



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

A162111/6

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 N° 002/19-09-2007-ECCC/OCIJ (PTC08)

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

Date: 28 August 2008

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SAMN RADA	

PUBLIC

DECISION ON IENG SARY'S APPEAL AGAINST LETTER CONCERNING REQUEST FOR INFORMATION CONCERNING LEGAL OFFICER DAVID BOYLE

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

ឯកសារច្បាប់តាមប្រការ ១១៦ រដ្ឋប្បវេណី	
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SAMN RADA	

Charged Person

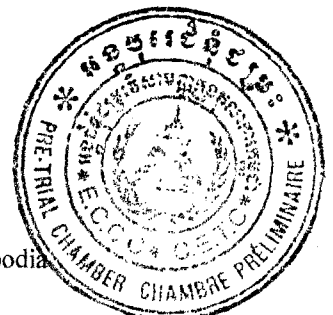
IENG Sary

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Co-Lawyers for the Defence

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), is seized of the Appeal of Mr. Ieng Sary (“the Charged Person”) against the OCIJ’s Decision on the *Defence Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle* (“Appeal”).

I. INTRODUCTION

1. On 4 March 2008 the Charged Person’s Co-Lawyers filed their Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle (“Request”).
2. The Co-Investigating Judges denied the Request in their decision issued by Letter on 26 May 2008 (“Decision of the Co-Investigating Judges”).
3. The Co-Lawyers filed a Notice of Appeal with the Office of the Co-Investigating Judges on 5 June 2008. On 6 June 2008, the Co-Lawyers filed their Appeal Brief with the Pre-Trial Chamber.
4. On 23 June 2008, the Co-Prosecutors submitted their Response to Ieng Sary’s Submission on Conflict of Interest of an OCIJ Investigator (“Response”).
5. The Lawyers for the Civil Parties did not file a response.
6. On 4 August 2008, the Pre-Trial Chamber, after considering the views of the Parties expressed in their pleadings, decided to determine the Appeal on the basis of written submissions only.
7. Pursuant to article 8.4 of the Practice Direction on Filing Documents before the ECCC, the Co-Lawyers’ Reply to the Response (“Reply”), filed on 30 June 2008, will be taken into consideration in the determination of the Appeal.

II. ADMISSIBILITY

1. Deadline for filing the Appeal Brief

8. In their Response, the Co-Prosecutors submit that “[t]he submission is barred by time as the Charged Person filed his Notice of Appeal on 6 June 2008. The deadline for its filing expired on



5 June 2008. [...] Rule 75(1) requires an appellant to file a Notice of Appeal within ten days of the date of notice of the impugned decision. In the present case, the Co-Investigating Judges issued the Impugned Letter on 26 May 2008 and the Case File Officer communicated it to the Charged Person's counsel on 27 May 2008. Accordingly, the Notice of Appeal was due on 5 June 2008".¹

9. The Co-Lawyers submit, in their Reply, that their Appeal is admissible. The Co-Lawyers submit that "[t]he Defence not only orally notified the Greffier of the OCIJ on 5 June 2008, but also signed the Record of Appeal on that date, thus giving *written* Notice of Appeal".²

10. Internal Rule 75(1) provides:

1. Except as otherwise provided in these IRs, any notice of appeal to the Chamber must be filed within 10 (ten) days from the date that notice of the decision or order was received. [...]

2. Notice of appeal shall be made in writing to the Greffier of the Co-Investigating Judges, who shall immediately inform the Co-Investigating Judges and keep a record of all pre-trial appeals. As soon as a notice of appeal is received, the Greffier of the Chamber shall be informed immediately.

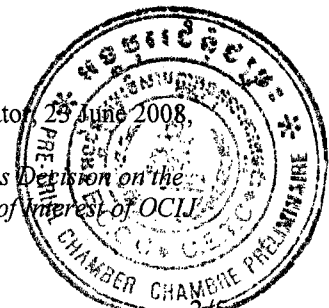
3. Submissions on appeal shall be filed by the appellant with the Greffier of the Chamber within 30 (thirty) days from the date that notice of the decision or order was received. Under exceptional circumstances, the time-limit may be extended. The Greffier shall record the date of receipt of submissions on appeal and immediately place them on the case file. The Greffier shall immediately notify the other parties and transmit a copy of the submissions.

11. The Pre-Trial Chamber observes that it is without dispute that the Decision of the Co-Investigating Judges was notified to the Charged Person on 27 May 2008. According to the Record of Appeal, the Greffier of the Co-Investigating Judges received on 5 June 2008, at 2 p.m., a Notice of Appeal from the national Co-Lawyer of the Charged Person. The Record of Appeal is signed by the 'appellant'.

12. The Pre-Trial Chamber finds, therefore, that the Notice of Appeal was filed within ten days from the date that notice of the decision was received, in accordance with Internal Rule 75(1). The Pre-Trial Chamber further notes that the Appeal Brief was filed on 6 June 2008, in accordance with Internal Rule 75(3).

¹ Co-Prosecutors' Response to Ieng Sary's Submission on Conflict of Interest of an OCIJ Investigator, A162/III/2 ("Response"), paras. 25 and 26.

² Ieng Sary's Reply to the Co-Prosecutors' Response to *Appeal of Mr. Ieng Sary against the OCIJ's Decision on the Defence Request for Information Concerning the Apparent Bias & Potential Existence of Conflict of Interest of OCIJ Legal Officer David Boyle*, 30 June 2008, A162/III/4 ("Reply"), para. 22.



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2. Scope of Jurisdiction of the Pre-Trial Chamber

13. The Co-Lawyers submit that “Internal Rule 74(3) does not state that it contains an exhaustive list of all possible grounds for appeal. [...] Furthermore, Internal Rule 73 [...] is not a limiting provision, but a provision giving it additional jurisdiction. It does not purport to limit the PTC [Pre-Trial Chamber] to having jurisdiction only over the matters listed”.³ The Co-Lawyers submit in this respect that it would be “ironic, if not unfair, to allow the OCP [Office of the Co-Prosecutors] to appeal *all* orders of the OCIJ [Office of the Co-Investigating Judges], while limiting the appellate rights of the accused. The fundamental right to a fair trial includes the right to *equality of arms*”.⁴ The Co-Lawyers finally submit that “it is not clear from the Rules that the PTC does not have power to hear all types of appeals from decisions of the OCIJ. Simply, there is no Internal Rule which denies the PTC this power. Furthermore, as stated above, the Internal Rules are not determinative in this matter. Where they conflict with the fundamental fair trial rights of Mr. IENG Sary, as they would here under the OCP’s reading, they cannot be blindly followed”.⁵
14. The Co-Prosecutors submit that the Appeal is inadmissible, since it “is clearly beyond the scope of Rule 74(3)”.⁶ According to the Co-Prosecutors, “Rule 74(3) exhaustively enumerates the types of orders against which a charged person may appeal to the Pre-Trial Chamber. It clearly does not envisage an appeal against an order refusing to provide information”.⁷
15. The Pre-Trial Chamber notes that Internal Rule 73 provides:

Additional Jurisdiction of the Pre-Trial Chamber

In addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges, as set out in the Agreement and the ECCC Law, the Chamber shall have sole jurisdiction over:

- a) appeals against decisions of the Co-Investigating Judges, as provided in Rule 74;
- b) applications to annul investigative action, as provided in Rule 76; and
- c) the appeals provided for in Rules 11(5) and (6); 23(7) and (9); 35(6) and 38(3) of these IRs.

16. Internal Rule 74 provides, in relevant part:

³ Reply, paras. 17 and 18.

⁴ Reply, para. 19.

⁵ Reply, para. 20.

⁶ Response, para. 24.

⁷ Response, para. 21.



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Grounds for Pre-Trial Appeals

1. No appeal shall lie against decisions of the Co-Investigating Judges where the matter has already been heard by the Chamber pursuant to the dispute settlement provisions in Rule 72.
2. The Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.
3. The Charged Person may appeal against the following orders of the Co-Investigating Judges:
 - a) confirming the jurisdiction of the ECCC;
 - b) refusing requests for investigative action allowed under these IRs;
 - c) refusing requests for the restitution of seized items;
 - d) refusing requests for expert reports allowed under these IRs;
 - e) refusing requests for additional expert investigation allowed under these IRs;
 - f) relating to provisional detention or bail;
 - g) refusing an application to seize the Chamber for annulment of investigative action; or
 - h) relating to protective measures.
4. [...]

17. The Pre-Trial Chamber finds that neither Internal Rule 73(c) nor 74(3) allows the Charged Person to appeal against the Decision of the Co-Investigating Judges. Therefore, the Pre-Trial Chamber has, on the basis of these rules, no jurisdiction over the Appeal.

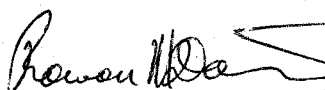
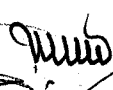



18. As to the asserted violation of the principle of equality of arms, the Pre-Trial Chamber notes that Internal Rule 74(2) allows the Co-Prosecutors to appeal against all *orders*. Since the Decision of the Co-Investigating Judges does not constitute an order, no issue as to the principle of equality of arms arises.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The appeal is inadmissible. 

Phnom Penh, 28 August 2008

Pre-Trial Chamber

Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Vuthy PRAK Kimsan

