



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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D277/1/1/4

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

Case File N° 004/2/07-09-2009-ECCC/OCIJ (PTC34)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 3 April 2017

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PUBLIC REDACTED

DECISION ON APPEAL AGAINST DECISION ON [REDACTED] SEVENTH REQUEST FOR INVESTIGATIVE ACTION

Co-Prosecutors

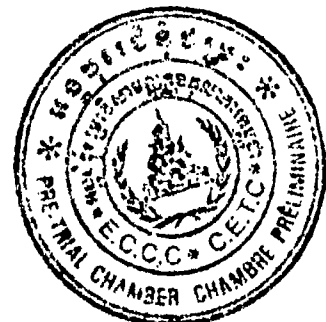
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia is seised of the “Appeal Against Decision on ██████████ Seventh Request for Investigative Action”, filed by ██████████ Co-Lawyers (respectively the “Appellant” and the “Co-Lawyers” or “Defence”) on 6 January 2017 (the “Appeal”).¹

I. INTRODUCTION

1. This Appeal concerns a decision of the International Co-Investigating Judge, issued on 8 December 2016, partially rejecting the Appellant’s seventh request for investigative action (the “Impugned Decision”).²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him.³

3. On 23 November 2015, the Co-Lawyers filed a request for investigative action, asking to conduct a full inquiry into: (a) the composition, structure and leadership of Centre, Old North Zone and Region 106 military and security forces operating in the Central Zone at the time of the alleged purge, (b) the involvement of such forces in the alleged purge, and (c) ██████████ control over and responsibility for such forces’ acts (“Seventh Request”).⁴

4. On 8 December 2016, the International Co-Investigating Judge issued the Impugned Decision, informing the Co-Lawyers that the requested investigative actions have been performed in part and denying the remainder of the Seventh Request.⁵

5. On 14 December 2016, the Co-Lawyers filed a Notice of Appeal against the Impugned Decision.⁶

¹ Appeal Against the Decision on ██████████ Seventh Request for Investigative Action, 6 January 2017, D277/1/1/2 (“Appeal”).

² Decision on ██████████ Seventh Request for Investigative Action, 8 December 2016, D277/1 (“Impugned Decision”).

³ Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Seventh Request for Investigative Action, 23 November 2015, D227 (“Seventh Request”).

⁵ Impugned Decision, paras. 52, 53.

⁶ Appeal Register of Appeal against Decision on ██████████ Seventh Request for Investigative Action, 14 December 2016, D277/1/1.



6. On 16 December 2016, the International Co-Investigating Judge filed the notice of conclusion of judicial investigation.⁷

7. On 4 January 2017, the Co-Lawyers submitted a request to file the Appeal in English first with the translation into Khmer language to follow.⁸ On 6 January 2017, they filed the Appeal in English only, followed by the filing of the Khmer translation on 3 February 2017. On 7 February 2017, the International Co-Prosecutor filed his response to the Appeal (the “Response”).⁹ No reply was filed within the legal deadline.

III. ADMISSIBILITY

8. The Co-Lawyers filed the Notice of Appeal in accordance with the time limits provided for under Internal Rule 75(1). On 17 January 2017 the Pre-Trial Chamber, having considered the reasons provided in, and that no objections were raised against, the Language Request, and pursuant to Internal Rule 39(4) and Article 7.2 of ECCC’s Practice Direction on Filings, allowed the filing of the Appeal in English only. The Pre-Trial Chamber further agrees with the Co-Lawyers¹⁰ that the Appeal is admissible under Internal Rule 74(3)(b), since the Seventh Request was filed under Internal Rules 21, 55(10) and 58(6) and asked the Co-Investigating Judges to undertake actions aimed at collecting information.¹¹

IV. STANDARD OF REVIEW

9. Pursuant to the Pre-Trial Chamber’s jurisprudence, the Co-Investigating Judges’ decisions may be overturned, if they are: a) based on an error of law invalidating the decision; b) based on an error of fact occasioning a miscarriage of justice; or c) so unfair or unreasonable as to constitute an abuse of the judges’ discretion.¹²

10. The Pre-Trial Chamber further recalls that a decision by the Co-Investigating Judges on a request for investigative action is discretionary. For the Pre-Trial Chamber to overturn

⁷ Notice of Conclusion of Judicial Investigation against ██████, 16 December 2016, D334.

⁸ Request to File in English First the Appeal against Decision on ██████ Seventh Request for Investigative Action, 4 January 2017, D277/1/1/1.

⁹ International Co-Prosecutor’s Response to ██████ Appeal against Decision on ██████ Seventh Request for Investigative Action, 7 February 2017, D277/1/1/3 (“Response”).

¹⁰ Appeal, para. 17.

¹¹ See, e.g., Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC11), Decision on KHIEU Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/1/20, para. 28.

¹² See, e.g., 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC24), Considerations on Appeal Against Decision on ██████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3 (“Considerations on Fifth Request for Investigative Action”), para. 15.



the Co-Investigating Judges' exercise of discretion, the Appellant must demonstrate that the impugned order is: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion. Not all errors will cause the Pre-Trial Chamber to set aside the decision of the Co-Investigating Judges. The error must have been fundamentally determinative of the exercise of the discretion leading to the appealed decision being made.¹³

V. APPLICABLE LAW

11. Internal Rule 55(10) addresses the right of parties to request investigative actions:

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 useful 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.

12. Internal Rule 58(6) further provides that:

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.

13. The Pre-Trial Chamber has held that two cumulative¹⁴ conditions have to be satisfied for requests to be granted by the Co-Investigative Judges: (i) the precision requirement and

¹³ Considerations on Fifth Request for Investigative Action, para. 16, *referring to* Case 002 (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13 ("Decision on the SMD"), paras 25-27; Case 002 (PTC62), Decision on the IENG Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for IENG Thirith' of 15 March 2010, 14 June 2010, D353/2/3 ("Decision on IENG Thirith's Appeal"), para. 8; Case 002 (PTC67), Decision on Reconsideration of Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 28 September 2010, D365/2/17 ("Decision on Reconsideration of Co-Prosecutors' Appeal"), paras 36, 55-58.

¹⁴ Case 002 (PTC63), Decision on the Appeal Against the 'Order on the Request to Place on the Case [File] the



(ii) the *prima facie* relevance requirement. It established that “it is implicit 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”.¹⁵ The Pre-Trial Chamber recalls that a decision by the Co-Investigating Judges on a request for investigative action is discretionary as, in light of their overall duties and their familiarity with the case files, they are best able to assess whether the request is indeed conducive to ascertaining the truth.¹⁶

VI. MERITS

14. The Pre-Trial Chamber, after having reviewed the Appeal, considers that it is not necessary to undertake the requested investigative actions. The opinions of the Judges of the Pre-Trial Chamber are appended.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- **FINDS** the Appeal admissible;
- **DISMISSES** the Appeal.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 3 April 2017

President

Pre-Trial Chamber



[Handwritten signatures of PRAK Kimsan, Olivier BEAUVALLET, NEY Thol, Kang Jin BAIK, and HUOT Vuthy]

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.

Documents Relating to Mr. KHIEU Samphan's Real Activity', 7 July 2010, D370/2/11, para. 22.

¹⁵ Decision on the SMD, para. 44 and footnote 56.

¹⁶ Decision on Reconsideration of Co-Prosecutors' Appeal, paras 36, 55-58; Considerations on Fifth Request for Investigative Action, para.16.



OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

15. The National Judges of the Pre-Trial Chamber (“PTC”) are presenting their opinions concerning ██████ appeal against the decision on ██████ seventh request for investigative action.

16. The National Judges of the PTC are of the view that the ECCC was established in accordance with the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (“Agreement”), and the Law on the Establishment of the ECCC (“ECCC Law”), and applies its Internal Rules.

17. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia’s national courts. Prosecution and judicial investigation under the national courts merely concern facts, not persons.¹⁷ On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions—first, *facts* “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, *persons* “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”—are met.¹⁸

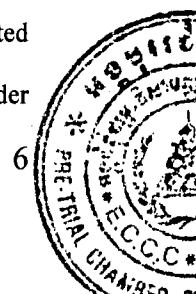
18. The National and International Co-Prosecutors disagreed over the issuance of the Third Introductory Submission in Case 004. While the International Co-Prosecutor requested to submit the Third Introductory Submission, the National Co-Prosecutor rejected it on the ground that “the suspects are not senior leaders and/or those who were most responsible.”¹⁹ The National and International Judges of the PTC also disagreed over this matter. The National Judges of the PTC supported the National Co-Prosecutor’s argument.²⁰

¹⁷ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

¹⁸ Article 1 of 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; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.

¹⁹ National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observation, 22 May 2009, para. 86(a).

²⁰ Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009, “█████ is not a senior leader



19. The National Judges of the PTC have previously decided that it is not necessary for the International Co-Investigating Judge to take any investigative action or any supplementary investigative action in Case 004.²¹ Therefore, the National Judges find it unnecessary to consider any request or appeal whose subject is the same.

20. In light of the foregoing, the National Judges of the PTC reject this appeal.

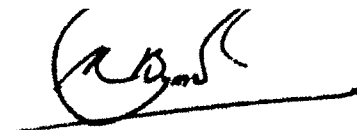
Phnom Penh, 3 April 2017



President PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy



of Democratic Kampuchea or among those who were most responsible for the crimes.”

²¹ Considerations on Appeal against Decision on ██████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, para. 30.

**OPINION ON MERITS OF THE APPEAL BY JUDGES BEAUVALLET AND BAIK
(THE “UNDERSIGNED JUDGES”)**

21. The Co-Lawyers argue that the International Co-Investigating Judge erred in: (a) misconstruing the precision requirement and failing to consider that the Defence cannot conduct its own investigations under the ECCC legal framework; (b) requiring the Defence to demonstrate more than a *prima facie* reason that the requested investigative actions may yield exculpatory evidence; and (c) misinterpreting ECCC law and placing expeditiousness above the Appellant’s right to prepare his defence.²²

A. Application of the Precision Requirement

1. Arguments

22. The Co-Lawyers contend that, while correctly citing the applicable standard, the International Co-Investigating Judge failed to assess on a case-by-case basis the precision requirement with regards to the sub-requests to interview former members of military forces on the command structure and witnesses on the distinctions in uniforms and accents.²³ The Co-Lawyers submit, first, that requiring further details than the types of witnesses to be interviewed, their geographic location at the time of relevant events and the information sought from them, would oblige the Defence to conduct its own investigation, including onsite visits and interviews outside preliminary inquiries, which is forbidden under the ECCC legal framework.²⁴ Secondly, the Co-Lawyers, relying on a previous decision on a Co-Prosecutor’s request, assert that the International Co-Investigating Judge applied a higher standard to the Defence’s requests than to the International Co-Prosecutor’s requests.²⁵

23. The International Co-Prosecutor generally responds that the International Co-Investigating Judge correctly interpreted and applied the relevant law.²⁶

²² Appeal, para. 2.

²³ Appeal, paras 31-33.

²⁴ Appeal, paras 30, 34-37.

²⁵ Appeal, paras 30, 38-40 *referring to* Decision on ICP’s Request for Investigative Action regarding Case 004 Crime Sites and Responsibility of ██████, 7 December 2016, D41/2 (“Decision on Co-Prosecutor’s Request”).

²⁶ Response, para. 1.



2. Discussion

24. The Undersigned Judges note that the International Co-Investigating Judge found the sub-request to identify and interview former members of military forces about the command structure “too unspecific”, since it “would require investigative actions in broad geographical areas, including locations that are not connected to any crimes sites alleged in the [Third Introductory Submission]”.²⁷ Similarly, the International Co-Investigating Judge considered that the sub-request to interview witness about the distinctions in uniforms and accents was “too unspecific to satisfy the precision requirement”.²⁸

25. The Undersigned Judges recall that proposed witnesses do not have to be specifically named.²⁹ A request tending to expand interviews to unnamed and unlocated people may thus rightly meet the precision requirement. The Undersigned Judges further observe that the International Co-Investigating Judge did not require the Defence to name or locate witnesses³⁰ and that the Co-Lawyers do not point to any specific impugned finding to support such assertion. Rather, the International Co-Investigating Judge properly found that a broad requests to identify “all RAK and other security forces”³¹ operating in the Central Zone during the alleged purge and “witnesses”³² able to give evidence on uniforms and accents, although providing general indications as to the nature of the investigations sought, did certainly not meet the specificity requirement.

26. The Undersigned Judges also dismiss the argument regarding the alleged violation of the equality of arms and different standard applied to the International Co-Prosecutor, since they already concluded that the Defence was never required to name witnesses. The Undersigned Judges observe, in addition, that the decision on which the Co-Lawyers rely to demonstrate the different standard applied did not grant the International Co-Prosecutor’s requests nor assessed the alleged imprecision, but merely stated that the investigative actions had already been performed.³³ The Appellant has therefore not demonstrated any violation of the equality of arms that would warrant the Pre-Trial Chamber’s intervention.

²⁷ Impugned Decision, para. 18.

²⁸ Impugned Decision, para. 23.

²⁹ Case 002 (PTC50 & 51), Decision on NUON Chea’s and IENG Sary’s Appeal against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8 (“Decision on Requests for Summons”), para. 49.

³⁰ Impugned Decision, paras. 18, 23.

³¹ Seventh Request, para. 24.

³² Seventh Request, para. 25.

³³ Appeal, para. 39 referring to Decision on Co-Prosecutor’s Request, paras 19, 31, 88 and p. 11.



27. Accordingly, the Undersigned Judges conclude that the International Co-Investigating Judge applied the adequate test to the proper standard, when assessing the precision of the two sub-requests, and dismiss the first ground of appeal.

B. Application of the *Prima Facie* Exculpatory Requirement

1. Arguments

28. The Appellant, recalling the Pre-Trial Chamber's and international jurisprudence,³⁴ contends that the International Co-Investigating Judge erred in applying an incorrect higher standard and requiring him to demonstrate to more than a *prima facie* level the potential exculpatory value of the evidence sought in three of his sub-requests.³⁵ The Co-Lawyers sustain that they made a credible case, under the correct low standard, that the requested actions would result in exculpatory evidence and presented *prima facie* evidence that other forces may have been responsible for the alleged purge in the Central Zone.³⁶ In particular, they submit that, contrary to the Impugned Decision findings, the Defence pointed to more than the written record of interview of ██████████ as *prima facie* evidence supporting their request, including evidence from ██████████, ██████████ and ██████████.³⁷

29. The International Co-Prosecutor contends that the Co-Lawyers have failed to show how the command structure of military and security forces, for which there is no reason to believe that they were involved in the purge of Sector 41, and the accents of individuals involved in the purge, would be relevant to Case 004/2 or the Appellant's criminal liability.³⁸

2. Discussion

30. The Undersigned Judges recall that the Co-Investigating Judges "have a duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence. To fulfil this obligation, [they] have to review [...] materials when there is a *prima facie* reason to believe that they may contain exculpatory evidence".³⁹ The determinative factor is thus whether the Co-Investigating Judges are satisfied that the requesting party has demonstrated a *prima facie*

³⁴ Appeal, paras 44-47.

³⁵ Appeal, paras 43, 48.

³⁶ Appeal, paras 48-49.

³⁷ Appeal, para. 48 referring to Impugned Decision, paras. 18, 24, 25 and 27 and to the Seventh Request, paras. 15-16, 18-24, 27-30.

³⁸ Response, paras 2-3.

³⁹ Decision on the SMD, para. 35.



reason to believe that the action sought may yield exculpatory evidence.⁴⁰ It is not enough to refer to the documents as “relevant” and “necessary to the defence” and merely assert that they contain exculpatory evidence without any further explanation as to how they may suggest innocence or mitigate the personal responsibility.⁴¹

31. In the Impugned Decision, the International Co-Investigating Judge noted the “absence of *prima facie* indications that forces from outside Sector 41 were involved in any of the crimes alleged in the [Third Introductory Submission]”⁴² and further found the evidence as to the involvement of Region 106 military “scarce”.⁴³ He also considered speculative and unclear the possible exculpatory effect of evidence suggesting that some of the forces operating in the Central Zone had distinguishing accents or uniforms.⁴⁴

32. The Undersigned Judges indeed observe that, apart from merely asserting that the requested investigative actions “are necessary and relevant to ascertaining the truth about the identity of those most responsible”⁴⁵ and pointing at evidence on the case file indicating that other forces may have been responsible for the purge,⁴⁶ the Co-Lawyers did not explain in the Seventh Request how the evidence sought may suggest the Appellant’s innocence or mitigate his responsibility. The existence, in the case file, of more witness accounts, than referred to in the Impugned Decision,⁴⁷ does not negate the necessity for the Defence to clearly explain how such statements, put together, may suggest the Appellant’s innocence or mitigate his responsibility.⁴⁸ Similarly, the suggestion that “further inquiry into [the accent and uniform] distinctions may help the [Co-Investigating Judges] to identify forces operating on the territory of the Central (Old North) Zone during the alleged purges”⁴⁹ is insufficient for the purposes of persuading the Co-Investigating Judges to follow such leads. In particular, the

⁴⁰ Decision on IENG Thirith’s Appeal, para. 47.

⁴¹ Case 002 (PTC49), Decision on the Appeal Against Order on Nuon Chea’s Request for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for KHIEU Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/1/5, para. 21; Case 002 (PTC54), Decision on the Appeal Against Order on NUON Chea’s Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/2/2, para. 21.

⁴² Impugned Decision, para. 18.

⁴³ Impugned Decision, para. 27.

⁴⁴ Impugned Decision, para. 24.

⁴⁵ Seventh Request, paras 26 and 34.

⁴⁶ Seventh Request, paras 18-24, 27-30. See also Seventh Request, footnotes 49 and 52 referring to the statements of [REDACTED] and [REDACTED], respectively.

⁴⁷ See Appeal, para. 48.

⁴⁸ See also Seventh Request, paras. 15-16.

⁴⁹ Seventh Request, para. 25.



Co-Lawyers did not put forth how any reason to believe that the involvement of any other military forces in the Zone could impact the assessment of the Appellant's criminal responsibility, especially in light of the evidence already gathered as to the authority he exercised over the crime sites under investigation, including by issuing or passing down orders.⁵⁰ In sum, the International Co-Investigating Judge rightly relied on the factual circumstances of the case, illustrated by evidence already on the case file, to conclude that the Defence did not clarify, the exculpatory effect of the evidence sought, to an extent that the Request would fulfil the *prima facie* exculpatory requirement.

33. Therefore, the Undersigned Judges, noting that they already held that the cumulative precision requirement was not met concerning two of the sub-requests at stake,⁵¹ also find no error in the International Co-Investigating Judge's application of the *prima facie* exculpatory requirement. The second ground of appeal is thus dismissed.

C. Whether the ICIJ Placed Expeditiousness in Closing the Investigation above the Appellant's Rights

1. Arguments

34. The Co-Lawyers argue that, in finding that the two sub-requests to place on the case file notes and recordings from Alexander Hinton and Steven Heder would be time consuming or difficult, the International Co-Investigating Judge placed expeditiousness in closing the investigation above the Appellant's right to a fair trial.⁵² They submit that the standard for granting investigative requests is rather whether the precision requirement and *prima facie* relevance and exculpatory requirements were satisfied".⁵³

35. In particular, the Co-Lawyers contend that the International Co-Investigating Judge erred in declining to use his power to obtain Hinton's notes and research materials because coercive measures "would ultimately require a considerable amount of time", while he acknowledged that the evidence sought may support the Defence case.⁵⁴ Similarly, they challenge the International Co-Investigating Judge's failure to exhaust the possible avenues to acquire Heder's notes and recording, since he declared the request "fruitless and

⁵⁰ Impugned Decision, para. 24.

⁵¹ See *supra* para. 27.

⁵² Appeal, paras 51, 54.

⁵³ Appeal, para. 51.

⁵⁴ Appeal, para. 55.



terminated” without making any efforts to contact Heder, besides a single attempt, or to order coercive measures.⁵⁵

36. The International Co-Prosecutor responds in general terms that the International Co-Investigating Judge correctly interpreted and applied the relevant law and was well within his discretion in denying the investigative request.⁵⁶

2. Discussion

37. The Undersigned Judges recognise that the standard for granting investigative requests is not whether the requests are time consuming or difficult but, as stated above, whether they satisfy the precision and *prima facie* relevance requirements. The Undersigned Judges, however, also recall that Co-Investigating Judges have a broad discretion in assessing requests for investigative action⁵⁷ and that they retain the discretion to decide on the usefulness or the opportunity to execute any investigative action, and this even when the threshold requirements have been met.⁵⁸ The International Co-Investigating Judge thus does not have any duty to exhaust all means at his disposal to collect relevant documents, but only, in discharging his duty to ascertaining the truth, to determine whether the requested material is useful for the conduct of investigation.

a) *Hinton's Research Notes*

38. The Undersigned Judges consider that the International Co-Investigating Judge implicitly acknowledged the relevance and specificity of the request by attempting to collect the notes and research materials from Hinton, who ultimately refused to communicate them on the basis of human subjects protections required by United States Universities.⁵⁹ The International Co-Investigating Judge thus did not reject the sub-request because the threshold requirements were not met or question that such evidence could have been rightly gathered. He rather used his broad discretion to weigh, on one hand, his assessment of the usefulness of Hinton's notes and research materials and, on the other hand, the difficulties associated with the enforcement of coercive measures, before concluding that he did not consider

⁵⁵ Appeal, para. 56.

⁵⁶ Response, para. 1

⁵⁷ See, e.g., Decision on Request for Summons, para. 28; Decision on the SMD, para. 22.

⁵⁸ Decision on Reconsideration of Co-Prosecutors' Appeal, para. 57.

⁵⁹ Impugned Decision, para. 30.



“appropriate” to use such measures “in these circumstances”.⁶⁰ The International Co-Investigating Judge gave particular importance to the fact that the requested notes “only supplement Alexander Hinton’s book”, already on the case file, and that there was so far no reason to doubt the reliability of the research.⁶¹

39. The Undersigned Judges are indeed satisfied that Hinton’s book, on which the Defence based the request,⁶² exists in the case file and that there are no reasons to doubt the reliability of this work and thus no need to corroborate it by other materials at the disposal of the author. The Undersigned Judges further note the presence on the case file of the transcripts of the testimony delivered by Hinton before the Trial Chamber in March 2016.⁶³ The Undersigned Judges also observe that Hinton made clear that his primary sources include the scholars David Chandler and Ben Kiernan,⁶⁴ whose works also figure on the case file,⁶⁵ and that his book was released in 2004 with no further researches after he collected his sources in 1994-1995.⁶⁶

40. In these circumstances, the Undersigned Judges are not convinced that the International Co-Investigating Judge placed expeditiousness in closing the investigation above the Appellant’s right to a fair trial. They rather find that the International Co-Investigating Judge, in fairly trying to get the evidence but in vain, and in considering that the research notes only supplement Hinton’s book, properly discharged his duty to ascertaining the truth pursuant to Internal Rule 55(5) and Article 127 of the Cambodian Code of Criminal Procedure.

b) Heder’s Interview Notes and Recordings

41. Similarly, the Undersigned Judges consider that the International Co-Investigating Judge had no obligation to exhaust all possible avenues to acquire Heder’s notes and recordings, even if the threshold requirements were met. As previously recalled, the Co-

⁶⁰ Impugned Decision, para. 31.

⁶¹ Impugned Decision, para. 31.

⁶² Seventh Request, para. 18 and footnote 33.

⁶³ D219/792.1.6, D219/792.1.7, D219/792.1.8 and D219/792.1.9.

⁶⁴ D219/792.1.6, p.17 (ERN 01217257).

⁶⁵ See, *inter alia*, D1.3.17.5, D6.1.937, D6.1.1104 (Kiernan), D6.1.83, D.6.1.84, D6.1.596 (Chandler).

⁶⁶ D219/792.1.6, p.6 (ERN 01217246).



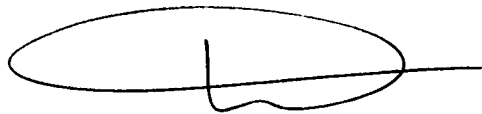
Investigating Judges are under no obligation to comply with a request insofar as they believe that it will not assist in ascertaining the truth.⁶⁷

42. In particular, the Undersigned Judges observe that the evidence sought from Heder was included in the request to investigate ██████████ role and involvement in the purge of the Central Zone,⁶⁸ for which the International Co-Investigating Judge noted that a significant amount of evidence was already on the case file.⁶⁹ In addition, the International Co-Investigating Judge, following the Seventh Request, conducted investigations regarding ██████████ role and placed on the case file relevant documents from other case files, as well as the book *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*.⁷⁰ Facing the absence of reply from Heder, the International Co-Investigating Judge further decided to place on the case file an analytical report titled *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Authority in Comparative Perspective*.⁷¹

43. The Undersigned Judges, recalling the broad discretion of the Co-Investigating Judges to assess requests for investigative action in light of their familiarity with the case file,⁷² thus consider that the International Co-Investigating Judge acted well within his discretion and that the overall aim to investigate the role of ██████████ in the Central Zone to ascertaining the truth, as per the Seventh Request, has been achieved.

44. Accordingly, the Undersigned Judges would dismiss the Appeal in its entirety.

Phnom Penh, 3 April 2017



Judge Olivier BEAUVALLET



Judge Kang Jin BAIK

⁶⁷ Case 002 (PTC40), Decision on the Appeal against the Co-Investigating Judges Order on Nuon Chea's Second Request for Investigative Action, 5 May 2010, D100/9/2, para. 23.

⁶⁸ Seventh Request, p. 11.

⁶⁹ Impugned Decision, paras 41, 43.

⁷⁰ Impugned Decision, paras 43, 47.

⁷¹ Impugned Decision, paras 48-49.

⁷² Considerations on Fifth Request for Investigative Action, para. 16.

