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D97/9/3

Phnom Penh, 15 July 2009

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់
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មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:..... Ratanak

To:
The Co-Investigating Judges
YOU Bunleng and
Marcel LEMONDE
EEEC
Phnom Penh, Cambodia

Case No: 002/19-09-2007

Subject: Interference with the administration of justice – Rule 35(2)

Your Honours,

As you were informed by our fellow defence lawyers more than a week ago,¹ Mr Michael Scharf, a special assistant with the Office of the Co-Prosecutors recently delivered a lecture in The Hague on the subject of joint criminal enterprise before the Cambodian Tribunal. In his lecture, Mr Scharf – the main architect of the Co-Prosecutors’ request for the application before the ECCC of the form of liability known as joint criminal enterprise – admitted that the Office of the Co-Prosecutors knowingly omitted to include certain information in the said request, because it contradicts their claims on the subject. The intended objective is clear and conceded, namely to ensure at all costs that this form of participation – the Co-Prosecutors’ “secret weapon” – is declared applicable by the Co-Investigating Judges.

As a matter of substance, this attitude tends to prove what the Defence has been saying all along, namely that the notion of joint criminal responsibility is not part of the law applicable before the ECCC and must not be recognized as such.

More generally, it is clear that withholding such information goes against the ethics of any member of the judiciary and is unbecoming of a public prosecuting authority, a representative of the judiciary and guardian of the law. This Office, which, in these capacities, wields a great deal of power throughout the judicial investigation and trial, and which, for this reason only, is much more than just a party to the proceedings. Of course, “[TRANSLATION] the obligation of impartiality is not binding (...) [on the

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¹ Ieng Sary’s Request for Sanctions Under Internal Rule 35 due to the Co-Prosecutors Misleading the Court in Their Supplementary Observations on Joint Criminal Enterprise Filed on 31 December 2008, 29 June 2009, D97/9; Submission in Support of Ieng Sary’s Request for Sanctions”, 8 July 2009, D97/9/1.

prosecution. However, the prosecution] is still bound by the obligation of objectivity and neutrality".² In fact, this obligation applies to all those who work for of the OCIJ or under supervision in the performance of its mission of justice.

We are hereby requesting, in support of the requests by fellow defence lawyers, that, on the one hand, that the Co-Investigating Judges order the Office of the Co-Prosecutors to correct the observations they filed concerning the notion of joint criminal enterprise in view of the information they refused to reveal earlier, and, on the other hand, pursuant to Rule 35(2), that the Co-Investigating Judges impose any such sanctions as may be necessary or investigate this incident.

We await prompt action on your part,

Accept, Your Honours, the assurances of our highest consideration.

Without prejudice,

For the Lawyers of Mr KHIEU Samphan

[signed]

Sa Sovan

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² See: *L'impartialité du juge en procédure pénale*, Franklin Kuty-
<http://books.google.fr/books?id=N5psD4Su1nAC&pg=PA179&dq=procureur+et+impartialit%C3%A9>, p.
180.