



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
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 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi
លេខ/No: D 345/5/១១

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 Extraordinary Chambers in the Courts of Cambodia
 Chambres extraordinaires au sein des tribunaux cambodgiens
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 du dossier: Uch Arun

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 (PTC60)

Before: Judge PRAK Kimsan, President
 Judge Rowan DOWNING
 Judge NEY Thol
 Judge Catherine MARCHI-UEL
 Judge HUOT Vuthy

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PUBLIC
DECISION ON IENG SARY'S APPEAL AGAINST CO-INVESTIGATING JUDGES' ORDER ON IENG SARY'S MOTION AGAINST THE APPLICATION OF COMMAND RESPONSIBILITY

Co-Prosecutors

CHEA Leang
 Andrew CAYLEY

Charged Person

IENG Sary

Lawyers for the Civil Parties

Mr. NY Chandy
 Mr. Madhev MOHAN
 Ms. Lima NGUYEN
 Mr. KIM Mengkhy
 Ms. MOCH Sovannary
 Ms. Elizabeth-Joelle RABESANDRATANA
 Ms. Annie DELAHAIE
 Mr. Philippe CANONNE
 Ms. Martine JACQUIN
 Ms. Fabienne TRUSSES-NAPROUS
 Ms. Françoise GAUTRY

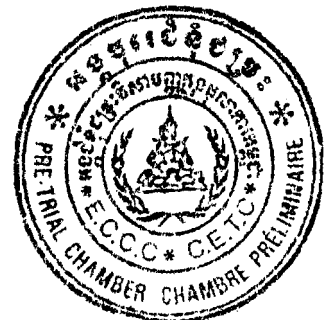
Co-Lawyers for the Charged Person

ANG Udom
 Michael G. KARNAVAS



Ms. Isabelle DURAND
Ms. Christine MARTINEAU
Ms. Laure DESFORGES
Mr. Ferdinand DJAMMEN
Mr. LOR Chunthy
Mr. SIN Soworn
Mr. SAM Sokong
Mr. HONG Kim Suon
Mr. KONG Pisey
Mr. KONG Heng
Ms. Silke STUDZINSKY
Mr. Olivier BAHUGNE
Ms. Marie GUIRAUD
Mr. Patrick BAUDOUIN
Ms. CHET Vanly
Mr. PICH Ang
Mr. Julien RIVET
Mr. Pascal AUBOIN

Unrepresented Civil Parties:



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Ieng Sary’s Appeal against the [Co-Investigating Judges’] Order on Ieng Sary’s Motion Against the Application of Command Responsibility” filed by the Co-Lawyers for the Charged Person Ieng Sary on 13 April 2010 (“the Appeal”).¹

I. INTRODUCTION

1. On 15 February 2010, the Co-Lawyers for Ieng Sary filed “Ieng Sary’s Motion against the Application of Command Responsibility at the ECCC” (“the Motion”)² and “Ieng Sary’s Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC (“the Alternative Motion”).³ The Co-Lawyers ask the Co-Investigating Judges to “reject the applicability of command responsibility liability before the ECCC”, or that in the case they find that it may be applied, the Co-Investigating Judges should: “a) Reject the application of command responsibility to crimes listed in Article 3 new of the Establishment law; b) Apply command responsibility only to situations involving an international armed conflict; c) Apply command responsibility only where there was a causal relationship between the superior’s actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a pre-existing legal duty to prevent or punish; and d) Reject the application of command responsibility to specific intent crimes, such as genocide.”
2. On 19 March 2010, the Co-Investigating Judges issued their Order on Ieng Sary’s Motion against the Application of Command Responsibility (“the Order”).⁴ The Co-Investigating Judges decided not to consider the Motion because they considered it to be a “request for declaratory relief”.⁵ The Co-Investigating Judges did “not consider the Alternative Motion” because they found it to be a “duplicitous filing” “entirely in disregard” of their

¹ Ieng Sary’s Appeal against the OCIJ’s Order on Ieng Sary’s Motion Against the Application of Command Responsibility, 13 April 2010, D345/5/1.

² Ieng Sary’s Motion against the Application of Command Responsibility at the ECCC, 15 February 2010, D345/2.

³ Ieng Sary’s Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3.

⁴ Order on Ieng Sary’s Motion against the Application of Command Responsibility, 19 March 2010, D345/4.

⁵ Order, paras. 10-13.



direction relating to the Co-lawyers' Request for extension of page limits for the Motion.⁶ The Co-Investigating Judges, note in the Order that they will deal with the legal issues related to command responsibility, if necessary, in the Closing Order.⁷

3. On 25 March 2010, the Co-Lawyers for the Charged Person filed a notice of appeal against the Order and on 13 April 2010 they filed the Appeal. In the Appeal the Co-Lawyers request the Pre-Trial Chamber to: a) declare the appeal admissible under Internal Rules 74(3) (a) and 21; b) Reverse the OCIJ's rejection of the Motions, and 3) declare that command responsibility is inapplicable at the ECCC.
4. On 4 May 2010 the Co-Prosecutors filed their Response to the Appeal ("the Co-Prosecutors' Response").⁸ The Co-Prosecutors ask the Pre-Trial Chamber to declare the Appeal inadmissible or in the alternative, were it to find the Appeal admissible, that it should deny the Appeal, uphold the Order and declare the Command Responsibility applicable at the ECCC.⁹
5. On 11 May 2010 the Pre-Trial Chamber scheduled a hearing *in camera* on the Appeal for 25 May 2010 at 9:00 a.m. On 21 May 2010, the Co-Prosecutors informed the Pre-Trial Chamber that they do not intend to present oral arguments at the hearing on this Appeal.¹⁰ On the same day of 21 May 2010 the Co-Lawyers for the Charged Person filed a written Reply¹¹ to the Co-Prosecutors' Response which "was drafted to track [their] planned oral submissions" (the "Reply"). The Co-Lawyers indicated that "should the Pre-Trial Chamber be of the opinion that no oral Reply is necessary and the written Reply just submitted is sufficient, [they] do not object to the hearing being cancelled."¹² On 26 May 2010 the Pre-Trial Chamber cancelled the hearing on the Appeal.¹³

⁶ Order, paras. 6-9.

⁷ Order, para.12.

⁸ Co-Prosecutors' Response to Ieng Sary's Appeal on Command Responsibility, 4 May 2010, D345/5/11.

⁹ Co-Prosecutors' Response, paras. 62-63.

¹⁰ Withdrawal of Notice of Appearance, 21 May 2010, D345/5/8.

¹¹ Ieng Sary's Written Reply in support of the Oral Submissions to the Hearing before the Pre-Trial Chamber Concerning the Co-Prosecutors' Response to Ieng Sary's Appeal on command Responsibility, 21 May 2010, D345/5/9.

¹² E-mail, dated 21 May 2010, from the Legal Consultant of Ieng Sary's Defence Team to a Greffier of the Pre-Trial Chamber.

¹³ Cancellation Order, 26 May 2010, D345/5/10.

Decision on Ieng Sary's Appeal against OCIJ's Order on Ieng Sary's Motion Against the Application of 4/7 Command Responsibility



6. In their Reply to the Co-Prosecutors' Response the Co-Lawyers for the Charged Person request the Pre-Trial Chamber to grant the Appeal and the relief requested therein.

II. ADMISSIBILITY OF THE APPEAL

7. The Order was issued and notified to the parties on 19 March 2010. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 25 March 2010. The Appeal was filed on 13 April 2010 and therefore within the time provided for in Internal Rule 75(3) of the ECCC Internal Rules (the "Internal Rules").
8. In the Appeal, the Co-Lawyers, while acknowledging that the Order "did not explicitly confirm the jurisdiction of the ECCC to apply command responsibility", submit that Internal Rule 74(3) (a) provides for the right to appeal orders that confirm the jurisdiction of the ECCC. Further, referring to paragraph 12 of the Order, the Co-Lawyers consider that the Co-Investigating Judges' refusal to address the Motions at this stage, results in a constructive denial of the relief requested and, referring to previous Pre-Trial Chamber jurisprudence,¹⁴ the Co-Lawyers ask the Pre-Trial Chamber to find the appeal admissible on grounds of constructive refusal. The Co-Lawyers also submit that the Appeal is admissible under Internal Rule 21, claiming that the failure of the Co-Investigating Judges to address jurisdictional challenges will violate the Charged Person's right to adequate time and facilities to prepare a defence.¹⁵
9. In their Response to the Appeal the Co-Prosecutors submit that the Appeal "is not provided for in [Internal Rule] 74(3), and does not otherwise raise issues affecting the Appellant's fundamental right to a fair trial."¹⁶ They argue that "the subject matter of this Appeal is essentially declaratory in nature" and that "ECCC's procedural framework does not require the Co-Investigating Judges to issue declaratory orders, and, consistently with that, it does not provide for appeals against any declaratory decisions that the Co-

¹⁴ Appeal, para. 1.

¹⁵ Appeal, paras. 2 and 3.

¹⁶ Co-Prosecutors' Response, para. 5.

Investigating Judges may issue.”¹⁷ The Co-Prosecutors suggest that the Appeal “is not within the limited grounds of appeal provided for in [Internal Rule] 74(3)(a), insofar as a decision on the availability of a mode of liability does not amount to ‘confirming the jurisdiction of the Court’.”¹⁸ The Co-Prosecutors also contend that Internal Rule 21 does not require the Pre-Trial Chamber to adopt a broader interpretation of a Charged Person’s right to appeal under Rule 74(3)(a), as his rights are preserved by the ability to make such submissions before the Trial and the Supreme Court Chambers.¹⁹

10. In the Reply the Co-Lawyers for the Charged Person insist that the Co-Investigating Judges’ refusal to decide on their Motions results in constructive denial of the requests and “thus confirm[s the] jurisdiction of the ECCC.” They explain that the Appeal does not seek declaratory relief and repeat that the Appeal is “also admissible pursuant to [Internal] Rule 21 since the legal issues raised affect [the Charged Person’s] right to adequate time and facilities to prepare his defence.”²⁰

11. The Pre-Trial Chamber notes that Internal Rule 74(3)(a) provides:

“The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges:

a) confirming the jurisdiction of the ECCC.”

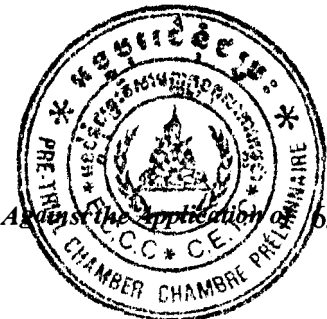
The Pre-Trial Chamber observes, as also acknowledged by the Co-Lawyers in the Appeal, that this Appeal is related to a decision of the Co-Investigating Judges to “not make a decision” and not to a decision confirming the jurisdiction of the ECCC. The Co-Lawyers assert that the Co-Investigating Judges’ refusal to address the Motions at this stage, results in a constructive denial of the relief requested and request to the Pre-Trial Chamber to find the appeal admissible on grounds of constructive refusal. The Pre-Trial Chamber notes that the Co-Investigating Judges stated that “they will give due consideration to the legal issues

¹⁷ Co-Prosecutors’ Response, para. 6.

¹⁸ Co-Prosecutors’ Response, para. 7.

¹⁹ Co-Prosecutors’ Response, para. 8.

²⁰ Reply, para 4/a-f.



related to command responsibility, as may be necessary, in the drafting of the Closing Order.”²¹ In this respect, the Pre-Trial Chamber observes that the Internal Rules do not oblige the Co-Investigating Judges to decide on this matter before the Closing Order. However, at this stage of the proceedings a Closing Order is imminent, and if the Closing Order confirms the jurisdiction of ECCC over Command Responsibility, the Charged Person may consider the effect of Internal Rule 67 (5) when read in conjunction with Internal Rule 74(3) (a).

At this point, it is speculative as to what, if any, consideration the Co-Investigating Judges may give to the jurisdiction of the ECCC in respect of command responsibility. The Co-Investigating Judges are not obliged to give declaratory decisions, as has been effectively requested in the Motion, and the Pre-Trial Chamber will not provide advisory opinions and cannot fetter the exercise of the discretions of the Co-Investigating Judges in respect of their decisions to be expressed in the Closing Order.

The Pre-Trial Chamber finds that no fundamental rights of the Charged Person are harmed by declaring the appeal inadmissible at this stage of the proceedings and that Internal Rule 21 does not compel the Pre-Trial Chamber to render the Appeal admissible.

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

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

The Appeal is inadmissible.

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

Phnom Penh, 9 June 2010

Pre-Trial Chamber

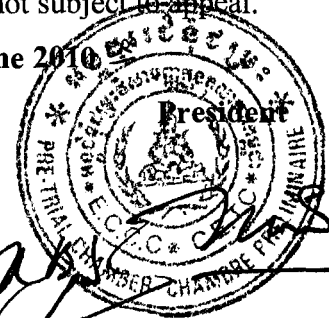

Rowan DOWNING


NEY Thol


Catherine MARCHI-UHEL


HUOT Vuthy


PRAK Kimsan



²¹ Order, para. 12.