



អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC05)

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

Date: 30 April 2008

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PUBLIC

DECISION ON APPEAL CONCERNING CONTACT BETWEEN THE CHARGED PERSON AND HIS WIFE

Co-Prosecutors

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YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

Charged Person

IENG Sary

Lawyers for the Civil Parties

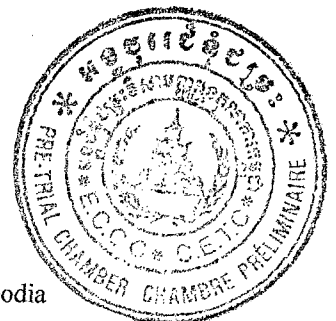
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A104/II/7

I. INTRODUCTION

1. The Pre-Trial Chamber is seized of an appeal lodged on 29 January 2008 by the Co-Lawyers for the Charged Person against a letter of the Co-Investigating Judges dated 22 January 2008 ("Letter of the Co-Investigating Judges").
2. In this letter, the Co-Investigating Judges stated:

In response to your letter dated 20 December 2007 regarding the authorization of visits to IENG Thirith by IENG Sary, we would like to inform you that given the ongoing judicial investigation in Case File N.002/19-09-2007-ECCC/OCIJ, we are not planning any change in the conditions that currently apply for visits. Therefore, no meeting between IENG Thirith and your client is possible for the time being.
3. The Pre-Trial Chamber ruled on 21 March 2008 on the admissibility of this appeal. The Pre-Trial Chamber declared the appeal admissible, considering that:

As a matter involving the right to respect human dignity and taking into account its duty as prescribed in Rule 21(1) of the Internal Rules, the Pre-Trial Chamber finds that this appeal falls within the scope of Rule 74(3)(f) of the Internal Rules.
4. Meanwhile, on 17 March 2008, the Co-Investigating Judges sent a memorandum to the Chief of ECCC Provisional Detention Facility authorizing visits between Ieng Sary and Ieng Thirith once a week. According to the Co-Investigating Judges, this authorization could be given since some investigative actions which were previously necessary had been completed.
5. On 25 March 2008, the Co-Lawyers filed substantive submissions on the appeal. Reference was made to the memorandum of the Co-Investigating Judges dated 17 March 2008 mentioned above. The Pre-Trial Chamber therefore understands that the scope of the appeal encompasses this latter decision. This will avoid complications concerning the status of this latter decision after the Pre-Trial Chamber's decision on the current appeal.
6. On 1 April 2008, the Co-Prosecutors responded to the substantive submissions and declared that they do not oppose the appeal although they do not agree with the legal and factual arguments put forward by the Co-Lawyers.
7. No response was filed by the Civil Parties.



8. The Pre-Trial Chamber finds that the matter is sufficiently argued by the Parties and that an oral hearing is therefore not required. The Pre-Trial Chamber will determine the appeal on the basis of the written submissions in accordance with Rule 77 of the Internal Rules read in conjunction with the Practice Direction ECCC/01/2007/Rev.1 on filing of documents before the ECCC.

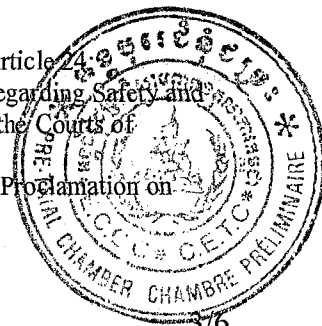
II- CONSIDERATIONS

9. The Pre-Trial Chamber notes that it can be inferred from the request made by the Charged Person and the Letter of the Co-Investigating Judges that detainees at the ECCC Provisional Detention Facility are not allowed to meet and are, in fact, segregated one from another. This is apparently on the basis of instructions of the Co-Investigating Judges.
10. The Pre-Trial Chamber also notes that the ECCC Provisional Detention Facility is under the authority of the Royal Government of Cambodia¹ and subject to Cambodian law. Within his authority under Article 3(2) of Prakas No. 217 and Article 4.1 of Prison Procedure No. 31, the Chief of the ECCC Provisional Detention Facility is currently in the process of adopting Rules Governing the Detention of Persons Awaiting Trial or Appeal before the ECCC or Otherwise Detained on the Authority of the Extraordinary Chambers in the Courts of Cambodia (the "draft Detention Rules of the ECCC").
11. The Pre-Trial Chamber considers that two different types of decision might have the effect of segregation: i) an order of segregation issued by the Chief of the Provisional Detention Facility pursuant to his authority set out in the applicable detention rules and ii) an order limiting contacts between a detainee and any other detainee issued by the Co-Investigating Judges.
12. Reading the Case File and the submissions made by the parties, there is no indication that the Chief of the ECCC Provisional Detention Facility, who has sole jurisdiction to order segregation on the basis of the Cambodian Law² and the draft Detention Rules of the ECCC³, has made such decision.

¹ Agreement between the United Nations and the Royal Government of Cambodia, 6 June 2003, Article 24; Supplementary Agreement between the United Nations and the Royal Government of Cambodia regarding Safety and Security, 14 March 2006, Article 9; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2004, Article 33.

² Prison Procedure No. 3 – Separation of Prisoners, adopted in accordance with Article 4(3) of the Proclamation on administration of prisons

³ Rule 3 of the Draft Detention Rules of the ECCC.



A 104/E/7

13. As for the Co-Investigating Judges' authority to limit the contacts between detainees to protect the interests of the investigation, Internal Rules 55(5) provides, in its relevant parts:

In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. (...) To that end, the Co-Investigating Judges:

- b) Take any appropriate measures to provide for the safety and support of potential witnesses and other sources.
- d) Issue such orders as may be necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders.

14. The Pre-Trial Chamber finds that Rule 55(5) is sufficiently broad in its scope to give the Co-Investigating Judges jurisdiction to limit contacts between the Charged Person and any other person in the interest of the investigation.

15. This jurisdiction of the Co-Investigating Judges is however limited by Internal Rule 21(2) which reads:

Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.

16. These findings are in accordance with the practice at international tribunals which has established a clear distinction between (i) the segregation of a detained person from all or some of the other detained persons for the purpose of preserving the order in the prison and the security of the detainees and (ii) the restriction of communication and contact between a detained person and any other person to avoid any prejudice to the outcome of the proceedings.⁴ The rules applicable at the International Criminal Court (ICC), at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International

⁴*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, "Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui", Judge Syliva Steiner, 13 March 2008 (the "Chui decision"), p.8.



A104/II/7

Criminal Tribunal for the Rwanda (ICTR) state that judicial authorities have jurisdiction in the latter case⁵, but not in the former.⁶

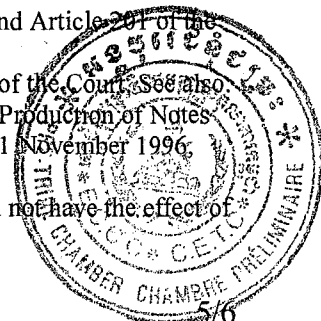
17. It is clear from the practice at international tribunals that limitation of contact has to be ordered by a reasoned decision.⁷ From this reasoning, it must be clear which interest is protected and any limitation should be based upon the protection of such interest.
18. The Pre-Trial Chamber notes that the decisions of the Co-Investigating Judges made in their Letter dated 22 January 2008 and in the memorandum dated 17 March 2008 are not adequately reasoned. The Co-Investigating Judges do not explain how the limitation of contacts is a necessary and proportional measure to protect the interests of the investigation. Furthermore, no attention is paid in the Letter of the Co-Investigating Judges to the implications of their decision, which leads to a *de facto* segregation.⁸
19. The Charged Persons Ieng Sary and Ieng Thirith have been married for 57 years. The alleged crimes were committed 30 years ago so the Charged Persons have had all that time to discuss any matter related to such allegations.
20. In these circumstances, it is not clear to the Pre-Trial Chamber how limiting contact between the two Charged Persons protects the interest of the investigation.
21. Furthermore, the long duration of the measures imposed since the investigation started on 19 November 2007, without proper justification, affects the Charged Person's right to be treated with humanity and must therefore cease. The Charged Persons should be allowed to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility. The memorandum of the Co-Investigating Judges authorizing visits once a week is not in accordance with these rules.

⁵ At the ICTY and ICTR, the decision to limit contacts is made by the Registrar, on request of the Prosecutor, and is subject to revision by the President of the Court. At the ICC, such decision is made by the Chamber seized of the case, on request of the Prosecutor. See: Rule 64 of the Rules of Detention of the ICTY and ICTR and Rule 101 of the ICC's Regulation of the Court.

⁶ Rule 43 of the Rules of Detention of the ICTY, Rule 38 of the Rules of Detention of the ICTR and Article 201 of the ICC Regulations of Registry. See also the Chui decision, pages 8 and 9.

⁷ Rule 64 of the ICTY and ICTR Rules of Detention and Regulation 101 of the ICC's Regulation of the Court. See also *Prosecutor v. Delalic*, IT-96-21-A, "Decision of the President on the Prosecutor's Motion for the Production of Notes exchanged between Zejnil Delalic and Zdravko Mucic", President of the International Tribunal, 11 November 1996, para. 14.

⁸ In the Chui decision, the International Criminal Court found that an order to limit contact should not have the effect of segregation: Chui decision, pages 8 and 9.



A104/D/7

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

- 1) The appeal is allowed;
- 2) The decisions of the Co-Investigating Judges expressed in the Letter dated 22 January and in the Memorandum dated 17 March 2008 are set aside;
- 3) The Pre-Trial Chamber decision shall have the effect that the Charged Persons be allowed to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility.

In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal.

GIVEN BY the Pre-Trial Chamber, ost

Phnom Penh, 30 April 2008

Pre-Trial Chamber

President


Rowan DOWNING


NEY Thol


Katinka LAHUIS


HUOT Vuthy

