



**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 Préliminaire

D 273 / 3 / 5

*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 (PTC58)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Catherine MARCHI-UGHEL  
Judge HUOT Vuthy

**Date:** 10 June 2010

**ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
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មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Ueh Arun

**PUBLIC REDACTED**  
**DECISION ON APPEAL AGAINST OCIJ ORDER ON NUON CHEA'S**  
**EIGHTEENTH REQUEST FOR INVESTIGATIVE ACTION**

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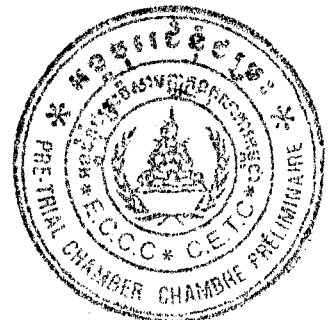
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**Unrepresented civil parties**



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of an “Appeal Against OCIJ Order on NUON Chea’s Eighteenth Request for Investigative Action”, filed by the Co-Lawyers for Nuon Chea (“Charged Person” or “Appellant”) on 19 March 2010 (“Impugned Order”<sup>1</sup> and “Appeal”<sup>2</sup>).

## I. PROCEDURAL BACKGROUND

1. On 11 December 2009, the Charged Person filed his “Eighteenth Request for investigative action” (“Request”),<sup>3</sup> whereby, in light of [REDACTED] unique role as both a former member of the Khmer Rouge and one of the architects of Democratic Kampuchea’s downfall, he requested that (1) [REDACTED] be interviewed; (2) any relevant document in his possession be collected; 3) an English version of his autobiography be obtained; and 4) the documents obtained as a result of the three requested actions be placed on the case file as soon as possible.<sup>4</sup>
2. On 17 February 2010 the Co-Investigating Judges (“CIJs”) issued the Impugned Order rejecting the Request.<sup>5</sup> The Impugned Order was notified to the Co-Lawyers of the Charged Person on the same day and they filed the Notice of Appeal against it on 18 February 2010.
3. The filing of the Appeal was originally rejected as untimely by the Greffier of the Pre-Trial Chamber. Then, on 7 April 2010 the Pre-Trial Chamber decided to accept the late filing of the Appeal in light of the justified indisposition of counsel that amounted to exceptional circumstances.<sup>6</sup>
4. No response has been filed by any other party within the set deadline.

<sup>1</sup> Order on Nuon Chea’s Eighteenth Request for Investigative Action, issued confidentially by the Co-Investigating Judges (“CIJs”) on 17 February 2010, D273/2 (“Impugned Order”).

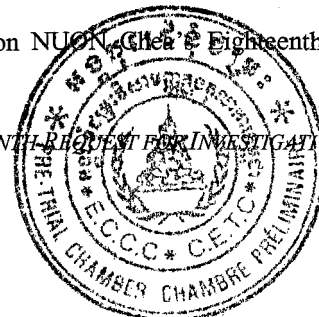
<sup>2</sup> Appeal against OCIJ Order on Nuon Chea’s Eighteenth Request for Investigative Action, 19 March 2010, D273/3/2 (“Appeal”).

<sup>3</sup> Eighteenth Request for Investigative Action, filed on 11 December 2009, D273 (“Request”).

<sup>4</sup> Request, paras. 1 and 12.

<sup>5</sup> Impugned Order, page 4.

<sup>6</sup> Decision to Accept Late Filing of Appeal Against OCIJ Order on NUON CHEA’S EIGHTEENTH REQUEST FOR INVESTIGATIVE ACTION, 7 April 2010, D273/3/3, para. 4.



5. The Appellant requested a public oral hearing to determine the matter.<sup>7</sup> The Pre-Trial Chamber considered that it is appropriate to determine the Appeal based on the Charged Person's written submissions.<sup>8</sup>

## II. OVERVIEW OF THE APPEAL

6. The Appeal is filed pursuant to Internal Rule 74(3)(b)<sup>9</sup> and alleges three grounds of appeal<sup>10</sup> related to the CIJs' refusal to place [REDACTED] autobiography on the case file",<sup>11</sup> to interview him<sup>12</sup> and to try to collect any documents in his possession given that, according to the CIJs, it is "insufficiently likely that [REDACTED] would be in possession of any relevant documents, in addition to those that have already been placed on the case file", as he spent a significant period of time in custody [REDACTED] after 1979.<sup>13</sup>

## III. ADMISSIBILITY OF THE APPEALS

7. The late filing of the Appeal has been validated by the Pre-Trial Chamber. Internal Rule 74(3)(b) permits a Charged Person to appeal before the Pre-Trial Chamber orders from the CIJs refusing requests for investigative action. In so far as the Appellant requests the interview of [REDACTED] and the collection of any relevant document in his possession, it is a request for investigative action pursuant to Internal Rule 55(10). The Impugned Order refusing this investigative action, the Appeal is admissible under Internal Rule 74(3)(b).

8. In so far as the request to obtain an English version of [REDACTED] autobiography and place it upon the case file is concerned, the Pre-Trial chamber notes that the Appellant informed the CIJs that it is in possession of the original Khmer version of [REDACTED]

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<sup>7</sup> Appeal, para. 28.

<sup>8</sup> Decision to determine the appeal on the basis of written submissions, 8 June 2010, D273/3/4.

<sup>9</sup> Appeal, para. 8.

<sup>10</sup> Under the heading "A Final Thought" the Appeal (paras. 26-27) alleges that the Impugned Order is the "latest (and hopefully the last) example of blatant partiality on the side of the CIJs" in that it fails to neutrally, fairly and objectively assessing reasonable Defense requests. For reasons indicated under each of the three grounds of appeals, the Pre-Trial Chamber finds the allegation to be unsupported.

<sup>11</sup> Appeal, para. 9-17.

<sup>12</sup> Appeal, paras. 18-22.

<sup>13</sup> Impugned Order, para. 8; Appeal, para. 4 c).

autobiography but was not able to locate an English or French translation.<sup>14</sup> The Chamber further notes that the Request, in relevant part, sought to ‘obtain an English version of the [a]utobiography’,<sup>15</sup> not to place its original Khmer version on the case file. This last part of the Request, does not amount to a request to place the Khmer version of the autobiography on the case file. However, the CIJs appear to have understood the Request to seek the original Khmer version of [REDACTED] autobiography to be placed on the case file,<sup>16</sup> unless they considered that the request to place an English translation of the autobiography on the case file implicitly required also placing the original Khmer version on the case file. In any event, the Appellant is taking issue with the CIJs ruling on this issue, and the Pre-Trial Chamber will address the admissibility of the appeal, as if the Request sought to obtain the original Khmer version of the biography being placed on the case file.

9. Internal Rule 55(10), in relevant part, envisages the following two types of requests which a charged person may put to the CIJs at any time during the investigation, *i.e.* “to make such orders” and “to undertake such investigating actions” as they consider necessary for the conduct of the investigation. Contrary to the second type of requests, the first type does not imply seeking information that would contribute to the establishment of the truth. The distinction is important because, although Internal Rule 74(3)(b) clearly opens the possibility for the charged persons to appeal orders from the CIJs refusing requests for investigative action, it does not give the right for the charged person to appeal a rejection by the CIJs of a request to “make such orders” envisaged by Internal Rule 55(10). The Pre-Trial Chamber is of the view that requests to place a document on the case file, such as requests to translate documents, does not amount to a request for investigative action. The Pre-Trial Chamber has already ruled, in the context of an appeal by the Defence for IENG Thirith, on a possible inconsistency between Internal Rule 74(3)(b)<sup>17</sup> and Internal Rule 55(10).<sup>18</sup> It ruled that “[a]ny inconsistency that may derive from a suggested general possibility to appeal under Internal Rule 55(10) and the limited possibility to appeal for the

<sup>14</sup> Request, footnote 14.

<sup>15</sup> Request, para. 12 c).

<sup>16</sup> Impugned Order, paras. 3 and 5.

<sup>17</sup> Internal Rule 74(3)(b) limits the possibility for the Charged Person to appeal before the Pre-Trial Chamber orders from the OCIJ refusing requests for investigative action.



Charged Person under Internal Rule 74(3)(b) cannot lead to conclusions as drawn by the Co-Lawyers on the admissibility of this Appeal.”<sup>19</sup> The Pre-Trial Chamber finds that Internal Rule 74(3)(b) provides no avenue for the Appeal in so far as the autobiography sought to be placed on the Case File is concerned.

10. The Pre-Trial Chamber will however also examine whether the facts and circumstances of that part of the Appeal require adopting a broad interpretation of Internal Rule 74(3) in light of the right of the Charged Person to a fair trial. The overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21.1 a) which states that proceedings “shall be fair and adversarial and preserve the rights of the parties.”

11. The Pre-Trial Chamber notes that this part of the appeal raises an issue of fairness since the Appellant argues that in concluding that the autobiography “does not need to be placed on the case file”, the CIJs failed to recognize the potentially exculpatory relevance of material it contains. The Pre-Trial Chamber is cognizant of the possibility for the Appellant to present evidence during trial.<sup>20</sup> However if, as alleged by the Charged person, the document whose placement is sought on the case file indeed contains exculpatory evidence, its analysis could lead to the exclusion of charges, even partially, and/or specific modes of liability in the closing order, in relation to which the Appellant would not have to present a defence later during the trial. As a consequence, if established, such allegation could have serious consequences on the right of the Charged Person to a fair trial and should therefore be examined on the merits now. The Appellant further alleges that the CIJs applied a double standard depending on whether the request is made by the Charged Person or by the Co-Prosecutors. Given the seriousness of the allegation of partiality, and its possible consequences on the right of the Charged Person to a fair trial, the Pre-Trial Chamber finds that it is appropriate to also consider this part of the Appeal on the merits.

12. The Appeal is therefore admissible.

<sup>18</sup> Decision on Admissibility of the Appeal Against Co-Investigating Judges’ Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 January 2010, D/130/10/12.

<sup>19</sup> *Ibid.*, para. 17.

<sup>20</sup> *Cf.* Internal Rules 84 (1) and 93.



#### IV. MERIT OF THE APPEALS

13. The Pre-Trial Chamber will examine each of the grounds of appeal in turn. Before doing so, the Pre-Trial Chamber recalls that decisions (or orders) on requests for investigative actions are discretionary and that such decisions may be overturned if the Appellant demonstrates that the challenged decision was (1) based on an incorrect interpretation of governing law, which is not alleged in the instant case; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse by the CIJ's discretion.<sup>21</sup>

##### A. First Ground of Appeal Related to the Refusal to Place the Autobiography on the Case File

14. The first ground of appeal is that the refusal to place [REDACTED] autobiography on the case file amounts to an abuse of the CIJs' discretion and is based on an incorrect application of governing law.<sup>22</sup> The Appellant asserts that in concluding that the autobiography "does not need to be placed on the case file", the CIJs failed to recognize the contextual and potentially exculpatory relevance of material it contains.

15. The Impugned Order contains the following findings "[a]s regards the request to place [REDACTED] Khmer language autobiography on the case file", on the basis of which the CIJs declined to place the book on the case file:<sup>23</sup>

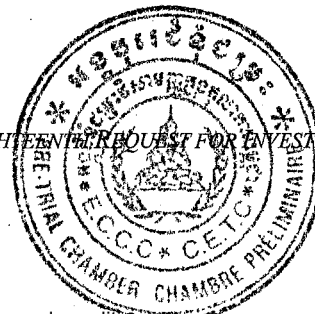
- (1) "after an initial review of the book, the CIJs fail to see how it may be more conducive to ascertaining the truth than other elements already on the case file, in particular since it provides no direct evidence with respect to the facts under investigation, being based on indirect sources accessible to the author from outside the country;"<sup>24</sup>

<sup>21</sup> Public 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, paras. 25-27, adopting the test developed by the ICTY Appeals Chamber in the interlocutory appeal case *Slobodan Milošević v. Prosecutor*, IT-02-54-AR73.7, 1 November 2004.

<sup>22</sup> Appeal, paras. 9-17.

<sup>23</sup> Impugned Order, para. 3.

<sup>24</sup> Impugned Order, para. 3.



- (2) “after preliminary research, there does not appear to be a published English or French language version,” thus “placing the entire book on the case file and requiring significant resources for the full translation of over 300 pages would be considered as wasted consumption of Court resources and uselessly time-consuming;”<sup>25</sup> and
- (3) “the document raises a number of issues related to matters which fall outside the temporal jurisdiction of the ECCC. Whilst such matters may be conducive to determining the truth in certain circumstances, in this case the CIJs are not persuaded, and the Defence fails to explain, how the book could assist in clarifying the context of the criminal conduct alleged to have occurred within the ECCC temporal jurisdiction, establishing or disproving the elements (in particular, criminal intent) thereof, or demonstrating the existence or absence of a deliberate pattern of conduct”.<sup>26</sup>

16. To successfully appeal this aspect of the Impugned Order, the Appellant needs to show that each of the three basis for the decision are erroneous or, if he only makes such demonstration in relation to some of these basis, he needs to show that the remaining ones do not support the Impugned Order.

17. The Appellant challenges the first of the three grounds on which the Impugned Order is based, submitting that in respect of the test applied by the CIJs to reach the conclusion was such that the Appellant “fail[s] to see how it may be more conducive to ascertaining the truth than other elements already on the case file” is both incomprehensible and untenable.<sup>27</sup> The Pre-Trial Chamber agrees with the Appellant that the relevant test is whether the document in question is, in and of itself, conducive to ascertaining the truth, rather than whether it is more conducive to ascertaining the truth than other elements already on the case file.<sup>28</sup> The Appellant further takes issue with the underlying conclusion that, in particular, the autobiography “provides no direct evidence with respect to the facts

<sup>25</sup> Impugned Order, para. 3.

<sup>26</sup> Impugned Order, para. 4 and footnote 3, referring to the Decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) in the case *The Prosecutor v. Nahimana et al.* (ICTR-99-52-A), Appeals Judgment, 28 November 2007, para. 315 and to the Order on Requests D153, D172, D173, D174, D178 and D284, 12 January 2009, para. 9, D300.

<sup>27</sup> Appeal, para. 12





under investigation, being based on indirect sources accessible to the author from outside the country”.<sup>29</sup> Again, the Pre-Trial Chamber agrees that this finding lacks clarity. The Pre-Trial Chamber is of the view that the first reason underlying the Impugned Order does not support it. The Chamber turns next to the other arguments raised by the Appellant in respect of the second and third reasons.

18. The Appellant further submits that the CIJs applied a relaxed standard of admissibility with respect to the requests from the Co-Prosecutors seeking the admission of books which, according to the Appellant, exposes a biased approach by the CIJs towards the Defence and amounts to an error of law.<sup>30</sup> The Appellant fails to demonstrate the biased approach he alleges. The Pre-Trial Chamber notes that indeed, the statement by the CIJs in the second order referred to by the Appellant that “books are public documents for which a placement in the case file is not absolutely necessary” but that “in order to facilitate access to the parties an quotations the CIJs consider that they should be placed in the Case File”<sup>31</sup> could give the impression that the CIJs admitted books on the case file, as if they were merely placed in a table of authorities in order to facilitate reference to it by parties. Even if the order in question does not provide full reasons for the admission of the books,<sup>32</sup> the Pre-Trial Chamber is of the view that the CIJs were satisfied that, as argued by the Co-Prosecutors’ request on which the order is based,<sup>33</sup> the books were relevant and conducive to ascertaining the truth regarding at least three sets of allegations in the Introductory Submissions and Supplementary Submissions, namely the commission of the alleged crimes, jurisdictional elements of the crimes and their contextual setting as well as the charged persons’ authority and participation.<sup>34</sup> The same applies to the first order referred

<sup>28</sup> Appeal, para. 12.

<sup>29</sup> Impugned Order, para. 3.

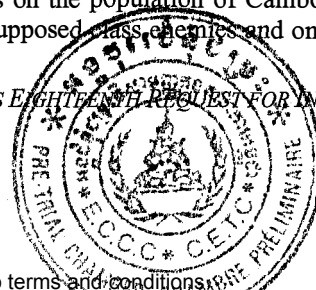
<sup>30</sup> Appeal, paras. 13 and 14, referring to two orders from the CIJs, D222/1 (admitting twenty-two books, according to the Appellant, “without reason or reference to the standard applied in the Impugned Order”) and D313/1 (admitting eleven books although the CIJs then recalled that “books are public documents for which a placement in the Case File is not absolutely necessary. Nevertheless, to facilitate access to the parties and quotations the CIJs consider that they should be placed in the Case File).

<sup>31</sup> D313/1, para. 2.

<sup>32</sup> In this respect, Internal Rule 55(10) merely requires reasons being provided for rejection orders.

<sup>33</sup> D313, paras. 5-6.

<sup>34</sup> According to the request in question, the books inter alia give account of the Cambodian civil war, forming part of the context of the Communist party of Kampuchea’s (CPK) seizure of power on 17 April 1975, including the role of the USA and the effects of its heavy bombardments on the population of Cambodia); the urban society which developed until 1975 and became one of the CPK’s supposed class enemies, and one of the group the CPK



to by the Appellant, which does not provide specific reasons for granting the request on which it is based.<sup>35</sup> Review of the Co-Prosecutors' request in question reveals that like their previous request, and unlike the Request on which the Impugned Order is based, it contains an analysis of the books sought to be admitted and argues precisely why it is conducive to ascertaining the truth.<sup>36</sup>

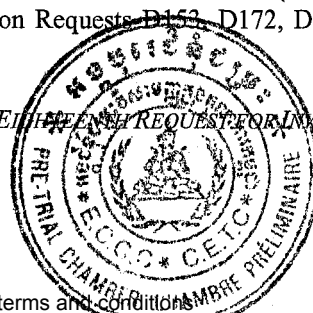
19. The Appellant does not provide any convincing argument to challenge the third reason underlying the Impugned Order which, in the view of the Pre-Trial Chamber provides a sufficient ground to support the refusal to admit [REDACTED] autobiography. In particular, the CIJs stated that (1) it raises a number of issues related to matters which fall outside the temporal jurisdiction of the ECCC, (2) they are not persuaded that such matters may be conducive to determining the truth, and (3) the Defence fails to explain, how the book could assist in clarifying the context of the criminal conduct alleged to have occurred within the ECCC temporal jurisdiction, establishing or disproving the elements, in particular, criminal intent, thereof, or demonstrating the existence or absence of a deliberate pattern of conduct.<sup>37</sup> The Pre-Trial Chamber notes that, although in possession of the original Khmer version of the autobiography and counting national Khmer members of its team, the Defence for the Charged Person seem to have omitted to proceed to any analysis of the autobiography in its possession. Indeed, the Request did not refer to any specific portion of the autobiography and merely stated that “[g]iven [REDACTED] early defection to Vietnam, his involvement in the [REDACTED] [REDACTED], and his former position as [REDACTED] [REDACTED]” as well as his “early membership in the Khmer Rouge and, in particular, his relationships with [REDACTED] and other senior DK cadres” the “Autobiography *likely contains* relevant information with regard (emphasis added)” to

targeted as “the new people”; persecution of the “new people” by the CPK and Democratic Kampuchea (DK) authorities; sociological and anthropological aspects of the Cambodian society under CPK/DK rule and population trends which are probative on the issue of the alleged death toll; the fall of Phnom Penh and forced evacuation of its inhabitants as well as testimonies of crimes committed against civilians (D313, para. 6).

<sup>35</sup> D222/1.

<sup>36</sup> D222, paras 2-22; 24-26.

<sup>37</sup> Impugned Order, para. 4 and footnote 3, referring to the Decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) in the case *The Prosecutor v. Nahimana et al.* (ICTR-99-52-A), Appeals Judgment, 28 November 2007, para. 315 and D300, Order on Requests D153, D172, D173, D174, D178 and D284, 12 January 2009, para. 9.



“documents and other materials collected by Vietnamese officials during the occupation” and “the workings of the upper echelons [REDACTED]”. By failing to make use of its national Khmer resources and to analyse the content of the original Khmer version of the autobiography in its possession, and by choosing to speculate on its potential import, the terms of the Request lend support to the Impugned Order’s challenged finding.

20. Finally, as regards the request to obtain an English translation of the autobiography and to place it on the case file, the Appellant argues that “hardly a waste of court resources, the translation and placement on the case file of such a unique and potentially valuable piece of contextual evidence would be highly conducive to ascertaining the truth” and that “the CIJ’s failure to do so is so unfair and unreasonable as to constitute an abuse of discretion.”<sup>38</sup> The Pre-Trial Chamber notes that, in this respect, having found that the book did not need to be placed on the Case file, the Impugned Order went on to state that “[s]hould the Defence submit specific passages which they consider to be exculpatory, accompanied by an English or French translation, as required by Article 7.1 of the Practice Direction on Filing of Documents before the ECCC, the CIJs will ensure that they are made available to the parties for use during any future proceedings, if the Trial Chamber considers it useful to do so”.<sup>39</sup> Having found that there was no error in the CIJs decision not to admit the autobiography on the Case File, the Pre-Trial Chamber disagrees that they abused their discretion in declining to require that an English version of this document be produced by using the resources of the ECCC.

21. For the foregoing reasons, the first ground of appeal is rejected.

**B. Second Ground of Appeal Related to the Refusal to Interview [REDACTED]**

22. The allegation under the second ground of appeal is that the refusal to interview [REDACTED] amounts to an abuse of the CIJs’ discretion and a mistake of law.

23. Paragraphs 6 and 7 of the Impugned Order, related to the request to interview [REDACTED] read :

<sup>38</sup> Appeal, para. 17.

<sup>39</sup> Impugned Order, para. 5.



As regards the request to interview ██████████, the CIJs recall that in determining whether to interview a person named in a Request, the potential information provided by that individual needs to be assessed with reference to the entire Case File and the extent to which such interview could facilitate the ascertaining of the truth bearing in mind the need to maintain expeditious proceedings within the parameters of the right to a fair trial, in particular, the right to be tried without undue delay.

In this case, the CIJs find that seeking to **conduct an interview at this stage would not sufficiently facilitate the ascertaining of the truth with respect to these issues, beyond that which is already available on the case file, to justify further delaying the proceedings** (*emphasis added*): on the one hand, ██████████ was not present in Cambodia at any time either immediately before or during the period of ECCC temporal jurisdiction and will not, thus, be likely to provide first hand information concerning crimes alleged to have been committed in Cambodia; and, on the other, there is a sufficient quantity of historical research and evidentiary material already placed on the Case File concerning the issues mentioned in the request.

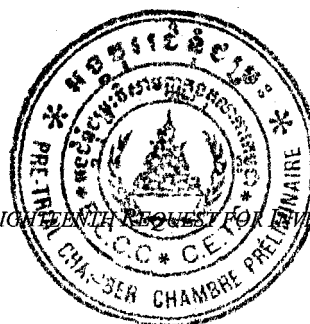
24. The Appellant challenges the conclusions supporting the above emphasised overall finding.<sup>40</sup> He firstly argues that the CIJs miss the point of the Request by holding that “██████████ was not present in Cambodia at any time during the period of ECCC temporal jurisdiction and will not, thus be likely to provide first-hand information concerning crimes alleged to have been committed in Cambodia.”<sup>41</sup> According to the Appellant, rather than seeking information from ██████████ with respect to the specific commission of the crimes, the Request sought to obtain his “impressions on the various contextual (and potentially exculpatory) issues” discussed at paragraph ten of the Appeal and, the fact that such impressions would have been formed in Vietnam rather than in Cambodia does not deprive them of relevance, on the contrary.<sup>42</sup>

25. The Appellant is correct in claiming that the Impugned Order’s finding that “██████████ was not present in Cambodia at any time during the period of ECCC temporal jurisdiction and will not, thus be likely to provide first-hand information concerning crimes alleged to have been committed in Cambodia” fails to address the specific reasons articulated in the Request to justify interviewing ██████████, that is that, (1) he is in a “unique position to provide information on the alleged hostilities with Vietnam” and “will likely be able to provide useful contextual information regarding documents and other

<sup>40</sup> Appeal, paras. 18-22, referring to Impugned Order, para. 7.

<sup>41</sup> Appeal, para. 19.

<sup>42</sup> Appeal, para. 19.



materials collected by Vietnamese officials during the occupation”<sup>43</sup> and that (2) he has “[REDACTED].”<sup>44</sup> In order to successfully challenge the refusal to interview [REDACTED] on appeal, the Appellant must demonstrate that the second reason on which this part of the Impugned Order is based (namely that “there is a sufficient quantity of historical research and evidentiary material already placed on the Case File” concerning these issues) is also erroneous, or does not alone support the Impugned Order. The Pre-Trial Chamber notes that, in so far as non exculpatory contextual information in possession of [REDACTED] is concerned, the Appellant does not attempt to make such demonstration.

26. Indeed, the Appellant limits his challenge to the above finding to the extent that it concerns evidence of an exculpatory nature potentially in possession of [REDACTED].<sup>45</sup> To support his challenge, the Appellant relies on this Chamber’s finding in the SMD decision that the CIJs reliance on the “principle of sufficiency” to avoid the collection and assessment of potentially exculpatory material amounts to a legal error.<sup>46</sup> The Pre-Trial Chamber agrees with the Appellant’s interpretation of the SMD Decision in so far as exculpatory material is concerned. Were the Request to contain *prima facie* reasons to believe that [REDACTED] possesses information of an exculpatory nature for the Charged Person, the CIJs would have had an obligation to grant the Request. According to the Appellant, the Request was supported by such *prima facie* reason.<sup>47</sup> The Pre-Trial Chamber is not satisfied that it is the case. Other than a general reference to Internal Rule 55(5) and the CIJs obligation to conduct the investigation impartially, whether the evidence is inculpatory or exculpatory,<sup>48</sup> the only reference in the Request to expected material of a

<sup>43</sup> Request, para. 11, referring to [REDACTED] early defection to Vietnam, his involvement in [REDACTED] and his former position as [REDACTED] in support of this argument.

<sup>44</sup> Request, para. 11, referring to [REDACTED] and, in particular, [REDACTED] and [REDACTED] in support of this argument.

<sup>45</sup> Appeal, para. 20.

<sup>46</sup> Appeal, para. 20, referring to Public Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, ERN 00402746-00402762 (“SMD Decision”), paras. 36-38. See also, Appeal, para. 21.

<sup>47</sup> Appeal, para. 20.

<sup>48</sup> Request, para. 9.



potentially exculpatory nature is limited to the autobiography and does not relate to the information to be obtained by interviewing ██████████.<sup>49</sup>

27. For the aforementioned reasons, this ground of appeal is rejected.

**C. Third Ground of Appeal Related to the Lack of Attempt to Obtain Documents from ██████████**

28. The Allegation under the third ground of appeal is that the CIJ's abused their discretion in assuming that it was "insufficiently likely that [██████████] would be in possession of any relevant documents, in addition to those that have already been placed on the case file to justify an interview", given that he spent a significant period of time in custody in ██████████ after 1979.<sup>50</sup> The Appellant argues that although ██████████ may indeed have spent time in detention after 1979, ██████████ ██████████ and would have had unparalleled access to official documents and other materials collected by Vietnamese officials during their occupation of Cambodia and he may well have found ways to safely store documents prior to being ██████████.<sup>51</sup> The Appellant challenges in particular the fact that the CIJs took no step to ask ██████████ himself whether he possessed such documents.<sup>52</sup>

29. The Pre-Trial Chamber notes that the Co-Lawyers for the Charged Person do not appear to have undertaken any preliminary enquiry as to whether ██████████ may or not be in possession of such documents.<sup>53</sup> More importantly, unlike the request to interview ██████████ which explained why the Appellant believed that ██████████ would be in a position to provide useful contextual information regarding documents and other materials collected by Vietnamese officials during the occupation,<sup>54</sup> the Request does not provide any reason as to why the Appellant believes that ██████████ may be in possession of

<sup>49</sup> Request, para. 11, last sentence.

<sup>50</sup> Appeal, paras. 23-25.

<sup>51</sup> Appeal, para. 23.

<sup>52</sup> Appeal, para. 24.

<sup>53</sup> 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 Investigating Actions relating to Foreign States, in respect of the Denial of the Request for Witness Interviews by Khieu Samphan, 002/19-09-2007-ECCC-OCIJ (PTC49), 7 June 2010, Confidential, D315/1/5, para. 15.

<sup>54</sup> Request, para. 11.



relevant documents.<sup>55</sup> Such scarce reasons are appearing for the first time on appeal and thus are incapable of demonstrating an error by the CIJs when they concluded that it was insufficiently likely that [REDACTED] would be in possession of any relevant documents. This ground of appeal is therefore rejected.

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

1. **DECLARES** the Appeal admissible and;
2. **DISMISSES** the Appeal on the merits.

Phnom Penh, 10 June 2010

Pre-Trial Chamber



Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUON Vuthy BRAK Kimsan



<sup>55</sup> Request, para. 12.