



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសេសវិសេសនៃតុលាការកម្ពុជា

Kingdom of Cambodia
Nation Religion King

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.: 003/07-09-2009-ECCC-OCIJ

Before: **YOU Bunleng**
Laurent KASPER-ANSERMET

Date: **2 December 2011**

Original: **English**

Classification: **Public**

ORDER ON RESUMING THE JUDICIAL INVESTIGATION

Co-Prosecutors

Mrs. CHEA Leang
Mr. Andrew CAYLEY



I, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Agreement signed on 6 June 2003 between the United Nations and the Royal Government of Cambodia for the purpose of bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian and international law committed during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979 (the “ECCC Agreement”);

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, 66 and 67 of the ECCC Internal Rules (the “Internal Rules”);

Noting the Code of Criminal Procedure of the Kingdom of Cambodia which came into force on 20 August 2007 and is applicable in the absence of a specific provision in the Internal Rules;

Noting the judicial investigation against two suspects relating to charges of crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, torture and murder, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and 500, 501, 503, 505, 506, 507 and 508 of the 1956 Penal Code of Cambodia;

Noting the Second Introductory Submission, dated 20 November 2008, relating to Case File 003,¹ requesting the arrest and provisional detention of suspects under Internal Rules 42 and 63, which was placed on the case file on 7 September 2009;²

PROCEDURAL HISTORY

Noting the Co-Investigating Judges’ Notice of Conclusion of Judicial Investigation, dated 29 April 2011;³

Noting the International Co-Prosecutor’s three requests for investigative action, dated 18 May 2011, seeking the admission of additional documents⁴ and further investigative action for the purpose of determining the responsibility of suspected individuals;⁵

¹ Case File No. 003/20-11-2008/ECCC/OCIJ, Co-Prosecutor’s Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

² Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

³ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁴ International Co-Prosecutor’s First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 18 May 2011, D17.

⁵ International Co-Prosecutor’s Second Request for Further Investigative Action regarding [the suspect] and Related Crime Sites, 18 May 2011, D18; and International Co-Prosecutor’s Third Investigative Request regarding [the suspect] and Related Crime Sites, 18 May 2011, D19.



Noting the Co-Investigating Judges' decision of 7 June 2011⁶ rejecting the above-mentioned requests on the ground that they were made solely by the International Co-Prosecutor, who is required to act jointly with his national counterpart, unless there has been a delegation of power (Internal Rule 13(3)) or a disagreement has been recorded (Internal Rule 71(1));

Noting the re-filing on 10 June 2011 of the said requests for investigative action,⁷ following the recording of a disagreement, requesting that the requests be considered valid despite the expiry of the 15-day time limit (Internal Rules 66(1) and 39(4));

Noting the International Co-Prosecutor's Appeal against the decision of 7 June 2011⁸ (Internal Rules 74(2) and 75(1));

Noting the 27 July 2011 decision of the Co-Investigating Judges rejecting the three requests for investigative action, dated 10 June 2011,⁹ on the grounds that:

- a) Since the Pre-Trial Chamber was already seised of the issue, it had sole jurisdiction to rule on the first three requests for investigative action;
- b) The Co-Investigating Judges could not exercise their discretion (Internal Rule 39(4));
- c) To extend the 15-day time limit (Internal Rule 66(1)) to file requests for investigative action would violate the principle that proceedings shall be brought to a conclusion within a reasonable time (Internal Rule 21(4));
- d) The International Co-Prosecutor could have requested investigative actions as of 9 June 2010, but waited until the conclusion of the judicial investigation to do so;
- e) The International Co-Prosecutor failed to give sufficient consideration to Article 2 of the ECCC Law which provides the foundation for the ECCC's *in personam* jurisdiction, a matter that must be dealt with over and above further investigations, which would commit the Court's resources unnecessarily and irresponsibly;

Noting the International Co-Prosecutor's Appeal, dated 26 August 2011, against the above-mentioned decision,¹⁰ emphasising, on the one hand, that his interests, as well

⁶ Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor regarding Case 003, 7 June 2011, D20/3.

⁷ Re-Filing of International Co-Prosecutor's First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 10 June 2011, D22; Re-Filing of International Co-Prosecutor's Second Request for Further Investigative Action regarding [the suspect] and Related Crime Sites, 10 June 2011; Re-Filing of International Co-Prosecutor's Third Investigative Request regarding [the suspect] and Related Crime Sites, 10 June 2011, D24.

⁸ International Co-Prosecutor's Appeal against the "Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor regarding Case 003", 7 July 2011, D20/4/1.

⁹ Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003, 27 July 2011, D26.

¹⁰ International Co-Prosecutor's Appeal against the "Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003", 27 August 2011, D26/1/1.



as those of prospective civil parties had been harmed as a result of a patently incomplete investigation and, on the other hand, that the Co-Investigating Judges could not form an opinion that had neither been formalized nor notified, without having made a prior determination based on a proper investigation as to the status of the persons under investigation and the exact nature of the crimes that could be alleged against them;

Noting the Considerations of the Pre-Trial Chamber, dated 2¹¹ and 15¹² November 2011, allowing the decisions of 7 June and 27 July 2011 to stand because the judges could not reach a super-majority (Internal Rule 77(13));

I.

1. **Whereas** as of 1 November 2011, the undersigned judge, in his capacity as International Reserve Co-Investigating Judge, assumed the duties hitherto performed by Judge Siegfried Blunk, who has resigned;

II.

2. **Whereas** a judicial investigation can only be concluded by a “Closing” Order (Internal Rule 67(1)) or “an order terminating the investigation” (Art. 247.1 CCPC) consisting in an indictment or an order to dismiss the case;

Until then, the Co-Investigating Judges are seised of the case file;¹³

Accordingly, they are empowered to reconsider all earlier decisions, including even decisions issued subsequent to the Notice of Conclusion of Judicial Investigation;¹⁴

3. **Whereas** after reviewing the above-noted proceedings, the undersigned judge will reconsider the admissibility of the International Co-Prosecutor’s three untimeously re-filed requests for investigative action, dated 18 May 2011;

III.

¹¹ Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Time Extension Request and Investigative Requests regarding Case 003, 2 November 2011, D20/4/4.

¹² Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests, 15 November 2011, D26/1/3.

¹³ Decision on Khieu Samphan’s Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, Pre-Trial Chamber, 12 January 2011, Doc. No. 2, para. 6.

¹⁴ French Case Law: Court of Cassation, Criminal Division, 9 January 1995, Appeal No. 94-84975, *Bulletin des Arrêts de la chambre criminelle* No. 6 (D 1995 Somm. 322 obs. Pradel; JCP 1996 I 3906 chron. J.-H. Robert); Court of Cassation, Criminal Division, 4 August 1998, Appeal No. 98-81678, *Bulletin des Arrêts de la chambre criminelle* 220.



4. **Considering** that where the Internal Rules and Cambodian law does not deal with a particular matter, guidance may be sought in international law (Article 12(1) of the ECCC Agreement, Article 23 of the ECCC Law);

That international law provides that a previous decision may be reconsidered where there is a legitimate basis, not only because of a change of circumstances (new facts, new arguments) but also where the previous decision was erroneous or has caused an injustice;¹⁵

That this is an “inherent power” of a judge¹⁶ who, under the law and as recognised by the courts, has a discretion to reconsider previous decisions;¹⁷

That, in fact, the Pre-Trial Chamber itself has reconsidered some previous decisions;¹⁸

5. **Considering** that under international law, late filings may be recognized as validly done:

- a) “on good cause being shown” (ICTY, Rules of Procedure and Evidence (Rev. 45), Rule 127; SCSL, Rules of Procedure and Evidence, Rule 116)
- b) or “in the interests of justice” (ICC, Regulations of the Court, Regulation 29);¹⁹

That it is necessary in this context to balance the competing interests, i.e., the importance of the rights and duties of the Prosecution against the harm that this may cause to other parties;²⁰

¹⁵ *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision *proprio motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituch, Trial Chamber, 17 May 2005; *Prosecutor v. Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, Appeals Chamber, 14 December 2001, para. 13; *Prosecutor v. Mucic et al.*, IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 April 2003, para. 49; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measures for Witness K56, Trial Chamber, 9 November 2006, para. 2.

¹⁶ *Prosecutor v. Galic*, IT-98-29-A, Decision on Defence’s Request for Reconsideration, Appeals Chamber, 16 July 2004, p. 2.

¹⁷ *Milosevic v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Appointment of Defense Counsel, Appeals Chamber, 1 November 2004, para. 9-10; quoted in Case File No. 002/19-09-2007-ECCC/OCIJ, 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, para. 26.

¹⁸ Decision on Application for Reconsideration of Civil Party’s Rights to Address Pre-Trial Chamber in Person, Case File No. 002/19-09-2007-ECCC/OCIJ, 28 August 2008, C22/1/68, para. 25; and Decision on the Reconsideration of the Admissibility of Civil Party Applications, Case File No. 002/19-09-2007-ECCC/OCIJ, 1 July 2011, D364/1/6, para. 9.

¹⁹ See also *Prosecutor v. Brima*, SCSL-04-16-T, Decision on Urgent Defence Request under Rule 54 with respect to Filing of Motion for Acquittal, Trial Chamber II, 19 January 2006.

²⁰ *Prosecutor v. Lukic*, IT-98-32/1-AR65.1, Decision on Defence Appeal against Trial Chamber’s Decision on Sreboje Lukic’s Motion for Provisional Release, Appeals Chamber, 16 April 2007, para. 12; *Prosecutor v. Boskoski and Tarculovski*, IT-04-82/AR65.3, Decision on Ljube Boskoski’s Interlocutory Appeal on Second Motion for Provisional Release, Appeals Chamber, 28 August 2006, para. 9; *Prosecutor v. Muvunyi*, ICTR-200-55A-A, Decision on “Accused Tharcisse Muvunyi’s Motion



That with regard to late filings, Internal Rule 39(4) specifically provides that:

The Co-Investigating Judges or the Chambers may, (...) on their own motion: recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.

That the Pre-Trial Chamber itself has accepted defective filings in the interests of justice;²¹

IV.

6. **Considering**, with regard to the Co-Investigating Judges' arguments for rejecting the requests for investigative action, that the fact that the Pre-Trial Chamber is already seised of the matter does not mean that the Co-Investigating Judges cannot rule upon late filings which have been cured of their defect (Internal Rule 77(11));

That the International Co-Prosecutor demonstrated good faith in re-filing the said requests along with a record of disagreement;

That, in any event, the Co-Investigating Judges could have waited for the Pre-Trial Chamber's decision before making a final ruling;

That it was inappropriate to impugn the International Co-Prosecutor's late filing of the requests for investigative action, in that:

- a) the only investigators' report, which was prepared pursuant to the rogatory letter of 9 June 2010 and finalised on 10 February 2011,²² had been placed on the case file on 7 March 2011,
- b) other items were placed on the case file in the month preceding the conclusion of the judicial investigation (more than one thousand documents were transferred from Case File 002 on 6 April 2011, more than 130 were transferred on 26 April 2011, many OCIJ Written Records of Interviews were transferred between the 26th and the 28th of April 2011,²³ civil party applications and victim complaints were transferred on 29 April 2011);

for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal'", Appeals Chamber, 19 March 2007, para. 7, footnote 22.

²¹ Public Decision on the Co-Lawyer's Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the case of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ, 4 February 2008, para. 8; Decision on the Co-Prosecutors' Applications for Extension of Time and Page Limits to File a Joint Response to Ieng Thirith, Khieu Samphan, Ieng Sary and Certain Civil Parties' Appeals Against the Order on Joint Criminal Enterprise, Case File No. 002/19-09-2007-ECCC/OCIJ, 9 February 2010, D97/15/5, para. 7.

²² Rogatory Letter Completion Report, 10 February 2011, D2/1.

²³ Written Record of Interview of Witness, 24 March 2011, D6, filed on 26 April 2011; Written Record of Interview of Witness, 25 March 2011, D8, filed on 26 April 2011; Written Record of Interview of Witness, 27 April 2011, D12, filed on 28 April 2011.



That, accordingly, the International Co-Prosecutor never had access in a timely manner to the complete and updated case file (Internal Rule 55(6)), and that this made it more difficult for him to request the investigative actions he still deemed necessary (Internal Rule 55(10));

That the principle alleged by the Co-Investigating Judges, according to which proceedings must be brought to a conclusion within a reasonable time, cannot prejudice the proper administration of justice, which entails conducting a full judicial investigation in the interests of all parties (Internal Rule 55(1));

That, for example, the case file contains a report dated 30 December 2010, indicating that “the investigation is not completed yet”;²⁴

7. **Considering**, further, that the suspects who have yet to be heard have an obvious interest in answering the accusations made against them;

That victims cannot, without lawful justification, be deprived of their right to be heard, their right to justice, their right to the truth and their right to reparations;²⁵

That all civil party applications have not been reviewed, as some require further investigations (e.g., 11-VSS-00064);

That the rejection of four civil party applications on the basis of more restrictive criteria than those set out by the Pre-Trial Chamber and international jurisprudence ought to be reconsidered;

V.

8. **Considering** therefore that the judicial investigation conducted so far appears to be defective and prejudicial to all parties;

That it deprived suspects, victims and the Prosecution of their rights;

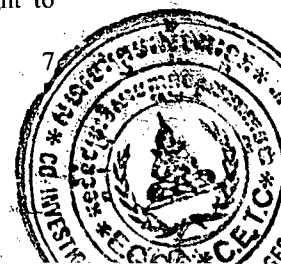
That such defects have also not been lost on civil society representatives who reacted strongly to the announcement of the conclusion of the judicial investigation in Case File 003;

That the public interest is therefore engaged;

9. **Considering** that under such circumstances, the Co-Investigating Judges should have exercised their discretion and allowed the three requests for investigative

²⁴ Site Identification Report of 30 December 2010, D2/23, p. 3.

²⁵ The right to the truth: United Nations, Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diana Orentlicher – Addendum 8 February 2005, E/CN.4/2005/102/Add.1, principles 2 to 18; The right to justice: principle 19; The right to reparation: principles 31 to 38.



action of 18 May 2011 (Internal Rules 55(1) and 55(5)), despite their untimeliness, and ruled on the investigative actions that were yet to be conducted;

That, given the impact of their refusal on the ensuing proceedings, they could not rely on a purely procedural defect;

That the rejection of the 18 May 2011 requests for investigative action may be regarded as a “refusal to investigate”, which is a breach of their duty to conduct a judicial investigation on the basis of the Introductory Submission of 20 November 2008;²⁶

10. **Considering** finally that, at this stage, the Co-Investigating Judges could not invoke their duty to ascertain the *in personam* jurisdiction of the ECCC as a matter of priority;

Moreover, that the notion of “those who were most responsible” (Article 2 of the ECCC Law) which provides the foundation for the ECCC’s jurisdiction is currently pending before the Supreme Court Chamber, which is expected to render its decision on 3 February 2012 on the appeal of Kaing Guek Eav, alias “Duch” against the Trial Chamber Judgement of 26 July 2010;²⁷

That, in their ruling, the Co-Investigating Judges will have to take into account the definition which will be adopted;

That, in this context, it is now necessary to carry out investigations in order to analyse, amongst others, the hierarchical position of the suspects and the extent of their powers at the relevant time,

VI.

11. **Considering** that, in view of the foregoing arguments, the 27 July 2011 decision declaring the 18 May 2011 requests for investigative action inadmissible appears to contain errors in the exercise of discretion, and was rendered without legitimate basis;

That the decision is not in the interests of justice as it is demonstrably prejudicial to all parties to the proceedings;

That it is in the public interest that the judicial investigation be resumed without further ado in order to carry out the full investigation warranted by the seriousness of the offences set out in Second Introductory Submission, dated 20 November 2008,

²⁶ French criminal procedure law, cf. Christian Guery, *Instruction préparatoire*, Rep. pen. Dalloz, para. 147; Pierre Chambon and Christian Guery, *Droit et pratique de l’instruction préparatoire*, Dalloz Action, 2007-2008, para. 21.14; Court of Cassation, Criminal Division, 18 July 1991, *Bulletin des Arrêts de la chambre criminelle* No. 300; Court of Cassation, Criminal Division, 26 February 1997, *Bulletin des Arrêts de la chambre criminelle* No. 77; Court of Cassation, Criminal Division, 6 February 1975, *Bulletin des Arrêts de la chambre criminelle* No. 42.

²⁷ Notice of Appeal by the Co-Lawyers for Kaing Guek Eav *alias* Duch Against the Trial Chamber Judgement of 26 July 2010, Case File No. 001/18-07-2007-ECCC/TC, E188/8, para. 7.



That this is in compliance, *inter alia*, with the ECCC Law and Internal Rule 21(1), which provides: “*The applicable (...) Internal Rules (...) shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings (...). In this respect: a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication*”;

FOR THESE REASONS,

Upon reconsidering the Co-Investigating Judges’ decision of 27 July 2011, **declare** the International Co-Prosecutor’s requests for investigative action dated 18 May 2011 admissible.

Rule that the judicial investigation in Case File 003 must resume pursuant to the Introductory Submission dated 20 November 2008.

Done in Phnom Penh, on 2 December 2011

សហចៅក្រមស៊ើបអង្កេតប្រចាំអន្តរជាតិ

**Co-juge d’instruction de l’Eserve internationale
International Reserve Co-Investigating Judge**



Laurent Kasper-Ansermet