name | Place | Signature |