



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

D140/4/5
ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

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 28)

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

Date: 14 December 2009

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	
14 / 12 / 2009	
ម៉ោង (Time/Heure) : 15:00	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé	
du dossier: C.A. 7uu	

PUBLIC/REDACTED

DECISION ON IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER ON REQUEST FOR ADDITIONAL EXPERT

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YET Chakriya
SENG Bunkheang
Anees AHMED

Charged Person

IENG Sary

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CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification):	
14 / 12 / 2009	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé	
du dossier: Uch ARUN	

Co-Investigating Judges

YOU Bun Leng
Marcel Lemonde



Philippe CANONNE
Pierre Olivier SUR
Elizabeth RABESANDRATANA
Olivier BAHUGNE
David BLACKMAN
Annie DELAHAIE
Fabienne TRUSSES-NAPROUS
Patrick BEAUDOIN
Marie GUIRAUD
LYMA NGUYEN

Unrepresented Civil Parties



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of an “Appeal against the Co-Investigating Judges’ Order on Request for Additional Expert” filed by the Co-Lawyers for Ieng Sary (the “Charged Person”) on 16 September 2009 (the “Appeal”).¹

BACKGROUND

1. On 30 October 2008, the Co-Lawyers for Nuon Chea filed before the Co-Investigating Judges their “Sixth Request for Investigative Action” (the “Nuon Chea’s Sixth Request”).² Nuon Chea’s Sixth Request asked for “the [Co-Investigating Judges] to attempt to determine – with the assistance of a qualified [REDACTED] expert (or experts) – [REDACTED] [REDACTED]”.³ In addition it sought the appointment of such an expert or experts.⁴
2. On 10 March 2009 the Co-Investigating Judges responded affirmatively to Nuon Chea’s Sixth Request,⁵ and appointed Dr Ewa Maria Tabeau and Mr They Kheam as [REDACTED] experts, to report by 31 August 2009.⁶ On 28 April 2009, the Co-Investigating Judges extended the deadline for submission of the expert report to 30 September 2009.⁷
3. On 22 July 2009 the Co-Lawyers for the Charged Person filed before the Co-Investigating Judges “Ieng Sary’s Request for Additional [REDACTED] Expert” (the “Ieng Sary’s Request”).⁸ The grounds for this Request were that Dr Tabeau lacks impartiality and competence, and that the Co-Investigating Judges did not consult the Co-Lawyers for the Charged Person prior to appointing [REDACTED] experts.⁹
4. On 18 August 2009 the Co-Investigating Judges denied Ieng Sary’s Request.¹⁰ The Co-Investigating Judges found that “there is no evidence that could raise reasonable doubts about the impartiality or competence” of Dr Tabeau, and declared that the OCIJ is not obliged under the Internal Rules to consult the parties before appointing an expert.¹¹

¹ Ieng Sary’s Appeal against the Co-Investigating Judges’ Order on Request for Additional Expert filed on 16 September 2009 (the “Appeal”), D140/4/1.

² “Sixth Request for Investigative Action” filed on 30 October 2008 (the “Nuon Chea’s Sixth Request”), D113.

³ “Nuon Chea’s Sixth Request, para 9.

⁴ “Nuon Chea’s Sixth Request, para 1.

⁵ “Response to the Sixth Request for Investigative Action (D113) and Partial Response to the Fifth Request for Investigative Action (D105)”, 10 March 2009, D113/2 and D105/2.

⁶ “Expertise Order”, 10 March 2009, D140.

⁷ “Expertise Order Correction”, 28 April 2009, D140/1.

⁸ “Ieng Sary’s Request for Additional [REDACTED] Expert”, 22 July 2009, (the “Ieng Sary’s Request”), D140/2.

⁹ “Ieng Sary’s Request, para 5.

¹⁰ “Order on Request for Additional [REDACTED] Expert”, 18 August 2009, (the “Order”) D140/3.

¹¹ The Order, paras 14-15.



5. On 16 September 2009 the Co-Lawyers for the Charged Person filed the Appeal. In the Appeal, the Co-Lawyers for the Charged Person request an oral hearing.¹² The Co-Prosecutors in their Response to the Appeal, which was filed on 30 September 2009, disagree with the Request, arguing that it is misconceived and unsupported by credible evidence.¹³ The Co-Prosecutors requested further that the Appeal be determined on the basis of written submissions, without a public oral hearing.¹⁴
6. Subsequent to the filing of the Appeal, Dr Tabeau and Mr They Kheam jointly filed on 30 September 2009 their [REDACTED] Expert Report.¹⁵
7. On 21 October 2009 the Pre-Trial Chamber decided to determine the Appeal on the basis of written submissions alone, and directed the Co-Lawyers for the Charged Person to Reply to the Co-Prosecutors' Response within the deadline provided for in Article 8.4 of the Practice Direction ECCC/01/2007/Rev.4.¹⁶ No Reply was filed within the deadline.

ADMISSIBILITY

8. On 18 August 2009, the Co-Investigating Judges issued their Order on the Charged Person's Request for Additional [REDACTED] Expert. The Order was notified to the Charged Person on 20 August 2009. On 27 August 2009 the Co-Lawyers for the Charged Person filed a Notice of Appeal. The Appeal brief was filed on 16 September 2009 and within the time limit provided for in Internal Rule 75(3).
9. The Pre-Trial Chamber observes that the Appeal refers to a request filed under Internal Rule 31(10) refused by the Co-Investigating Judges and that the Co-Lawyers argue that the Appeal is admissible as "where the Co-Investigating Judges reject such request", that ruling may be appealed as provided for in Internal Rule 74 (3) (e) which reads.¹⁷

"[t]he Charged Person may appeal against the following orders of the Co-Investigating Judges:

a) [...]

¹² The Appeal, paras 8-10.

¹³ The "Co-Prosecutors' Response to Ieng Sary's Appeal Against the Refusal of his Request by the Co-Investigating Judges for the Appointment of an Additional [REDACTED] Expert", filed on 30 September 2009 (the "Co-Prosecutors' Response"), D140/4/2, para. 3.

¹⁴ Co-Prosecutors' Response, paras 4-8.

¹⁵ "[REDACTED] Expert Report: Khmer Rouge Victims in Cambodia, April 1975 – January 1979. A Critical Assessment of Major Estimates", 30 September 2009, D140/1/1.

¹⁶ "Decision on Request for an Oral Public Hearing on Ieng Sary's Appeal against the Co-Investigating Judges' Order on Request for Additional Expert", 21 October 2009, D140/4/4.

¹⁷ The Appeal, paras. 6-7.

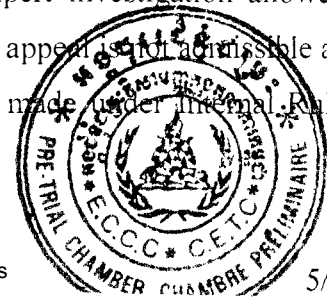


e) refusing requests for additional expert investigation allowed under these [Internal Rules]”.

10. Internal Rule 31(10) provides:

“The Co-Prosecutors, the Charged Person or Accused, the Civil Party, or their lawyers may request the Co-Investigating Judges or the Chambers to appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report. The request must be in writing and give reasons. The request shall be ruled upon by the Co-Investigative Judges or the Chambers as soon as possible and in any event before the end of the investigation or proceedings. Where the Co-Investigating Judges reject such a request, the ruling may be appealed to the Pre-Trial Chamber.”

11. The Pre-Trial Chamber notices that the Co-Investigating Judges had already appointed two experts and the request to appoint additional experts is substantially based on the assertion of the Co-Lawyers that the appointed international expert fails to fulfil the requirements to be appointed as such. Internal Rule 31(10) provides for two situations where additional experts can be appointed. The first situation is to conduct an examination which has not previously been conducted. The second situation refers to the re-examination of a matter already the subject of an expert report.
12. When the request subject to this Appeal was filed, there was already an appointment of [REDACTED] experts whose report was not then completed. Their report was filed on 30 September 2009, after the Appeal of the Co-Lawyers was filed. The Pre-Trial Chamber finds that the request made by the Co-Lawyers was therefore not within the ambit of the first situation referred to in Internal Rule 31(10), as the experts had already been appointed and the request was not related to what was then the “conduct of a new examination”.
13. As for the second situation under Internal Rule 31 (10) in respect of an appointment of an additional expert “to re-examine a matter already subject to an expert report” the Pre-Trial Chamber finds that as the request and the appeal based upon the rejection of such request predate the expert report there is no legal basis for the request.
14. Considering Internal Rule 74(3)(e), the jurisdiction of the Pre-Trial Chamber to determine appeals is limited to the refusal of “requests for additional expert investigation allowed under these Internal Rules”. The Pre-Trial Chamber finds that the appeal is not admissible as the request before the Co-Investigating Judges was not validly made under Internal Rule 31(10) and was thus made without legal basis.



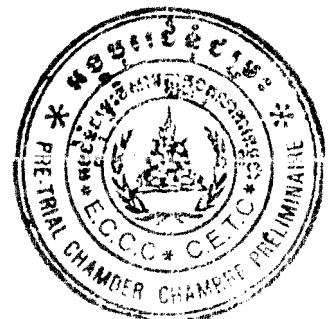
15. The Pre-Trial Chamber notes that Internal Rules appear to be silent as to whether a request for an additional expert pursuant to rule 31(10) is to be filed before or after the filing of an original expert report, particularly where the rules speak of appointing “additional experts to conduct new examinations”. However, the use of the term “new” in this sentence leads one to understand that the necessity for additional expertise would usually arise after some examination has already been undertaken.
16. The Pre-Trial Chamber finds that according to Cambodian law, it is not usual to appoint additional or contra-expert before the filing of the report of an expert. Thus, Article 170 of the Cambodian Code of Criminal Procedure, entitled “Notification of Conclusions of Expert Reports”, relevantly provides that the investigating judge shall inform the Royal Prosecutor “of that report” and summon the charged person and civil parties to inform them “about the conclusions of the expert”. Afterwards, “The investigating judge shall set a time limit within which the Royal Prosecutor, the charged person and the civil party can request for additional expertise or the appointment of a counter-expert”.
17. The Pre-Trial Chamber notes that the procedural rules established at international level are silent when it comes to the timing of requests for assignment of additional experts, however, it appears that “challenges to qualifications of the witness as an expert” are permitted only after the disclosure of the report of an expert. Thus, in the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the rule concerning experts is *94bis*. and in the Special Tribunal for Lebanon (STL) it is rule 161. The rule in each of these tribunals is in very similar terms. The ICTY rule provides as follows:

“Rule *94bis* Testimony of Expert Witnesses

(A) [...]

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

- (i) it accepts the expert witness statement and/or report; or
- (ii) it wishes to cross-examine the expert witness; and



(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) [...]”

18. The Pre-Trial Chamber finds that the provisions in the Internal Rules are in accordance with those established at the international level.
19. The Pre-Trial Chamber further notes that the Co-Lawyers argue that the refusal by the Co-Investigating Judges to appoint additional expert infringes upon the Charged Person’s right to fair trial.
20. In this respect, Internal Rule 21 provides:

“Rule 21. Fundamental Principles

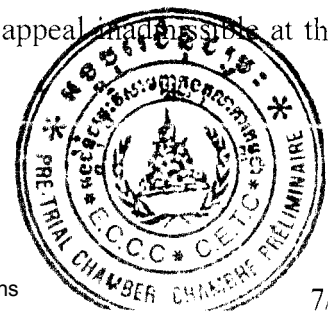
1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity 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. [...]

21. The Pre-Trial Chamber will examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person’s rights to appeal in order to ensure that proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties.
22. The Pre-Trial Chamber considers that the provisions in the Internal Rules still permit the defence to seek the appointment of an expert to re-examine a matter, now the subject of an expert report. Further it is noted that the report can be challenged before the Trial Chamber¹⁸ In addition the Trial Chamber may, where it considers that a new investigation is necessary, at any time order additional investigations.¹⁹ The Pre-Trial Chamber therefore finds that no fundamental rights of the defence are harmed by declaring the appeal inadmissible at this

¹⁸ Internal Rule 87.

¹⁹ Internal Rule 93 (1).



stage of the proceedings. Therefore Internal Rule 21 does not compel the Pre-Trial Chamber to allow the appeal.

23. The Pre-Trial Chamber finds the appeal not admissible.

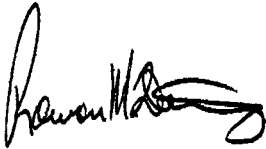
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

Declares the appeal inadmissible.

Phnom Penh, 14 December 2009 *Rath*

Pre-Trial Chamber

President



Rowan DOWNING



NEY Thol



Katinka LAHUIS



HOUT Vuthy



PRAK Kimsan