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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 23 / 09 / 2009
ម៉ោង (Time/Heure): 09 : 40
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: 23 September 2009

Classification: PUBLIC

ឯកសារបានត្រឹមត្រូវតាមច្បាប់
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ធ្វើការបញ្ជាក់ (Certified Date/Date de certification): 23 / 09 / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

DECISION ON GROUP 1 – CIVIL PARTIES’ CO-LAWYERS’ REQUEST THAT THE TRIAL CHAMBER FACILITATE THE DISCLOSURE OF AN UN-OIOS REPORT TO THE PARTIES

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INTRODUCTION

1. The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the Civil Parties (Group 1) request entitled “Group 1 – Civil Parties’ Co-Lawyers’ Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties”, filed on 11 May 2009.¹ The other parties have responded to this Request.

SUBMISSIONS

2. In their Request, the Civil Parties (Group 1) note that the United Nations Office of Internal Oversight Services (“UN-OIOS”) conducted an investigation into allegations of corruption within the ECCC. This investigation resulted in the publication of a report (“UN-OIOS Report”), the existence of which was publicised. The contents of the UN-OIOS Report however, remain confidential and have not been disclosed to the public or the parties.² The Request seeks the assistance of the Trial Chamber in facilitating the disclosure of the UN-OIOS Report to the parties.³

3. Specifically, the Request argues that the existence of the UN-OIOS Report is directly relevant to the present trial, as its potential publication after the close of the proceedings may expose the trial judgment to claims on the part of the Accused and others that corruption within the ECCC rendered the trial unfair, or that corruption constitutes an abuse of process warranting a permanent stay of the proceedings.⁴ It contends that, if made, these types of claims would “not only undermine the principle of finality of proceedings, but would render elusive the justice and closure for which the victims of these proceedings have been waiting.”⁵ Further, the Request submits that the only way to insulate the judgment from being so undermined is to permit the airing of any issues raised by the UN-OIOS Report by the parties prior to the close of the trial.⁶ Accordingly, the Trial Chamber is requested to: (i) formally request the United Nations Secretary-General to provide the Trial Chamber with a copy of the UN-OIOS Report; (ii) disclose the UN-OIOS Report to the parties in the present proceedings; (iii) invite the parties to make written submission regarding the content of the UN-OIOS Report within 21 days of its receipt; and (iv) instruct the Accused that any

¹ “Group 1 – Civil Parties’ Co-Lawyers’ Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties”, 11 May 2009 (Document E65) (“Request”). Notification of the Request was made in Khmer on 20 May 2009 and in French on 2 June 2009.

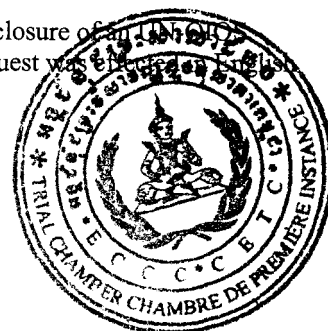
² Request, para. 1.

³ Request, paras 2, 4.

⁴ Request, paras 2, 8, 9, 13, 15, 16.

⁵ Request, para. 2.

⁶ Request, para. 9.



written submission filed on his behalf include a statement as to his continued commitment to the admissions he has made in these proceedings.⁷

4. On 22 May 2009, the Trial Chamber issued an Order directing Parties other than Civil Parties (Group 1) to file written submissions regarding the Request.⁸

5. On 2 June 2009, the Co-Prosecutors' filed their response to the Request.⁹ In their Response, the Co-Prosecutors first argue that the Trial Chamber should defer its decision on the Request until such time as the Pre-Trial Chamber rules on four substantive appeals then-pending before it ("Pre-Trial Chamber Appeals").¹⁰ The Co-Prosecutors' Response notes that the Pre-Trial Chamber Appeals raise similar issues to those in the Request, that they were first in time and that they are expected to be decided jointly and expeditiously.¹¹ In the alternative, it argues that, should the Trial Chamber not defer its decision until resolution of the Pre-Trial Chamber Appeals, the Request should be denied.¹² In particular, the Request is deficient given that the Accused has not himself raised any of the fair trial issues.¹³ Further, the Request does not demonstrate a nexus between the allegations of corruption, which concern whether certain national administrative officials of the ECCC paid money to obtain their positions, and the judicial decision-making functions of the ECCC.¹⁴ Moreover, according to the Co-Prosecutors' Response, any investigation of the allegations of corruption falls either to the disciplinary jurisdiction of the Government of Cambodia or to the criminal jurisdiction of the municipal court of Phnom Penh — but not to that of the ECCC.¹⁵ Notwithstanding the ECCC's lack of jurisdiction over the matter, the Co-Prosecutors' Response

⁷ Request, para. 18.

⁸ "Direction Setting Time Limits for the Filing of Submissions by the Parties to Group 1 – Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties", 22 May 2009 (Document E65/1) ("Trial Chamber Order").

⁹ "Co-Prosecutors' Response to Certain Civil Parties' Request for Disclosure of the UN-OIOS Report", 2 June 2009 (Document E65/2) ("Co-Prosecutors' Response").

¹⁰ Co-Prosecutors' Response, paras 2-5, referring to: (i) Case of NUON Chea, Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 21), D158/5/1/1 ("NUON Chea Appeal"); (ii) Case of IENG Sary, Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 20), D158/5/3/1 ("IENG Sary Appeal"); (iii) Case of IENG Thirith, Ieng Thirith Appeal Against the Office of the Co-Investigating Judges' 'Order on Request for Investigative Action' of 3 April 2009, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 19), D158/5/4/1 ("IENG Thirith Appeal"); and (iv) Case of KHIEU Samphan, Appel de la defense de M. Khieu Samphan contre l'ordonnance des co-juges d'instruction sur demande d'acte d'instruction en date du 03 avril 2009, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 22), D158/5/2/1 ("KHIEU Samphan Appeal").

¹¹ Co-Prosecutors' Response, paras 2-5, 21(i).

¹² Co-Prosecutors' Response, paras 6-20, 21(ii).

¹³ Co-Prosecutors' Response, paras 11-12.

¹⁴ Co-Prosecutors' Response, paras 13-16.

¹⁵ Co-Prosecutors' Response, paras 17-18.



concludes that “the credibility of this Court’s process would be enhanced by a release of the OIOS Report and a timely and credible resolution of this issue.”¹⁶

6. Civil Parties Groups 2, 3 and 4 filed responses to the Request on 2 June 2009,¹⁷ 11 June 2009¹⁸ and 11 June 2009,¹⁹ respectively, in which they generally adopted the arguments made in the Request and joined in seeking the disclosure of the UN-OIOS Report.²⁰

7. On 10 June 2009, the Defence filed a response to the Request,²¹ in which it noted concerns regarding the allegations of corruption but abstained from pronouncing itself on the merits of the Request.

8. On 15 June 2009, the Civil Parties (Group 1) filed a reply to the Co-Prosecutors’ Response.²² The Group 1 Reply first rejects the contention that the Trial Chamber should defer its decision on the Request until such time as the Pre-Trial Chamber Appeals are resolved. It argues that the Trial Chamber may not delegate to the Pre-Trial Chamber its assigned responsibility to maintain “the fair and expeditious conduct of the proceedings”.²³ The Group 1 Reply further contends that the Co-Prosecutors’ Response is internally inconsistent in that it both counsels for the release of the UN-OIOS Report and puts forth arguments against its disclosure pursuant to the Request.²⁴ The Group 1 Reply adds that the Civil Parties (Group 1) have an interest in ensuring the fairness of the proceedings and that it is not incumbent upon them to establish a nexus between corruption allegations and judicial decision-making as a pre-requisite to the disclosure of the UN-OIOS Report.²⁵ The Group 1 Reply stresses that it is not requesting that the Trial Chamber investigate the corruption allegations but merely that it facilitate the disclosure of the UN-OIOS Report to the parties.²⁶

¹⁶ Co-Prosecutors’ Response, para. 20.

¹⁷ “Group 2 – Co-Lawyers for Civil Parties’ Response on Request by Group 1 – Civil Parties’ Co-Lawyers on the Disclosure of an UN-OIOS Report to the Parties”, 4 June 2009 (Document E65/3) (“Group 2 Response”).

¹⁸ “Group 3 Civil Parties’ Co-Lawyers Response to the Group 1 Civil Parties’ Co-Lawyers’ Request Concerning Disclosure of an OIOS Report”, original in French filed 11 June 2009 (Document E65/7) (“Group 3 Response”).

¹⁹ “Group 4 Civil Parties’ Co-Lawyers Request for Disclosure of the OIOS Report, Joint to the One Filed by the Group 1 Civil Parties’ Co-Lawyers”, confidential, original in French filed 11 June 2009 (Document E65/6) (“Group 4 Response”).

²⁰ See Group 2 Response, para. 11; Group 3 Response, p. 4; Group 4 Response, para. 3.

²¹ “Defence Submissions Concerning the Group 1 Civil Parties’ Request for the Trial Chamber to Facilitate the Disclosure of a UN-OIOS Report”, original in French filed 10 June 2009 (Document E65/4) (“Defence Response”).

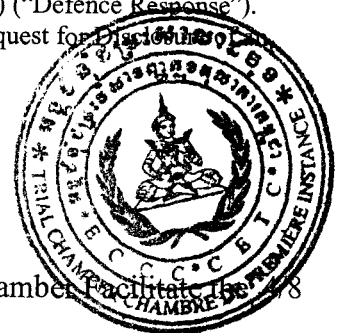
²² “Group 1 – Civil Parties’ Co-Lawyers’ Reply to Co-Prosecutors’ Response to CPG-1 Request for Disclosure of the UN-OIOS Report”, 15 June 2009 (Document E65/5) (“Group 1 Reply”).

²³ Group 1 Reply, para. 5, *citing* Internal Rule 79(7).

²⁴ Group 1 Reply, paras 11-13.

²⁵ Group 1 Reply, paras 16, 18.

²⁶ Group 1 Reply, paras 19-20.



9. On 9 July 2009, the Trial Chamber sent a letter to the United Nations Secretary-General²⁷ seeking clarification of a statement made by the Office of the Spokesperson for the Secretary-General on 30 March 2009 that suggested that the allegations of corruption investigated in the UN-OIOS Report also concerned some national judges at the ECCC.²⁸ A follow-up letter to the United Nations Secretary-General was sent on 10 August 2009.²⁹

10. On 14 August 2009, the Trial Chamber received a letter dated 28 July 2009 from the United Nations Under-Secretary-General for Legal Affairs in response to its 9 July 2009 Letter.³⁰ The UN Response states that the 30 March 2009 statement suggesting that the allegations of corruption involved national judges at the ECCC was inaccurate. The UN Response noted that the Spokesperson for the Secretary-General made a clarifying statement on 31 March 2009 and officially retracted the 30 March 2009 statement on 28 July 2009. The UN Response further added that the United Nations would follow “standard procedures for consultation” before taking a decision on whether the UN-OIOS Report would be disclosed.

FINDINGS

A. Previous Rulings of the Pre-Trial Chamber

11. As a preliminary matter, the Trial Chamber notes that the Pre-Trial Chamber recently rendered decisions denying as inadmissible the Pre-Trial Chamber Appeals filed by charged persons NUON Chea, IENG Sary, IENG Thirith and KHIEU Samphan.³¹ The Pre-Trial Decisions found that the applicable ECCC Internal Rules did not provide for “a request for investigative

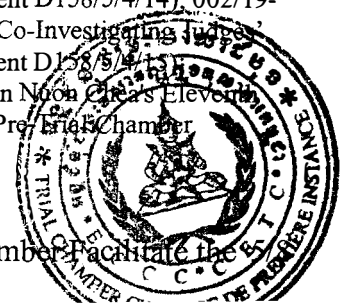
²⁷ “Letter from the Trial Chamber to the United Nations Secretary-General”, dated 9 July 2009 (Document E65/8) (“9 July 2009 Letter”). The 9 July 2009 letter, as well as subsequent correspondence between the Trial Chamber and the United Nations on this matter, was filed as “strictly confidential”. The Trial Chamber considers that there are no longer any reasons for maintaining the “strictly confidential” status of these documents and will order Court Management Section accordingly.

²⁸ 9 July 2009 Letter, pp. 2-4.

²⁹ “Letter from the Trial Chamber dated 10 August 2009”, dated 10 August 2009 (Document E65/8/1).

³⁰ “Response by the UN Legal Counsel to the Letter of the Trial Chamber dated 9 July 2009”, dated 28 July 2009 (Document E65/8/2) (“UN Response”); *see also* “Response by the Assistant Secretary-General in charge of the Office of Legal Affairs to the Letter of the Trial Chamber dated 10 August 2009”, dated 24 August 2009 (Document E65/8/3). Though the UN Response is dated 28 July 2009, the Trial Chamber did not receive it until 14 August 2009, after it had sent its follow-up letter dated 10 August 2009.

³¹ 002/19-09-2007-ECCC/OCIJ (PTC 21), “Decision on Appeal Against the Co-Investigating Judges’ Order on the Charged Person’s Eleventh Request for Investigative Action”, 18 August 2009 (Document D158/5/1/15); 002/19-09-2007-ECCC/OCIJ (PTC 19) “Decision on the Appeal of the Charged Person Against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action”, 25 August 2009 (Document D158/5/4/14); 002/19-09-2007-ECCC/OCIJ (PTC 20) “Decision on the Appeal of the Charged Person Against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action”, 25 August 2009 (Document D158/5/4/15); “Decision on the Appeal by the Charged Person against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action”, 27 August 2009 (Document D158/5/2/15) (collectively, “Pre-Trial Chamber Decisions”).



action on a factual situation that may suggest interference with the administration of justice or corruption in ECCC.”³² It further found that the charged persons’ fair trial rights were sufficiently safeguarded.

12. The Trial Chamber notes the decisions of the Pre-Trial Chamber but recalls that it is not bound by them. Further, the Pre-Trial Chamber Decisions concern a different, if related, set of requests made by other parties before the Co-Investigating Judges of the ECCC.

B. The Request

13. Article 33 (new) of the ECCC Law requires that the Trial Chamber ensure the fairness of the proceedings before it. Rule 21(1) of the Internal Rules, which sets out the “Fundamental Principles” governing trials at the ECCC, further states in relevant part:

[t]he 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 [...]

14. As an initial matter, the Trial Chamber notes that the Request alleges claims that go to the Civil Parties’ own interests, namely ensuring legal certainty and the transparency of proceedings.³³ Though these claims are tied to the fair trial rights of the Accused, the Trial Chamber rejects the Co-Prosecutors’ contention that the Civil Parties are in effect acting on behalf of the Accused by raising these claims.

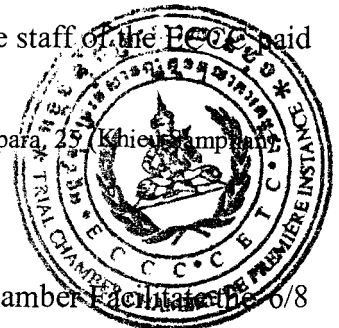
15. The Trial Chamber recalls that the Request does not claim that the corruption allegations that are the subject of the UN-OIOS Report concern the judicial processes of the ECCC. Nor is there any indication that allegations of this nature were investigated in the UN-OIOS Report. The UN Response informed the Trial Chamber that there was “no information to suggest that there has been or is corruption among any of the judges of the ECCC, nor information that would suggest that the ECCC judicial process is in any way prejudiced by corruption.”³⁴

16. Rather, it appears that the allegations of corruption that are the focus of the UN-OIOS Report (and of the Request) concern whether certain national administrative staff of the ECCC paid

³² Pre-Trial Decisions, para. 28 (Nuon Chea), para. 26 (Ieng Sary), para. 31 (Ieng Thirith), para. 27 (Khieu Samphan).

³³ Request, para. 13; *see also* Group 2 Response, para. 5.

³⁴ UN Response.



money to obtain or retain their positions. The Trial Chamber does not consider that there is any link between these allegations and the fair trial rights of any of the parties in the present case, that justifies it in requesting disclosure of the UN-OIOS Report. Disclosure of the UN-OIOS Report will not threaten the Civil Parties' interest in "legal certainty" where there is no indication that the Report contains information which might undermine the Trial Chamber's judgment. Nor would disclosure of the UN-OIOS Report impact the "transparency of proceedings" given that there is no suggestion that the Report concerns the present case.

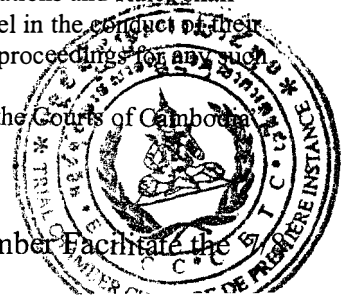
17. The Trial Chamber welcomes efforts to investigate thoroughly any credible allegations of corruption that concern the ECCC. The Trial Chamber must, however, act within the confines of its jurisdiction. Here, the allegations of corruption have no bearing on the fair trial rights of the parties and are not subject to a judicial remedy by this Trial Chamber.³⁵ Further, while the Trial Chamber retains the power to sanction any interference in the administration of justice (pursuant to Rule 35 of the Internal Rules) and to act to disqualify one or more of its judges for bias (pursuant to Rule 34 of the Internal Rules), it is not presently seized of any such requests.

18. The remedies sought by the Request accordingly lie outside the purview of the Trial Chamber and need instead to be pursued through the appropriate administrative, disciplinary and/or legal mechanisms. The Trial Chamber recalls that Rule 6(5) of the Internal Rules provides that proceedings for misconduct or negligence of national staff in the conduct of their duties are to be handled by the "appropriate national authorities".³⁶ The Trial Chamber is aware of press reports indicating that requests for disclosure of the UN-OIOS Report's findings on the allegations of corruption have been filed with the local Cambodian courts, as well as directly with the United Nations. The United Nations and the Royal Government of Cambodia also recently announced an agreement to establish an Independent Counsellor who, according to the joint announcement, will be empowered to confidentially receive allegations of corruption within the ECCC and to address such concerns.³⁷

³⁵ Cf. *Prosecutor v. Nzirorera*, ICTR-98-44-T, "Decision on Nzirorera's Motion for Withdrawal of Counsel", 3 October 2001, para. 20 (finding that "allegations of financial dishonesty by Counsel is an administrative matter that falls under the power of the Registry, not a Trial Chamber.").

³⁶ See also Rule 6(4) of the Internal Rules as regards international staff ("The UN Staff Regulations and Rules shall exclusively govern any proceedings for misconduct or negligence of all international personnel in the conduct of their duties. International personnel shall not be subject to any other administrative or disciplinary proceedings for any such actions.").

³⁷ See "Agreement to Establish an Independent Counsellor at the Extraordinary Chambers in the Courts of Cambodia" dated 11 August 2009.



19. In the instant case, the Request has failed to establish a basis upon which the Trial Chamber could grant the demands contained therein.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Request.

ORDERS the Court Management Section to reclassify the following documents from “strictly confidential” to “public” and to notify them to the parties:

- The 9 July 2009 letter from the Trial Chamber to the United Nations Secretary-General (Document E65/8);
- The 10 August 2009 letter from the Trial Chamber to the United Nations Secretary-General (Document E65/8/1 and its annex E65/8/1.1); and
- The 28 July 2009 letter from the United Nations Under-Secretary-General for Legal Affairs to the Trial Chamber (Document E65/8/2 and its follow-up Document E65/8/3). *DM JB.*

Phnom Penh, 23 September 2009
President of the Trial Chamber



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LM Noud