



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**

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges

Bureau des co-juges d'instruction

Before: **Judge YOU Bunleng**

Judge Marcel LEMONDE

Date: **06 September 2010**

Original: **Khmer/French**

Classification: **Public**

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**Order on the Admissibility of Civil Party Applicants from Current Residents of
Pailin Province**

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Charged Person(s)

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

Lawyers for the Civil Parties

NY Chandy	Philippe CANONNE
LOR Chunthy	Elizabeth RABESANDRATANA
KONG Pisey	Mahdev MOHAN
HONG Kim Suon	Olivier BAHOUgne
YUNG Phanit	Martine JACQUIN
KIM Mengkhy	Annie DELAHAIE
MOCH Sovannary	Fabienne TRUSSES-NAPROUS
SIN Soworn	Patrick BAUDOUIN
CHET Vannly	Lyma Thuy NGUYEN
PICH Ang	Marie GUIRAUD
VEN Pov	Laure DESFORGES
Silke STUDZINSKY	Christine MARTINEAU
Françoise GAUTRY	Pascal AUBOIN
Isabelle DURAND	Barnabe NEKUIE
Ferdinand Djammen-Nzepa	Nicole DUMAS
Emmanuel ALTIT	Daniel LOSQ
Emmanuel JACOMY	Julien RIVET

Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouy Seang
Diana ELLIS
SA Sovan
Jacques VERGÈS
Philippe GRÉCIANO
KAR Savuth

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់ខ្មែរ
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07-Sep-2010, 11:04

Kauv Keoratanak

We, **You Bunleng** (ឃុំ ប៉ុន្រែង) 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 judicial investigation against **NUON Chea** (នួន ឆា) and **other Charged Persons**, the authors 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 Rules 12, 12 *bis*, 21, 23, 23 *bis*, 23 *ter*, 49, 53, 55, 56(2)(a), 66 and 100 of the ECCC Internal Rules (Rev.5) (the “Internal Rules”);

Noting Articles 1, 3 and 6 of the Practice Direction on Victim Participation (the “Practice Direction”);

Noting the Introductory Submission from the Co-Prosecutors dated 18 July 2007 (D3)

Noting the Supplementary Submissions from the Co-Prosecutors dated 26 March 2008 (D83), 13 August 2008 (D98/I), 30 April 2009 (D146/3), 31 July 2009 (D196), 05 November 2009 (D146/4), 26 November 2009 (D146/5) and Co-Prosecutors’ Clarification Of Allegations Regarding Five Security Centres And Execution Sites Described In The Introductory Submission dated 11 September 2009 (D202);

Noting the Trial Chamber decision on succession to the claim of a deceased civil party applicant (E2/5/3);

Noting our Notice pursuant to Internal Rule 23 concerning placement on the Case File of Civil Party applications dated 13 January 2010 (D316);

Noting our Notice of Conclusion of Judicial Investigation, dated 14 January 2010 (D317);

Noting our Interoffice Memorandum on the filing of Civil Party applications and Complaints dated 27 January 2010 (D337);

Noting our Interoffice Memorandum extending the deadline to file Civil Party applications dated 26 March 2010 (D337/1);

Noting our Interoffice Memorandum on the Deadline for Filing Supplementary Information dated 29 April 2010 (D337/6);

Noting the decisions of the Pre-Trial Chamber dated 01 June 2010 (D364/1/3) and 27 April 2010 (D250/3/2/1/5);

Noting our Greffier’s Interoffice Memorandum on the deceased Civil Party applicants (D386);

Noting our Order pursuant to Internal Rule 23 *ter* organizing Civil Party Representation (D337/10);

Noting the Trial Chamber Judgment in KAING Guek Eav *alias* Duch (001/18-07-2007/ECCC/TC);

Noting the Response of the Co-Investigating Judges to Civil Parties' Lawyers Request for an extension of period of time for gathering and submitting supplementary information for the recently designated 569 civil party applicants (D337/11/1).

I - PROCEDURAL HISTORY

1. In accordance with Internal Rule 23 *bis* (2) and (3), the Co-Investigating Judges will decide on all 3988 Civil Party applications that they received¹. In consideration of the need for coordination of outreach and legal representation for Civil Parties and complainants, the Co-Investigating Judges have decided to issue admissibility orders based upon the current residence of applicants, as indicated on their application forms.
2. The Co-Investigating Judges note that the 706 applicants for whom a lawyer was only designated on August 2, 2010² were not in a position to file supplementary information by the 30 June 2010 deadline. The 19 applicants who filed their Civil Party applications in both Case 001/18-07-2007/ECCC/TC and 002/19-09-2007/ECCC/TC, and who having been declared inadmissible in case file 001/18-07-2007/ECCC/TC pursuant to the judgment of the Trial Chamber dated July 26, 2010, and wished to provide further information in this case, are in the same position.
3. The present order is in relation to **fourteen (14)** Civil Party applications filed with the Co-Investigating Judges (CIJ) by the ECCC Victims Support Section ("VSS") pursuant to Internal Rule 12 *bis* (b) by individuals residing in **Pailin Province**, Kingdom of Cambodia, at the time of their application.³ All of the Civil Party applications were filed within the deadline pursuant to the Internal Rules. Amongst these applicants, **twelve (12)** filed supplementary information in support of their initial Civil Party applications by 30 June 2010. The decision will only provide the pertinent information with respect to each applicant.⁴

¹ This number may change to take into account the withdrawals registered after the signature of the present order.

² D337/10 Annex D.

³ Annex 1 - Civil Party Applications filed before the Co-Investigating Judges.

⁴ The Victims Support Section has filed Individual reports for each civil party application, which include a summary in English of the alleged criminal acts filed on the case file.

II – REASONS FOR THE DECISION

4. Under the Internal Rules, a “Victim” is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC. Any Victim may file a complaint with the Co-Prosecutors pursuant to Internal Rule 49(2). A “Civil Party” is a Victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber.
5. Internal Rule 23(1) provides that the purpose of Civil Party action is to:
 - a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
 - b) Allow Victims to seek collective and moral reparations.
6. Accordingly, for a Victim to be admissible as Civil Party in the current proceedings - as opposed to Complainants - they must demonstrate specific standing, or *locus standi*.

A. GUIDING PRINCIPLES

7. Civil action before the ECCC is open to all Victims who are able to demonstrate, **in a plausible manner**, that they have *de facto* suffered physical, material, or psychological harm as a direct consequence of at least one of the crimes alleged against the Charged Persons, i.e. a material fact of a criminal nature coming within the OCP Introductory Submission and Supplementary Submissions.

i) Level of proof and sufficiency of information

8. Internal Rules 23 *bis* (1) and (4), and Article 3.2 of the Practice Direction provide that Civil Party applications “*must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the harm suffered, or tending to show the guilt of the alleged perpetrator*”, allowing the Co-Investigating Judges to be “*satisfied that facts alleged in support of the application are more likely than not to be true*”. This level of proof is specific to Civil Party admissibility and distinct from the sufficiency of evidence criterion set out in Internal Rule 67 (3)(c).
9. The Co-Investigating Judges note that, at the Pre-Trial Stage, they are not in a position to make final determinations concerning the harm suffered by Victims. Such final determinations will only be made, as appropriate, by the Trial Chamber in its Judgment, based on all of the evidence submitted in the course of proceedings.⁵. Consequently, for a Civil Party to be admissible, the

⁵ See, for e.g., consistent jurisprudence of the French Cour de Cassation: Cass.crim. [4 June 1996], *Cass. crim. [5 March 1990]*, *Cass. crim. [16 June 1998]* published in Bull. crim. n°

Co-Investigating Judges must assess whether, on the basis of the elements in the Case File, there are *prima facie* credible grounds to suggest that the applicant has indeed suffered harm directly linked to the facts under investigation.

10. The Co-Investigating Judges acknowledge that the specific context and scope of Case 002/19-09-2007-ECCC-OCIJ makes it difficult and, in some cases, impossible to expect that Victims will be able to fully substantiate their claims based on documentary evidence. The Co-Investigating Judges note that many applications in Case 002 came from individuals who lived through events which led to circumstances that, given the context of the temporal jurisdiction of the ECCC, do not enable them to provide the Co-Investigating Judges with sufficient information to allow verification of their compliance with the Internal Rules. This is particularly true for applicants who were very young at the time. Finally, they recall the demographic research done in the context of the judicial investigation which confirmed that “*no lists with victim names were usually compiled (except for S-21 and a few other occasional incidents)*” and that “*reliable statistical sources on deaths, births and migration (internal and external) are largely non-existent*”.⁶
11. Moreover, all applicants must clearly prove their identity. The Co-Investigating Judges acknowledge, however, that the nature of the birth and death registration procedures in Cambodia makes it difficult and sometimes impossible for some applicants to provide satisfactory proof of identity⁷. Accordingly, they are of the view that a flexible approach is required.
12. Furthermore, the Co-Investigating Judges note that most applicants alleging psychological harm will not be in a position to substantiate their relationship with the immediate victim. Therefore, where appropriate, they will apply a presumption of kinship based on the applicant’s Victim Information Form and any available supporting documents.

ii) Existence of harm

13. To have standing, a Victim who wishes to be joined as a Civil Party must make a plausible allegation so that the Co-Investigating Judges are able to admit as possible the existence of personal physical, material or psychological harm⁸, which has actually come into being. With regards to psychological harm, the CIJ note that Article 3.2 of the Practice Direction

191, Bull. Crim. 1990 n. 103; Cass. crim [16 February 1999] published in Bull. crim. n 17 ; Cass. crim. [19 February 1999] published in Bull. crim. 2002 n° 34 ; Cass. crim. [2 April 2003] published in Bull. crim. 2003, *Lubanga* ICC [18 January 2008] Trial Chamber (ICC-01/04-01/06-1119) para. 99 and *KAING Guek Eav alias Duch* ECCC [26 July 2010] Trial Chamber Judgment para. 636.

⁶ D140/1/1, Demographic Expertise Report p. 7, 12.

⁷ Cf. various documents issued by different authorities serve in practice as proof of identity, see also *KAING Guek Eav alias Duch* ECCC [26 February 2009] Trial Chamber Decision E2/94

⁸ For the purpose of the present order, harm suffered by the immediate victim may include physical and/or psychological harm

provides that “*psychological harm may include the death of kin who were the victim of such crimes*”⁹. Therefore, to be admissible, the harm suffered by the applicant does not necessarily have to be immediate but it must be personal.¹⁰

14. To establish the existence of personal psychological harm, the Co-Investigating Judges consider that:

- a. There is a presumption of psychological harm for the members of the direct family of the immediate Victim¹¹. In applying the criteria set out in the present order, the notion of direct family encompasses not only parents and children, but also spouses and siblings of the direct Victim¹². The presumption will be considered as determinant in the following situations:
 - i) When the immediate Victim is deceased or has disappeared as a direct consequence of the facts under investigation¹³.
 - ii) When the immediate Victim has been forcibly moved and separated from the direct family as a direct consequence of facts under investigation. Such separation results in suffering for the direct family members which meets the personal psychological harm threshold.
- b. When the immediate Victim has been forcibly married, such circumstances inevitably result to a suffering which meets the personal psychological harm threshold for his or her parents, spouse, and child(ren).
- c. The Co-Investigating Judges agree with the Trial Chamber finding that “*direct harm may be more difficult to substantiate in relation to more attenuated familial relationships*”¹⁴ and consider that only a

⁹ **Cambodian Penal Code** (1956) article 13: «an injury can be damage to property or physical or psychological damage».

¹⁰ See, for e.g., *Lubanga* ICC [8 April 2009] Trial Chamber I (ICC-01/04-01/06) para 49; *Lubanga* ICC [11 July 2008] Trial Chamber I (ICC-01/04-01/06-1432 OA9 AO10) para 32.

¹¹ See, for e.g., *Valle-Jaramillo et. al* IACHR [27 November 2008] Judgment para 119, *Kawas* IACHR [3 April 2009] Judgment.

¹² See, for e.g., *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations General Assembly Resolution 40/34 adopted on 29 November 1985); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (United Nations General Assembly Resolution 60/147 adopted on 16 December 2005) para. 8; *Lubanga* ICC [11 July 2008] Appeals Chambers (ICC-01/04-01/06 OA9 OA10) para 32; *Street Children* IAHR [26 May 2001] Judgment para. 68 ; *Myrna Mack Chang* IAHR [25 November 2003] Judgment paras 232, 244.

¹³ See, for e.g., *Lubanga* ICC [31 January 2008] Pre-Trial Chamber I (ICC-01/04-423) paras. 23-25 ; *Ahmad Harun et al* ICC [6 December 2007] Pre-Trial Chamber I (ICC-2/05-111) para. 35; *Kurt* ECHR [25 May 1998] Chamber Decision (15/1997/799/1002) paras. 130-134; *La Cantuta* IAHR [29 November 2006] “Merits, reparations and costs” para 123 ; *Myrna Mack Chang* IAHR [25 November 2003] “Merits, Reparations, and Costs” Reasoned Concurring Opinion Of Judge Sergio Garcia-Ramirez” para. 56, 57, 59, 60, 61, 62; *Cakici* ECHR [8 July 1999] Chamber Application No. 23657/94, *Bamaca Velasquez* ECHR [25 November 2000] Chamber Decision paras. 147 et suiv.; *Blake* ECHR [24 January 1998] Chamber Decision paras. 114-116 .

¹⁴ *KAING Guek Eav alias Duch* ECCC [26 July 2010] Trial Chamber Judgment para. 643.

relative presumption exists for extended family members (grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws and other indirect kin).¹⁵ In such cases, the Co-Investigating Judges will assess on a case-by-case basis, whether there are sufficient elements to presume bonds of affection or dependency between the applicant and the immediate Victim. The presumption will be considered as determinant when the immediate Victim is deceased or has disappeared as a direct consequence of facts under investigation.

- d. Therefore the personal psychological harm alleged as a consequence of the murder or disappearance of a next of kin will be more easily admissible than in relation to forced marriage or religious persecution. Similar reasoning must *apply a fortiori* to simple witnesses of facts under investigation: psychological harm has a dimension and character distinct from the emotional distress that may be regarded as inevitably caused to witnesses of crimes of this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature.

iii) Causality link between the harm and the crimes alleged against the charged persons

15. For the Civil Party application to be admissible, the applicant must demonstrate harm as a direct consequence of facts in the Introductory and Supplementary Submissions.¹⁶
16. This criterion is specific to Civil Party applications by way of intervention. Under ECCC procedure, contrary to Cambodian Criminal Procedure¹⁷, an applicant cannot launch a judicial investigation simply by being joined as a Civil Party: being limited to action by *way of intervention*, he or she may only join ongoing proceedings through the application, and not widen the investigation beyond the factual situations of which the *Co-Investigating Judges are seized by the Co-Prosecutors (in rem seisin)*.

¹⁵ See, for e.g., in France, psychological harm suffered indirectly by relatives had already been defined as early as in 1923 (Cass. Civ. [13 February 1923] by the French Cour de Cassation). Starting from this moment, bonds of affection were not extended to anybody except for the persons capable of justifying strong bonds with the principal victim, even if beyond the legal scope. See, for e.g., *Yasa* ECHR [2 September 1998] Chamber Decision (63/1997/847/1054) para. 63; *Kawas-Fernandez* IAHHR [3 April 2009] Judgment paras. 128, 139, 128; *Cakici* ECHR [8 July 1999] Chamber (Application no. 23657/94) para. 98

¹⁶ Cf. 05 November 2009 Statement from the Co Investigating Judges : Judicial investigation of case 002/19-09-2007-ECCC-OCIJ and civil party applications; See also *Cambodian Code of Criminal Procedure* (1964) article 13, which notes: "It is not sufficient to establish that there is a breach of criminal law and a harm caused ; it is necessary to establish in addition that there is a link between these two element in fact or otherwise, and that the harm is a direct result of the breach of criminal law, and that it is real and existing".

¹⁷ *Cambodian Code of Criminal Procedure* (2007) articles 138 to 142 (Complaint with Application to become Civil Party).

17. The Civil Party application is therefore limited in the sense that it may not allege new facts during the judicial investigation without first receiving a Supplementary Submission from the Co-Prosecutors.¹⁸
18. Accordingly, in order for a Civil Party application to be admissible, the applicant is required to demonstrate that his or her alleged harm results only from facts for which the judicial investigation has already been opened.

B. INDIVIDUAL ASSESSMENT OF CIVIL PARTY APPLICATIONS

19. In light of the guiding principles set forth above, the co-investigating judges deliver the following findings relating to the admissibility of the civil parties:

i) Proof of identification

20. The Co-Investigating Judges note that all Civil Party applicants have provided sufficient document of identity documents and an address in Cambodia, and are therefore considered to have established their identities accordingly.

ii) Existence of harm

21. They note, moreover, that all applicants provided sufficient evidence to consider it plausible that they suffered personal and direct harm within the jurisdiction of the ECCC.
22. However, the Co-Investigating Judges find that **one (1)**¹⁹ Civil Party applicant did not demonstrate any proof of relevant harm nor sufficiently substantiate a bond of affection or dependency with an immediate victim to meet the psychological harm threshold in relation to facts under investigation. Furthermore, the necessary causal link between other alleged harm and the facts under investigation was not established.
23. The Co-Investigating Judges also find that **one (1)**²⁰ Civil Party applicant did not demonstrate any proof of kinship with the immediate victim(s) ; and the necessary causal link between other alleged harm and the facts under investigation was not established.

¹⁸ See, for e.g., consistent jurisprudence of the French Cour de Cassation : *Cass. crim. [25 June 1937] published in Bull. crim. n°134* ; *Cass. crim. [25 January 1961] published in Bull. crim. n 44* ; *Cass. crim. [17 May 1989] D. 1990 p. 74 note D. Mayer* ; *Cass. crim. [15 January 1991] Juris-Data n° 1991-700801 published in Bull. crim. n 24* ; *Cass. crim. [9 November 1995] Juris-Data n°1995-003776 published in Bull. crim. n 345*.

¹⁹ **See Annex 3 Inadmissible Civil Parties : (2) No proof of relevant harm, in conjunction with (5) Threshold for personal psychological harm not met, and (6) harm is not linked to the facts under investigation**

²⁰ **See Annex 3 Inadmissible Civil Parties : (3) No proof of kinship with an immediate victim, in conjunction with (6) harm is not linked to the facts under investigation**

iii) Causal link between the harm and the crimes alleged against the charged persons

24. In light of the above considerations, **ten (10)** Civil Party applications²¹ appear admissible, the applicants having provided sufficient elements tending to establish *prima facie* personal harm as a direct consequence of the facts within the scope of the judicial investigation, as described in the Introductory and Supplementary Submissions from the Co-Prosecutors in Case 002. The list distinguishes the different types of injuries alleged by the applicants. The reference to one applicant may therefore appear under several sections :

Tuol Sleng (S21) Security Center / Phnom Penh:

- **One (1)** applicant personally suffered psychological harm as a direct consequence of crimes committed against one or several more member(s) of his/her family, as described in paragraph 49-55 of the Introductory Submission

Forcible Transfer from Phnom Penh - Phase 1:

- **Two (2)** applicants suffered personal harm as immediate victims, directly as a consequence of the crimes described in paragraphs 37-39 of the Introductory Submission
- **Three (3)** applicants personally suffered psychological harm as a direct consequence of crimes committed against one or several more member(s) of their families, as described in paragraphs 37-39 of the Introductory Submission

Forcible Transfer to the North and Northwest Zones - Phase 2:

- **One (1)** applicant suffered personal harm as an immediate victim, directly as a consequence of the crimes described in paragraphs 40-41 of the Introductory Submission

Treatment of Buddhist:

- **One (1)** applicant suffered personal harm as an immediate victim, directly as a consequence of the facts crimes described in paragraph 72 of the Introductory Submission

Forced Marriage:

- **Four (4)** applicants suffered personal harm as immediate victims, directly as a consequence of the crimes described in Supplementary Submissions D146/3, D146/4 and D146/5

²¹

See Annex 2 Admissible Civil Parties

- **Two (2)** applicants personally suffered psychological harm as a direct consequence of crimes committed against one or several more member(s) of their families, as described in Supplementary Submissions D146/3, D146/4 and D146/5

25. Conversely, the Co-Investigating Judges find that the necessary causal link between the alleged harm and the facts under investigation was not established by **two (2) applicants**,²² to the extent that the reported facts are in their entirety distinct from those of which the Co-Investigating Judges are currently seized and no circumstances allow them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation.

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

DECLARE Civil Party applications **09-VU-00037 (D22/0524), 09-VU-00038 (D22/1246), 09-VU-01904 (D22/2891), 09-VU-01905 (D22/2892), 09-VU-01907 (D22/2894), 09-VU-01908 (D22/2895), 09-VU-01909 (D22/2896), 09-VU-01922 (D22/2909), 09-VU-01923 (D22/2910), and 10-VU-00947 (D22/3954)** admissible.

DECLARE Civil Party applications **09-VU-01906 (D22/2893), 09-VU-01924 (D22/2911), 09-VU-01925 (D22/2912), and 09-VU-03827 (D22/3478)** inadmissible and further declare that, given the important information they contain concerning the facts which occurred between 17 April 1975 and 6 January 1979, on the territory of Democratic Kampuchea, they will be placed on Case File **002/19-09-2007-ECCC-OCIJ** as complaints.

Done in Phnom Penh on 06 September 2010

សហចៅក្រមស៊ើបអង្កេត

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

²² See **Annex 3 Inadmissible Civil Parties** : (6) *Harm is not linked to the facts under investigation.*