

លេខ/ល. ១២៧



ព្រះរាជាណាចក្រកម្ពុជា

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

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

សំណុំរឿងព្រហ្មទណ្ឌ

Criminal Case File /Dossier pénal

លេខ/No: 002/14-08-2006

លេខស៊ើបអង្កេត/Investigation/Instruction

លេខ/No: 002/19-09-2007-ECCC-OCIJ

ជាតិ សាសនា ព្រះមហាក្សត្រ
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Kingdom of Cambodia
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 du dossier: K. K. Ratanak

ដីកាសម្រេចស្តីពីការមើលឯកសារសំណុំរឿង

ដោយសេចក្តីសម្រេច

Ordonnance sur l'accès au dossier par les détenus

Order on Access to the Case File by Detainees

We, **You Bunleng** ឬ **ប៊ុនហ្គ្រង** 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 continuing judicial investigation against **NUON Chea and others** in relation to charges of **Crimes Against Humanity** and **Grave Breaches of the Geneva Conventions of 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law;

Noting Rules 22(3) and 55(6) of the ECCC Internal Rules (the "Internal Rules");

Noting sub-Rules 9(21) and (23) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the ECCC, dated 17 December 2008, (the "Detention Facility Rules");

Noting the Ieng Thirith Defence Request for Clarification of the Applicable Rules Concerning Charged Person Receiving Case File Documents, dated 22 October 2008 (A228);

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១
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ឯកសារទទួលបានច្បាប់
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 ថ្ងៃ ខែ ឆ្នាំ ផ្អែកលើបញ្ជាក់ (Certified Date/Date de certification):
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 មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
 du dossier: K. K. Ratanak

Noting the Nuon Chea Defence Team Request for Access to the Case File, dated 28 November 2008 (A239).

PROCEDURAL HISTORY

1. On 8 February 2008, in a decision in respect of Case File 001/18-07-2007-ECCC-OCIJ, the Co-Investigating Judges authorised the defence team to provide the detainee with copies of case file documents, subject to a number of limitations, notably requiring a defence team member to deliver the documents personally and take them back again every evening¹. Following that decision, the defence teams for detainees in Case File 002/19-09-2007-ECCC-OCIJ have allowed to benefit from a comparable system on an *ad hoc* basis.
2. On 22 October 2008, Counsel for IENG Thirith requested clarification of the applicable rules concerning the right of the Charged Person to receive Case File documents (A228).
3. On 28 November 2008, the Nuon Chea defence team requested access to the Case File for their client (A239).
4. On 11 December 2008, the Co-Investigating Judges requested the advice of the Chief of the Detention Facility regarding the availability of space and staff capacity to deal with copies of the Case File (A228/2 - 239/2).
5. On 19 December 2008, the Chief of the Detention Facility responded that for reasons of space and fire hazard, it would not be possible to keep a full copy of the Case File in the Detention Facility, but that it would be possible to install a small lockable cabinet in each cell in order to secure a limited number of documents (A/239/2/1).

THE LAW

6. Article 149 of the Cambodian Code of Criminal Procedure (2007) does not allow lawyers to provide copies of elements of the case file to their clients in ordinary proceedings before the Cambodian Courts: “ ... *The lawyer may read out part of the case file to his client. The lawyer may not give the copies of part of the case file to his client.* ”
7. Internal Rule 55(6) lays down the basic principle that “*the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier...*”. However, Internal sub-Rules 22(3) and (4) do not contain any prohibition of physical access to the case file by charged persons, simply recalling that in the performance of their duties, lawyers are subject, in

¹ 001/A54/I, **Memorandum to the Director of the ECCC Detention Facility**, 8 February 2008.

particular, to the provisions of the Internal Rules, the Cambodian Law on the Statutes of the Bar and recognised standards and ethics of the legal profession. For example, Detention Facility Rule 9(23) prohibits defence teams from contact with detainees other than their client.

ARGUMENTS BY THE PARTIES

- 8. The Ieng Thirith defence team noted “*the existence of contradictory rules and practices concerning the provision of copies of documents within the Case File to the Charged Person*” and requested clarification of OCIJ policy in light of the international defence rights set out in Article 14 of the International Covenant on Civil and Political Rights (the “ICCPR”). They affirmed that “constant” access to Case File documents would facilitate their clients preparation of his defence.
- 9. The Nuon Chea defence team adopted the arguments of the Ieng Thirith request by reference, adding that more regular access to Case File documents and “Attorney work product” than under the current *ad hoc* arrangements is necessary for their client to “participate in a meaningful way” in the judicial investigation. They requested the provision of a “dedicated, secure room” containing “a complete copy of Case File No. 002” to be placed at Nuon Chea’s disposal during regular operating hours, as well as a dedicated secure storage receptacle, preferably in his cell, allowing review of such documents without restriction.

REASONS FOR THE DECISION

- 10. The Co-Investigating judges note, in application of Article 23 (new) of the ECCC Law, that the nature of the alleged crimes, the complexity of the case and the sheer volume of documents involved in proceedings before the ECCC raise uncertainty regarding the concrete application of Internal Rule 55(6): the absence of any express denial of detainee access to their case file in Internal Rule 23(3) reflects the need for flexibility in such matters, the strict provisions in Article 149 of the Cambodian Code of Criminal Procedure not being suited to the facts of this case.
- 11. The case law of the European Court of Human Rights (ECHR) relating to access of the accused to the case file has evolved over time. After having considered that reserving access to the case file to the lawyers for the accused did not necessarily amount to a breach of Article 6 ECHR² (equivalent in this respect to Article 14 ICCPR), there has been an increasing tendency for the Court to recognise that the right of the accused to participate in his or her own defence and equality of arms with the prosecution requires a certain level of “direct, satisfactory” access to the evidence by the accused in person,

² See for example ECHR, *Kremzow v. Austria*, Judgment, Chamber, 21 September 1993, application no. 12350/86; and ECHR, *Kamasinski v. Austria*, Judgment, Chamber, 19 December 1989, application no. 9783/82.

so that “the applicant would have been able to identify arguments relevant to his defence other than those his lawyers advanced”.³ The ECHR has clarified that “satisfactory” access must be assessed “regard being had to the nature of the documents available to the detained person, their number and their importance to the assessment of the lawfulness of the detention.”⁴

- 12. This evolution in European Human Rights jurisprudence has been mirrored, in France (the procedural regime of which is of more direct pertinence to the ECCC), by legislation recognising a limited right of detainee access to the case file during the judicial investigation.⁵
- 13. Before other international criminal courts, although the nature of the “case file” at the Pre-Trial stage cannot be directly compared with the judicial investigation before the ECCC, consistent practice allows detainees to retain copies of their file in their cells⁶.
- 14. In addition, in the present case, wider access to the case file would enable the charged persons to better comply with the need, recognised in the CIJ’s Translation Order of 19 June 2008, to “contribute to the resolution of their own language needs” through use of their linguistic capacities⁷.
- 15. For all of these reasons, the Co-Investigating Judges consider it appropriate to lay down a general rule establishing an appropriate level of access to the case file for all detained charged persons, based on the defence right of satisfactory access to the case file while taking account of the practical constraints at the Detention Facility. To that end, the Co- Investigating Judges have taken guidance from procedural rules and practices established at the international level, as informed by the practice in legal systems applying comparable procedural rules.
- 16. In practice, as the Chief of the detention facility pointed out in his letter (A239/2/1) and as confirmed during a visit of the detention facility by OCIJ staff in the company of the Detention Liaison Officer, there is no room large enough to contain the entire case file; moreover, it would be difficult for CMS staff to keep such a copy up to date and impossible to guarantee its integrity without having someone permanently present to check in and out any documents used, a task which does not fall within the mandate or the capacity of the Detention Facility staff.
- 17. Accordingly, the current practice of requiring a defence team member to bring documents to the Detention Facility and take them back when the detainee no longer

³ ECHR, *Ocalan v. Turkey*, Judgment, Grand Chamber, 12 May 2005, application no. 46221/99, para 143 .
⁴ ECHR, *Migon v. Poland*, Judgment, Fourth Section, 25 September 2002, Application no. 24244/94; see also ECHR *Garcia Alva v. Germany*,Judgement, First Section, 13 February 2001, application no. 23541/94; and ECHR, *Lietzow v. Germany*.Judgment, First Section, 13 February 2001, application no. 24479/94.
⁵ See Article 114 of the French Code of Criminal Procedure, amended in 2007.
⁶ See for example, Regulations 11 and 41 of the ICTY Visits and Communications rules.
⁷ A190, **Order on Translation Rights and Obligations of the Parties**, 19 June 2008, E_ERN 00196923-00196930, para. 4.

needs them is the only feasible means of ensuring accountability and the integrity of the Case File. The Detention Facility being in close proximity to the permanent offices of the defence teams, this requirement should not place an unacceptable burden on the defence teams. Moreover, the recently adopted Detention Facility Rules lay down a detailed procedure for defence teams wishing to provide documents to their clients (see in particular sub-Rules 9(21) and (23)).

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- **Confirm** that Co-Counsel for all the detainees are responsible for providing their clients with copies of any case file documents and privileged communications necessary for the preparation of their defence, and taking such documents back, either directly or through members of their defence teams, in accordance with the procedures laid down in the ECCC Detention Facility Rules, notably sub-Rules 9(21) and (23);
- **Authorise** each detainee to keep such documents in their cells as long as necessary, on the one hand, and to work on them both when alone in his/her cell and during meetings with members of the defence team, on the other hand, provided that the total number of documents held at any one time must not exceed the capacity of a lockable cabinet to be placed in each cell;
- **Request** the Chief of the Detention Facility to confer with the Detention Liaison Officer and the Defence Support Section with a view to implementing this Order, including particularly the provision of a lockable cabinet to each detainee;
- **Request** the Chief of the Detention Facility to ensure that all such documents placed in the lockable cabinet are used only in their cells or during visits to the detainees by members of their defence team.
- **Request** the Detention Liaison Officer to ensure that all instructions or circulars to defence teams on visits to the detention facility are amended as necessary to reflect this Order;

Done in Phnom Penh, on 23 January 2009

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Co- Investigating Judges

Co-juges d'instruction