លេខ / No.: D298/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

Kingdom of Cambodia
Nation Religion King

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

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

ច្បាប់ចម្លងត្រឹមត្រូវនៃឯកសារដើម
CERTIFIED COPY/COPIE CERTIFIEE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការចម្លង (Certified Date/Date de certification): 24 / 02 / 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE

Date: **16 February 2010**

Original: **Khmer/French**

Classification: **Public**

Order Refusing Request for Further Charging

Co-Prosecutors
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Andrew CAYLEY

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

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We, **You Bunleng (យូ ប៊ុនឡេង)** 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 55 and 67 of the ECCC Internal Rules (the "Internal Rules");

Noting the ongoing judicial investigation against **NUON Chea (នួន ជា) 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 Judicial Investigation Case File No. 001/18-07-2007 against **Kaing Guek Eav (កាំង ហ្គេកអ៊ាវ)** alias **Duch (ឌុច)**, relating to charges of Crimes Against Humanity, Grave Breaches of the Geneva Conventions dated 12 August 1949, Murder and Torture, closed by our Indictment dated 8 August 2008, as amended by the Pre-Trial Chamber decision of 5 December 2008;

Noting our Forwarding Order, dated 18 September 2007 (D17) and our Separation Order, dated 19 September 2007 (D18);

Noting our Forwarding Order for the Purpose of Potential Dismissal, dated 6 January 2010 (D298);

Noting the Co-Prosecutors' response, dated 11 January 2010 (D298/1);

Noting the Request for Notification of Charges filed by the Co-Prosecutors on 21 January 2010 (D334).

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Mail Po Box 71, Phnom Penh Tel:+855(0)23 218914 Fax: +855(0) 23 218941.

PROCEDURAL HISTORY

1. On 31 July 2007, at his initial hearing, **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** was notified of all the facts imputed to him in the Introductory Submission of 18 July 2007 (which are the subject of the judicial investigation), and was charged with Crimes Against Humanity (D7).

2. On 19 September 2007, in the interest of the proper administration of justice, a Separation Order was issued (D18). The judicial investigation then continued in parallel, through Case File No. 001/18-07-2007 concerning **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** alone, on the one hand, and through Case File No. 002/19-09-2007, concerning Duch and four other persons, on the other hand.

3. On 2 October 2007, after having found during the judicial investigation that there was clear and consistent evidence that he may have been criminally responsible for the commission of such crimes, the Co-Investigating Judges brought an additional charge against **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** for Grave Breaches of the Geneva Conventions of 12 August 1949 (001/D20).

4. On 8 August 2008, further to judicial investigation No. 001/18-07-2007, **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** was indicted and sent for trial on the counts of Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, and kept in detention (001/D99).

5. Upon appeal of the Indictment by the Co-Prosecutors, the Pre-Trial Chamber, in a decision dated 5 December 2008, amended the Closing Order and sent **KAING**

Guek Eav (កាំង ហ្គេកអ៊ាវ) alias **Duch (ឌុច)** for trial on the counts of Crimes Against Humanity, Grave Breaches of the Geneva Conventions of 12 August 1949, murder and torture. The Accused was then tried before the Trial Chamber, which reserved judgment on 27 November 2009.

6. On 6 January 2010, as part of judicial investigation No. 002/19-09-2007, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors for the purpose of the potential dismissal of the case against **KAING Guek Eav (កាំង ហ្គេកអ៊ាវ)** alias **Duch (ឌុច)** (002/D298).

7. On 11 January 2010, the Co-Prosecutors responded, stating that, "*[w]hile the OCIJ could dismiss the case against **KAING Guek Eav (កាំង ហ្គេកអ៊ាវ)** alias **Duch (ឌុច)**, in respect of all matters raised in Case File 002/19-09-2007, under Rule 67 of the Rules, the appropriate time for such dismissal has not yet been reached*", the appropriate time being upon the issuance of the Closing Order[1] (002/D298/1).

8. On 14 January 2010, pursuant to Internal Rule 66, the Co-Investigating Judges advised the parties and their lawyers that they considered that judicial investigation No. 002/19-09-2007 had been concluded.

9. On 21 January 2010, the Co-Prosecutors filed a request to charge **KAING Guek Eav (កាំង ហ្គេកអ៊ាវ)** alias **Duch (ឌុច).** They argue that the Co-Investigating Judges may not indict a person for material facts in relation to which he or she has not first been charged; that the Co-Investigating Judges had held that prior to the conclusion of the judicial investigation, the Charged Persons would be summoned for clarification of the charges for which they may be indicted;[2] that the four other Charged Persons

[1] Response, para. 5

[2] See *Order on Co-Prosecutors' Request for Clarification of Charges*, 20 November 2009 (last paragraph).

were interviewed recently and informed of the charges for which they may be indicted; and that no such interview was held with Duch (ឌុច). Accordingly, they request the Co-Investigating Judges to *"rectify this disparity and similarly notify Duch (ឌុច) of the charges against him"*.

10. In addition, the Co-Prosecutors indicate that *"DUCH's detention in Case No. 002 may also be extended pursuant to Rule 63(7) on the basis of reasons contained in the Introductory Submission and the Trial Chamber's order of 15 June 2009"*.

REASONS FOR THE DECISION

Preliminary observations[3]

11. With respect to the Co-Prosecutors' request of 21 January 2010, entitled "*សំណើសុំធ្វើសេចក្តីជូនដំណឹងអំពីបទចោទប្រកាន់ កាំង ហ្គេកអ៊ាវ ហៅ ឌុច*" in Khmer and "Request for Notification of Charges to Kaing Guek Eav alias Duch in English" (French version not yet available), the Co-Investigating Judges observe that there is an ambiguity in Khmer stemming from the terminology used in Internal Rule 57, entitled "*ការជូនដំណឹងអំពីបទចោទប្រកាន់*" in Khmer, "Notification of Charges" in English and "*notification des chefs d'accusation*" in French. In fact, the drafters of this rule did not adopt the terminology used in Article 143 of the Code of Criminal Procedure of the Kingdom of Cambodia, entitled "*នដំណឹងអំពីការដាក់ឱ្យស៊ើបនៅក្រោមការចាត់តាំង*", "Notification of placement under judicial investigation" and "*notification des mises en examen*", which matches the French heading of Internal Rule 57. In order to clear up the ambiguity in Khmer, stemming from this matter of terminology, the Co-Investigating specify that the request dated 21 January 2010, entitled "*សំណើសុំធ្វើសេចក្តីជូនដំណឹងអំពីបទចោទប្រកាន់ កាំង ហ្គេកអ៊ាវ ហៅ ឌុច*", "Request for notification of

[3] Paragraphs 11 and 12 are aimed at clarifying the Khmer version; they have no effect on the French and English versions.

charges against Kaing Guek Eav alias Duch", will be dealt with here as *ការជូនដំណឹងអំពីការដាក់ឱ្យស៊ើបអង្កេតក្រោមការចោទ (a request for notification of placement under judicial investigation)* in respect of Kaing Guek Eav alias Duch.

12. Further, the Co-Investigating Judges wish to recall that as a rule, they do not render declaratory decisions on the applicable law. However, considering the ambiguity described above, they deem it is necessary to once again clarify the principles governing placement under judicial investigation before addressing the request.

Remarks concerning the notion of placement under judicial investigation

13. The Co-Investigating Judges wish to clarify that "charging" (a new notion adopted by the Cambodian Code of Criminal Procedure, referred to therein as "placement under judicial investigation", based on the French system[4]) is not a mere procedural formality, but rather a judicial decision made by the Co-Investigating Judges once they have found clear and consistent evidence of criminal responsibility against any person.[5] By such a decision, taken on their authority, the Co-Investigating Judges decide the proper timing and content of the judicial investigation. If the person is not named in the Introductory Submission, he or she acquires the status of a "Charged Person", which is the case for all persons named in the Introductory Submission.[6]

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[4] In France, ***mise en examen*** [charging, placement under judicial investigation] (the legal term which replaced ***inculpation*** [notice of charges, notice of prosecution] in 1993) is under the exclusive powers of the investigating judge. It concerns any person against whom there is evidence that he or she may have participated, as a perpetrator or an accomplice, in the commission of an offence; see *Lexique des Termes Juridiques*, 14th Edition, Dalloz, 2003.

[5] In France, Article 80-1 of the Code of Criminal Procedure sets out the conditions for placing a person under judicial investigation. Article 126, paragraph 2 of the Cambodian Code of Criminal Procedure and Internal Rule 55(4) set out similar conditions.

[6] Any person named in the Introductory Submission is referred to as *"the Charged Person"*: see definition of Charged Person in the ECCC Internal Rules glossary: *"any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case"*; see also French jurisprudence, Crim. 5 nov. 1985: Bull. crim. no 344; D. 186. IR. 303, obs. Pradel; JCP 1986 II. 20685, note Jeandidier: "[TRANSLATION] [...] *any person named in the introductory submission, even when referred to as "X appearing to be...", is automatically a charged person, regardless of the date on which he or she is notified of the charges by the investigating judge".*

14. Whilst it is true – as specified in their Order on the request for clarification – that the Co-Investigating Judges cannot send a person for trial in respect of material facts for which they have not previously been charged, it is equally clear that the Co-Investigating Judges may issue a dismissal order in respect of a person who has not previously been charged.[7] In such an instance, the only limit on the Co-Investigating Judges' powers is set out in Internal Rule 24(4), which prohibits them from calling as witness any person against whom there is evidence of criminal responsibility.

Regarding the specific case of KAING Guek Eav (កាំង ហួតអាវ) alias Duch (ឌុច)

15. The Co-Investigating Judges recall that in this case, as they pointed out in the *Order Concerning the Co-Prosecutors' Request for Clarification*, they have already informed **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** of all the facts imputed to him in the Introductory Submission of 18 July 2007[8] and that, during the period between the receipt of the Introductory Submission and the recent notification of the conclusion of the judicial investigation,[9] they also undertook investigative action concerning all these facts. Accordingly, the Co-Investigating Judges consider that their obligation to investigate all the facts set out in the Introductory Submission has been fulfilled.

16. As indicated previously, **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** has recently been tried before the Trial Chamber for his role as head of S-21 and, in this capacity, as one of those "most responsible" for crimes within the jurisdiction of the ECCC pursuant to Article 1 of the ECCC Law and Article 1 of the Agreement dated 6 June 2003. There is no plan to organise a second trial for Duch and, under these conditions, it does not appear to be of any avail to summon him *"for clarification of the charges for which [he] may be indicted"*. Laying further charges would thus be unsuited to the situation.

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[7] See D198/1, *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, 20 November 2009 (para. 10 and footnote 6 specifying the authorities underpinning this interpretation).
[8] Written Record of Initial Appearance of KAING Guek Eav, 31 July 2007, (D7).
[9] Notice of Conclusion of Judicial Investigation, 14 January 2010.

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17. Also, **KAING Guek Eav (កាំង ហួតអាវ)** alias **Duch (ឌុច)** was maintained in provisional detention from 8 August 2008 up to his appearance before the Trial Chamber, for a maximum period of four months pursuant to Internal Rule 68, at the time he was indicted and sent for trial in relation with Case File No. 001/18-07-2007. Since then, he is no longer provisionally detained in relation to Case File No. 002/19-09-2007, his detention not having been extended in this case file. Accordingly, it is not possible at this stage to *"extend his detention pursuant to Rule 63(7) on the basis of reasons contained in the Introductory Submission and the Trial Chamber's order of 15 June 2009*" since this detention has ended.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY

Declare that there are no grounds to undertake the requested actions.

Done in Phnom Penh, on 16 February 2010

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d'instruction

[signed]	[signed]
Marcel LEMONDE	**យូ ប៊ុនឡុង**

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