



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

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

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

Before: **YOU Bunleng**
Marcel LEMONDE
Date: **3 April 2009**
Original language: **Khmer/French**
Classification: **PUBLIC**

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Order on Request for Investigative Action

Co-Prosecutors

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Charged Person

NUON Chea
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IENG Thirith
KHIEU Samphan

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We, **You Bunleng** (ឃុំ ប៊ុនហ្គុន) 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 Rule 55 of the ECCC Internal Rules (the “Internal Rules”);

Noting the ongoing judicial investigation against **NUON Chea** (នួន ឆា) 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 the Eleventh Request for Investigative Action (the “Request”) filed by Counsel for the defence of NUON Chea (the “Defence”), dated 27 mars 2009 (D158);

Noting the motions filed by the defence teams for IENG Sary (D158/2), IENG Thirith (D158/3) and KHIEU Samphan (D158/4), dated 27 and 30 March and 3 April 2009 respectively.

PROCEDURAL HISTORY AND ARGUMENTS BY THE PARTIES

1. In a Request dated 27 March 2009, the Defence, citing a large number of press articles reporting allegations of corruption within the ECCC, requested the Co-Investigating Judges to investigate these facts.
2. After having reviewed the elements upon which it based its suspicions of corruption at the ECCC (Part II – A); recalled the “Official Reactions and Developments” (Part II – B; and outlined the “Defence Efforts” (Part II – C), the Defence for NUON Chea declared that the aim of the Request, in the name of transparency given that the “*UN and the RGC have been unwilling to assist in this inquiry*”, is to “*determine whether the ECCC is capable of delivering the kind of justice which accords with international standards of fairness*” (par. 17).
3. In this perspective, the Defence calls on the Co-Investigating Judges to “*collect ‘information conducive to ascertaining the truth’ about this tribunal*” (par. 17); and, more precisely, “*identify any corrupt elements within the Court*” (par. 21).
4. Accordingly, the Defence requested the Co-Investigating Judges to obtain from the UN, the RGC and/or any other organization or individual:
 - a) The results of the OIOS inquiry;
 - b) Any correspondence between the UN and the RGC related to the OIOS inquiry; and
 - c) Any other information suggesting an organized regime of institutional corruption at the ECCC,
 and that they disclose such information to the Defence and all other interested parties as soon as possible. Additionally, the Defence invites the OCIJ to request an

administrative inquiry into the outstanding allegations of corruption at the tribunal (par. 22).

5. In a motion dated 27 March 2009, the Defence team for IENG Sary gave notice that they wished to be joined in the Request.
6. On 30 March 2009, the Defence team for IENG Thirith advised that it supports the request by the NUON Chea Defence.
7. In a motion dated 3 April 2009, the Defence team for KHIEU Samphan gave notice that they wished to be joined in the Request.

REASONS FOR THE DECISION

8. The power of the Co-Investigating Judges to *"take any investigative action conducive to ascertaining the truth"* is limited to their jurisdiction, under Article 2 of the 2004 ECCC Law, which provides that the Extraordinary Chambers were established *"to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."*
9. This observation is supported by the provisions of Internal Rule 55(2), complying in this respect with Cambodian criminal procedure, which provides that the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission by the Co-Prosecutors.
10. Accordingly, this power cannot be extended to ascertaining the truth *"about this tribunal"* as the Defence wishes, as this issue is totally foreign to the facts covered by the current judicial investigation. Indeed, on 14 January 2009, the Co-Investigating Judges already refused to place on Case File No. 002/19-09-2007 a copy of the complaint filed by the NUON Chea Defence with the Prosecutor of the Phnom Penh Municipal Court on 8 January 2009, mainly for the reason that the complaint fell completely outside the factual situation the object of the judicial investigation (D124/1, p. 2).
11. In light of these elements, independently from any considerations relating to the merits of the allegations referred to in the Request, one cannot but observe that accepting the Request would amount to an abuse of power, since the facts at issue do not come within the jurisdiction of the Co-Investigating Judges under the ECCC Law. There is no motive sufficiently compelling to justify diverging from the fundamental principle of the Rule of Law, which in fact justifies the granting of grave powers to the judicial authorities: judicial submission to the law.
12. Of course, the Co-Investigating Judges must guarantee that the ongoing judicial proceedings are irreproachable in every way, especially by ensuring that all confirmed acts that interfere with the administration of justice are *"sanction[ed] or refer[red] to the appropriate authorities"* by virtue of Internal Rule 35. Nevertheless, nothing in the

Request justifies any affirmation that we are currently faced with such acts, since it limits itself to raising speculation as to hypothetical negative effects of any form of corruption on the proceedings (par. 17).

13. Finally, a request by the Co-Investigating Judges for an administrative inquiry into this issue would be superfluous, since the Cambodian and United Nations authorities are already seised of the issue and already have all of the information contained in the Request at their disposal. As a supplementary measure, a copy of this Order shall be forwarded to them for information.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

OBSERVE that they lack jurisdiction to accomplish the requested investigative action;

STATE that there are no grounds to request an administrative investigation.

Done in Phnom Penh, on 3 April 2009

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Co- Investigating Judges

Co-juges d'instruction