



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi
Kingdom of Cambodia
Nation Religion King

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction
Case File No: 002/19-09-2007-ECCC-OCIJ

ឯកសារទទួលបាន
DOCUMENT RECEIVED/DOCUMENT REÇU
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de réception):
..... 29 / 12 / 2009

Before: Judge YOU Bunleng
Judge Marcel LEMONDE
Date: 28 December 2009
Original language: Khmer
Classification: Public

Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC

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CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ត្រូវបានបញ្ជាក់ (Certified Date/Date de certification):
..... 29 / 12 / 2009

We, **You Bunleng (ឃុំ 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 Sary (អៀង សារី) and other Charged Persons** relating to charges of **Crimes against humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, Genocide, Murder, Torture and Religious persecution**, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and 209, 210, 500, 501, 503 à 508 of the 1956 Penal Code;

Considering the Motion by the Defence for IENG Sary entitled “IENG Sary’s Motion Against the Applicability of the Crime of Genocide at the ECCC”, dated 30 October 2009 (D240) (the “Request”);

Considering the Motion by the Defence for IENG Sary entitled “IENG Sary’s Supplemental Alternative Submission to his Motion Against the Applicability of the Crime of Genocide at the ECCC”, dated 21 December 2009 (D240/2) (the “Supplemental Request”);

Noting the Power Delegation Decision dated 22 December 2009

ARGUMENTS OF THE PARTIES

1. On 30 October 2009, the Defence for IENG Sary submitted its Request to reject the applicability of the crime of genocide before the ECCC.¹ The Defence argued that the crime of genocide cannot be applied before the ECCC because it is not penalized under domestic Cambodian law.² Furthermore, the Defence claimed that substantive international criminal law, whether based on international convention or customary international law, cannot be directly applied in Cambodian courts.³ Given these factors, the Defence argued that the application of genocide in the ECCC would therefore be a violation of the principle of *nullum crimen sine lege*.⁴
2. On 21 December 2009, the Defence for IENG Sary submitted its Supplemental Request setting forth their interpretation of the crime of genocide.⁵ In particular the Defence argues that only the definition of genocide under the Genocide Convention and the ECCC Law are punishable before the ECCC.⁶ Additionally the Defence argues that genocide is a crime of specific intent⁷ and that the ECCC

¹ D240, pg. 15.

² D240, para. 13.

³ D240, para. 17.

⁴ D240, pg. 1; para. 14.

⁵ D240/2, pg. 1.

⁶ D240/2, paras 9-15.

⁷ D240/2, paras 20-26.

must follow a “purpose-based” rather than a “knowledge-based” approach to intent for genocide.⁸ Finally the Defence argues that the definition of genocide applied at the ECCC must comply with the principle of *nullum crimen sine lege*.⁹

REASONS FOR THE DECISION

3. The Co-Investigating Judges note that this Request and Supplemental Request seek declaratory relief concerning the applicable law before the ECCC. The Request argues that investigative requests for declaratory relief have been previously considered by the Co-Investigating Judges, referring to the filings relating to joint criminal enterprise.¹⁰ However, the filings relating to joint criminal enterprise were admitted on the basis that it was necessary for the Charged Persons to have due notice of the modes of liability that may be under investigation, particularly considering that the term “joint criminal enterprise” is not explicitly set out in either the ECCC Law or Agreement.¹¹ This concern does not arise with matters such as the offence of genocide, which is expressly articulated in Article 4 of the ECCC Law and Article 9 of the Agreement.
4. The Co-Investigating Judges recall that they are not required to set out final legal characterizations until the Closing Order.¹² Therefore, it is not necessary at this stage to conduct a full analysis of the applicable elements of genocide. The Co-Investigating Judges also recall their Orders relating to forced marriage and enforced disappearance where it was also asserted that declaratory relief in such circumstances will not be granted.¹³
5. The Co-Investigating Judges therefore find that subject matter jurisdiction over the crime of genocide is expressly recognised in the ECCC Law and Agreement and constitutes a potential legal characterization of facts under investigation at the crime scenes and locations of which they are seized in the Introductory Submission and Supplementary Submissions, to be determined in the assessment of the evidence for the Closing Order. The Co-Investigating Judges take note of the substantive arguments contained in the Supplemental Request, which will be given due consideration as part of the full legal analysis of this issue in the context of the Closing Order.
6. Finally, the Co-Investigating Judges note that the arguments in the Supplementary Request could have been set out in the initial Request. It is open for the parties to argue in the alternative in the same submission. Filing multiple requests cannot be a method for unnecessarily delaying proceedings. All the parties are reminded to make their arguments as fully as possible in their requests and are warned that repetitious or duplicitous requests may be considered

⁸ D240/2, paras 29-34.

⁹ D240/2, paras 27-28.

¹⁰ D240, pg. 1.

¹¹ D97/13.

¹² Internal Rules (Rev. 4), 11 September 2009, Rules 53(2)(a) and 67(2). Internal Rule 67(2) states that “*The Indictment shall be void for procedural defect unless it sets out...a description of the material facts and their legal characterization...*”, whereas according to Internal Rule 53(1) the Co-Prosecutors are required only to provide “*a summary of the facts*”.

¹³ D268/2; D180/6 (Enforced Disappearance Orders)

grounds for sanctions under Rule 38 (1), including withholding payment of any fees associated with the filing.¹⁴

FOR THESE REASONS, HEREBY:

REJECT the Request;

TAKE DUE NOTE of the Supplemental Request.

Done in Phnom Penh, on 28 December 2009

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d'instruction

¹⁴ As done, for example in: ICTR Case No. ICTR-99-50-T, *Prosecutor v. Bizimungu et al.* Trial Judgement II, Decision on Jerome-Clement Bicamumpaka's submission for stay of proceedings and motion for disclosure concerning witness GKB, 19 May 2009, para. 15.