



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
 Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge NIL Nonn, President
 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

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**DECISION ON NUON CHEA MOTIONS REGARDING FAIRNESS OF JUDICIAL INVESTIGATION
 (E51/3, E82, E88 AND E92)**

Co-Prosecutors
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 NUON Chea

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1. INTRODUCTION

1. The Chamber is seised of several requests by NUON Chea (“Accused”) concerning the judicial investigation in Case 002. The first, included in the Accused’s preliminary objections filed pursuant to Internal Rule 89, alleges interference by the Royal Government of Cambodia (“RGC”) in the judicial investigation, as well as a biased and non-transparent investigative process.¹ It seeks in consequence the termination of proceedings or, in the alternative, a stay of proceedings.² The Civil Party Lead Co-Lawyers and Co-Prosecutors submitted their responses to the preliminary objections of all parties on 7 and 21 March 2011 respectively.³
2. On 28 April 2011, the Accused further requested the Trial Chamber to conduct investigations into allegations of interference with the administration of justice pursuant to Rule 35(2)(b).⁴ A similar request for investigation into an instance of alleged interference with a potential witness in Case 002 was filed by the Accused on 3 June 2011.⁵ The Co-Prosecutors responded to these requests on 9 May 2011 and 13 June 2011 respectively.⁶
3. Finally, on 18 May 2011, the Accused requested the Trial Chamber to undertake a number of investigative actions that had been fully or partly refused by the Co-Investigating Judges (“CIJ”) during the judicial investigation.⁷ The Co-Prosecutors responded to this request on 3 June 2011.⁸
4. In view of the substantial overlap between them, the Chamber renders a consolidated decision in relation to all requests.⁹

¹ Consolidated Preliminary Objections, E51/3, 25 February 2011 (“Preliminary Objections”), para. 3.

² Preliminary Objections, para. 65.

³ *Réponse conjointe de parties civiles aux requêtes des équipes de défense portent sur les exceptions préliminaires (règle 89)*, E51/5/4, 7 March 2011, para. 32 (objecting to these parts of the Preliminary Objections on grounds of both admissibility and merits, but without detailed arguments in support); Co-Prosecutors’ Joint Response to Defence Rule 89 Objections, E51/5/3/1, 21 March 2011 (“Preliminary Objections Response”).

⁴ Request for Investigation pursuant to Rule 35, E82, 28 April 2011 (“Rule 35 Request”).

⁵ Second Request for Investigation pursuant to Rule 35, E92, 3 June 2011 (“Second Rule 35 Request”).

⁶ Co-Prosecutors’ Response to NUON Chea Request for Investigation pursuant to Rule 35, E82/1, 9 May 2011 (“Rule 35 Response”); Co-Prosecutors’ Response to NUON Chea’s Second Request for Investigation pursuant to Rule 35, E92/1, 13 June 2011 (“Second Rule 35 Response”).

⁷ First Consolidated Request for Additional Investigation, E88, 18 May 2011 (“Request for Investigations”).

⁸ Co-Prosecutors’ Response to NUON Chea First Consolidated Request for Additional Investigations, E88/2, 3 June 2011 (“Request for Investigations Response”).

⁹ See further Memorandum entitled Scheduling of Initial Hearing, 11 May 2011, E86 (indicating that the Chamber would not hear oral argument on certain matters).



2. SUBMISSIONS

2.1. Challenges to the Judicial Investigation (Preliminary Objections)

5. The Accused submits that there were three main flaws in the judicial investigation performed by the Co-Investigating Judges: a failure to adequately investigate exculpatory evidence, lack of transparency, and poor execution of interviews. Twenty of the twenty-six Requests for Investigative Action (“RIAs”) submitted by the Accused were rejected in whole or in part by the CIJ.¹⁰ The Accused argues that these rejections demonstrate a failure to investigate exculpatory evidence and shows an inculpatory bias on the part of the CIJ.¹¹

6. The Accused further argues that the RGC interfered with the investigation by preventing the CIJs from interviewing King Father Sihanouk and six high-ranking officials, and that the RGC has continued to interfere in the investigations in Cases 003 and 004.¹² He also submits that the CIJs’ failure to justify investigative decisions or explain its methodology demonstrates a lack of transparency, and has prevented the Defence from ensuring a thorough investigation and an absence of bias and political interference.¹³

7. Finally, the Accused contends that the flaws in the Case 002 case file are so fundamental that they can only be cured by an entirely new investigation: an effort that would be beyond the capacity of the Trial Chamber and in any event unfair to the Accused.¹⁴ As a practical matter, the flaws in the Case File are irremediable and therefore, termination of the prosecution is required. In the alternative, the Accused seeks a temporary stay of proceedings in order to permit additional investigations.¹⁵

8. In response, the Co-Prosecutors submit that the decisions of the CIJs were fair. Where the Pre-Trial Chamber considered that any unfairness may have resulted, it granted appellate relief.¹⁶ In this regard, allegations both of the CIJ’s inculpatory bias and political interference by the RGC have already been adjudicated and rejected by the Pre-Trial Chamber, and the present requests adduce no new evidence in support of these allegations.¹⁷ In addition, it is

¹⁰ Request for Investigations, para. 3.

¹¹ Preliminary Objections, para. 58.

¹² Preliminary Objections, paras 6, 10-14, 57.

¹³ Preliminary Objections, paras 16, 59.

¹⁴ Preliminary Objections, para. 62.

¹⁵ Preliminary Objections, paras 64-65.

¹⁶ Preliminary Objections Response, paras 74-75.

¹⁷ Preliminary Objections Response, paras 69, 76-77.



premature to allege fair trial violations based upon witnesses sought by the Accused until the Trial Chamber has made determinations on which witnesses will ultimately be called at trial.¹⁸

9. The Co-Prosecutors further submit that the Accused at the time sought and received information from the CIJ concerning the judicial investigation, and the Accused at all times had full access to the Case File as it was developed by the CIJs.¹⁹ Finally, the Co-Prosecutors note that under international and ECCC jurisprudence, a stay of proceedings is a drastic remedy for which a very high burden is placed on the moving party. Termination of the current proceedings would be inappropriate in all the circumstances.²⁰

2.2. Requests in Relation to Alleged Interference with the Administration of Justice (Internal Rule 35)

10. In his first Rule 35 Request, the Accused refers to the alleged interference with the administration of justice by the RGC described in his preliminary objections, and requests the Trial Chamber to conduct investigations into these allegations pursuant to Internal Rule 35(2)(b). The Accused argues that the applicable legal standard for investigations under this rule is reason to believe that such interference has taken place.²¹ Acknowledging that he has previously sought similar relief from the CIJs and Pre-Trial Chamber, the Accused contends that the Trial Chamber has an independent duty to investigate in light of the impact of these allegations on the Accused's right to a fair trial. Further, more recent developments did not form part of his prior requests.²²

11. The Accused's Second Rule 35 Request concerns a single instance in which a family member of [REDACTED] (a potential suspect before the ECCC) is alleged to have approached a potential witness in Case 002.²³

12. The OCP opposes the first request. They submit that it is inappropriate for the Trial Chamber to investigate matters that occurred during the judicial investigation, but to the extent that any new issues arise during the trial proceedings, the Accused is entitled to seek relief pursuant to Rule 35.²⁴ The Co-Prosecutors, however, support a limited investigation

¹⁸ Preliminary Objections Response, paras 71, 78.

¹⁹ Preliminary Objections Response, para. 73.

²⁰ Preliminary Objections Response, paras 63-68, 79.

²¹ Rule 35 Request, para. 17.

²² Rule 35 Request, paras 10, 29 (noting as an example remarks made by the Prime Minister during the visit of UN Secretary-General Ban Ki-Moon to Cambodia on 27 October 2010).

²³ Rule 35 Request, para. 2 (noting statements by that witness during two interviews with the CIJ in 2008).

²⁴ Rule 35 Response, para. 3.



into the allegations in the Second Rule 35 Request in order to determine whether [REDACTED] or his family members interfered with a witness in Case 002.²⁵ Any allegations concerning Cases 003 and 004 are otherwise irrelevant to the Chamber's treatment of Case 002.²⁶

2.3. Consolidated Requests for Investigation

13. In his Request for Investigations, the Accused argues that the twenty RIAs rejected in whole or in part by the CIJs ought now be taken up by the Trial Chamber pursuant to Internal Rule 93. The Accused contends that the relevant test in this regard is whether or not these new investigations are necessary, in the sense that they may lead to the discovery of *prima facie* relevant and probative material or information.²⁷ The Accused alleges that the new investigations sought are necessary due to their impact on the Accused's fair trial rights (in consequence of the alleged weaknesses of the judicial investigation) and incorporates by reference the arguments in his initial RIAs in order to demonstrate the relevance of each specific request.²⁸ Finally, the Accused contends that investigations into acts outside the temporal jurisdiction of the ECCC are required in order to provide relevant context.²⁹

14. In response, the Co-Prosecutors submit that the CIJs' rejection of the RIAs identified in this request were based on valid reasons and were not the consequence of a flawed investigative process. They further maintain that the scope of Internal Rule 93 should be limited to investigations into specific, discrete investigative acts that are directly relevant to the matters for which the Accused have been indicted in the Closing Order and essential to the ascertainment of the truth.³⁰ In this regard, the further investigative requests of NUON Chea are overly broad and of marginal or no relevance.³¹

3. FINDINGS

3.1. Admissibility of Request to Terminate or Stay Proceedings

15. The Chamber notes that these requests form part of the Accused's preliminary objections filed pursuant to Internal Rule 89. Internal Rule 89(1)(c) expressly states that the Trial

²⁵ Second Rule 35 Response, paras 3-6.

²⁶ Second Rule 35 Response, para. 2.

²⁷ Request for Investigations, paras 9-11.

²⁸ Request for Investigations, paras 13, 15-18 (citing, in relation to the alleged weakness of the judicial investigation, the same factual foundations as those contained in the Accused's Preliminary Objections).

²⁹ Request for Investigations, para. 12.

³⁰ Request for Investigations, paras 3-5.

³¹ Request for Investigations, para. 5.



Chamber may only consider the nullity of procedural acts made “after the indictment was filed”.³² As a general matter, objections regarding procedural steps or decisions taken by the CIJ’s and the Pre-Trial Chamber during the investigative phase must be raised with the competent judicial organs before the Closing Order becomes final. The Chamber notes that the Accused did in fact raise these objections with both the CIJ and the Pre-Trial Chamber during the investigative phase, and that these formed the subject of earlier decisions by both bodies.³³

16. The Accused grounds his preliminary objections instead on Internal Rule 89(1)(b). This sub-rule as it reads in the English version provides that preliminary objections may be based on “any issue which requires the termination of prosecution”. The French and Khmer versions of Internal Rule 89(1)(b) accord with the concept of extinction of criminal actions (*l’extinction de l’action publique*) foreseen by Article 7 of the 2007 Code of Criminal Procedure of the Kingdom of Cambodia (“CCP”). The latter provision does not include alleged defects within a judicial investigation within its scope but instead provides the following reasons for extinguishing a charge in a criminal action: (1) the death of the offender; (2) the expiration of the statute of limitations; (3) a grant of general amnesty; (4) abrogation of the criminal law; and (5) *res judicata*.³⁴

17. The Chamber finds that Rule 89(1)(b) is accordingly limited to these listed grounds.³⁵ On this basis, it determines the portions of the Accused’s preliminary objections challenging the validity of the judicial investigation on grounds of procedural defects, bias or interference with the administration of justice to be inadmissible. Insofar as the RIAs contend that the judicial investigation was procedurally defective, the Trial Chamber further notes that the

³² Internal Rule 89 (1)(c).

³³ See e.g. “Co-Investigating Judges’ Response to ‘Request for Investigative Action,’ concerning *inter alia*, the Strategy of the Co-Investigating Judges in Regard to Judicial Investigation”, D171/5, 11 December 2009; Pre-Trial Chamber “Decision on IENG Sary’s Appeal Against the Co-Investigating Judges’ Constructive Denial of Ieng Sary’s Third Request for Investigative Action”, D171/4/5, 22 December 2009.

³⁴ Article 7 (French) of the CCP (entitled *extinction de l’action publique*) states: “*Les causes d’extinction de l’action publique sont: 1) la mort de l’auteur de l’infraction; 2) la prescription; 3) l’amnistie; 4) l’abrogation de la loi pénale; 5) l’autorité de la chose jugée. Lorsque l’action publique est éteinte, les poursuites pénales ne peuvent plus être engagées ou doivent cesser.*” Rule 89(1)(b) (french) provides: “*Les exceptions préliminaires concernent: a) La compétence de la Chambre; b) L’extinction de l’action publique; c) La nullité d’actes de procédure accomplis postérieurement à la décision de renvoi.*”

³⁵ In certain circumstances, not relevant to the present context, Article 8 may provide other grounds for terminating proceedings. However, these reasons must be “expressly provided for in separate laws” (see Article 8, CCP: “*Lorsque des lois particulières le prévoient expressément, l’action publique peut également s’éteindre: 1) par une transaction avec l’Etat; 2) par le retrait de la plainte, dans le cas où la plainte est la condition nécessaire des poursuites pénales; 3) par le paiement d’une amende forfaitaire ou transactionnelle.*”

Internal Rules do not envisage examination by the Trial Chamber of the procedural correctness of the judicial investigation upon being seised of the case.³⁶

18. When referring instead to procedural rules established at the international level,³⁷ the Trial Chamber notes the extremely high threshold necessary for the grant of a termination or stay of proceedings.³⁸ The ECCC legal framework concerning the judicial investigation contains sufficient procedural safeguards for the Accused, including opportunities to address the CIJs on any matter and appeal to the Pre-Trial Chamber on decisions taken by the CIJs, where considered necessary.³⁹ As previously described, the Accused made extensive use of these mechanisms before the Pre-Trial Chamber.⁴⁰ The Trial Chamber is not an appeal or review body in relation to decisions of that Chamber. Further, the Accused has not to date identified any tangible impact of these alleged deficiencies in the judicial investigation in Case 002 on the fairness of the trial or shown that these remedies would be the only means available to the Chamber to address any alleged violations.⁴¹ There is accordingly no basis for the granting of a stay.

³⁶ Internal Rule 76(7) provides that “[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”

³⁷ See Article 33 new of the ECCC Law (permitting recourse to procedural rules established at the international level where existing Cambodian rules of procedure do not deal with a particular matter, where there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards).

³⁸ Termination or stays of proceedings have occasionally been granted by other international tribunals, but examples are few and reflect situations in which discontinuance is considered to be the only remedy capable of ensuring the fairness of proceedings or otherwise imperative in the interests of justice (see e.g. *Prosecutor v. Karadzic*, Decision on Motion for Stay of Proceedings, Case No. IT-95-5/18-T, ICTY Trial Chamber, 8 April 2010, para. 4 (acknowledging that the extreme remedy of a stay proceedings may be granted where serious violations of Accused human rights render a fair trial is impossible); *Prosecutor v. Lubanga Dyilo*, Judgement on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court [...], ICC Appeals Chamber (ICC-01/04-01/06-772), 14 December 2006, para. 30; see also *Prosecutor v. Bararyagwiza*, Decision, Case No. ICTR-97-19, ICTR Appeals Chamber, 3 November 1999, para. 77, 106 (granting motion for termination of proceedings where undue delay was egregious and termination of charges was the only remedy available) *reconsidered in Prosecutor v. Bararagyiza*, Case No. ICTR-97-19, ICTR Appeals Chamber, Decision (Prosecutor’s Request for Review or Reconsideration, 31 March 2000, para. 65 (reinstating proceedings on the basis of new facts)).

³⁹ Internal Rules 34, 55(10) and 74(3).

⁴⁰ See note 33, above. Requests for stays of proceedings have also been sought and adjudicated before the Pre-Trial Chamber (see e.g. Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, D264/2/6, 10 August 2010, para. 27 (ruling that the Chamber must be satisfied that the alleged misconduct results in a violation of the Charged Person’s rights to a fair trial and is of such an egregious nature that a stay of proceedings must be granted)).

⁴¹ See further “Directions to Parties concerning Preliminary Objections and related issues”, E51/7, 5 April 2011 (indicating, in response to alleged defects in the judicial investigation, that any matters alleged to impact on the fairness of proceedings may be raised before the Chamber at trial on a case-by-case basis)).

3.2. Consolidated Requests for Investigation

19. The Accused has had ample opportunity, during a judicial investigation spanning almost two and one half years, to request of the CIJs all investigative actions considered by the Accused to be relevant, and to challenge any refusals of such requests by the CIJs to the Pre-Trial Chamber when considered necessary.⁴² Where rejections of specified RIAs were considered to reflect an inculpatory bias on the part of the CIJs or to be otherwise unwarranted, these and other procedural safeguards exist to protect the rights of the Accused. The Accused has not demonstrated why the Trial Chamber must now accede to any of the specified RIAs in order to ensure the fairness of the trial. Furthermore, it is the Co-Prosecutors who bear the burden of proof at trial in relation to all allegations against the Accused in the Indictment. The Chamber considers that it is a fair and public trial, in relation to which the Accused has the opportunity, amongst other things, to request that exculpatory witnesses be called before the Chamber, to adduce documentary or other evidence considered necessary to ascertain the truth, and to cross-examine witnesses and otherwise rebut the evidence and allegations against him, which constitutes a further corrective to any alleged defects in the judicial investigation to date.⁴³

20. In relation to the Accused's request for investigations in relation to events outside the indictment period, the Chamber notes that it must weigh this request against its duty to safeguard the Accused's right to an expeditious trial. The Chamber has therefore already ruled that background contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber only when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber.⁴⁴

3.3. The Rule 35 Requests

21. Concerning the Accused's allegations of interference with the administration of justice or political interference in relation to Cases 003 and 004, the Trial Chamber notes that

⁴² The case file in Case 002 was transferred to the CIJs on 18 July 2007. The CIJs informed the parties that the judicial investigation had been concluded on 14 January 2010 (*see* Amended Closing Order, paras. 3, 13).

⁴³ Many of the RIAs in question sought to interview persons who the Accused has since proposed to hear as witnesses at trial (*see e.g.* NUON Chea's updated summaries of proposed Witnesses, Experts, and Civil Parties, E93/4, 21 June 2011 and NUON Chea's Request for additional Witnesses and continuation of initial hearing, E93/9, 6 July 2011). These requests are currently under consideration by the Chamber. *See further* Internal Rules 93(1) (permitting the Trial Chamber to order additional investigations where it considers that a new investigation is necessary).

⁴⁴ *See* "Directive in advance of Initial Hearing concerning proposed witnesses", E93, 3 June 2011.



Internal Rule 35(2) contemplates an investigation into such allegations “[w]hen the Co-Investigating Judges or the Chambers have reason to believe that a person may have knowingly and wilfully interfered with the administration of justice.”⁴⁵ It follows that an investigation pursuant to this Rule can only be meaningfully be conducted by the judicial body seised of the case. As these cases are presently in the investigative stage, proper recourse is to the CIJs in the first instance and the Pre-Trial Chamber on appeal.⁴⁶ As the First Rule 35 Request identifies no tangible impact of these allegations on the fairness of the trial proceedings in Case 002 (with which the Trial Chamber is seised), it is accordingly rejected.

22. The Accused’s Second Rule 35 Request, by contrast, alleges interference or misconduct in relation to a potential witness in Case 002. The Chamber, in the exercise of its responsibility to safeguard the fairness of trial proceedings, requested the Witnesses and Experts Support Unit (“WESU”) to investigate an accident which occurred at Prey Sar Prison in which this potential witness was injured, and to report its findings to the Chamber. On 5 May 2011, WESU filed its report regarding the accident.⁴⁷ In the course of the investigation, this potential witness ██████████ also mentioned to the investigator that he had been approached by a niece of ██████████. However, ██████████ indicated that he did not feel intimidated by this incident and did not request protective measures. WESU thus concluded that there are presently no grounds for concern in relation to this potential witness and recommended no protective measures in relation to him.⁴⁸

23. The Chamber notes that the incidents referred to by the NUON Chea Defence became part of the case file on 5 January 2009.⁴⁹ The NUON Chea Defence failed to raise this allegation of interference with the administration of justice until more than two years later, reflecting a lack of due diligence and casting doubt on the urgency of the request.⁵⁰ In any event, ██████████ has also since been subsequently interviewed by both the OCIJ or WESU on 30 November 2009 and on 5 May 2011 respectively, without indicating that he had been

⁴⁵ Decision on Appeal against the Co-Investigating Judges Order on the Charged Person’s Eleventh Request for Investigative Action, D158/5/1/15, 18 August 2009, para. 29 (noting that Internal Rule 35 does not provide for the initiation of investigative action upon request of a party).

⁴⁶ Internal Rule 79(1).

⁴⁷ Witness Expert Support Unit (WESU) Assessment ██████████, E29/447, 5 May 2011.

⁴⁸ Witness Expert Support Unit (WESU) Assessment ██████████, E29/447, 5 May 2011.

⁴⁹ Written Record of Interview of Witness ██████████, D123/1, 5 January 2009, pp. 13-14.

⁵⁰ See *Prosecutor v. Taylor*, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation Into Contempt of Court By the Office of the Prosecutor and its Investigators, SCSL Trial Chamber (Case No. SCSL-03-1-T), 11 November 2010, paras. 23-26 (finding the Defence did not act with due diligence in raising allegations of contempt 2 to 8 years after alleged incidents).

intimidated or threatened in any way.⁵¹ The Trial Chamber accordingly considers that no grounds currently exist to initiate proceedings pursuant to Internal Rule 35.⁵²

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

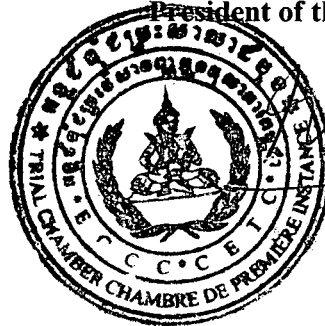
DECLARES the Accused's request in his Consolidated Preliminary Objections (E51/3) for termination of the proceedings, or in the alternative a stay of proceedings, to be inadmissible and in any event not justified on the merits;

REJECTS in its entirety the First Consolidated Request for Additional Investigation (E88) and the Request for Investigation pursuant to Rule 35 (E82);

GRANTS the Second Request for Investigation pursuant to Rule 35 (E92) but determines, following enquires conducted by the Witnesses and Experts Support Unit, that no further measures are required by the Chamber; and

REJECTS in consequence the Accused's requests for an oral hearing in relation to any of these matters. *Min g*

Phnom Penh, 9 September 2011
President of the Trial Chamber



Nil Nonn

⁵¹ Written Record of Interview of Witness [REDACTED], D234/22, 16 December 2009.

⁵² Additional follow-up by WESU has nonetheless since been requested by the Chamber. The ensuing report from WESU will be placed on the case file in due course.