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 Royaume du Cambodge  
 Nation Religion Roi  
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 Nation Religion King

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

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

Before: Judge YOU Bunleng  
 Judge Marcel LEMONDE  
 Date: 21 June 2010  
 Original language: Khmer/English  
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**Order in Response to the Decision of the Pre-Trial Chamber on 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**

**Co-Prosecutors**

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 Mr. Andrew CAYLEY

**Charged Person(s)**

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 IENG Sary KAING Guek Eav  
 IENG Thirith alias "Duch"

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We, **You Bunleng (ឃុំ 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** the ongoing judicial investigation against **NUON Chea (នួន ធី)** 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 209, 210, 500, 501, 503 to 508 of the 1956 Penal Code;

**Noting** Rules 55(10) and 77(14) of the ECCC Internal Rules (the “Internal Rules”);

**Noting** the Co-Prosecutors’ Request to Place on the Case File Additional Evidentiary Material Which Assists in Proving the Charged Person’s Knowledge of the Crimes, dated 11 February 2010 (the “Request”);<sup>1</sup>

**Recalling** the Co-Investigating Judges’ Order on Co-Prosecutors’ Request to Place on the Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, dated 5 April 2010 (the “Order”);<sup>2</sup>

**Considering** the Decision of the Pre-Trial Chamber on the 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, dated 15 June 2010 (the “Decision”);<sup>3</sup>

## REASONS FOR THE DECISION

1. The Co-Investigating Judges have been ordered by the Pre-Trial Chamber to reconsider their Order having “*erred in law, as paragraph five of the Order fails to disclose the reasons for the exercise of the discretion by the Co-Investigating Judges in so far as they reject documents referred to in the Request.*”<sup>4</sup>
2. The Pre-Trial Chamber states at paragraph 21 of the Decision:

*The brevity of paragraph five, as the operational paragraph in respect of the rejection of the documents is such that the actual basis for consideration of identified documents is impossible. It is not possible to ascertain which documents were, for instance, rejected on the basis of lacking “relevance under the scope of the investigation”, and basis of such, or what documents were “determined to be addressing matters too general in nature”.*

<sup>1</sup> D365

<sup>2</sup> D365/1

<sup>3</sup> D365/2/10

<sup>4</sup> Decision, para.26



3. At the outset, the Co-Investigating Judges note that the documents forming the subject of the Request are entirely composed of press articles of the time from the international media on a wide variety of topics. The press articles form a second-hand form of public source evidence, written by journalists who were almost certainly outside of the country during the relevant temporal period and therefore likely based on indirect sources; and so must by their very nature be viewed as being of significantly lower probative value than any of the direct evidence collected by the Co-Investigating Judges.
4. The Co-Investigating Judges additionally note that the Pre-Trial Chamber has recently ruled in another Decision regarding the placement of documents on the Case File that for the Co-Investigating Judges to fully determine their obligation to establish the truth regarding matters under investigation, the relevance of any particular piece of evidence is an appropriate determination to make in assessing whether such evidence would assist in establishing the truth.<sup>5</sup> The Co-Investigating Judges consider this to mean that in deciding whether a piece of evidence can assist in establishing the truth, it must be shown that it relates to a probative fact under investigation. Put simply, the investigation must establish the truth; to do this, investigations must focus solely on the seized matters upon which the truth is required, without being distracted by manifestly irrelevant matters, the truth of which the investigation is not required to establish.
5. Taking the above into consideration, the Co-Investigating Judges at paragraph 4 of their Order particularized which of the submitted documents were considered to be relevant under the scope of the investigation as seized (the evacuation of Phnom Penh, forced marriage, potential responsibility of any of the Charged Persons, etc.) and for the above reasons accepted these documents to be placed on the Case File.
6. Conversely, the Co-Investigating Judges found that a number pertained to matters falling beyond the factual scope of the defined investigation, either because they did not address a specific alleged crime site, or any facts of which the Co-Investigating Judges are seized nationwide, or, because they did not contain information which would have assisted in determining any applicable jurisdictional elements or forms of responsibility. By way of illustration, the Co-Investigating Judges refer to Document 198, a May 1978 article from the Los Angeles Times reporting on a visit of a World War II veteran to a San Francisco high school to speak to students about his experiences of the liberation of the Dachau concentration camp and in which he comments that the students displayed indifference to the number of deaths in Cambodia.
7. The Co-Investigating Judges find that where a piece of evidence, and especially one with as low a probative value as a newspaper article, does not specifically address one of the above enunciated relevant matters, it cannot be considered to be conducive to the establishing of the truth to the required facts in Case File 002. Accordingly, the placement on the Case File of the documents contained in Annex A to this Order is rejected on this basis.

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<sup>5</sup> D313/2/2, Pre-Trial Chamber Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges' Order on Request to Place Additional Evidentiary Material on the Case File Dated 31 December 2009, dated 20 May 2010, para.28 [CONFIDENTIAL]




8. Concerning the documents determined to be addressing matters too general in their nature, the Co-Investigating Judges note that whilst these documents may have potentially fallen within the scope of the investigation, nonetheless given the lack of detail, specificity or probative value of the content, they would not assist in establishing the truth, beyond a mere superficial understanding of the facts. By way of illustration, the Co-Investigating Judges refer to Document 214, a 1978 book review in the Washington Post of François Ponchaud's book *Cambodia: Year Zero* wherein the book is critiqued as a work of literature.<sup>6</sup>
9. The Co-Investigating Judges find that where a piece of evidence, and especially one with as low a probative value as a newspaper article, addresses facts in such a general nature, it cannot be considered to be conducive to the establishing of the truth to the required facts in Case File 002. Accordingly, the placement on the Case File of the documents contained in Annex B to this Order is rejected on this basis.
10. For the foregoing reasons the Co-Investigating Judges re-affirm their Order and decline to place the rejected documents on the Case File, having provided the above stated reasons.

**FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:**

- **Confirm** their previous Order, for the reasons set out above.

Done in Phnom Penh, on 21 June 2010

សហចៅក្រមអង្គជំនុំជម្រះ  
 Co-Investigating Judges  
 Co-Juges d'Instruction



Marcel LEMONDE ឃុំ ប៊ុនណារ៉ុន

<sup>6</sup> Notwithstanding the probative value of a book critique, Ponchaud's *Cambodia: Year Zero* has already been placed on the Case File (IS4.37) and the author was interviewed by the Co-Investigating Judges (D133).