



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

D99/3/19

**អង្គបុរេជំនុំជម្រះ**

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

**Criminal Case File N° 001/18-07-2007-ECCC/OCIJ (PTC 02)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

**Date:** 06 October 2008

<b>ឯកសារដើម</b>
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**PUBLIC**

**DECISION ON IENG SARY'S REQUEST TO MAKE SUBMISSIONS ON THE APPLICATION OF THE THEORY OF JOINT CRIMINAL ENTREPRISE IN THE CO-PROSECUTORS' APPEAL OF THE CLOSING ORDER AGAINST KAING GUEK EAV "DUCH"**

**Co-Prosecutors**

CHEA Leang  
Robert PETIT  
YET Chakriya  
William SMITH  
PICH Sambath  
Alex BATES

<b>ឯកសារទទួលបានតាមប្រព័ន្ធគ្រប់គ្រងឯកសារ</b>
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**Charged Person**

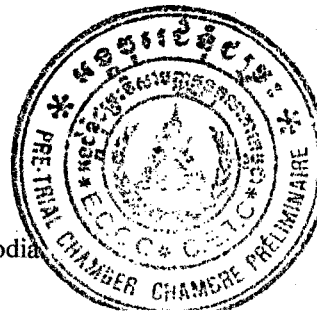
KAING Guek Eav alias "DUCH"

**Lawyers for the Civil Parties**

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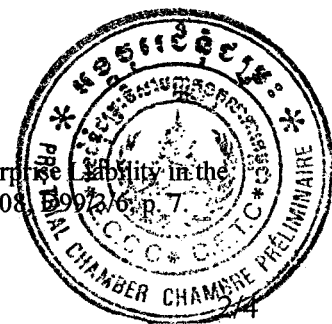


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1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) notes that on 21 August 2008, the Co-Prosecutors filed a Notice of Appeal against the Closing Order of the Co-Investigating Judges in Case File 001/18-07-2007-ECCC/OCIJ (the “Appeal”).
2. In the Co-Prosecutors’ Appeal Brief, filed on 5 September 2008, it is requested that the Pre-Trial Chamber amend the Closing Order and indict the Charged Person for committing the alleged crimes via participation in a joint criminal enterprise.
3. On 15 September 2008, the Co-Lawyers for Ieng Sary filed an “Expedited Request to make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav ‘Duch’” (the “Request”). By their Request, the Co-Lawyers ask the Pre-Trial Chamber to “[g]rant the Defence the right to make written submissions before the Pre-Trial Chamber in the Co-Prosecutors’ Appeal of the Duch Closing Order within 15 days of the issuance of a decision to that effect.”<sup>1</sup>
4. On 16 September 2008, the Pre-Trial Chamber directed that any responses to the Request by the Parties should be filed within three days.
5. The Co-Lawyers for Duch and the Co-Prosecutors filed responses on 18 September 2008. The Civil Parties did not file a response.
6. On 24 September 2008, the Co-Lawyers for Ieng Sary filed a request to amend the original Request, seeking to extend the proposed deadline for submissions to 27 October 2008, the date on which the Pre-Trial Chamber has set the deadline for the receipt of invited amicus briefs (“Amended Request”).
7. In their Request, the Co-Lawyers submit that “[t]he application of JCE liability at the ECCC fundamentally affects Mr. IENG Sary because he is alleged to be part of the same ‘common criminal plan’ as Duch. In these circumstances, Mr. IENG Sary has a clear interest in the outcome of the appeal and must be permitted to make submissions on this appeal.”<sup>2</sup>

<sup>1</sup> Ieng Sary’s Expedited Request to make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav ‘Duch’, 15 September 2008, ECCC/OCIJ (PTC02) p. 7.

<sup>2</sup> Request, para. 1. See also paras 8 and 10 of the Request.



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8. The Pre-Trial Chamber notes that Ieng Sary is not a party in the Case File 001/18-7-2007-ECCC-OCIJ. Following a Separation Order by the Co-Investigating Judges on 19 September 2007<sup>3</sup>, Duch has been prosecuted alone in this Case File.
9. The Internal Rules do not provide a right for a third party to intervene in a Case File and make submissions on issues raised by an appeal, nor does the Cambodian Code of Criminal Procedure.
10. Under the Internal Rules, only a party to a Case File, namely “the Co-Prosecutors, the Charged Person/Accused and Civil Parties”<sup>4</sup>, can claim a right to be heard before the Pre-Trial Chamber makes a decision on an appeal. This can be inferred from Internal Rules 77(3) and (10), which provide that the Pre-Trial Chamber can decide on an appeal “on the basis of the written submissions of the parties only” or, if there is a hearing, that “the Co-Prosecutors and the lawyers for the parties may present brief observations.”
11. The Pre-Trial Chamber recalls that in the case of Ieng Sary’s appeal against the provisional detention order, it opened the opportunity to file responses to the Civil Party Theory Seng’s application for reconsideration of a previous decision to unrepresented Civil Parties in a separate case file.<sup>5</sup> This invitation was made in circumstances where the determination of the application would lead to the issuance of general directions on the procedural rights of unrepresented civil parties to address the Pre-Trial Chamber.<sup>6</sup> In this case, the directions issued by the Pre-Trial Chamber would directly apply to the Civil Parties in a separate case file.
12. The Appeal lodged by the Co-Prosecutors concerns the charges for which Duch will be sent for trial. The decision to be delivered by the Pre-Trial Chamber will therefore not be directly applicable to Ieng Sary, who will still have the possibility to challenge the application of the theory of joint criminal enterprise in the Case File 002/19-09-2007-ECCC/OCIJ to which he is a party.
13. The Pre-Trial Chamber further notes that the Co-Prosecutors did not identify Ieng Sary as a member of the group of persons who participated in the alleged joint criminal enterprise in their Final Submissions and their Appeal Brief in the present Case File. The Co-Lawyer’s assertion that “[i]f JCE liability were to be applied against Duch then the application of the

<sup>3</sup> Separation Order, 19 September 2007, D18.

<sup>4</sup> Definition of “Party” in the Glossary of the Internal Rules.

<sup>5</sup> Further Directions concerning Application for Reconsideration of Civil Party’s Right to Address the Chamber, 14 July 2008, C22/I/59.

<sup>6</sup> Case 002/19-09-2007-ECCC/OCIJ, Directions on Unrepresented Civil Parties’ Right to Address the Pre-Trial Chamber in person, 29 August 2008, C22/I/69.



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JCE liability against Mr. IENG Sary would become almost inevitable<sup>7</sup> is without foundation.

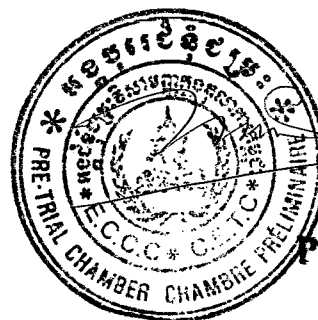
14. The Pre-Trial Chamber considers that it is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised. It does not result from that situation that charged persons have the right to intervene in a case file to which they are not parties to submit their views on an issue.

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

Denies the Request and the Amended Request. mf

Phnom Penh, 06 October 2008

**President of the Pre-Trial Chamber**



**PRAK KIMSAN**

<sup>7</sup> Request, para. 8.