



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសេសវិសេសនៃតុលាការកម្ពុជា

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

Kingdom of Cambodia
Nation Religion King

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

Case File No: 002/19-09-2007-ECCC-OCIJ

Before: Judge YOU Bunleng
Judge Marcel LEMONDE
Date: 25 February 2010
Original language: Khmer/English
Classification: Public

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du dossier: Uch Arun

Order issuing warnings under Rule 38

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IENG Thirith
KHIEU Samphan
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We, **You Bunleng (ឃុំ ប៊ុនលេង)** 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 Rules 35, 38, 55, 56 and 66 of the ECCC Internal Rules (the “Internal Rules”);

Noting Articles 3 and 4 of the Practice Direction on Filing of Documents before the ECCC (the “Practice Direction on Filing”);

Noting the Practice Direction on Classification and Management of Case-Related Information (the “Practice Direction on Classification”);

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 to 508 of the 1956 Penal Code;

Noting the Response of the Co-Investigating Judges to the Letter Dated 20 December 2007 Concerning the Conduct of the Investigation, dated 10 January 2008 (A110/I);

Noting the Order of the Co-Investigating Judges on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, dated 19 June 2009 (D164/2);

Noting the Order rejecting the request for annulment and the request for stay of proceedings on the basis of abuse of process filed by Ieng Thirith (D263/1);

Considering the communication sent by the Defence for IENG Sary to the Co-Investigating Judges concerning conducting their own investigations, dated 10 February 2010 (D346), (the “investigation communication”);

Considering the communication sent by the Defence for IENG Sary to the Co-Investigating Judges concerning access to “the entire dossier”, dated 12 February 2010 (D354), (the “dossier communication”);

Considering the communication sent by the Defence for IENG Sary to the Co-Investigating Judges concerning joinder in part of NOUN Chea Requests, dated 12 February 2010 (D355), (the “joinder communication”);

ARGUMENTS BY THE PARTIES

1. The Defence for IENG Sary has submitted three documents in which they request the Co-Investigating Judges:



- i) To “clarify whether, and to what extent, the defence of Ieng Sary (“the Defence”) can conduct investigations relevant to Case 002”, while referring to a previous memorandum of the Co-Investigating Judges clarifying that parties cannot conduct their own investigations.¹ The Defence argues that they wish to conduct additional investigations “*inter alia, due to its loss of confidence in the OCIJ to conduct an impartial and independent investigation*” that they are allegedly permitted to do based on their interpretation of Article 121 of the Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”); and based on their interpretation of the Pre-Trial Chamber decision relating to the characterization of the ECCC within the Cambodian court structure.²
- ii) To grant the Defence for IENG SARY access to “*the entire dossier*” (sic) including all documents in the Co-Investigating Judge’s possession which are not available to the parties such as Casemap, internal memoranda, investigative notes, analysis and work products generated by Office of the Co-Investigating Judges in relation to the investigation of Case File 002.³
- iii) To support and join, in part, “*NUON Chea’s Nineteenth to Twenty Fifth (inclusive) Requests for Investigative Action*” in that they request the Co-Investigating Judges to provide information on: the investigative procedures employed, in particular, in gathering exculpatory evidence; the planning and strategy to conduct the investigation of Case File 002; and the qualifications and experience of OCIJ staff.⁴

REASONS FOR THE DECISION

2. The communication from the Defence for IENG Sary raises three issues: first, the disregard for the rules for filing of documents; second, the disregard for the procedural regime applicable to the judicial investigation; and third, duplicitous filings and matters already judicially addressed

Disregard for the rules for filing of documents

3. The three communications from the Defence for IENG Sary state that they are public filings. According to the Practice Direction on Filing and the Practice Direction on Classification, the parties may only *propose* the classification of documents they submit to the Co-Investigating Judges.⁵ It is not the first time Ieng Sary’s defence team is reminded of this procedure.⁶
4. The Co-Investigating Judges hereby warn the lawyers for IENG Sary under Rule 38 of the Internal Rules that they are required to clearly indicate on the filing that

¹ D346, p.1, referring to A110/I.

² D346, p.3 referring to PTC Decision on DUCH appeal of provisional detention, 3 December 2007.

³ D354, p.1.

⁴ D355, p.1.

⁵ Articles 3(2)(g); 3(12); 3(13) Practice Direction on Filing; see also the Practice Direction on Classification and Management of Case-Related Information.

⁶ See for example: A238/1; D138, D138/1/8.



the classification level indicated by the parties is merely a proposal. This is satisfied through the terms on Appendix B of the Practice Direction on Filing, namely, “classification of the document suggested by the filing party”.⁷

5. The Co-Investigating Judges hereby warn the lawyers for IENG Sary that any further filing without stating that the classification level indicated by them is merely a proposal, and any public release of information relating to a filing before its public classification by the Co-Investigating Judges, amounts to misconduct and the lawyers are duly warned in this Order in accordance with Rule 38 of the ECCC Internal Rules that sanctions may be applied against them.

Disregard for the procedural regime applicable to the judicial investigation

6. The investigation communication filed by the Defence for IENG Sary refers to Article 121 of the CCPC, entitled “Confidentiality of Judicial Investigation”, which states:

Persons who participate in the judicial investigation, especially prosecutors, judges, lawyers, court clerks, judicial police and military police officers, civil servants, experts, interpreters/translators, medical doctors and other persons mentioned in Article 95 (Technical or Scientific Examination) of this Code, shall maintain professional confidentiality.

7. The Defence for IENG Sary concludes that “Article 121 allows for the participation of the Defence in the judicial investigation as long as confidentiality of the investigation is kept”. If one were to apply the reasoning of the Defence for IENG Sary to its logical conclusion, court clerks, civil servants, experts, interpreters/translators, medical doctors and other persons mentioned in Article 95 of the CCPC could conduct investigations also, as long as they maintained confidentiality. Furthermore, judicial police and military police officers could also conduct their own investigations without respecting Article 71 of the CCPC, which requires that judicial and military police may only conduct investigative acts on the basis of a rogatory letter of the investigating judges. This is clearly not the correct interpretation of the CCPC.
8. It is apparent to the Co-Investigating Judges that the Defence for IENG Sary seeks to base their investigation communication on their repudiation of the civil law process wherein the judicial investigation is conducted solely by the investigating judge.⁸ Indeed, the Defence for IENG Sary cites the finding of the Co-Investigating Judges on 10 January 2008, which the Co-Investigating Judges hereby re-affirm:

“Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. Of

⁷ See D163.5 where the Greffiers returned documents as deficiently filed when they did not comply with Appendix of the Practice Direction on Filing.

⁸ The Co-Investigating Judges have already made a similar observation with respect to a filing related to the Defence for NUON Chea although it addressed aspects relating to filings by the Defence for IENG Sary, of which the Defence for IENG Sary were duly notified (the Co-Investigating Judges had classified it as a public document), D221/1, p. 1.



course, the parties have the right, under Rules 55(10) and 58(6), to request the Co-Investigating Judges to undertake investigative action; if the Co-Investigating Judges do not accept the request, they must hand down an order rejecting the request, before the end of the investigation at the latest, which is open to appeal. The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action”⁹.

9. The Co-Investigating Judges hereby warn the lawyers for IENG Sary under Rule 38 of the Internal Rules that they are prohibited from conducting their own investigations and any breach of this prohibition may result in the application of sanctions against them.

Duplicious filings and matters already judicially addressed

10. The three communications from the Defence for IENG Sary raise several issues which have already been raised and addressed during these proceedings:
- a) Indeed, as mentioned by the Defence for IENG Sary in D346, the matter considered above regarding whether the parties can conduct their own investigations has already been raised by the parties and addressed by the Co-Investigating Judges.¹⁰
 - b) Again, as noted by the Defence for IENG Sary in D354,¹¹ the Co-Investigating Judges have already responded to IENG Sary’s request for access to “relevant” information.
 - c) Additionally, the Co-Investigating Judges have already addressed matters raised in D355 through their response to the Defence for IENG Sary, NUON Chea and KHIEU Samphan dated 11 December 2009 (D171/5).
11. The Defence for IENG Sary also repeats previous allegations in the three communications concerning their alleged “lack of confidence” in the Co-Investigating Judges and their staff.¹² This matter has also been addressed both by the Co-Investigating Judges and appealed to the Pre-Trial Chamber.¹³
12. The ECCC Internal Rules set out matters which may be appealed and the procedure for appeals, including rules on whether such appeals may be considered admissible.¹⁴ The parties cannot attempt to circumvent this by repeated filings on matters which have already been judicially addressed.

⁹ A110/I, p.2.

¹⁰ A110/I. See also D164/2, para. 14.

¹¹ See D354, p. 3: “In denying a previous request for access to relevant information the OCIJ relied upon Rule 70 (A) of the ICTY Rules of Procedure and Evidence.”

¹² D346, pp 1-2; D354, pp. 1-2; D355 pp. 1-4.

¹³ See filings and decisions associated with A121, A162, A252, D171, D221, D263, D264. As per the normal practice in maintaining the Case File, the Defence for IENG Sary was duly notified of all such confidential and public filings and decisions, even if they were not themselves responsible for submitting the initial filings.

¹⁴ See for example Rule 55(10) of the Internal Rules for appeals of investigative requests.



13. The Co-Investigating Judges have reminded the parties of the particular situation facing the ECCC. The right to trial without undue delay is intrinsic to the right to a fair trial. The age and health situation of the Charged Persons further mandates all parties to operate as efficiently as possible. It is in the interests of justice to maintain judicial economy and not waste the resources dedicated to this judicial process.¹⁵
14. The Co-Investigating Judges have issued several warnings to the parties, in particular in response to filings made by the Defence for IENG Sary, under Rule 38 of the Internal Rules with respect to duplicitous filings.¹⁶ In the current communications, the Co-Investigating Judges find that the content and degree of repetition amounts to an abuse of process. The Co-Investigating Judges hereby warn the lawyers for IENG Sary under Rule 38 of the Internal Rules that they are prohibited from submitting duplicitous filings or filings made against matters already addressed on appeal and that any breach of this prohibition may result in the application of sanctions against them.
15. Should repetitious requests or any other filing in violation of this Order be received in future, by IENG Sary or any other party, including on matters already addressed on appeal, the Co-Investigating Judges will reject them summarily with reference to the prior filings and decisions, as appropriate.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- **ORDER** Ieng Sary's lawyers to comply with the Practice Direction on Filings (including its Annex B) and the Practice Directive on Classification by indicating "classification of the document suggested by filing party";
- **ORDER** Ieng Sary's lawyers to comply with the classification decided by the Co-Investigating Judges;
- **WARN** Ieng Sary's lawyers under Rule 38 of the Internal Rules that breaches of the Practice Direction on Filings and the Practice Direction on Classification will result in the Co-Investigating Judges issuing sanctions under Rule 38 of the Internal Rules;
- **WARN** Ieng Sary's lawyers under Rule 38 of the Internal Rules that they are prohibited from submitting duplicitous filings or filings made against matters already addressed on appeal and any breach of this prohibition will result in the application of sanctions against them;
- **WARN** Ieng Sary's lawyers under Rule 38 of the Internal Rules that they are prohibited from conducting their own investigations and any breach of this prohibition will result in the application of sanctions against them;

¹⁵ D261/2, paras 13-14.

¹⁶ D240/3, para. 6; D261/2, paras 13-14.

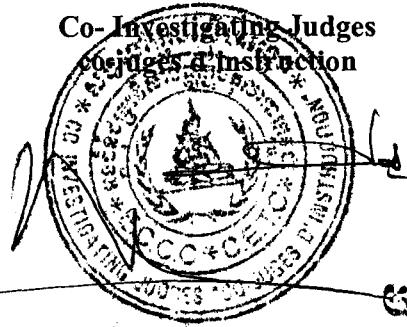


- **REJECT** the three communications from the Defence for IENG Sary (D346, D354, D355);
- **AFFIRM** that all the parties have access to this Order and that they therefore have sufficient notice and are duly warned that they must comply with the Practice Direction on Filings (including its Annex B); with the Practice Directive on Classification by indicating “classification of the document suggested by filing party”; with the classification decided by the Co-Investigating Judges; that they cannot submit duplicitous filings; and that they are prohibited from conducting their own investigations;
- **DECLARE** that the Greffiers of the Co-Investigating Judges will return to the filing party any document in breach of the Practice Direction on Filings and its annexes, and the Practice Directive on Classification, without placing it on the Case File.

Done in Phnom Penh, on 25 February 2010

សហចៅក្រមស៊ើបអង្កេត

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



ឃុំ ម៉ុងឡេ

Marcel LEMONDE