

002/14-08-2006



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the
Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction
សំណុំរឿងព្រហ្មទណ្ឌ
Criminal Case File /Dossier pénal
លេខ/No: 002/14-08-2006
លេខស៊ើបអង្កេត/Investigation/Instruction
លេខ/No: 002/19-09-2007-ECCC/OCIJ

ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification):
.....25...../.....01...../.....2008.....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier:.....**CHEA Kosal**.....

ដីកាសម្រេចបដិសេធបណ្តឹងសុំរលាយកាត
Order Refusing a Request for Annulment
Ordonnance de rejet d'une requête en nullité

ORIGINAL DOCUMENT
RECEIVED ON 24-01-2008
AT: 16:00 PM
BY SANN RADA
COURT OFFICER

We, You Bunleng and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia,

Noting the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004, Noting Rules 48, 63 and 76 of the Internal Rules of the Extraordinary Chambers,

Noting the judicial investigation opened against **NUON Chea**, charged with Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004.

Request by the defence

1. In an Application dated 21 December 2007, the co-lawyers for NUON Chea requested the annulment of the Written Records of his initial appearance (D-20), adversarial hearing (C-8) and interview dated 26 September 2007 (D-23). Reiterating the arguments developed in paragraphs 4 to 14 of their Appeal against the provisional detention order (C-11/ 4), currently pending before the Pre-Trial Chamber, and adding to them, they claim that:

- the Co-Investigating Judges should not have conducted the initial appearance and the adversarial hearing in the absence of defence counsel. They argue that this situation resulted in the violation of several of the Charged Person's rights (right to counsel and rights to an adversarial hearing, reasonable time to prepare his defence, remain silent and equality of arms). They assert that "Mr. NUON's apparent waiver of his right to counsel was involuntary, uninformed, ambiguous, and therefore ineffective";

- the Co-Investigating Judges should not have continued the interview on 26 September 2007 by overriding the objections of defence counsel and the Charged Person, based on *“the limited familiarity with the case of the defence-counsel SON Arun and Mr NUON’s delicate state of health”*.

REASONS FOR THE DECISION

Concerning the initial appearance

2. It is opportune to recall the progression of the initial appearance, which was conducted in accordance with Internal Rule 57. Mr. Nuon Chea was arrested in execution of an arrest warrant and transferred from his domicile in Pailin to the ECCC premises by helicopter, so as to reduce the fatigue caused by the trip as much as possible. The initial appearance was then rescheduled so as to allow him more time to get over the trip and to eat. Then, Mr. NUON Chea was clearly informed of his right to remain silent, as provided in Rule 57(1). In addition, since the Charged Person was not assisted by a lawyer, he was expressly informed of his right to such assistance. He then replied: *“I would like to appoint a Cambodian lawyer, Mr. SUN Arun. As regards the appointment of an international lawyer, I will consult my lawyer Sun Arun Later.”* Mr Nuon Chea was then advised that he had the right to remain silent and that, if he wished to make a statement, it would be taken immediately. He was again informed that he had the right to consult his lawyer before being interviewed and that he had the right to the presence of his lawyer during his deposition. He then declared: *“I would like to make a statement despite the absence of my lawyer”*.

3. To consider that a waiver of the right to assistance of counsel, expressed in this manner, might only be *“involuntary, uninformed and ambiguous”* would, in practice, take all substance out of Rule 57, under the terms of which, *“If the Charged Person agrees, the Co-Investigating Judges shall take the statement immediately.”* As it happens, Mr. Nuon Chea chose to make a statement in order to *“deny all of these charges”*, which was his absolute right; to refuse this right would, in fact, have denied him all freedom as a man of reason.

4. It is undoubtedly essential for the judge to provide, in a sufficiently precise manner, any explanations allowing an understanding of the proceedings, since the judicial mechanism is of difficult access for most people appearing before the courts. Even so, it must be recalled that a political leader, even if elderly, undoubtedly has a capacity for comprehension superior to that of the average person appearing before the courts.

5. In reality, it appears difficult to imagine a situation where the waiver could have been clearer and more deliberate than in this case, without questioning the intellectual capacity of Mr. Nuon Chea, which does not appear to have been in question here.

6. Finally, it must be noted that, although it is not entirely clear from the application, it appears that defence counsel, in referring to the provisions of Rule 58(2) (*“A Charged Person shall only be questioned in the presence of his or her lawyer, unless the Charged Person waives the right to the presence of a lawyer, in a separate written record signed by the Charged Person, included in the case file. The waiver shall be recorded pursuant to Rule 25.”*), has confused the rules applicable during the initial appearance with those which govern later interviews.

In view of all these elements, the initial appearance was thus in complete conformity with the applicable law.

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Concerning the adversarial hearing

7. At the end of the initial appearance, the charged person was informed that an adversarial hearing would be organized in order to decide whether he was to be placed in provisional detention. Clearly informed of his rights, Mr Nuon Chea then made the following observations: *"Although my lawyer is not yet present, I want the Adversarial Hearing to take place immediately"*.

8. Before commencing the adversarial hearing, the Co-Investigating Judges reminded the charged person that he had chosen Mr Sun Arun to be his Cambodian lawyer. The investigating judges, for whom the presence of counsel is always preferable, attracted the attention of the charged person to the fact that his counsel could not come to the tribunal until the next day, thus implicitly highlighting the possibility of a deferred hearing. Mr Nuon Chea replied, however, that, *"even though my lawyer is not yet present, I want to have this Adversarial Hearing immediately"*.

9. Mme Chea Leang, also attempting, on behalf of the Co-Prosecutors, to convince the charged person that his interest was probably to have counsel at his side, asked for a re-explanation of the exact meaning of the adversarial hearing, so as to dissipate any ambiguity.

10. Co-Investigating Judge, You Bunleng, could only repeat that, *"As noted in the Record of Initial Appearance, Mr. Marcel Lemonde stated this matter clearly, concerning the presence of a lawyer, and the Charged Person said, 'at this time I do not need a lawyer'"*.

11. Mr Nuon Chea reiterated his decision one more time and confirmed his thorough understanding of the scope of his decision, when he declared that he wished to waive the presence of his lawyer temporarily, only as regards the adversarial hearing relating to detention: *"Yes that is right, I want a lawyer, but I do not require the presence of my lawyer at this time. I may defend myself at this time. Beginning tomorrow, I will have my lawyer defend me"*.

12. Article 14(3)(d) of the International Covenant on Civil and Political Rights expressly allows the charged person to defend himself, it was hardly possible for the Co-Investigating Judges to insist any more without totally denying his freedom of choice. The Co-Investigating Judges were not, therefore, able to continue beyond this explanation of Mr. Nuon Chea's rights.

13. It was under these conditions that the hearing began. The defence appeal, to which the present application refers, seems to reprove the Co-Investigating Judges for not having recalled, at 16 h 25, the right to silence that had been drawn to the attention of the charged person at the beginning of the initial appearance (at 14 h 40). It should be emphasised here that neither this adversarial hearing, nor the investigative action which followed it, constituted a new "stage" of the proceeding within the meaning of Internal Rule 21, which provides expressly, within the general provisions section of the Rules, that every suspected or prosecuted person must be informed of his or her right to remain silent *"at every stage of the proceedings"*, that is, during the preliminary investigation, at the beginning of the judicial investigation, at the beginning of the trial and on appeal.

14. Since the Co-Prosecutors had decided to file new documents in support of their arguments, the Co-Investigating Judge, Marcel Lemonde, observed that respect for the

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adversarial nature of the hearing required that the charged person be given time to examine the documents beforehand. Yet again, Mr Nuon Chea waived his right to a supplementary period, declaring: *"I can respond without having to read the documents"*. He then argued firmly and systematically against the Co-Prosecutors' arguments, striving to convince the Co-Investigating Judges that placing him in provisional detention was not justified. The terms in which he did so demonstrate, to any impartial observer, that he was in full possession of his faculties. It would thus unjustly question his capacity to consider that these declarations were not made by a person enjoying all his faculties.

Accordingly, the adversarial hearing was conducted in normal respect for the rights of the defence.

Concerning the interview on 26 September 2007

15. At the outset of this interview, which was entirely conducted in the presence of counsel, Mr Arun recalled that he had filed a written request to adjourn the interview, stating that he had not had enough time to examine the case file, but adding that *"I will respect the decision of the Co-investigating judges on this matter"*. The Co-Investigating Judges then observed that the time period set out in Internal Rule 58(1) had been respected and that there was no reason to adjourn the interview.

16. In response to the first question asked by the Investigating Judges, however, Mr Nuon Chea replied that he was not in good health: *"I could not sleep last night and my blood pressure went up to 16,17,18. Therefore my brain is not normal. So (I) request the judges to consider this matter"*.

17. Since the judges had not been informed at any time of any medical problem, by the doctor responsible for constantly supervising the detainee's state of health, they expressed some doubt as to the reality of the symptoms suffered by him, since the changing nature of the requests for adjournment (first, time to prepare the defence, then state of health) led them to believe that a dilatory attitude was not to be totally excluded.

18. Of course, the charged person would have been perfectly within his rights to inform the investigating judges, directly or through his lawyer, that he intended to exercise his right to silence and would, henceforth, refuse to reply to any questions. That was not, however, the attitude he adopted at that point in time. Indeed, during the adversarial hearing, Mr Nuon Chea had already stated that *"I want to enlighten the Cambodian people and the world to show who are their friends and who are their enemies"*. During the impugned interview on 26 September 2007, he explained that *"[i]f the judges allow me to rest I can enlighten the Court later"*. This attitude persisted during the following interview on 17 October 2007, during the course of which he stated that *"[f]irst my legs are swollen, second, my head is heavy and I cannot hear clearly, third, my blood pressure is irregular, fourth, my heart is not well because having a cold affects the heart."*, whereas his lawyer again requested an adjournment, asserting that he had not had enough time to examine the file (adjournment that was then granted). In the end, it was only during the interview on 25 October 2007 that he explicitly stated that he did not wish to reply to any questions *"for now"*.

19. Of course, the defence is free to choose their arguments, whatever the nature, however the judge has the right to raise any apparent contradictions. Furthermore, respect for defence rights must not be confused with a right for the accused to paralyze the proceedings, since the

judge has the duty to guarantee not only respect for adversarial proceedings but also a trial without undue delay.

20. It was not, therefore, abnormal for the Co-Investigating Judges to have refused to comply with the first request for adjournment without any further checking, and to have preferred ordering a medical examination (at 10 h 40 on 26 September 2007) before deciding. Finally, since this examination effectively showed arterial hypertension (an illness which, according to later expertise, may be controlled without difficulty by taking medicine, in the absence of any other specific counter-indication concerning participation in the judicial investigation by the charged person), the interview never took place. The result is that, even assuming, for the sake of argument, that the refusal by the judges immediately to adjourn this interview to a later date might be open to criticism, it is hard to see what harm this refusal could have caused to the charged person, since he did not make any statement. This remark leads us, therefore to question the admissibility of the present application with respect to this specific point, under Rule 48, by virtue of which no investigative action may be annulled for procedural defect where it does not infringe the rights of the party concerned.

21. In summary, at no time in the course of the initial appearance, the adversarial hearing or the interview on 26 September 2007, were there any threats, promises or incitement, whether implicit or explicit, aimed, in particular, at pressuring Mr. Nuon Chea to speak without the presence of his lawyer, or capable of implying that the latter's presence was subject to conditions or could be delayed. The rights of the charged person were notified clearly and unambiguously, even in-depth, and they were respected during each of the impugned investigative actions.

In view of all of these elements, the application being manifestly unfounded, there is no reason to seize the Pre-Trial Chamber.

FOR THESE REASONS

We declare that there is no reason to seize the Pre-Trial Chamber.

Dated the 24th day of January 2008 in Phnom Penh

សហចៅក្រមស៊ើបអង្កេត

**Co- Investigating Judges
Co-juges d'instruction**

This order has been done in the Khmer and French languages, then translated into English.