



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

សំណុំរឿងព្រហ្មទណ្ឌ
Criminal Case File /Dossier pénal
លេខ/No: 002/14-08-2006

លេខស៊ើបអង្កេត/Investigation/Instruction
លេខ/No: 002/19-09-2007-ECCC-OCIJ

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King **ព្រះមហាក្សត្រ**

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ជំនាញស្រុកប្រជុំការស៊ើបអង្កេតសំណុំរឿង
Ordonnance sur demande d'extension
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មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: C.A. Juy

We, You Bunleng (ឃ្ម ប៊ុនឡេង) and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC"),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the "ECCC Law");

Noting the ongoing judicial investigation against IENG Thirith (ឡិន ធីរីត) relating to charges of Crimes against humanity, an offence defined and punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law;

Noting Rules 39(6) and 55(5) of the ECCC Internal Rules (the "Internal Rules");

Noting sub-Articles 5.1 and 5.4 of the Practice direction on Filing of Documents before the ECCC (the "Practice Direction");

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ ទូរស័ព្ទលេខ +៨៥៥(០)២៣ ២១៨៩១៤ ទូរសារលេខ +៨៥៥(០)២៣ ២១៨៩៤១។

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Noting the Co-Prosecutors Request for extension of page limit to file their response to IENG Thirith's motion on exclusion of evidence obtained by torture, dated 3 March 2009 (D130/1);

PROCEDURAL HISTORY

1. On 11 February 2009, IENG Thirith's lawyers filed a Motion for exclusion of evidence obtained by torture (D130).
2. On 3 March 2009, the Co-Prosecutors filed a Request for an extension of the page limit to file their response to IENG Thirith's Motion (D130/1).
3. On 6 March 2009, IENG Thirith's lawyers challenged the Co-Prosecutors Request for extension of that page limit (D130/2).

THE LAW

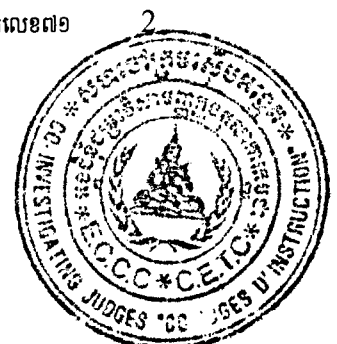
4. In accordance with Internal Rule 39(6), sub-Articles 5.1 and 5.4 of the Practice Direction provide that documents filed with the Co-Investigating Judges should not exceed 15 pages in English unless, at the request of a party, the judges consider that exceptional circumstances warrant extending that limit.

ARGUMENTS BY THE PARTIES

5. In their Request, the Co-Prosecutors state their intention to file a brief in response by 30 April 2009, that is, more than two and a half months after the original Motion was filed by the IENG Thirith Defence (the "Defence"). They further state that, given the importance of the issue, thirty pages will be necessary to fully brief the Co-Investigating Judges. Citing international case law on the matter, the Co-Prosecutors raise "exceptional circumstances" due to the fact the issue itself is complex and will require an analysis of statutory provisions and jurisprudence since the Second World War; a survey of Cambodian Law and "scholarly writings" on the matter (paras. 2-3).
6. The Defence claims that there are no exceptional circumstances in this case, stating that the supposed complexity of the matter had not stopped them from respecting the same word limit (para.7). They argue that the international case law cited by the Co-Prosecutors does not support their request, distinguishing the cases cited as involving different circumstances, notably where the first filing party had already been granted an extension of page limit (paras. 9-16). The Defence further argues that, if the page limit were to be enforced, the Co-Prosecutors would not need such a long time to respond (para. 18). Finally, the Defence points out that the proper standard to be applied is the existence of exceptional circumstances and not the question whether the extension will affect fair trial rights (paras. 19-21).

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REASONS FOR THE DECISION

Applicable standards

- 7. As the Defence rightly points out (para. 18), given the nature of the judicial investigation, any brief by the Co-Prosecutors on the issue of evidence obtained under torture will not be subject to the time limits relating to "responses" before the other judicial bodies of the ECCC. The only requirement is the general 15-page limit on the length of filings before the Co-Investigating Judges under Article 5.1 of the Practice Direction.
- 8. Accordingly, the international case law cited relating to primary filings and responses, as discussed by both parties in their pleadings, is not strictly applicable in this case. Nevertheless, this case law may be pertinent concerning the criteria for assessing the existence of "exceptional circumstances" in a specific case.
- 9. Furthermore, the case law cited by the Co-Prosecutors shows a general concern of internationalised courts to ensure equality of arms¹ and avoid undue delay² through a reasonable application of rules relating to page limits. Finally, the Co-Prosecutors have made it clear that they intend their brief to be a response to the Defence request.
- 10. The Co-Investigating Judges consider, therefore, that in assessing the existence of exceptional circumstances, they should also take account of the need to ensure equality of arms and avoid undue delay.

Exceptional circumstances

- 11. In the case in hand, the issue of the proper use, if any, of evidence obtained under torture is of clear importance, given the large number of documents originating from S-21 that have been placed on the case file.
- 12. Nevertheless, given that the Co-Investigating Judges are empowered by Internal Rule 55(5) to conduct their own judicial investigation, there is no need for the parties' briefs to undertake an exhaustive analysis of every aspect of the issue at hand³.
- 13. Moreover, this issue has not been raised before any other ECCC judicial body, nor been the subject of amicus briefs, factors which led us to accord an extension concerning the

¹ See for example: ICTY, *Prosecutor v. Seselj*, Trial Chamber, Decision on Prosecution's Request to Exceed the Ten Page Limit for Motions, 4 February 2004, p. 2; and SCSL, *Prosecutor v. Brima, Kamara & Kanu*, Decision on Urgent Motion for an Extension of the Page Limit for its Appeal Brief, 24 August 2007, para. 7.

² See for example: ICTY, *Prosecutor v. Kordic & Cerkez*, Appeals Chamber, Decision authorizing appellant's briefs to exceed the limit imposed by the practice direction on the length of briefs and motions, 29 August 2001, para. 6.

³ For comparable reasoning before the ICTY concerning the limited purposes of Pre-Trial briefs, see: ICTY, *Prosecutor v. Stanisic & Simatovic*, Trial Chamber, Decision on Defence Request for Extension of Page Limit Pertaining to Defence Pre-Trial Brief, 6 December 2004, p. 2.

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issue of JCE. Accordingly, there do not appear to be sufficiently exceptional circumstances to justify an extension in this case.

Undue Delay

14. Despite Defence argument to the contrary (Defence Motion, para. 19), the Co-Investigating Judges consider that the relatively long time period before filing, indicated by the Co-Prosecutors, should in fact allow them to be more concise. Indeed, as Hunt J. pointed out in one case cited by the Co-Prosecutors:

*It will be recognized by anyone who has had experience in drafting written submissions that it takes considerably longer to make those submissions succinct than it does to permit them to be verbose...*⁴

15. In this case, the Co-Investigating Judges do not consider that waiting for the Co-Prosecutors' filing before deciding this matter will cause undue delay, given the ongoing judicial investigation. However, this long period weakens there request for a page extension.

Equality of Arms

16. The Co-Investigating Judges note that the Defence has made its case without requesting any extension and has contested the request for extension at hand.

17. Should the request be granted, thus authorising the Co-Prosecutors' to file a response of double the length of the original filing, there would be a clear issue of equality of arms.

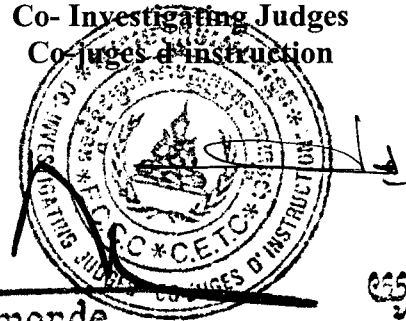
FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- **Take note** of the indication by the Co-Prosecutors that they intend to file their brief by 30 April 2009; and
- **Reject** the request for extension of page limit.

Done in Phnom Penh, on 02 April 2009

សហចៅក្រមស៊ើបអង្កេត

**Co-Investigating Judges
Co-juges d'instruction**



ឃុំ ប៉ុល ផ្លែឆ្មារ

MARCEL Lemonde

⁴ ICTY, *Prosecutor v. Kordic & Cerkez*, Appeals Chamber, Decision authorizing appellant's briefs to exceed the limit imposed by the practice direction on the length of briefs and motions, 29 August 2001, para. 4.

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