



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Kingdom of Cambodia
Nation Religion King

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

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**Order Concerning the Co-Prosecutors' Request
for Clarification of Charges**

Co-Prosecutors

Mrs. CHEA Leang
Mr William SMITH

Charged Persons

NUON Chea KHIEU Samphan
IENG Sary KAING Guek Eav
IENG Thirith alias Duch

Civil Party Lawyers

NY Chandy
LOR Chhunthy
Kong Pisey
HONG Kim Suon
YUNG Phanit
KIM Mengkhy
MOCH Sovannary
SIN Soworn
Silke STUDZINSKY
Philippe CANONNE
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RABESANDRATANA
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Olivier BAHUGNE
David BLACKMAN
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Defence Lawyers

SON Arun
Michiel PESTMAN
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Michael G. KARNAVAS
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SAR Sovan
Jacques VERGES
KAR Savuth
Francois ROUX
Marie-Paule
CANIZARES

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

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

Noting Rules 55 and 67 of the ECCC Internal Rules (“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 Co-Prosecutors’ request dated 4 September 2009 (the “Request” - D198).

CO-PROSECUTORS’ REQUEST

1. In the above-mentioned Request, the Co-Prosecutors requested *“that the Co-Investigating Judges issue an order, or hold a further hearing at which the Charged Persons appear, to clarify the charges against NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan and KANG Guek Eav alias DUCH for which they may be indicted at the conclusion of the judicial investigation in this case”*.
2. They recall that *“[i]n their Initial Appearances, the Charged Persons were notified of the acts set out in the Co-Prosecutors’ Introductory Submission for which they were placed under judicial investigation. They were informed that those acts were open to legal characterisation as Violations of the 1956 Penal Code, Genocide, Crimes Against Humanity and Grave Violations of the Geneva Conventions of 12 August 1949”*. They were also *“advised that they were charged with Crimes Against Humanity and Grave Breaches of the Geneva Conventions, while IENG Thirith was advised that she was charged with Crimes Against Humanity”*.
3. Since the Initial Appearances, the Co-Prosecutors have filed Supplementary Submissions concerning the North Zone Security Centre (Doc. No. D83), forced marriage and sexual relations (Doc. D146/3) and genocide of the Cham (Doc. No. D196).
4. The Co-Prosecutors are of the view that, *“under ECCC law, the only notification of legal significance at the Initial Appearances was the notification that the Charged Persons were being judicially investigated for the acts and charges set forth in the Introductory Submission. The Co-Investigating Judges are obligated to investigate all matters contained in the Introductory Submission and Supplementary Submissions, including the charges of Genocide and Violations of the 1956 Penal Code, and to determine in the Closing Order after the conclusion of their judicial investigation whether the Charged Persons will be indicted and for what crimes”*.
5. The Co-Prosecutors therefore request the Co-Investigating Judges to *“notify the Charged Persons (a) that the acts for which they are being judicially investigated include all those set forth in the Introductory and Supplementary Submissions filed by the Co-Prosecutors and (b) that the crimes for which they may be indicted*

in the Closing Order are not limited to Crimes Against Humanity and Grave Breaches of the Geneva Conventions (i.e., the specific charges reference by the Co-Investigating Judges at the Initial Appearances), but may also include Genocide, Violations of the 1956 Penal Code and any other crimes within the jurisdiction of the ECCC, if the Co-Investigating Judges determine that acts set forth in the Introductory and Supplementary Submissions are established by sufficient evidence and subject to legal characterisation”.

REASONS FOR THE DECISION

6. As rightly recalled by the Co-Prosecutors, the Co-Investigating Judges have the obligation – as set forth in Rule 55(2) of the Internal Rules¹ – to investigate *in rem* all the material facts (*faits*^{*}) set out in the Introductory Submission (and Supplementary Submissions) by which they are seised of such facts.
7. Of course, in this instance, the Co-Investigating Judges have never lost sight of this obligation: it was precisely in order to make the scope of the judicial investigation absolutely clear that the Co-Investigating Judges expressly informed the Charged Persons, at their Initial Appearance, of all the facts of which they had been seised by the Co-Prosecutors.² Since then, the parties have received notification of the Co-Prosecutors’ Supplementary Submissions, seising the Co-Investigating Judges of additional facts.³
8. Nonetheless, from a reading of the Request there would still appear to be some confusion, perhaps the result of ambiguity in the wording of the English version of the Internal Rules; the notions of “*faits reprochés*” [charges], “*charges suffisantes*” [sufficient evidence] and “*mise en examen*” [charging] being difficult to translate into English due to the lack of equivalent notions at Common Law.
9. Therefore, the purpose of this Order is to recall the relevant provisions of the Internal Rules and, to the extent possible, clarify their interpretation.⁴

¹ Rule 55(2) of the Internal Rules provides: “2. *The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission*”. Also, the obligation for the Co-Investigating Judges to decide, in the Closing Order, on all of the facts of which they have been regularly seised (see *supra*, footnote 13) also implies an obligation to investigate all of the material facts.

* Translators Note: “*faits*” is generally translated as “facts” in the ECCC Internal Rules.

² Written Record of Initial Appearance of Kaing Guek Eav alias DUCH, 31 July 2007, D7; Nuon Chea, 19 September 2007, D20; Ieng Sary, 12 November 2007, D38; Ieng Thirith, 12 November 2007, D39; Khieu Samphan, 19 November 2007, D42.

³ Co-Prosecutors’ Supplementary Submission Concerning the North Zone Security Centre, 26 March 2008, D83; Co-Prosecutors’ Response to the Forwarding Order of the Co-investigating Judges and Supplementary Submission, 30 April 2009, D146/3; Co-Prosecutors’ Supplementary Submission Regarding the Genocide of Cham, 31 July 2009, D196; Co-Prosecutors’ Clarification of Allegations Regarding Five Security Centres and execution Sites Described in the Introductory Submissions, 11 September 2009, D202; Co-Prosecutor’s Further Authorisation Pursuant to Co-Prosecutors’ 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 5 November 2009, D146/4.

⁴ There are explicit provisions in the Internal Rules concerning charging by the Co-Investigating Judges. Nonetheless, in order to clear up any ambiguity as to their interpretation, reference will be made hereinafter to a number jurisprudential decisions; it should be noted that in the instant case, the most useful precedents may be found in French case law concerning the procedural system on which the Cambodian law is based.

10. In application of these provisions, the following principles govern the conditions, modalities and consequences of the Co-Investigating Judges charging a person:

- The obligation to investigate all the facts referred to the Co-Investigating Judges must not be mistaken for an "obligation to charge" in relation to those facts; such an obligation could not be imposed upon the Co-Investigating Judges without depriving them of the essential powers attaching to their functions as independent Judges: it results from the very terms of Rule 55(4)⁵ that the Co-Investigating Judges have the "power", but not the obligation, to charge a person⁶, whether or not that person is named in the Introductory Submission. Where the Co-Investigating Judges decide to charge a person, they are free to choose when to do so.⁷
- The "power" to charge is nonetheless governed by the provisions of both Rule 24(4),⁸ which proscribes calling as a witness any person against whom there is evidence of criminal responsibility, and Rule 55(4), under which charges may only be laid if there is clear and consistent evidence indicating that a person may be criminally responsible for the commission of a crime alleged in the OCP submission, whether or not such person is named in that submission.⁹
- During the charging process, notification of the "charges" includes specifying the legal characterization of the facts,¹⁰ bearing in mind that legal characterisations are always provisional at the judicial investigation stage.¹¹ The Co-Investigating Judges are free to characterise the facts they are seized of as they see fit; although they have the obligation to make a decision concerning the characterisations

⁵ Rule 55(4) of the Internal Rules provides: "*The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons*".

⁶ This means that the Co-Investigating Judges may dismiss a case without laying charges, subject to Rule 24(4) of the Internal Rules; for a similar application under French law, see: Crim 27 novembre 1963 *Bull crim* N°338 and Crim 14 février 1984 *Bull crim* N°58.

⁷ For a comparable interpretation under French law, see Crim 14 février 1984 *Bull crim* N°58: [TRANSLATION] *The investigating judge possesses unfettered power to decide when to lay charges, where applicable, after having conducted all necessary investigations.*

⁸ Rule 24(4) of the Internal Rules provides: "*The Co-Investigating Judges and the Chambers shall not call as a witness any person against whom there is evidence of criminal responsibility, except as provided in Rule 28*".

⁹ See Rule 55(4) of the Internal Rules, *op. cit.*

¹⁰ Charging is the process by which a person is notified of the potentially criminal nature of the acts under investigation. By definition, it consists in notifying the person of the acts and their legal characterisation as envisaged at this stage of the judicial investigation. In the instant case, the notion of "charges" [*faits reprochés*], which is mentioned in the Khmer and French versions of the Internal Rules, must therefore be understood as also implying the envisaged legal characterisation. This interpretation is consistent with Cambodian criminal procedure: see Article 140 of Cambodian Code of Criminal Procedure. In the same vein, see also Article 116 of the French Code of Criminal Procedure.

¹¹ For examples from French law, see *Crim 13 mars 1984, Bull crim* n°107.

proposed by the Co-Prosecutors, they are not bound by those characterisations.¹²

- The Co-Investigating Judges have the obligation to make a decision, in the Closing Order, with respect to each of the facts of which they have been validly seised, either by issuing an indictment or dismissing the case.¹⁴
- Finally, whereas the Co-Investigating Judges may not indict a person for facts in relation to which he or she has not first been charged,¹⁵ charging does not prejudice the final decision of the Co-Investigating Judges whether to issue an indictment or dismiss the case in the Closing Order.

11. In light of these principles, the answers to the specific questions raised by the Co-Prosecutors are as follows:

- it is indeed true that the Co-Investigating Judges' investigation extends to all the facts set out in the Introductory Submission and Supplementary Submissions; and
- the Charged Persons may be indicted for all facts imputed to them by the Co-Prosecutors, subject to the condition that those persons have been charged beforehand by the Co-Investigating Judges in relation to such facts.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY

State that the ongoing judicial investigation extends to all the facts alleged in the Co-Prosecutors' Introductory and Supplementary Submissions;

¹² This principle is specifically mentioned in the Internal Rules only at the Closing Order stage (see Rule 67), at all the other stages of the judicial investigation, it is implied in the jurisdictional powers attached to the functions of the Co-Investigating Judges. For a French law example, see Crim 28 octobre 1980 *Bull Crim N°277*.

¹⁴ Rule 67 of the Internal Rules provides: "1. *The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions. 2. The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility. (...) 4. The Closing Order shall state the reasons for the decision. A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others*". For a similar interpretation under French law, see also Crim 24 mars 1977 *Bull crim N°112*.

¹⁵ For French law examples, see *Crim 12 octobre 1972, Bull crim n°286; Crim 6 novembre 1979, Bull crim n°306*. Regarding the alternative, whereby the Co-Investigating Judges may issue a dismissal order without charging a suspect, see *supra*, footnote 6.

State that, in the Closing Order, the Co-Investigating Judges will make a decision in respect of all of these facts and the related legal characterisations proposed by the Co-Prosecutors (including Genocide and offences under the 1956 Penal Code), either by indicting the charged persons, after having charged them, or by issuing a dismissal order in relation to all or part of those facts; and

State that, prior to the conclusion of the judicial investigation, the Charged Persons will be summoned for clarification of the charges for which they may be indicted; on that occasion, they will be notified of any further charges.

Signed in Phnom Penh, on 20 November 2009

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