

**BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATION FOR
SANCTIONS AGAINST THE CO-PROSECUTORS FOR ALLEGEDLY MISLEADING
THE COURT REGARDING THE LAW ON JOINT CRIMINAL ENTERPRISE**

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Distribute to:

Co-Investigating Judges:

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Judge Marcel LEMONDE

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Person / Applicant**

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I. RESPONSE

1. Applicant IENG Sary has filed an application (“Application”) to the Co-Investigating Judges to sanction the Co-Prosecutors for allegedly misleading the Co-Investigating Judges by not disclosing the correct law in the Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise (“Supplementary Observations” and “JCE”).¹ The Applicant alleges that by not citing a resolution of the United Nations General Assembly (“GA Resolution”), that undermines the Co-Prosecutors’ case on JCE, the Co-Prosecutors have “cavalierly conspired to deliberately mislead and deceive” the Co-Investigating Judges.²
2. The Co-Prosecutors request the Co-Investigating Judges to reject the Application.
3. The Co-Prosecutors state that the Supplementary Observations correctly reflected their understanding of the law on JCE on the date of its filing. While no legal pleading can claim to refer to all the available authorities on its subject matter, to the Co-Prosecutors’ knowledge and belief, the Supplementary Submission contained a comprehensive review of authorities to support the Co-Prosecutors’ submission that JCE was part of customary international law during 1975-9 and, as such, applicable before this Court.
4. The Co-Prosecutors themselves, or to their knowledge any of their staff members, neither deliberately withheld nor advised anybody else to withhold, any known relevant legal authority from any filing before any judicial body of this Court. The allegations to this effect, contained in the Application, are unsubstantiated and, therefore, should be ignored and/or rejected.
5. If the Applicant is aggrieved that the Co-Prosecutors have not filed a document that may undermine the Co-Prosecutors’ case, then it is open for the Applicant to bring that document to the attention of the Co-Investigating Judges to assist them in reaching a just determination of the issue of the application of JCE. Such is the nature of adversarial proceedings

¹ *Case of IENG Sary, Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise*, 31 December 2008, D97/8.

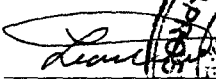

² *Case of IENG Sary, Ieng Sary’s Request for Sanctions Under Internal Rule 35 due to the Co-Prosecutors’ Misleading the Court in their Supplementary Observations on Joint Criminal Enterprise Filed on 31 December 2008*, 29 June 2009, D97/9, para. 7 [*hereafter* Application].


guaranteed by this Court in Internal Rule 21(1)(a) (“Rules”). The Co-Investigating Judges are yet to rule on the issue of JCE. In deciding the issue, the Co-Investigating Judges shall certainly consider any document brought by the Applicant that contradict the Co-Prosecutors’ case. However, what the Applicant cannot do—as he has sought to do in his application—is to compel the Co-Prosecutors to file a document in their (Co-Prosecutors’) pleadings.³

6. The Co-Prosecutors have perused the GA Resolution and, according to them, it (the GA Resolution), contrary to the Applicant’s submission, does not undermine the Co-Prosecutors’ submission that JCE was part of customary international law during 1975-9.⁴
7. The Co-Prosecutors submit that the factual basis of the Application—comprising solely of unsubstantiated allegation of “shared recollections”⁵ of a Defence consultant and a third party—are wholly insufficient to envision sanction under Rule 35(1) for interference with the administration of justice. In addition, these facts, even if believed to be true, in and of themselves, would not amount to interference with the administration of justice. Non-filing of a publicly available GA Resolution, which any party can file in a litigation that is yet to be finally ruled upon by the Co-Investigating Judges, does not give rise to facts sufficient to invite sanction. For the punitive sanction of Rule 35(1) to trigger (1) a person must interfere with the administration of justice, (2) there must be an actual interference, and (3) this interference must be done knowingly and wilfully. The Application fails on each limb of this triple test.

II. CONCLUSION

8. The Co-Prosecutors, accordingly, request the Co-Investigating Judges to summarily dismiss the Application.



 CHEA Leang Robert TIT
 Co-Prosecutor Co-Prosecutor



Signed in Phnom Penh on this sixteenth day of July 2009.

³ Application, relief (a).

⁴ Application, para. 6.

⁵ Application, fn. 3.