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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 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 N° 002/19-09-2007-ECCC/OCIJ (PTC31)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: **10 May 2010**

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 10 / 05 / 2010
ម៉ោង (Time/Heure): 11:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent char
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PUBLIC
DECISION ON ADMISSIBILITY OF IENG SARY'S APPEAL AGAINST THE OCIJ'S CONSTRUCTIVE DENIAL OF IENG SARY'S REQUESTS CONCERNING THE OCIJ'S IDENTIFICATION OF AND RELIANCE ON EVIDENCE OBTAINED THROUGH TORTURE

ឯកសារចម្លងបានត្រឹមត្រូវតាមឯកសារដើម
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ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 10 / 05 / 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Ratanak

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture" filed by the Co-Lawyers for the Charged Person on 19 November 2009 ("Appeal").[1]

I. PROCEDURAL BACKGROUND

1. On 17 July 2009, the Co-Lawyers for the Charged Person filed a Request with the Co-Investigating Judges concerning the OCIJ's identification of, and reliance upon, evidence obtained through torture ("First Request").[2]

2. On 20 July 2009, the Co-Investigating Judges officially informed the Co-Lawyers for the Charged Person that "in the coming days" they were issuing a decision that "will respond to the questions [they] raised" ("Co-Investigating Judges Letter of 20 July 2009")[3] and on 28 July 2009, the Co-Investigating Judges issed an "Order on Use of Statements Which Were or May Have Been Obtained by Torture" ("Order").[4]

3. On 7 August 2009, the Co-Lawyers for the Charged Person filed a further Request with the Co-Investigating Judges concerning the identification of, and reliance upon, evidence obtained through torture ("Second Request").[5]

4. On 19 November 2009, the Co-Lawyers for the Charged Person filed the Appeal.

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[1]Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Relienace on Evidence Obtained Through Torture, 19 November 2009, D130/7/3.
[2]Ieng Sary's Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7.
[3] "Response to your letter dated 17 July 2009 concerning the identification of and reliance on evidence obtained through torture", 20 July 2009, D130/7/1.
[4]Order on Use of Statements which Were or May have been Obtained by Torture, 28 July 2009, D130/8.
[5]Ieng Sary's Letter Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 7 August 2009, D130/7/2.

5. On 2 December 2009, the Co-Prosecutors filed their Response to the Appeal ("Co-Prosecutors' Response").[6]

6. On 9 December 2009, the Pre-Trial Chamber directed the Co-Lawyers for the Charged Person to express their views in relation to the admissablity issues raised by the Co-Prosecutors in their Response ("Pre-Trial Chamber Directions").[7]

7. On 14 December 2009, the Co-Lawyers for the Charged Person filed their Reply ("Co-Lawyers Reply").[8]

II. SUBMISSION OF THE PARTIES

8. In their Appeal, the Co-Lawyers for the Charged Person request the Pre-Trial Chamber to i) declare that the current appeal is admissible, (ii) grant a public hearing, (iii) reverse the OCIJ's constructive dismissal of the Defence Requests, and (iv) order the OCIJ to add to the Case File the information requested in the First Defence Request and as set out in paragraph 2 of the Appeal.[9]

9. The Co-Lawyers for the Charged Person argue that the Appeal is admissible under Rules 55(10) and 74(3)(b) as "an appeal against the constructive denial of a request for investigative action". They argue that "the failure of the Co-Investigating Judges to decide on the Request makes it impossible for the Charged Person to obtain the benefit which he sought".[10]

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[6]Co-Prosecutors' Response to Ieng Sary's Appeal Against the Alleged Constructive Denial by the Co-Investigating Judges of His Requests Concerning Identification of and Reliance on Evidence Obtained Through Torture, 2 December 2009, D130/7/3/2.
[7]Pre-Trial Chamber's Directions to Co-Lawyers for Ieng Sary for Comments on Admissability Issues Raised by the Co-Prosecutors in their Response to the Appeal, 9 December 2009, D130/7/3/3.
[8]Ieng Sary's Reply to Co-Prosecutors' Response to Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 14 December 2009, D130/7/3/4.
[9] Appeal, para 58.
[10] Appeal, paras. 41-42.

10. In their response, the Co-Prosecutors ask the Pre-Trial Chamber to dismiss the appeal as inadmissible[11] and note that i) if the Co-Lawyers are trying to challenge the Order, their appeal is belated[12] and ii) with regard to the part of the Requests not responded to in the Order, the Charged Person has only sought "information" from the Co-Investigating Judges, which does not amount to a request for investigative action and therefore the appeal is inadmissible.[13]

11. The Co-Lawyers for the Charged Person, in reply argue that their Appeal is not belated as the Order did not address the questions raised and did not refer to their First Request.[14]

12. The Co-Lawyers for the Charged Person submit that the information sought in their Requests does constitute a request for investigative action, which is appealable under Rules 55(10) and 74(3)(b) and that the Requests must be considered investigative requests useful to the conduct of the investigation because the missing information impacts directly on how the factual conclusions reached by the OCIJ are evaluated.[15]

13. The Co-Lawyers for the Charged Person further submit that the Appeal is admissible as the OCIJ's constructive denial of the Requests violates the Charged Person's fundamental fair trial rights, including his right to prepare a defence. They suggest a possibility for admissibility of the appeal under Internal Rule 21.[16]

III. RELEVANT LAW

14. Reference is made to Internal Rules 21, 55(10), 73, 74(3) and 75, and to Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR)

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[11] Co-Prosecutors' Response para. 11.
[12] Co-Prosecutors' Response paras. 4-6.
[13] Co-Prosecutors' Response paras. 7-10.
[14] Co-Lawyers Reply, para 1.
[15] Co-Lawyers Reply, paras. 2-4.
[16] Co-Lawyers Reply, paras. 5-7.

IV. CONSIDERATIONS OF THE PRE-TRIAL CHAMBER

15. The Pre-Trial Chamber observes that in the Appeal the Co-Lawyers are claiming constructive refusal of their Requests and ask the Pre-Trial Chamber to "order the [Co-Investigating Judges] add to the Case File the information requested in [their] First Defence Request."[17]

16. The Pre-Trial Chamber notes that the First Request was filed on 17 July 2009. On 20 July 2009 the Co-Investigating Judges officially informed the Co-Lawyers for the Charged Person that "in the coming days" they were issuing a decision that "will respond to the questions [they] raised" and on 28 July 2009 they issued the Order.

17. The Pre-Trial Chamber finds that notwithstanding the fact that the Order itself does not formally refer to the First Request, the Co-Investigating Judges' formal letter of 20 July 2009 to the Co-Lawyers makes it clear that it was their intention to respond to their First Request in the Order. Further, without entering into the substantial contents of the Order, the Pre-Trial Chamber observes, as also noted by the Co-Lawyers,[18] that the First Request was actually addressed in the Order.[19] Therefore, as far as the First Request is concerned, the Pre-Trial Chamber finds that there is no constructive refusal from the Co-Investigating Judges.

18. The Pre-Trial Chamber further observes that as the Order is of general application, thus affecting all the Charged Persons in case 002, no matter whether the Co-Lawyers for the Charged Person filed a related request or not, or whether the request was refered to in the Order, the Charged Person has standing to appeal the Order.[20] No appeal against the

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[17] Appeal, para 58(d).
[18] Second Request, second paragraph.
[19] Order, see especially paras. 19, 26, 27 and 29.
[20] Pre-Trial Chamber's Decision on Admissibility of the Appeal Lodged by Khieu Samphan and Directions to the Co-Prosecutors, 22 September 2009, D164/4/7 (PTC24), para 12.

Order was filed within the time limit prescribed by Internal Rule 75 and no extension of time was sought..

19. As far as the Second Request is concerned, the Pre-Trial Chamber observes that in the Second Request the Co-Lawyers, after acknowledging that the Order addresses "general issues regarding the legality and use of torture evidence during the investigations", state that they "reiterate [their] specific questions from [their First Request]". The content of the Second Request shows that the Co-Lawyers were not satisfied with the "general" nature of the answers given by the Co-Investigating Judges in the Order and that they insisted in receiving a more detailed answer for their "specific" questions of the First Request.

20. The Pre-Trial Chamber notes that the correct procedure for the parties to challenge the nature of the answer given in an order is an appeal against it and not a subsequent request reiterating the initial request which was addressed in the order. Notwithstanding this, assuming the Co-Lawyers were confused by the lack of a formal referral in the Order to the First Request, the Pre-Trial Chamber shall examine whether this would entitle them to a right to an appeal for constructive refusal of the Second Request. To determine whether it has jurisdiction over the Appeal, the Pre-Trial Chamber shall start with an examination of the nature of the related Request.

21. The Second Request does not mention the legal grounds under which it was submitted to the Co-Investigating Judges and its indicated purpose is to "request information" and to "reiterate [the] specific questions of the [First Request]." The First Request also does not mention the legal grounds under which it was submitted to the Co-Investigating Judges however its purpose, as announced in its first paragraph, is to "formally request information". Further, as mentioned in para 12 above, in the Appeal the Co-Lawyers submit that their Requests must be considered as investigative requests useful for the conduct of the investigation as provided in Internal Rule 55(1).

22. The Pre-Trial Chamber observes that in the First Request the Co-Lawyers ask the Co-Investigating Judges to "ascertain the following information:

1. To what extent has the OCIJ identified, concretely, any material in the Introductory Submission which constitutes material obtained under torture. This would include inter alia any reports or analyses relied upon or generated by the OCP which contain information obtained by torture;

2. To what extent has the OCIJ identified, concretely, any material that is derivative from information obtained by torture;

3. To what extent has the OCIJ set standards on what constitutes information obtained by torture;

4. To what extent has the OCIJ established guidelines on the use of information obtained by torture;

5. To what extent has the OCIJ used information which was obtained by torture as a means of gathering further information;

6. To what extent does the OCIJ intend to disclose to the Charged Persons the information it has which it believes is the product of torture, or derivative thereof."

23. The Pre-Trial Chamber observes that, taking into account their purpose, the Requests are not "requests for investigative action" within the ambit of Internal Rule 74(3)(b) and as defined by the Pre-Trial Chamber in its Decision on Khieu Samphan's Translation Appeal.[21] They are not requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth.

24. The Pre-Trial Chamber further notes that it has, in general, no jurisdiction to review matters related to methods used for evaluation or admissibility of evidence by the Co-Investigating Judges as they undertake their task of searching to the truth. According to Internal Rule 87 the matter of admissibility of evidence arises at the trial stage of the

[21] Decision on Khieu Samphan's appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, para.28. A190/I/20.

criminal proceeding if a Closing Order is issued sending the Charged Person to trial. Similarly, Article 321 of the Cambodian Code of Criminal Procedure provides on the admissibility of evidence at the trial stage. Such rules give the trial judges broad discretion to decide whether or not to admit evidence.

25. The Pre-Trial Chamber finds for these reasons that the appeal cannot be declared admissible while applying Internal Rules 55 and 74.

26. The Pre-Trial Chamber further observes that the Co-Lawyers also submit that the Appeal is admissible because the Co-Investigating Judges' constructive denial of the Requests amounts to an irreparable violation of the Charged Person's fundamental fair trial rights, including the right to "adequate time and facilities for the preparation of his defence".[22] They suggest a possibility for admissibility of the Appeal under Internal Rule 21.

27. Internal Rule 21 provides:

> "Rule 21. Fundamental Principles
>
> 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
> b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;
> c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and

[22] Appeal, paras. 49-55.

d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.

28. The Pre-Trial Chamber shall examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person's rights to appeal in order to ensure that proceedings are fair and the rights of the Charged Person are safeguarded.

29. The Pre-Trial Chamber observes that the Co-Lawyers summarize the requested information as follows:

> "[information on] the procedure or protocol by which the [Co-Investigating Judges'] decide on the reliability of certain confessions".[23]

30. The Pre-Trial Chamber finds that nowhere in the laws applicable before the ECCC or in the jurisprudence of international courts in relation to Article 14(3)(b) of the ICCPR is provided that "information on the procedure and protocol used by the investigating authorities during the investigations" has to be put at the disposal of the defence in order to facilitate the preparation of a defence.

31. As the Co-Lawyers have also submitted,[24] the Pre-Trial Chamber finds that the right to adequate facilities for the preparation of someone's defence includes apart from the right to communicate with one's lawyer also the opportunity of the accused to acquaint himself with the results of the investigations, and reasonable time for preparation of the defence.[25]

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[23] Second Request, last sentence.
[24] Appeal, para 50.
[25] For an understanding of the meaning of "adequate facilities for the preparation of defence" see Article 14(3)(b) of the ICCPR and Human Rights Committee jurisprudence: *Aston Little v. Jamaica,* No. 283/1988; *O.F. v. Norway*, No. 158/1983; *Wight v. Madagascar*, No.115/1982; *Pietraroia v. Uruguay*, No. 44/1979; *Drescher Caldas v. Uruguay*, No. 43/1979; Lafuente Penarrieta v. Bolivia, No. 176/1984, see also Article 6(3)(b) of the European Convention on Human Rights; *Campbell and Fell v UK* A 80 (1984); *Jespers v. Belgium* No 8403.78.

The Pre-Trial Chamber observes that the term "results of the investigations" means the product of investigations, such as documents and records in the case file and not information on the procedure followed by investigating authorities in analysing the evidence that they have collected.

32. The rationale of the analysis of the evidence will become apparent when a Closing Order either indicting the Charged Person or dismissing the case is issued at the conclusion of the investigation. Where a Closing Order is issued, Internal Rule 67(4) requires that reasons for any decision to send a Charged Person to trial or to dismiss the case are to be given.

33. The Pre-Trial Chamber notes that two and a half years have been spent thus far on the pre-trial phase of the proceedings and that a closing order can be expected before the expiration of three years. After the issuance of a closing order, if there is an indicment of their client, the Co-Lawyers of the Charged Person have time to prepare their defence for the trial phase by examining the evidence which is available to them.[26] Anything asserted to the effect that the defence lacks reasonable time for preparing their defence will therefore not be further discussed.

34. The Pre-Trial Chamber further observes that Internal Rule 87 also gives to the Charged Person the possibility to object to the admissibility of evidence during the trial stage.[27]

35. The Pre-Trial Chamber also notes that the established procedure before the Trial Chamber for evaluation of evidence for trial is in accordance with the international standards of law and safeguards the fair trial rights of the Charged Person. Similar to the discretion granted to judges in other international tribunals,[28] the Trial Chamber of the ECCC is granted the discretion to reject requests for evidence (analogous to excluding evidence presented)

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[26] Internal Rule 55(6).
[27] For a better understanding of the provisions of Internal Rule 87, see Trial Chamber's Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, paras 5-7.
[28] Rule 95 of the Rules of Procedure and Evidence of ICTY and ICTR.

when such is "not allowed under the law".[29] The "law" applicable in Cambodia includes international instruments such as the Convention Against Torture (CAT).[30]

36. Article 15 of the CAT provides:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"

37. On 28 October 2009 the Trial Chamber noted in a decision in the case of KAING Guek Eav "Duch", in respect of documents obtained by torture:

> "The relevance of these documents is limited to the fact that they were made and,where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents".[31]

38. Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order,[32] Article 15 of the CAT is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.[33] The Pre-Trial Chamber observes that, at the time it was seized of this Appeal, the original and two translated versions of the Order were inconsistent with each other in particular in regard to paragraph 28[34] which was specifically commented in the Appeal.

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[29] Internal Rule 87(3)(d).
[30] Cambodia ratified the Convention Against Torture on 15 October 1992.
[31] See Trial Chamber Decision, 28 October 2009, E176, para. 8.
[32] Order, para.28.
[33] The drafting history of Article 15 of the CAT makes this clear. See: UN Doc E/CN.4/1285, 18 January 1978; Summary Prepared by the UN SG in Accordance with Commission Res'n 18 (XXXIV), UN Doc. E/CN.4/1314, 19 December 1978, 22.; UN Doc. E/CN.4/WG/1/WP.1, 16 February 1979; UN Doc. E/CN.4/NGO/213, 15 January 1978; Commission on Human Rights, decision 1 (XXXVI) at its 1526th meeting on 5 February 1980; Commission on Human Rights, Report of Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1367, 5 March 1980, para 82. Reproduced in the Commission on Human Rights, Report on the Thirty-Sixth Session of 4 February to 14 March 1980, UN Doc. E/1980/13, E/CN.4/1408, para.205, pp. 52-73, para.83.
[34] The Pre-Trial Chamber notes that this has since been corrected in the Zylab but not yet in the public ECCC website.

The Pre-Trial Chamber further observes that due to this inconsistency, the application of Article 15 of the CAT in relation to the evidence in question as discussed in the Order was unclear.

39. The Pre-Trial Chamber finds that the Charged Person's rights provided for in Internal Rule 21 are sufficiently safeguarded by the existing legal framework, as reasoned above. The Pre-Trial Chamber therefore finds that Internal Rule 21 does not oblige it to interpret the Internal Rules in such a way that the Appeal should be declared admissible.

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY DECIDES:

The Appeal is inadmissible.

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

Phnom Penh, 10 May 2009

Pre-Trial Chamber

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**