



ឯកសារច្បាប់តម្កល់ទុកដោយស្របច្បាប់  
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME

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

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ  
Pre-Trial Chamber  
Chambre Préliminaire

(Certified Date/Date de certification):  
..... 31 / 08 / 2010 .....

មន្ត្រីមុខបញ្ជីករ/Case File Officer/L'agent chargé  
du dossier: Uch Arun

D 370/2/11

*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 No:** 002/19-09-2007-ECCC/OCIJ (PTC 63)

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

**Date :** 7 July 2010

**PUBLIC**

**DECISION ON THE APPEAL AGAINST THE 'ORDER ON THE REQUEST TO PLACE ON THE CASE [FILE] THE DOCUMENTS RELATING TO MR. KHIEU SAMPHAN'S REAL ACTIVITY'**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Charged Person**  
KHIEU Samphan

**Lawyers for the Civil Parties**

NY Chandy	Ferdinand DJAMMEN-
Madhev MOHAN	NZEPA
Lima NGUYEN	LOR Chunthy
KIM Mengkhy	SIN Soworn
MOCH Sovannary	SAM Sokong
Elizabeth-Joelle	HONG Kim Suon
RABESANDRATANA	KONG Pisey
Annie DELAHAIE	KONG Heng
Philippe CANONNE	Silke STUDZINSKY
Martine JACQUIN	Olivier BAHOUGNE
Fabienne TRUSSES-	Marie GUIRAUD
NAPROUS	Patrick BAUDOUIN
Françoise GAUTRY	CHET Vanly
Isabelle DURAND	PICH Ang
Christine	Julien RIVET
MARTINEAU	Pascal AUBOIN
Laure DESFORGES	YUNG Phanith

**Co-Lawyers for the Defence**  
SA Sovan  
Jacques VERGES  
Philippe Greciano

**ឯកសារដើម**  
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL  
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):  
..... 31 / 08 / 2010 .....

ម៉ោង (Time/Heure): 9:30

មន្ត្រីមុខបញ្ជីករ/Case File Officer/L'agent chargé  
du dossier: Uch Arun



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) notes the filing on 19 April 2010 of the “Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’”<sup>1</sup> (“the Appeal”) by Khieu Samphan (“the Appellant”).

### I. PROCEDURAL BACKGROUND

1. On 3 March 2010, the Appellant filed his “Request to Place on the Case File all the Documents Relating to Mr. Khieu Samphan’s Real Activity During the Period of Democratic Kampuchea”<sup>2</sup> (“the Request”). The Appellant requested the Co-Investigating Judges to place on the case file “the 600 documents referenced in Mr. [Craig C.] Etcheson’s Record of Analysis and which have not yet been placed on the case file” and to translate the documents into the other two official working languages of the ECCC.<sup>3</sup>
2. On 19 March 2010, the Co-Investigating Judges issued their “Order on ‘Request to place on the Case File all the documents relating to Mr. Khieu Samphan’s real activity’”<sup>4</sup> (“the Order”), rejecting the Request. The Order was notified in the three official working languages of the ECCC on 19 March 2010.
3. On 24 March 2010, the Appellant filed a Notice of Appeal<sup>5</sup> against the Order, and on 19 April 2010 filed his Submissions on Appeal.<sup>6</sup>
4. No Response to the Appeal was filed pursuant to Article 8.3 of the Practice Direction “Filing of Documents before the ECCC.”<sup>7</sup>

<sup>1</sup> Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’, 19 April 2010, D370/2/1 (“the Appeal”).

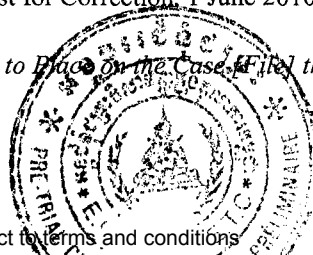
<sup>2</sup> Request to Place on the Case File all the Documents Relating to Mr. Khieu Samphan’s Real Activity During the Period of Democratic Kampuchea, 3 March 2010, D370 (“the Request”). The French and Khmer versions were filed on 3 March 2010, and the English version was filed on 10 March 2010.

<sup>3</sup> Request, para. 7.

<sup>4</sup> Order on ‘Request to place on the Case File all the documents relating to Mr. Khieu Samphan’s real activity’, 19 March 2010, D370/1 (“the Order”).

<sup>5</sup> Record of Appeals, 25 March 2010, D370/2. According to this Record of Appeals, the Greffiers of the Co-Investigating Judges “received the Notice of Appeal” on 24 March 2010 at 2:00pm. The French and Khmer versions of the Record of Appeals were filed on 25 March 2010, and the English version was filed on 6 May 2010.

<sup>6</sup> The French version of the Appeal was filed on 19 April 2010, the Khmer version on 29 April 2010, and the English version on 6 May 2010. The English version of the Appeal was refiled on 26 May 2010 with the incorporation of two corrections, as reflected in the Request for Correction, 1 June 2010, D370/2/1/Corr.1.



5. On 20 May 2010, the parties were notified of the Pre-Trial Chamber's Order to schedule an oral hearing for the Appeal on 27 May 2010 at 2:00pm.<sup>8</sup> On 21 May 2010, the Appellant filed "Urgent Defence Requests Concerning the Hearings of 27 May 2010" ("the Motion") making three requests related to the oral hearing.<sup>9</sup> On 27 May 2010, the parties were notified of the Pre-Trial Chamber's Order to cancel the hearing, and to determine the Appeal on written submissions only.<sup>10</sup> On 7 June 2010, the Pre-Trial Chamber notified its "Decision on Motion" dismissing the Motion because the cancellation of the oral hearing rendered the Motion moot.<sup>11</sup>
6. On 11 June 2010, the Pre-Trial Chamber issued its disposition of the Appeal, indicating that "A reasoned decision in respect of the Appeal shall follow in due course."<sup>12</sup> It was decided that:

"1. The following petitions for relief in the Appeal are inadmissible: "Authorise the Defence to produce the evidence in its possession for the purpose of facilitating the process of ascertaining the truth"; "Order the Office of the Co-Prosecutors to disclose the evidence in its possession and thereby guarantee the Defence effective enjoyment of its rights"; and "Alternatively, Order the Co-Investigating Judges to place the said documents on the judicial investigation file."

2. The petition for relief in the Appeal to "Reverse the Order" is admissible.

3. The Co-Investigating Judges committed an error of law by not concluding that the documentation referred to by Dr. Craig C. Etcheson at paragraphs 31

<sup>7</sup> ECCC/01/2007/Rev.4 (amended on 5 June 2009).

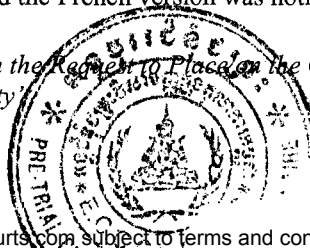
<sup>8</sup> Scheduling Order, 11 May 2010, D270/2/2. This Scheduling Order was notified in English and Khmer on 11 May 2010, and in French on 20 May 2010.

<sup>9</sup> 21 May 2010, D370/2/8 ("the Motion"). The French and Khmer versions of the Motion were notified on 2 June 2010. The English version of the Motion was notified on 14 June 2010.

<sup>10</sup> Cancellation Order, 26 May 2010, D370/2/7. This Cancellation Order was notified in English on 26 May 2010, and in French and Khmer on 27 May 2010.

<sup>11</sup> Decision on Motion, D370/2/9, 7 June 2010. The English, French, and Khmer versions of this Decision were notified on 7 June 2010.

<sup>12</sup> Decision on the Appeal Against the 'Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', 11 June 2010, D370/2/10. The English and Khmer versions of this disposition were notified on 11 June 2010, and the French version was notified on 14 June 2010.



and 146 and footnote 341 of his Written Record of Analysis (“hundreds of reports and memoranda” and “more than six hundred examples of these kinds of communications”) is *prima facie* conducive to ascertaining the truth.

4. The Appeal is dismissed because the Request does not identify the investigative action with sufficient precision.”

## REASONS FOR THE DECISION

### II. ADMISSIBILITY OF THE APPEAL CONSIDERED

7. The Notice of Appeal was filed within the time limit prescribed by Internal Rule 75(1). The Pre-Trial Chamber notes that the French version of the Appeal was filed within the time limit prescribed by Internal Rule 75(3). However, contrary to Article 7 of the Practice Direction “Filing of Documents before the ECCC,” the Khmer version of the Appeal was filed outside this time limit. The Pre-Trial Chamber exercised its discretion under Internal Rule 39(4)(b) to recognise the validity of the filing of the Appeal, notwithstanding that the Khmer version of the Appeal was filed after the expiration of the time limit prescribed by Internal Rule 75(3). No party is to be penalised as a consequence of legitimate difficulties with obtaining the translation of a document.
8. The Appellant brings the Appeal under Internal Rule 74(3)(b) and, in the alternative, under Internal Rule 21(1).<sup>13</sup>
9. The Pre-Trial Chamber recalls that Internal Rule 74(3)(b) requires that the Appeal satisfy the following three cumulative conditions in order to be found admissible: 1) the Appellant must have submitted a request for investigative action to the Co-Investigating Judges; 2) such request must be allowed under the Internal Rules; and 3) such request must have been refused by the Co-Investigating Judges.
10. The Appeal is admissible insofar as it is based upon the refusal of a request for investigative action under Internal Rule 55(10) to place documents on the case file. The

<sup>13</sup> Appeal, paras. 1, 24-38.



Appellant requested the Co-Investigating Judges to search for, identify, analyse documents located in the Shared Materials Drive or in the possession of DC-Cam that are not already on the case file and to place those documents on the case file that the Co-Investigating Judges consider are conducive to ascertaining the truth. The Pre-Trial Chamber finds that such a request can be considered a request for investigative action within the meaning of Internal Rule 74(3)(b).<sup>14</sup>

11. The Pre-Trial Chamber finds that there have been no requests to the Co-Investigating Judges under Internal Rules 55(10) or 58(6) to place some or all of the documents in Annex A of the Appeal “on the judicial investigation file,” or to order the Office of the Co-Prosecutors “to disclose the evidence in its possession.”<sup>15</sup> These are new requests set out in the prayer for relief on appeal in respect of which the Pre-Trial Chamber has no jurisdiction. They are inadmissible under Internal Rule 74(3)(b).
12. Internal Rule 21(1) cannot be applied by the Pre-Trial Chamber to permit the Appellant to avoid the procedures established by Internal Rules 55(10) and 58(6). The Appellant bears the sole responsibility for any consequence that his failure to follow these procedures may have. The Appellant’s submissions on Internal Rule 21(1) are therefore dismissed.<sup>16</sup>

### III. GROUNDS OF THE APPEAL CONSIDERED

#### Standard of Appellate Review

13. The Pre-Trial Chamber recalls that an order by the Co-Investigating Judges on a request for investigative action is discretionary. For the Pre-Trial Chamber to overturn the Co-Investigating Judges’ exercise of discretion, the Appellant must demonstrate that the impugned Order is: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; and/or (3) so unfair or unreasonable as to

<sup>14</sup> Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, paras. 21-28.

<sup>15</sup> Appeal, para. 85. *See also* Appeal, paras. 71-75.

<sup>16</sup> Appeal, paras. 33-38.



constitute an abuse of the Co-Investigating Judges' discretion.<sup>17</sup> The Pre-Trial Chamber further recalls that not all errors will cause it to set aside a decision or order of the Co-Investigating Judges. The Pre-Trial Chamber will set aside a decision or order under Internal Rule 74(3)(b) when an error committed by the Co-Investigating Judges is determinative of the exercise of their discretion leading to the appealed decision or order being made.

### Request of Appellant

14. In the first paragraph of the Appellant's Request, under the heading "Introduction", he requests the Co-Investigating Judges to place on the case file "all the documents relating to Mr. Khieu Samphan's activity in his capacity as 'officer in charge of relations with the FUNK and the government, in charge of commerce, of the lists of goods and their prices'."<sup>18</sup> The Appellant continues in the second paragraph of his Request to state, "The Shared Drive contains a series of documents . . . which . . . are of paramount importance, because they reflect Mr. Khieu Samphan's real activity in his capacity as 'member in charge of the lists of products' throughout the period of Democratic Kampuchea."<sup>19</sup>
15. At the end of the Request the Appellant indicates that the scope of his Request is narrower than "all the documents" and "a series of documents." In the final paragraph of the Request under the heading "For These Reasons", the Appellant requests the Co-Investigating Judges to place on the case file "the 600 documents referenced in Mr. [Craig C.] Etcheson's Record of Analysis and which have not yet been placed on the case file."<sup>20</sup>
16. The Pre-Trial Chamber considers that it is clear from the Request and also the Appeal<sup>21</sup> that the Appellant's references in the Request to "all the documents", "a series of

<sup>17</sup> 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.

<sup>18</sup> Request, para. 1.

<sup>19</sup> Request, para. 2.

<sup>20</sup> Request, para. 7.

<sup>21</sup> E.g., Appeal, para. 43.



documents”, “these documents”, “the documents”, and “the 600 documents” are to the same documents, that is, the DC-Cam documents referred to in paragraph 28 below.

17. The Request also claims that “Some of these documents [DC-Cam documents] have been placed on the case file, while others are still in the Shared Drive.”<sup>22</sup> They are therefore, strictly speaking, not on Mr Khieu Samphan’s case file. Such selective filing is not justified; it could hurt Mr Khieu Samphan’s interests and thereby impede the search for the truth.”<sup>23</sup>

### Order of Co-Investigating Judges

18. The Co-Investigating Judges rejected the Request because it “does not explain how it came to the conclusion that they [i.e., DC-Cam documents] ‘reflect Mr Khieu Samphan’s real activity’ and, in particular, without stating whether it had approached DCCam with a view to ascertaining the number of documents in the hands of this public source or their content.”<sup>24</sup> “Moreover,” with respect to the Appellant’s reference in the Request to “a series of documents”, the Co-Investigating Judges stated:

[T]he request provides no indication as to their [“series of documents”] designation. Thus, beyond noting the general utility of the documents signed or written by Khieu Samphan, the Request does not explain why those specific documents that it says it had identified in the shared drive would contribute to the ascertainment of the truth concerning the matters under investigation in this case.<sup>25</sup>

19. “Accordingly,” the Co-Investigating Judges considered that “the Defence does not meet its obligation, articulated previously, to show *prima facie* with sufficient specificity the relevance of its request or the list of documents that are the subject of the Request.”<sup>26</sup>
20. The Co-Investigating Judges conclude their Order by responding to the statements in the Request that “selective filing is not justified” and “the documents he [Dr. Etcheson]

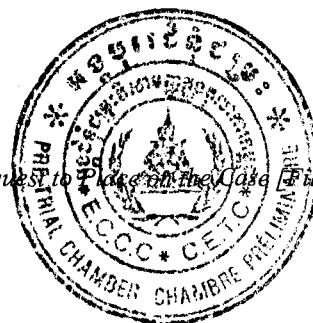
<sup>22</sup> Footnote 4 in the Request states, “Documents cited in Annex C of the Introductory Submission, *D3/IV*; Report of the Execution of Rogatory Letter of 27 January 2009 and the annexes thereto (a total of 51 documents), *D161/1 and D161/1.1.*”

<sup>23</sup> Request, para. 6.

<sup>24</sup> Order, para. 4.

<sup>25</sup> Order, para. 5.

<sup>26</sup> Order, para. 6 (footnote omitted).



references and which are generally annexed to his report must be placed on the case file, with no exceptions.<sup>27</sup> The Co-Investigating Judges state in response:

[F]or the purpose of determining whether any given evidentiary material is conducive to ascertaining the truth, whether the evidence is inculpatory or exculpatory, they [the Co-Investigating Judges] take into consideration its relevance with regard to the facts before them and consider whether it does not duplicate evidence with respect to the same subject that is already on the case file.

As the Defence acknowledges, the judicial investigation case file contains more than a hundred items on trade issues, including some that concern Khieu Samphan. The Co-Investigating Judges made every effort to identify documents sent to Khieu Samphan or written by him, whether they were on the shared drive, at DCCam, or elsewhere. All of these documents were analysed, in particular for the purpose of determining the nature of Khieu Samphan's activities during the regime, and those deemed conducive to ascertaining the truth have been placed on the case file. The remaining documents, including those considered as being unduly repetitive or insufficiently relevant, were regrouped on the shared drive.<sup>28</sup>

### Disposition of the Appeal

21. The Pre-Trial Chamber recalls that a Request under Internal Rule 55(10):

[S]hall identify specifically the investigative action requested *and* explain the reasons why he or she considers the said action to be necessary for the conduct for the investigation. This allows the Co-Investigating Judges to assess whether the Request is relevant to ascertaining the truth and to give reasons for their decision.<sup>29</sup>

22. The effect of these two cumulative conditions of Internal Rule 55(10) is that it would be a proper exercise of the Co-Investigating Judges' discretion to reject a request that satisfies only one of the conditions. The Pre-Trial Chamber finds that this Request satisfies the second condition of Internal Rule 55(10) (*prima facie* relevance), but does not satisfy the first condition (detail and precision of request). The Pre-Trial Chamber will therefore examine both conditions of Internal Rule 55(10) in this Decision as part of its consideration as to whether there has been an error of law. The Pre-Trial Chamber will

<sup>27</sup> Request, paras. 5-6.

<sup>28</sup> Order, paras. 7-8 (footnotes omitted).

<sup>29</sup> 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, para. 44. (Emphasis added)





begin with the second ground of appeal relating to the *prima facie* relevance of the Request.

**Second Ground of Appeal – Failure to assess the relevance of the Request in terms of its *prima facie* conduciveness to ascertaining the truth**

23. The Appellant submits that the Order is “at variance with the applicable law”<sup>30</sup> with respect to the standard that the Co-Investigating Judges must apply to decide on a request for investigative action under Internal Rule 55(10). The Appellant submits that the standard established by the Order is “restrictive.”<sup>31</sup> The Pre-Trial Chamber finds that the Co-Investigating Judges correctly described the appropriate legal standard.<sup>32</sup> The Pre-Trial Chamber, however, finds that the Co-Investigating Judges committed an error of law by reaching an incorrect conclusion after applying the correct legal standard.
24. In the Order, the Co-Investigating Judges state that the Appellant “does not explain how it came to the conclusion that they [the DC-Cam documents] ‘reflect Mr. Khieu Samphan’s real activity’.” The Pre-Trial Chamber finds that the Co-Investigating Judges are correct in their finding that the sole reason given in the Request as to why the DC-Cam documents “must be placed on the case file” is that Dr. Etcheson “specifically” refers to them in his Written Record of Analysis (“Record of Analysis”).<sup>33</sup> The Pre-Trial Chamber finds that the Appellant’s reasons for “how it came to the conclusion that they [the DC-Cam documents] ‘reflect Mr. Khieu Samphan’s real activity’” are necessarily implicit in the Request and were available for the Co-Investigating Judges to consider.
25. In the Request, the only factual information provided about the DC-Cam documents is the general description given of them by Dr. Etcheson in his Record of Analysis. In the first paragraph of the sub-section “Economic” under the section “Standing Committee”, Dr. Etcheson writes the following:

<sup>30</sup> Appeal, para. 61.

<sup>31</sup> Appeal, para. 61.

<sup>32</sup> 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. 41-46.

<sup>33</sup> 18 July 2007, D2-15 (“Record of Analysis”).



[31] The Standing Committee exercised centralized control over the entire Cambodian economy, primarily, but not exclusively, through Office 870. Planning, pricing, production, imports and exports, and consumption were all managed by the Party Center. For example, the archives of the Documentation Center of Cambodia contain hundreds of reports and memoranda on these topics addressed to and from Khieu Samphan in Office 870. These documents deal with all aspects of the economy, although many focus on the extraction of (allegedly) surplus production from the Zones, presumably for storage, redistribution, and export.

26. In the first paragraph of the sub-section “Communications” under the section “Ministries”, Dr. Etcheson writes the following:

[146] Communications patterns surrounding the DK ministries appear to have been less structured than communications involving the political-administrative, internal security and military hierarchies. The upper echelons (especially the Standing Committee and Office 870), the ministries, and the lower echelons had multiple channels to communicate with one another. All of these channels seem to have been in parallel use. For example, individual ministries reported to, and received instructions from, the Center through a variety of mechanisms . . . These personal interactions [i.e., mechanisms] were supplemented by written exchanges between the upper echelons and ministries, in the form of letters, telegrams, memoranda and reports (weekly or monthly[footnote omitted]), as well as policy directives and Party propaganda such as the periodical, *Revolutionary Flag*. [footnote omitted] For example, reports addressed to Khieu Samphan flooded Office 870. These reports discussed topics ranging from daily statistics on rice production, weekly and monthly reports on product shipments from the Zones to the Center, imports and exports flowing through the Kampong Som port, and meetings at the Commerce Ministry, the Foreign Ministry and foreign embassies. [footnote 341 in original reproduced below]

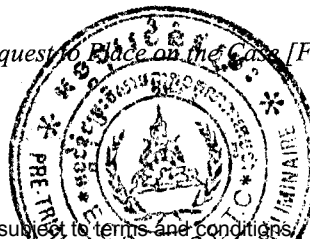
27. In footnote 341 at the end of this paragraph, Dr. Etcheson writes the following:

The archives of the Documentation Center of Cambodia contain more than six hundred examples of these kinds of communications to Khieu Samphan at Office 870 obtained from the Cambodian National Archives ranging from daily reports of rice production through to yearly reports concerning the activities of Zones, ministries and other echelons.

28. The Pre-Trial Chamber refers to the “hundreds of reports and memoranda” and the “more than six hundred examples of these kinds of communications” described by Dr. Etcheson in his Record of Analysis as “the DC-Cam documents.”

29. The Pre-Trial Chamber finds that Dr. Etcheson’s brief description of the DC-Cam documents is insufficient to conclude that they are, in fact, conducive to ascertaining the

10/13



truth. The Pre-Trial Chamber finds that it should have been clear to the Co-Investigating Judges that, as the Appellant later submitted in the Appeal, the DC-Cam documents are *prima facie* relevant to ascertaining the truth because “they are official documents of the [Khmer Rouge] regime, contain information on Mr. Khieu Samphan’s role during the period of Democratic Kampuchea, relate to Mr. Khieu Samphan, contain information on Mr. Khieu Samphan’s presence in Cambodia during the period of Democratic Kampuchea and on his functions during the regime.”<sup>34</sup>

30. The Pre-Trial Chamber recognises that it is not clear whether Dr. Etcheson, who is advanced in the Request as being the sole source of factual information concerning the DC-Cam documents, bases any of his conclusions in the Record of Analysis, even in part, on any one of the specific “hundreds of reports and memoranda” or “more than six hundred examples of these kinds of communications” to which he refers.

31. The Pre-Trial Chamber also notes that, in the Order, the Co-Investigating Judges themselves appear to agree that “items on trade issues . . . that concern Khieu Samphan” should be “analysed . . . for the purpose of determining the nature of Khieu Samphan’s activities during the regime, and those deemed conducive to ascertaining the truth . . . placed on the case file.”<sup>35</sup> This is why the Co-Investigating Judges “made every effort to identify documents sent to Khieu Samphan or written by him, whether they were on the shared drive, at DCCam, or elsewhere.”<sup>36</sup>

32. In the Appeal, the Appellant asks, by way of submission, why the Co-Investigating Judges “made every effort to identify” “items on trade issues . . . that concern Khieu Samphan” if they did not consider that such items are *prima facie* relevant to ascertaining the truth.<sup>37</sup> The Pre-Trial Chamber considers that the Appellant’s answer to his question is correct: “[T]hey [the Co-Investigating Judges] *prima facie* deemed those documents conducive to ascertaining the truth.”<sup>38</sup>

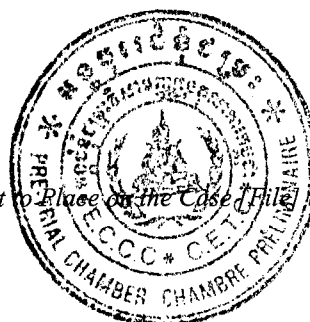
<sup>34</sup> Appeal, para. 66.

<sup>35</sup> Order, para. 8.

<sup>36</sup> Order, para. 8.

<sup>37</sup> Appeal, para. 69.

<sup>38</sup> Appeal, para. 69. *See also* Appeal, para. 34.



33. The Pre-Trial Chamber finds that the Request contained a *prima facie* reason for the Co-Investigating Judges to believe that the DC-Cam documents referred to by Dr. Etcheson in paragraph 31 and footnote 341 of his Record of Analysis are conducive to ascertaining the truth. The Co-Investigating Judges committed a mixed error of law and fact by concluding otherwise.<sup>39</sup> It is therefore unnecessary for the Pre-Trial Chamber to consider the Appellant's remaining submissions under the second and third grounds of appeal.<sup>40</sup>
34. This error does not warrant reversing the Order because, as will be discussed below, the Pre-Trial Chamber finds that the Request did not identify specifically the investigative action requested, and therefore was properly rejected by the Co-Investigating Judges.
35. The Pre-Trial Chamber now examines the first ground of appeal relating to whether the Request specifically identified the investigative action requested.

**First Ground of Appeal – Misapplication of the requirement for specificity of requests under Internal Rule 55(10)**

36. The Appellant submits that the “specificity requirements” prescribed in the Order “go far beyond the obligation established by the Pre-Trial Chamber, and, as such, are untenable.”<sup>41</sup> The Appellant also submits that he “clearly specified the action sought in [his] Request,”<sup>42</sup> and that he “specifically referred [in the Request] to the documents at issue and their provenance.”<sup>43</sup>
37. The Pre-Trial Chamber finds for the following reasons that the Request is not “specific enough to give clear indications to the Co-Investigating Judges as to what they should search for.”<sup>44</sup> First, the Appellant's submission that “the documents at issue [i.e., the DC-

<sup>39</sup> Order, paras. 4, 6.

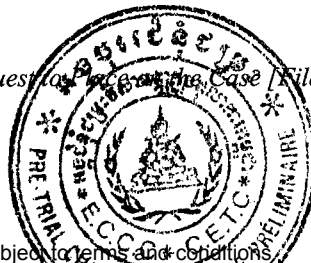
<sup>40</sup> Appeal, paras. 54-59, 62-65, 76-83.

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

<sup>42</sup> Appeal, para. 43. *See also* Appeal, para. 47.

<sup>43</sup> Appeal, para. 45

<sup>44</sup> 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, para. 45.



Cam documents] are specifically referenced by [Dr. Etcheson]”<sup>45</sup> is not accurate. In fact, Dr. Etcheson refers to the DC-Cam documents in a general manner. He does not provide a citation to any of the documents in the two locations of his Record of Analysis (paragraph 31 and footnote 341) in which he generally refers to them. Secondly, contrary to what the Appellant asserts,<sup>46</sup> it is not clear to the Pre-Trial Chamber which DC-Cam documents, if any, are in the possession of the Co-Prosecutors. Thirdly, it is not clear which, if any, of the DC-Cam documents are cited by Dr. Etcheson in Annexes A, B, or C to his Record of Analysis. Fourthly, the number of DC-Cam documents is not sufficiently clear to the Pre-Trial Chamber, as there could be “hundreds” or “more than six hundred.” Fifthly, it is not clear whether the two groups of DC-Cam documentation (“hundreds of reports and memoranda” and “more than six hundred examples of these kinds of communications”) contain the same documents.

38. The final reason why the Pre-Trial Chamber considers that the Request does not “identify specifically the investigative action requested”<sup>47</sup> is that it is not clear from the Request which DC-Cam documents are already in the SMD or on the case file. In the Request, the Appellant claims that “Some of these documents [i.e., the DC-Cam documents] have been placed on the case file, while others are still in the Shared Drive.”<sup>48</sup> In footnote 4 of the Request the Appellant purports to provide citations to “Some of these documents [that] have been placed on the case file.” As the Request does not provide specific citations to the balance of the DC-Cam documents that are not on the case file, the Request does not make it possible for the Co-Investigating Judges to deduce the amount or location of the DC-Cam documents that are not on the case file. It is only in the Appeal, not in the Request, where the Appellant submits that “many” of the documents that he found at DC-Cam “[f]ollowing the Co-Investigating Judges’ decision . . . are not on the case file or in the shared drive.”<sup>49</sup>

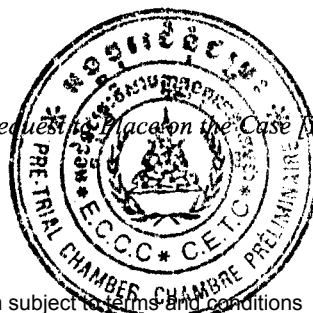
<sup>45</sup> Appeal, para. 76. *See also* Request, para. 3.

<sup>46</sup> Appeal, footnote 55.

<sup>47</sup> 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, para. 44.

<sup>48</sup> Request, para. 6.

<sup>49</sup> Appeal, para. 72.




39. Requesting the Co-Investigating Judges to search for, identify and analyse elusive documents, lacking specific description of content and location, is inconsistent with the Appellant's "obligation to proceed in a manner that will not delay the proceedings."<sup>50</sup> In this respect, the Pre-Trial Chamber finds that the Co-Investigating Judges did not err by considering "in particular" that the Appellant did not state in the Request "whether it had approached DCCam with a view to ascertaining the number of documents in the hands of this public source or their content."<sup>51</sup> Consequently, the Pre-Trial Chamber finds that the Co-Investigating Judges exercised their discretion correctly.
40. The Pre-Trial Chamber dismisses the Appeal as the Request does not identify the investigative action with sufficient precision. It is therefore unnecessary for the Pre-Trial Chamber to consider the Appellant's remaining submissions under the first ground of appeal.<sup>52</sup>
41. For all the above mentioned reasons, the Pre-Trial Chamber decided as announced in its determination on 11 June 2010.


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

Phnom Penh, 7 July 2010 *Ch.*

Pre-Trial Chamber

President

  
 Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan



<sup>50</sup> 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, para. 45.

<sup>51</sup> Order, para. 4.

<sup>52</sup> Appeal, paras. 48-53.