D164/3/6

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC25)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 12 November 2009

PUBLIC

DECISION ON THE APPEAL FROM THE ORDER ON THE REQUEST TO SEEK EXCULPATORY EVIDENCE IN THE SHARED MATERIALS DRIVE

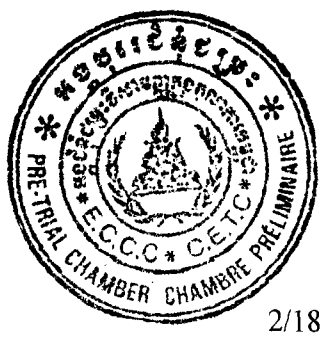
Co-Prosecutors
CHEA Leang
YET Chakriya
William SMITH
PICH Sambath
Vincent de WILDE d'ESTMAEL

Charged Persons
SARY Ieng

Lawyers for the Civil Parties
HONG Kim Suon
LOR Chunthy
NY Chandy
KONG Pisey
YONG Phanith
KIM Mengkhy
MOCH Sovannary
SIN Soworn
Silke STUDZINSKY
Martine JACQUIN
Philippe CANNONE
Pierre Olivier SUR
Elizabeth RABESANDRATANA
Olivier BAHOUGNE

Co-Lawyers for the Charged Persons
ANG Udom
Michael G. KARNAVAS

David BLACKMAN
Annie DELAHAIE
Fabienne TRUSSES-NAPROUS
Patrick BEAUDOIN
Marie GUIRAUD
LYMA NGUYEN



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009" filed on 24 July 2009 (the "Appeal").[1] "SMD" is the acronym applied for the Shared Materials Drive maintained as part of the electronic data deposited with the ECCC.

I- PROCEDURAL BACKGROUND

1. On 19 June 2009, the Co-Investigating Judges issued their Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD (the "Order")[2] dismissing the request filed jointly by the Co-Lawyers for Ieng Thirith, Ieng Sary and Nuon Chea on 20 April 2009 (the "Request").[3]

2. On 3 July 2009, the Co-Lawyers for Ieng Sary filed a notice of appeal[4] and, on 24 July 2009, they filed their Appeal.

3. On 10 August 2009, the Co-Prosecutors filed their Response.[5] They requested that the Pre-Trial Chamber determine the Appeal on the basis of written submissions alone.[6]

4. On 20 August 2009, the Pre-Trial Chamber decided to determine the Appeal on the basis of written submissions alone and directed the Co-Lawyers to file a reply within the deadline provided for in Article 8.4 of the Practice Direction ECCC/01/2007/Rev.4.[7]

5. On 24 August 2009, the Co-Lawyers for Ieng Sary filed their Reply.[8]

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[1] Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Material Drive, 24 July 2009, D164/3/1 (the "Appeal").
[2] Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2.
[3] Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, D164.
[4] Record of Appeals, 3 July 2009, D164/3.
[5] Co-Prosecutors' Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary against the Co-Investigating Judges' Order denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, D164/4/2 (the "Response").
[6] Response, paras 12-16.
[7] Decision on "Request for an Oral Hearing" on the Appeals PTC 24 and 25, 20 August 2009, D164/4/3.

II- SUBMISSIONS OF THE PARTIES

6. The Appeal adopts the facts and arguments raised in the "Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009"[9] filed on the same day by the Co-Lawyers for Ieng Thirith, Nuon Chea and Khieu Samphan ("Joint Appeal") and made further submissions on two grounds.

7. By their Appeal, the Co-Lawyers for Ieng Sary request the Pre-Trial Chamber to (i) quash the Order, (ii) "declare that the principle of sufficiency of evidence espoused by the [Co-Investigating Judges] must proactively search for and take into account all exculpatory evidence when assessing to indict a Charged Perosn under Rule 67(1)"; (iii) order the Co-Investigating Judges to review all the documents placed in the SMD, (iv) provide a report of their analysis and (v) provide a list of exculpatory material contained in the SMD.[10]

8. In the Joint Appeal, it was argued that (i) by adopting the approach that they merely need to find sufficient evidence to indict a Charged Person before closing their investigation, the Co-Investigating Judges breached their obligation to seek exculpatory evidence set out in Internal Rule 55(5),[11] (ii) the documents on the SMD fall under "other material of evidentiary value" in Internal Rule 53(2) and therefore the Co-Investigating Judges have a duty to analyse it,[12] (iii) the Co-Investigating Judges cannot relieve themselves of their obligation to investigate the documents in the SMD by relying on the Charged Person's right to be tried without delay as this would breach Internal Rules 21 and 55(5)[13] and (iv) the Request was sufficiently specific.[14]

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[8] Ieng Sary's Reply to the Co-Prosecutor's Response to the Appeal against the Co-Investigating Judges' Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Material Drive, 24 August 2009, D164/3/4 (the "Reply").

[9] Case File 002/19-09-2007-ECCC/OCIJ (PTC24), Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 24 July 2009, D164/3/1 (the "Joint Appeal").

[10] Appeal, pages 5-6.

[11] Joint Appeal, paras 18-21.

[12] Joint Appeal , paras 22-28.

[13] Joint Appeal, para. 34.

[14] Joint Appeal, paras 35-42.

9. In their Appeal, the Co-Lawyers for Ieng Sary additionally argue that there is no principle of sufficiency of evidence in a civil law system and that the Co-Investigating Judges confused the requirement for sending a charged person for trial with the closing of an investigation.[15] They argue that the Charged Person must not be forced to choose between the right to a trial without undue delay and the right to a fair trial[16] and annex to the Appeal a waiver signed by the Charged Person on 24 July 2009 of "his right to a fair trial without undue delay for a period of one month in order for the OCIJ to undertake the investigative action requested".[17]

10. In their Response, the Co-Prosecutors submit that the Co-Investigating Judges properly refused the Request and that the Appeal should be dismissed but they assert that it may be appropriate for the Pre-Trial Chamber to substitute, or supplement, the reasoning in the Order in so far as it refers to the "principle of sufficiency" by the one proposed in the conclusions of their Response.[18]

11. In particular, the Co-Prosecutors argue that the Co-Investigating Judges erred in making an unqualified statement that a judicial investigation can be closed as soon as there is sufficient evidence to indict and that sufficiency of evidence outweighs exhaustiveness.[19] They assert that viewed in its context, the application of this principle is not so broad as to justify dismissal of the Order[20] as the Co-Investigating Judges have properly construed both their obligation to impartially explore all relevant documentary sources in search for inculpatory and exculpatory evidence and the requirement that requests for investigative actions must be relevant and sufficiently specific.[21] They further assert that the Co-Investigating Judges do not have an obligation to analyse the documents on the SMD as they were not submitted with the

[15] Appeal, paras 3-10.
[16] Appeal, paras 11-12.
[17] Appeal, para. 12.
[18] Response, paras 58 and 59.
[19] Response, para. 28.
[20] Response, para. 28.
[21] Response, para. 26.

Introductory Submission in support of the allegations therein nor have they been made part of the Case File subsequently.[22]

12. In their Reply, in addition to making comments on the Pre-Trial Chamber's decision to determine the Appeal on the basis of written submissions[23], the Co-Lawyers for Ieng Sary reiterate their objection to a specificity requirement for a request for investigative action and state that "[t]he [Co-Prosecutors] may not re-characterise the [Co-Investigating Judges]' clear and unequivocal assertion that it must only investigate until there is enough evidence to indict".[24] They also submit that the Order "strongly implies that the [Co-Investigating Judges] is improperly relying on the right to a trial without undue delay to dismiss otherwise legitimate investigative requests".[25] Finally, they point out that the the Order did not address the waiver signed by the Charged Person.[26]

III- ADMISSIBLITY OF THE APPEAL

13. On 19 June 2009, the Co-Investigating Judges issued their Order, which was notified to the Parties on 23 June 2008. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 3 July 2009, in accordance with Internal Rule 75(1). The Appeal was filed on 24 July 2009, within the time limit set out in Internal Rule 75(3).

14. It is asserted in the Joint Appeal that the Appeal is admissible under Internal Rule 74(3)(b) as it is lodged against an order refusing a request for investigative action.

15. The Pre-Trial Chamber observes that pursuant to Internal Rule 74(3)(b), a charged person may appeal against orders of the Co-Investigating Judges refusing requests for investigative actions allowed under the Internal Rules.

[22] Response, para. 34.
[23] Reply, para. 1.
[24] Reply, para. 6.
[25] Reply, para. 11.
[26] Reply, para. 12.

16. Internal Rule 58(6), which deals specifically with requests for investigative actions by charged persons, provides:

> "6. At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber."

17. Internal Rule 55(10), which addresses more generally the right of all parties to request investigative actions, provides:

> "10. At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party 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. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal."

18. In its Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, the Pre-Trial Chamber found that "requests for investigative actions should be interpreted as being requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth."[27]

19. The Request, in its essence, sought that the documents made available by the Office of the Co-Prosecutors and the Co-Investigating Judges through the SMD be analysed by the Co-Investigating Judges in order for them to identify potential exculpatory evidence and, eventually, place it in the Case File. This Request was rejected on its merits by the Co-

[27] Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 28.

Investigating Judges. Without assessing the fulfilment of the conditions for the Request to be valid and its merits, the Pre-Trial Chamber finds that taking into account its purpose, the Request can be seen as a request for investigative action. The Order refusing such request is thus appealable under Internal Rule 74(3).

20. For these reasons, the Pre-Trial Chamber finds that the Appeal is admissible.

III- CONSIDERATIONS

A. Standard of review

21. The Pre-Trial Chamber observes that the Co-Investigating Judges have a broad discretion when deciding on requests for investigative actions. In this regard, Internal Rule 55(5) provides that "[i]n the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth". In its Decision on Appeal against Extension of Provisional Detention of Ieng Thirith, the Pre-Trial Chamber acknowledged that the Co-Investigating Judges "are independent in the way they conduct their investigation".[28] As such and in the absence of any precise criteria in the Internal Rules, the Co-Investigating Judges have discretion to decide on the usefulness or the opportunity to accomplish any investigative action, even when it is requested by a party.[29] This is merely a question of fact.[30] In other words, the parties can suggest, but not oblige, the Co-Investigating Judges to undertake investigative actions.[31] It is further noted that even if an investigative action is denied during the judicial investigation, it remains possible that this action be ordered at a later stage by the Trial Chamber.[32]

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[28] Decision on Appeal against Extension of Provisional Detention of Ieng Thirith, para. 63, referring to the French system which has been used to interpret Internal Rule 55(5), in particular : C. Guéry, *Instruction Préparatoire,* Rép. pén. Dalloz, January 2008, para. 56.
[29] C. Guéry, *Instruction Préparatoire,* Rép. pén. Dalloz, January 2008, para. 56; Crim. Cass., 19 September 1995, Bull. crim. 1995, no. 272, p. 759.
[30] Crim. Cass., 25 March 1997, Bull. Crim. 1997, no. 118, p. 400; Crim. Cass., 19 September 1995, Bull. crim. 1995, no. 272, p. 759.
[31] F.L. COSTE, *Chambre de l'instruction,* Rép. pén. Dalloz, December 2006, para. 163.
[32] Internal Rule 93.

22. The Pre-Trial Chamber notes that the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea and the Internal Rules do not define the standard of its review when seized of appeals against orders refusing requests for investigative actions.

23. The Cambodian Code of Criminal Procedure ("CPC"), for its part, grants the Investigation Chamber jurisdiction to "order additional investigative action which it deems useful"[33] and generally gives broad powers to the Investigation Chamber when seized of an appeal, as previously stated by the Pre-Trial Chamber in its Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH".[34]

24. The Pre-Trial Chamber observes that the Internal Rules do not grant the Pre-Trial Chamber the power to order additional investigative actions but rather limit its role to deciding on appeals lodged against orders of the Co-Investigating Judges.[35] This departure from the CPC is justified by the unique nature of the cases before the ECCC, which involve large scale investigations and extremly voluminous cases, and where the Pre-Trial Chamber has not been established and is not equiped to conduct investigations. As a decision on a request for investigative action is a discretionary decision which involves questions of fact, the Pre-Trial Chamber considers that in the particular cases before the ECCC, the Co-Investigating Judges are in a best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files. In these circumstances, it would be inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the Co-Investigating Judges when deciding on an appeal against an order refusing a request for investigative action.

25. The Pre-Trial Chamber notes that the Appeals Chambers of international tribunals have a very limited scope of review when dealing with appeals against discretionary decisions of a first

[33] CPC, Art. 262.
[34] Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007, C5/45, para. 41.
[35] Internal Rule 73(a).

instance jurisdiction. In this regards, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") stated in its "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel" in the case of *Milošević v. Prosecutor:*[36]

"Standard of Review

9. As the Appeals Chamber has previously noted, a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure." A Trial Chamber's assignment of counsel fits squarely within this last category of decisions. It draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings. The Appeals Chamber therefore reviews the Trial Chamber's decision only to the extent of determining whether it properly exercised its discretion in imposing counsel on Milosevic.

10. In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision." In order to challenge a discretionary decision, appellants must demonstrate that "the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion," or that the Trial Chamber "[gave] weight to extraneous or irrelevant considerations,... failed to give weight or sufficient weight to relevant considerations, or... made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly." In practice, this array of factors boils down to the following simple algorithm: a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then,

[36] *Milosevic v. Prosecutor,* IT 02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel", Appeals Chamber, 1 November 2004 (the "*Milosevic* Decision").

the scope of appellate review is quite limited: even if the Appeals Chamber does not believe that counsel should have been imposed on Milosevic, the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously."[37]

26. Seeking guidance in the jurisprudence of international tribunals, the Pre-Trial Chamber finds that the review of the Order is limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion, by applying the test set out above. It is not for the Pre-Trial Chamber to replace its view for that of the Co-Investigating Judges.

b. The Merits of the Appeal

27. The SMD is a database accessed by all Parties and sections of the Court, including the Defence Support Section, through the ECCC Search Portal that contains more than 17,000 documents and videos which had not been analysed yet but are asserted to be potentially relevant to the trials before the ECCC. The SMD Protocol provides:

> "1. The OCIJ and the Parties may have (hard/electronic copies of documents and audio-visual material, sometimes voluminous) at their disposal which has not yet been analyzed for relevance to the case file. In the absence of such analysis, these documents have not been placed on the case file so as not to unduly burden the case file (and the translation teams). However, some of the material could contain relevant exculpatory/inculpatory evidence and their sources are already open (the "Swedish Collection", DC Cam and Bophana etc).
>
> 2. A Shared Materials Drive (SMD) will be created in ZyImage onto which the OCIJ and the Parties could place such materials (other than those related to an ongoing investigation by the OCP or a judicial investigation by the CIJ) and through which access can be given to such material."[38]

28. The documents on the SMD include:

[37] *Milosevic* Decision, paras 9-10 (footnotes omitted).
[38] Shared Materials Drive Protocol, available at: http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActio

(i) clips of contemporaneous footage from the Democratic Kampuchea (DK) era;
(ii) documents from the People's Revolutionary Tribunal at Phnom Penh in 1979;
(iii) numerous contemporaneous records created by the DK government;
(iv) interviews;
(v) analytical material related to the DK period;
(vi) newspaper clippings, press releases, public statements, excerpts from the British Broadcasting Corporation's World Service Summary of World Broadcasts coverage of Far Eastern Affairs and academic articles related to DK and the Communist Party of Kampuchea (CPK); and
(vii) a collection of contemporaneous, open source, radio and press reports relating to DK and associated issues, from January 1975 to January 1979.

29. These documents may contain relevant information to the judicial investigation, including:
(i) interviews with suspects named in the Introductory Submission, victims and potential witnesses;
(ii) information about living conditions in Cambodia during the DK era;
(iii) information on the structure and organization of the DK government;
(iv) evidence of information flow between various branches of the DK government;
(v) official publications produced by the government of DK; and
(vi) contemporaneous news coverage of the situation in Cambodia from the early 1970s to the 1990s.

30. The Pre-Trial Chamber notes that a large part of the documents have been placed by the Co-Prosecutors on the SMD on 20 July 2007, two days after the filing of the Introductory Submission.[39] Other documents were placed on the SMD by the Co-Investigating Judges.

[39] It is noted that the Order appears to be incorrect when it says that the SMD was made available "two days before the opening of the current judicial investigation" as it is said to have been made available on 20 July 2007 (Order, para. 1) and that the Introductory Submission has been filed on 18 July 2007 (Order, para. 14).

31. The Parties to this Appeal dispute the fact that the documents on the SMD fall under Internal Rule 53(2) so the Co-Investigating Judges would have an obligation to investigate them.

32. Pursuant to Internal Rule 53(2), an Introductory Submission "shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory". The expression "case file" is defined in the Glossary of the Internal Rules as referring to "all the written records (procès-verbaux) of investigative action undertaken in the course of a Preliminary Investigation or a Judicial Investigation, together with all applications by parties, written decisions and any attachments thereto at all stages of the proceedings, including the record of proceedings before the Chambers". When read in conjunction with the definition of "case file" set out in the glossary, the expression "any other material of evidentiary value in the possession of the Co-Prosecutors" set out in Internal Rule 53(2) appears to refer to documents other than those described in the definition of "case file" that the Co-Prosecutor considers to constitute evidence as these either support their Introductory Submission or are of exculpatory nature.

33. The Pre-Trial Chamber observes that the documents on the SMD are not part of the material referred to by the Co-Prosecutors to support their Introductory Submission or that were attached to it when it was sent to the Co-Investigating Judges in order to open the judicial investigation. While it is not clear to what extent the Co-Prosecutors have reviewed the documents on the SMD, they indicated that they have not analysed this material. They have not reached a conclusion that documents or videos in the SMD have "evidentiary value". The Co-Prosecutors further declare that they are not aware of the existence of exculpatory evidence on the SMD, although they mention that they cannot not exclude this possibility. The fact that the Co-Prosecutors placed the documents on the SMD is not, of itself, evidence that the documents are themselves relevant for the investigation. The Co-Prosecutors placed this material on the SMD as a matter of fairness to make it available to the Co-Investigating Judges and all parties

because it was in their possession and they considered it might contain relevant information in relation to the Introductory Submission.[40]

34. For these reasons, the Pre-Trial Chamber finds that the documents on the SMD do not fall under Internal Rule 53(2). The Co-Prosecutors acted fairly by making this material available for perusal by the Co-Investigating Judges and the parties. This did not, by itself, create an obligation for the Co-Investigating Judges to review the documents on the SMD as it was clearly not part of the Introductory Submission or of any Supplementary Submission.

35. The Pre-Trial Chamber notes that the Co-Investigating Judges have a duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence. To fulfil this obligation, the Co-Investigating Judges have to review documents or other materials when there is a prima facie reason to believe that they may contain exculpatory evidence. This review shall be undertaken before the Co-Investigating Judges decide to close their investigation, regardless of whether the Co-Investigating Judges might have, or not have, sufficient evidence to send the case to trial. In this respect, the Internal Rules indicate that the Co-Investigating Judges first have to conclude their investigation,[41] which means that they have accomplished all the acts they deem necessary to ascertaining the truth in relation to the facts set out in the Introductory and Supplementary Submissions,[42] before assessing whether the charges are sufficient to send the Charged Person to trial or whether they shall dismiss the case.[43] This latter step is done only after the Co-Investigating Judges have notified the parties that their judicial investigation is closed,[44] the parties had the opportunity to present additional requests for investigative actions[45] and the Co-Prosecutors have filed their final submissions requesting the Co-Investigating Judges either to indict the Charged Person or to dismiss the case.[46] Inculpatory and exculpatory evidence shall equally be considered when the Co-Investigating Judges make their decision to either send the case for trial or dismiss it.

[40] Introductory Submission, 18 July 2007, D3.
[41] Internal Rule 66(1).
[42] Internal Rules 55(1), (2) and (5).
[43] Internal Rule 67(1).
[44] Internal Rule 66(1).
[45] Internal Rule 66(1).
[46] Internal Rule 66(5).

36. By reasoning that "an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person"[47], the Co-Investigating Judges have overlooked this preliminary obligation to first conclude their investigation before assessing whether the case shall go to trial or not. This first step is necessary to ensure that the Co-Investigating Judges have fulfilled their obligation to seek and consider exculpatory evidence, which shall equally be sent to the Trial Chamber.

37. By incorrectly interpreting their obligation to seek exculpatory evidence, the Pre-Trial Chamber finds that the Co-Investigating judges have made an error in law. Considering the Co-Investigating Judges' obligation to seek exculpatory evidence before closing their investigation, as set out above, the Pre-Trial Chamber will examine whether there is a prima facie reason to believe that the SMD may contain evidence of exculpatory nature, in which case the Co-Investigating Judges would have to review this material.

38. The description of the SMD above indicates that there may be some relevant material in relation to the Introductory and Supplementary Submissions but there is nothing pointing specifically towards the presence of exculpatory evidence. The fact that the Co-Prosecutors cannot exclude the possibililty that the documents on the SMD may contain exculpatory evidence does not constitute a prima facie indication that the SMD may effectively contain such evidence.

39. In the absence of any specific indication that any document and/or video on the SMD may be of exculpatory nature, the Pre-Trial Chamber finds that the obligation to investigate exculpatory evidence does not, in itself, oblige the Co-Investigating Judges to review all the materials contained in the SMD. In these circumstances, the error of law made by the Co-Investigating Judges shall not lead the Pre-Trial Chamber to overturn the Order and grant the Request but the reasoning of the Co-Investigating Judges in this regard shall be substituted by that of the Pre-Trial Chamber.

[47] Order, para. 6.

40. The Co-Investigating Judges rejected the Request on the basis that it does not fulfill the requirements for a request for investigative action to be granted. In particular, the Co-Investigating Judges considered that they must be selective when dealing with a plethora of evidence so they must assess whether a request for investigative action is sufficiently specific and relevant before responding to it.[48] They stated that "[f]ar from being a formal condition open to flexible interpretation, the requirement that all requests be sufficiently specific is of paramount importance because it is closely related to the need for expeditious proceeding".[49] They added that "whenever the Defence files a request for investigative action, it must provide sufficiently precise information to show the Judges why they believe such a request is 'reasonable'".[50] The Co-Investigating Judges found that "[a] defence request whose sole aim is to seek an exhaustive catalogue of evidence cannot be considered pertinent."[51] They further found that the Request is not specific enough as it requested the Co-Investigating Juges to "review *all documents* placed on the SMD" and does not provide any particulars explaining why they consider the Request to be reasonable.[52] They considered that because of its lack of precision, granting the Request would have the concrete effect of delaying the proceedings unduly.[53]

41. The parties dispute the fact that the Request was sufficiently specific and that the Co-Investigating Judges applied the right standard in this regard.

42. The Pre-Trial Chamber notes that Internal Rule 58(6) provides that requests made by a charged person under this rule, which includes requests to collect evidence, shall "be made in writing with a statement of factual reasons for the request". Internal Rule 55(10), which is of more general nature, allows all parties to request "such investigative action as they consider necessary for the conduct of the judicial investigation", without expressly mentioning the requirement to state factual reasons as set out in Internal Rule 58(6). Both Internal Rules 58(6)

[48] Order, para. 7.
[49] Order, para. 9.
[50] Order, para. 11.
[51] Order, para. 8.
[52] Order, paras 9 and 11.
[53] Order, para. 9.

and 55(10) provide that the Co-Investigating Judges shall issue a reasoned order when they refuse requests for investigative actions.

43. The Pre-Trial Chamber finds that it is implicite from the text of Internal Rule 55(10), which shall be read in conjunction with Internal Rule 58(6), that a party who files a request under Internal Rule 55(10) shall identify specifically the investigative action requested and explain the reasons why he or she considers the said action to be necessary for the conduct of the investigation.[54] This allows the Co-Investigating Judges to assess whether the Request is relevant to ascertaining the truth and to give reasons for their decision. As stated by the Co-Investigating Judges, the requirement that a request for investigative action be sufficiently precise and relevant is deemed to ensure that proceedings are not unduly delayed and that the Charged Person's right to be tried within a reasonable time, enshrined in Article 14 of the ICCPR and in Internal Rule 21(4), is respected.

44. It is observed that the Defence have access to all the documents and videos on the SMD and are allowed to request investigative actions but they also have an obligation to proceed in a manner that will not delay the proceedings, notably by ensuring that their requests are specific enough to give clear indications to the Co-Investigating Judges as to what they should search for and for what reasons this should be investigated. [55]

45. The Pre-Trial Chamber finds that the Co-Investigating Judges were correct in reasoning that the Request shall be sufficently specific and relevant to ascertaining the truth. The Pre-Trial

[54] The Cambodian and French systems have been used to assist the Pre-Trial Chamber in its interpretation of Internal Rule 55(10), more particularly the following references: Article 133 of the Cambodian Code of Criminal Procedure; Article 82-1 of the French Code of Criminal Procedure; F.L. COSTE, *Chambre de l'instruction, Appel et saisine directe ou "Appel par défaut", Rép. Pén. Dalloz*, Décember 2006, para. 192 ; Cour d'appel de Limoges, 25 September 2003 ; Cour d'appel de Besançon, 17 October 2001. C. GUÉRY, *Instruction Préparatoire, Droits des parties, Rép. pén. Dalloz* , January 2008, para. 557.

[55] Similar criteria are applied by International Tribunals when dealing with requests for disclosure of exculpatory material: *Prosecutor v. Blaškić*, IT-95-14-PT, "Decision on the Production of Discovery Materials", Trial Chamber, 27 January 1997; *Prosecutor v. Blaškić*, IT-95-14, "Decison on the appellant's motions for the production of material, suspension or extension of the briefing schedule, and additional filings", Appeals Chamber, 26 September 2000; *Prosecutor v. Delalić*, IT-96-21-T, "Decision o the Request of the Accused Hzim Delic pursuant to Rule 68 for Exculpatory Information", Trial Chamber, 24 June 1997; *Nahimana* v. *Prosecutor*, ICTR-99-52-A, "Décision sur les requêtes de Ferdinand Nahimana aux finds de divulgation d'éléments en possession du procureur et necessaries à la defense de l'appelant et aux fins d'assistance du greffe pour accomplir des investigations complémentaires en phase d'appel", Chambre d'appel, 3 December 2006.

Chamber also finds that the Co-Investigating Judges' conclusion that the Co-Lawyers did not fulfil this obligation, as set out in paragraph 9 and 11 of their Order, is a correct application of the law and of their discretion. Contrarily to what is asserted by the Co-Lawyers, the Co-Investigating Judges did not invoke the Charged Person's right to a trial without undue delay as an excuse to deny a valid request for investigative action but rather referred to this fundamental right in order to explain the importance of the requirements for a request for investigative action to be specific and relevant to ascertaining the truth. The Pre-Trial Chamber further notes that the argument by the Co-Lawyers that the Co-Investigating Judges disregarded the waiver signed by Ieng Sary is without merit as the waiver is dated 24 July 2009 and was thus signed after the Co-Investigating Judges issued their Order.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1) The Appeal is admissible;
2) The Order is affirmed with the reasons set out in paragraphs 35 to 39 of this Decision being substituted to that of the Co-Investigating Judges.
3) The Appeal is dismissed.

In accordance with Rule 77(13) of the Internal Rules, this Decision is not subject to appeal.

Phnom Penh, 12 November 2009

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**