

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

Case File N° : 002/19-09-2007-ECCC/PTC 104
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***Avocats Sans Frontières France* Co-Lawyers for the Group 3 Civil Parties' Brief in Response to
KHIEU Samphan's Appeal against the Closing Order**

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Before:

The Pre-Trial Chamber:

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

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I- FACTS AND PROCEDURE

- 1- On 16 September 2010, the Co-Investigating Judges issued a Closing Order, by which they indicted Mr KHIEU Samphan.¹
- 2- On 25 October 2010, Mr KHIEU Samphan filed his Appeal.²
- 3- By decision dated 28 October 2010, the Pre-Trial Chamber permitted the civil parties to file their to the Defence appeals against the Closing Order within five (5) days of the filing of the Co-Prosecutors responses.³
- 4- *Avocats Sans Frontières France*, Co-Lawyers for the Group 3 Civil Parties are therefore entitled to file their observations in accordance with the above decision.

II- DISCUSSION

A- MAIN SUBMISSION: INADMISSIBILITY OF MR KHIEU SAMPHAN'S APPEAL

- 5- Rule 74(3) of the Internal Rules provides:

"The Charged Person or the Accused may appeal against (...) orders and decisions by the Co-Investigating Judges:

- a) *confirming the jurisdiction of the ECCC;*
- b) *refusing requests for investigative actions allowed under [the] IRs;*
- c) *refusing requests for restitution of seized items;*
- d) *refusing requests for expert reports allowed under [the] IRs;*
- e) *refusing requests for additional expert investigation allowed under [the] IRs*
- f) *relating to provisional detention or bail;*
- g) *refusing applications to seize the Chamber for annulment of investigative action;*
- h) *relating to protective measures or*
- i) *declaring a civil party application inadmissible".*

- 6- The Pre-Trial Chamber Decision on the Co-Prosecutors' Appeal against the Closing Order Indicting Duch⁴ states that "*(...) the Closing Order, [is] the decision that concludes the whole investigation in which all Parties have had the possibility to participate. Such an order contains various conclusions of fact and law with regard to all the acts that were subject to investigation (...)*".⁵

¹ Co-Investigating Judges' Closing Order, 16 September 2010.

² KHIEU Samphan's Appeal.

³ Pre-Trial Chamber Decision, 28 October 2010.

⁴ Decision on the Co-Prosecutors' appeal against the Closing Order indicting DUCH, D/99/3/42.

⁵ Decision D/99/3/42, para. 29 .

7- The Charged Person's Appeal is inadmissible, because Rule 74(3) sets out an exhaustive list of decisions and orders that the Charged Person can appeal to the Pre-Trial Chamber; Mr KHIEU Samphan's appeal does not fall within the ambit of this Rule.

8- However, the Co-Lawyers for the Group 3 Civil Parties respond to the matters in Mr KHIEU Samphan's appeal, should the Chamber still proceed to entertain the appeal.

B- ALTERNATIVE SUBMISSION: GROUNDS OF APPEAL RAISED BY MR KHIEU SAMPHAN

1) Absence of an adversarial debate

9- Concerning the alleged denial of its right to respond to the Co-Prosecutors' Final Submission, the Defence claims that it did not receive the French version of the said Submission, in violation of the right to translation.

10- Although Article 45 of the ECCC Law provides that "*the official working languages of the Extraordinary Chambers shall Khmer English and French*,"⁶ there is no provision in the Rules dealing with translation.

11- Questions relating to translation are judicial matters, and are thus outside the remit of Rule 73(3).

12- In its Decision of 20 February 2009 on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, the Pre-Trial Chamber indicated that, "the fair trial requirement for provisions of documents in a language that the defendant understands are amply met by recourse to the full linguistic capacities of the Defence team, resources of the Defence Support Section, full-time translator assigned by the translation [Order] and the effort of Court Management Section to provide timely translation services".⁷

13- Finally, imposing the requirement to translate all the documents in the criminal case file into all three official working languages of the ECCC would certainly have a serious effect on the right to be tried within a reasonable time. Therefore, the various parties, including the Charged Person, are expected to contribute to meeting their own needs through recourse to the linguistic capacities within their teams.

⁶ Article 45 of the ECCC Law.

⁷ Pre-Trial Chamber dated 20 February 2009, A190/I/20.

2) Lack of transparency in the judicial investigation

14- Rule 62(1)⁸ states that rogatory letters shall not be issued in a general form. Rogatory Letters are issued for a specific purpose, and it is in respect thereof that the related written records of investigation and findings are prepared. Moreover, the Co-Investigating Judges are not required to wait for execution of all rogatory letters before issuing their decision.

15- It must be recalled that this is a criminal case where the fair trial rights of all the parties must be safeguarded, including the right to be tried within a reasonable time, as mentioned earlier.

3) Uncompleted and biased judicial investigation

16- In its aforementioned Decision D/99/3/42, the Pre-Trial Chamber recalled that the Closing Order is the decision that concludes the whole investigation in which all Parties participated. The Defence had all the time necessary to request any action relating to the investigation; it cannot therefore claim that the investigation in which it participated is uncompleted, now that it has ended.

17- Rule 58(6) provides:

*“At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of the investigation. The rejection order shall state the factual reasons for the rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber”.*⁹

Rule 66(1) provides:

*“Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. This decision shall be made public. The parties shall have fifteen (15) days to request further investigative action. They may waive such period”.*¹⁰

18- Accordingly, it is not permissible for Mr KHIEU Samphan to request investigative actions months after the conclusion of the judicial investigation, given that the law allowed him 15 days following notification of the conclusion of the judicial investigation to request further investigative action. It is noteworthy that some of the requests for investigative action date back to July 2010.¹¹

19- Citing remarks made by one of the Co-Investigative Judges in a press interview, the Defence alleges that the judicial investigation focused on inculpatory evidence and was dangerous, and that some of the charges against KHIEU Samphan are based on evidence obtained by torture.

⁸ Rule 62(1) of the IRs.

⁹ Rule 58(6) of the IRs.

¹⁰ Rule 66(1) of the IRs.

¹¹ KHIEU Samphan Appeal, Annexes 85, 86 and 87.

20- However, the truth is that Judge Lemonde's remarks are merely a reflection of his personal feelings following the conclusion of the judicial investigation. The charges against KHIEU SAMPHAN are based on all the evidence gathered throughout the judicial investigation and through interviews. His indictment is not based on the personal feelings of the Co-Investigating Judges. Finally, it must be noted that the prosecution case is not based solely on the testimony of PEHN THUOK, alias VON VET.

III- CONCLUSION

21- Main submission

Find Mr KHIEU Samphan's Appeal inadmissible, as it does not fall within the ambit of Rule 74(3) of the Internal Rules.

22- Alternatively,

Send Mr KHIEU Samphan for trial before the Pre-Trial Chamber pursuant to the Closing Order.

Done in Phnom Penh, on 18 November 2010.

For *Avocats Sans Frontières France*, Co-Lawyers for the Group 3 Civil Parties,

<p>[signed]</p> <p><u>KIM Mengkhy</u></p> <p>Martine JACQUIN MOCH Sovannary Philippe CANONNE Fabienne TRUSSES-NAPROUS Elisabeth RABESANDRATANA Laure DESFORGES Christine MARTINEAU Françoise GAUTRY Annie DELAHAIE Nicole DUMAS Ferdinand DJAMMEN NZEPA Isabelle DURAND Daniel LOSQ Barnabé NEKUIE</p>	<p>[signed]</p> <p><u>Martine JACQUIN</u> Head of Project – ASF-France</p>
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