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Royaume du Cambodge
Nation Religion Roi

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

Kingdom of Cambodia
Nation Religion King

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
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Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE
Date: **21 December 2009**
Original language: **English/Khmer**
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**Order on Civil Party Request for Investigative Action concerning
Enforced Disappearance**

Co-Prosecutors
Mrs. CHEA Leang
Mr. Andrew CAYLEY

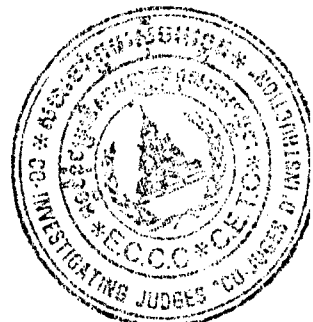
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IENG Sary KAING Guek Eav
IENG Thirith alias "Duch"

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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 the ongoing judicial investigation against **NUON Chea** (នួន ឆា) and other **Charged Persons**, relating to charges of **Crimes against humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, Genocide, Murder, Torture and Religious persecution**, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and 209, 210, 500, 501, 503 to 508 of the 1956 Penal Code;

Noting Rule 55(10) of the ECCC Internal Rules (the “Internal Rules”);

Considering the Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance, dated 30 June 2009 (D180) (the “Request”);

Considering the Joint Defense Response to Civil Parties’ Investigative Request Concerning the Alleged Crime of Enforced Disappearance, from the Defence for IENG Thirith and the Defence for NUON Chea, dated 24 July 2009 (D180/2), (the “Joint Response”);

Considering Ieng Sary’s Response to the Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance and Request for Extension of Page Limitation, dated 6 August 2009 (D180/4), (“Ieng Sary’s Response”);

Noting the Order of the Co-Investigating Judges on Request for Extension of Page Limit, dated 8 September 2009 (D180/5);

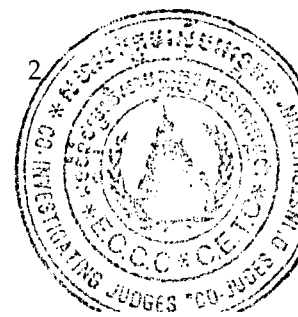
ARGUMENTS OF THE PARTIES

1. On 30 June 2009, the Co-Lawyers for the Civil Parties filed a joint Request arguing that there are sufficient grounds for identifying enforced disappearance as a legal characterisation under international criminal law¹ and providing a list of individuals alleging incidences of enforced disappearance.²
2. The Joint Response argues that civil parties are not able to request investigative actions with respect to facts which are not contained in the Introductory or Supplementary Submissions.³ In addition the Joint Response states there is no

¹ D180, *Co-Lawyers of Civil Parties’ Investigative Request concerning the Crimes of Enforced Disappearance*, 30 June 2009, 00347157-00347172, para. 26.

² D180, *Co-Lawyers of Civil Parties’ Investigative Request concerning the Crimes of Enforced Disappearance*, 30 June 2009, 00347157-00347172, para. 27.

³ D180/2, *Joint Defence Response to Civil Parties’ Investigative Request concerning the Alleged Crime of Enforced Disappearance*, 24 July 2009, 00355676-00355691, paras. 5-6.



such basis for identifying enforced disappearance as a crime under international criminal law⁴ and submits that the Request should be denied in its entirety.⁵

3. IENG Sary's Response requests that the Co-Investigating Judges to declare the Request inadmissible on the grounds that the Introductory Submissions do not seize the Co-Investigating Judges with enforced disappearance⁶ and the civil parties cannot therefore make an investigative request in the absence of a Forwarding Order and Supplementary Submissions.⁷ In the alternative, it is argued that the Request should be rejected on the basis that there are no grounds for finding enforced disappearance under international criminal law.⁸

REASONS FOR THE DECISION

4. 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*". Internal Rule 55(10) bestows a discretion on the relevant parties, including the Civil Parties, to determine the content of these requests, whereas the Co-Investigating Judges have the corresponding discretion to determine the form of their response which will vary depending on the nature of the submissions. For the current Order, the Co-Investigating Judges find the Request sufficiently clear and pertinent to assist in ascertaining the truth.⁹
5. The Co-Investigating Judges find that, contrary to the submissions in IENG Sary's Response, there are several specific facts in the Introductory and Supplementary Submissions which could be described as instances of persons disappearing. For example, there are references to persons disappearing from worksites¹⁰, security centres¹¹, persons disappearing from families with mixed Vietnamese-Khmer

⁴ D180/2, *Joint Defence Response to Civil Parties' Investigative Request concerning the Alleged Crime of Enforced Disappearance*, 24 July 2009, 00355676-00355691, paras. 44-47.

⁵ D180/2, *Joint Defence Response to Civil Parties' Investigative Request concerning the Alleged Crime of Enforced Disappearance*, 24 July 2009, 00355676-00355691, paras. 44-47.

⁶ D180/4, *IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation*, 6 August 2009, 00373977-00373994, para. 10.

⁷ D180/4, *IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation*, 6 August 2009, 00373977-00373994, para. 11.

⁸ D180/4, *IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation*, 6 August 2009, 00373977-00373994, paras. 13-37.

⁹ See ECCC, PTC24, D164/4/13, *Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive*, 18 November 2009, 00402746-00402762, paras. 44-46.

¹⁰ See for example, D3, *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 47: "*Arrests took place continually; those who made mistakes were taken away for execution. The people who disappeared were constantly replaced by new detainees*". See also, Schedule 48 cited in D3, *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 14; Schedule 59 cited in D3 *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 43; D3 *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 44; and D3 *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 48.

¹¹ See for example, D3 *Introductory Submission*, 20 July 2007, 00141011-00141166, para. 64: "*At night, high-ranking prisoners were loaded onto trucks and driven to the west towards Kratie province.*"



marriages¹², persons disappearing from the Cham population¹³, and other similar facts of alleged disappearances¹⁴.

6. Although the OCP's Introductory and Supplementary Submissions may not have explicitly used the term "enforced disappearance" in setting out the types of offences that the facts may support,¹⁵ the Co-Investigating Judges recall that they are not bound by the legal characterizations set out by the OCP.¹⁶ The Co-Investigating Judges are seized of facts alleged in the Introductory and Supplementary Submissions and it is open to the Co-Investigating Judges to examine the range of potential legal characterizations for the alleged facts.¹⁷
7. Additionally, the Co-Investigating Judges recall that they are not required to set out legal characterizations until the Closing Order.¹⁸ Therefore, it is not necessary at this stage to conduct a full analysis of the supposed elements of enforced disappearances. The Co-Investigating Judges will take due consideration of the submissions of the parties on this point in the drafting of the Closing Order.

These people disappeared and were presumably executed". See also, D3 Introductory Submission, 20 July 2007, footnote 245; D3 Introductory Submission, 20 July 2007, 00141011-00141166, para. 63; D3 Introductory Submission, 20 July 2007, 00141011-00141166, para. 67; D83 Co-Prosecutors' Supplementary Submission Regarding the North Zone Security Centre, 26 March 2008, 00176265-00176278, para. 9.

¹² See D3 Introductory Submission, 20 July 2007, 00141011-00141166, para. 69: "*The CPK engaged in a policy of physically eliminating the entire Vietnamese population of Prey Veng Province through execution. Part of that policy required that Vietnamese fathers of mixed Cambodian-Vietnamese marriages be 'taken away' and executed and also required the removal and execution of both the mother and any children if the mother was Vietnamese. A similar policy was implemented in Svay Rieng province*".

¹³ See for example, D196 Co-Prosecutors Supplementary Submission regarding Genocide of the Cham, 31 July 2009, 00369556-00369578, para. 14: "*In Kroch Chhmar commune, hundreds of Cham people were gathered at Wat Khsach Praches. The older people and children were taken away by boat, and never seen again*". See also, D196, Co-Prosecutors Supplementary Submission regarding Genocide of the Cham, 31 July 2009, 00369556-00369578, para. 17; D196, Co-Prosecutors Supplementary Submission regarding Genocide of the Cham, 31 July 2009, 00369556-00369578, footnote 8; D196, Co-Prosecutors Supplementary Submission regarding Genocide of the Cham, 31 July 2009, 00369556-00369578, footnote 40.

¹⁴ See for example, D3 Introductory Submission, 20 July 2007, 00141011-00141166, footnote 521; D3 Introductory Submission, 20 July 2007, 00141011-00141166, footnote 542; Schedule 20; Schedule 49; Schedule 51; Schedule 55; Schedule 65; Schedule 71; Schedule 72; Schedule 75; Schedule 78; Schedule 89; and Schedule 100.

¹⁵ Internal Rules (Rev. 4), 11 September 2009, Rules 53(1)(b) and Rule 53(1)(c): the Co-Prosecutors are only required to set out the type of offenses alleged and the relevant provisions of the law that defines and punishes the crimes.

¹⁶ See Case File 001/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/42, *Decision on Appeal Against Closing Order Indicting KAINING Guek Eav, alias "DUCH"*, 5 December 2008, 00249846-00249887, paras 35 – 39; D198/1, *Ordonnance sur le demande de clarification déposée par les co-procureurs*, 20 novembre 2009, 00403612-00403617, para. 10.

¹⁷ The Co-Investigating Judges found evidence and described facts of torture at Prey Sar (S-24) in its Closing Order notwithstanding the absence of any proposed charges of torture at this site by the Co-Prosecutors in the Introductory Submission. See D99 *Closing Order indicting KAINING Guek EAV alias Duch*, 8 August 2008, 00210783-00210860, para. 106; and D3, *Introductory Submission*, 20 July 2007, 00141011-00141166, paras. 48 and 122.

¹⁸ Internal Rules (Rev. 4), 11 September 2009, Rule 67(2).



8. Although the Co-Investigating Judges cannot pre-judge the Closing Order by providing declaratory relief on how facts will be legally characterized, the Co-Investigating Judges take due note of the characterization of enforced disappearance as a crime against humanity of other inhumane acts under Article 7(1)(i) of the Rome Statute of the International Criminal Court as elaborated in the Elements of Crimes.¹⁹
9. The Co-Investigating Judges therefore find that enforced disappearance constitutes a potential legal characterization of facts under investigation at the crime scenes and locations raised in the Introductory Submission and Supplementary Submissions.
10. The Co-Investigating Judges recall the discretion afforded to them under Rule 55(10) in responding to requests for investigative action as set out in paragraph 4 above. With respect to the persons named in the Request for interview, the Co-Investigating Judges are continuing their assessment of the evidence and will interview the named persons as may be necessary or issue a supplementary order before the close of the investigation.

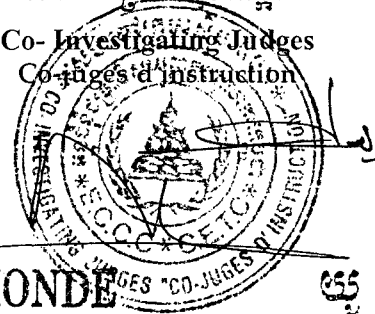
FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

11. **FIND** the Request by the Civil Parties dated 30 June 2009 admissible;
12. **GRANT** the request to conduct investigations into persons disappearing throughout the crime scenes invoked in the Introductory and Supplementary Submissions;
13. **NOTE** that the legal characterizations will be set out at the Closing Order upon an assessment of the evidence;
14. **MAINTAIN** that the assessment of the list of persons for interview is on-going and if necessary, a supplementary order may be issued at the close of the investigation.

Done in Phnom Penh, on 21 December 2009

សហចៅក្រមស៊ើបអង្កេត

Co-Investigating Judges
Co-juges d'Instruction



Marcel LEMONDE

ឃុំ ប៊ុនស្រី

¹⁹ Additionally, Article 9 of the 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, cites Crimes Against Humanity with reference to the 1998 Rome Statute of the International Criminal Court.