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ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

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

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

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

Before: Judge YOU Bunleng
Judge Marcel LEMONDE
Date: 31 December 2009
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**Order Rejecting the Request for Annulment and the Request for Stay
of Proceedings on the Basis of Abuse of Process Filed by Ieng
Thirith**

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Mr. Andrew CAYLEY

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Mr IENG Sary Mr KAING Guek Eav
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ឯកសារបញ្ជាក់ថាជាកម្រិតតាមច្បាប់ដើម
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We, **You Bunleng (ឃុំ ប៊ុនលេង)** and **Marcel Lemonde**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);

Noting Rules 21, 48, 56 and 76 of the ECCC Internal Rules (the “Internal Rules”);

Noting the ongoing judicial investigation against **NUON Chea (នួន ឆា)** and other **Charged Persons**, relating to charges of **Crimes against humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, genocide, murder, torture and religious persecution**, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and Articles 209, 210, 500, 501, 503 to 508 of the 1956 Penal Code;

Noting the Request to the Co-Investigating Judges to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations, filed by IENG Thirith’s Defence (the “Defence”), on 7 December 2009 (D263);

Noting the Request for Stay of Proceedings on the Basis of Abuse of Process, filed by the Defence on 7 December 2009 (D264);

Noting the signing authority issued to Judge You Bunleng on 22 December 2009;

PROCEDURAL HISTORY AND DEFENCE SUBMISSIONS

1. On 7 December 2009, the Defence requested the Co-Investigating Judges to seize the Pre-Trial Chamber with a view to annulment of all investigations (the “Request for Annulment”) under Rules 48 and 76(2) of the Internal Rules and to order the stay of the judicial investigation for abuse of process (the “Request for a Stay of Proceedings”) essentially on the basis of the *abuse of process* doctrine and other provisions attached to the request.
2. In the Request for Annulment,¹ the Defence argues “*a lack of impartiality shown by Judge Lemonde’s comment referred to [by Mr. Bastin]; ... a violation of the mandatory separation between prosecutorial and adjudicatory offices; information [being] withheld by the ‘international side’ of the OCIJ from the ‘national side’, and (...) breaches of the principle of confidentiality*”. In addition to these allegations, in the Request for a Stay of Proceedings,² the Defence affirms that “*the misinterpretation, by the OCIJ, of its own raison d’être; and the comments by Prime Minister Hun Sen all contribute to an overarching lack in confidence in the investigations at this Court*”.

¹ D263, **Request to the Co-Investigating Judges to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations**, 7 December 2009, 00411924-00411940, para. 52 (hereinafter “D263, Request for Annulment”).

² D264, **Defence Request for Stay of Proceedings on the Basis of Abuse of Process**, 7 December 2009, 00412236-00412252, para. 59 (hereinafter “D264, Request for a Stay of Proceedings”).

3. In support of its requests, the Defence refers to:
 - a statement by Mr Wayne Bastin,³ dated 8 October 2009, provided in support of a request to disqualify Judge Lemonde, filed by IENG Sary's Defence, and based on the same allegations (the "First Bastin Statement");
 - Judge Lemonde's written response;⁴ and
 - an additional statement by Mr Wayne Bastin,⁵ dated 2 December 2009 (the "Second Bastin Statement").
4. In support of its Request for a Stay of Proceedings, the Defence also refers to:
 - the speech of the Prime Minister of the Royal Government of Cambodia in Takeo Province, dated 9 September 2009;
 - Judge Lemonde's "interference" with the performance appraisal of a member of his staff;
 - the Co-Investigating Judges' Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD;⁶
 - the Order on Extension of Provisional Detention of IENG Thirith.⁷
5. The Defence notes that, on 7 December 2009, it filed a parallel request before the Pre-Trial Chamber for the disqualification of Judge Lemonde.⁸
6. For all these reasons, the Co-Lawyers request the Co-Investigating Judges "to seize the Pre-Trial Chamber with a view to annulment of all investigations"⁹ and "to stay the proceedings"¹⁰ on the basis of "the doctrine of abuse of process" set out at paragraphs 7 to 16 of the Request for a Stay of Proceedings.

REASONS FOR THE DECISION

Preliminary Considerations

7. To begin, the Co-Investigating Judges point out that the multiplicity of interlocutory proceedings leads to a certain legal confusion entertained by the Defence itself, since the present Request for Annulment refers¹¹ to arguments contained in an application for disqualification of which one of the two Co-Investigating Judges obviously had no knowledge since the disqualification proceedings only concerned the other judge. Such multiplicity makes it difficult for the Co-Investigating Judges to respond, either jointly or separately, whether to the factual arguments involving a single Investigating Judge, or those relating to both of them.

³ D263, **Request for Annulment**, para. 4; D264, **Request for a Stay of Proceedings**, para. 3.

⁴ Case File No. 002/09-10-2009-ECCC/OCIJ (PTC01) and 002/13-10-2009-ECCC/OCIJ (PTC02), 4, **Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan**, 5 November 2009, 00399417-00399430.

⁵ D263, **Request for Annulment**, para. 5; D264, **Request for a Stay of Proceedings**, para. 3.

⁶ D164/2, **Co-Investigating Judges' Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD**, 19 June 2009, 00343279-00343286.

⁷ C20/8, **Order on Extension of Provisional Detention**, 10 November 2009, 00399346-00399357.

⁸ D263, **Request for Annulment**, para. 10.

⁹ D263, **Request for Annulment**, para. 59.

¹⁰ D264, **Request for a Stay of Proceedings**, para. 61.

¹¹ D263, **Request for Annulment**, para. 10.

8. Notwithstanding this incongruity, the Co-Investigating Judges will jointly address all the arguments raised by the Defence, both in the Request for Annulment and in the Request for a Stay of Proceedings, including common or individual reasoning depending on the arguments raised. Thus, any reasoning that is not specified to be the individual reasoning of one of the Co-Investigating Judges is adopted by both of them.

A. The Request for Annulment

Applicable Law

9. Apart from the situation in which non-compliance with an expressly prescribed formality vitiates a procedure, a procedural defect can only lead to annulment of one or more procedural actions if there is proof that there has been an infringement of the rights of the Defence within the meaning of the International Covenant on Civil and Political Rights (ICCPR).¹² These rights are reflected in Rule 21 of the Internal Rules.
10. Under Rule 48 of the Internal Rules, “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”. Accordingly, when considering a request for annulment, the Co-Investigating Judges must:
- determine whether there has been a procedural defect; and
 - in the affirmative, they must determine whether or not the defect infringes the rights of the party making the application.
11. These are the principles against which the Co-Investigating Judges will consider the merits of the Defence claims in this case.

The First Bastin Statement

12. Paragraphs 12 to 22 of the Request for Annulment¹³ refer to a single “fact” – the words supposedly uttered by Judge Lemonde in August 2009 at a meeting in his home that was attended by several members of the staff of the Office of the Co-Investigating Judges – as the basis for the allegation of partiality.¹⁴
13. In its decision dated 9 December 2009, the Pre-Trial Chamber dismissed an application for disqualification based on the same ground, noting that “*the Charged Person [had] not discharged the burden of proof placed upon him.*”¹⁵
14. As the Defence merely asserts that the allegation of partiality “*provides sufficient basis for the current application for annulment*”,¹⁶ its evidentiary

¹² Case File No. 002/19-09-2007-ECCC /OCIJ (PTC06), D55/I/8, **Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment**, 26 August 2008, 00225149-00225160, paras. 34 to 41; in particular, see para. 36.

¹³ And, in almost identical terms, paragraphs 17 to 23 of the Request for a Stay of Proceedings.

¹⁴ However, the CIJs note that at paragraph 15 of the Request for Annulment, the Defence committed a revealing slip of the pen when they state that: “*the comment demonstrates impartiality*” (emphasis added).

¹⁵ Case File No. 002/19-09-2007-ECCC /OCIJ (PTC07), **Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde**, 9 December, 00411300-00411309, para. 26.

burden herein is, in every respect, identical. Consequently, in this respect, the Request for Annulment and the Request for a Stay of Proceedings can only be rejected for the same reason as the application for disqualification and they need not be examined any further.

The Second Bastin Statement

15. Before addressing each of the allegations contained in the Second Bastin Statement, it should be noted that it is surprising to read, in the Defence filings, that “[f]or the purposes of this request, the truth of [these allegations] [...] will be presumed”,¹⁷ with no qualification. The Pre-Trial Chamber has expressed strong reservations with respect to the weight to be attached to this type of statement.¹⁸ The international Investigating Judge has already had the opportunity to point out that the Defence should have proceeded with extreme caution before giving any credence to Mr Bastin’s statement, who has violated his duty of confidentiality (a duty that was specifically created to ensure that the ECCC and its staff and officials can undertake their important tasks free from the constant fear of the threat that what is said or done would be served up to public opinion absent any context, and thus be subject to misinterpretation or controversy).
16. The Co-Investigating Judges also note that Mr Bastin waited more than two months to report what Judge Lemonde allegedly said at a meeting held in August 2009, and waited another two months before making new “disclosures”, with no explanation as to why and the conditions under which the two statements were provided to defence teams and not to the appropriate United Nations bodies. Moreover, the Defence does not explain why the Second Bastin Statement, which it received on 2 December 2009,¹⁹ was made public at the same time that the applications based thereon were being filed.²⁰
17. Having made these preliminary comments, it is necessary to address the substance of the Second Bastin Statement by successively examining the issues that it raises.

Cooperation between the Co-Investigating Judges

18. The Defence submits that the “international side” of the Office of the Co-Investigating Judges has, on several occasions and in various ways, withheld information from the “national side”²¹ (without however specifying how such “withholding of information” could have vitiated one or more documents in the proceedings). The logic behind the Defence’s reasoning is sometimes difficult to

¹⁶ D263, **Request for Annulment**, para. 18.

¹⁷ “For the purposes of this request the truth of the allegations contained within both statements of Mr. Bastin will be presumed.”: D263, **Request for Annulment**, para. 8; D264, **Request for a Stay of Proceedings**, para 5.

¹⁸ Case File No. 002/19-09-2007-ECCC/OCHJ (PTC07), **Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde**, 9 December, 00411300-00411309, para. 20.

¹⁹ D263, **Request for Annulment**, para. 5.

²⁰ See Cambodia Daily, 8 December 2009.

²¹ D263, **Request for Annulment**, para. 31; D264, **Request for a Stay of Proceedings**, paras. 30 to 33.

follow since, on the one hand, it insists on the importance of the contribution of the Cambodian staff to the quality of the judicial investigation²² and, on the other hand, it is concerned about the possibility of interference by the Cambodian Government in the workings of the ECCC,²³ while speculating that the alleged withholding of information stems from the international Investigating Judge's lack of trust in his Cambodian counterpart. Whatever the case, this suspicion of withholding of information must be dispelled.

19. The ECCC Law and Agreement establish a system of Co-Investigating Judges with identical powers. As correctly stated by the Defence, "*the doctrine of mutuality of decision making is a fundamental tenet of the Court's creation*".²⁴ Because they possess identical powers, the Co-Investigating Judges must therefore cooperate in order to effectively move the investigations forward. They have been doing it without difficulty for close to three years.
20. This permanent cooperation is part and parcel of the responsibilities of the Judges themselves. The staff of the OCIJ acts only under their strict direction. The international Investigating Judge notes that a member of staff such as Mr Bastin, not being in possession of all necessary information (and, in fact, not being particularly knowledgeable about the procedural system applicable before the ECCC), has no standing to don the mantle of the Judges in order to assess how such cooperation should, in concrete terms, be effected and, in particular, to decide, in place of the Judges if and when information about the best way to conduct investigations should be discussed between the Co-Investigating Judges.
21. Moreover, the Co-Investigating Judges add that, in OCIJ practice, any work conducted unilaterally by the national or international team is only considered to be preparatory work; and that all investigative action must be conducted jointly by the national and international staff, under the direction of the Co-Investigating Judges and after prior discussion and common decision. As regards discussions between the judges preceding all decisions, this does not involve either judge influencing the other (both of them being independent), but rather reciprocal provision of information in light of the legal principles and precepts of good administration of justice that must guide the decision.

The Documentary Film Crew

22. The Defence submits, on the sole basis of Mr Bastin's statements, that the terms under which a documentary film on the judicial investigations underpinning the Khmer Rouge trials is being produced, in addition to constituting an example of the "withholding of information" referred to at paragraphs 18 to 21 above, constitutes a breach of the confidentiality of judicial investigations.
23. It should be recalled that, as part of an agreement entered into with the Office of Administration of the ECCC, a documentary film crew has been authorised to

²² D263, **Request for Annulment**, paras. 37 and 38.

²³ D263, **Request for Annulment**, paras. 53 to 55.

²⁴ D263, **Request for Annulment**, para. 33.

produce a film for pedagogical and historical purposes, a film in which all Defence teams willing to do so may participate (which is the case for practically all Defence teams).

24. The agreement, which received the approval of the two Co-Investigating Judges, expressly provides that the film will only be broadcast or released after the conclusion of all pending trials and after it has been viewed by the Judges, who may ask for any changes. Since the film crew has been given authorised access to the investigations, they are obviously bound by a confidentiality undertaking. The agreement expressly provides that the producers must obtain the written consent of all persons interviewed or named in the film, including the parties, victims and witnesses, even when the latter do not speak. It is therefore absurd to think that the international Investigating Judge “*allowed a film crew to surreptitiously film and covertly record a witness interview*”.
25. The film crew’s access to documents as well as to investigative action falls under the discretion conferred under Rule 56(2)(b) of the Internal Rules and cannot, as submitted by the Defence, be regarded as “*providing information to third parties*”. It was the judgment of the two Co-Investigating Judges that this project was entirely consistent with the Internal Rules, that it met the obvious need for “restorative” justice within the context of a historically relevant trial, and that it ensured the confidentiality of the investigations during the pre-trial stage while enabling light to be shed on this key moment in Cambodian history after the completion of the proceedings, i.e. at a time when the rights of the Defence could no longer be affected.

Distribution of an Office of the Co-Prosecutors Document

26. The Defence takes exception to the fact that “a document” was allegedly provided to the international side of the Office of the Co-Investigating Judges by Mr Craig Etcheson, an investigator with the Office of the Co-Prosecutors. The Cambodian Investigating Judge obviously cannot say anything about this alleged provision, of which he knows nothing. On his part, the international Investigating Judge cannot see to which document the Defence is referring, as it has provided no details about the document apart from the information supplied by Mr Bastin himself which is, to say the least, vague if not contradictory as he states, on the one hand, that “*it was stressed a number of times how important it was to ensure the Cambodian staff did not get a copy of it*” and, on the other hand, that “*it contained nothing that should have precluded either the Cambodian staff or anyone within OCIJ for that matter, from having access to it*”. In view of this, the Co-Investigating Judges both consider that these confusing statements cannot in any way substantiate the categorical Defence statement that “*[t]he OCIJ has received an unofficial document suggesting certain avenues of enquiry from Dr Etcheson of the OCP not in the course of the Introductory Submission or a Supplementary Submission*”.²⁵
27. Obviously, the presumption of impartiality in favour of the judges is not rebuttable by means of such a vague allegation: as recalled by ICTY case-law with respect to judges in general, “*it would be as much of a potential threat to*

²⁵ D263, **Request for Annulment**, para. 26.

*the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias”.*²⁶ The same would apply if the Co-Investigating Judges were to discontinue their activities or if the investigative action that they have undertaken could be cancelled on the basis of such unfounded charges.

*

28. In short, the Defence interpretation of the Second Bastin Statement is speculative, and at times unsupported by the second statement which, itself, often contains vague second-hand charges, obtained under circumstances which cannot clothe them with any probative value. Moreover, it should be pointed out that even if the truthfulness of the statement were to be presumed, there is nothing in it to lead to the conclusion that the OCIJ investigations have been conducted in anything other than an impartial manner.
29. In light of the foregoing, the applicant has not in any way proven that there is any procedural defect that may warrant seizing the Pre-Trial Chamber.

B. The Request for a Stay of the Judicial Investigation

Applicable Law

30. The Co-Investigating Judges consider that the principles governing the law applicable to a request for annulment and those governing the law applicable to a request for a stay of proceedings are the same, especially where the requests are essentially based on the same facts. However, it is necessary to respond to the Defence analysis of the doctrine of abuse of process.
31. The case-law on the doctrine of “abuse of process” is clear: it is only applicable where:
 - to try those proceedings will amount to an abuse of its own process either*
 - 1) *because it will be impossible (usually by reason of delay) to give the accused a fair trial or*
 - 2) *because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*²⁷
32. In Case No. 001/18-07-2007, the CIJs had occasion to note that “[t]he courts that have applied this doctrine have always considered the proportional relationship between the alleged violations and the proposed remedy. It is obvious that in a case of crimes against humanity, the proceedings should be stayed only where the rights of the accused have been seriously affected, at

²⁶ See *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Appeal Judgment, ICTY Appeals Chamber, 20 February 2001 (*Čelebići Appeal Judgment*), par. 707, quoted in Case File No. 002/09-10-2009-ECCC/OCIJ (PTC01) and 002/13-10-2009-ECCC/OCIJ (PTC02), **Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan**, 5 November 2009, 00399417-00399430, para. 14.

²⁷ House of Lords, *R. v. Horseferry Road Magistrates’ Court ex parte Bennett*, quoted in the Request for a Stay of Proceedings, para. 12.

least, for example, to the degree in *Toscanino*. The Co-Investigating Judges are therefore compelled to follow the solution adopted in *Nikolic and Lubanga* which requires, for the application of the abuse of procedure doctrine, the existence of grave violations of the rights of the Accused.”²⁸

33. The Defence submits that, in this case, for the purpose of determining whether there has been abuse of process, the applicable threshold should be lower than that applied by the CIJs in their above-noted decision because “*the abuse has been committed by an institution of the ECCC itself, and .. the abuse relates to the unfairness of the proceedings conducted against the Charged Person, rather than extended pre-trial detention*”.²⁹ The Co-Investigating Judges can find no support for this proposition in the relevant international practice.³⁰
34. In any event, the doctrine of abuse of process cannot apply in this matter, as there has been no infringement of the interests of the Charged Person.

The Factual Allegations

35. The grounds alleged here are essentially the same as those provided in support of the Request for Annulment: the request is a verbatim recitation of the allegations contained in Wayne Bastin’s first statement and, with respect to the Second Bastin Statement, a verbatim recitation of the allegations pertaining to the alleged withholding of information by the international Investigating Judge, to the film crew and to the transmission of a document by the Office of the Co-Prosecutors. These grounds have been addressed at paragraphs 12 to 28 above.
36. However, the Request for a Stay of Proceedings raises additional grounds which should be examined separately.

²⁸ C3, *Order of Provisional Detention*, 31 July 2007. 00145478-00145488, para. 21.

²⁹ D264, *Request for a Stay of Proceedings*, para. 8.

³⁰ See *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, par. 26; See also *Prosecutor v. Barayagwiza*, Appeals Chamber, Decision, 3 November 1999, Case No. ICTR-97-19-A, para. 73: for example: “However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.”

Mr Stephen Heder's Appraisal

37. The Defence submits that there was an “*attempted interference by Judge Lemonde with Heder's appraisal by Bastin*”. The Cambodian Investigating Judge is not concerned by this issue. On his part, the international Investigating Judge, while pointing out that it is not possible to address Mr Heder's performance appraisal here, which in no way concerns the rights of the parties, can but share the Defence view that “[i]t is self-evident that a work appraisal should represent the honest opinion of its author;”³¹ however, he must point out that it is the head of the service (i.e. the international Investigating Judge) rather than the intermediary (Mr Bastin) who has the final appreciation of the performance appraisal of the staff of the international side of the Office of the Co-Investigating Judges. The charge of “interference” is therefore baseless.

The Prime Minister's Speeches

38. The general comments of the Defence about the Prime Minister's statements and about the Cambodian context, which it argues makes it impossible to have confidence that a trial would be fair, are not substantiated by any concrete examples of decisions or action by the Judges that might have, in any manner whatsoever, been taken under circumstances that might be open to criticism from a strictly judicial perspective. At times, they are even contradictory, as shown above (paragraph 18). They cannot therefore warrant a stay of the proceedings.

The “SMD” Decision

39. The Defence invokes the Co-Investigating Judges' decision on the search for potentially exculpatory evidence in the materials on the shared drive and the reasons in support of the Pre-Trial Chamber's decision on appeal, as proof of the Co-Investigating Judges' partiality. But, as evidenced by its use of the phrase “*non-existing 'principle of sufficiency'*”, the Defence has obviously misconstrued the Co-Investigating Judges' decision.
40. There is no inconsistency between the decision of the Pre-Trial Chamber and what the Co-Investigating Judges wrote for the simple reason that the two decisions refer to two separate issues: the Pre-Trial Chamber described the chronology of the procedural steps for conclusion of the judicial investigation whereas the Co-Investigating Judges addressed the reasons why they would “*consider that an investigation [had] been concluded*” pursuant to Rule 66(1) of the Internal Rules. Perhaps, the Co-Investigating Judges were not sufficiently clear as to what they meant by the “*principle of sufficiency of the evidence*”. Clearly, at no time did they consider not adhering to the procedural steps consisting in announcing the end of the investigations before obtaining possible submissions from the parties and taking into account all the evidence, including exculpatory evidence, for the purpose of ruling on the sufficiency of the evidence. They merely attempted to explain that in order to announce the conclusion of the judicial investigation; they must necessarily have an opinion

³¹ D264. *Request for a Stay of Proceedings*, para. 43.

on the content of the case file and on all the material that has been gathered.³² If, on the basis of all the material – both inculpatory and exculpatory – in the case file, they consider that it is possible to envisage issuing either an indictment or a dismissal order, they have a duty to notify the parties, otherwise there will be no reason to ever put an end to the judicial investigation. This is the context in which the “*principle of sufficiency of the evidence*” obviously applies and in which the “*principle of exhaustiveness*” would lead to an absurd situation. It is therefore completely inappropriate to see in this decision proof of partiality on the part of the Co-Investigating Judges.

The Order on Extension of Provisional Detention of Mrs IENG Thirith

41. The Defence takes issue with the Co-Investigating Judges’ reasons underpinning the extension of detention: they argue that the Co-Investigating Judges did not “*use the same terminology*” when dealing with inculpatory and exculpatory evidence and that thus, once again, they exhibited their partiality. While it undoubtedly makes sense for the Defence to criticise a decision that it has appealed, it is more surprising that the Defence would wonder why that decision lays emphasis on the inculpatory evidence required to justify the detention, by showing that this evidence weighs more heavily than the exculpatory evidence. Had the Co-Investigating Judges considered that such was not the case, they would have ordered the release of the Charged Person. A judge’s impartiality does not include a prohibition from expressing an opinion on the weight of the evidence when he or she makes a decision concerning detention. Appellate remedies are available to correct any errors of judgment and there is no reason here to set the discussion against the backdrop of an allegation of partiality.³³

Conclusion

42. In light of all these reasons, there is nothing to justify, on the one hand, seizing the Pre-Trial Chamber with a view to the annulment of the proceedings or, on the other hand, a stay of the judicial investigation: absent any procedural defect, there has been no infringement of any of the rights of the Defence under the International Covenant on Civil and Political Rights or under Rule 21 of the Internal Rules and the two requests should be rejected.

³² Which is also the analysis of the Pre-Trial Chamber: See *Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde*, dated 9 December 2009, para. 24, ERN 00407723-00407724.

³³ See *Decision on Khieu Samphan’s Application to Disqualify Co-Investigating Judge Marcel Lemonde*, dated 14 December 2009, paras. 34 and 35, ERN 00414122.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY

State that there are no grounds to seize the PTC with a view to annulment;

State that there are no grounds for a stay in the proceedings;

Reject the requests.

Done in Phnom Penh, on 31 December 2009

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**Co- Investigating Judges
The Co-Investigating Judges**