



ព្រះរាជាណាចក្រកម្ពុជា
 ជាតិ សាសនា ព្រះមហាក្សត្រ
 Royaume du Cambodge
 Nation Religion Roi
 Kingdom of Cambodia
 Nation Religion King

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

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 Office of the Co-Investigating Judges
 Bureau des Co-juges d'instruction
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Before: Judge YOU Bunleng
 Judge Marcel LEMONDE
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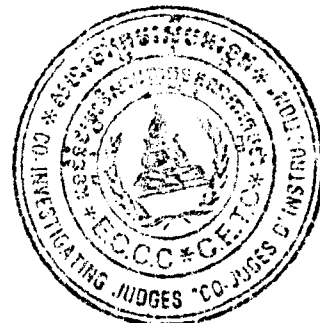
Order on the Request by the IENG Sary Defence Team for Sanctions against the Co-Prosecutors

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 William SMITH

Charged Person(s)
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 IENG Sary KAING Guek Eav
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We, **You Bunleng (ឃុំ ប៊ុនឡុង)** 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 Rule 55 of the ECCC Internal Rules (the “Internal Rules”),

Noting the ongoing judicial investigation against **IENG Sary and other Charged Persons** relating to charges of **Crimes against Humanity** and **Grave breaches of the Geneva Conventions dated 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law,

Considering the Request by the Defence for IENG Sary for “Sanctions against the Co-Prosecutors for Misleading the Court Regarding the Law on Joint Criminal Enterprise” dated 29 June 2009 (D97/9);

Considering the Submission by the Defence for NUON Chea dated 8 July 2009 (D97/9/1);

Considering the Submission by the Defence for KHIEU Samphan dated 15 July 2009 (D97/9/3);

Considering the Response by the Co-Prosecutors dated 16 July 2009 (D97/9/2);

Considering the Reply to the Co-Prosecutors by the Defence for IENG Sary dated 30 July 2009 (D97/9/4);

Considering the Supplementary submission by the Defence for IENG Sary to his Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC dated 24 November 2008: Limited to the applicable United Nations General Assembly Resolutions, dated 31 July 2009 (D97/12);

Considering the response by the Civil Parties dated 6 August 2009 (D97/9/5);

Considering the reply to the Civil Parties by the Defence of IENG Sary dated 25 September 2009 (D97/9/6);

PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 28 July 2008, the Defence for IENG Sary requested the Co-Investigating Judges to declare that liability on the basis of a joint criminal enterprise (“JCE”) is not a form of liability applicable before the ECCC.¹ In its response and supplementary observations, the Office of the Co-Prosecutors (“OCP”) submitted

¹ D97, para. 15; D97/7, para. 28.



that the request should be dismissed, arguing that all three forms of JCE liability are applicable before the ECCC.²

2. The Defence for IENG Sary submits in its current request that the OCP misled the Co-Investigating Judges by relying on UN General Assembly Resolution 95(1), and failing to cite UN General Assembly Resolution 488(V), which it claims undermines the arguments made by the OCP regarding the applicability of JCE before the ECCC.³ Based on comments made by Mr. Michael Scharf at a conference in The Hague in June 2009, the Defence alleges that the OCP was aware of Resolution 488(V) and deliberately misled the OCIJ by failing to reveal this information.⁴
3. The Defence for IENG Sary requests the Co-Investigating Judges to order the OCP to file a corrigendum to its Supplementary Observations concerning the impact on Resolution 95(1) of the 1950 Report by the International Law Commission, Resolution 488(V) and any other UNGA Resolutions which have an impact of the status of the Nuremberg Principles.⁵ It further submits that the Co-Investigating Judges should sanction the International Co-Prosecutor or members of the OCP for deliberately misleading the court or conduct further investigations into this alleged breach of the OCP's ethical obligations, pursuant to Rule 35(2) of the Internal Rules.⁶ The Defence for NUON Chea and KHIEU Samphan support the IENG Sary request.⁷
4. The OCP Response requests the Co-Investigating Judges to dismiss the application on the basis that the OCP did not deliberately mislead the court by withholding any known legal authority.⁸
5. The Response of the Civil Parties submits that the Defence incorrectly quoted the law at issue and that the evidence provided by the Defence supports the OCP position regarding the applicability of JCE before the ECCC, and accordingly asks that the request be rejected.⁹

REASONS FOR THE DECISION

6. Sanctions may be applied for interference with the administration of justice at the discretion of the Co-Investigating judges under Internal Rule 35(1), which states:

² D97/2, para. 40; D97/8, para. 51.

³ D97/9, paras. 6-7; D97/9/4, paras. 3-4; D97/9/6, paras. 6-22; referring to *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Resolution 95(I), UN GAOR, 1st Session, 11 December 1946, U.N. Doc A/236 (1946), pt. 2 at 1144 ("Resolution 95(1)") and the *Formulation of the Nuremberg principles*, Resolution 488(V), 5th Session, 12 December 1950, Official Records, Supplement No. 20, p. 77 ("Resolution 488(V)").

⁴ D97/9, para. 5; D97/9/4, paras. 5-6.

⁵ D97/9, para. 7.

⁶ D97/9, paras. 7-8; D97/9/4, para. 9; D97/9/6, paras. 3-5.

⁷ D97/9/1, para. 2 ; D97/9/3. p. 2.

⁸ D97/9/2, para. 4, 8.

⁹ D97/9/5, paras. 2, 17-18.



The ECC *may* sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice [...] (emphasis added).

7. Under Internal Rule 38(1), the Co-Investigating Judges also have the discretion to apply sanctions for misconduct of a lawyer after issuing a warning, if the conduct of the lawyer is considered to be:

[...] offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.

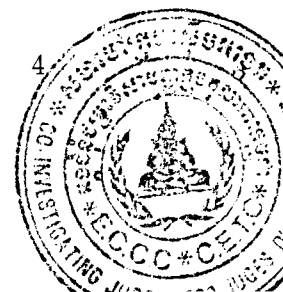
8. For the Co-Investigative Judges to exercise their discretion in imposing sanctions, an obligation and corresponding violation should be identified. The Co-Investigative Judges will then determine whether the alleged violation was such that a warning or sanction may be issued.
9. In the case at hand, the Defence for IENG Sary alleges that a violation of the prohibition against interference with the administration of justice as set out under Rule 35 has been committed through the non-disclosure of an open-source document which the Defence find to be potentially exonerating evidence.
10. The OCP has the obligation under Internal Rule 53(4) to disclose potentially exonerating evidence:

The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.

11. The Defence for IENG Sary alleges that the OCP did not conduct their analysis of potentially exonerating evidence in good faith. They base this accusation on an alleged statement made during a public lecture given by an academic who may have worked for the OCP, which apparently has been subsequently denied by the person involved.¹⁰ In view of these elements, the Co-Investigative Judges do not find this a sufficient basis to take any further action in respect of the Request.
12. Moreover, even if the allegations were to be proved, the Co-Investigative Judges would also be required to consider whether or not the Defence had effectively been prejudiced by the failure to disclose exonerating material.¹¹
13. In this respect, it is important to note that UNGA Resolution 488(V) is a publicly accessible document, which is now on the Case File and subject to filings arguing its relevance. It is also worth recalling that the procedural system applicable before the ECCC empowers the Co-Investigating Judges to conduct research

¹⁰ Doc. n° D97/9/4, para. 4, note 13: Douglas Gillison, Cambodia Daily, 'Lawyer Denies Helping to Deceive ECC', 18-19 July 2009, p.13.

¹¹ *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para 268; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 153.



themselves, without being required to rely on filings of the parties. Considering these points, the Co-Investigating Judges find that there has been no prejudice to the Defence and no need for any corrigendum to the Supplementary Submissions.

FOR THESE REASONS, HEREBY

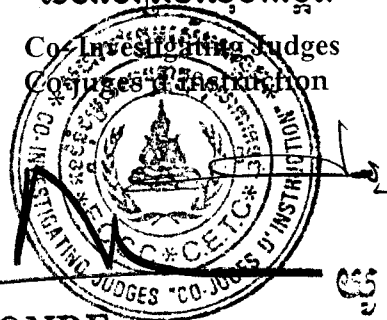
Dismiss the Request.

Done in Phnom Penh, on 26 November 2009

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges

Co-juges d'Instruction



Marcel LEMONDE

ឃុំ ប៉ុលពត