



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

លេខ/No: ០៣៦៥/២/១០

អង្គជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

ឯកសារដើម

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Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC67)

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

Date: 15 June 2010

PUBLIC

DECISION ON CO-PROSECUTORS' APPEAL AGAINST THE CO-INVESTIGATING JUDGES ORDER ON REQUEST TO PLACE ADDITIONAL EVIDENTIARY MATERIAL ON THE CASE FILE WHICH ASSISTS IN PROVING THE CHARGED PERSONS' KNOWLEDGE OF THE CRIMES

Co-Prosecutors

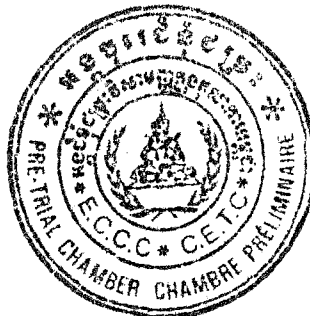
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IENG Sary
KHIEU Samphan

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002/19-09-2007-ECCC/OCIJ (PTC67)

២១៩/No: D365/2/10

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Unrepresented Civil Parties

Co-Investigating Judges

YOU Bunleng
Marcel LEMONDE



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“the ECCC”) is seized of the Appeal of the Co-Prosecutors (“the Appellants”) in “response to the Co-Investigating Judges’ Order Regarding Request to Place on Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ knowledge of the crimes (“the Appeal”).¹

INTRODUCTION

1. On 11 February 2010, the Co-Prosecutors filed with the Co-Investigating Judges a Request to Place on Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ knowledge of the crimes (“the Request”).²
2. On 5 April 2010, the Co-Investigating Judges issued their Order on Co-Prosecutors’ Request to Place on Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ knowledge of the crimes (“the Order”).³ The Order was notified to the parties on the same day of 5 April 2010.
3. On 19 April 2010 the Co-Prosecutors filed their Notice of Appeal against the Order and on 4 May 2010 they filed the Appeal.
4. On 11 May 2010, the Pre-Trial Chamber scheduled a hearing *in camera* on the Appeal to be held on 26 May 2010, “conditional on the Chamber receiving notice [of intent to present oral submissions] from a respondent.”⁴ On 12 May 2010, the Co-Lawyers for Ieng Sary filed notice of intent to present oral submissions in response to the Appeal.⁵ On 18 May 2010, the Co-Lawyers for Nuon Chea filed notice of intent to present oral submissions in response to



¹ Co-Prosecutors Appeal Brief in Response to the Co-Investigating Judges Order Regarding Request to Place on Case file Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 4 May 2010, D365/2/1.

² Co-Prosecutors’ Request to place on the Case File Additional Evidentiary Material which assists in proving the Charged Persons’ Knowledge of the Crimes, 11 February 2010, D365

³ Order on Co-Prosecutors Request to place on the Case File Additional Evidentiary Material which assists in proving the Charged Persons’ Knowledge of the Crimes, 5 April 2010, D365/1.

⁴ Scheduling Order, 11 May 2010, D365/2/2.

⁵ Ieng Sary’s Notice of Intent to be Heard concerning the OCP’s Appeal regarding Request to place on the Case File Additional Evidentiary Material which assists in proving the Charged Persons’ Knowledge of the Crimes, 12 May 2010, D365/2/5.

002/19-09-2007-ECCC/OCIJ (PTC67)

១១៩/No: D365/2/10

the Appeal.⁶ On 21 May 2010, the Co-Lawyers for Khieu Samphan indicated their intent to present oral submissions in response to the Appeal.⁷

5. On 26 and 27 May 2010 was held, in the presence of the Charged Persons, a hearing in camera on the Appeal. The Pre-Trial Chamber heard Responses to the Appeal from the Co-Lawyers for IENG Sary, NUON Chea and KHIEU Samphan followed by a reply from the Appellants. It is noted that the Pre-Trial Chamber received the Notice of Intention to be heard from the Co-Lawyers of KHIEU Samphan out of time, but the Pre-Trial Chamber decided, without request, to accept the notice to ensure that the fair trial rights of the Charged Person KHIEU Samphan were observed.⁸

ADMISSIBILITY OF THE APPEAL

6. The Co-Investigating Judges issued the Order on 5 April 2010. The Order was notified on 5 April 2010. The Notice of Appeal was filed on 19 April 2010, which is within the period prescribed in Internal Rule (“Rule”) 75(1), taking into account the holidays on 14, 15 and 16 April 2010. The submissions on Appeal were filed on 4 May 2010, therefore within the time provided for in Internal Rule 75(3) of the ECCC Internal Rules (“Internal Rules”).
7. The Appeal is submitted pursuant to Internal Rule 74(2),⁹ according to which the Co-Prosecutors may appeal against all orders of the Co-Investigating Judges. The Appeal is admissible.

THE ORDER

8. The Appellants filed a request “To Place on the Case File additional evidentiary material which assists in proving the Charged Persons’ Knowledge of the Crimes” on 11 February 2010. The Request related to 268 documents. The Order advised of the acceptance of 70 documents onto the case file and rejection of 198 documents.

⁶ Notice of Intent to be Heard, 18 May 2010, D365/2/6.

⁷ E-mail, dated 21 May 2010, from a representative of the Defence Team for Khieu Samphan.

⁸ Scheduling Order of 11 May 2010 (D365/2/2) was notified to the parties on the same day of 11 May 2010.

⁹ Appeal, para. 2.

Decision on Appeal



9. The reasons provided in the Order are brief and set out below in full:

“REASONS FOR THE DECISION

1. In their Request the Co-Prosecutors seek to have placed on the Case File a series of documents comprising wholly public source article from the international press during the temporal period of the Khmer Rouge which the Co-Prosecutors submit would assist in establishing the truth, given their relevance and probative value in relation to the allegations contained in the Introductory and Supplementary Submissions.
2. The Co-Investigating Judges note that the Co-Prosecutors make detailed submissions as to how these documents are related to the allegations in this case and how they would assist in establishing the truth. As such, the Co-Investigating Judges find that the Request is sufficiently specific to be considered.
3. With respect to any request to place documents on the Case File, the Co-Investigating Judges reiterate that they perform their own legal analysis of the requested documents to determine whether they may be conducive to ascertaining the truth. The Co-Investigating Judges take into consideration whether the evidence is relevant to the facts under investigation, having special regard to exculpatory material, limited to the matters of which the Co-Investigating Judges are seized (including jurisdictional elements or modes of liability) and whether or not the evidence is unduly repetitive in relation to evidence already on the Case File concerning the same issues.
4. As regards the press articles which specifically relate to the treatment of Buddhists, the practice of forced marriage, the evacuation of Phnom Penh, rape, enforced disappearances, the potential responsibility of any of the Charged Persons, the existence of an international armed conflict with Vietnam and any articles written by a witness of the Co-Investigating Judges during the investigation, the Co-Investigating Judges consider that these articles are sufficiently relevant to a number of the factual scenarios of which they are seized and should therefore be placed on the Case File.
5. Regarding the remaining documents, the Co-Investigating Judges were unable to determine how they would be relevant under the current scope of the investigation as they do not refer to any specific aspect of the investigation or were determined to be addressing matters too general in their nature. Therefore they will not be placed on the Case File but will be placed on the Shared Materials Drive, where they remain available to all the parties.”



INITIAL OBJECTIONS

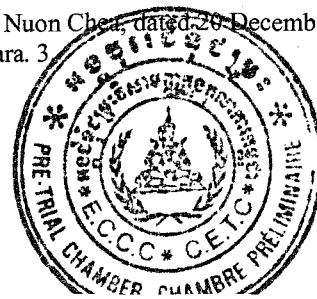
10. The Co-Lawyers for IENG Sary objected to the Request, and thus the basis of the order and all flowing from such. It was submitted that the prior action of the Appellants in collecting the 268 documents was to be categorised as an investigative action and therefore impermissible. The Appellants addressed this issue in paragraph four of the Request, stating:

“Under the ECCC procedural framework, although parties are not permitted to carry out investigative acts, they may undertake such preliminary inquiries as are necessary for them to effectively exercise their right to file requests for investigative action by the ICJ. Thus, the CIJ have held that ‘the parties are entirely free to review any document from any public source in their search for evidence, and if necessary request the Co-Investigating Judges to place such evidence on the Case File. Such preliminary inquiries do not affect the prohibition for the parties to accomplish their own investigations.’”

11. In an Inter-Office Memorandum of 10 January 2008 to the Parties to Case File No. 2, the Co-Investigating Judges, in part, observed at paragraph three, “[T]here is no provision which authorises the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.... The capacity of the parties to intervene is thus limited to such preliminary inquiries as one strictly necessary for the effective exercise of their right to request investigative action.”¹⁰

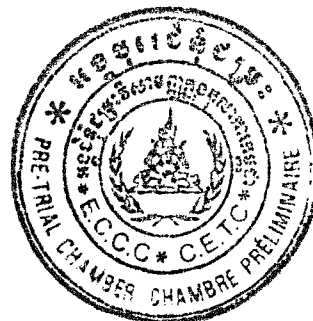
12. The Pre-Trial Chamber finds that there has been no offensive conduct by the Appellants in respect of them making any impermissible investigation. On the contrary, they have based the Request only upon documents from a “public source”. They have not made an investigation, rather, their action amounted to the request for admission of documents which had been the subject of identification as a result of permissible enquiries of public sources and not investigation. Such enquiries are expressly authorised by the Co-Investigating Judges, who recognised in paragraph one of the Order, that the documents “comprised wholly public source articles”. If the requested documents were only discoverable by enquiry of non public sources this may have amounted to an investigation.

¹⁰ Inter Office Memorandum, “Copy of Response to a letter for the lawyers of Nuon Chea, dated 20 December 2007, on the conduct of the judicial investigation”, 10 January 2008, A110/II, p.2, para. 3



13. Co-Lawyers for IENG Sary and NUON Chea further objected to the timing of the request as being inappropriate given the conclusion of the Judicial Investigation and, as such, the request as a whole should not be considered. They did not refer to any law or jurisprudence to support this assertion. The Pre-Trial Chamber is unable to independently identify any support for this, on the contrary, there is no such limitation placed upon any party making such a request under Rule 55(10) at any time permitted. Rule 66(1) expressly provides “where the Co-Investigating Judges consider an investigation to be concluded”, which in this case they did on 14 January 2010, “...The parties shall have 15 (fifteen) days to request further investigative action”. Thus the request was specifically permitted.
14. The Co-Lawyers for NUON Chea further raised the issue of the adverse affect upon the rights of the Charged Persons in respect of their being able to request further investigative action consequent upon the admission of the 70 documents in the Order, or any additional documents admitted as a result of this appeal and the names of witnesses or other sources of evidence in those documents. It is not for the Pre-Trial Chamber to dispose of this matter at this stage, not only given the decision it has reached as to rejected documents, but also because the decision to grant or not an extension of the time to file requests for investigative action belongs in first instance to the Co-Investigating Judges. The Pre-Trial Chamber notes that, as far as the 70 documents admitted by the Order are concerned, the Respondent did not elect to seek such an extension.
15. In addition, all the Parties to Case File No 2, have had access to public source documents at all times. They were in no way prevented from requesting investigative action arising from any material of such nature at any time prior to, and fifteen days after the Notice of the Conclusion of the Judicial Investigation.¹¹ This would have included other sources of such information from India, Scandinavian countries and elsewhere, as suggested by the International Co-Lawyer for KHIEU Samphan. Complaint cannot now be made that the opportunity which was open to the parties for at least two years and was not used, no longer exists.

¹¹ Notice of Conclusion of Judicial Investigation, 14 January 2010, D317.



16. The Co-Lawyers for IENG Sary further requested that the Pre-Trial Chamber order the rejection of the 70 documents admitted to the case file in the Order. The Pre-Trial Chamber notes that no appeal was lodged to this effect and that without such being lodged, and a determination being made as to its admissibility under the Internal Rules, there is no right to present such an appeal, orally, as a response to the Appeal. The Pre-Trial Chamber will not entertain such a request.

CONSIDERATION OF THE APPEAL

17. The Appeal provides three substantive grounds of Appeal:

- (i) Incorrect standard applied;
- (ii) Incorrect assessment of facts; and
- (iii) Failure to address the cumulative effect of like evidence.

A. Ground 1. Incorrect Standard Applied

18. The Appellants have summarised their contentions in respect of this ground in the following terms:

“In assessing the materials attached to the Request, the CIJs applied an incorrect standard of a document’s “relevance” as distinct from a standard for assessing a document’s “conduciveness to ascertaining the truth of the facts set out in the Introductory Submission on a Supplementary Submission”. The CIJs thus erroneously subjected the proposed materials to a standard of admissibility not applicable at the judicial investigation stage, amounting to an error of law. In any case, the CIJs’ application of an incorrect standard was accompanied with very scant reasoning as to the basis on which the items were refused. Further, the CIJs have adopted an unduly narrow interpretation of the “scope of investigation”, effectively limiting the range of potentially acceptable material, which may assist in proving a Charged Person’s knowledge or intent in relation to the crimes.”¹²

19. At the hearing on Appeal no comments or observations of or concerning this ground were made by any of the Charged Persons or their Co-Lawyers.

¹²Appeal, para.4/a.



20. In paragraph five of the Order the Co-Investigating Judges have rejected the documents not otherwise admitted finding they “were unable to determine how they would be relevant under the current scope of the investigation as they do not refer to any specific aspect under the current scope of the investigation”. The Co-Investigating Judges also found that the “the Request is sufficiently specific to be considered.”
21. The Appellants assert that the reference to a “relevance” test is erroneous and that the correct test under which the discretion should have been considered was whether the documents were “conducive to ascertaining the truth”. In paragraph three of the Order the Co-Investigating Judges have correctly stated “the Co-Investigating Judges reiterate that they perform their own legal analysis of the requested documents to determine whether they may be conducive to ascertaining the truth”. They were thus aware of their duty in this regard. Paragraph five, by reference to “relevance”, does not disclose that in fact the documents were actually assessed on the basis of the correct test, notwithstanding the statement in paragraph three of the Order. The brevity of paragraph five, as the operational paragraph in respect of the rejection of the documents, is such that the actual basis for consideration of identified documents is impossible. It is not possible to ascertain which documents were, for instance, rejected on the basis of lacking “relevance under the current scope of the investigation”, and basis of such, or what documents were “determined to be addressing matters too general in the nature”.
22. The Co-Investigating Judges have not provided in the Order sufficient reasoning to disclose their analysis of the requested documents.¹³ It is thus not possible for the Pre-Trial Chamber to be able to fully and properly consider the appropriateness or otherwise of the findings of fact leading to the expression of the conclusion in paragraph five of the Order and of the correct exercise of their discretion.



¹³ The Pre-Trial Chamber, in its decision in Nuon Chea’s appeal regarding the Request for Annulment, found that “all decisions of judicial bodies are required to be reasoned, as this is an international standard.” Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21

002/19-09-2007-ECCC/OCIJ (PTC67)

၈၅၈/No: D365/2/10

23. Rule 55(10) relevantly, provides in respect of orders rejecting a request, "...the order, which shall set out the reasons for rejection, shall be notified to the parties and shall be subject to appeal".
24. It is a fundamental right that parties know the reasons for a decision. This permits a party to know the basis of a decision, placing an aggrieved party in a position to be able to determine whether to appeal, and upon what grounds. Equally a respondent to any appeal has a right to know the reasons of a decision for so that a proper and pertinent response may be considered.
25. In addition, Rule 77(14) requires the Pre-Trial Chamber to provide "reasoned" decisions. No appellate court can provide such reasoned decision when the rationale and logic of the decision appealed is not itself disclosed by a reasoned decision. The Pre-Trial Chamber further refers to its discussion of this matter in its Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order on request for investigative action by the Defence for Ieng Thirith of 15 March 2010.¹⁴
26. The Pre-Trial Chamber finds that the Co-Investigating Judges have erred in law, as paragraph five of the Order fails to disclose the reasons for the exercise of the discretion by the Co-Investigating Judges in so far as they reject documents referred to in the Request. The matter is remitted to the Co-Investigating Judges for their reconsideration on this issue alone and the provision of the reasons for any rejection of the request according to law.
27. In the circumstances the Pre-Trial Chamber shall not further consider the other grounds of appeal, as this would necessarily require speculation as to the reasons for the rejection of the Request.



¹⁴Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order on request for investigative action by the Defence for Ieng Thirith of 15 March 2010, 14 June 2010, D353/2/3, paras 22-28.

002/19-09-2007-ECCC/OCIJ (PTC67)

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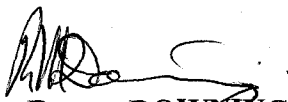
THEREFORE, THE PRE-TRIAL CHAMBER HERBY UNANIMOUSLY DECIDES:

1. The Appeal is admissible;
2. The Co-Investigating Judges are directed to provide reasons according to law for their decision to reject part of the Request as provided for in paragraph five of the Order within five (5) working days from the notification of this decision;
3. Within two days from notification of such Reasons by the Co-Investigating Judges to the parties, the Appellants shall advise the Pre-Trial Chamber and the other parties to the Appeal in writing of their intention to proceed with or withdraw the Appeal;
4. If the Appellants advise of an intention to proceed they shall have three working days from the notification of their intention to proceed in which to make further written submissions. The other parties to the Appeal shall have three days from the date of notification of the Appellants written submissions to respond in writing. The Appellants may reply in writing to any responses within two working days of their notification.

In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

Phnom Penh, 15 June 2010 ^{OR}

Pre-Trial Chamber



Rowan DOWNING



NEY Thol




Catherine MARCHI-UHEL

HUOT Vuthy

PRAK Kimsan

