



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

**Royaume du Cambodge
Nation Religion Roi**

**Kingdom of Cambodia
Nation Religion King**

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

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

Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE
Date: **19 March 2010**
Language(s): **Khmer / French**
Classification: **Confidential**

ឯកសារទទួល
DOCUMENT RECEIVED/DOCUMENT REÇU
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de reception): 19 03 2010
ម៉ោង (Time/Heure):..... 15 : 00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

**Order on Ieng Sary's Motion Against the Application of Command
Responsibility**

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Charged Person(s)

NUON Chea KHIEU Samphan
IENG Sary KAING Guek Eav
IENG Thirith alias "Duch"

Lawyers for the Civil Parties

NY Chandy	Philippe CANONNE
LOR Chunthy	Elizabeth RABESANDRATANA
KONG Pisey	Mahdev MOHAN
HONG Kim Suon	Olivier BAHUGNE
YUNG Phanit	David BLACKMAN
KIM Mengkhy	Martine JACQUIN
MOCH Sovannary	Annie DELAHAIE
SIN Soworn	Fabienne TRUSSES-NAPROUS
CHET Vannly	Patrick BAUDOIN
PICH Ang	Lyma Thuy NGUYEN
Silke STUDZINSKY	Marie GUIRAUD
Françoise GAUTRY	Laure DESFORGES
Isabelle DURAND	Christine MARTINEAU

Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT PouV Seang
Diana ELLIS
SA Sovan
Jacques VERGÈS
KAR Savuth
François ROUX
Marie-Paule CANIZARÈS

Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel:+855(0)23 218914 Fax: +855(0)23 218915

ឯកសារប្រាប់តម្លៃប្រកបដោយភាពជឿជាក់
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃខែឆ្នាំបញ្ជាក់ (Certified Date/Date de certification): 19 03 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

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 to 508 of the 1956 Penal Code;

Noting Rules 38, 39(6), 55(5), 55(10) and 67(2) of the ECCC Internal Rules (the “Internal Rules”);

Noting Articles 5.1 and 5.4 of the Practice Direction on Filing of Documents before the ECCC (the “Practice Direction on Filing”);

Noting the Request for an Extension of Page Limit dated 4 February 2010 filed by the defence for IENG Sary (D345);

Noting the Co-Investigating Judges’ Order on the Request for Extension of Page Limit dated 12 February 2010 (D345/1);

Considering the Motion Against the Application of Command Responsibility at the ECCC filed by the Defence for IENG Sary dated 15 February 2010 (D345/2 - “the First Motion”);

Considering the Alternative Motion Against the Application of Command Responsibility at the ECCC filed by the Defence for IENG Sary dated 15 February 2010 (D345/3 - “the Alternative Motion”);

PROCEDURAL HISTORY

1. On 4 February 2010, the Defence for IENG Sary filed a request for an extension of the page limit relating to an intended filing on the application of command responsibility at the ECCC.¹ They argued that there were exceptional circumstances in this case because the motion would relate to modes of liability that, according to the Co-Lawyers, were not applicable before the ECCC.
2. By Order dated 12 February 2010, the Co-Investigating Judges (the “CIJs”) rejected the request for an extension of the page limit.² The CIJs directed the Co-Lawyers to “make all their arguments in one filing within the page limit, should they make a request on command responsibility” and warned that “any additional

¹ D345.

² D345/1.

filings circumventing the provisions of the Practice Direction will be treated as a breach of procedure".³

3. On 15 February 2010, the Co-Lawyers for IENG Sary filed their First Motion requesting the CIJs to reject the application of command responsibility before the ECCC. This first motion submitted that command responsibility is not recognized in Cambodian law or customary international law.
4. On the same day, the Co-Lawyers for IENG Sary filed their second Alternative Motion on the same subject matter. This Alternative Motion submitted that in the event that command responsibility was considered to be within the jurisdiction of the ECCC, then the CIJs should find that there are various factual and legal limitations on its applicability at the ECCC.

REASONS FOR THE DECISION

5. The motions under consideration in this order raise two issues: firstly the disregard of the CIJs' direction and warning in their order of 12 February 2010; and secondly the application for declaratory relief.

The disregard of the CIJs' direction and warning

6. In their order of 12 February 2010, the CIJs explicitly directed the Co-Lawyers for IENG Sary to file any motion relating to the applicability of command responsibility in a single filing within the prescribed page limit.⁴ The CIJs warned the Co-Lawyers in accordance with Article 38 of the Internal Rules that they would treat any duplicitous filing or any attempt to circumvent the page limit set out in articles 5.1 and 5.4 of the Practice Direction on Filing as a breach of procedure.⁵
7. The Co-Lawyers for IENG Sary have entirely disregarded this direction and warning. They simultaneously filed two separate motions on the same subject matter which when combined significantly exceeded the prescribed page limit. The CIJs find that the Co-Lawyers have attempted to circumvent the page limit set out in the Practice Direction on Filing by filing the alternative motion. This is a breach of procedure and a violation of the CIJs' order.
8. The CIJs reiterate that repeated filings on the same subject are duplicitous and wasteful of judicial resources. The CIJs have issued several warnings to the parties under Rule 38 of the Internal Rules with respect to duplicitous filings⁶ and have warned the parties that repetitious requests will be rejected summarily.⁷
9. For the above reasons, the CIJs will not consider the Alternative Motion filed by the Co-Lawyers for IENG Sary on 15 February 2010.

³ D345/1 para. 7.

⁴ D345/1 para. 7.

⁵ D345/1 para. 7.

⁶ See for example D345/1, para. 6; D240/3, para.6; D261/2, paras. 13-14; D367, paras 10-15.

⁷ D367 para. 15.

The application for declaratory relief

10. The First Motion filed by the Co-Lawyers for IENG Sary requests the CIJs to reject the applicability of command responsibility before the ECCC.⁸ Despite the Co-Lawyers' claim to the contrary⁹, the nature of this motion is clearly a request for declaratory relief as it requests a declaration as to the applicable law before the ECCC.
11. The CIJs have issued a number of orders refusing requests for declaratory relief and these orders set out detailed reasoning for the refusal and the issue of notice to the parties.¹⁰ They refer, as regards this issue, to their order of 12 February 2010.¹¹ The Co-Investigating Judges are not required, and indeed, will not pre-judge any legal characterisation of the facts until the Closing Order and they see no value in again repeating the reasoning for this continued refusal to grant declaratory relief to the parties.
12. For the above reasons, the CIJs will not consider the First Motion filed by the Co-Lawyers for IENG Sary on 15 February 2010. They will give due consideration to the legal issues related to command responsibility, as may be necessary, in the drafting of the Closing Order.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- **REJECT** the Motion and the Alternative Motion against the Application of Command Responsibility at the ECCC filed by the Co-Lawyers for IENG Sary dated 15 February 2010 (D345/2 and D345/3);
- **NOTE** that the legal characterisations adopted will be set out at the Closing Order upon an assessment of the evidence.

Done in Phnom Penh, on 19 March 2010

សហចៅក្រមស៊ើបអង្កេត

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

⁸ D345/2.

⁹ D345/2, para 1.

¹⁰ See for example D240/3, paras. 3-5; D268/2, paras. 9-11; and D180/6, paras. 6-8. The only exception to the CIJ's continued refusal to grant declaratory relief was the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise (D97/13); the reasoning behind issuing that order does not apply to modes of liability such as command responsibility that are explicitly set out in Article 29 (new) of the ECCC Law. See D240/3 paras. 3-5.

¹¹ D345/1, para 5.