



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

Case File No: 003/07-09-2009-ECCC/OCIJ

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

Before: Judge YOU Bunleng
Judge Siegfried BLUNK

Date: 27 July 2011

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Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ ៧១
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We, **YOU Bunleng** (ឃុំ ប៊ុនហ្គេង) and **Siegfried BLUNK** (ស៊ីគ្រីហ្វ ប្លឺង), 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 Rules 21, 54, 55 and 66 of the ECCC Rules (Rev.7) (the "Rules");

Noting Articles 3.12 of the Practice Direction on Filing Documents before the ECCC (the "Practice Direction");

Noting the judicial investigation being conducted pursuant to the Co-Prosecutors' Second Introductory Submission;

Noting our notice of conclusion of judicial investigation dated on 29 April 2011 (D13)

I - PROCEDURAL HISTORY

1. On 18th May 2011, the International Co-Prosecutor ("ICP") submitted to the Co-Investigating Judges ("CIJs") three investigative requests ("Requests"):
 - (i) International Co-Prosecutor's first case file 003 investigative request to admit additional documents and observation on the status of the investigation¹;
 - (ii) International Co-Prosecutor's second request for further investigative action regarding [Redacted] and related crime sites²;
 - (iii) International Co-Prosecutor's third investigative request regarding [Redacted] and related crime sites³;
2. On 7th June 2011, the CIJs issued a decision rejecting as invalid the Requests, ("Decision")⁴.
3. On 10th June 2011, the ICP re-filed the Requests ("Re-filed Requests") and requested pursuant to Rule 39(4) for each *"that the Co-Investigating Judges recognize its validity as an action being executed after the expiration of a time limit under such terms as they see fit"*.⁵

¹ D17, International Co-Prosecutor's First Case File 003 Investigative Request to admit Additional Documents and Observations on the Status of the Investigation, 18th May 2011.

² D18, International Co-Prosecutor's Second Request for Further Investigative Action regarding [Redacted] and Related Crime Sites, 18th May 2011.

³ D19, International Co-Prosecutor's Third Investigative Request regarding [Redacted] and related Crime Sites, 18th May 2011.

⁴ D20/3, Decision on Time Extension Request and Investigative Requests by International Co-Prosecutor Regarding Case 003, 07th June 2011.

⁵ D22, International Co-Prosecutor's First Case File 003 Investigative Request to admit Additional Documents and Observations on the Status of the Investigation, 10th June 2011, paragraphs 1-3; D23, International Co-Prosecutor's Second Request For Further Investigative Action regarding [Redacted] and Related Crime Sites, 10th June 2011, paragraphs 1-3; D24, International Co-Prosecutor's Third Investigative Request regarding [Redacted] and related Crime Sites, 10th June 2011, paragraphs 1-3



4. On 7th July 2011, the ICP filed an appeal against the Decision to the Pre-Trial Chamber (“PTC”).⁶ The appeal was not only based on the grounds that the CIJs erred in rejecting the Requests as invalid but also on the alternative that “*the CIJ’s failure to consider the substance of the Requests contravenes the CIJ’s legal obligation to conduct a complete and impartial investigation*”⁷.

II – REASONS FOR THE DECISION

5. After the CIJs rejected the Requests as invalid, the ICP instead of appealing that Decision as would have been the appropriate procedure⁸ re-filed the Requests, but then did not await the CIJs decision on the Re-filed Requests but appealed the original Decision, and based the Appeal not only on formal grounds but also on substance⁹. Therefore, the PTC is now seized with the issue whether the Requests are valid. It is solely for the PTC to decide about their validity, and the CIJs are not entitled to interfere with the PTC’s competency over this issue, and to circumvent the PTC’s jurisdiction by deciding on the issue themselves. The ICP by re-introducing the issue in the guise of a re-filing cannot hide the fact that the issue remains the same.
6. The CIJs while fully aware of their discretion under Rule 39 are unable to exercise it as requested by the ICP for the following reasons:

- a) Rule 66 (1) provides:

“Where the Co-Investigating Judges consider that investigation has been concluded, they shall notify all the parties and their lawyers. (....). The parties shall have 15 (fifteen) days to request further investigative action. ”

This time limit is important because it emanates from a principle for proceedings enshrined in Rule 21 “*Fundamental Principles*”, that provides:

“4. Proceedings before the ECCC shall be brought to conclusion within reasonable time.”

The ICP, to comply with the requirement of expeditiousness of proceedings, was obligated to file valid requests for further investigations within the stipulated 15 day period, which however he failed to do. Were the CIJs to extend the time limit and recognize the invalid requests as valid despite this failure of the ICP, they would therefore violate a fundamental principle of proceedings.

- b) A further reason why the CIJs are unable to exercise their discretion as requested by the ICP is the following:

Rule 55 (10) provides:

“At any time during an investigation, the Co-Prosecutors ... may request the Co-Investigating Judges to make such orders or undertake such investigative

⁶ D20/4/1 International Co-Prosecutor’s Appeal against the “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 07 July 2011.

⁷ D20/4/1 International Co-Prosecutor’s Appeal against the “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 07 July 2011, para. 9 (c) (ii).

⁸ Rule 74 (2).

⁹ Supra para. 4.



action as they consider useful for the conduct of the investigation.”

As the investigations in Case 003 have been ongoing at least since the issuance of the Rogatory Letter dated 9 June 2010¹⁰ the ICP had almost a full year to make investigative requests, but chose not to do so until after the closure of investigations by the CIJs pursuant to Rule 66(1).

- c) It is still not apparent that the ICP is giving sufficient consideration to the basic jurisdictional requirement of Article 2 ECCC Law, namely that the suspects in Case 003 must be “senior leaders” of DK or “most responsible” for crimes committed during that period: [Redacted]

[Redacted]

- d) The Co-investigating Judges, having analysed in depth the existing evidence, are not entitled to ignore Rule 55 (1) which permits investigations only “*within the jurisdiction of the ECCC*”, from which follows, that investigations regarding the basic jurisdictional requirement of Article 2 ECCC Law, have to take priority. [Redacted]

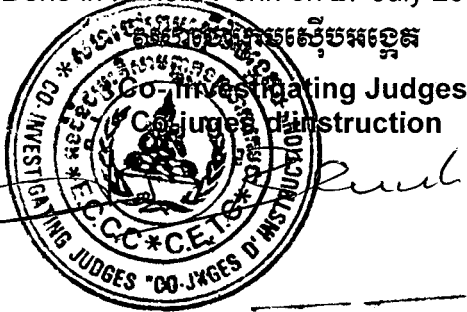
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III - DECISION

For these reasons the Co-Investigating Judges

9. **REJECT** the Re-filed Requests.

Done in Phnom Penh on 27 July 2011


Dr. Siegfried BLUNK

¹⁰ D2 Rogatory Letter dated 09 June 2010.

¹¹ D1 Co-Prosecutors' Second Introductory Submission regarding the Revolutionary Army of Cambodia dated 20 November 2008, para. 96.

¹² D23, International Co-Prosecutor's Second Request For Further Investigative Action regarding [Redacted] and Related Crime Sites, 10th June 2011, para.12; D24, International Co-Prosecutor's Third Investigative Request regarding [Redacted] and related Crime Sites, 10th June 2011, para. 19.

¹³ D427 Closing Order (Case 002) date 15 September 2011, para. 129.