



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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Chambres extraordinaires au sein des Tribunaux cambodgiens

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ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges

Bureau des Co-juges d'instruction

Composed of: Judge YOU Bunleng
Judge Marcel LEMONDE

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Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise

Co-Prosecutors

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William SMITH

Charged Person(s)

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IENG Sary KAING Guek Eav
IENG Thirith alias "Duch"

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We, **You Bunleng (ឃុំ ប្រ្រ្រ)** 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 Rule 55 of the ECCC Internal Rules (the “Internal Rules”);

Noting the ongoing judicial investigation against **IENG Sary 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;

Considering the Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise by the Defence for IENG Sary (D97), dated 28 July 2008 (“the Request”);

Considering the Request for an Oral Hearing, or, in the Alternative, Request for Extension of Time to Reply to the Office of the Co-Prosecutors’ Response to the Request by the Defence for IENG Sary (D97/1), dated 7 August 2008;

Considering the Co-Prosecutors’ Response to IENG Sary’s Motion on Joint Criminal Enterprise (D97/2), dated 11 August 2008 (“the Response”);

Noting the Order of the Co-Investigating Judges of the ECCC dated 16 September 2008 inviting the parties to file supplementary observations on this issue before 31 December 2008 and responding to the Defence request for an oral hearing or additional time (D97/3);

Noting the Co-Prosecutors’ Application for an Extension of Page Limit for their Observations on Joint Criminal Enterprise Pursuant to the Co-Investigating Judges’ Order of 16 September 2008 (D97/4), dated 21 November 2008;

Noting the Request for an Extension of the Page Limit for Filing Supplementary Observations on the Application of Joint Criminal Enterprise Liability at the ECCC by the Defence for IENG Sary (D97/5), dated 24 November 2008;

Noting the Order of the Co-Investigating Judges of the ECCC dated 2 December 2008 granting the requests by the Co-Prosecutors and the Defence for IENG Sary to extend page limits (D97/6);

Considering the Supplementary Observations from the Defence for IENG Sary, dated 24 November 2008 (D97/7);

Considering the Submissions from the Defence for KAING Guek Eav alias Duch, dated 24 December 2008 (D97/3/1);

Considering the Submissions from the Defence for IENG Thirith, dated 30 December 2008 (D97/3/2);

Considering the Submissions from the Defence for NUON Chea, dated 30 December 2008 (D97/3/3);

Considering the Submissions from the Co-Lawyers for the Civil Parties, dated 30 December 2008 (D97/3/4);

Considering the Letter from the Defence for KHIEU Samphan, dated 30 December 2008 (D97/3/5);

Considering the Supplementary Observations from the Co-Prosecutors, dated 31 December 2008 (D97/8);

Noting the Request for Sanctions against the Co-Prosecutors for Misleading the Court Regarding the Law on Joint Criminal Enterprise by the Defence for IENG Sary, dated 29 June 2009 (D97/9);

Considering the Joint Defence Letter Regarding the Decision on the Application of the Form of Responsibility Known as Joint Criminal Enterprise from the Defence for IENG Sary, KHIEU Samphan and NUON Chea, dated 3 July 2009 (D97/10), and the Reply of the Co-Investigating Judges dated 28 July 2009 (D97/11);

Noting the Submission on the Issue of Sanctions by the Defence for NUON Chea, dated 8 July 2009 (D97/9/1);

Noting the Response on the Issue of Sanctions by the Co-Prosecutors, dated 16 July 2009 (D97/9/2);

Noting the Submission on the Issue of Sanctions by the Defence for KHIEU Samphan, dated 15 July 2009 (D97/9/3);

Noting the Reply to the Co-Prosecutors on the issue of sanctions by the Defence for IENG Sary, dated 30 July 2009 (D97/9/4);

Considering the Supplementary Submissions to the Supplementary Observations on Joint Criminal Enterprise Filed on 24 November 2008: Limited to the Applicable United National General Assembly Resolutions as Argued/Omitted by the OCP by Defence for IENG Sary dated 31 July 2009 (D97/12);

Noting the Response on the Issue of Sanctions by the Civil Parties, dated 6 August 2009 (D97/9/5);

Noting the Reply to the Civil Parties on the Issue of Sanctions by the Defence of IENG Sary, dated 25 September 2009 (D97/9/6);

Noting the Order of the Co-Investigating Judges of the ECCC on the Request by the IENG SARY Defence Team for Sanctions against the Co-Prosecutors, dated 26 November 2009 (D97/9/7).

1) PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 28 July 2008, the Defence for IENG Sary submitted its Request that the Co-Investigating Judges declare joint criminal enterprise (“JCE”) to be inapplicable before the ECCC. They argue that applying JCE before the ECCC would be a violation of the principle *nullum crimen sine lege* since it was not acknowledged as customary international law in 1975-1979, nor is it presently recognized as such.¹ In addition it is argued in the Request that JCE is not specified in the ECCC Establishment Law, nor is it part of Cambodian law, or recognized by any international convention enforceable before the ECCC.²
2. On 11 August 2008, the Office of the Co-Prosecutors (“OCP”) submitted their Response stating that the Request is improperly filed under Internal Rule 53(1)³ and in addition, the Request is procedurally defective since it seeks relief not permitted under the Internal Rules. The Co-Prosecutors argue that JCE has been established and utilized since Nuremberg⁴ and therefore is not a violation of *nullum crimen sine lege* and is a valid mode of liability before the ECCC.⁵
3. On 24 December 2008, the lawyers for KAING Guek Eav alias Duch informed the Judges that they will not file any observations.⁶ On 30 December 2008, the Defence for IENG Thirith made a submission concurring with the arguments established in the IENG Sary Request and Supplementary Observations.⁷ Furthermore, the Defence for IENG Thirith stated that in the alternative, the ECCC only has jurisdiction to apply the first form of JCE and that the Co-Prosecutors had inadequately plead JCE in the Introductory Submissions.⁸ On this same day, the Defence for NUON Chea filed a submission supporting the positions of IENG Sary and IENG Thirith.⁹
4. On 14 January 2009, the Co-Lawyers for the Defence of KHIEU Samphan claimed that insufficient translations of documents into French placed the Defendant, *de facto*, in an unfair position in comparison to all the other Parties and requested the Co-Investigating Judges to take any measures necessary to restore equity.¹⁰
5. On 30 December 2008 the Co-Lawyers for the Civil Parties filed their submissions stating that the application of JCE 3 at the ECCC would amount to a violation of the principle *nullum crimen nulla poena sine lege*.¹¹

¹ D97, para. 29; D97/7, Section I(A).

² D97, p. 1, 15; D97/5, p. 2; D97/7, Section I(B-F)

³ D97/II, para. 5.

⁴ D97/II, para. 2.

⁵ D97/II, para. 3, 40; D97/8, par. 51.

⁶ D97/3/1, para. 2.

⁷ D97/3/2, para. 13.

⁸ D97/3/2, para. 32.

⁹ D97/3/3, para. 2

¹⁰ D97/3/5.

¹¹ D97/3/4, para. 34.

6. On 31 December 2008, the Office of the Co-Prosecutors submitted their Supplementary Observations stating that the Request and Defence Observations should be dismissed because they attempt to politicize the judicial process.¹² The Co-Prosecutors repeated their submissions that the Co-Investigating Judges should apply all three forms of JCE liability before the ECCC.¹³
7. On 29 June 2009, the Defence for IENG Sary submitted its Request to sanction the International Co-Prosecutor or members of the OCP¹⁴ due to an alleged failure to disclose United Nations General Assembly Resolution 488(V) which related to the scope of acceptance of the Nuremberg Principles.¹⁵ The Defence for NUON Chea¹⁶ and KHIEU Samphan¹⁷ supported this filing, and the Office of the Co-Prosecutors submitted a response¹⁸ to which the Defence for IENG Sary replied.¹⁹ On 06 August 2009 the Co-Lawyers for Civil Parties submitted their Response in support of dismissing the request for sanctions²⁰ to which the Defence for IENG Sary replied.²¹ The Office of the Co-Investigating Judges issued an Order on 26 November 2009 dismissing the request for sanctions and noting the submissions relating to United Nations General Assembly Resolution 488(V).²²

2) REASONS FOR THE DECISION

A) Procedural Matters

8. The Defence for IENG Sary has requested the Co-Investigating Judges to issue a decision on whether they will apply the mode of liability known as JCE. Under Internal Rule 55(10), the parties may request the Co-Investigating Judges to make “such orders or undertake such investigative action as they consider necessary for the conduct of the investigation”.²³ Internal Rule 55(10) bestows discretion on the relevant parties, including the Charged Person, to determine which orders or investigative action they may deem useful for the conduct of the investigation. The OCP is correct in asserting that the motion of IENG Sary was submitted erroneously under Internal Rule 53(1), which deals with the filing of Introductory Submissions by the OCP. However, the Co-Investigating Judges decide *proprio motu* to consider the motion under the correct provision of the Internal Rules, namely Rule 55(10).

¹² D97/8, para. 50.

¹³ D97/8, para. 51.

¹⁴ D97/9, Section IV (b), p. 7-8.

¹⁵ D97/9, para. 5-6. D97/12, p. 9.

¹⁶ D97/9/1, para. 1-3.

¹⁷ D97/9/3.

¹⁸ D97/9/2, para. 2, 7.

¹⁹ D97/9/4, para. 2, D97/12.

²⁰ D97/9/5, para. 17.

²¹ D97/9/6, para. 23.

²² D97/7, para. 13.

²³ The Co-Investigating Judges note the slight difference in wording of the French version of Internal Rule 55(10): *À tout moment durant l'instruction, les co-procureurs, la personne mise en examen, ou la partie civile peuvent demander aux co-juges d'instruction de rendre une décision ou d'accomplir les actes d'instruction qu'ils estiment utiles.* (emphasis added)

9. The OCP also challenges the form of relief sought by the Defence for IENG Sary. The Co-Investigating Judges note that the form of their response to any submission of the parties will vary depending on the nature of the submissions. Given the discretion of the parties to make requests, the Co-Investigating Judges have the corresponding discretion to determine the form of the response.²⁴
10. The issue forming the basis of the current Request raises the matter of providing due notice to the Defence on modes of liability. Due notice may be furnished as deemed appropriate throughout the investigation and at the Closing Order. The term “joint criminal enterprise” is not expressly mentioned in the Law or in the Agreement. Thus, although the Co-Investigating Judges will not consider requests for declaratory relief, in these circumstances, the Co-Investigating Judges find it necessary to respond to the Request for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement. The Co-Investigating Judges find the Request sufficiently clear and pertinent.²⁵ The Co-Investigating Judges therefore reject the OCP submission that the motion seeks inappropriate relief, in these circumstances.
11. The Co-Investigating Judges are cognisant of the letter from the Defence for KHIEU Samphan requesting the translation into French of certain documents filed in relation to this Request.²⁶ The Co-Investigating Judges recall their previous orders relating to translation²⁷ and the decisions of the Pre-Trial Chamber.²⁸ The Co-Investigating Judges find that these previous orders and decisions address the arguments raised by the Defence and there is no need to make further findings in these circumstances.

B) Elements of Joint Criminal Enterprise

12. The Request concerns the application of a particular mode of liability, namely, JCE. The relevant provision in the ECCC law relating to individual modes of liability is Article 29, which states that:

²⁴ Case File Number 002/19-09-2007-ECCC/OCIJ (PTC24), *Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Marterials Drive*, ECCC Pre-Trial Chamber, 18 November 2009 (D164/4/13), para. 22.

²⁵ Case File Number 002/19-09-2007-ECCC/OCIJ (PTC24), *Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Marterials Drive*, ECCC Pre-Trial Chamber, 18 November 2009 (D164/4/13), paras 44-46.

²⁶ D97/3/5.

²⁷ Case File Number 002/19-09-2007-ECC-OCIJ, *Order on Translation Rights and Obligations of Parties*, ECCC OCIJ 19 June 2008, (A190) pp 2-4; Case File Number 002/19-09-2007-ECC-OCIJ, *Ordonnance sur “Recours en Annulation Pour Abus de Procedure”*, ECCC OCIJ 29 September 2009 (D197/4).

²⁸ Case File Number 002/19-09-2007-ECCC/OCIJ (PTC12), *Decision on IENG Sary’s Appeal against the OCIJ Order on Translation Rights and Obligations of the Parties*, ECCC Pre-Trial Chamber, 20 February 2009 (A190/II/9); Case File N°002/19-09-2007-ECCC/OCIJ (PTC11), *Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties*, ECC Pre-Trial Chamber, 20 February 2009 (A190/I/20).

Any suspect who planned, instigated, ordered, aided and abetted or committed any of the crimes referred to in Article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime

13. Article 29 does not expressly refer to JCE. However, JCE is a mode of liability articulated as a form of commission in the *Tadic* Appeal Judgement at the ICTY, defining three categories of JCE, all of which have the same *actus reus* elements. The different categories of JCE are therefore defined according to the different degrees of *mens rea*.
14. The *actus reus* elements that are common to all three categories of JCE are as follows:
 - i) Plurality of persons;²⁹
 - ii) The existence of a common purpose (or plan) which amounts to or involves the commission of a crime within the law;³⁰
 - iii) The accused must contribute to the common plan.³¹
15. With respect to *mens rea*, under the first (basic) form of JCE (“JCE 1”), the accused must intend to perpetrate the crime and this intent must be shared by all co-perpetrators.³² The second (systemic) form of JCE (“JCE 2”), is a variation of JCE 1 and concerns a common concerted system of ill-treatment where the accused has knowledge of the nature of the system and intends to further the common system of ill-treatment.³³
16. The third (extended) form of JCE (“JCE 3”) concerns acts, which, although outside of the common plan for which the accused held shared intent, are a natural and foreseeable consequence of the common plan. The accused must be aware that the crimes outside of the common plan are a natural and foreseeable consequence of the plan and must have willingly taken this risk.³⁴
17. Since JCE 2 is essentially a variation of JCE 1, the two aspects of *mens rea* that will be assessed by the Co-Investigating Judges are “intent” under JCE 1 and “natural and foreseeable consequence” under JCE 3.

C) Principle of Legality

18. For criminal concepts such as JCE to be relied upon in legal proceedings, the principle of legality (*nullum crimen sine lege*) requires an assessment of

²⁹ See IT-98-30/1-A, *Kvočka et al.*, Appeal Judgement, para. 96.

³⁰ See IT-00-39A, *Krajisnik*, Appeals Judgement, paras 57-102, 163, 206-251. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise, see IT-97-25-A, *Krnojelac*, Appeal Judgement, para. 31. See also IT-99-36-T, *Brdjanin*, Trial Judgement, para. 342.

³¹ See IT-98-30/1-A, *Kvočka et al.*, Appeal Judgement, paras 96, 112-113 and 421.

³² IT-94-1-A, *Tadic* Appeal Judgement, para. 196.

³³ IT-94-1-A, *Tadic* Appeal Judgement, para. 203.

³⁴ See IT-94-1-A, *Tadic* Appeal Judgement, paras 203, 204; *contra* IT-98-30/1-A, *Kvočka and others* Appeal Judgement, para. 86: “[...] A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes *were a natural and foreseeable consequence to him.*” (emphasis added).

whether the particular criminal concept was applicable law at the time of the alleged facts under investigation.

19. Article 33(new) of the ECCC Law sets out the principle of legality by referring to the provisions of Article 15 of the 1966 International Convention on Civil and Political Rights (ICCPR).³⁵ Article 15 of the ICCPR was also relied upon at the ICTY in setting out the aspects of the principle of legality. The seminal decision of the ICTY Appeals Chamber refers to the key considerations when assessing the principle of legality, in particular, whether:

the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the Prosecution.³⁶

20. This test of foreseeability and accessibility can be satisfied when the alleged activity was criminalised under national law or under international law at the particular time period. Judicial decisions and international instruments will be of guidance in assessing the foreseeability and accessibility of criminal norms, as is the nature and gravity of the alleged acts themselves.³⁷
21. The Co-Investigating Judges find that the application of international customary law before the ECCC is a corollary from the finding that the ECCC holds indicia of an international court applying international law.³⁸ Considering the international aspects of the ECCC, and considering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC,³⁹ the Co-Investigating Judges find that there is a basis under international law for applying JCE as set out above in paragraphs 14-17, including the relevant footnotes, highlighting the subjective assessment of natural and foreseeable consequences.⁴⁰

D) Application of JCE limited to International Crimes

22. International crimes (Articles 4 to 8 of the ECCC Law) typically concern persons who bear the most responsibility yet may have operated far from the physical perpetration of the criminal acts.⁴¹ International criminal law

³⁵ International Covenant on Civil And Political Rights, Article 15, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

³⁶ IT-05-98, *Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 37.

³⁷ *Ibidem*, para. 37 *et seq.*

³⁸ Case File Number 002/19-09-2007-ECCC/OCIJ (PTC01), *Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH"*, ECCC Pre-Trial Chamber, 3 December 2007 (C5/45), para. 20.

³⁹ IT-94-1-A, *Tadic* Appeal Judgement, paras. 185 *et seq.*

⁴⁰ IT-98-30/1-A, *Kvočka and others* Appeal Judgement, para. 86: "[...] A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him." (emphasis added).

⁴¹ Several international and hybrid courts, including the ECCC, limit cases to senior leaders or those most responsible; see: Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 1 (new): "senior

addresses this through modes of liability such as command responsibility or JCE.⁴² However, it cannot be affirmed that such modes of liability apply beyond the domain of international crimes. The Co-Investigating Judges recall that the 1956 Cambodian Penal Code was inspired from French law⁴³, and under French law, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal “regimes”, distinct from domestic criminal law, and characterized by a coherent set of rules of procedure and substance.⁴⁴ The Co-Investigating Judges recall that the ECCC has the indicia of an international court⁴⁵ and that the ECCC Law and Agreement provides for adjudication of both international and national crimes. However, pursuant to the principles of interpretation of autonomous legal “regimes” in line with French law, the modes of liability for international crimes can only be applied to the international crimes. This is particularly the case since JCE is not expressly articulated in the ECCC Law or the ECCC Agreement and has only been the subject of international litigation with reference to international crimes. The elements of JCE which the Co-Investigating Judges find to be applicable law for the ECCC only apply with respect to international crimes and not Cambodian national crimes.

23. The Co-Investigating Judges therefore find the JCE elements set out in the dispositive section below applicable to the international crimes under the jurisdiction of the ECCC. In light of the analysis set out above, these elements were foreseeable and accessible under international law in 1975 in Cambodia, in accordance with the principle of legality. These aspects were adequately pled in the Introductory Submission, in particular under the sections relating to the alleged common criminal plan (paras 5-16), the paragraphs relating to the alleged participation and knowledge of the Charged Persons and paragraph 116.

leaders” and “those most responsible”; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Article 1: “senior leaders” and “those who were most responsible”; Statute of the Special Court for Sierra Leone, Article 1(1): “persons who bear the greatest responsibility”; Rome Statute of the International Criminal Court Article 1: “most serious crimes”. See also *Attorney General of Israel v. Adolf Eichmann*, District Court of Jerusalem, Judgement of 12 December 1961, 36 ILR 18 (1968), para. 197, as cited in Schomburg's Separate Opinion in IT-95-11-A, *Martić* Appeal Judgement, para. 8, and in Shahabudeen Separate's Opinion in IT-98-29-A, *Galić* Appeal Judgement, para. 44.

⁴² IT-94-1-A, *Tadić* Appeal Judgement, paras 190-193.

⁴³ Université Royale de Droit et des Sciences Economiques, *Introduction au Droit cambodgien*, Editions Funan (2005), Partie I, Chapitre I, p. 12, para. 29; Claude-Gilles Gour, *Institutions constitutionnelles et politiques du Cambodge*, Dalloz (1965), p. 389; Case File Number 002/19-09-2007-ECCC/OCIJ (PTC), *Decision on Appeal Against Closing Order Indicting KAING Guek Eav, alias "DUCH"*, ECCC Pre-Trial Chamber, 5 December 2008, Note 37 (D99/3/42).

⁴⁴ F. Desportes and F. Le Gunehec, *Droit Pénal Général*, Ed. ECONOMICA, CorpusDroitPrivé, (2002), p. 177, para. 174.

⁴⁵ Case File Number 002/19-09-2007-ECCC/OCIJ (PTC01), *Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH"*, ECCC Pre-Trial Chamber, 3 December 2007 (C5/45), para. 20.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- DECIDE THAT THE FORM OF RESPONSIBILITY KNOWN AS JOINT CRIMINAL ENTERPRISE DOES NOT APPLY TO NATIONAL CRIMES;

REGARDING INTERNATIONAL CRIMES:

- REJECT THE REQUEST INsofar AS THE *ACTUS REUS* AND *MENS REA* FOR JCE 1 APPLIES BEFORE THE ECCC;

- REJECT THE REQUEST INsofar AS THE *ACTUS REUS* AND *MENS REA* FOR JCE 2 APPLIES BEFORE THE ECCC;

- REJECT THE REQUEST IN SO FAR AS THE *ACTUS REUS* FOR JCE 3 APPLIES BEFORE THE ECCC;

- PARTIALLY GRANTS THE REQUEST INsofar AS THE ONLY *MENS REA* FOR JCE 3 APPLICABLE BEFORE THE ECCC IS THE SUBJECTIVE ACCEPTANCE OF THE NATURAL AND FORESEEABLE CONSEQUENCES OF THE IMPLEMENTATION OF THE COMMON PLAN.

Done in Phnom Penh, on 8 December 2009

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d'instruction