



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

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

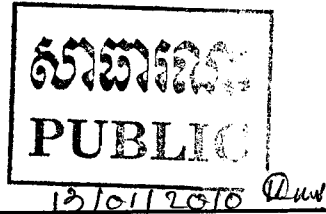
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

Case File No: 002/19-09-2007-ECCC-OCIJ

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Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Before: Judge YOU Bunleng
Judge Marcel LEMONDE
Date: 25 November 2009
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Order on Request for Adoption of Certain Procedural Measures

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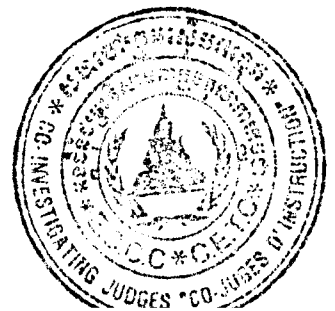
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We, **You Bunleng** (ឃុំ ប៊ុនហ្គុល) and **Marcel Lemonde**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);

Noting the ongoing judicial investigation against **NUON Chea ឆ្លូង ជាំ 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;

Noting Rules 39(4)(a) and 66 of the ECCC Internal Rules (the “Internal Rules”);

Noting Nuon Chea’s Co-Lawyers Request for Adoption of Certain Procedural Measures, dated 5 November 2009 (D235);

Noting IENG Thirith’s Co-Lawyers Request for additional time at the end of the Investigation, dated 11 November 2009 (D237);

Noting IENG Sary’s Co-Lawyers Motion to Join NUON Chea’s Request, dated 12 November 2009 (D235/1).

PROCEDURAL HISTORY AND ARGUMENTS BY THE PARTIES

1. In a filing dated 5 November 2009, the Defence Team for Nuon Chea (the “Defence”) submitted a Request for Adoption of Certain Procedural Measures (hereinafter the “Request”) based on the Internal Rule 66, requesting the Co-Investigating Judges to:

“Inform the parties as soon as possible, with at least two months notice before the filing of the actual notice, of the exact date on which the OCIJ plans to file the notice pursuant to Rule 66;

Add all new results of the investigation to the case file at least two months before the filing of the notice pursuant to Rule 66. Such a timeframe is indispensable in order to safeguard the effective participation by the Defence in the proceedings;

Decide upon all outstanding investigative requests at least two months before the filing of the notice pursuant to Rule 66. Such a timeframe is indispensable in order to safeguard the effective participation of the Defence in the proceedings; and

Respond to this request within two weeks of its filing”¹.

2. The Defence recalls that in accordance with the Internal Rules and the 2004 Agreement, the Charged Person, Nuon Chea, has the right to adequate time to

¹ D235, Request for Adoption of Certain Procedural Measures, 5 November 2009, para. 58.



organize and prepare his defence and that “*legal certainty and transparency of proceedings, inter alia, are of the highest importance throughout the proceedings*”.

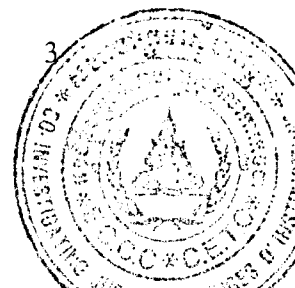
3. In their Request, the Defence argues that “*only by adopting these measures*” will the Defence be able to take certain measures to safeguard “*the fair trial rights of Nuon Chea*” and further outlines procedural issues relating to the judicial investigations which it considers “*may seriously harm*” these rights.
4. On 11 November, the Defence for IENG Thirith also submitted a request related to the issue of Rule 66 notification, supporting the Request by NUON Chea, but seeking a different form of relief:

“[T]he defence requests the OCIJ to: (i) Inform the parties of the exact date of its notification; (ii) Add newly assembled information at their earliest convenience to the case file; and (iii) To extend the deadline of 15 days provided in Internal Rule 66(1) to 45 days”.

5. Finally, in joining the NUON Chea Request, the Defence for IENG Sary stated that it “*unreservedly adopts all facts and legal arguments set out by the NUON Chea Defence. This motion for joinder is made necessary in order to avoid manifest injustice to all Charged Persons in Case File 002 as described in the Request*”.

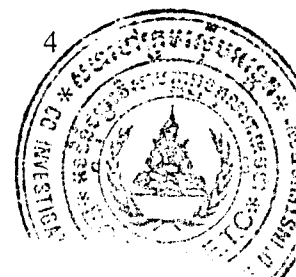
REASONS FOR THE DECISION

6. The NUON Chea Request, as joined by the Defence for IENG Sary, takes the form of a proposal for amendment of the Internal Rules, in guise of a request for investigative action: the Co-Investigating Judges are requested to provide two-month’s notice of their intention to file notice under Rule 66, during which period no further evidence is to be placed on the case file; and to respond to all outstanding investigative requests from the parties before giving such “pre-notice”.
7. The Co-Investigating Judges consider that these issues are fully and unambiguously addressed in Rule 66, the precise purpose of which is to organize notification of the fact that the Co-Investigating Judges' consider the investigation concluded, in order to allow the parties to make further requests for judicial investigation.
8. In this regard, as the Defence highlights, the widening of Rule 66 to allow submissions by *all* the parties was adopted by the Judges in plenary in order to promote better equality of arms than provided under existing Cambodian criminal procedure.
9. Furthermore, no further evidence may be placed on the case file after Rule 66 notice has been given. Indeed, should the Co-Investigating Judges decide that, despite having given Rule 66 notice, it has become necessary to place further inculpatory or exculpatory material on the case file, they would then be required to file a new Rule 66 notice.



10. As regards the request to decide upon all outstanding investigative requests before giving Rule 66 notice, the Internal Rules specifically provide that requests "*filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges*", may be decided upon, at the latest, when responding to further requests for investigative action filed during the 15 day period after Rule 66 notification.
11. Of course, every response must be given as soon as possible, and the Co-Investigating Judges re-iterate that, in the interests of procedural efficiency, they are making every effort to respond to all currently outstanding requests without awaiting the end of the judicial investigation.² However, in certain cases, a decision on the need to conduct specific requested investigative action can only be taken once all other sources of information or avenues of investigation have been fully investigated, and thus cannot be made prematurely.
12. Moreover, it should be recalled that, in order to preserve the rights of the parties to the greatest possible extent, the Co-Investigating Judges have already informed the parties as precisely as possible, in May 2009, of the projected date of the conclusion of the judicial investigation by the end of the year, and have confirmed this aim on a number of occasions, the most recent being the OCIJ Press Release on Thursday 5 November 2009.
13. The Co-Investigating Judges do not, therefore, find any *lacunae* in the Internal Rules, as regards Rule 66 notification, that could raise issues concerning the Charged Person's right to participate effectively in the proceedings and thereby justify the requested action.
14. In particular, the time period for appeal against any decisions of the Co-Investigating Judges handed down in the framework of Rule 66 is the same as for all other decisions of the Co-Investigating Judges, and cannot thus be considered unfair to the Defence in this case.
15. As regards the issue, raised in particular by the Defence for IENG Thirith, whether the 15 day period provided for in the Rules is sufficient, given the circumstances of the case and the need for translations, the Co-Investigating Judges note that this period is consistent with that set out in Article 246 of the Cambodian Code of Criminal Procedure, when the Charged Persons are under Provisional Detention. Indeed, the fact that the period is shorter in case of detention indicates the legislator's intention to avoid undue delay in closing the judicial investigation in such cases.

² D221/1 CIJs' Response to the Letter of NUON Chea's lawyers on lack of confidence in the Judicial Investigation, 27 October 2009, 00398108-00398111, p. 3; responses have recently been made to a number outstanding Defence requests for investigative action: D214/2 CIJ' Response to the Ieng Sary's Lawyers 7th Request for Investigative Actions, 19 October 2009, 00390071-00390072; D218/2 CIJ' Response to the Ieng Sary's Lawyers 8th Request for Investigative Actions, 21 October 2009, 00391841-00391842; D130/11/2 CIJ' Response to NUON Chea's Lawyers' 15th Request for Investigative Actions and Related Letters from IENG Sary's Lawyers, 30 October 2009, 00398434-00398436; D140/6 CIJ' Response to IENG Sary's Lawyers on Request for Information Regarding Cambodian Demographic Expert, 5 November 2009, 00398789-00398790; and D194/2 Ordonnance sur demande de transcription, 5 November 2009, 00398886-00398889.



16. Nevertheless, the Co-Investigating Judges recognize that the situation at the ECCC may be distinguished from the normal course of Cambodian criminal procedure, due both to the extent of the investigation here and the fact that the Charged Persons are allowed to make requests in addition to those of the Co-Prosecutors. In the absence of clear direction from Cambodian procedure, the Co-Investigating Judges find, therefore, that there are sufficient reasons to vary the applicable time limit in this case, in application of Internal Rule 39(4)(b) in order to establish an appropriate balance between the right to expeditious proceedings and effective exercise of the right of the parties to request further investigative action.

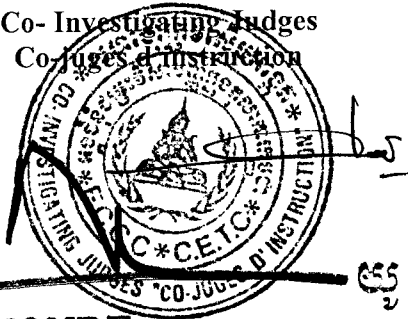
FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- **Reject** the Request by NUON Chea for the adoption of additional procedural measures; and
- **Decide** to recognise the validity of requests for further investigative action submitted by the parties after the expiration of the fifteen (15) day time limit prescribed in Rule 66(1), as long as they are filed within thirty (30) days of receiving notice from the Co-Investigating Judges pursuant to that sub-rule ;

Done in Phnom Penh, on 25 November 2009

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges
Co-Juges d'Instruction



ឃុំ ម៉ុងគ្រូ

Marcel LEMONDE