



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême



សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១៩)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(19)

Before:
Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: 12 March 2013
Language(s): Khmer/English
Classification: PUBLIC

ORDER FOR IMMEDIATE COMPLIANCE WITH RULE 108 OF THE INTERNAL RULES

Co-Prosecutors
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Accused
IENG Sary
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NUON Chea

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Jacques VERGÈS

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is currently seized of four immediate appeals filed by IENG Sary, one immediate appeal filed by NUON Chea, and a request filed by KHIEU Samphan (together, “Workload”).¹

2. The aforementioned documents were filed with the Greffier of the Trial Chamber, in accordance with Rule 106(2) of the Internal Rules.² According to Rule 108(2) of the Internal Rules, the Greffier of the Trial Chamber is then bound to forward the “case file” together with certified copies of the decision and each immediate appeal to the Supreme Court Chamber. However, the Supreme Court Chamber notes that, in practice, the Greffier of the Trial Chamber forwards only portions of the case file upon the filing of immediate appeals. By way of example, after the filing of IENG Sary’s Appeal against Oral Decision on Participation in Holding Cell, the Greffier of the Trial Chamber forwarded a list of document numbers which he deemed relevant thereto, and granted the Supreme Court Chamber with access to only to those confidential or strictly confidential documents which may have been on that list.³ The Greffier of the Trial Chamber forwarded similar lists of, and granted similar access to, documents which he deemed relevant to the filings of IENG Sary’s Appeal against Fitness Decision and IENG Sary’s Appeal against Written Decision on Participation in Holding Cell.⁴

¹ IENG Sary’s Appeal against the Trial Chamber’s Oral Decision to Deny His Right to be Present in the Courtroom and to Prohibit Him from Being Video Recorded in the Holding Cell, E238/9/1/1, 18 December 2012 (“IENG Sary’s Appeal against Oral Decision on Participation in Holding Cell”); Immediate Appeal against Trial Chamber Decision on Application for Immediate Action pursuant to Rule 35, E189/3/1/1, 24 December 2012; IENG Sary’s Appeal against the Trial Chamber’s Decision that He is Fit to Stand Trial and Its Refusal to Appoint an Additional Expert to Assess Fitness, E238/9/2/1, 3 January 2013 (“IENG Sary’s Appeal against Fitness Decision”); IENG Sary’s Appeal against the Trial Chamber’s Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), E251/1/1, 8 January 2013; IENG Sary’s Appeal against the Trial Chamber’s 16 January 2013 Decision to Deny His Request to be Audio and/or Video Recorded in the Holding Cell, E254/3/1/1, 5 February 2013 (“IENG Sary’s Appeal against Written Decision on Participation in Holding Cell”); *Demande de l’équipe de M. KHIEU Samphân tendant à ce que les ordonnances et décisions rendues par la Chambre de la Cour suprême lui soient notifiées dans les trois langues officielles des CETC*, E163/5/1/14, 20 February 2013.

² Internal Rules of the ECCC, Revision 8, 3 August 2011 (“Internal Rules”).

³ Electronic mail sent by Roger PHILLIPS, Legal Officer and Greffier of the Trial Chamber, entitled “Documents for Appeal E238/9/1/1”, 21 December 2012 at 12h50.

⁴ Electronic mail sent by Roger PHILLIPS, Legal Officer and Greffier of the Trial Chamber, entitled “List of Documents for Appeal E238/9/2/1”, 3 January 2013 at 14h21; Electronic mail sent by Roger PHILLIPS, entitled “Re: Fw: [Filed by Ieng Sary Def.] NEW DOCUMENT(S): CASE FILE No. 002 - IENG Sary - IENG Sary’s notice of appeal against decision on the IENG Sary Defence request to audio and/or video record IENG Sary in the holding cell and request for consolidation of consideration of appeal with the appeal against the Trial Chamber’s oral decision to deny his right to be present in the courtroom and to prohibit him from being video recorded in the holding cell (E238/9/1/1)”, 11 February 2013 at 16h19.

3. During the course of the discharge of its Workload, the Supreme Court Chamber deemed it necessary to examine additional confidential or strictly confidential documents not included in the portions of the case file forwarded, and accordingly requested the Greffier of the Trial Chamber to forward a list of those documents and grant commensurate access.⁵ In response, the Supreme Court Chamber was denied provision and access to the requested documents, based on the claim that Rule 108 of the Internal Rules “distinguishes between appeals of the judgement and immediate appeals” in a way that precludes the Supreme Court Chamber’s access to documents beyond those cited in parties’ immediate appeals, and that “[i]f it were otherwise, the Trial Chamber and the Supreme Court Chamber could be simultaneously seized of the entire [c]ase [f]ile.”⁶

4. The Supreme Court Chamber finds no basis for this interpretation. The term “case file” in Rule 108(2) of the Internal Rules is not limited in any way, and is defined in the Glossary of the Internal Rules as referring to “all the written records (*procès verbaux*) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers.”⁷ It follows that, upon the filing of any immediate appeal by any party in Case 002, the Greffier of the Trial Chamber must forward the “case file” so defined. The determination of what, if any, documents on the case file are relevant to the proper adjudication of appeals – be they immediate or from judgment – rests within the sole discretion of the Supreme Court Chamber. The Supreme Court Chamber therefore requires unrestricted access to the entirety of the case file in Case 002 every time that it becomes seized of any immediate appeal.

5. There is also nothing in the Internal Rules to preclude the Trial and Supreme Court Chambers from being simultaneously seized of the entire case file, or of Case 002 for that matter, a situation which by definition exists when a party files an immediate appeal from a decision of

⁵ Electronic mail sent by Sheila PAYLAN, Legal Officer and Greffier of the Supreme Court Chamber, entitled “Request for further documents on the case file”, 27 February 2013 at 10h07.

⁶ Electronic mail sent by Roger PHILLIPS, Legal Officer and Greffier of the Trial Chamber, entitled “Re: Fw: Request for further documents on the case file”, 5 March 2013 at 09h19 (“Dear S[upreme Court Chamber Greffier], Thank you for your inquiry. I agree that the Supreme Court Chamber is seized of the entire Case File upon an appeal of the judgement. However, *Internal Rule 108 distinguishes between appeals of the judgement and immediate appeals*. With regard to immediate appeals, the practice of the Trial Chamber is to provide the Supreme Court Chamber those documents on the Case File that are cited in the submissions of the parties. *If it were otherwise, the Trial Chamber and the Supreme Court Chamber could be simultaneously seized of the entire Case File*. Therefore, I will not be able to grant you access to strictly confidential or confidential documents that are not cited by the parties in the immediate appeal to which you refer. Thanks for your understanding.” (Emphasis added)).

⁷ Internal Rules, p. 79.

the Trial Chamber.⁸ The interpretation of Rule 108 of the Internal Rules expressed by the Greffier of the Trial Chamber is therefore erroneous and has caused unnecessary delays and difficulties in the discharge of the Supreme Court Chamber's Workload, particularly in light of the strict time constraints under which it is bound to deliver its decisions.⁹

6. For the foregoing reasons, the Supreme Court Chamber:

ORDERS the Trial Chamber to immediately forward the entirety of the case file in Case 002 to the Supreme Court Chamber in accordance with Rule 108(2) of the Internal Rules; and

INSTRUCTS the Court Management Section of the ECCC to assist the Trial Chamber in implementing the present Order by granting the Supreme Court Chamber with immediate and unrestricted access to the entirety of the case file in Case 002.

Phnom Penh, 12 March 2013

President of Supreme Court Chamber



⁸ See e.g., Rule 104(4) of the Internal Rules (“Unless otherwise provided in the Internal Rules or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber.”).

⁹ See Rule 108(4)(bis) of the Internal Rules.