D171/4/5

ព្រះរាជាណាចក្រកម្ពុជា
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 (PTC 29)**

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

Date: **22 December 2009**

ឯកសារដើម
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PUBLIC

DECISION ON IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONSTRUCTIVE DENIAL OF IENG SARY'S THIRD REQUEST FOR INVESTIGATIVE ACTION

ឯកសារបានចំតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
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Co-Investigating Judges
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of the Appeal of the Co-Lawyers for Ieng Sary (the "Charged Person") against the Constructive Denial of the Charged Person's Third Request for Investigative Action, filed on 21 October 2009 (the "Appeal").[1]

PROCEDURAL BACKGROUND

1. On 21 May 2009 the Co-Lawyers for the Charged Person filed "Ieng Sary's Third Request for Investigative Action" asking the Co-Investigating Judges to place on the Case File information relating to the applicable law, strategy and the procedures of the judicial investigation. The Co-Lawyers also asked for information related to the qualifications and experience of the Investigators of the Office of the Co-Investigating Judges (OCIJ) and their Standard Operating Procedures.[2]

2. On 26 May 2009, the Greffiers of the Co-Investigating Judges replied to the Co-Lawyers for the Charged Person, stating that "[t]he Co-Investigating Judges shall issue an order as soon as possible and, in any event, before the end of the judicial investigation".[3]

3. On 19 October 2009, the Co-Lawyers for the Charged Person filed a Notice of Appeal[4] and the Appeal claiming that the Co-Investigating Judges constructively denied their Third Request for Investigative Action.

4. On 6 November 2009 the Co-Prosecutors filed a Response to the Appeal in which they argue that the Appeal is inadmissible and that even if it were admissible, "judicial economy would require the Pre-Trial Chamber remand it back to the Co-Investigating Judges with a direction to dispose of the Request within a fixed and expeditious timeframe".[5]

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[1] Ieng Sary's Appeal against the Co-Investigating Judges' Constructive Denial of Ieng Sary's Third Request for Investigative Action", 21 October 2009, (the "Appeal"), D171/4/1.
[2] Ieng Sary's Third Request for Investigative Action, 21 May 2009, (the "Request"), D171/1.
[3] Letter from Greffiers of the Co-Investigating Judges to Ieng Sary's Defense Team, 26 May 2009, D171/1.
[4] Notice of Appeal, 19 October 2009, D171/4.
[5] Co-Prosecutors' Response to Ieng Sary's Appeal against the Alleged Constructive Denial by the Co-Investigating Judges of his Request for Investigative Action, 6 November 2009, (the "Co-Prosecutors' Response"), D171/4/2, paras. 1-4.

5. On 19 November 2009 the Pre-Trial Chamber issued Directions to the Co-Lawyers for the Charged Person giving them an opportunity to submit their views in relation to the Co-Prosecutors' submissions on issues related to admissibility of the Appeal.[6] On 23 November 2009 the Co-Lawyers for the Charged Person submitted their Reply to these Directions.[7]

REASONING

6. The Pre-Trial Chamber has previously considered the issue of constructive refusal in the flowing terms:

> *"The Pre-Trial Chamber considers that by its nature, the Co-Lawyers' Request requires timely attention. The Pre-Trial Chamber notes by analogy that Article 170 of the Cambodian Code of Criminal Procedure allows charged persons to seize the Investigative Chamber directly when an investigating judge fails to issue an order responding to a request to appoint an expert within thirty days.*
>
> *The Pre-Trial Chamber considers that with the passage of time, the failure of the Co-Investigating Judges to decide on [a] Request makes it impossible for the Charged Person to obtain the benefit which he sought. [...] The Pre-Trial Chamber notes that in the case of Boodhoo and others v. Attorney General of Trinidad and Tobago, the Privy Council found that "delay in producing a judgement would be capable of depriving an individual of his right to the protection of the law" in circumstances where "the parties were unable to obtain from the decision the benefit which they should".*

[6] Directions to the Co-Lawyers for the Charged Person concerning "Co-Prosecutors' Response to Ieng Sary's Appeal against the Alleged Constructive Denial by the Co-Investigating Judges of his Request for Investigative Action, 19 November 2009, D171/4/3.

[7] Ieng Sary's Reply to Co-Prosecutor's Response to the Appeal Against the OCIJ Constructive Denial of Ieng Sary's Third Request for investigative action, 23 November 2009, D171/4/4.

The Pre-Trial Chamber finds that the failure of the Co-Investigating Judges to rule on [a] Request as soon as possible, in circumstances where a delay in making a decision deprives the Charged Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of the application, which can be appealed against under Internal Rule 74[...]". [8]

7. The Pre-Trial Chamber further notes that in relation to requests for investigative action the Code of Criminal Procedure of the Kingdom of Cambodia hold other similar provisions for the failure of the Co-Investigative Judges to make decisions under Article 133 as in Article 170, being the provision mentioned in the decision cited above.

8. The Pre-Trial Chamber observes that, taking into account its purpose, the Request is not a "request 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.[9] Requests for investigative action are 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.

9. The Pre-Trial Chamber finds that the Appeal is not seeking something which deprives the Charged Person of the possibility of obtaining the benefit he seeks which can be appealed under Internal Rule 74(3)(b). The Pre-Trial Chamber finds that it would be improper to use the notion of constructive refusal to found a right of appeal where no substantive right exists in any event, as the request made was not one falling within the right of the Charged Person to make under the laws applicable to the ECCC or its Internal Rules..

[8] Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, paras. 22-24 (footnotes omitted).
[9] 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.

10. The Pre-Trial Chamber further observes that on 14 December 2009 the Co-Investigating Judges issued their Response to Ieng Sary's Third Request for Investigative Action.[10]

11. For these reasons the Pre-Trial Chamber finds that there is no constructive refusal from the Co-Investigating Judges to undertake the requested action which is appealable and the Appeal is therefore inadmissible.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Appeal is inadmissible.

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

Phnom Penh, 22 December 2009

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Vuthy PRAK Kimsan

[10] Co-Investigating Judges Response to Ieng Sary's "'Request for Investigative Action', concerning, inter alia, the Strategy of the Co-Investigating Judges in regard to the Judicial Investigation", 14 December 2009, D171/5.