ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

លេខ/No: D367/1/5

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/09-09-2007-ECCC/OCIJ (PTC56)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **7 June 2010**

PUBLIC

DECISION ON APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER ISSUING WARNINGS UNDER INTERNAL RULE 38

Co-Prosecutors
CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH
SENG Bunkheang
Anees AHMED

Charged Person
IENG Sary

Lawyers for the Civil Parties
Mr NY Chandy
Mr Madhev MOHAN
Ms Lima NGUYEN
Mr KIM Mengkhy
Ms MOCH Sovannary
Ms Elizabeth-Joelle RABESANDRATANA
Ms Annie DELAHAIE
Mr Philippe CANONNE
Ms Martine JACQUIN
Ms Fabienne TRUSSES-NAPROUS
Ms Françoise GAUTRY

Co-Lawyers for the Defence
ANG Udom
Michael G. KARNAVAS

Co-Lawyers for the other Charged Persons
PHAT Pouv Seang
Diana ELLIS
SON Arun
Michiel PESTMAN
Victor KOPPE

Ms Isabelle DURAND
Ms Christine MARTINEAU
Ms Laure DESFORGES
Mr Ferdinand DJAMMEN-NZEPA
Mr LOR Chunthy
Mr SIN Soworn
Mr SAM Sokong
Mr HONG Kim Suon
Mr KONG Pisey
Mr KONG Heng
Ms Silke STUDZINSKY
Mr Olivier BAHOUGNE
Ms Marie GUIRAUD
Mr Patrick BAUDOUIN
Ms CHET Vanly
Mr PICH Ang
Mr Julien RIVET
Mr Pascal AUBOIN
Mr YUNG Phanith

Andrew IANUZZI
SA Sovan
Jacques VERGÈS
KAR Savuth
François ROUX
Marie-Paule CANIZARÈS

Co-Investigating Judges

Judge YOU Bunleng
Judge Marcel LEMONDE

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "IENG Sary's Co-Lawyers Appeal Against the [Co-Investigating Judges'] Order Issuing Warnings Under Rule 38", filed by the Co-Lawyers for IENG Sary on 29 March 2010 ("Appeal").[1]

I. INTRODUCTION

1. On 10 February 2010 the Co-Lawyers for the Charged Person (the "Defence") submitted a Request to the Co-Investigating Judges (the "CIJ") to ask clarification on whether, and to what extent, the Defence can conduct investigation relevant to Case 002.[2] In the Request the Defence referred to a memorandum from the CIJ, dated 10 January 2008 and addressed to the Defence for NUON Chea,[3] indicating that before the ECCC, the power to conduct investigations is assigned solely with the CIJ and not to the parties. Further in the Request, relying on Article 121 of the Cambodian Criminal Procedure Code, the Defence stated its intention to conduct its own investigation because, among other reasons, it lost confidence in the CIJ to conduct an impartial and independent investigation.

2. In a subsequent letter of 12 February 2010,[4] the Defence requested access to the entire dossier and to the case map of the Office of the Co-Investigating Judges (OCIJ), if one exists. Finally, by a separate letter of the same date,[5] the Defence for the Charged Person supported and partly joined NUON Chea's Nineteenth to Twenty-fifth requests[6] for investigative action in that it requests the Co-Investigating Judges to provide information on the investigative procedures employed, in particular, in gathering exculpatory evidence; the planning and strategy to conduct the investigation of Case File 002 and the qualifications and experience of OCIJ staff.

3. On 25 February 2010, the CIJs rendered an Order issuing warnings under Rule 38 (the "Impugned Order").[7] In the Impugned Order, the Co-Investigating Judges consider that the above letters raise three issues for which the Defence for the Charged Person show disregard, namely, the

1 IENG Sary's Co-Lawyers Appeal Against the OCIJ's Order Issuing Warnings Under Rule 38, 29 March 2010, D367/1/1.
2 IENG Sary's Request to OCIJ as to whether, and to what extent, the Defence can conduct investigations, 10 February 2010, D346.
3 CIJ Response to Nuon Chea's Lawyers letter dated 20 December 2010, 10 January 2010, A110/I.
4 IENG Sary's Request to access the entire dossier, including all documents in the possession of the OCIJ not available to the parties and, if one is prepared, access to the casemap, 12 February 2010, D354.
5 IENG Sary's Support and joinder in part of Nuon Chea's Nineteenth, to Twenty-Fifth (Inclusive) Requests for Investigative Action, 12 February 2010, D355.
6 D355, p.1, referring to D319, D320, D336, D338, D339 and D340.
7 Co-Investigating Judges' Order issuing warnings under Rule 38, 25 February 2010, D36[illegible]

rules for filing of documents;[8] the procedural regime applicable to the judicial investigation, and[9] duplicitous filings and matters already judicially addressed.[10] The Impugned Order accordingly warns the Defence for the Charged Person under Rule 38 of the Internal Rules in the following terms:

> i. In relation to the filing of documents, the Defence for the Charged Person is warned that it is required to clearly indicate on the filing that the classification level indicated is merely a proposal and that any further filing, failing to do so as well as any public release of information relating to a filing before its public classification by the Co-Investigating Judges, amounts to misconduct by the lawyers and that sanctions may be applied against them;[11]
>
> ii. In relation to the procedural regime applicable to the judicial investigation, the Defence for the Charged Person is warned that it is prohibited from conducting its own investigations and that any breach of this prohibition may result in the application of sanctions against them and;[12]
>
> iii. In relation to the filings the Defence for the Charged Person is warned that it is prohibited from submitting duplicitous filings or filings made against matters already addressed on appeal and that any breach of this prohibition may result in the application of sanctions against the lawyers.[13]

4. On 4 March 2010, the Defence for the Charged Person filed a notice of appeal against the Impugned Order and it subsequently filed the Appeal on 29 March 2010. In the Appeal, the Defence for the Charged Person claims that the OCIJ erred in imposing the warnings in that, (1) the Defence did not submit duplicitous filings and raise matters judicially addressed; (2) they proposed a classification level; (3) they only made information available to the public which the CIJs deem to be public information; (4) they did not show disregard for the procedural regime applicable to the

---

8 At paragraph 3 and footnote 5, the Impugned Order notes that the three letters state that they are public filings, while according to the Practice Direction on Filing (Articles 3(2)(g); 3(12) and 3(13)) and the Practice Direction on Classification and Management of Case-Related Information, parties may only propose the classification of documents they submit to the Co-Investigating Judges.

9 At paragraphs 6 and 7, the Impugned Order, takes issue with the Appellant's reading of Article 121 of the CPC, considering that if it were correct, all persons mentioned in that Article could conduct investigation as long as they maintain confidentiality.

10 At paragraph 10, the Impugned Order lists three issues which it considers have already been raised and addressed during the proceedings, namely, the question of whether parties can conduct their own investigation; the question of access to "relevant" information and; matters raised in D355. Further, at paragraph 11 the Impugned Order emphasises that the Defence for the Charged Person repeats its alleged lack of confidence in the Co-Investigating Judges and their staff, a matter addressed both by the Co-Investigating Judges and the Pre-Trial Chamber. The Impugned Order also stresses that (1) parties cannot circumvent the procedures related to matters which can be appealed and under which conditions, by repeated filings on matters already judicially addressed (Impugned Order, para. 12) and (2) the right to trial without undue delay forms part of right to a fair trial and the age and health of the charged persons further mandates all parties to operate as efficiently as possible and to avoid wasting judicial resources (Impugned Order, para. 13).

11 Impugned Order, paras 4 and 5.

12 Impugned Order, para.9.

judicial investigation; and (5) the Impugned Order is procedurally incorrect and thus cannot impose warnings under Internal Rule 38.[14] The Appellants accordingly request the Pre-Trial Chamber to revoke the three above mentioned warnings and to order the CIJs to accept their three letters and to respond to them.[15]

5. On 9 April 2010, the Co-Prosecutors filed their Observations (the "Co-Prosecutors' Observations"),[16] whereby they submit that the Appeal is procedurally bared and that it should be dismissed.[17] It also invites the Pre-Trial Chamber to hold, as a matter of principle, that as all warnings issued by the ECCC are final and without appeal, they must be issued exceptionally and with caution, especially when they are directed towards defence counsel, as any other approach has to potential to undermine the rights of the defendants to assistance of counsel and to mount an effective defence and the duty of counsel to protect the rights and interests of the defendants.[18]

6. On 30 April 2010 the Pre-Trial Chamber issued a Decision to determine the Appeal on basis of written submissions and direction for Reply.[19] The Defence filed its Reply to Co-Prosecutors' Observations on 4 May 2010.[20]

II. ADMISSIBILITY OF THE APPEAL

7. The Impugned Order was issued on 25 February 2010 and notified to the Parties on the same date. The Defence for the Charged Person filed a Notice of Appeal on 4 March 2010. The Appeal was filed on 29 March 2010 and therefore within the time provided for in Internal Rule 75(3) of the ECCC Internal Rules (the "Internal Rules").

8. In the Appeal, the Appellants submit that three of the four warnings issued by the Co-Investigating Judges do not specifically place the actions undertaken by the Defence within the actions of misconduct listed in Rule 38(1) and that only the fourth warning related to duplicitous

13 Impugned Order, para. 14. The Impugned Order further finds that the content and degree of repetition in the letters referred to at paragraphs 1 and 2 above, amounts to an abuse of process.
14 Appeal, para. 48. See also, para. 49 whereby the Defence for the Charged Person argues that in issuing the warnings the CIJs acted in an unjust and disproportionately severe manner and attempted to circumvent answering the requests set out in the letters.
15 Appeal, page 20.
16 Co-Prosecutors' Observations on Defence Counsel's Appeal on Warning by the Co-Investigating Judges, 9 April 2010, D367/1/2, ("Co-Prosecutors' Observations").
17 Co-Prosecutors' Observations, para. 5.
18 Co-Prosecutors' Observations, para. 6.
19 Decision to determine the Appeal on written submissions and Direction for Reply, 30 April 2010, D367/1/3.
20 Reply to Co-Prosecutors' Observations on Ieng Sary's Co-Lawyers' Appeal against the CIJs' Order Issuing Warnings under Rule 38, 4 May 2010, D367/1/4

filings qualify the action of the Defence as amounting to "abuse of process".[21] The Appellants "assume" that the other actions they are being warned against fall under Internal Rule 35, which "also deals with the misconduct of a lawyer" and stress that while Internal Rule 35(5) "states that interference with the administration of justice amounts to misconduct," the list of examples of interferences set out in Internal Rule 35(1) is non exhaustive.[22] Finally, according to the Appellants denying them the right to appeal the warnings will result in the Defence being unable to confirm or deny any wrongdoing on their part and the warning will stand, thus having the detrimental effect of constraining the Defence in effectively preparing the defence of the Charged Person.[23]

9. The Co-Prosecutors respond that Internal Rule 38 pursuant to which the warnings have been issued by the Co-Investigating Judges only permits appeals against sanctions, not against warnings that are issued prior to sanctions.[24] They stress that this situation accords with international procedural standards the ECCC is obliged to uphold.[25] According to the Co-Prosecutors, the attempt by the Defence for the Charged Person to characterize the warnings as a decision under Internal Rule 35, for which a right of appeal is provided by Internal Rule 35(6), is misconceived. Internal Rules 35(2) and 35(4) do not envisage the issuance of a warning.[26] Therefore, in the Co-Prosecutors' view the Appeal is procedurally barred.[27]

10. The Pre-Trial Chamber observes that according to the terms of the Impugned Order, the warnings it contains were issued pursuant to Internal Rule 38, specifically dealing with the misconduct of counsel and which provides, in relevant part, that the Co-Investigating Judges 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 Agreements. The Pre-Trial Chamber is not persuaded by the arguments developed by the Appellants in support of their assumption that the first three warnings have been issued pursuant to Internal Rule 35 and not Internal Rule 38. This is not only because, unlike Internal Rule 38, Internal Rule 35 does not foresee a necessary warning prior to imposing sanction against a counsel, or because the Impugned Order does not qualify the

21 Appeal, para. 3, referring to Impugned Order, para. 14.
22 Appeal, para. 4.
23 Appeal, para. 5.
24 Co-Prosecutors' Observations, para. 2.
25 Co-Prosecutors' Observations, para. 4, referring to Rule 46(H) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and Rule 46 of the respective Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, dealing with misconduct of counsel, and Rule 77, dealing with contempt.
26 Co-Prosecutors' Observations, para. 3.
27 Co-Prosecutors' Observations, para. 5.

conduct of the Defence for the Charged Person as 'interference with the administration of justice'. The Pre-Trial Chamber notes that in respect of each of the four warnings, the Impugned Order specifically indicates that the warning in question is made under Internal Rule 38 and that sanctions may be imposed against counsel pursuant to that rule for the conduct described in the Impugned Order.[28]

11. Internal Rule 38 does not foresee a right to appeal a warning prescribed prior to imposing sanctions and the Pre-Trial Chamber is of the view that procedural defects potentially attaching to such warnings can only be challenged as part of an appeal against a subsequent sanction imposed pursuant to Internal Rule 38. In relation to the argument raised in the Appeal as to the fact that the first three warnings do not refer specifically to any of the types of misconducts envisaged at paragraph 1 Internal Rule 38: offensive or abusive conduct, obstruction of the proceedings, abuse of process, or any other conduct otherwise contrary to Article 21(3) of the Agreements, the Pre-Trial Chamber finds that this is not determinative of the admissibility of the Appeal and that the Appeal is premature,[29] in so far as no sanction has been imposed against counsel at this stage and may even become moot if no sanction is imposed in the future.

12. For the aforementioned reasons the Appeal is inadmissible.

28 Impugned Order, para. 5, in relation to "filing without stating that the classification level indicated by them is merely a proposal" and "any public release of information relating to a filing before its public classification by the Co-Investigating Judges"; Impugned Order, para. 9, in relation to Defence for the Charged Person "conducting their own investigation" and; Impugned Order, para. 14, in relation to "submitting duplicitous filings or filings made against matters already addressed on appeal."

29 The Pre-Trial Chamber notes that there is a difference between a warning and a sanction (see Prosecutor v. Seselj Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel , Case No. IT-03-67-AR73.3, ICTY Appeals Chamber 20 October 2006, para. 23.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

The Appeal is inadmissible

In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

Phnom Penh, 7 June 2010

Pre-Trial Chamber **The President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan