



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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

លេខ/No# -30-

Case File N° 002/14-12-2009-ECCC/PTC (08)

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

Date: 3 May 2011

PUBLIC (REDACTED)

DECISION ON IENG SARY'S REQUEST TO RECLASSIFY ALL PTC08 DOCUMENTS AS PUBLIC

Office of the Co-Investigating Judges

YOU Bunleng
Siegfried BLUNK

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Dale Lysak

Charged Person

IENG Sary

Co-Lawyers for the Charged Person

ANG Udom
Michael G. KARNAVAS

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| ORIGINAL DOCUMENT/DOCUMENT ORIGINAL | |
| ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): | |
| 03 / 05 / 2011 | |
| ម៉ោង (Time/Heure) : | |
| 14 : 35 | |
| មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé | |
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Ieng Sary’s Request to Reclassify all PTC08 Documents as Public” filed by the Co-Lawyers for Ieng Sary on 28 March 2011 (the “Request”).¹

1. By their Request, the Co-Lawyers ask the Pre-Trial Chamber to reclassify from “Strictly Confidential” to “Public” all the documents in case PTC08, which pertain to an investigation conducted pursuant to Internal Rule 35 on allegations of interference with the administration of justice by an employee of [REDACTED] (the “Respondent”), upon an application made by the Co-Lawyers.² The Co-Lawyers argue that there is no reason for these documents to be classified as strictly confidential and that the parties, the public and the ECCC’s donors have the right to know about the matters raised in this case.³
2. On 4 April 2011, the Co-Prosecutors have requested leave to file a response to the Co-Lawyers’ Request,⁴ which was denied by the Pre-Trial Chamber on the basis that the Co-Prosecutors lack standing in respect of the Co-Lawyers’ Request, the sole respondent being [REDACTED].⁵
3. By a response filed on 11 April 2011, the Respondent opposes the reclassification of the documents as “Public” on the grounds that (i) the Pre-Trial Chamber has correctly maintained the confidentiality of the investigation conducted in this case; (ii) public disclosure may be detrimental to his reputation; (iii) the Co-Lawyers attempt to litigate the matter in the public domain rather than using the appropriate channels.⁶

¹ Ieng Sary’s Request to reclassify all PTC08 documents as public, 28 March 2011, Doc. No. 24 (“Co-Lawyers’ Request”).

² Ieng Sary’s Request for Investigation Under Internal Rule 35 into the Actions of [REDACTED]

³ Co-Lawyers’ Request, para. 1.

⁴ [REDACTED] Request for an Extension of Time to file their Response to Ieng Sary’s Request to Reclassify all PTC08 Documents as Public, 4 April 2011, Doc. No. 25.

⁵ Decision on the [REDACTED] Request for an Extension of Time to File their Response to Ieng Sary’s Request to Reclassify all PTC08 Documents as Public, 8 April 2011, Doc. No. 26.

⁶ [REDACTED]’s Response to Ieng Sary’s Request to Reclassify all PTC08 Documents as Public, 11 April 2011, Doc. No. 27, para. 1.



4. The Co-Lawyers filed a reply on 26 April 2011 (the “Reply”).⁷ The Pre-Trial Chamber notes that Article 3.14 of the the Filing of Documents Before the ECCC (“Practice Direction on Filing”), rev. 6⁸, upon which the request is based and which will be further discussed below, envisages that the parties may be given an opportunity to be heard prior to any reclassification of document being made by the Chamber. The Pre-Trial Chamber considers that where a party requests the reclassification of document in a case of investigation on allegations of interference with the administration of justice, which is *sui generis* procedure, the parties are entitled to state their views once, without being entitled to reply to the submissions of the other party. In any event, the person affected by the procedures that are asked to be made public, in that case the Respondent, shall be heard last. The Reply will thus not be considered.
5. The documents in the case PTC08 have been, upon filing, classified as “Stricly Confidential” by the Pre-Trial Chamber. As such, they were and remain “open only to the Judges and such other persons, including court staff who require access in the discharge of their duties, expressly given access by the Court” in accordance with the Practice Direction on Classification and Management of Case-Related Information (“Practice Direction on Classification”).⁹
6. The Co-Lawyers’ Request is based on Article 3.14 of the Practice Direction on Filing, which envisages that documents on the case file may be reclassified *inter alia* by the Pre-Trial Chamber, after having heard the parties. This provision reads:
- “3.14 Where required in the interests of justice, Co-Investigating Judges or a Chamber seised of a case may re-classify any document on the case file. Affected parties will be given an opportunity to be heard either prior to such a decision being made, or during any period of a temporary re-classification that is necessary to protect information that may be confidential or strictly confidential. In any event, parties to the case will be notified of any temporary re-classifications and of any decisions on re-classification.”

⁷ Ieng Sary’s Reply to ██████████’s Response to Ieng Sary’s Request to Reclassify all PTC08 Documents as public, 26 April 2011, Doc. No. 28, para. 1.

⁸ Practice Direction ECCC/01/2007/Rev. 6 as amended on 2 March 2011.

⁹ Practice Direction on Classification and Management of Case-Related Information, 004/2009, adoted on 5 June 2009, Article 2(d)(ii).



7. The Pre-Trial Chamber notes that the provisions related to the confidentiality of documents contained in the Practice Direction on Filing, including Article 3.14 relied upon by the Co-Lawyers, deal with the confidentiality level of documents in a case file opened following the filing of an Introductory Submission by the Co-Prosecutors.¹⁰ They do not address specifically cases of investigation on allegations of interference with the administration of justice, which shall be seen in this regards as a *sui generis* procedure. However, the Chamber considers that these provisions, in the absence of specific provisions dealing with the confidentiality of cases of interference with the administration of justice, can serve as a guidance in deciding upon on the current matter as they provide useful indication on the power of the Chamber to decide on the confidentiality level of documents and the possibility to request reclassification.
8. In particular, the Practice Directions on Filing and the Practice Direction on Classification provide that a party who files a document in a criminal case file may propose a classification but it remains for the judicial authority seized of the case to determine the appropriate classification¹¹ considering “the need to balance the confidentiality of the judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy”.¹² The Practice Direction on Classification, while providing guidance as to the category of case file documents that may be classified as “Public”, “Confidential” or “Strictly Confidential” by establishing principles applicable in the absence of a Court decision, also makes it clear that it is to the authority seized of the case to decide on the classification of documents.¹³ It is noted that there is no indication as to how documents pertaining to an investigation on allegations of interference with the administration of justice would be classified in the absence of a Court’s decision as the Practice Direction on Classification also solely addresses the confidentiality of document in a criminal case file. Noting that the rules applicable at the ECCC give discretion to the judicial authority seized of a criminal case file

¹⁰ See in particular Articles 1.1, 3.12 and 3.13 of the Practice Direction on Filing.

¹¹ Article 3.12 of the Practice Direction on Filing.

¹² Article 1.2 of the Practice Direction on Classification. *See also* Internal Rule 21(1).

¹³ Practice Direction on Classification, Articles 4-6.



to decide on the confidentiality level of documents while balancing the competing interests, the Pre-Trial Chamber considers that the same principle applies when dealing with other types of cases which are not explicitly covered by the Practice Directions.

9. In the exercise of its discretion, the Chamber may, in the absence of any rule dealing with the matter in Cambodian Law, seek guidance in the procedural rules established at the international level, as directed by Article 12(1) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea. The Chamber notes in this regards that other international tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Court (“ICC”), have adopted specific rules providing that documents related to an investigation on allegation of interference with the administration of Justice or misconduct of Court officials or lawyers are to remain confidential.¹⁴ At the ICTY, only if sufficient grounds have been determined by a Chamber in order to proceed against a person for contempt is the case being made public.¹⁵ These rules are a strong indication that in cases of investigation on allegation of interference with the administration of justice, the need to preserve the reputation of an individual may outweigh the need for publicity of the proceedings. For the reasons set out below, the Pre-Trial Chamber finds that a similar approach is warranted in the present case.
10. The Chamber emphasizes that the current case concerns an investigation conducted pursuant to Internal Rule 35(2)(b) by the Pre-Trial Chamber on the allegations of interference with the administration of justice made by the Co-Lawyers against an employee of [REDACTED]. After having conducted an investigation, and notably on the basis of [REDACTED]’s testimony during an *in camera* hearing, the Pre-Trial Chamber found that “there is no fact in this case indicating that [REDACTED] would have interfered with the administration

¹⁴ ICTY, Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, 6 May 2004, IT/227 (“ICTY Practice Direction”), Articles 5, 8, 9 and 11. ICC, Code of Professional Conduct for Counsel, ICC-ASP/4/Res. 1, 2 December 2005, Articles 34 (5) (providing for the confidentiality of complaints alleging misconduct of counsel), Article 39 (3) (providing for the confidentiality of all information concerning the disciplinary procedure). See also ICC, Rules of Procedure and Evidence, Article 26(1) (providing for the confidentiality of complaints alleging misconduct of Court’s officials).

¹⁵ ICTY Practice Direction, Article 15.



of Justice, in contravention to Internal Rule 35(1), as asserted in the Application. There is therefore no sufficient ground for instigating proceedings against [REDACTED] pursuant to Internal Rule 35(2)(b).”¹⁶ The Pre-Trial Chamber decided unanimously to terminate the investigation in case PTC08 on the alleged actions, which were found to be without merit. The Co-Lawyers themselves, during the hearing, informed the Co-Rapporteurs that they were satisfied with the answers provided and “prepared to let the matter drop as it is”.¹⁷

11. The Pre-Trial Chamber emphasises that no judicial proceedings were instituted in this case. The interest of the public in the documents in this file is thus limited and does not outweigh the need to preserve the reputation of the individual concerned. The Chamber further notes that in their filings, and notably in their current Request and Reply, the Co-Lawyers continue on making allegations on purportedly unethical conduct by various officials of the Court, which they argue, stem from the investigation. The Pre-Trial Chamber considers that these allegations go well beyond the result of the investigation and their disclosure may affect the reputation of third persons, who were not part of the current proceedings.
12. In these circumstances, the Pre-Trial Chamber decides that the documents in Case PTC08 will remain “Strictly Confidential”.

¹⁶Fourth Decision on Ieng Sary’s Request for Investigation under Internal Rule 35 into the actions of [REDACTED]

¹⁷ Transcripts of the Hearing held on 17 February 2011, p. 14



THEREFORE THE PRE-TRIAL CHAMBER DECIDES UNANIMOUSLY

Dismiss the Co-Lawyers' Request.

PhnomPenh, 3 May 2011 ^{CR}

Pre-Trial Chamber

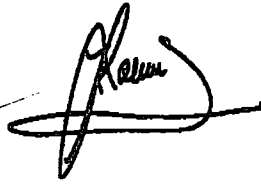
President




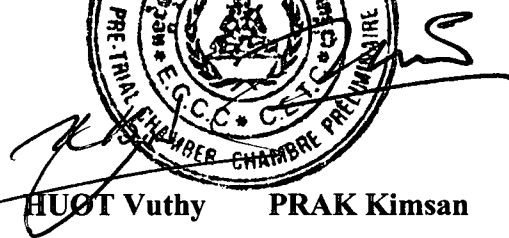
Rowan DOWNING



NEY Thol



Katinka LAHUIS



HUOT Vuthy

PRAK Kimsan