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

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

D356/2/9

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° 002/19-09-2007-ECCC/OCIJ (PTC 66)

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

Date: **1 July 2010**

PUBLIC (REDACTED)
DECISION ON NUON CHEA'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER REJECTING REQUEST FOR A SECOND EXPERT OPINION

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Charged Person

NUON Chea

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Unrepresented Civil Parties

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of Nuon Chea's "Appeal against [the Co-Investigating Judges]' Order Rejecting Request for a Second Expert Opinion" filed by the Co-Lawyers for Nuon Chea (the "Charged Person") on 30 April 2010 (the "Appeal").[1]

BACKGROUND

1. On 30 October 2008, the Co-Lawyers for Nuon Chea filed before the Co-Investigating Judges their "Sixth Request for Investigative Action" (the "Sixth Request").[2] Nuon Chea's Sixth Request asked for "the [Co-Investigating Judges] to attempt to determine – with the assistance of a qualified [redacted] expert (or experts) – the [redacted].[3] In addition it sought the appointment of such an expert or experts.[4]

2. On 10 March 2009 the Co-Investigating Judges responded affirmatively to Nuon Chea's Sixth Request,[5] and appointed Dr Ewa Maria Tabeau and Mr They Kheam as [redacted] experts, to report by 31 August 2009 (the "Order Appointing Experts").[6] On 28 April 2009, the Co-Investigating Judges extended the deadline for submission of the expert report to 30 September 2009.[7]

3. On 30 September 2009, Dr Tabeau and Mr They Kheam jointly filed their [redacted] Expert Report (the "Expert Report").[8]

4. On 12 February 2010 the Co-Lawyers for the Charged Person filed Nuon Chea's Twenty-Sixth Request for Investigative Action (the "Twenty-Sixth Request")[9] seeking "the appointment of an additional expert to re-examine the subject contained within the [redacted] Expertise Report"[10] because, as the Co-Lawyers claim, the Expert Report is "blunted by unnecessary discrepancies and shortcomings, as well as a demonstrated reluctance to pursue exculpatory theories and a lack of impartiality."[11] The Co-Lawyers ask

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[1] Appeal against [the Co-Investigating Judges]' Order Rejecting Request for a Second Expert Opinion, 30 April 2010, D356/2/1.
[2] Sixth Request for Investigative Action, 30 October 2008, D113.
[3] Nuon Chea's Sixth Request, para 9.
[4] Nuon Chea's Sixth Request, para 1.
[5] Response to the Sixth Request for Investigative Action (D113) and Partial Response to the Fifth Request for Investigative Action (D105), 10 March 2009, D113/2 and D105/2.
[6] Expertise Order, 10 March 2009, D140.
[7] Expertise Order Correction, 28 April 2009, D140/1.
[8] [redacted] Expert Report: Khmer Rouge Victims in Cambodia, April 1975 – January 1979: A Critical Assessment of Major Estimates, 30 September 2009, D140/1/1.
[9] Twenty-Sixth Request for Investigative Action, 12 February 2010, D356.
[10] Twenty-Sixth Request, para. 1.
[11] Twenty-Sixth Request, para. 11.

the Co-Investigating Judges to: 1) appoint an additional [redacted] expert, with background in [redacted] science to re-evaluate the estimated number [redacted]; 2) conduct an inquiry into the extent to which Dr. Ewa Tabeau exercises "prosecution bias"; 3) disclose any and all correspondence between Dr. Ewa Tabeau and the Co-Investigating Judges (CIJs) or the Office of the Co-Prosecutors (OCP); 4) disclose the literature review relied upon by the experts; 5) Identify and supply materials provided to the experts by the CIJs; 6) provide an actual body-count by an expert in order to obtain a "[redacted] acceptable figure."[12]

5. On 1 April 2010 the Co-Investigating Judges issued an Order rejecting the Twenty-Sixth Request (the "Order").[13] On 2 April 2010 the Co-Lawyers for the Charged Person filed a notice of appeal and on 30 April 2010 they filed their submission on the Appeal against the Order.

6. On 11 May 2010, the Pre-Trial Chamber scheduled a hearing on Appeal to be held on 26 May 2010 "conditional on the Chamber receiving notice [of intent to present oral submissions] from a respondent.[14] On 21 May 2010, the Co-Prosecutors filed a notice indicating that they "do not intend to submit any written or oral response" to the Appeal.[15] The Civil Parties did not file anything within the deadline. On 26 May 2010, the Pre-Trial Chamber cancelled the hearing on Appeal, determining to consider the matter on the basis of written submissions on the Appeal.[16]

7. On 10 June 2010, the Pre-Trial Chamber announced, in writing, its determination of the final disposition on the Appeal indicating that "a reasoned decision in respect of the Appeal shall follow in due course."

THE PRE-TRIAL CHAMBER DECIDED UNANIMOUSLY THAT:

1. "The Appeal is admissible in so far as it relates to the request for appointment of an additional expert to re-examine the existing expert report. It is otherwise inadmissible;
2. That part of the Appeal which is found admissible is dismissed on merit."[17]

8. The Pre-Trial Chamber hereby provides the reasons for this decision.

[12] Twenty-Sixth Request, para. 37.
[13] Order Rejecting Request for a Second Expert Opinion (Nuon Chea's Twenty-Sixth Request for Investigative Action, 1 April 2010, D 356/1.
[14] Scheduling Order, 11 May 2010, D356/2/2.
[15] Withdrawal of Notice of Appearance, 21 May 2010, D356/2/6.
[16] Cancelation Order, 26 May 2010, D356/2/7.
[17] Decision on Appeal against OCIJ Order Rejecting Request for a Second Expert Opinion, 10 June 2010, D356/2/8.

REASONS FOR THE DECISION:

A. RELEVANT LAW

9. Reference is made to Internal Rules 31, 55, 73, 74 and 75.

B. ADMISSIBILITY

10. On 1 April 2010 the Co-Investigating Judges issued the Order which was notified to the Charged Person on the same date of 1 April 2010. On 2 April 2010 the Co-Lawyers for the Charged Person filed a Notice of Appeal. The submission on Appeal was filed on 30 April 2010 and within the time limit provided for in Internal Rule 75(3).

11. The Pre-Trial Chamber observes that the Appeal is submitted pursuant to Internal Rules 73, 74 and 75[18] and refers to requests filed by the Co-Lawyers to the Co-Investigating Judges pursuant to Internal Rules 55(10) and 31(10).[19]

12. So far as the Appeal is related to a request for investigative action pursuant to IR55(10), the Co-Lawyers submit that the Appeal is admissible because:

> "it is apparent from the Order that the Co-Investigating Judges: (i) accepted the Twenty-Sixth Request as validly submitted under the Rules and (ii) rejected it on its merits. Accordingly, the instant appeal is admissible pursuant to Rule 74(3)(b)."[20]

13. The Pre-Trial Chamber observes that the Order does not expressly consider the issue of admissibility as far as that part of the Twenty-Sixth Request that was submitted under Internal Rule 55(10) is concerned. In the Twenty-Sixth Request the Co-Lawyers submit to the Co-Investigating Judges a number of sub-requests.[21] The Twenty-Sixth Request does not explain which of its sub-requests is submitted pursuant to Internal Rule 55(10) and which pursuant to Internal Rule 31(10).

14. The Pre-Trial Chamber observes that, considering the nature of some of these sub-requests, which are not directly related to Internal Rule 31(10),[22] they do not fall under Internal Rule 55(10) either, as they do not seek an investigative action that falls within the ambit of

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[18] Appeal, para. 1.
[19] Twenty-sixth Request, para. 1. refering to a request for investigative action and pursuant to Internal Rule 55(10) and a request for the appointment of an additional expert to re-examine an expert report pursuant to Internal Rule 31(10).
[20] Appeal, para. 13.
[21] Twenty-Sixth Request, para. 37, see also para. 4 *supra*.
[22] Twenty-sixth Request, para.37(b) and (c).

Internal Rule 55(1), but rather represent a fishing exercise by the Defence in order to prepare for cross-examination. For an appeal to be found admissible under Internal Rule 74(3)(b), two prerequisites have to be fulfilled: first, there must be a request which is "allowed under the Internal Rules" and second, such request has to have been "refused" by the Co-Investigating Judges.[23] In the instant case, the sub-requests brought in paragraph thirty-seven (b) and (c) of the Twenty-Sixth Request are not found to qualify as requests for investigative action "allowed under the Internal Rules", and therefore do not give a reason for Internal Rule 74(3)(b) to become operative.

15. In relation to the remainder of the Appeal, the Pre-Trial Chamber has found that the "Internal Rules permit the defence to seek the appointment of an expert to re-examine a matter now the subject of an expert report."[24]

C. STANDARD OF REVIEW

16. The Appeal is related to an Order of the Co-Investigating Judges rejecting a request by the Co-Lawyers for the appointment of an additional expert to re-examine an existing report and alleges that "the order is so unfair and unreasonable as to constitute an abuse of the [Co-Investigating Judges]' discretion."[25] The Co-Lawyers for the Charged Person do not submit anything in relation to the standard of review applicable to errors such as the ones alleged in the Appeal.

17. The Internal Rules are silent in relation to the standard of review for appeals against Co-Investigating Judges' Orders on requests submitted by the parties under Internal Rules 55(10) and 31(10). Requests submitted by the parties under Internal Rule 31(10) like those submitted under Internal Rule 55(10) aim at asking the Co-Investigating Judges to order or take action(s) which they consider necessary for the conduct of the investigation. In its Decision on Appeal against the Co-Investigating Judges' Order on Request to Seek Exculpatory Evidence in the Shared Material Drive (the "SMD Decision"),[26] the Pre-Trial Chamber, seeking guidance in the jurisprudence of international tribunals, found that the review of such orders is limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion, by applying the test set out in the "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense

[23] Decision on Appeal Against the Co-Investigating Judges Order on [Nuon Chea]'s Eleventh Request for Investigative Action, 18 August 2009, D158/5/1, paras. 21 and 24.
[24] Pre-Trial Chamber's Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5, para. 22.
[25] Appeal, Section V/B.
[26] Decision on Appeal against the Co-Investigating Judges' Order on Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, paras. 22-27.

Counsel" in the case of *Milosevic v. Prosecutor* (the "Milosevic Decision")[27] rendered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). The test in the Milosevic decision was:

> "a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not believe that counsel should have been imposed on Milosevic, the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously."[28]

18. Further guidance from the jurisprudence of international tribunals demonstrates that the same test is applied when reviewing appeals related to orders on requests similar to requests as those submitted under Internal Rule 31(10).[29]

D. CONSIDERATIONS

19. The Co-Lawyers argue that the Co-Investigating Judges erred in that they failed to appoint and instruct a qualified expert to attempt to collect original [redacted] evidence and that lack of collection of such data amounts to abuse of discretion by the Co-Investigating Judges.[30]

20. In the Twenty-Sixth Request, the Co-Lawyers asked the appointment of an "additional [redacted] expert with background in [redacted] science, to re-evaluate the estimated [redacted]."[31]

21. In the Order, the Co-Investigating Judges state that the Defence did not ask for a [redacted] expert but rather for a [redacted] one and that their 26th request "to appoint an additional [redacted] expert with background in [redacted] science to conduct first-hand research to determine accurate data" is filed too late and will cause undue delay of the proceedings thus affecting the rights of the Charged Person.[32]

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[27] *Milosevic v. Prosecutor,* IT 02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel", Appeals Chamber, 1 November 2004.
[28] *Milosevic* Decision, paras 9-10 (footnotes omitted).
[29] *Prosecutor v. Vujadin Popovic et.al.*, IT-05-88-AR73.2, "Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness," Appeals Chamber, 30 January 2008.
[30] Appeal, para14.
[31] The Twenty-Sixth Request, para 37(a).
[32] The Order, para. 7.

22. The Pre-Trial Chamber observes that the Co-Lawyers' complaint about how evidence was collected or was ordered to be collected is rather argumentative than showing an error or abuse in the Co-Investigating Judges' exercise of discretion.[33] In the Appeal the Co-Lawyers complain about the fact that the appointed experts did not undertake first hand [redacted] research. In this respect, the Co-Lawyers try to interpret their requests to show that they actually intended to ask for "the collection of reliable [redacted] evidence during the investigative stage of the proceedings."[34]

23. The Pre-Trial Chamber further observes that the original Sixth Request did not specifically ask for the appointment of [redacted] experts or collection of first hand [redacted] data and that the Co-Investigating Judges' Order to Appoint Experts was notified to the Co-Lawyers on 13 March 2009.[35] Were the Co-Lawyers unhappy with the way their Sixth Request was interpreted or determined by the Co-Investigating Judges in the Order to Appoint Experts, the Co-Lawyers had the option, at that time, to further and clearly explain to the Co-Investigating Judges the real purpose of their Sixth Request or to specifically[36] ask the Co-Investigating Judges to appoint additional [redacted] experts to conduct new [redacted] examinations pursuant to Internal Rule 31(10). The Co-Lawyers choose not to take advantage of such opportunity at that time and cannot almost one year later, challenge by way of a new request the [redacted] experts' report on grounds of alleged "flaws in methodology" and of lack of impartiality of the experts.[37] They have not, in particular, demonstrated why they could not raise their concern about the approach taken in the Order or the alleged lack of impartiality of the expert, following the issuance of that order.

24. The Pre-Trial Chamber finds that the Co-Investigating Judges exercised their discretion correctly in finding that the new defence request to appoint an expert with background in [redacted] science to conduct first-hand research has been filed too late in the course of the investigative proceedings. The Pre-Trial Chamber also observes that the Co-Investigating Judges have provided, in paragraph eight of the Order, sufficient reasoning for their decision to not organize [redacted] investigative work on their own motion.

[33] Appeal, paras. 14-17.
[34] Appeal, para.14.
[35] [redacted] Expertise Order, 11 March 2009, D140.
[36] The Pre-Trial Chamber observes that none of the requests of the Charged Person on this matter is sufficiently specific in that they wanted the appointment of a [redacted] expert. The Defence should have put the request for a [redacted] expert in the conclusion of the request(s).
[37] Twenty-sixth Request.

25. The Co-Lawyers also argue that the Co-Investigating Judges failure to conduct an inquiry into the extent to which the experts are impartial amounts to an abuse of their discretion.[38] The Co-Lawyers, referring to paragraph fifteen of the Order, submit that the Co-Investigating Judges' previous conclusions on the issue of impartiality of the experts are related solely to Ieng Sary's allegations on Dr. Tabeau's previous employment with OTP-ICTY, whereas the Twenty Sixth Request was "primarily based on an assessment of the expert report itself, where Dr. Tabeau's general institutional bias is explicitly apparent"[39] and complain that this was not dealt with in the Order.

26. In relation to this contention, the Pre-Trial Chamber observes that the Co-Investigating Judges have provided sufficient reasoning in the Order. The Co-Investigating Judges thoroughly explain how they examined the way the experts refer to different sources and also assert that the judges "are not bound by the expert report" and that "in the event the Charged Person is indicted ....the experts may still be called to give evidence and be cross-examined concerning such technical issues."[40]

27. The Pre-Trial Chamber observes that the Co-Lawyers in their Appeal allege the lack of impartiality of experts in order to challenge the expert report. Firstly, were the Co-Lawyers concerned about the impartiality of the experts, as stated above, the right time to address the issue was when the Co-Investigating Judges issued the Order appointing them.[41] Secondly, the issue of impartiality of experts is rather related to the weigh that may be given to the expert report, and as the Co-Investigating Judges explain in their Order, the judges are not bound by the expert report, and the Pre-Trial Chamber further observes that the complaint, as grounded, is immature, because the Co-Investigating Judges have not yet issued a decision or order which shows what weigh they may give to the report. In addition, the Pre-Trial Chamber notes that the experts may still be called to give evidence and be cross-examined during trial.

28. The Pre-Trial Chamber finds that attempts made to allege impartiality of an expert on grounds of prior associations that are not directly related to the particular case before the Co-Investigating Judges represent an overgeneralization and unsubstantiated claim and do not reach the threshold of sufficient specificity for such a claim to be confirmed. The Co-

[38] Appeal. paras. 22-24.
[39] Appeal. para.23.
[40] The Order, paras.13 and 14.
[41] See para. 23 above.

Lawyers adopt Ieng Sary's allegations on impartiality of experts, which the Co-Investigating Judges and the Pre-Trial Chamber have already dismissed.[42]

29. The Co-Lawyers, suggesting that the Cambodian appointed Expert Mr. They Keam's position within the Cambodian Ministry of Planning is cause for concern, further submit that the Co-Investigating Judges' failure to acknowledge the recurrent problem of dependence of government employees from the Government authorities is "discouraging."[43] The Pre-Trial Chamber observes, as also asserted by the Co-Investigating Judges in the Order, that this Co-Lawyers' concern is unsubstantiated with specifically related evidence to the expert or the case before the Co-Investigating Judges.

30. For all the abovementioned reasons, the Pre-Trial Chamber decided as announced in its determination on Appeal of 10 June 2010.

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

Phnom Penh, 1 July 2010

Pre-Trial Chamber

President

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

[42] Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional [redacted] Expert to Re-examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 28 June 2010, D140/9/5, Order on Request for Additional [redacted] Expert, 18 August 2009, D140/3 and Order on Ieng Sary's Request for Appointment of an Additional [redacted] Expert, 23 February 2010, D140/8.

[43] Appeal, para. 24 refering to the Order, para. 16 and the Twenty-sixth Request, para.35.