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Nation Religion Roi

Kingdom of Cambodia
Nation Religion King

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

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

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Before: **Judge YOU Bunleng**
Judge Marcel LEMONDE

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Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD

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We, **You Bunleng (ឈូ ប៊ុនឡេង)** 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 53, 55 and 58 of the ECCC Internal Rules (the "Internal Rules");

Noting the ongoing judicial investigation against **NUON Chea (នួន ជា), IENG Sary (អៀង សារី) and other Charged Persons**, relating to charges of **Crimes against humanity** and **Grave breaches of the Geneva Conventions dated 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law,

and against **IENG Thirith (អៀង ធីរិទ្ធ)**, relating to charges of **Crimes against humanity**, crimes defined and punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law,

Noting the joint Request for Investigative Action filed by the Defence teams of NUON Chea, IENG Sary and IENG Thirith, to seek exculpatory evidence in the SMD, dated 20 April 2009 (D164).

PROCEDURAL HISTORY AND ARGUMENTS BY THE DEFENCE

1. On 20 July 2007, two days before the opening of the current judicial investigation, the Co-Prosecutors made available to all the parties, and to the Co-Investigating Judges, a set of electronic documents on what is known as the Shared Materials Drive or SMD.

2. The documents in question were already available in various public sources, including the Documentation Centre of Cambodia (DC-Cam).

3. In a Request dated 20 April 2009, the defence teams of IENG Thirith, IENG Sary and NUON Chea (the "Defence") seised the Co-Investigating Judges of a Request to seek exculpatory evidence in the SMD (the "Request").

4. In the Request, the Defence contends:

   - that *"During a meeting between representatives of the Office of the Co-Investigating Judges ("OCIJ"), the Office of the Co-Prosecutors and the Defence Support Section ("DSS") on 4 February 2009, it appeared that the OCP had received those documents in the course of their primary investigation, and that they did not have time to analyse them before filing their Introductory Submission. Because the OCP did not want to be accused of concealing exculpatory elements, and because they considered that those documents could be relevant to the case, they decided to make those available to the judges and the parties through a channel other than the Case File. The OCP made clear that although they are not aware of the presence of any*

specific exculpatory evidence among these documents, they could not exclude the possibility of such presence. It is precisely for this reason that they 'disclosed' those materials". (para. 4)

- that *"The Rules do not provide for any disclosure channel other than the Case File. The SMD does not fall under Rule 53(4) as this only applies to exculpatory evidence of which the Co-Prosecutors have actual knowledge. In any case, such disclosure would have to be placed in the Case File. In other words, both the OCP and the OCIJ have not acted pursuant to any legal provision or procedure, and the SMD cannot in any way be considered as the adequate or proper fulfillment of its legal duty of disclosure"* (para. 14);

- that *"the creation of the SMD had the effect of wrongly shifting the burden of the investigation for exculpatory evidence onto the Defence"* (para. 16); and that, "*given the overwhelming volume of the SMD, and the lack of resources available to defence teams, it is not possible to consider that the documents placed in the SMD are 'available' to the defence in any meaningful way*" (para. 20); and, finally,

- that by use of the SMD, *"the OCP and the OCIJ have sought to evade their statutory responsibilities to search for exculpatory material which might assist the Charged Person"* (para. 20).

5. The Defence thereore requests the Co-Investigating Judges, *inter alia*, to:

   - *"review all the documents placed in the SMD by the OCP and the OCIJ",*

   - and to *"produce a sufficiently detailed report of their analysis to enable the defence to ensure that all necessary investigative actions have been undertaken to identify potential exculpatory evidence"* (para. 25).

REASONS FOR THE DECISION

6. Pursuant to the criminal law principle limiting procedural bars to the admissibility of evidence *[liberté de la preuve]* applicable before the ECCC,[1] ultimately, any material may be considered as evidence. However, even in the context of a single criminal act, it is materially impossible to produce an exhaustive catalogue of all possible evidence. This, of course, also applies, *a fortiori,* to a judicial investigation of large-scale crimes such as those allegedly committed during the Democratic Kampuchea regime. For this reason, while the Co-Investigating Judges are obviously not permitted to make an arbitrary selection within the material they have collected, thereby excluding some evidence they know to exist, it does not follow that they are required to conduct an exhaustive search for all evidence; an impossible task. The logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged

[1] See for example, Rule 87(1) of the ECCC Internal Rules.

Person.[2] It follows that the dismissal of a request for investigative action does not, of itself, call into question the impartiality of the Co-Investigating Judges in the discharge of their duty to seek evidence.[3]

7. It is a matter of common sense that the Co-Investigating Judges must be selective when dealing with a plethora of evidence. Nonetheless, being selective must not be construed as cherry picking the existing evidence; it draws its rationale from the fact that the excluded investigative action would not be any more conducive to ascertaining the truth than the action taken by the Co-Investigating Judges, the results of which are placed on the case file. This is why it is important to assess both the relevance and the specificity of each request for investigative action before responding.

8. A defence request whose sole aim is to seek an exhaustive catalogue of evidence cannot be considered pertinent. Yet this is clearly the case here, given that the Defence Request under consideration is solely aimed at expanding the catalogue of evidentiary materials without any indication that the information sought is, in fact, conducive to ascertaining the truth.

9. Moreover, the Defence fails to satisfy the specificity criterion when it requests the Co-Investigating Judges to "[r]eview *all documents* placed in the SMD".[4] Far 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 proceedings, implying that any request which could have the effect of delaying the proceedings may be dismissed. In this instance, granting such an imprecise request would have the concrete effect of delaying the proceedings unduly and would thus be contrary to the "trial within a reasonable time" principle.

10. Respecting the requirement for trial within a reasonable time, or more precisely, refusing to accept any undue delay, now features among the established requirements of fair proceedings and is enshrined in international instruments, some of which are directly applicable within the Cambodian legal system.[5] This requirement, which must be observed by the judges both at the trial stage and at the investigation stage, is determined on a case-by-case basis, as confirmed by

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[2] The Co-Investigating Judges have the discretionary power to choose the means of ascertaining the truth; in exercising such discretionary, the investigative acts are to be taken "*whether the evidence is inculpatory or exculpatory*"; Rule 55(5): "(...) *the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. (...)*".

[3] "*... by nature, an evolving process, guided by Co-Investigating Judges's role in seeking the truth in an impartial manner.*" See A193, p. 2.

[4] Defence Request, para. 25 (i). (Emphasis added).

[5] Article 14 (3) of the International Covenant on Civil and Political Rights, 19 December 1966, of which Cambodia is a signatory, provides:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (...)*
> *(c) To be tried without undue delay (...)"*

It is recalled that Rule 87(3)(b) of the Internal Rules contains provisions to the same effect. For a concrete application of this principle, see the ECCC Trial Chamber decision dated 26 May 2009, para. 20 (E43/4).

international case-law.[6] It follows that the Co-Investigating Judges must refrain from continuing the judicial investigation beyond a certain length of time in order to avoid the danger of infringing the fairness of the trial. As a consequence, the judges have the right and even the duty to dismiss requests for investigative action submitted by the parties where they do not consider such requests to be conducive to ascertaining the truth.

11. The Defence cannot satisfy the relevance and specificity criteria described *supra* merely by asserting that it is the duty of the Co-Investigating Judges to *"(...) ensure that all reasonable exculpatory leads have been explored*", without providing any further particulars. Indeed, 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". Yet they have failed to do so in this case.

12. Moreover, differences in systems apart, it bears noting that within international criminal tribunals, the Defence has the *prima facie* obligation to provide supporting material in order to be sufficiently specific as to the nature of its request.[7]

13. According to the system in place within other international criminal tribunals, requests for disclosure of documents in the possession of the Prosecutor are aimed at allowing defence access to the information they contain, so as to determine whether such documents are useful for the defence of their client. However, in this instance, all the documents in the SMD are already available to the parties in various sources, such as DC-Cam or the UN Bibliographic Information System. Therefore, the concept of "disclosure" is not the appropriate framework for analysing the fact that the Co-Prosecutors placed documents from the above sources in the SMD.[8] Not only does "disclosure" not function the same

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[6] Article 5(3) of the ECHR provides: *"Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time (...)"*. The European Court of Human Rights has held on several occasions that reasonable time starts to run from the moment when a person is charged. In this connection, see *Zanouti v France*, Judgement, 31/07/2001; *Ottomani v. France*, Judgement, 15/10/2002; *Donsimoni v. France*, 5/10/1999; *Etcheveste and Bidart v. France*, 21/03/2002.

[7] In this direction, an ICTY Trial Chamber considered that the defence "*must submit to the Trial Chamber all prima facie proofs tending to make it likely that the evidence is exculpatory and was in the Prosecutor's possession*" (ICTY, *Blaskic,* Decision on the Production of Discovery Materials, Trial Chamber, 27 January 1997, para. 49); in this regard, the ICTR Appeals Chamber pointed out that when complaining about the Prosecution's failure to meet its disclosure obligations, it is not enough for the Defence to refer to the documents as *"relevant" to [its] case and "necessary to the defence" and merely assert[ing] that "they contain exculpatory evidence" without any further explanation as to how they may "suggest [the Accused's] innocence" or mitigate his personal responsibility"*, (ICTR, *Nahimana et al.*, Appeals Chamber, Decision on Ferdinand Nahimana's Motions for Disclosure of Material in the Prosecutor's Possession Necessary for the Appellant's Defence and for Registry's Assistance to Conduct Further Investigations at the Appeal Stage, 8 December 2006, para. 8); and in the same Decision with regard to complaints about breach of the Prosecution's disclosure obligations: "*Any submission made by the Defence regarding a potential breach of Rule 68 must be accompanied by all prima facie proofs which show that it is likely that the evidence is exculpatory and is in the possession of the Prosecutor* (para. 7).

[8] In particular, the use of the SMD cannot be viewed as an attempt by the Co-Prosecutors to "conceal" exculpatory elements or to evade their disclosure obligations, as was the case for EDS, *Prosecutor v.*

way in the civil law system,[9] but also – as the Defence acknowledges[10] – the Co-Prosecutors clearly indicated that they were not aware of the presence of any exculpatory evidence in the documents at issue. The fact that such presence is not excluded in the explanatory Protocol included in the SMD by CMS – an unofficial document without legal force – does not call into question the Co-Prosecutors' initial statement. The Co-Prosecutors have the obligation to disclose any evidence *"they are aware of"* and it may be presumed that they are act in good faith.[11]

14. Moreover, the Co-Prosecutors' obligation to inform the Co-Investigating Judges of any evidence that comes to their knowledge, whether such evidence is inculpatory or exculpatory,[12] should not be misinterpreted. The filing of an Introductory Submission not only seises the Co-Investigating Judges of a case, but it simultaneously terminates the Co-Prosecutors' authority to accomplish investigations into the same facts. Therefore, as of 18 July 2007, the Co-Prosecutors could no longer accomplish investigative action; having determined that some of the public documents in their possession could be relevant to the case, they decided to make them available to the parties and to the Co-Investigating Judges in the interest of equality of arms[13] and procedural efficacy. They did not require any particular legal basis to do so. Therefore, the use of the SMD is in no way intended as roundabout form of "disclosure" as the Defence argues, especially given that it does not affect the obligations of the bodies involved in the judicial investigation. It is important to recall that the parties are entirely free to review any document from any public source in their search for evidence and, if necessary, request the Co-Investigating Judges to place such evidence on the Case File. Such preliminary inquiries do not affect the prohibition for the parties to accomplish their own investigative action.[14] In any

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Karamera et al, ICTR Appeals Chamber, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006.

[9] The positive obligation for the Prosecution to disclose any exculpatory evidence in its possession, pursuant to the ICC Rules (ICTY, Rule 70; ICTR, Rule 68) falls squarely within the ambit of common law because of the absence of a judicial investigation case file kept by an impartial judge. This explains why the ICTR Electronic Disclosure Suite (EDS) contains evidence which has *already* been *analysed* by the prosecutors for inclusion in the Suite precisely on account of its probative value, and this includes evidence which, to their knowledge could be exculpatory.

[10] D164, Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in Shared Materials Drive, 20 April 2009, para. 4.

[11] On this subject, see *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR Appeals Chamber, Decision on Ferdinand Nahimana's Motions for Disclosure of Material in the Prosecutor's Possession Necessary for the Appellant's Defence and for Registry's Assistance to Conduct Further Investigations at the Appeal Stage, 8 December 2006, para. 7.

[12] For example, pursuant to Rule 53 of the Internal Rules: on the introductory submission, *2. The 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*; and, during the investigative stage, *"4. The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence"*.

[13] In the sense that having received electronic copies of documents from the DC-Cam collection put the Co-Prosecutors in a potentially advantageous position in terms of access from a purely technical point of view, compared to the other parties, transferring these copies to the Court Management Section made it easier for the parties to access those materials on an equal footing.

[14] In this connection, see our Memorandum to the NUON Chea Defence team, dated 10 January 2008 (A110/I).

event, considering the specificity of the charges relating to international crimes within the Cambodian context – i.e. the existence, in this case, of massive documentary resources – the SMD is a particularly useful technical tool for all ECCC organs, and does not in any way prejudice the Defence.[15]

15. This analysis leads to the conclusion:

- that whenever the Co-Investigating Judges undertake specific investigative action involving the search for documentary evidence that is conducive to ascertaining the truth, either at the request of the parties or *proprio motu*, they actively explore all documentary sources which in their view could contain the categories of documents being sought – including documents in the SMD;

- that any document identified by the Co-Investigating Judges as meeting these criteria, whether it be inculpatory or exculpatory, is systematically placed on the Case File, and thereby made available to the parties;

- that the SMD does not serve the same purpose as the electronic data suites already analysed by the prosecutors within other international tribunals. This is accomplished within the ECCC by the Case File, on which Co-Investigating Judges, either *proprio motu* or at the request of the parties, are required to place all evidentiary material that may come to their knowledge, whether it is inculpatory or exculpatory, including through the use of the SMD;

- that in omitting to specify the underlying reasons for, and relevance of, the investigative action sought, thereby requiring the Co-Investigating Judges to review not just the electronic copies of selected documents contained in the SMD but, in fact, all manner of documentary sources throughout the world the Request fails to satisfy the relevance and specificity requirements described *supra*;[16]

- that, in fulfilling their duty of impartiality, the Co-Investigating Judges are under no obligation to go on "fishing expeditions"[17] in search of exculpatory materials as long as they satisfy the requirement of sufficiency;

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[15] The inclusion in the Zylab portal of the electronic copies of these documents allows for powerful, rapid full text searches, as well as the filtering of various sources; also, once found, a document can be downloaded easily in .pdf or even text format and copied into another document; finally, having an ERN on each page makes it easier to quote such documents and for the Co-Investigating Judges to place them in the Judicial Investigation Case File, where necessary.

[16] ICTY, *Blaskic*, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 40: "*A request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request*"; the Trial Chamber has also required the defence to demonstrate the existence of "*a prima facie showing of the exculpatory nature*" of any requested evidentiary material (*Delalic*, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, ICTY, TC, 24 June 1997, paras. 13, 15 and 18).

[17] For example, *Prosecutor v. Delalic et al*, Separate Opinion of Judge David Hunt on Motion by Esad Landzo to Preserve and Provide Evidence, 22 April 1999, para. 4; see also, *Prosecutor v. Hadzihasanovic et al*, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

- that the Defence request for a sufficiently detailed report on the content of the SMD is tantamount to asking the Judges to review, in its behalf, documents which are already available to the Defence, without providing any further explanation as to the reasons why the Defence considers such documents contain exculpatory elements. This is not the role of the Co-Investigating Judges; and

- that if, after having conducted a search in the SMD or any other public documentary source, the Defence becomes aware of evidence which it wishes to bring to the attention of the Co-Investigating Judges or documents that it has reasons to believe contain exculpatory elements, it is entitled to inform us accordingly.

FOR THE REASONS STATED,

HEREBY DISMISS the Request.

Done in Phnom Penh, on 19 June 2009

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges
Co-juges d'instruction