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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE
Criminal Case File No. 001/18-07-07-ECCC-OCIJ (PTC01)

Phnom Penh, 19 November 2007

REPORT OF EXAMINATION

- A) Proceedings
- B) Legal provisions
- C) Facts at issue

បានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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A) PROCEEDINGS

I- Introduction

Pursuant to Rule 77 (10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“the Internal Rules”), the President of the the Pre-Trial Chamber has assigned, by the appointment No. 07-08-006 ECCC/PTC dated 24 August 2007, Judges Huot Vuthy and Rowan Downing to set out the details of the decision of the Co-Investigating judges to make a Detention Order which is appealed against and the relevant facts of the Case File No. 001/18-07-07-ECCC/PTC01.

In which the charged person

Kaing Guek Eav, alias Duch (“Duch”), male, born 17 November 1942, in Peuvveuy village, Peam Bav commune, Stong district, Kampong Thom province, Cambodian, pre-arrest address village O Tuntim, Commune Ta Sagn, District Somlot, Province Battambang, occupation teacher, father’s name Duch Ky (deseased), mother’s name Meas Kim Sieu (alive).

Duch is represented by Defence Lawyers Mr. Kar Savuth and Mr. François Roux. Duch is charged with crimes against Humanity, being crime(s) set out and punishable under articles 5, 29 (new) and 39 (new) of the Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004 (ECCC Law). On 2 October 2007, there has been a supplementary charge in respect of graves breaches of the Geneva Conventions of 1949, in breach of Article 6 of ECCC Law.

Purpose of this report

This report of the co-rapporteurs sets out the details of the decision appealed against and the facts in issue before this court. It is to assist those who are not parties to the proceedings understand the matters before the court.

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II- Facts

The Co-Prosecutors alleged, amongst other matters, that Duch was directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population, including, in broad terms: mass murder, arbitrary detention, and torture which occurred within a political context of widespread and systematic abuses and constitute crimes against humanity. In more specific terms, the allegations include keeping of some prisoners in pits which would fill with rain causing them to drown and torture inflicted upon prisoners by them being beaten, suspended from ropes and stabbed, having their fingernails punctured or removed and being bled to death.

It is alleged that many thousands of civilians died in S-21 between 1975 and 1979.

The following is a chronology of events relating to Duch's detention since 1999. It is understood that these events are not in dispute.

- 10 May 1999 – Duch was arrested by the authorities of the Kingdom of Cambodia and brought before the Military Court of Phnom Penh. The Investigating Judge of the Military Court issued an *Order to Forward for Investigation* in relation to Duch's case and The Office of the Military Prosecutor issued *Second Order to Forward Case for Investigation No. 029/99*, in which the Prosecutor indicted Duch, together with another, for crimes against domestic security.
- 6 September 1999 – Military Prosecutor Major General Sao Sok issued *Order to Forward Case for Investigation No. 044/99*, in which he indicted Duch, together with another, for the crime of genocide, in violation of Article 2 of Decree Law No. 1.
- 22 February 2002, 22 February 2003 and 22 February 2004 – “To ensure good investigation”, the Investigating Judge of the Military Court issued *Detention Orders* against Duch for crimes against humanity according to Articles 5 and 39 of the 2001 ECCC Law dated 10 August 2001.
- 28 February 2005, 28 February 2006 and 28 February 2007 – “In order to carry out a good investigation”, Investigating Judges of the Military Court issued three detention orders, citing charges of war crimes and crimes against internationally protected persons, according to Articles 6 and 8 of the 2004 ECCC Law.

III- Introductory Submission of Co-Prosecutors

On 18 July 2007, the Co-Prosecutors of ECCC filed an Introductory submission in which they asked the Co-Investigating judges to open a judicial investigation against a number of suspects, including Duch, and asked that all suspects be arrested and detained.

The Co-Prosecutors requested that Duch be placed in provisional detention on the grounds that there are well founded reasons to believe that he had participated in the crimes stated in the Introductory Submission, and that such detention is necessary to prevent pressure on witnesses, ensure his presence at the trial, protect his personal safety and preserve public order.

IV- A) Detention Order issued by Co-Investigating Judges

On 30 July 2007, the Co-Investigating Judges of ECCC issued warrant to bring Duch before them. Duch was then transferred from the Military Court detention centre to that of the ECCC. On 31 July 2007, after having conducted an adversarial hearing, the Co-Investigating Judges issued an Order for Provisional Detention not exceeding one year.

B) Reasons for the Decision of the Co-Investigating Judges

Factual situation and legal issues raised in the Decision

Within the context of military proceedings, Duch was placed in provisional detention beginning 10 May 1999 and has remained in detention since that date. "His continued provisional detention is problematic in light of international standards of justice and ... articles 9 (3) and 14 (3) (c) of the ICCPR".

The question is: "is such detention so excessive and prejudicial to the rights of the defence as to affect the very ability to bring this case within the jurisdiction of the Extraordinary Chambers, to no longer allow the detention of the Charged Person within the jurisdiction of the Extraordinary Chambers, or even to require the Co-Investigating Judges to stay the proceedings?"

The choice is: must the maxim *male captus bene detentus* apply, or should the theory of abuse of process take precedence? In plain words, should the circumstances which bring an accused before a tribunal have no effect on the judgment of the accused by the court or is what has previously occurred to the accused to be considered such an abuse or violation of the accused's rights that continuing with the proceedings would "contravene the court's sense of justice"?

Conclusion of the Co-Investigating Judges

(1) The Co-Investigating Judges found that they *do not have jurisdiction to determine the legality of Duch's prior detention*. The fact that the ECCC is part of the judicial system of Cambodia does not lead to the conclusion that this tribunal acted in concert with the military court. The tribunal only became operational on 22 June 2007 when the Internal Rules entered into force.

(2) *The abuse of process doctrine does not apply to the case*. Courts applying this doctrine have always considered the proportional relationship between the alleged violations and the proposed remedy. *In a case of crimes against humanity, proceedings should only be stayed where the rights of the accused have been seriously affected*. The Co-Investigating Judges, after considering the jurisprudence on this matter found:

"Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the [ECCC], the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused."

An eventual remedy for the prejudice caused by the prior detention is not an issue during the investigative phase of the case.

The reasons for ordering provisional detention are:

- (1) the gravity of the alleged acts is such that public order is disrupted and release could lead to violence;
- (2) because Duch may be sentenced to life imprisonment, there is a risk of flight; and
- (3) the detention is required to protect Duch's safety.

V- **A) Appeal lodged by Duch against the Order of Provisional Detention**

On 23 August 2007, Duch's lawyers filed an appeal against the Order of Provisional Detention and, on 5 September 2007, they filed an Appeal Brief.

B) Duch's submissions

The grounds of appeal, as set out in the Appeal Brief, are:

- (1) Duch should be released on the grounds that his provisional detention is a violation of Cambodian law and of the international standards for the protection of human rights and that the necessary legal inferences from this violation have not been drawn.
- (2) The period already spent in detention should have been taken into account in determining whether to keep Duch in detention for a further year, and the conditions for detaining Duch as at 31 July 2007 were not met.
- (3) Duch should be awarded compensation for the harm he has suffered as a result of the time he has spent in provisional detention which has exceeded legal time limits.

Particular assertions by Duch's lawyers in support of these grounds

1. Illegality of detention

Article 14 (3) of the International Covenant on Civil and Political Rights and 5 (3) of the the European Convention on Human Rights (similar to Article 9 (3) International Covenant on Civil and Political Rights) have been violated. These provisions assert the fundamental principle that an accused is entitled to trial within a reasonable time or release and are applicable

This right is protected under Cambodian law: Constitution of 1993, United Nations Transitional Authority in Cambodia Penal Code of 1992, Law on Temporary Detention Period of 26 August 1999.

Provisional detention of more than 8 years is illegal under Cambodian law. New charges were brought several times against Duch in order to keep him in provisional detention.

The Constitution provides that Cambodia shall respect human rights as stipulated in the various human rights instruments.

Article 9 (3) of the International Covenant on Civil and Political Rights provides that a charged person "shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody."

According to European Convention on Human Rights case law, it is necessary to establish that the judicial authorities have exercised particular diligence in conducting the proceedings, in order not to fall foul of Article 5 (3) of the Convention.

Duch has not been tried in as expeditious manner as possible, or failing that, released, as required under human rights law.

He has been detained without reasons given. The length of detention is not attributable to Duch or his defence.

2. Jurisdiction

The Co-Investigating Judges did have jurisdiction to determine the legality of Duch's prior detention, the Pre-Trial Chamber is asked to declare that it has jurisdiction and must draw all necessary legal inferences from the violation of Duch's rights.

In ordering Duch's detention for a ninth year, the Co-Investigating Judges have contributed to the excessive duration of the detention and validated the prior proceedings relating to his detention.

Duch has been detained while awaiting the establishment of the ECCC and the proceedings before the military court and the ECCC are intrinsically linked.

Article 12 of the Agreement, and Article 33 of ECCC Law, state that ECCC shall exercise its jurisdiction in accordance with international standards of justice.

Decisions of the international tribunals are relevant concerning the entitlement to trial within a reasonable time or release. These confirm that the relevant period starts from the arrest or initial detention and that the period prior to the date on which the court was granted jurisdiction to examine the violation has to be taken into consideration.

The international criminal tribunals have allowed similar applications for release for persons accused of crimes as serious as the ones with which Duch is accused.

3. Conditions for Provisional Detention

Even if the decision of the Co-Investigating Judges relating to jurisdiction was valid, the Co-Investigating Judges were bound to take into account the previous period of detention when ruling on a further period of detention.

The conditions of Internal Rule 63 (3), providing for the preconditions for the making of a detention order, were not met. The Co-Investigating Judges were of the opinion that Duch had to remain in detention: (1) to preserve public order, (2) to ensure that Duch would be present in court, and (3) to protect Duch's own safety. These reasons were neither pertinent nor sufficient.

Public order

According to the case law, the conditions to be met before an order for detention can be made on this ground are: facts which demonstrate that the release of the detained person would disturb public order; detention remains legitimate only if there is a threat to public order and; it may not be used in anticipation of a custodial sentence. The relevance of this factor decreases over time.

Personal safety

The Co-Investigating Judges have not demonstrated that a genuine threat exists. Moreover, Duch could be protected in other ways, e.g. house arrest.

Risk of flight

The only justification invoked is that Duch may be sentenced to life imprisonment. According to international jurisprudence, the risk that the person will abscond must be established, and the risk of absconding may not simply be assessed on the basis of the gravity of the sentence.

Duch should be granted bail and that he can meet bail conditions and alternative measures to detention may be adopted, e.g. house arrest.

4. Reparation

The Pre-Trial Chamber is requested to state that in the event of an acquittal, financial compensation should be paid to Duch, and in the event of a conviction, the 8 years he has already served should be deducted from the sentence.

VI- A) Response by the Co-Prosecutors

In matters of this nature the Co-Prosecutors defend the decision of the Co-Investigating judges before this court. Submissions in response to the Appeal Brief were filed by the Co-Prosecutors on 3 October 2007.

B) Co-Prosecutors' submissions

The Prosecution argues that the appeal should be dismissed because:

- (1) the Co-Investigating Judges were correct in finding that the grounds for provisional detention were satisfied; and
- (2) any violations of the right to be tried within a reasonable time are not attributable to the ECCC, and such violations are not of sufficient seriousness to require the ECCC to provide Duch with a remedy at the investigative stage.

The Prosecution also seeks a ruling on the interpretation of the time limit in Internal Rule 75, asserting that the Defence had failed to comply with the time limits provided.

1. Grounds for Provisional Detention

The Prosecution submits that there are both well founded reasons to believe that Duch committed the offences charged in the Introductory Submission and a solid evidentiary basis for finding that provisional detention is necessary.

The Pre-Trial Chamber is asked to apply international standards concerning procedure and to seek guidance primarily from the jurisprudence of other international tribunals rather than the decisions of human rights bodies.

It is pointed out that the grounds under Internal Rule 63(3) are disjunctive. The standard in relation to the grounds is described as being one of "considering" that they are made out, as distinct from proving the existence of any of the grounds.

Standard of review and burden of proof

The Prosecution submits that the standard of review is whether it can be shown that the Co-Investigating Judges made a "discernible error" in the exercise of their discretion and the Defence must bear the burden of proof of demonstrating that the Co-Investigating Judges erred.

Alternatively, the Pre-Trial Chamber should find that the grounds for detention have been made out, and that the burden of showing that provisional detention is no longer necessary falls on the Defence.

Ground 1

The Prosecution refers to evidence demonstrating that Duch is a flight risk. The Prosecution argues that there is no discernible error in the Co-Investigating Judges exercise of discretion, or alternatively, that the Defence has failed to prove that the presence of Duch would be ensured should he be released.

Ground 2

The Prosecution refers to evidence demonstrating that the safety of Duch would be imperiled if he were released and that the passage of time has not diminished these threats. The Prosecution argues that there is no discernible error in the Co-Investigating Judges exercise of discretion, or alternatively, that the Defence has failed to prove that there would be no danger to the security of Duch if he were released.

Ground 3

The Prosecution argues that commencement of judicial activities may impact upon public order as memory and suffering is reactivated, and that there was thus no discernible error in the Co-Investigating Judges exercise of discretion or alternatively, the Defence has failed to prove that there would be no danger to the public should Duch be released.

Ground 4

The Prosecution argues that as the Co-Investigating Judges did not address the issue of exerting pressure on witnesses, the Pre-Trial Chamber is entitled to substitute its own discretion and therefore presents submissions on this point.

The Prosecution asserts that no bail order would be rigorous enough to ensure the presence of Duch and there is no precedent for such an order in Cambodian criminal procedure as the concept has only recently been introduced.

2. No error in failing to release Duch

The Prosecution submits that the Co-Investigating Judges Order was not a validation of the prior detention ordered by the Military Court but rather an independent judicial decision taken in the exercise of their unique jurisdiction, in that (1) the ECCC is an independent judicial entity, separate from the Military Court, and (2) the ECCC has never acted in concert with or adopted the actions of the Military Court.

Independence of the ECCC

The ECCC is a "special internationalized tribunal":

- (1) created by international treaty;
- (2) forming part of the "machinery of international justice";
- (3) having different jurisdiction to the national courts of Cambodia, being limited materially, temporally and personally;
- (4) having no possibility of appeal to other courts in Cambodia;
- (5) having a limited lifespan; and
- (6) having unique structural characteristics not found in domestic courts.

No concerted action between ECCC and Military Court

The Prosecution submits that the fact that the Military Court invoked ECCC law in ordering the detention of Duch is of no consequence as there is no judicial continuity either in fact or law between the proceedings of the Military Court and of the ECCC. In particular, the ECCC did not ask the Military Court to detain Duch; the Office of the Co-Prosecutors conducted its own preliminary investigation; Duch was arrested through an arrest warrant issued by the Co-Investigating Judges and not transferred from the Military Court and; the complete files of the Military Court have not been placed before the Co-Investigating Judges.

The Prosecution submits that the Pre-Trial Chamber should examine the extent to which Duch exhausted his remedies before the Military court as part of any consideration as to whether the ECCC should provide a remedy.

3. Residual basis for a remedy

The Prosecution submits that the Co-Investigating Judges were correct in determining that prolonged detention was not sufficiently grave to require an immediate remedy, and that any eventual remedy was not an issue at the investigative stage. It is argued that, relying on international tribunal case law as a more appropriate guide than human rights case law, only where there is evidence of torture or serious mistreatment must a tribunal trying serious international crimes provide an immediate remedy.

VII- Amicus curiae Briefs (being participants not involved in a the case but that have made submissions to the Court to assist it)

On 4 September 2007, this Court invited organizations and the public to submit written *amicus curiae* briefs in this matter by October 3, 2007. The Court acknowledges with thanks the submissions received from:

- (1) Stan Starygin;
- (2) Jeffrey M. Kahan of the Cambodian Defenders Project;
- (3) Cambodian Human Rights Action Committee;
- (4) Professor David Scheffer;
- (5) The Centre for Social Development & The Asian International Justice Initiative; and
- (6) Anne Heindel.

These submissions deal with substantially legal issues and are not otherwise referred to in this report. These submissions will be considered by the Court, as will the responses to such made by the Defence and the Co-prosecutors.

B) RELEVANT LEGAL PROVISIONS

Duch, if found guilty of the offenses for which he is currently detained and under investigation, is liable under Article 39 of the ECCC Law to “be sentenced to a prison term from five years to life imprisonment.”

The provisional detention in the present case is governed by Article 63 of the Internal Rules of this Court. Paragraph (3) of said Rule states the grounds on which the Co-Investigating Judges can order a provisional detention and paragraph (4) provides the right for the charged person to lodge an appeal before the Pre-Trial Chamber.

Article 63 of the Internal Rules

3. *The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:*

- a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and*
- b) the Co-Investigating Judges consider Provisional Detention to be necessary measure to:*
 - i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;*
 - ii) preserve evidence or prevent the destruction of any evidence;*
 - iii) ensure the presence of the Charged Person during the proceedings;*
 - iv) protect the security of the Charged Person; or*
 - v) preserve public order.*

4. *The Charged Person may appeal against an order for Provisional Detention to the Pre-Trial Chamber.*

C) FACTS AT ISSUE

Well-founded reasons to believe that the person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63 (3) a))

The Co-Prosecutors alleged that Duch has admitted that he was the deputy and then Chairman of S-21, from 1975 onward, a fact not contested by the Defence lawyers in their Appeal Brief. This is also the position he had adopted when speaking with journalists, according to documents filed by the Co-Prosecutors.

Duch has asserted that his authority in S-21 was theoretical and that it was merely a conduit of his superiors, as reported in two media articles following interviews in 1999, titled “Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul” and “Duch’s Mother: Family Fears for the Tuol Sleng (S-21) Prison Chief.”

Since the Order for Provisional Detention, Duch has been interviewed several times by the Co-Investigating Judges and has made a number of comments upon the evidence which this court will take into account, but cannot, at this stage, make public, as the case file is still confidential.

Necessary measure to ensure the presence of the Charged person during the proceedings (Internal Rule 63 (3) b) iii))

Duch was at liberty from 1979 to 1999, before he was arrested and detained by the Military Court.

Duch has used a number of names including Yim Keav, Guek-Eav, Duch and Hang Pin as well as Kaing Cheav.

It is argued that it was a common practice during the revolution to change one's name.

In the article titled "Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul", journalist Seth Mydans reports that Duch had told him that he left the movement in 1992 and became a teacher. Then, under "assumed names", he worked for the United Nations and private relief organizations.

In the book "The Lost Executioner: A Story of the Khmer Rouge", journalist Nic Dunlop reports that after Duch was first recognized by an official, who requested anonymity, he has indicated to that official that he knew people in Samlut that can offer him protection (the moment is not indicated in the extract filed by the Co-Prosecutors). He was then offered a job there as the Director of Education.

Journalist Dunlop also reports that he had seen the biography and curriculum vitae that Duch gave to his employer at the education offices in Sisophon.

Duch was in Samlut when Dunlop discovered him in April 1999.

According to Dunlop, when the story of his discovery and confession was made public, Duch disappeared.

In the article "Duch's Mother: Family Fears for the Tuol Sleng (S-21) Prison Chief", journalists John Ciorciari and Kok-Thay Eng report a conversation with Duch's mother where she said that Duch disappeared in 1979 and that his family did not hear from him for nearly two decades, so she thought he was dead. The journalists also report that Duch's mother mentioned that he came back at some point to visit her and resumed frequent visits to her between 1996 and 1999. According to the journalists, Duch lived a quiet life in the Khmer Rouge controlled area of northwestern Cambodia until 1995. When he became christian in 1995, he adopted the alias Ta pin and work as medical aid worker in refugees camp.

In an article titled "Death in Detail", journalist Nate Thayer, who had conducted a 40 hour interview with Duch just before he was taken into custody, quotes him: "I guess that I will have to go to jail now, but it is OK. The killings must be understood. The truth should be known". Nic Dunlop writes in his article that Duch had given himself to the authorities. Apparently, he was flown by helicopter to Phnom Penh in a high-security prison to be formally charged.

The Defence proposes guarantees to ensure that Duch will appear for his trial but do not submit any evidence in respect of such (para. 123).

Necessary measure to protect the security of the Charged person (Internal Rule 63 (3) b) iv))

After having talked with Nic Dunlop about the Khmer Rouge regime and given him names of the leaders, Duch asked Dunlop if "anyone know he were here and he knew about his identity. He added that "They will be angry if the know", apparently referring to the Khmer Rouge, either the remaining ones or the ones who had defected to the government. Dunlop reports that he did not know if it was a caution or a threat. He adds that Duch's protector was still in control of the area and, as far as he knew, Duch could still order people to silence him if he felt threatened.

Duch has given interviews to a representative of the UNHCR and journalists where he confirmed his previous position as Chairman of S-21 and exposed other members of the Regime. In three media articles, it is reported that before his arrest in May 1999, Duch had expressed his fear for his life to journalists. The United Nations and Amnesty International also expressed their concerns about Duch's safety at that time, since the interviews he was giving exposed crimes committed by Khmer Rouge leaders.

The Co-Prosecutors also raised the fact that Duch's identity is now famous as his "recent photograph has appeared in virtually every newspaper and on television stations in Cambodia."

The Defence raised the fact that during the time Duch was in liberty, no attempt was made to his safety.

Necessary measure to preserve public order (Internal Rule 63 (3) b) v))

To support their assertion that the commencement of ECCC's judicial activities may pose risks on Cambodian Society, the Co-Prosecutors filed a report assessing the potential witnesses' fear to testify before the ECCC, which cannot be disclosed publicly.

The Defence raised the facts that when Duch was at liberty between 1979 and 1999, the public order was not disrupted.

Necessary measure to prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC (Internal Rule 63 (3) b) i))

Duch asserts that he does not know the name of the witnesses and that even if he did, he has no reason to interfere with them.

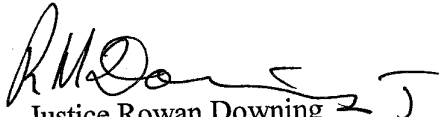
It is not contested that the full case file has now been made available to Duch, including the names of potential witnesses.

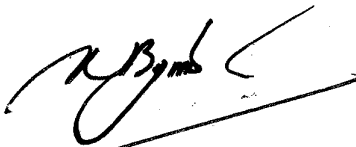
The Co-Prosecutors referred to an article titled "Victims and Perpetrators – Testimony of Young Khmer Rouge Comrades" to support their allegation that the prisons guard who use to serve under Duch at Prison S-21 expressed the "ubiquitous feeling of fear" they had at the time they were working at S-21.

A public report titled "Weapons Collection Record 2005-2007 has been provided, stating that 16 940 weapons were collected in two Cambodian districts from September 2005 to August 31 2007 (obviously prepared after the Order for Provisional Detention), and another titled "How many

Weapons Are There in Cambodia?", estimating that some 22 000 to 85 000 weapons were illegally circulating in Cambodia in 2005.

Phnom Penh, 19 November 2007


Justice Rowan Downing


Judge Huot Vuthy