



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ  
Royaume du Cambodge  
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Kingdom of Cambodia  
Nation Religion King

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

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

Before: Judge YOU Bunleng  
Judge Marcel LEMONDE  
Date: 23 September 2009  
Original Language: Khmer/French  
Classification: Public

**Order on Request for Exclusion of the Report of Mr. Craig C. Etcheson**

Co-Prosecutors

CHEA Leang  
William SMITH

Charged Persons

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

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<b>ឯកសារបានផ្តល់ឱ្យត្រឹមត្រូវតាមច្បាប់ដើម</b> CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
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We, **You Bunleng (ឃុំ ប៊ុនហ្គេង)** 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** Rules 31 and 55(10) of the ECCC Internal Rules (the “Internal Rules”),

**Noting** the ongoing judicial investigation against **IENG Thirith (អៀង ធីរិទ្ធ)** relating to charges of **Crimes against humanity**, and against 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 IENG Thirith Defence Request for Exclusion of the Report of Mr. Craig C. Etcheson, dated 11 August 2009 (D192);

### **ARGUMENTS BY IENG THIRITH**

1. In support of their Introductory Submission dated 18 July 2007,<sup>1</sup> the Co-Prosecutors (“OCP”) filed a report by Mr. Craig C. Etcheson entitled “Written Record of Analysis” (the “Etcheson Report”).<sup>2</sup> Accordingly, this document was placed on the Case File.

2. The Defence for IENG Thirith requests that the Co-Investigating Judges treat the Etcheson Report as inadmissible for lack of any probative value.<sup>3</sup>

3. The Defence submits that the request does not meet the minimum standards for an expert report to be deemed admissible, as set out in the ICTY and ICTR jurisprudence.<sup>4</sup> Specifically, it submits that the OCP has not provided sufficient information to allow an assessment as to whether Dr. Etcheson is properly qualified to be relied upon as an expert,<sup>5</sup> that the report is unreliable as it contains many inaccurate references or references lacking specificity,<sup>6</sup> frequently fails to refer to any source at all,<sup>7</sup> relies on translations and interpretations that may have been erroneous,<sup>8</sup> is replete with generalizations<sup>9</sup> and misrepresents the underlying sources.<sup>10</sup> Moreover,

<sup>1</sup> Introductory Submission, 18 July 2007, D3.

<sup>2</sup> Written Record of Analysis, 18 July 2007, D2/15. The Etcheson Report (including footnotes) is in the public domain as it is part of the public Case File in *Prosecutor v. Kaing Guek Eev alias Duch*, Case File 001.

<sup>3</sup> D192, para. 57.

<sup>4</sup> D192, paras 12-16, 54, referring *inter alia*, to *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para. 6 and *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Preclude Testimony by Charles Ntampaka, 26 September 2007, para. 8. The four requirements outlined in this jurisprudence are: i) The witness is an expert; ii) The statement/report is reliable; iii) The statement/report is relevant, and of probative value; and iv) The contents of the statement/report fall within the accepted expertise of the witness.

<sup>5</sup> D192, paras. 17-18, 47, 53.

<sup>6</sup> D192, paras 25-28.

<sup>7</sup> D192, para. 31.

<sup>8</sup> D192, paras. 20-24.

<sup>9</sup> D192, para. 35.

the Defence submits that the report is unreliable because large portions of it rely on material in confessions which may have been obtained by torture.<sup>11</sup> In sum, the Defence submits that the report is neither relevant, as the facts it relies on are not true, nor probative, as the report is fundamentally flawed.<sup>12</sup>

## REASONS FOR THE DECISION

4. Under the procedural system in force before the ECCC, by definition, experts are designated by a judge following a strictly defined procedure:<sup>13</sup> They can only act within the framework of a mission set by the judge in the decision ordering the expertise; they must swear a specific oath; they conduct their mission under the supervision of the judge; the report is notified to the parties, who may request a new examination or re-examination, in which case the judge is obliged to make a ruling that is subject to appeal.

5. It must be observed that this was not the case here: there was no judicial decision designating Mr. Etcheson to conduct an expertise and the formal requirements in Internal Rule 31 were not accomplished. When drafting his “Written Record of Analysis”, Mr. Etcheson was acting in his capacity as an OCP investigator and the simple fact that, amongst other witnesses such as David Chandler, Raoul Jennar, etc., he was apparently heard as an “expert” before the Trial Chamber in Case No. 1 cannot suffice to modify this situation and confer upon him the status of an expert within the meaning of Internal Rule 31. Thus, the Report placed on the Case File in support of the Introductory Submission is not an expert report and the jurisprudence cited by the Defence regarding the requirements for an “expert” report to be deemed admissible is inapplicable in this case.

6. As regards the content of the Etcheson Report, it should be recalled that, while the judges are never bound by the conclusions of an expert report, they are bound even less by documents filed by the parties. Accordingly, as with all of the other evidence on the Case File, the Co-Investigating Judges will assess the reliability of each of the assertions in the Etcheson Report in the course of the investigation, and in so doing, determine the weight, if any, that will be given to this report in the Closing Order. In making this determination, the Co-Investigating Judges will assess the report in light of the reliability of its underlying sources, and will take into account any inaccuracies that may be found in the report.<sup>14</sup>

7. With respect to the affirmation by the Defence that the Etcheson Report should not be relied upon as it is based in large part upon material which may have been obtained by torture,<sup>15</sup> the OCIJ refers to its previous “Order on Material which was or

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<sup>10</sup> D192, paras. 32-34.

<sup>11</sup> D192, paras. 40-43.

<sup>12</sup> D192, paras. 51-52.

<sup>13</sup> ECCC Internal Rule 31.

<sup>14</sup> The Co-Investigating Judges notes that it referred to the Etcheson Report twice in the Closing Order for Case File 1. See *Prosecutor v. Kaing Guek Eav aka Duch*, Case File No. 001/18-07-2007/ECCC/TC, fns. 24 and 80. In both cases, the Etcheson Report was one among many pieces of evidence relied on by the Co-Investigating Judges as support for the particular proposition in the Closing Order.

<sup>15</sup> D192, paras. 40-43.

may have been obtained by torture” issued on 28 July 2009.<sup>16</sup> In this Order, the Co-Investigating Judges held, referring, *inter alia*, to the Etcheson Report, that:

[T]he Co-Investigating Judges will assess reports and secondary materials on the Case file whose sources are, in whole or in part, material obtained by torture, for their reliability on a case-by-case base. If, after such an analysis, the Co-Investigating Judges finds that the confessions on which the reports/secondary materials are based are not reliable, it will assess the secondary materials in light of this determination, which will affect the weight that the Co-Investigating Judges will accord to such secondary material in its analysis.<sup>17</sup>

8. The OCIJ therefore finds that the arguments in the Defence Request regarding the admissibility of the Etcheson Report cannot be sustained.

**FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY**

**DISMISS THE DEFENCE REQUEST.**

Done in Phnom Penh on 23 September 2009

**សហចៅក្រមស៊ើបអង្កេត**

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

<sup>16</sup> D130/8.

<sup>17</sup> D130/8, para. 29.