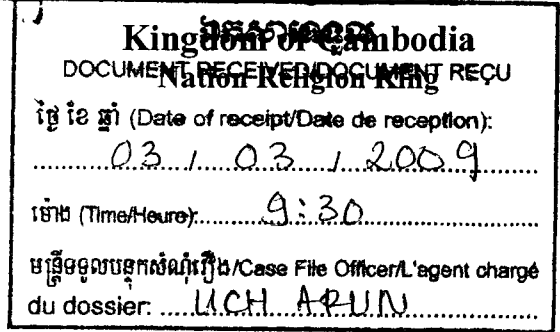




លេខ/No: D138

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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
លេខស៊ើបសួរ/Investigation/Instruction
លេខ/No: 002/19-09-2007-ECCC-OCIJ

ដីកាសម្រេចស្តីពីការរំលោភបំពានលើភាពសម្ងាត់
នៃកិច្ចស៊ើបសួរ
Order on Breach of Confidentiality of the
Judicial Investigation
Ordonnance sur violation du secret de
l'instruction

We, **You Bunleng (ឃុំ ប៉ុនឡេង)** 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** and **Grave breaches of the Geneva Convention dated 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law;

Noting Rules 35, 38 and 56 of the ECCC Internal Rules (the "Internal Rules");

Noting Article 3.12 of the Practice Direction on Filing of Documents Before the ECCC, dated 10 October 2008 (the "Practice Direction");

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ 1

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FACTUAL AND PROCEDURAL HISTORY

1. On 3 December 2008, following an article in the Cambodia Daily entitled “*Nuon Chea seeks Evidence from Foreign Powers*”, which discussed confidential information, the Co-Investigating Judges sent a letter to all of the defence teams (A238) reminding the parties of their obligations regarding confidentiality. The letter stated, in part:

The confidentiality of the investigation is a matter which can only be set aside by the seized judicial organ ... and the Co-Investigating Judges have not made such a decision in this instance. ... We wished to take the opportunity to underline the confidentiality of the investigation case file and, in particular, to remind you that, even if a party drafts a submission to the case file, that party cannot choose to render it public or to divulge the fact that such material has been placed on the case file.

2. Following an 11 December 2008 meeting between the Defence team for IENG Sary (the “Defence”) and Mr. Knut ROSANDHAUG, Deputy Director of the ECCC Office of Administration, the Defence sent a letter to Mr. Rosandhaug on 18 December 2008, copied to, among others, the Co-Investigating Judges. In this letter, the Defence stated:

Finally, to further demonstrate our commitment to a fair and transparent judicial process at the ECCC, we would also like to reiterate the intention expressed in our meeting to establish a website to provide access to all public (sic) filings submitted by the IENG Sary Defence team. The current practice by the Judicial Chambers and Co-Investigating Judges at the ECCC, of suppressing Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges, all under the fig leaf that these are necessary measures to protect the supposed confidentiality and integrity of the investigation or judicial decision-making process, must be discontinued without exception. Submissions which are solely the work of the Defence team and which do not relate to the substance of the ongoing judicial investigation but relate solely to legal issues, must be debated under the watchful eye of the public. To allow non-confidential issues to be debated behind closed doors not only deprives Mr. IENG Sary of a fair and public trial but also deprives Cambodia of a demonstration of how complex trials for the most serious crimes can be conducted openly and transparently.

3. On 15 January 2009, the Co-Investigating Judges sent a letter to the Defence (A238/1/Corr.1) stating, in particular:

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The CIJ reiterate that the confidentiality of the case file for which the Internal Rules provide concerns all filings thereon, including the filings drafted by the parties.... As previously noted, it is for the Judges, and not for the parties, to decide when and how to disclose confidential case file material.

- 4. On 20 January 2009, the Defence acknowledged receipt of the 15 January letter and responded (A238/2). Though clearly rejected by the Co-Investigating Judges, they reiterated that they were free to distribute case file material at will, adding (in paragraph 4 of the response):

It is also notable that at the International Tribunals for the Former Yugoslavia and Rwanda, websites have been used by Defence Counsel practicing before those tribunals to publicise their own filings. This has occurred at both the pre-trial stage, akin to the judicial investigation, and later during the trial stage. These have not appeared to cause any difficulties for the respective tribunals concerned.

- 5. On 26 January 2009, more than 10 days after receiving the Co-Investigating Judges' letter reminding the Defence of their legal obligations, the Defence proceeded to post nine case file documents on their website, the publication of which had at no time been authorized by the Judges.

THE LAW

- 6. Internal Rule 56 states:
 - 1. *In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.*
 - 2. *However, the Co-Investigating Judges may:*
 - a) *jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and*
 - b) *jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38.*

7. Article 3.12 of the Practice Direction on Filing of Documents before the ECCC states that:

The investigation is confidential. The filing party may indicate whether it wishes a document to be marked ‘Public’, ‘Confidential’, or ‘Under seal’. The Co-Investigating Judges or the Pre-Trial Chamber reserve the sole power to review the document to determine whether such annotation is appropriate.

8. Internal Rule 35, entitled “Interference with the Administration of Justice” provides that:

1. The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, including any person who:

a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;

(...)

5. If a lawyer is found to have committed any act set out in sub-rule 1, the Co-Investigating Judges or the Chambers making such finding may also determine that such conduct amounts to misconduct of a lawyer pursuant to rule 38.

9. Internal Rule 38, entitled “Misconduct of a lawyer”, specifies:

1. The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.

2. The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body.

10. Finally Article 21(3) of the Agreement on the Establishment of the ECCC provides that:

Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

REASONS FOR THE DECISION

11. First, it should be noted that the principle of confidentiality of the judicial investigation does not, in any way, infringe the right of charged persons to a fair trial, since it only concerns the preparatory stage of the proceedings, and does not apply during the trial stage. The trial will be fair if, after the confidential judicial

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investigation, there is a public hearing during which the Defence has every opportunity to contest the evidence, since the fairness of a trial must be considered in view of the judicial proceedings considered as a whole.¹

- 12. The aforementioned provisions of the Internal Rules and Practice Direction make clear that the confidentiality of the judicial investigation applies to all documents, including those drafted by the parties and that it is solely for the Judges to decide when and how to disseminate confidential case file material, since a decision concerning publicity must take account of objective criteria, such as preservation of the rights and interests of the parties, the protection of witnesses and victims and the impartiality of the judicial investigation, as well as the judicial calendar.² The Co-Investigating Judges have given the parties a number of clear, firm reminders of their obligations in this respect³.
- 13. The Defence may not raise a lack of knowledge of the civil law system applicable before the ECCC, nor state its disagreement with the principle of the confidentiality of the judicial investigation, in order to contest the force of perfectly clear provisions of the Internal Rules, Practice Directions or any decision⁴ by the judges of this institution, or to be relieved of their professional obligations.
- 14. With a view to transparency, the Defence could have requested that the Co-Investigating Judges publish a document if they believed such publication was necessary for the public to gain a full understanding of the judicial proceedings. Yet, instead of seising the Co-Investigating Judges of such a request, the Defence wrote a letter to the Deputy Director of the Administration (a person who has no authority to determine whether part of the judicial investigation should be made public, if any), stating its intention to release any document that the Defence, unilaterally, deems appropriate for public dissemination.

¹ ECHR, *Barberà, Messegue and Jabardo v. Spain*, Judgment of 6 December 1988, series A no 146, para. 68; see also : ECHR, *Berkouche v. France*, 24/08/2005, para. 53; ECHR, *Delta v. France*, 19/12/2009, para. 36, citing ECHR, *Kostovski v. Netherlands*, 20/11/1989, series A no 166, para. 41; ECHR, *Unterpertinger v. Austria* 24/11/1986, series A n 110, para. 31.

² In order to establish this calendar, the Co-Investigating Judges must take multiple elements into account, in particular, requests from all defence teams, the prosecution and civil parties, as well as their own investigative action. Internal Rule 55(10) provides that, in case of refusal of a request, the Co-Investigating Judges must deliver a rejection order “as soon as possible and, in any event, before the end of the judicial investigation”; it provides no such language concerning accepted requests.

³ See paragraphs 1 and 3 above.

⁴ While the Co-Investigating Judges’ order came in the form of a letter, the jurisprudence of the ECCC makes clear that it is the content of a communication that determines whether the communication is an order, not the format of that communication; see *Decision on the Admissibility of the Appeal Lodged by IENG Sary on Visitation Rights*, dated 21 March 2008.

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ 5
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15. The Defence alleges that the Co-Investigating Judges have “*suppress[ed] Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges, all under the fig leaf that these are necessary measures to protect the supposed confidentiality and integrity of the investigation or judicial decision-making process. ...*”. These allegations are serious and unsubstantiated. Even assuming, *arguendo*, that these claims were meritorious; this would not grant the Defence *carte blanche* to determine unilaterally which documents may be made public.
16. In addition, the justification of “transparency” does not stand up to analysis of the facts as they appear from the chronology of recent events. Indeed, on Friday 20 February 2009, the Defence filed a request before the Pre-Trial Chamber entitled “*Ieng Sary’s Request to add the medical report of Dr. Paulus Falke to the case file and request to permit Dr. Paulus Falke to give evidence via videolink during the hearing on 26 February 2009*”. The Defence posted the document referenced in this request (a letter from Dr. Paulus Falke) on their website around noon on 23 February, that is, before the Pre-Trial Chamber had even finalized its response (which was handed down at 4 p.m. on the same day). This decision by the Pre-Trial Chamber was notified on the morning of 24 February, less than two working days from the date of reception of the request. That same morning, the Cambodia Daily ran a front page article on the report of Dr. Paulus Falke, entitled “*Ieng Sary’s Health Unclear: Hague Doctor*”. Given this chronology, it can hardly be said that the Defence published this information to redress the suppression of a document by the Pre-Trial Chamber.
17. Moreover, the Defence affirmation that the documents they have published “*do not relate to the substance of the ongoing judicial investigation but relate solely to legal issues*”, is directly countered by the fact that at least two of these requests (relating to the alleged existence of conflicts of interest within the Office of the Co-Investigating Judges) aim to obtain an investigation by the Co-Investigating Judges of specific issues.
18. Finally, the Defence decision to publish the document entitled “20080702 – Sary – Defence Appeal on Psychiatric Examination.pdf” is in direct defiance of the Pre-Trial Chamber’s 24 July 2008⁵ decision by virtue of which this document was classified as “confidential”.
19. In light of all of these elements, the Defence’s decision to publish the above-mentioned documents, in direct defiance of the Co-Investigating Judges’ 15 January 2009 decision prohibiting publication of case file material, violates Internal Rule 56(1) and Article 21(3) of the 6 June 2003 Agreement.

⁵ *Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: IENG Sary’s Appeal Regarding Appointment of an Expert (A189/I/6).*

20. This breach may be sanctioned under Rules 35 and 38 of the Internal Rules.

FOR THESE REASONS

The Co-Investigating Judges hereby:

Decide that Messrs Michael G. KARNAVAS and ANG Udom have not respected the decision of the Co-Investigating Judges dated 15 January 2009, have breached ECCC Internal Rule 56(1) by revealing confidential information and have breached Article 21(3) of the 2003 Agreement by failing to act in accordance with the standards and ethics of the legal profession;

Order that:

1. The abovementioned lawyers shall immediately:
 - a) Cease posting information or documents related to the judicial investigation other than those documents published on the ECCC website; and
 - b) Remove the offending content from the Defence website. If this content is not removed within 48 hours said lawyers will commit a further breach of this Order, and will thus expose themselves to the legal consequences.
2. A copy of this Order shall be forwarded to:
 - a) The Bar Association of the Kingdom of Cambodia;
 - b) The American Bar Association;
 - c) The Alaska State Bar Association; and
 - d) The Defence Support Section,
 so that these bodies may decide on any appropriate action.

Done in Phnom Penh, on 3 March 2009

សហចៅក្រមស៊ើបអង្កេត

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