



SUMMARY OF PRE-TRIAL CHAMBER RULING REGARDING NEW INVESTIGATIONS OF FORMER KHMER ROUGE LEADERS

September 3, 2009

By Michael Saliba, J.D. (Northwestern Law '09), Consultant to the Center for International Human Rights, Northwestern University School of Law

On September 2, 2009, the Pre-Trial Chamber issued a ruling related to a disagreement between the international and national co-prosecutors, ending a nine-month impasse on the issue of whether the ECCC will proceed with additional criminal investigations against former leaders of the Khmer Rouge.

Procedural Background and Relevant Law

The disagreement between the co-prosecutors arose late last year when the national co-prosecutor, Chea Leang, objected to the request of the former international co-prosecutor, Robert Petit, to forward two new Introductory Submissions and one Supplementary Submission to the Office of Co-Investigating judges (OCIJ). The two new Introductory Submissions would create the possibility of a third and fourth trial at the ECCC while the Supplementary Submission would open up the possibility of a fifth charged person in Case 002, where four former leaders of the Khmer Rouge are currently awaiting prosecution. (On March 5, 2009, the international co-prosecutor withdrew his request for the Pre-Trial Chamber to adjudicate the dispute related to the Supplementary Submission because upon additional investigation, he was satisfied with the evidence that the suspect was dead.)

Unable to resolve the disagreement, the international co-prosecutor submitted the dispute to the Pre-Trial Chamber on December 3, 2008. (The international co-prosecutor was not required to submit the dispute to the Pre-Trial Chamber. In fact, it is the co-prosecutor objecting to the new Introductory Submissions—the national co-prosecutor in this case—who carries the burden of challenging the decision before the Pre-Trial Chamber. In the absence of such a challenge, after receiving 30 days notice, the international co-prosecutor technically would be permitted to proceed with the new Introductory Submissions.) Pursuant to the ECCC's constitutional documents and the Internal Rules, a super-majority of four out of five judges is required to reach a binding decision. (The Pre-Trial Chamber consists of three Cambodian judges and two international judges.) In the absence of a super-majority decision, the ECCC's constitutional documents and the Internal Rules specify that the new Introductory Submissions shall be forwarded to the OCIJ for judicial investigation.

Objections of the National Co-Prosecutor

The national co-prosecutor objected to the new Introductory Submissions on three legal grounds. First, she argued that the new Introductory Submissions must be rejected because the preliminary investigation of the international co-prosecutor violated the ECCC Law and Internal Rules. Specifically, she asserted that she was never informed or consulted with regard to the *preliminary* investigation that led to the issuance of the new Introductory Submissions.

Second, she argued that the facts and the crimes specified in the new Introductory Submissions have already been put forth to the OCIJ in the first Introductory Submission dated July 18, 2007. She argued that the first Introductory Submission covered the totality of crimes that occurred in Democratic Kampuchea from April 17, 1975, until January 6, 1979. Therefore, she asserted that the new Introductory Submissions are unnecessary as the facts and crimes alleged therein are already under the investigative power of the OCIJ which has the power to extend its investigations to suspects not named in the first Introductory Submission.

Finally, she objected to the new Introductory Submissions on the basis of her prosecutorial discretion. She argued that the decision to investigate and prosecute former Khmer Rouge leaders should first and foremost reflect the purpose and spirit of the ECCC's constitutional documents which is to promote peace, stability, and national reconciliation in Cambodia. She asserted that the suspects currently identified in the new Introductory Submissions were not "senior" leaders of the Khmer Rouge. Furthermore, she argued that in the event of additional prosecutions, lower-ranking ex-Khmer Rouge officials would be hesitant to act as witnesses and may even commit violent acts for fear of being prosecuted. Finally, she argued that existing trials would be jeopardized because additional prosecutions would strain the budget and resources of the court.

Response by the International Co-Prosecutor

The international co-prosecutor challenged several of the substantive pleadings of the national co-prosecutor. Contrary to her assertions, he argued that the suspects identified in the new Introductory Submissions were senior leaders of the Khmer Rouge and additional prosecutions were necessary to fulfill the mandate of the ECCC. (There has been speculation that the five living suspects currently identified in the new Introductory Submissions were high ranking officials with the Khmer Rouge but no longer hold significant positions of influence).

Furthermore, the international co-prosecutor asserted that the new Introductory Submissions did raise new facts and crimes that are not currently before the OCIJ. He contested the national co-prosecutor's assertion that the scope of crimes and facts from the first Introductory Submission dated July 18, 2007, covered all crimes that occurred in Democratic Kampuchea from April 17, 1975, until January 6, 1979. Finally, the international co-prosecutor argued that pursuant to Internal Rule 53, the main criteria by

which to determine if new investigations should proceed is whether there is “reason to believe” that crimes have been committed.

Pre-Trial Chamber Ruling Split Between National and International Judges

The three Cambodian judges—Prak Kimsan, Ney Thol, and Huot Vuthy—ruled in favor of the national co-prosecutor on the ground that the preliminary investigation was conducted without the knowledge or consultation of the national co-prosecutor and on the ground that the new Introductory Submissions did not raise any additional crimes or facts. The Cambodian judges found it unnecessary to address the prosecutorial discretion argument raised by the national co-prosecutor because they already had two independently sufficient grounds to rule in favor of the national co-prosecutor.

The Cambodian judges determined that the preliminary investigation was conducted without the knowledge or consultation of the national co-prosecutor. The judges highlighted the fact that when the national co-prosecutor finally learned about the preliminary investigations, the former deputy international co-prosecutor, William Smith, told her that he was “sorry” that preliminary investigations were conducted unilaterally and promised to inform her if further investigations would be conducted. The Cambodian judges determined that such a unilateral investigation was in violation of the ECCC Law and Internal rules and thus invalidated the new Introductory Submissions.

The Cambodian judges also determined that the facts and alleged crimes raised by the new Introductory Submissions already existed in the first Introductory Submission filed with the OCIJ. Specifically, they found that the first Introductory Submission covered the totality of crimes that occurred during the period of Democratic Kampuchea from April 17, 1975, to January 6, 1979. Therefore, the judges concluded that there was no reason to forward new Introductory Submissions given that the facts and crimes alleged therein were already within the investigative power of the OCIJ and the judicial investigation in Case 002 is not yet complete.

The international judges—Rowan Downing and Katinka Lahuis—ruled in favor of the international co-prosecutor on both grounds addressed by the Cambodian judges. The international judges determined that the issue of a unilateral preliminary investigation was not germane to the disagreement between the co-prosecutors and falls therefore outside of the jurisdiction of the Pre-Trial Chamber. Notwithstanding that determination, they noted that the Internal Rules allow one of the co-prosecutors to move forward with a preliminary investigation without the consent of the other co-prosecutor.

Based on an analysis of the new Introductory Submissions, and the fact that the Office of the Co-Prosecutors (OCP) filed several Supplementary Submissions limiting the scope of the facts and the crimes to be investigated in the first Introductory Submission, the international judges determined that the new Introductory Submissions were proper. If the first Introductory Submission was so broad, they reasoned, there would have been no need for Forwarding Orders issued by the OCIJ and Supplementary Submissions filed by the co-prosecutors. Furthermore, they stated that the first Introductory Submission could

not be so broad as to include all crimes that occurred within Democratic Kampuchea from April 17, 1975, until January 6, 1979, because such a submission would not be specific enough to meet the requirements of Internal Rule 53(1).

Finally, the international judges found that the national co-prosecutor would have first known of the preliminary investigations on November 18, 2008, and learned precise details about it on December 3, 2008. Yet she waited until May 22, 2009, in answer to questions of a different nature to object to the preliminary investigations. The international judges found the issue not to be part of the disagreement of which the Pre-Trial Chamber was seized and that it thus was unnecessary to consider whether she knew or did not know about the preliminary investigations.

Ramifications and Next Steps

The Pre-Trial Chamber's decision lays the groundwork for additional judicial investigations. The acting international co-prosecutor, William Smith, is "pleased that further investigations can now proceed." His office will "implement the decision and commence its preparations to assist the Co-Investigating Judges in these further investigations as soon as possible." However, at this stage it is still too early to speculate on whether and when such investigations will materialize into additional prosecutions.

Once the OCIJ receives the new Introductory Submissions, it must investigate the facts and alleged crimes. Indictments can only be issued if the OCIJ determines that the investigation of the facts warrants charges against suspects named in the new Introductory Submissions. If the disagreements between the co-prosecutors and the pre-trial chamber judges are any indication, the issue of whether additional suspects will be charged ultimately may run into similar roadblocks within the OCIJ. The OCIJ is staffed by one Cambodian judge and one international judge. The procedure to break a deadlock within the OCIJ is very similar to that of breaking a deadlock within the OCP. Specifically, either co-investigating judge can bring a disagreement about an arrest or detention order before the Pre-Trial Chamber. In such cases, the arrest or detention order will move forward unless a super-majority of four of the five judges blocks the action.

Given the on-going disagreements regarding this issue, any new indictments of former Khmer Rouge leaders will likely take some time to materialize. While extending the operation of the tribunal is sure to strain the financial resources at the court, Youk Chhang of the Documentation Center of Cambodia (DC-Cam) explained that the extended period would allow the tribunal to inform the public of its actions, thus alleviating many concerns regarding the alleged detrimental effects additional prosecutions would have on the peace and stability of Cambodia.

A DC-Cam survey suggested that the country, like the court, is also divided on this issue, with 57% of the country in favor of additional prosecutions. Youk Chhang explained that the younger generation of Cambodians is more likely to support additional prosecutions, but that many others would prefer that the court fulfill its mandate and conclude as quickly as possible.