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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' COMBINED RESPONSE TO THE APPEALS BY IENG THIRITH, NUON CHEA, KHIEU SAMPHAN AND IENG SARY AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING A JOINT DEFENCE REQUEST FOR INVESTIGATIVE ACTION TO SEEK EXCULPATORY EVIDENCE IN THE SHARED MATERIALS DRIVE**

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### INTRODUCTION AND PETITION

1. This is a combined response to the appeal filed by Ieng Thirith, Nuon Chea and Khieu Samphan (“**Appeal 1**”), and the appeal filed by Ieng Sary (“**Appeal 2**”) (together the “**Appeals**”), challenging an Order of 19 June 2009 (the “**Order**”), by which the Co-Investigating Judges dismissed a Joint Defence Request for investigative actions relating to the Shared Materials Drive (the “**SMD**”). Appeal 1 (which is also adopted by reference by the Charged Person Ieng Sary), asserts, inter alia, that the Co-Investigating Judges have breached Sub-rule 55(5) by applying a principle of sufficiency, that they have the obligation to investigate the SMD, that they have invoked the right to a trial without undue delay as an excuse to deny the Charged Persons a fair trial, and that they erred in finding that the original request was imprecise. By Appeal 2 the Charged Person Ieng Sary further asserts, inter alia, that the Co-Investigating Judges have displayed a fundamentally incorrect approach to their duty to investigate impartially.
2. The Co-Prosecutors file a combined response to the Appeals since the issues raised in the Appeals are either identical or largely overlap, and Appeal 2 incorporates Appeal 1 by reference. .
3. The Pre-Trial Chamber may dismiss Appeal 1 in part as inadmissible, in so far as it is filed by the Charged Person Khieu Samphan. The Charged Person was not one of the parties who made the original request which is the subject of the Order, is not directly affected by it and therefore may not have standing to appeal the Order.
4. The Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeals on the following grounds:
  - a. The Appellants have failed to show that the Co-Investigating Judges incorrectly interpreted and applied their power to take investigative actions conducive to ascertaining the truth and their obligation to conduct the investigation impartially, whether the evidence is inculpatory or exculpatory. The Co-Investigating Judges have correctly interpreted their obligations to actively explore all relevant documentary sources, including the documents in the SMD
  - b. The Appellants have failed to show that the Co-Investigating Judges applied the right to a trial without undue delay in a manner that jeopardises their right to a fair trial

- c. The Co-Investigating Judges have correctly concluded that, by not specifying the underlying reasons for, and the relevance of, the original request for investigative actions, the Appellants had failed to satisfy relevance and specificity requirements which attach to such requests, and
  - d. The Co-Investigating Judges have correctly concluded that the disclosure obligations raised by the Appellants are fulfilled by the placement on the case-file (to which the Defence have continuous access) of all evidentiary material conducive to ascertaining the truth, whether it be inculpatory or exculpatory, and that the Defence are entitled to request specific investigative actions which they can show, based on preliminary inquiries, are conducive to ascertaining the truth.
5. To the extent that the Co-Prosecutors are of the view that partial reliance by the Co-Investigating Judges on a principle of sufficiency is unsound, they propose that the Pre-Trial Chamber consider supplementing their reasoning or substituting for that reasoning the reasons indicated in the Conclusion.

#### **SUMMARY OF RELEVANT FACTS AND PROCEDURAL BACKGROUND**

6. The SMD was created after the opening of this judicial investigation as a common electronic platform on which collections of general, potentially relevant documents may be “shared” between the Office of the Co-Investigating Judges and parties to the proceedings.<sup>1</sup> It is a facilitating tool, akin to an electronic library, which the participants can use to search for materials which may be conducive to ascertaining the truth about the matters within the scope of the judicial investigations.<sup>2</sup> Where such materials are identified (whether within the SMD or otherwise) by, or brought to the attention of, the Co-Investigating Judges, they can be placed on the case-file. Not being part of the official investigations, SMD is accessible to persons other than the Judges and the parties, such as staff of the Defence Support Section.<sup>3</sup>
7. By an urgent request dated 20 April 2009, the Defence teams for Ieng Thirith, Nuon Chea and Ieng Sary requested the Co-Investigating Judges to review all the documents on the

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<sup>1</sup> Shared Materials Drive Protocol (available at <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>), paragraph 1.

<sup>2</sup> Ibid, Section A, paragraph 2, and Section B, paragraph 3.

<sup>3</sup> Ibid, Section B, paragraph 2.

SMD, produce a sufficiently detailed report of their analysis, and provide a list of exculpatory material contained in the SMD (the “Request”).<sup>4</sup> As noted in the Introduction, the Co-Investigating Judges dismissed the Request on 19 June 2009.

## PRELIMINARY ISSUES

### *Admissibility of Khieu Samphan’s appeal*

8. The Pre-Trial Chamber may consider that Khieu Samphan does not have standing to appeal the Order as he was not one of the original moving parties and is arguably not directly affected by the Order. Although Sub-rule 55(10) states that an order refusing a request for investigative action “shall be notified to the parties and shall be subject to appeal,” and Rule 74 permits all parties to appeal orders in this category, these provisions should be interpreted as meaning that, generally, orders refusing investigative requests may only be appealed by the moving parties. There may be circumstances in which it would be appropriate for the Chamber to entertain appeals by other parties provided that they are directly affected by an order,<sup>5</sup> and are granted leave to appeal by the Chamber. Khieu Samphan has neither sought leave of the Chamber to appeal the Order, nor put forward any arguments to show why his appeal would be admissible even though he was not a party to the original request. Alternatively, while it was open to him to respond to the Appeals, he has elected not to exercise this option either.
9. Rule 74 was not intended to enable parties to appeal orders by which they are not directly affected. The original request sought to initiate actions to identify exculpatory materials relating to the moving parties (Charged Persons Ieng Thirith, Nuon Chea and Ieng Sary). Khieu Samphan was not a moving party, and so the request did not require the Co-Investigating Judges to take any actions in relation to him. The Chamber may therefore conclude that he does not have a sufficient interest to argue the correctness of the Order.
10. The alternative would be to interpret Rule 74 as allowing any party to appeal all rejections of investigative requests, so that a party who was not the original moving party

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<sup>4</sup> Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, D164

<sup>5</sup> That would logically follow from the provisions of Sub-rule 21 and Article 33 new of the *Law on the Establishment of the ECCC*.

would not be required to show that they are affected by the order they are appealing.<sup>6</sup> Considering the detrimental effect such widening of appellate possibilities would have on the efficient and fair conduct of the proceedings, and the consequent risk of abuse of process, such an interpretation could not have been intended by the drafters of the Internal Rules.

11. Finally, the Co-Prosecutors note that the purported joining of the Appeal by Khieu Samphan fails to comply with the requirements of the *Practice Direction on Filing of Documents before the ECCC*<sup>7</sup> in that the appeal was filed in Khmer and English, and therefore not in both languages selected by the Defence team for Khieu Samphan.<sup>8</sup> Although ultimately not relevant to the outcome of Appeal 1, this non-compliance by the Defence team is peculiar given that they have previously argued that it is impossible for them to participate in the proceedings unless all documents are translated into French.

*Oral Hearing should be dispensed with*

12. The Appellants have requested an oral hearing on the Appeals. While the Co-Prosecutors continue to support oral hearings before the Pre-Trial Chamber, they submit that these Appeals do not raise complex or important legal issues and should be decided on the basis of written submissions in the interests of judicial economy.
13. Paragraph 77(3)(b) of the Internal Rules gives the Chamber the discretion to decide to determine an appeal on the basis of written submissions only, after considering the views of the parties. When dealing with a request to exercise this discretion, the Chamber has previously considered the importance of an appeal.<sup>9</sup>
14. The Appellants state that the Appeals relate to the scope of the Co-Investigating Judges' investigations. They submit that a hearing should be scheduled to "shed light on this issue" which "lies at the heart of the proceedings of the ECCC." The Co-Prosecutors

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<sup>6</sup> This is theoretically because since Rule 74 permits all parties to appeal refusals of investigative requests.

<sup>7</sup> See Article 7.2. of the Practice Direction on Filing of Documents Before the ECCC (*ECCC/01/2007/Rev.4*)

<sup>8</sup> *KHIEU Samphan's Lawyer's Notification of Language of Filing and Receipt of Documents*, 2 January 2008, Document number A114

<sup>9</sup> *Public Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order*, Khieu Samphan, 002/19-09-2007-ECCC/OCIJ (PTC 15), 6 February 2009, Document C26/5/13, paragraph 7.

respectfully submit that the issues in the Appeals are neither as broad nor as significant as the Appellants allege, but are simple and largely technical, and therefore appropriate for determination on the basis of written submissions. The Appeals primarily relate to matters of practical procedure (namely, the proper use of the mechanism of requests for investigative actions and the status of materials outside the case-file) and do not reveal any significant points of law.

15. While the Appellants allege that the Co-Investigating Judges have fundamentally misconstrued the nature and scope of their investigative powers, a review of the Request, the Order and the Appeals reveals that this is not the case. The outcome of the Appeals hinges on very limited points of divergence (the need for specificity of an investigative request, and the notion of “sufficiency”) which are clearly identified and can be determined on the basis of written submissions. Further, the international jurisprudence reveals only a handful of brief decisions of international tribunals which are relevant to the issue of disclosure of exculpatory materials, and the case-law is straightforward.
16. Finally, in this stage of the investigation, expeditious determination of interlocutory appeals is essential. Since the Chamber is not resident at the Court, by proceeding “on the papers,” it will be able to determine the Appeals more expeditiously than if it were to wait for the next available hearing dates before deliberating on them.

## **THE LEGAL FRAMEWORK**

### **Relevant Legal Provisions**

#### *Law on the establishment of the ECCC*

17. Article 23 (new) of the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* states, in part:

‘If ... existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.’

*Code of Criminal Procedure*

18. Article 127 of the *Code of Criminal procedure of the Kingdom of Cambodia* provides:

‘An investigating judge, in accordance with the law, performs all investigations that he deems useful to ascertaining the truth. An investigating judge has the obligation to collect inculpatory as well as exculpatory evidence.’

*Internal Rules*

19. Sub-rule 53(4) of the *ECCC Internal Rules* provides:

‘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.’

20. Sub-rule 55(5) states, in the relevant part:

‘In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.’

21. Sub-rule 55(10) provides:

‘At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.’

22. Sub-rule 66(1) states, in the relevant part:

‘Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. The parties shall have 15 (fifteen) days to request further investigative action.’

23. Sub-rule 67(3) provides, in the relevant part:

‘The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:

...

c) There is not sufficient evidence against the Charged Person or persons of the charges.

#### *Application of international principles*

24. Given that the *Code of Criminal Procedure* and the *Internal Rules* do not define explicitly the parties’ obligations in relation to specificity and relevance of investigative requests and a level of uncertainty may arise as to the obligations, if any, of the Co-Investigating Judges in relation to unspecific requests to search for exculpatory materials, it is appropriate to seek guidance in rules and principles established at the international level.<sup>10</sup> These principles will be examined where appropriate in response to the specific issues raised by the Appellants.

### **RESPONSES TO THE POINTS RAISED ON APPEAL**

#### **Preliminary observations on the Co-Investigating Judges’ obligations**

25. Once seised with a judicial investigation, the Co-Investigating Judges have a duty to search for evidence conducive to ascertaining the truth about the allegations set out in the Introductory Submission and a Supplementary Submission.<sup>11</sup> That duty is discharged by taking actions which the Judges *deem useful to ascertaining the truth*,<sup>12</sup> and such actions may be initiated by the Judges *proprio motu*, or by a specific request of one of the parties. While the judges have a discretion to determine what investigative acts should be taken, that being an exercise of judicial power, it must be exercised impartially, on the basis of facts and in accordance with the law.<sup>13</sup> Investigative activity conducive to ascertaining

<sup>10</sup> Article 23 (new) of the *Law on the Establishment of the ECCC*

<sup>11</sup> Sub-rule 55(2) and 55(3)

<sup>12</sup> Article 127 of the *Code of Criminal procedure of the Kingdom of Cambodia*

<sup>13</sup> *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; see also *The Burgh Principles On the Independence of the International Judiciary* (available at [www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf)), at page 1.



the truth must be performed objectively and with the same vigour whether it is likely to lead to inculpatory or exculpatory evidence.<sup>14</sup>

26. The Co-Prosecutors submit that, while the Co-Investigating Judges erred in applying a principle of sufficiency in the form set out in the Order, they nevertheless correctly apply the above substantive principles. They properly construe their obligations to act impartially in actively searching for both inculpatory and exculpatory materials, as well as the requirement that requests for investigative actions must be relevant and sufficiently specific.

**“Principle of Sufficiency”**

**(Appeal 1 - Ground 1 and Appeal 2 Argument III(A))**

27. The Appeals refer to the following statement in the Order where the Co-Investigating Judges invoke a principle of sufficiency, which, the Appellants assert, does not exist in the proceedings before the ECCC:

‘The logic underpinning a criminal investigation is that the principle of sufficiency 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 Person.’

On the principle or requirement of sufficiency, the Order also states:

‘[I]n fulfilling their duty of impartiality, the Co-Investigating Judges are under no obligation to go on “fishing expeditions” in search of exculpatory materials as long as they satisfy the requirement of sufficiency.’ (footnote omitted)

The Order does not refer to any legal provision or authority on a principle or requirement of sufficiency.

28. The Co-Prosecutors respectfully submit that the Co-Investigating Judges’ reasoning is erroneous in so far as it does not appropriately qualify the stated principle of sufficiency of evidence. An unqualified statement that a judicial investigation can be closed as soon

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<sup>14</sup> Sub-rule 55(5).

as there is sufficient evidence to indict, combined with a notion that sufficiency outweighs exhaustiveness, is unsound. However, as will be illustrated below, viewed in context, the Co-Investigating Judges' use of the "principle" is ultimately not so broad as to justify a dismissal of the Order.

29. In the Co-Prosecutors' submission, if a request for investigative action is relevant and sufficiently specific in that it shows, *prima facie*, that the proposed action is conducive to ascertaining the truth, the Co-Investigating Judges must accede to it, whether or not they may have come to a view, prior to receiving the request, that "there is sufficient evidence to indict." This would be the case, for example, where a request filed prior to the expiration of the period in Sub-rule 66(1) points to new evidence that would shed additional light on the matters under investigation and justify further investigative steps. However, this would not mean that one principle has been outweighed by another (sufficiency versus exhaustiveness), but simply that the Judges' investigative powers have been properly invoked. The Internal Rules explicitly make provision for the filing of further investigative requests once the Judges issue a notice of a proposed closure of an investigation (a point at which the Judges consider that the investigation has been concluded).<sup>15</sup>

30. However, the Co-Investigating Judges' reasoning on the principle of sufficiency should not be read out of context. The Order does not suggest that the principle narrows the scope of an investigation, or that it would justify the refusal of an otherwise valid investigative request. The Co-Investigating Judges clearly recognise that their duty is not limited to searching only for evidence to indict the Charged Persons,<sup>16</sup> and state that they are searching equally for inculpatory and exculpatory evidence, and actively exploring all documentary sources which in their view could contain categories of documents that may be conducive to ascertaining the truth – including documents in the SMD. They further state that:

- a. Any document identified as meeting the criterion of being conducive to ascertaining the truth, whether inculpatory or exculpatory, is systematically placed on the case-file, and

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<sup>15</sup> Sub-rule 66(1).

<sup>16</sup> Order, paragraph 15, points 1 and 3.

- b. If, after a preliminary search, the Defence become aware of evidence which they wish to bring to the attention of the Co-Investigating Judges, they are entitled to inform them accordingly.<sup>17</sup>
31. The Co-Investigating Judges clearly have no discretion in relation to their duty to be impartial in searching for evidence conducive to ascertaining the truth, and doing so actively and diligently, whether the evidence happens to be of an inculpatory or exculpatory nature.<sup>18</sup> However, they certainly do have the discretion to determine what investigative activity is conducive to ascertaining the truth, so that their duty to act impartially clearly does not extend to requiring them to perform any investigative activity that may be requested, regardless of how vaguely or widely described and ultimately ineffective. In this respect, the Judges state, correctly, that they 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.”<sup>19</sup>
32. On balance, it is submitted that, despite the reference in the Order to the principle of sufficiency, the Co-Investigating Judges properly understood the nature of their obligations, and their reasoning in the Order does not justify a conclusion, put forward in the Appeals, that the Judges have sought to improperly reduce the scope of their investigations.

### **Appeal 1 – Ground 2: The “obligation” to investigate SMD**

33. The Appellants invoke Sub-rules 53(1) and (2) to argue that the Co-Investigating Judges have been “seised” of the materials on the SMD by the Co-Prosecutors and are therefore under an obligation to investigate them. The Co-Prosecutors submit that this argument fails both due to a misconstruction of the provisions and a misunderstanding of the facts.
34. There are only two methods in which materials can come onto the case-file from the moment of opening of a judicial investigation: the first is by being formally submitted at the time of the opening of the investigation, and the second is by being subsequently

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<sup>17</sup> Order, paragraph 15.

<sup>18</sup> This is clear both from Sub-rule 55(5) and from Article 127 of the *Code of Criminal procedure of the Kingdom of Cambodia*

<sup>19</sup> Order, paragraph 10.

placed on the case-file by the Co-Investigating Judges. Under the first option (which relies on Sub-rules 53(1) and (2)), materials have to be submitted by the Co-Prosecutors and accompany the Introductory Submission (together with the case-file), at the time of its filing. This was not the case here.<sup>20</sup> The materials on the SMD were not “submitted” with the Introductory Submission in support of the allegations therein. The SMD has also not been made part of the case-file subsequently.

35. The SMD was set up after the filing of the Introductory Submission to enable the participants to share potentially relevant materials.<sup>21</sup> As it contains general open sources, it is in fact no different from any library containing documents relating to the events in Cambodia during the period of the temporal jurisdiction of the Court. The Co-Prosecutors have stated that they are not aware of the presence of any exculpatory material on the SMD but they remain cognisant and in compliance of their obligations under Sub-rule 53(4) in relation to the SMD or any other materials within their possession or control.
36. As the Request acknowledged, the SMD is not a formal mechanism for disclosure or submission of evidence.<sup>22</sup> The SMD Protocol states that materials placed on the SMD are materials “other than those related to an ongoing investigation by the OCP or a judicial investigation by the CIJ”<sup>23</sup> and that their placement on the SMD “does not in any way absolve persons from any other legal obligations they may have as regards the material and its usage.”<sup>24</sup>
37. SMD was therefore not set-up to fulfill or avoid the substantive responsibilities of the Co-Investigating Judges or the Co-Prosecutors, nor has it been used as such. The case-file constitutes the official record of the judicial investigation to which the Defence have continuous access, with individual notifications in respect of each document that is placed on the file. This enables them to see and follow the entire progress of a judicial

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<sup>20</sup> Order, paragraph 14.

<sup>21</sup> One collection of general materials on the SMD has been “shared” by the Co-Investigating Judges themselves: see Shared Materials Drive description on the Court’s Intranet page, at <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>

<sup>22</sup> Request, paragraph 14.

<sup>23</sup> Ibid, Section A, paragraph 2.

<sup>24</sup> Ibid, Section B, paragraph 3.

investigation and make informed, relevant and specific requests, which they have failed to do on this occasion.

**Whether the Order incorrectly applies the right to a trial without undue delay  
(Appeal 1 – Ground 3; Appeal 2 Argument III(B))**

38. In dealing with the importance of the specificity requirement which attaches to investigative requests (which is dealt with under Appeal 1 - Ground 4 below), in the context of the right to a trial without undue delay, the Co-Investigating Judges state that “any request which could have the effect of delaying the proceedings *may* be dismissed.”<sup>25</sup>
39. The Appellants argue that this is a misuse of the right to a trial without undue delay to justify a violation of the right to a fair trial and a thorough investigation.<sup>26</sup> However, this is a misreading of the Order.
40. In the relevant part of the Order, the Judges state that, as a consequence of the requirements to avoid undue delays *and to avoid the danger of infringing the fairness of the trial*, they must dismiss requests if they do not consider them conducive to ascertaining the truth.<sup>27</sup> The Order therefore (1) places the obligations to comply with the right to a fair trial and the right to a trial without undue delay on an equal footing, and applies them cumulatively, and (2) seeks to protect these rights by dismissing imprecise and unspecific requests.
41. Further, it is clear that the Co-Investigating Judges have not sought to invoke these rights to limit their duties in an arbitrary manner. In fact, the opposite is true. In addition to stating (as noted in paragraph 30 above) that they *actively explore all documentary sources* which in their view could contain documentary evidence conducive to ascertaining the truth, systematically placing such evidence (whether inculpatory or exculpatory) on the case-file,<sup>28</sup> the Co-Investigating Judges also recognise that they are not permitted to make arbitrary selections of evidence or to refuse to take actions

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<sup>25</sup> Order, paragraph 9.

<sup>26</sup> Appeal 1, paragraphs 30 and 33, Appeal 2, paragraph 11.

<sup>27</sup> Order, paragraph 10.

<sup>28</sup> Order, paragraph 15.

conducive to ascertaining the truth.<sup>29</sup> This approach clearly protects the Appellants' right to a fair trial and a thorough investigation.

42. The Co-Prosecutors submit that the above reasoning indicates a proper understanding and application of the rights of the Charged Persons.

**Appeal 1 – Ground 4: Whether the request is sufficiently specific**

43. The request asked the Co-Investigating Judges to review *all documents* placed in the SMD, produce a detailed report of their analysis and provide a list of exculpatory materials contained in the SMD.<sup>30</sup> The generality and lack of specificity and relevance of this request are clear when it is considered that the contents of the SMD include:

- a. 200 films and documentaries that relate to the period of Democratic Kampuchea made after 6 January 1979
- b. 17,607 documents relating to Democratic Kampuchea and / or the Communist Party of Kampuchea
- c. A chronological collection of contemporaneous, open source radio and press reports relating to Democratic Kampuchea and associated issues, from January 1975 to January 1979
- d. Public affairs material, and
- e. Common general documents that do not fit into the above categories.<sup>31</sup>

44. As indicated in the Introduction, the Co-Investigating Judges dismissed the request for lack of specificity and relevance. They correctly held that when the Defence makes a request for investigative action, it must provide sufficiently precise information to show why it believes such a request to be reasonable.<sup>32</sup>

45. The requirements of specificity and relevance attaching to investigative requests clearly arise from the criterion that investigative actions must be conducive to ascertaining the

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<sup>29</sup> Order, paragraph 7.

<sup>30</sup> Request, paragraph 25.

<sup>31</sup> Shared Materials Drive description on the Court's Intranet page, at <http://zylab/Exe/ZyNET.exe?Client=Common+Collection&Init=1&ZyAction=ZyActionr>

<sup>32</sup> Order, paragraphs 11 and 15 (point 4)

truth.<sup>33</sup> To properly invoke the Co-Investigating Judges' powers to undertake investigative actions, a party must show the relevance of the action to the allegations in the Introductory Submission and state its request in specific terms (e.g. by pointing to the location and nature of the evidence) to enable the Judges to assess the request and undertake the actions in an effective manner. An investigative request cannot simply ask the Judges to conduct a research project with a broad outline that would be no different from asking them to review any library in the world which may contain materials relating to the events in Cambodia during the temporal jurisdiction of the Court.

46. The Appeals refer to the Pre-Trial Chamber's ruling on the meaning of the term "investigative request" (which the Chamber defined as "requests for actions with the purpose of collecting information conducive to ascertaining the truth"<sup>34</sup>). However, that definition is consistent with the way the Co-Investigating Judges have interpreted their obligations in relation to the Request. The meaning prescribed by the Chamber does not extend to requests for *any action* that may theoretically lead to the finding of relevant information regardless of how broad the action may be.

47. Conceptually, in so far as it relates to disclosure of exculpatory materials within a collection available to an organ of the Court, the Request was similar to disclosure motions by defence teams before the international *ad hoc* Tribunals alleging that exculpatory evidence other than that already disclosed is in the possession or control of the prosecutor. While affirming the importance of the prosecutor's role in actively searching for and disclosing exculpatory evidence (as the Co-Investigating Judges have done in relation to their duties), the Tribunals have adopted the following approach in dealing with such defence requests:

- a. The defence must submit prima facie proofs tending to make it likely that the evidence is exculpatory and is in the Prosecutor's possession,<sup>35</sup> and

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<sup>33</sup> Sub-rules 55(5) and (1).

<sup>34</sup> *Public Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties*, Khieu Samphan, 002/19-09-2007-ECCC/OCIJ (PTC 11), 20 February 2009, Document A190/1/20, paragraph 28.

<sup>35</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Blaskic*, Trial Chamber Decision on the Production of Discovery Materials, 27 January 1997, paragraph 50(2); *Prosecutor v Blaskic*, Appeals Chamber Judgment, 29 July 2004, paragraph 268.

- b. The prosecution is expected to fulfill its duties in good faith, and the court must assume that the prosecution is doing so unless there is some evidence to the contrary (so that an order to compel the prosecutor to disclose exculpatory materials should only be contemplated where the defence can satisfy the Court that the prosecution has failed to discharge its obligations).<sup>36</sup>
48. Applying these principles to the ECCC's procedural framework, in exercising their powers, the Co-Investigating Judges are expected, and must be presumed, to act in good faith. That presumption is arguably even stronger at the ECCC than in the case of the *ad hoc* Tribunals (where investigations are within the purview of the prosecutor), since the Co-Investigating Judges are an independent judicial organ and not a party to the proceedings.
49. If the Appellants seek to allege that the Co-Investigating Judges have not met their obligations to actively search for and file exculpatory evidence, then, applying the relevant international principles, they must submit *prima facie* proofs that such evidence exists and that it is in possession or within reach of the Co-Investigating Judges. Neither the Request nor the Appeals have done so.
50. In conclusion, the Co-Investigating Judges were correct in dismissing the Request. The Charged Persons cannot escape the basic requirements of relevance and specificity by putting forward unreasonably wide requests which fail to show that the requested actions are conducive to ascertaining the truth.

#### **Appeal 1 – Ground 5: Alleged application of a common law standard**

51. The Appellants argue that a reference in the Order to the decisions of the International *ad hoc* Tribunals on the issue of requests for disclosure of exculpatory materials led to the application of the wrong standard in that the principle described in the decisions is “more

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<sup>36</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Brdjanin*, Appeals Chamber Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, pages 2 and 3.



a common law than a civil law principle.”<sup>37</sup> Apart from this general statement, the Appeal fails to explain why the decisions of the International Tribunals are not relevant.

52. The Tribunals’ jurisprudence outlines generic rules relating to the disclosure of exculpatory materials by an investigating organ and sets minimum requirements for defence requests in cases of alleged non-compliance. Even leaving aside the fact that the Tribunals do not apply the common law system but merely an adversarial procedure which in fact incorporates aspects of the civil law system (such as the absence of extensive rules of evidence),<sup>38</sup> the general principles of criminal procedure developed by them are clearly relevant. These are principles established at the international level which the ECCC is required to consider in circumstances such as these.<sup>39</sup>

53. While raising a common law / civil law dichotomy, in their brief argument, the Appellants seem to confuse the position of the defence in the two systems. They assert that the principles developed by the *ad hoc* Tribunals do not apply to the civil law system where “the defence is excluded from [the process of investigation].”<sup>40</sup> If the Appellants wish to raise an alleged “exclusion” of the Defence at the ECCC from an investigative process as a reason to distinguish the jurisprudence of the International Tribunals, they have put forward a self-defeating argument since “exclusion” of defence from an investigation more closely resembles an investigation at the International Tribunals. This argument, however, need not be pursued given the manifest lack of logic in suggesting that the ECCC should not have regard to rules at the international level simply because a party seeks to impose a common law or a civil law label on a Tribunal.

54. The differences between the procedural frameworks between the ECCC and the International Tribunals actually support an argument that the obligations on the Defence in relation to requests for exculpatory materials before the ECCC are entirely reasonable. The International Tribunals’ Statutes and Rules of Procedure and Evidence give the defence far less access to the investigating organ than is the case in the proceedings before the ECCC, and yet the Tribunals require the defence to submit *prima facie* proofs

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<sup>37</sup> Appeal 1, paragraph 40.

<sup>38</sup> The Tribunals also do not apply any national rules of evidence: see Rule 89 of the Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia

<sup>39</sup> Article 23 (new) of the *Law on the Establishment of the ECCC*

<sup>40</sup> Appeal 1, paragraph 41.

of the existence of exculpatory evidence where an order of disclosure is sought.<sup>41</sup> In a civil law judicial investigation, the Defence is arguably in a more favourable position (than in an investigation conducted by a prosecutor) because the investigative process is conducted by a judicial organ, which gives the Defence full access to its case-file, so that it can see each and every piece of evidence collected and relied upon, and make specific requests for investigative actions. Far from being excluded, the Defence is therefore very much an active participant in a civil law judicial investigation, albeit that the exclusive authority for undertaking formal investigative acts rests with the Investigating Judge.

55. If this is the case, then clearly the minimum standard established by the *ad hoc* Tribunals in relation to defence requests for exculpatory evidence can apply to similar requests by the Defence in proceedings before the ECCC. If, as the Co-Prosecutors submit, the Defence should be required to (1) ensure their investigative requests are specific and relevant, and (2) put forward *prima facie* proofs supporting any allegation that the Co-Investigating Judges have failed to search for and disclose exculpatory evidence, this is a minimum requirement which the Defence can easily comply with considering the full access to the judicial investigation which they have been afforded.

56. By stating that the Defence may undertake preliminary searches within the available materials, and inform the Co-Investigating Judges should they wish to bring evidence to their attention,<sup>42</sup> while not abrogating their responsibility to undertake a thorough and impartial investigation, the Co-Investigating Judges have correctly applied the international principles in the context of the ECCC's procedural framework. In fact, the Order offers practical ways in which the Defence can make effective use of the SMD, by pointing out that all of the documentary materials have been digitised and that their searching allows for "powerful rapid full text searches as well as filtering of various sources."<sup>43</sup> This makes it easy for the parties to search for evidence which they consider relevant and to propose it for consideration by the Judges.

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<sup>41</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Blaskic*, Trial Chamber Decision on the Production of Discovery Materials, 27 January 1997, paragraph 50(2); *Prosecutor v Blaskic*, Appeals Chamber Judgment, 29 July 2004, paragraph 268.

<sup>42</sup> Order, paragraph 15.

<sup>43</sup> Order, footnote 15.

57. While to date the SMD has been used by the Co-Investigating Judges and Co-Prosecutors, it is available to all parties, including the Defence. The Defence are free not to avail themselves of this facility and may choose not to add to it general documents which they have at their disposal. However, if they request the Co-Investigating Judges to undertake investigative actions which they say would result in the placement of additional evidence on the case-files, they must meet the specificity and relevance requirements discussed under Appeal 1 - Ground 4.

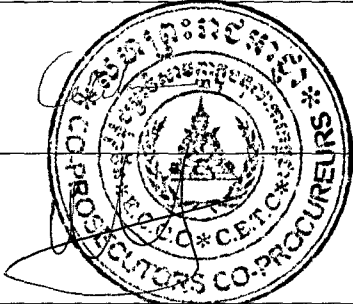
### CONCLUSION

58. In conclusion, the Co-Prosecutors submit that the Co-Investigating Judges properly refused the Request, and respectfully request the Pre-Trial Chamber to dismiss the Appeals.

59. In light of the issue raised by the reference in the Order to a principle of sufficiency, the Co-Prosecutors respectfully submit that it may be appropriate for the Pre-Trial Chamber to substitute (or supplement) the reasoning in the Order, in so far as it refers to that principle, with the reasoning that:

- a. In discharging their duty to act impartially and search for inculpatory and exculpatory evidence, the Co-Investigating Judges have a discretion to determine which investigative acts are conducive to ascertaining the truth. They must be presumed to be acting in good faith in the absence of evidence to the contrary.
- b. The Co-Investigating Judges are not required to conduct searches for any and all information which may be theoretically relevant, and are entitled to dismiss requests which they find not to be conducive to ascertaining the truth in that they are frivolous, generalised, unspecific, repetitious or irrelevant.
- c. A party requesting investigative actions bears the onus of showing that the action is conducive to ascertaining the truth, and should do so by ensuring its request is sufficiently specific and relevant to be acted upon.
- d. A party alleging that the Co-Investigating Judges have failed to fulfill their obligations to search for or disclose inculpatory or exculpatory evidence must submit prima facie proofs as to the specific nature of the evidence, showing that the evidence is in possession of the Co-Investigating Judges, or otherwise pointing to its location.

- e. The Co-Investigating Judges may close the investigation when they consider that all actions required to ascertain the truth about the allegations in the Introductory and Supplementary Submissions have been taken.
- f. At that stage (whether or not sufficient evidence has been found to indict a Charged Person), the Co-Investigating Judges must consider further requests submitted in accordance with Sub-rule 66(1).
- g. If the Co-Investigating Judges find such further requests to be conducive to ascertaining the truth in that they are likely to lead to findings materially different from, or additional to, those based on the information already gathered, the Co-Investigating Judges are under a duty to act on them.

Date	Name	Place	Signature
10 August 2009	YETH Chakriya <b>Deputy Co-Prosecutor</b>	Phnom Penh	
	William SMITH <b>Deputy Co-Prosecutor</b>	Phnom Penh	