



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges

Bureau des co-juges d'instruction

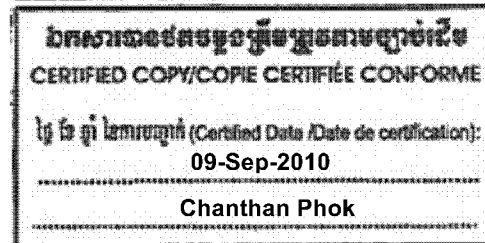
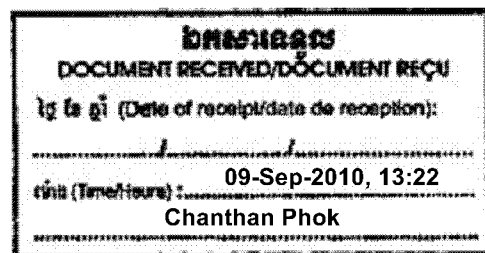
Before: Judge YOU Bunleng

Judge Marcel LEMONDE

Date: 3 September 2010

Language(s): Khmer/French

Classification: Confidential



Order Refusing Ieng Sary's Requests for Annulment (D381 and D387)

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We, **You Bunleng (ឃុំ ប៊ុនហ្គេង)** 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 21, 48 and 76 of the ECCC Internal Rules (the “Internal Rules”);

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 Request dated 19 May 2010, in which Ieng Sary’s Defence (“the Defence”) requested the Co-Investigating Judges to seize the Trial Chamber with a view to annulment of all investigative acts performed by or with the assistance of Mr Stephen Heder and Mr David Boyle (“the First Request”, D381);

Noting the Request dated 20 July 2010, in which the Defence requested the Co-Investigating Judges to seize the Trial Chamber with a view to annulment of the evidence collected from the Documentation Centre of Cambodia (“the Second Request”, D387);

PROCEDURAL BACKGROUND AND DEFENCE SUBMISSIONS

Request for Annulment of all Investigative Acts Performed by or with the Assistance of Stephen Heder and David Boyle

1. In the First Request, the Defence argues that Messrs Heder and Boyle “*are not sufficiently impartial to be relied upon to conduct impartial investigative acts*”. It asserts that “[T]he evidence of a bias on the part of Mr Boyle and Mr Heder is known to the OCIJ. The defense has repeatedly brought this matter to the OCIJ’ attention. Despite this, the OCIJ has done absolutely nothing to safeguard the judicial investigation from the taint of bias. It has instead refused to answer any requests for information and has done everything in its power to avoid addressing the issue in its investigation”.¹
2. The Co-Lawyers accordingly invite the Co-Investigating Judges “*to seize the Pre-Trial Chamber with a view to annulment of all investigative acts performed by or with the assistance of Stephen Heder and David Boyle*”.

Request for Annulment of all Evidence Collected from the Documentation Centre of Cambodia

3. In the Second Request, the Defence submits that “*the OCIJ has not exercised the required due diligence in verifying the authenticity, credibility and reliability of evidence collected from DC-Cam*”. The Defence argues that “*it must be*

¹ **D381**, First Request, para. 37.

assumed that the OCIJ has made no effort or investigations to correct the defects of evidence collected from DC-Cam"² adding that "[t]he use of evidence collected from DC-Cam in the Closing Order would fail to take into account the fair trial rights of Mr. IENG Sary"³. The Defence further claims that "[t]he ECCC should follow the ICTY guidelines on admissibility of evidence to avoid a flood of inadmissible evidence being considered as a basis for an indictment"⁴. Lastly, the Defence contends that "[t]he annulment of evidence collected from DC-Cam must be made now. The Defence does not have recourse at a later stage in the proceedings to cure the procedural defect in the judicial investigation caused by the OCIJ's reliance on evidence collected from DC-Cam"⁵.

4. In view of the foregoing elements, the Co-Lawyers invite the Co-Investigating Judges "to seize the Pre-Trial Chamber with a view to annul all evidence collected from the Documentation Center of Cambodia".

REASONS FOR THE DECISION

Applicable law

5. With the exception of the circumstance where a procedure is specifically prescribed under pain of nullity, a procedural defect may warrant annulment of one or more procedural actions only where it has been demonstrated that the rights of the Defence under the International Covenant on Civil and Political Rights (ICCPR) have been infringed.⁶ Those rights are included in Internal Rule 21.
6. Pursuant to Internal Rule 48, "[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application". Accordingly, when the Co-Investigating Judges are seised of a request for annulment, they must determine:
 - whether a procedural defect exists; and
 - if so, whether the defect infringes the rights of the party concerned.
 It is appropriate to examine the merits of the Defence's claims in light of these principles.

Request concerning Stephen Heder and David Boyle

7. The Co-Investigating Judges emphasise, first of all, that a request for annulment of investigative actions must be specific and must not be a disguised application for disqualification. In this instance, the Defence has already filed an application for the disqualification of Mr Stephen Heder and Mr David Boyle, which application was found inadmissible by the Pre-Trial Chamber on 22 September

² D387, Second Request, para. 34.

³ D387, Second Request, para. 42.

⁴ D387, Second Request, para. 35.

⁵ D387, Second Request, para. 43.

⁶ D55/I/8, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, paras. 34-41, in particular para. 36.

2009.⁷ However, the request for annulment at hand does not refer to any action in particular; it amounts to a disguised attack on the same individuals, as it makes a vague request for annulment of all the work they have performed and to consider “*all investigative action performed by or with the assistance of Mr Heder and Mr Boyle to be null and void*”.⁸

8. As recalled by the Defence, the Co-Investigating Judges have responded on several occasions that such requests are without legal basis, and this includes actual applications for disqualification,⁹ requests to limit the scope of duties¹⁰ or repeated requests for annulment of the investigative actions of specific individuals. The repetitive filing of requests that are without legal basis does nothing but hamper the work of the Office of the Co-Investigating Judges (OCIJ) at the expense of the obligation of the Co-Investigating Judges’ to bring the judicial investigation proceedings to a close within a reasonable time, pursuant to Internal Rule 21(4).

Request concerning the Documentation Centre of Cambodia

9. The Defence avers that “[t]he OCIJ has not analyzed the methodology which DC-Cam uses to interview witnesses”¹¹ and that “the OCIJ has simply collected evidence from DC-Cam and placed it on the Case File. In doing so, the OCIJ has simply outsourced the investigation to DC-Cam. Those working at DC-Cam have therefore become *de facto* investigators”.¹² These allegations are unfounded, given that the Co-Investigating Judges delegate their powers only within the clearly regulated framework of rogatory letters, as set out in Rule 62 of the ECCC Internal Rules; this is clearly not the case in this instance. The documentary records from the Documentation Centre of Cambodia have been the subject of OCIJ investigative actions, and, where applicable, it was only after a court interview, recorded in the form of written record of interview, that persons previously interviewed by DC-Cam were recognised as witnesses in the proceedings.
10. As regards the Defence’s demand to apply the ICTY *prima facie* authenticity standard,¹³ suffice it to say that the Co-Investigating Judges are bound by the rules of procedure set out in the ECCC Internal Rules and not by the rules followed by other tribunals. The ICTY *prima facie* authenticity standard applies only to inculpatory investigations by the prosecution at the ICTY, and is therefore incompatible with OCIJ judicial investigation at the ECCC, which covers both inculpatory and exculpatory evidence.

⁷Case of IENG Sary, 002/08-07-2009-ECCC-PTC, Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009.

⁸ **D381**, First Request, para. 25.

⁹ **A121/III**, Letter titled “Request for information on ‘the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle,’” 26 May 2008; **A252/2**, Letter titled “Your Request for Information Concerning Mr. Stephen Heder”, 29 May 2009.

¹⁰ **D377/1**, Letter “Re: Request to Limit the Scope of Duties of OCU Investigator Stephen Heder”.

¹¹ **D387**, Second Request, para. 31.

¹² **D387**, Second Request, para. 36.

¹³ **D387**, Second Request, para. 35.

11. Lastly, above and beyond the admissibility of the evidentiary material, it is in fact its actual probative value that the Defence impugns in challenging the potential value attached thereto by the OCIJ: the Defence is thereby engaging in wholesale speculation as to both the content of the Closing Order and as to whether Ieng Sary's rights could be infringed. The speculative nature of the Request renders it entirely inadmissible, as the Pre-Trial Chamber found earlier in respect of a similar request, in which it held that "*the Defence's inquiry into the intention of the OCIJ to rely on certain portions of the Case File is premature at this stage of the proceedings*".¹⁴ Moreover, the Defence is in error in claiming that it will not have the opportunity to challenge the authenticity of the evidence after the issuance of the Closing order; as the Pre-Trial Chamber has again affirmed, "*were the Appellant to have actual doubts as to the authenticity of materials relied upon by the OCIJ in the Closing Order due to their source and/or chain of custody, he retains the opportunity to challenge such authenticity before the Trial Chamber*".¹⁵
12. In view of all the foregoing elements, there are no grounds for seising the Pre-Trial Chamber, as absent any procedural defect, none of the Defence's rights under the International Covenant on Civil and Political Rights or the Internal Rule 21 have been infringed, and both Requests cannot but be dismissed.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES

Hereby find that there are no grounds to seise the PTC with a view for annulment;

Dismiss the Requests.

Done in Phnom Penh, on 3 September 2010

សហចៅក្រមស៊ើបអង្កេត

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

(Signed)	(Signed)
Marcel LEMONDE	យូ ប៊ុនឡេង

¹⁴ **D253/3/5**, Decision on Appeal against OCIJ Order on Nuon Chea's Sixteenth (D253) and Seventeenth (D265) Requests for Investigative Action, 6 April 2010, para. 12.

¹⁵ **Ibid.**, para. 13.