



**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

**លេខ/No: ០២៦៥/២/១៧**

**អង្គបុរេជំនុំជម្រះ**  
Pre-Trial Chamber  
Chambre Préliminaire

*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 (PTC 67)**

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

**Date:** 27 September 2010

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
28 / 09 / 2010	
ម៉ោង (Time/Heure):	
13:30	
មន្ត្រីទទួលខុសត្រូវករណី/Case File Officer/L'agent chargé du dossier:	
Ratanak	

**PUBLIC**

**DECISION ON RECONSIDERATION OF 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**

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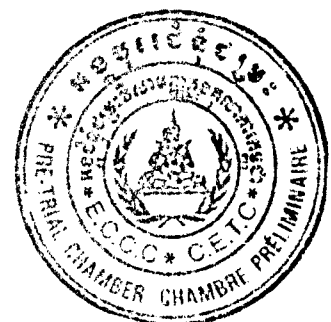
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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Appeal Brief of the Co-Prosecutors in Response to Co-Investigating Judges Order Regarding Request to Place on Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes” (“the Appeal Brief”)<sup>1</sup> dated 4 May 2010 of the Co-Prosecutors against 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” (“the First Impugned Order”)<sup>2</sup> dated 5 April 2010. The Pre-Trial Chamber is further seised of the Co-Investigating Judges’ “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” (“the Second Impugned Order”)<sup>3</sup> dated 21 June 2010 and the “Co-Prosecutors’ Written Submissions Pursuant to the Pre-Trial Chamber’s Decision of 15 June 2010” (“the Reconsideration Submission”)<sup>4</sup> dated 28 June 2010.

## I. PROCEDURAL BACKGROUND

1. On 11 February 2010, the Co-Prosecutors (“the Appellants”) filed the “Request to Place on Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes” (“the Request”).<sup>5</sup> The Request seeks the admission to the Case File of 268 press articles published between 1975 and 1979.<sup>6</sup> On 5 April 2010, the Co-Investigating Judges issued the First Impugned Order partially granting the Request by admitting 70 of the press articles to the Case File.<sup>7</sup> On 19 April 2010, the Co-Prosecutors filed their notice of appeal against the Order and on 4 May 2010 they filed the Appeal Brief, which is limited to those parts of the Request denied by the First Impugned Order.

<sup>1</sup> Co-Prosecutors’ Appeal Brief in Response to the Co-Investigating Judges Order Regarding Request to Place on Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 4 May 2010, D365/2/1 (“the Appeal Brief”).

<sup>2</sup> 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, 5 April 2010, D365/1 (“the First Impugned Order”).

<sup>3</sup> 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, 21 June 2010, D365/3 (“the Second Impugned Order”).

<sup>4</sup> Co-Prosecutors’ Written Submissions Pursuant to the Pre-Trial Chamber’s Decision of 15 June 2010, 28 June 2010, D365/2/12 (“the Reconsideration Submission”).

<sup>5</sup> Co-Prosecutors’ Request to Place on the Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 11 February 2010, D365 (“the Request”).

<sup>6</sup> Request, para. 30. The placement of the press articles that are subject of this request may be referred to herein as placement of evidence on the Case File or placement of documents on the Case File. The press articles themselves may be described as “press articles,” “documents,” “evidentiary materials,” the “rejected documents,” or a combination thereof. These terms are used interchangeably in this decision, except as otherwise specifically noted.

<sup>7</sup> First Impugned Order, para. 4.



2. Before deciding on the merits of the Co-Prosecutors' Appeal Brief, the Pre-Trial Chamber conducted an in camera hearing on 26 and 27 May 2010.<sup>8</sup> The Co-Lawyers for Ieng Sary, Nuon Chea and Khieu Samphan presented oral responses to the Appeal and the Appellants provided an oral reply to the responses.<sup>9</sup> On 15 June 2010, the Pre-Trial Chamber issued the "Decision 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" ("the 15 June 2010 Decision").<sup>10</sup> In the 15 June 2010 Decision, the Pre-Trial Chamber (i) decided unanimously that the appeal was admissible; (ii) directed the Co-Investigating Judges to provide reasons for their decision to partially reject the Request, as explained in paragraph five of the First Impugned Order; and (iii) retained the matter while providing the Co-Investigating Judges with five working days to reconsider the Request.<sup>11</sup> The Decision further directed that upon receipt of the Co-Investigating Judges' order in response to the 15 June 2010 Decision, the Pre-Trial Chamber would permit the Appellants two days to decide whether to proceed with the Appeal and if the Appellants elected to proceed, they would be granted three working days to submit further submissions.<sup>12</sup> Thereafter, the Pre-Trial Chamber considered that the other parties to the Appeal would also be granted three days to respond in writing to the Appellants' further submissions and that the Appellants would further be granted two working days to reply to the responses of the other parties to the Appeal.<sup>13</sup>

3. On 21 June 2010, the Co-Investigating Judges issued the Second Impugned Order. On 23 June 2010, the Co-Prosecutors provided notice that they would proceed with the appeal and on 29 June 2010, the Co-Prosecutors notified their Reconsideration Submission. The Appeal Brief and the Reconsideration Submission shall be collectively referred to herein as "the Appeal." On 2 July 2010, the defence of Nuon Chea filed their "Response to Co-Prosecutors' Submissions Pursuant to the Pre-Trial Chamber's Decision of 15 June 2010" ("the Nuon Chea Response").<sup>14</sup> On 7 July 2010, the defence of Khieu Samphan filed the "Response of Mr. Khieu Samphan's Defence to the Co-

<sup>8</sup> Scheduling Order, 11 May 2010, D365/2/2.

<sup>9</sup> Document Nos D-365/2, Hearing Transcript, 26 May 2010, ERN 00531441-00531487 and D-365/2, Hearing Transcript, 27 May 2010, ERN 00531583-00531634.

<sup>10</sup> Decision 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, 15 June 2010, D365/2/10 ("the 15 June 2010 Decision").

<sup>11</sup> 15 June 2010 Decision, para. 27.

<sup>12</sup> 15 June 2010 Decision, para. 27.

<sup>13</sup> 15 June 2010 Decision, para. 27.

<sup>14</sup> Response to Co-Prosecutors' Written Submissions Pursuant to the Pre-Trial Chamber's Decision of 15 June 2010, 5 July 2010, D365/2/13 ("the Nuon Chea Response").



Prosecutors' Written Submissions Pursuant to the Pre-Trial Chamber Decision of 15 June 2010" ("the Khieu Samphan Response").<sup>15</sup> The defence of Ieng Sary did not respond to the Co-Prosecutors' Reconsideration Submission. The Co-Prosecutors notified the Pre-Trial Chamber by email dated 13 July 2010 that they would not file a reply.<sup>16</sup>

4. On 14 July 2010, the Pre-Trial Chamber announced its disposition of the Appeal, stating that "[a] reasoned decision in respect of the Appeal shall follow in due course.

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

CONFIRMS the partial denial of the Request in the First Impugned Order and Second Impugned Order; and DISMISSES the Appeal."<sup>17</sup>

**II. ADMISSIBILITY**

5. The First Impugned Order was notified to the parties on 5 April 2010. The notice of appeal was filed on 19 April 2010, which is within the period prescribed in Internal Rule ("Rule") 75(1) of the ECCC Internal Rules ("the Internal Rules"),<sup>18</sup> taking into account the holidays on 14, 15 and 16 April 2010. The submissions on Appeal were filed on 4 May 2010, therefore within the time provided for in Rule 75(3).

6. In accordance with the 15 June 2010 Decision and within the time limits prescribed therein, the Co-Investigating Judges issued the Second Impugned Order on 21 June 2010. On 28 June 2010, the Appellants filed the Reconsideration Submission within the time limits prescribed by the 15 June 2010 Decision. On 2 July 2010 and 7 July 2010 respectively, the Nuon Chea Response and the Khieu Samphan Response were filed within the time limits prescribed by the 15 June 2010 Decision.

7. The Pre-Trial Chamber observes that the Co-Prosecutors submitted the Request as a request made pursuant to Rule 55(10).<sup>19</sup> In a Pre-Trial Chamber decision notified after the filing of the

<sup>15</sup> Response of Mr. Khieu Samphan's Defence to the Co-Prosecutors' Written Submission Pursuant to the Pre-Trial Chamber Decision of 15 June 2010, 7 July 2010, D365/2/15 ("the Khieu Samphan Response").

<sup>16</sup> Email from A. Ahmed dated 13 July 2010 entitled "OCP's Notice of NOT Filing a Reply to the Defence Responses to the OCP Written Submissions (PTC 67)" to Greffiers and Legal Officers of the Pre-Trial Chamber.

<sup>17</sup> 15 June 2010 Decision, page 5.

<sup>18</sup> Internal Rules (Rev. 5) as revised on 9 February 2010 ("the Internal Rules").

<sup>19</sup> Request, para. 1.



Request, it was determined that a request for an order to place evidence on the Case File is not a request for investigative action made pursuant to Rule 55(10) but rather is a request for an order “necessary for the conduct of the investigation” pursuant to Rule 55(10).<sup>20</sup>

8. The Appeal is submitted pursuant to Rule 74(2), according to which the Co-Prosecutors may appeal against all orders of the Co-Investigating Judges. The Appeal is admissible.<sup>21</sup>

### III. THE APPEAL BRIEF

9. As will be discussed further in Section IV of this decision, the Pre-Trial Chamber noted but did not discuss the substantive grounds of appeal in the 15 June 2010 Decision. Having received the Second Impugned Order from the Co-Investigating Judges and the responses provided by the parties, the Pre-Trial Chamber now considers the grounds of appeal delineated by the Co-Prosecutors in the Appeal Brief. The positions expressed in the Reconsideration Submission and in the additional responses from the defence of the charged persons will be considered in subsequent sections of this decision.

10. In the Appeal Brief, the Appellants submit that there are three substantive grounds of appeal:

- (i) Incorrect standard applied;
- (ii) Incorrect assessment of facts; and
- (iii) Failure to address the cumulative effect of like evidence.<sup>22</sup>

#### A. Ground 1. Incorrect Standard Applied

11. The Appellants state that the First Impugned Order relies on “an incorrect standard of a document’s ‘relevance’ as distinct from a standard for assessing a document’s ‘conduciveness to ascertaining the truth of the facts set out in the Introductory Submission or a Supplementary Submission.’”<sup>23</sup> The Appellants submit that the application of the ‘relevance’ standard results in the documents in the Request being subject to a standard for admissibility that is too high in the judicial

<sup>20</sup> “The Request did not require an investigation to be performed but rather the placement on the Case File of the evidence submitted.” 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, 20 May 2010, D313/2/2 (“the 20 May 2010 Decision”), para. 12.

<sup>21</sup> The Pre-Trial Chamber found the Appeal admissible in the 15 June 2010 Decision.

<sup>22</sup> Appeal Brief, para. 4.

<sup>23</sup> Appeal Brief, para. 4.



investigation phase.<sup>24</sup> The Appellants consider that the employment of the incorrect standard in the First Impugned Order constitutes an error of law.<sup>25</sup> The Appellants submit that this error of law is compounded by the “scant reasoning” provided to explain the refusal to admit the rejected documents and by the “unduly narrow interpretation of the ‘scope of investigation’” which functions to impermissibly limit the admissibility of the requested documents.<sup>26</sup> As part of the relief sought in the Appeal, the Co-Prosecutors have asked that the Pre-Trial Chamber confirm and apply the appropriate standard for such requests.

### **B. Ground 2. Incorrect Assessment of Facts**

12. The Appellants appeal the First Impugned Order on the basis that the Co-Investigating Judges have incorrectly assessed the factual relevance of the press articles.<sup>27</sup> In particular, the Co-Prosecutors observe that the evidence provided by the press articles is probative as to modes of liability, which specifically fall within the scope of the investigation.<sup>28</sup> In addition, the Co-Prosecutors submit that the Co-Investigating Judges apparent failure to consider how the press articles are probative as to the charged persons’ knowledge reflects an incorrect assessment of facts. To support this ground of appeal, the Co-Prosecutors note that the title of the Request and the content thereof, including the Co-Prosecutors’ explicit statement that the press articles are “particularly probative in proving the knowledge or awareness of the Charged Persons of the crimes occurring in DK”<sup>29</sup> serve to explicitly define the purpose of placing the documents on the Case File.

### **C. Ground 3. Failure to Address the Cumulative Effect of Like Evidence**

13. The Appellants submit that the Co-Investigating Judges have erred in failing to consider the submissions made by the Co-Prosecutors in the Request as to the use of a body of like evidence that may show knowledge of the crimes by the charged persons.<sup>30</sup> The Appellants note that evidence of a like type, especially of a single document type, has utility in the prosecution of crimes committed on a massive scale.<sup>31</sup> While the scale of the crimes may not permit any one person to serve as a witness for all of the crimes in the indictment, evidence that shows that the charged persons continually received credible and consistent information about criminal acts in Democratic

<sup>24</sup> Appeal Brief, para. 4.

<sup>25</sup> Appeal Brief, para. 4.

<sup>26</sup> Appeal Brief, para. 4.

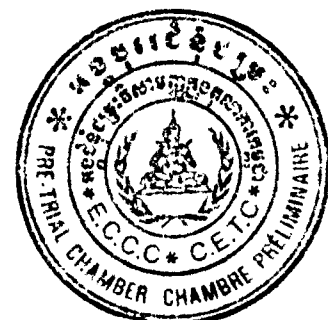
<sup>27</sup> Appeal Brief, para. 25.

<sup>28</sup> Appeal Brief, paras 24-25.

<sup>29</sup> Appeal Brief, para. 63.

<sup>30</sup> Appeal Brief, para. 4.

<sup>31</sup> Appeal Brief, para. 65.





Kampuchea will support the Co-Prosecutors' statements on the state of mind of the charged persons and may also corroborate witness testimony that "knowledge of the crimes was widespread and well known."<sup>32</sup>

14. The Co-Prosecutors request that the Pre-Trial Chamber consider the three grounds of appeal and determine that the errors of the Co-Investigating Judges amount to an abuse of, or failure to properly exercise, their discretion.<sup>33</sup> The Appellants have asked for the Pre-Trial Chamber to reverse the First Impugned Order and order that the rejected documents be placed on the Case File because of the alleged errors of the Co-Investigating Judges concerning (a) the legal standard for placing evidence on the Case File, (b) their assessment of the content of the rejected documents, and (c) the failure to consider the cumulative effect of the rejected documents, particularly in light of the burden on the Co-Prosecutors to demonstrate knowledge in a scenario in which the charged persons have not admitted to the crimes charged.

#### IV. THE 15 JUNE 2010 DECISION

15. In the first decision on this Appeal, the Pre-Trial Chamber considered the Appeal Brief and oral submissions of the parties made during the in camera hearings held on 26 and 27 May 2010. The Pre-Trial Chamber identified that the First Impugned Order is internally contradictory. In the 15 June 2010 Decision, the Pre-Trial Chamber notes that:

[i]n paragraph five of the Order, the Co-Investigating Judges have rejected the documents not otherwise admitted finding they 'were unable to determine how they would be relevant under the current scope of the investigation as they do not refer to any specific aspect under the current scope of investigation.' The Co-Investigating Judges also found that 'the Request is sufficiently specific to be considered.'<sup>34</sup>

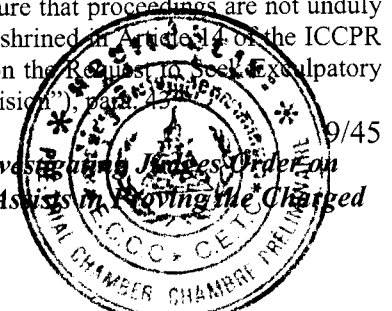
16. The Pre-Trial Chamber considered that the position taken by the Co-Investigating Judges in the First Impugned Order was untenable: either the Request is sufficiently specific to be considered, in which case the Co-Investigating Judges must provide reasoning to explain why they have not accepted the Request, or the Request is not sufficiently specific and the request may be denied by the Co-Investigating Judges.<sup>35</sup> The Pre-Trial Chamber considered that the First Impugned Order

<sup>32</sup> Appeal Brief, para. 65.

<sup>33</sup> Appeal Brief, para. 68.

<sup>34</sup> 15 June 2010 Decision, para. 20.

<sup>35</sup> This Chamber has previously noted that requests must be precise in order to "ensure that proceedings are not unduly delayed and that the Charged Person's right to be tried within a reasonable time, enshrined in Article 14 of the ICCPR and in Internal Rule 21(4), is respected." 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 ("SMD Decision"), para. 10.



contains contradictory language as a request will fail to be sufficiently specific to be considered if, among other things, it does not refer to any specific matter, or aspect of a matter, under the scope of the investigation. The Pre-Trial Chamber recalls that the Internal Rules limit the purview of the Co-Investigating Judges to matters that are within the scope of the investigation.<sup>36</sup> As such, the Pre-Trial Chamber expects that a request will not be granted, even in part, if it does not contain an explanation by the party making the request as to how the evidence to be placed on the Case File or the investigative act to be performed fit within the scope of the investigation. Without further information from the Co-Investigating Judges, the Appellants could not be certain why the Request had been granted in part but not in full.

17. The Pre-Trial Chamber further noted in the 15 June 2010 Decision that the Appellants have submitted in the Appeal that the First Impugned Order contains “scant reasoning” to explain why the rejected documents were refused.<sup>37</sup> The Pre-Trial Chamber agreed with the Appellants that the First Impugned Order contains insufficient reasoning.<sup>38</sup> The Pre-Trial Chamber concluded that the Co-Investigating Judges failed to comply with the requirement found in the Internal Rules that orders of the Co-Investigating Judges made pursuant to Rule 55(10) must set out the reasons for the rejection.<sup>39</sup> The Pre-Trial Chamber further considered that:

[i]t is a fundamental right that parties know the reasons for a decision. This permits a party to know the basis of a decision, placing an aggrieved party in a position to be able to determine whether to appeal, and upon what grounds. Equally a respondent to any appeal has a right to know the reasons of a decision for so that [sic] a proper and pertinent response may be considered.

In addition, Rule 77(14) requires the Pre-Trial Chamber to provide “reasoned” decisions. No appellate court can provide such reasoned decision when the rationale and logic of the decision appealed is not itself disclosed by a reasoned decision.<sup>40</sup>

18. In particular, the Pre-Trial Chamber found that the First Impugned Order did not explain why certain documents were rejected and did not, in the operative paragraph five, explain whether the rejected documents were considered and found to be “lacking ‘relevance under the current scope of the investigation’” or were “determined to be addressing matters too general in their

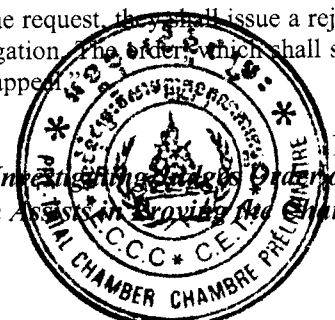
<sup>36</sup> Rule 55(2) provides that “[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or Supplementary Submission.”

<sup>37</sup> Appeal Brief, paras 4(a), 61.

<sup>38</sup> 15 June 2010 Decision, para. 22.

<sup>39</sup> Rule 55(10) provides that “[i]f 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.”

<sup>40</sup> 15 June 2010 Decision, paras 24-25.



nature” or were rejected for other reasons.<sup>41</sup> Having found that the Co-Investigating Judges erred in law by not providing sufficient reasoning in their analysis of and decision to accept or reject certain of the documents that are the subject of the Request, the Pre-Trial Chamber directed the Co-Investigating Judges to reconsider the First Impugned Order, specifically instructing the Co-Investigating Judges to “provide reasons according to law for their decision to reject part of the Request as provided for in paragraph five of the [First Impugned] Order.”<sup>42</sup> The Pre-Trial Chamber set out the Appellants’ other grounds of appeal, but considered that due to the lack of reasoning in the First Impugned Order, further consideration of the grounds of appeal would require the Chamber to speculate as to the reasoning employed by the Co-Investigating Judges in considering the Request.<sup>43</sup> The Pre-Trial Chamber declined to engage in speculation.<sup>44</sup>

## V. THE SECOND IMPUGNED ORDER

19. The Pre-Trial Chamber instructed the Co-Investigating Judges to provide specific reasoning for the decision to deny the Request in part.<sup>45</sup> In the Second Impugned Order, the Co-Investigating Judges, having observed that the documents that are the subject of the Request are press articles, state that the documents are “likely based on indirect sources; and so must by their very nature be viewed as being of significantly lower probative value” compared to other evidence already collected.<sup>46</sup> The Co-Investigating Judges next submit that the Pre-Trial Chamber’s jurisprudence supports using “relevance” as the criterion or standard to determine whether the placement of the evidence on the Case File would be conducive to ascertaining the truth.<sup>47</sup> The position of the Co-Investigating Judges, as explained in the Second Impugned Order, is set out below in full:

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. 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 seised matters upon which the

<sup>41</sup> 15 June 2010 Decision, para. 21.

<sup>42</sup> 15 June 2010 Decision, para. 27.

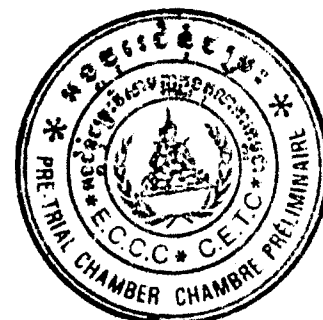
<sup>43</sup> 15 June 2010 Decision, para. 27.

<sup>44</sup> 15 June 2010 Decision, para. 27.

<sup>45</sup> 15 June 2010 Decision, para. 27.

<sup>46</sup> Second Impugned Order, para. 3.

<sup>47</sup> Second Impugned Order, para. 4.



truth is required, without being distracted by manifestly irrelevant matters, the truth of which the investigation is not required to establish.<sup>48</sup>

20. The Co-Investigating Judges next apply the holding of the previous decision of the Pre-Trial Chamber to this Appeal and conclude that while the Co-Investigating Judges have an obligation to make decisions concerning evidence based on an overarching requirement that they establish the truth, only documents related to probative facts under investigation are relevant for purposes of placement on the Case File.<sup>49</sup> Based on the foregoing, 70 documents were accepted in the First Impugned Order.<sup>50</sup>

21. The Co-Investigating Judges explain that certain of the 198 rejected articles were refused because they cover matters that are outside the factual scope of the defined investigation.<sup>51</sup> The Co-Investigating Judges reviewed the contents of each article and determined that press articles fall *outside* the factual scope if they do not (i) address a specific alleged crime site, (ii) address any facts of which the Co-Investigating Judges are seised nationwide, (iii) contain information which would have assisted in determining any applicable jurisdictional elements, or (iv) contain information which would have assisted in determining any forms of responsibility.<sup>52</sup> The Co-Investigating Judges conclude that if a piece of evidence does not specifically address one of these “enunciated relevant matters, it cannot be found to be conducive to establishment of the truth of the required facts in Case File 002” and has been rejected in the First Impugned Order on that basis.<sup>53</sup> The Co-Investigating Judges provide an illustration of their use of these criteria by highlighting the content of one press article and concluding that the article is not within the scope of the investigation because it does not contain content that fits into one of the enunciated relevant matters.<sup>54</sup>

22. Next, the Co-Investigating Judges suggest that some of the 198 rejected documents may have potentially fallen *within* the scope of the investigation but that “given the lack of detail, specificity or probative value of the contents of these articles, these articles would not assist in establishing the truth.”<sup>55</sup> The Co-Investigating Judges conclude that if a piece of evidence addresses facts “in such a general nature” as they found to be the case for newspaper articles with a low probative value, the placement of such documents on the Case File cannot be found to “be

<sup>48</sup> Second Impugned Order, para. 4 (footnotes omitted).

<sup>49</sup> Second Impugned Order, para. 4.

<sup>50</sup> Second Impugned Order, para. 5.

<sup>51</sup> Second Impugned Order, para. 6.

<sup>52</sup> Second Impugned Order, para. 6.

<sup>53</sup> Second Impugned Order, para. 7.

<sup>54</sup> Second Impugned Order, para. 7.

<sup>55</sup> Second Impugned Order, para. 8.



conducive to the establishment of the truth of the required facts in Case File 002” and have been rejected on that basis.<sup>56</sup> The Co-Investigating Judges provide an illustration of their application of these principles in the case of one press article that they find may be within the scope of investigation but is rejected because it addresses facts in a general nature and therefore would not assist in establishing the truth.<sup>57</sup>

23. Having considered that some of the 198 rejected documents were refused on the basis that they do not fall within the factual scope of the investigation and having found that some of the 198 rejected documents may potentially have fallen within the scope of the investigation but are nonetheless not of assistance in establishing the truth and were therefore refused, the Co-Investigating Judges reaffirmed the First Impugned Order.<sup>58</sup>

## VI. THE CO-PROSECUTORS’ RECONSIDERATION SUBMISSION

24. The Appellants filed the Reconsideration Submission in response to the Second Impugned Order. In the Reconsideration Submission, the Appellants incorporate by reference the Appeal Brief and the oral submissions made during the in camera hearings of 26 and 27 May 2010.<sup>59</sup> The Reconsideration Submission itself contains four grounds of response to the Second Impugned Order.

### A. Ground 1. Failure to Comply with Directions in the 15 June 2010 Decision

25. The Appellants allege that the Second Impugned Order does not contain findings of fact to explain the decision of the Co-Investigating Judges to refuse each of the rejected documents. The Appellants state that the Second Impugned Order is a “literal repetition of the ‘reasoning’ contained in the [First] Impugned Order” and note that this reasoning was deemed “insufficient” by the Pre-Trial Chamber in the 15 June 2010 Decision.<sup>60</sup>

26. The Appellants suggest that since the Co-Investigating Judges have not, as directed, provided discrete findings of fact for each rejected document, the Pre-Trial Chamber should itself consider the Appeal.<sup>61</sup>

<sup>56</sup> Second Impugned Order, para. 9.

<sup>57</sup> Second Impugned Order, para. 8.

<sup>58</sup> Second Impugned Order, para. 10.

<sup>59</sup> Reconsideration Submission, para. 7. *See also* 15 June 2010 Decision, paras 10-16.

<sup>60</sup> Reconsideration Submission, para. 9.

<sup>61</sup> Reconsideration Submission, paras 9-10.



## **B. Ground 2. Reasoning is Arbitrary and Internally Contradictory**

27. The Appellants submit that the Co-Investigating Judges characterisation of newspaper articles as being of “significantly lower probative value than any of the direct evidence” in the possession of the Co-Investigating Judges fails as “reasoning” since the Co-Investigating Judges’ statement is arbitrary and internally contradictory.<sup>62</sup> The Appellants claim that the Co-Investigating Judges’ reasoning is arbitrary because media reports, including newspaper articles, have been utilised for evidentiary purposes in similar prosecutions before other courts.<sup>63</sup>

28. The Appellants find that the reasoning provided in the Second Impugned Order on the value of newspaper articles is not persuasive because it is internally contradictory.<sup>64</sup> The Co-Investigating Judges discount the value of all press articles as sources with lower probative value. Yet, the Co-Investigating Judges admitted 70 documents of this type. The Appellants question why evidence of “lower probative value” has been at once accepted and rejected without any discussion of the specific differences, if any, in the evidentiary value of the press articles that would allow 70 documents to be accepted while 198 were rejected.<sup>65</sup>

29. The Appellants further submit that the determination of the Co-Investigating Judges assigning lower probative value to press articles lacks factual and legal foundation.<sup>66</sup> The Appellants claim that the Co-Investigating Judges conclusion is not factually supported with respect to the rejected documents.<sup>67</sup> The Appellants state that the Trial Chamber and not the Co-Investigating Judges should conduct an assessment of probative value.<sup>68</sup> Furthermore, the Appellants disagree with the probative value test and maintain that the standard or criterion for admission to the Case File is whether the requested document is conducive to ascertaining the truth.<sup>69</sup>

## **C. Ground 3. Reconsideration Order Misconstrues the Pre-Trial Chamber’s Ruling**

30. In support of the Second Impugned Order, the Co-Investigating Judges rely on the 20 May 2010 Pre-Trial Chamber Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges

<sup>62</sup> Reconsideration Submission, para. 11.

<sup>63</sup> Reconsideration Submission, para. 12.

<sup>64</sup> Reconsideration Submission, para. 13.

<sup>65</sup> Reconsideration Submission, para. 13.

<sup>66</sup> Reconsideration Submission, para. 14.

<sup>67</sup> Reconsideration Submission, para. 14.

<sup>68</sup> Reconsideration Submission, para. 14.

<sup>69</sup> Reconsideration Submission, para. 14.



Order on Request to Place Additional Evidentiary Material on the Case File Dated 31 December 2009 (“the 20 May 2010 Decision”).<sup>70</sup> The Appellants observe that the 20 May 2010 Decision “permits the Co-Investigating Judges to consider placing documents on the Case File in view of their ‘relevan[ce] within the scope of the investigation to ascertain the truth.’”<sup>71</sup> The Co-Prosecutors refute the validity of the Co-Investigating Judges interpretation of the 20 May 2010 Decision and submit that contrary to the claims of the Co-Investigating Judges, the 20 May 2010 Decision supports their position on the proper standard or criterion for admitting documents to the Case File.<sup>72</sup> The Appellants submit that the erroneous interpretation of the Co-Investigating Judges “undermine[s] both the judicial investigation and the Co-Prosecutors’ mandate to prove the case beyond a reasonable doubt before the Trial Chamber.”<sup>73</sup>

#### **D. Ground 4. The Rejected Documents are Relevant**

31. The Appellants, having asserted that the Co-Investigating Judges have misconstrued the letter and spirit of the 20 May 2010 Decision, submit that the proper standard, as enumerated in the 20 May 2010 Decision and as applied by the Co-Prosecutors, requires the placement of the documents on the Case File. The Pre-Trial Chamber emphasises that the discussion immediately following is a description of the Appellants’ submissions, which may not reflect the Pre-Trial Chamber’s assessment of the proper standard or criterion for requests made pursuant to Rule 55(10). The Pre-Trial Chamber shall consider the degree of precision and standards for assessing requests made pursuant to Rule 55(10) in due course.

32. The Appellants state that there are several dimensions to the relevance analysis. First, the Appellants find that the standard or criterion adopted by the Pre-Trial Chamber in the 20 May 2010 Decision requires, on its face, that the documents be placed on the Case File. In support of the assertion that the documents are relevant, the Appellants observe that unlike in Case 001, the charged persons in Case 002 have not entered any type of guilty plea or admission, have denied responsibility on occasion and have exercised the right to remain silent.<sup>74</sup> The Impugned Orders, when considered in the context of the distinguishable factual situation in Case 002, represent failure

<sup>70</sup> 20 May 2010 Decision, para. 4.

<sup>71</sup> Reconsideration Submission, para. 17.

<sup>72</sup> Reconsideration Submission, para. 17.

<sup>73</sup> Reconsideration Submission, para. 19.

<sup>74</sup> Reconsideration Submission, paras 21-22.



on the part of the Co-Investigating Judges to observe the “nature of this case and the evidence required to prove it beyond a reasonable doubt.”<sup>75</sup>

33. Next, the Appellants consider that the Co-Investigating Judges have further erred in assessing the content of the articles because certain of the articles may serve to corroborate evidence that the charged persons were contemporaneously aware of the commission of crimes.<sup>76</sup> In support of this claim, the Appellants note that certain of the rejected documents contain quotations from the charged persons in which the charged persons purportedly respond to statements printed in publications published outside Cambodia and statements made by persons located outside Cambodia.<sup>77</sup> Finally, the Appellants restate their position that the rejected documents are relevant because of their potential to show knowledge using the cumulative effect of like evidence.<sup>78</sup>

34. For all of the reasons stated above, namely that (i) the Second Impugned Order fails to comply with the Pre-Trial Chamber’s directions to the Co-Investigating Judges in the 15 June 2010 Decision, (ii) the reasoning given by the Co-Investigating Judges that newspaper articles are of lower probative value is arbitrary and internally contradictory, (iii) the Co-Investigating Judges have misconstrued a previous decision of the Pre-Trial Chamber and relied on their incorrect interpretation of that decision to support the Second Impugned Order; and (iv) the rejected documents are relevant within the scope of the investigation to ascertain the truth, the Appellants submit that the Co-Investigating Judges have, in the Second Impugned Order as well as the First Impugned Order, committed an error of law.<sup>79</sup> The Co-Prosecutors ask the Pre-Trial Chamber to (i) set aside the First Impugned Order and the Second Impugned Order, (ii) consider the Appeal on its merits, and (iii) order that the rejected documents be placed on the Case File.<sup>80</sup>

35. As the Pre-Trial Chamber has received the reasoning from the Co-Investigating Judges and the responses thereto from the Appellants, it is now appropriate to consider the grounds of appeal.

<sup>75</sup> Reconsideration Submission, para. 21.

<sup>76</sup> Reconsideration Submission, para. 23

<sup>77</sup> Reconsideration Submission, para. 23.

<sup>78</sup> Reconsideration Submission, paras 25-26.

<sup>79</sup> Reconsideration Submission, para. 28.

<sup>80</sup> Reconsideration Submission, para. 28.





## VII. STANDARD OF REVIEW

36. The Pre-Trial Chamber recalls that decisions on requests for orders made pursuant to Rule 55(10) are discretionary.<sup>81</sup> The Pre-Trial Chamber's review of discretionary decisions is limited to whether the Co-Investigating Judges have properly exercised their discretion. The following standard of review, formulated by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, has been established as the test before the ECCC. Discretionary decisions of the Co-Investigating Judges may only be overturned if the Appellant demonstrates that the challenged order or decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion.<sup>82</sup> Not every error of law or fact will invalidate the exercise of discretion by the Co-Investigating Judges and lead to a reversal of an order or decision. The onus is on the Appellant to demonstrate that (i) the error of law invalidated the decision, (ii) the error of fact occasioned a miscarriage of justice, or (iii) that the decision or order is so unreasonable as to force the conclusion that the Co-Investigating Judges failed to exercise discretion judiciously.

## VIII. CONSIDERATION OF THE APPEAL

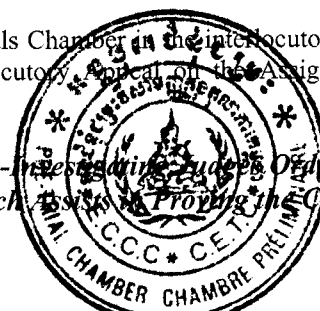
37. In the Appeal, the Appellants submit that there are three substantive grounds of appeal:
- (i) Incorrect standard applied;
  - (ii) Incorrect assessment of facts; and
  - (iii) Failure to address the cumulative effect of like evidence.

### A. Preliminary Matter: 20 May 2010 Decision of the Pre-Trial Chamber

38. At the outset, the Pre-Trial Chamber observes that the Co-Prosecutors and the Co-Investigating Judges cite the 20 May 2010 Decision in support of their differing views on the proper analysis to be conducted by the Co-Investigating Judges when faced with a request for an order pursuant to Rule 55(10). The Co-Investigating Judges and the Co-Prosecutors agree that evidence must be within the scope of the investigation in order to be considered for placement on the Case File. The Co-Investigating Judges interpret the 20 May 2010 Decision to mean that only documents related to probative facts under investigation are relevant and may be considered for placement on

<sup>81</sup> 20 May 2010 Decision, para. 16.

<sup>82</sup> SMD Decision, paras 25-26, adopting the test developed by the ICTY Appeals Chamber in the interlocutory appeal decision of *Milosevic v. Prosecutor*, IT 02-54-AR73.7, "Decision on Interlocutory Appeal on the Assignment of Defense Counsel," Appeals Chamber, 1 November 2004, para. 10.



the Case File.<sup>83</sup> The Co-Prosecutors interpret the same decision to mean that the Co-Investigating Judges shall admit those documents that contain evidence that is relevant within the scope of the investigation to ascertain the truth.<sup>84</sup> As the grounds of appeal in the instant appeal concern, in part, an alleged error of law<sup>85</sup> based on the application of the standard enumerated in a separate but similar appeal, the appellate proceedings in respect of the separate appeal shall be discussed herein and referred to by the Pre-Trial Chamber proceeding number, PTC 43.

39. In PTC 43, the Pre-Trial Chamber was faced with an appeal in which the Co-Prosecutors sought review of the Co-Investigating Judges' order refusing to place certain evidentiary materials on the Case File.<sup>86</sup> The Co-Prosecutors appealed the related order on the basis that the partial refusal of the request to place documents on the Case File and the rationale provided for the partial refusal was so unreasonable as to constitute an abuse of discretion.<sup>87</sup> The abuse of discretion was described as the erroneous application of an incorrect legal standard combined with factual errors.<sup>88</sup> In the appeal filed in respect of PTC 43, the Co-Prosecutors made the same submissions as in the Appeal Brief regarding the appropriate standard to be utilised by the Co-Investigating Judges in considering placement of evidence on the Case File at the investigative stage of proceedings.<sup>89</sup> As an appellate body, the Pre-Trial Chamber considered the narrow question before it of whether the order was so unreasonable as to constitute an abuse of discretion.<sup>90</sup> The Pre-Trial Chamber dismissed the Co-Prosecutors' appeal in part because it found that the alleged errors of law and fact did not amount to an abuse of discretion or constitute a failure to properly exercise discretion.<sup>91</sup> The Pre-Trial Chamber disagreed with the Co-Prosecutors' argument that it was an error of law for the Co-Investigating Judges to use "relevance within the scope of the investigation to ascertain the truth" as the criterion for placing documents on the Case File.<sup>92</sup> The Pre-Trial Chamber noted that while the Co-Prosecutors criticised the use of "relevance" by the Co-Investigating Judges, the use of the standard of relevance originated in the Co-Prosecutors' original request.<sup>93</sup> On the facts of

<sup>83</sup> Second Impugned Order, para. 4.

<sup>84</sup> Reconsideration Submission, para. 17.

<sup>85</sup> Appeal Brief, para. 4.

<sup>86</sup> 20 May 2010 Decision, para. 4.

<sup>87</sup> 20 May 2010 Decision, para. 4.

<sup>88</sup> Co-Prosecutors' Appeal of the Order on the Co-Prosecutors' Request to Place Additional Evidentiary Material on the Case File, 5 February 2010, D313/2/1 ("Co-Prosecutors' Appeal PTC 43"), para. 5. The Co-Prosecutors submitted that the Co-Investigating Judges applied the wrong legal standard and misunderstood the phrase they relied upon in rejecting the related request.

<sup>89</sup> Co-Prosecutors' Appeal PTC 43, para. 5.

<sup>90</sup> 20 May 2010 Decision, paras 26, 31.

<sup>91</sup> 20 May 2010 Decision, para. 31.

<sup>92</sup> 20 May 2010 Decision, para. 28.

<sup>93</sup> 20 May 2010 Decision, para. 28 citing Co-Prosecutors' Request to Place Additional Evidentiary Material on the Case-File, D313, 31 December 2009, paras 2, 6, 9, 12, 18, 27, 29, 30.



PTC 43, the Pre-Trial Chamber concluded that save for the omission of consideration of one category of documents,<sup>94</sup> there was nothing before the Chamber to indicate that the order was made on the basis of an incorrect interpretation of applicable law, or reflected a patently incorrect conclusion of fact, or that the order was so unfair or unreasonable so as to constitute an abuse of discretion by the Co-Investigating Judges.<sup>95</sup>

40. The standard used by the Co-Investigating Judges, termed “relevant within the scope of the investigation to ascertain the truth,” is not an inappropriate standard for use by the Co-Investigating Judges in considering requests for placement of evidence on the Case File.<sup>96</sup> The actions of the Co-Investigating Judges in PTC 43 represented an appropriate application of their power to take discretionary decisions pursuant to Rule 55(10). This is the limited holding of the 20 May 2010 Decision. The 20 May 2010 Decision does not purport to establish the criterion or standard for all requests to place documents on the Case File. Upon review of the submissions made on the holding of the 20 May 2010 Decision and its application to the instant Request and the Impugned Orders, the Pre-Trial Chamber concludes that the Co-Prosecutors and the Co-Investigating Judges have misconstrued the 20 May 2010 Decision.

### **B. Ground 1. Incorrect Standard Applied**

41. The Co-Prosecutors have submitted in the Appeal Brief and in paragraph 14 of the Reconsideration Submission that the Co-Investigating Judges should not consider “relevance” as a criterion or standard for admission and should instead adopt the standard of “conducive to ascertaining the truth.” The 20 May 2010 Decision was issued after the First Impugned Order and Appeal Brief were filed but before the Second Impugned Order and Reconsideration Submission were issued by the Co-Investigating Judges and Co-Prosecutors, respectively.

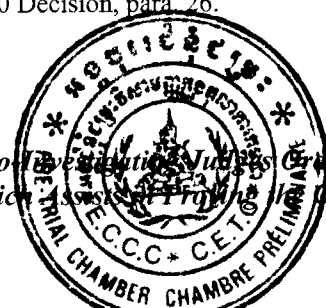
42. The Pre-Trial Chamber notes that the Co-Prosecutors have suggested in their Reconsideration Submission that the Pre-Trial Chamber confirmed in the 20 May 2010 Decision that the proper standard or criterion for placement of documents on the Case File is whether the document is conducive to ascertaining the truth.<sup>97</sup> The Pre-Trial Chamber has not made any such confirmation. In fact, in the 20 May 2010 Decision, the Pre-Trial Chamber found that it was not

<sup>94</sup> The Pre-Trial Chamber granted the appeal in part because the Co-Investigating Judges had neglected to consider the admission of one category of material that were part of the request. 20 May 2010 Decision, para. 26.

<sup>95</sup> 20 May 2010 Decision, para. 31.

<sup>96</sup> 20 May 2010 Decision, para. 28.

<sup>97</sup> Reconsideration Submission, para. 14.



persuaded by the Co-Prosecutors' submissions on appeal in PTC 43 that the Co-Investigating Judges should have employed a different standard or criterion such as whether the document is conducive to ascertaining the truth and that to do otherwise constituted an error of law.<sup>98</sup> Furthermore, the submissions of the Co-Prosecutors as to the correct standard, as posited in the Reconsideration Submission, are unclear. The Co-Prosecutors at once argue that the criterion is conduciveness to ascertaining the truth and, in the same filing before this Chamber, they state that the 20 May 2010 Decision standard is that documents shall be rejected if they are not "relevant within the scope of the investigation to ascertain the truth."<sup>99</sup>

43. In the 20 May 2010 Decision, the Pre-Trial Chamber found that the application by the Co-Investigating Judges of the standard of "relevan[t] within the scope of the investigation" when seised with a request made pursuant to Rule 55(10), was not an inappropriate limitation on the performance by the Co-Investigating Judges of their duty to ascertain the truth.<sup>100</sup> Further, the Co-Investigating Judges have discretion to accept or reject a request even if the request relates to a matter that is relevant within the scope of the investigation.<sup>101</sup> The Pre-Trial Chamber has explicitly recognised in the 20 May 2010 Decision that the decision of the Co-Investigating Judges is a discretionary decision.<sup>102</sup> The Pre-Trial Chamber considers that its consideration and dismissal in the 20 May 2010 Decision<sup>103</sup> of the Co-Prosecutors' arguments concerning the Co-Investigating Judges use of "relevance within the scope of the investigation to ascertain the truth" as a criterion for requests to place evidence on the Case File, as made in the Co-Prosecutors' Appeal PTC 43,<sup>104</sup> and as restated in the Appeal Brief<sup>105</sup> and in the Reconsideration Submission,<sup>106</sup> apply in the instant case.

44. The standard or criterion found appropriate by the Pre-Trial Chamber in PTC 43 is the appropriate measure for the Co-Investigating Judges to utilise for similar requests as a threshold standard to be met for consideration of evidence for admission to the Case File. To ensure that the parties are able to prepare requests for orders to admit evidence to the Case File with the requisite degree of precision necessary to meet the threshold for consideration required for such requests

<sup>98</sup> 20 May 2010 Decision, para. 28.

<sup>99</sup> Reconsideration Submission, para. 20.

<sup>100</sup> 20 May 2010 Decision, para. 28.

<sup>101</sup> 20 May 2010 Decision, para. 29.

<sup>102</sup> 20 May 2010 Decision, para. 29.

<sup>103</sup> 20 May 2010 Decision, para. 28.

<sup>104</sup> Co-Prosecutors' Appeal PTC 43, paras 5, 21-33.

<sup>105</sup> Appeal Brief, para. 4.

<sup>106</sup> Reconsideration Submission, para. 14.



made pursuant to Rule 55(10), the Pre-Trial Chamber briefly reviews the applicable principles, which are also applicable to requests for investigative action made pursuant to Rule 55(10), as distilled from previous decisions. The Pre-Trial Chamber considers that it is in the interests of “ensur[ing] legal certainty”<sup>107</sup> to expressly review and, as applicable, restate the requirements developed in its previous jurisprudence that guide its decision in the instant appeal.

### 1. Precision and Relevance Requirements for Requests Made Pursuant to Rule 55(10)

45. The Pre-Trial Chamber first addressed the requirements of precision and relevance in the context of Rule 55(10) requests in the SMD Decision. The SMD Decision concerned a request made by the defence of Ieng Sary for an order for investigatory measures and placement of materials on the Case File. Due to the requirement inherent in the request that the Co-Investigating Judges undertake investigation and analysis of the materials on the shared materials drive and identify potential exculpatory evidence for eventual placement on the Case File, the Pre-Trial Chamber concluded that “taking into account its purpose, the [underlying request] can be seen as a request for investigative action.”<sup>108</sup> The Pre-Trial Chamber found that:

a party who files a request under Internal Rule 55(10) shall identify specifically the investigative action requested and explain the reasons why he or she considers the said action to be necessary for the conduct of 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>109</sup>

46. The conclusions of the Pre-Trial Chamber are not limited to requests for investigative action. The Pre-Trial Chamber has held that requests for orders for placement of materials on the Case File, if not coupled with an inherent request for an investigation to be performed such as through an analysis of the materials or the identification of exculpatory evidence, are not properly characterised as requests for investigative action, but rather as requests for orders pursuant to Rule 55(10).<sup>110</sup> The requirements for precision and relevance, as excerpted from the SMD Decision above, apply to requests made pursuant to Rule 55(10) which have as their purpose the establishment of the truth, including those made for orders necessary for the conduct of the

<sup>107</sup> Rule 21(1) states that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted...so as to ensure legal certainty and transparency of proceedings.”

<sup>108</sup> SMD Decision, para. 19. *See also* 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,’ 7 July 2010, D370/2/11 (“Khieu Samphan’s Real Activity Decision”), para. 11 (request concerning placement of evidence on the Case File may be considered a request for investigative action where Appellant asked the Co-Investigating Judges to search for, identify and analyse documents located in the Shared Materials Drive).

<sup>109</sup> SMD Decision, para. 44.

<sup>110</sup> 20 May 2010 Decision, para. 12.



investigation. Not every request for an order made pursuant to Rule 55(10) is a request for an order for placement of evidence on the Case File. Requests for orders not related to placement of evidence on the Case File may concern matters that are necessary for the conduct of the investigation but that are not related to the establishment of the truth. For example, the co-lawyers of the charged persons have made requests for orders that relate to a matter that may be deemed necessary for the conduct of the investigation, such as a request for translation.<sup>111</sup> Such requests are not requests for investigative action and do not have as their purpose the establishment of the truth.<sup>112</sup> The translations that are the subject of the request, which relate to the ability of the co-lawyers to prepare their defence, might, depending on the circumstances of the case, be necessary to ensure that a charged person is able to exercise his/her rights during the investigation.<sup>113</sup> The express extension in this decision of the requirements of precision and relevance to orders made pursuant to Rule 55(10) is limited to orders that have as their purpose the realization of an act or action that is taken for the purpose of establishing the truth. For all other requests for orders brought pursuant to Rule 55(10), the Pre-Trial Chamber considers that the discretion of the Co-Investigating Judges to assess the sufficiency of and merits of each request on a case by case basis is undisturbed.

47. In order for a request made to the Co-Investigating Judges pursuant to Rule 55(10) to be considered validly made, the party making the request must satisfy the two cumulative conditions articulated in the SMD Decision.<sup>114</sup> Namely, the request must (i) identify the action to be taken or order to be made, as applicable, with sufficient precision<sup>115</sup> (“the precision requirement”), and (ii) demonstrate in detail the reasons why the requested investigative action or action resulting from an order made pursuant Rule 55(10), as applicable, is *prima facie* “relevant to ascertaining the truth”<sup>116</sup>

<sup>111</sup> Request for Expedited Translation of All Supporting Documentation to the Introductory Submission, 10 January 2008, A120.

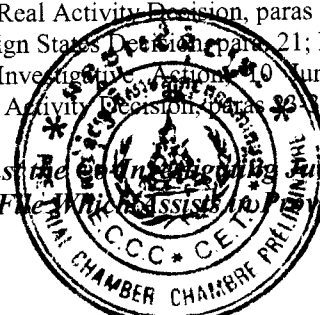
<sup>112</sup> The Pre-Trial Chamber has determined that requests to translation are not requests for investigative action. Decision on IENG Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, (“Ieng Sary Translation Decision”), paras 25-26; Decision on Khieu Samphan’s Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, (“Khieu Samphan Translation Decision”), paras 30-31.

<sup>113</sup> Ieng Sary Translation Decision, para. 26; Khieu Samphan Translation Decision, para. 43.

<sup>114</sup> Although Rule 55(10) does not explicitly mention the necessary requirements for a request for investigative action to be valid, the Pre-Trial Chamber has held that Rule 55(10) must, when applied to requests made by the charged person, be read in conjunction with Rule 58(6), which provides that requests made pursuant to this rule will “be made in writing with a statement of factual reasons for the request.” SMD Decision, paras 42-43, citing Rule 58(6). *See also* Khieu Samphan’s Real Activity Decision, para. 22.

<sup>115</sup> SMD Decision, para. 43; Decision on the Appeal Against Order on Nuon Chea’s Request for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by Khieu Samphan, 7 June 2010, D315/1/5 (“Foreign States Decision”), paras 19-21; Khieu Samphan’s Real Activity Decision, paras 36-40.

<sup>116</sup> SMD Decision, paras 43-45; 20 May 2010 Decision, para. 28; Foreign States Decision, para. 21; Decision on Appeal Against OCIJ Order on NUON Chea’s Eighteenth Request for Investigative Action, 19 June 2010, D273/3/5 (“Eighteenth Request Decision”), paras 17, 26; Khieu Samphan’s Real Activity Decision, para. 23.



(“the *prima facie* relevance requirement”). The failure of a requesting party to satisfy one of these requirements, although the other might have been met, constitutes a valid and sufficient reason for the Co-Investigating Judges to reject the request.<sup>117</sup> In making any determination on whether to grant a request made pursuant to Rule 55(10), it is the obligation, initially on the Co-Investigating Judges, and then on the Pre-Trial Chamber in the case of an appeal, to balance, at each stage, the relevant factors taking into consideration the exercise of judicial discretion, the fundamental principles enunciated in Internal Rule 21 and the fair trial rights provided for in the International Covenant on Civil and Political Rights (“the ICCPR”).<sup>118</sup>

48. The Pre-Trial Chamber notes that the precision requirement obliges the requesting party to identify the investigative action or other action to be accomplished by an order, as applicable, with sufficient precision and, in the case of an investigative action, to be “specific enough to give clear indications to the Co-Investigating Judges as to what they should search for.”<sup>119</sup> The Pre-Trial Chamber has previously noted that the Co-Investigating Judges are under no obligation to go on “fishing expeditions” as imprecise requests that require such interpretation by the Co-Investigating Judges may unduly delay proceedings or affect the charged persons’ right to a fair trial.<sup>120</sup> In the context of previous appeals concerning placement of evidence on the Case File, the Pre-Trial Chamber has found that a request that does not clearly state the number of documents or their exact location within collections of documents or archives, fails to meet the precision requirement.<sup>121</sup> This lack of precision in a request is inconsistent with the obligation of the parties to proceed in a manner that will not delay the proceedings.<sup>122</sup> The previous decisions referred to in this paragraph are illustrative of the case-specific analysis that is conducted by the Co-Investigating Judges. The Pre-Trial Chamber recognises that the degree of precision required will vary depending on the circumstances of the particular request. While determining whether the precision requirement has been met, the Co-Investigating Judges may consider factors including the breadth of the request<sup>123</sup>

<sup>117</sup> Eighteenth Request Decision, para. 19 (failure of the requesting party to meet the *prima facie* relevance requirement was a sufficient ground for the Co-Investigating Judges to reject the request); Khieu Samphan’s Real Activity Decision, para. 22 (it is “a proper exercise of the Co-Investigating Judges’ discretion to reject a request that satisfies *only one* of the conditions”) (emphasis added). *See also* Foreign States Decision, para. 53.

<sup>118</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (“the ICCPR”).

<sup>119</sup> SMD Decision, para. 44.

<sup>120</sup> Foreign States Decision, para. 20. *See also* Khieu Samphan’s Real Activity Decision, para. 29.

<sup>121</sup> Khieu Samphan’s Real Activity Decision, paras 38-39.

<sup>122</sup> Khieu Samphan’s Real Activity Decision, paras 38-39.

<sup>123</sup> Foreign States Decision, para. 24.



and whether identifying information and the whereabouts of pertinent evidence and/or persons have been specified in the request.<sup>124</sup>

49. In respect of the *prima facie* relevance requirement, the Pre-Trial Chamber notes that this threshold condition comprises two discrete sub-requirements. The first sub-requirement is that a request for investigative action must be relevant to the scope of the investigation pursuant to the limitations and parameters set by the Introductory and Supplementary Submissions.<sup>125</sup> A request may satisfy this sub-requirement by seeking information that falls within the temporal and geographical scope of the facts and crimes alleged in the Introductory and any Supplementary Submissions. Alternatively, a request may satisfy this sub-requirement by seeking information that bears on the criminal responsibility<sup>126</sup> and culpability<sup>127</sup> of the Charged Person, jurisdictional elements of the alleged crimes<sup>128</sup> or certain other contextual elements.<sup>129</sup> The Pre-Trial Chamber notes that the manner in which the scope of the investigation is considered by the Co-Investigating Judges when making a determination on the *prima facie* relevance requirement may be distinct from the Co-Investigating Judges' ultimate determination of whether the request falls within the scope of the investigation when considered on the merits. For further discussion on the discretion of the Co-Investigating Judges, see paragraphs 56-57 below.

50. The second sub-requirement of *prima facie* relevance is that a request for investigative action must detail why the requested information is conducive to ascertaining the truth or detail why the requested action that is the subject of an order is conducive to ascertaining the truth.<sup>130</sup> To meet this requirement, a request for investigative action must make out a *prima facie* nexus between the information sought through the requested action and a matter within the scope of the investigation,

<sup>124</sup> Khieu Samphan's Real Activity Decision, paras 37-39.

<sup>125</sup> 20 May 2010 Decision, para. 28.

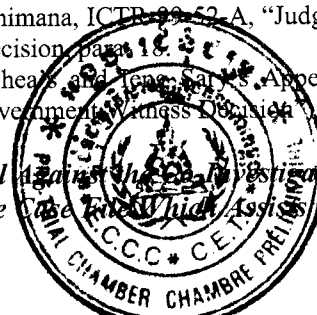
<sup>126</sup> Information regarding criminal responsibility might include evidence supporting or disproving the commission of the alleged crimes as well as the modes of liability employed. For example, the Pre-Trial Chamber has previously noted that evidence which "may support the establishment of the criminal plan alleged in the Introductory Submission, or even the establishment of the *mens rea* required for the crimes and modes of responsibility alleged against the Charged Persons" may be relevant if a case goes to trial. Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D274/4/5, para. 53.

<sup>127</sup> For example, Rule 55(3) contemplates that facts, though not found in the Introductory Submission or any Supplementary Submission, that constitute aggravating circumstances of an existing submission may come to the attention of and be investigated by the Co-Investigating Judges during the investigative process.

<sup>128</sup> Eighteenth Request Decision, para. 18.

<sup>129</sup> The Co-Investigating Judges have previously recognised the relevance of certain limited contextual elements that fall outside of the temporal jurisdiction of the Court. Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010, D300, paras 9-10, referencing Prosecutor v. Nahimana, ICTR-99-52-A, "Judgement," Appeals Chamber, 28 November 2007, para. 315. See also Eighteenth Request Decision, para. 18.

<sup>130</sup> SMD Decision, para. 43; See also Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D316/2/7 ("Government Witness Decision"), para. 51.





including, but not limited to the crimes alleged against the charged person.<sup>131</sup> It is not enough for a requesting party to merely assert that the object of the investigative action is relevant or necessary or contains exculpatory material without any further explanation.<sup>132</sup> The Pre-Trial Chamber has upheld orders of the Co-Investigating Judges that denied requests made pursuant to Rule 55(10) because the requesting party did not explain why the persons who were the subjects of the request should be subject to investigative action.<sup>133</sup> The requesting party must specify why the individuals in question are sought.<sup>134</sup> The converse is also true: it is not sufficient for the party making the request to describe the information they expect to obtain if the request is granted. The party must set forth in detail the *prima facie* reasons why the specific information that is expected, which varies according to each request, directly relates to the charges against the charged person. If the requesting party fails to do this, the Co-Investigating Judges may reject the request as inadequate.<sup>135</sup>

51. This sub-requirement ensures that the Co-Investigating Judges understand the potential benefits from the material sought.<sup>136</sup> It is contrary to the role of the Co-Investigating Judges to expect them to speculate as to the factual and legal bases for any requested action.<sup>137</sup> In order to properly exercise their discretion in determining whether granting a request is conducive to ascertaining the truth, the Co-Investigating Judges must be provided, together with the request, with the nexus between the request and a matter within the scope of the investigation.

52. As with the precision requirement, the Pre-Trial Chamber notes that the degree of detail needed to satisfy the second prong of the *prima facie* relevance requirement depends on the particular circumstances of each case. Factors that may be considered include the accessibility of pertinent information to the requesting party and his or her capacity to analyse it.<sup>138</sup> The Co-Investigating Judges may also consider whether the requesting party took the opportunity to conduct “preliminary inquiries as are strictly necessary for the effective exercise of their right to

<sup>131</sup> Foreign States Decision, paras 34-35, 41, 44, 52-53.

<sup>132</sup> Foreign States Decision, para. 21.

<sup>133</sup> Government Witness Decision, para. 51.

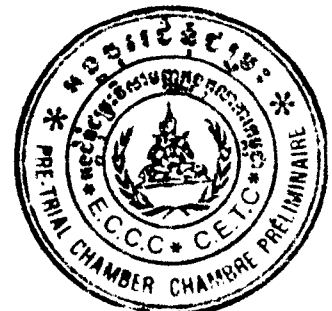
<sup>134</sup> Government Witness Decision, para. 51.

<sup>135</sup> Foreign States Decision, para. 53.

<sup>136</sup> Foreign States Decision, para. 41.

<sup>137</sup> Foreign States Decision, para. 44 (the Co-Investigating Judges “cannot be expected to enter into a divinatory exercise on behalf of the First Charged Person and try to discern a possible justification for the material requested for which he has failed to articulate.”).

<sup>138</sup> Eighteenth Request Decision, para. 19. In this case, the requesting party sought placement of a Khmer-language book on the Case File. However, despite being in possession of the book and having Khmer speakers on his team, the requesting party failed to refer to or analyse any part of the book, instead “choosing to speculate on its potential import.” The Pre-Trial Chamber held that the Co-Investigating Judges therefore did not err in rejecting the request.



request investigative action.<sup>139</sup> Whilst the parties must abide by the limitations inherent in the ECCC procedural framework,<sup>140</sup> the Co-Investigating Judges may take into account the performance or non-performance by a requesting party of permissible preliminary inquiries where such inquiries could have contributed to the satisfaction of the second prong of the *prima facie* relevance requirement.<sup>141</sup> As demonstrated by this review of principles from prior orders of the Co-Investigating Judges and decisions of the Pre-Trial Chamber, the Co-Investigating Judges are necessarily making a determination that requires them to consider the totality of the circumstances and arrive at a fact-specific finding as to whether the second prong of the *prima facie* relevance requirement has been met.

53. The underlying rationale for the precision and *prima facie* relevance requirements, as applied to requests for investigative action, has been articulated by this Chamber as ensuring that “proceedings are not unduly delayed and that the Charged Person’s right to be tried within a reasonable time, enshrined in Article 14 of the ICCPR and in Internal Rule 21(4), is respected.”<sup>142</sup> The opportunity to make any request pursuant to Rule 55(10) is contingent upon the performance by the requesting party of its general obligation “to proceed in a manner that will not delay the proceedings.”<sup>143</sup> In furtherance of this objective, the Co-Investigating Judges and this Chamber have stated that in the context of requests for investigative action, the requests must be “specific enough to give clear indications to the Co-Investigating Judges as to what they should search for and for what reasons this should be investigated.”<sup>144</sup>

54. The Pre-Trial Chamber finds that the same considerations are pertinent in the context of a request for an order to be made pursuant to Rule 55(10). The Pre-Trial Chamber is cognisant that in the same way that requests for investigative action must be precise and relevant to avoid undue

<sup>139</sup> Inter Office Memorandum, “Copy of Response to a letter for the lawyers of Nuon Chea, dated 20 December 2007, on the conduct of the judicial investigation,” 10 January 2008, A110/II (“OCIJ Memorandum to Defence”), page 2, para. 3. The Co-Investigating Judges advised the parties that they may conduct preliminary inquiries in accordance with the institutional structure and incumbent limitations of the Court.

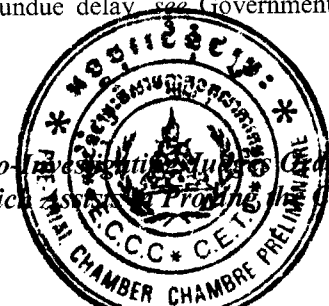
<sup>140</sup> OCIJ Memorandum to Defence, page 2, para. 3. *See also* 15 June 2010 Decision, para. 12, in which reviews of documents from public sources were deemed to be permissible preliminary inquiries.

<sup>141</sup> Eighteenth Request Decision, para. 29 (containing analysis of the Pre-Trial Chamber regarding opportunities to be more specific and precise related to documents that may be in the possession of potential witness); *See also* Foreign States Decision, para. 15 (noting that procedures before ECCC allow the defence to conduct preliminary inquiries that are specific to actions sought in subsequent requests to Co-Investigating Judges).

<sup>142</sup> SMD Decision, para. 43. *See also* Foreign States Decision, para. 23, noting that “the CIJs are entitled to consider whether a request might cause an unreasonable delay when exercising its judicial discretion in light of the overall investigation.” For relevant factors that may be considered when assessing undue delay *see* Government Witness Decision, para. 70.

<sup>143</sup> SMD Decision, para. 44.

<sup>144</sup> SMD Decision, para. 44.



delay, a request for an order for placement of evidence on the Case File that is not sufficiently precise or for which the underlying evidence is irrelevant may also risk causing undue delay in the proceedings or may cause infringement of the fair trial rights of the charged persons.

55. As has been noted in previous decisions, the Co-Investigating Judges are, “in light of their overall duties and their familiarity with the case files”<sup>145</sup> best able to assess whether the request is indeed conducive to ascertaining the truth and “to give reasons for their decision,”<sup>146</sup> thereby fulfilling their obligation to issue reasoned orders pursuant to Rule 55(10). Familiarity with the Case File weighs as heavily in favour of discretion by the Co-Investigating Judges in the case of requests for orders pursuant to Rule 55(10) as in the case of requests for investigative action. Furthermore, it is important that these requirements be satisfied in the initial request, rather than in submissions on appeal, because although exceptions may exist given the particular circumstances of an appeal, the provision on appeal of more precise descriptions and additional details on the relevance of the request will not generally assist the requesting party. The Pre-Trial Chamber must consider that such information was not before the Co-Investigating Judges in the first instance when they examined the request to determine whether granting the request would be conducive to ascertaining the truth.<sup>147</sup>

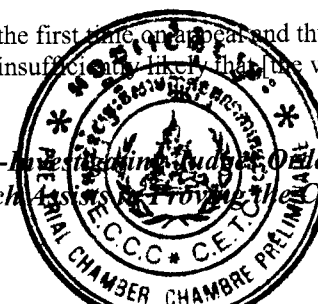
56. The Internal Rules contemplate that the Co-Investigating Judges may reject requests brought under Rule 55(10). Rule 55(10) states that the Co-Investigating Judges will issue a rejection order in response to a request for investigative action if they “do not agree with the request.” The Pre-Trial Chamber expects that this exercise of discretion by the Co-Investigating Judges may manifest itself in various ways. The following is merely a discussion of possible manifestations of the exercise of this discretion and is not exhaustive.

57. The exercise of discretion by the Co-Investigating Judges is present at all stages of consideration of the request. First, the Co-Investigating Judges enjoy discretion in the assessment of the threshold requirements for consideration. For example, this Chamber has held that “[t]he Co-Investigating Judges are entitled to decide whether the necessary specific and clear description of a document’s relevance to an investigation has been established...[i]f the Co-Investigating Judges find that relevance has not been established, the Co-Investigating Judges may refuse to

<sup>145</sup> SMD Decision, para. 24.

<sup>146</sup> SMD Decision, para. 43.

<sup>147</sup> Eighteenth Request Decision, para. 29, noting that “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 [the witness] would be in possession of any relevant documents.”



investigate.”<sup>148</sup> Second, the Pre-Trial Chamber has found that the satisfaction of the threshold requirements of precision and *prima facie* relevance is not a sufficient reason, alone, to conclude that the Co-Investigating Judges have committed an error or to compel them to grant a request for investigative action or for an order to place evidence on the Case File.<sup>149</sup> The Co-Investigating Judges may decide not to grant a request made pursuant to Rule 55(10) because they might have already performed the action identified in the request and therefore it would be a proper exercise of their discretion to reject the request as duplicative although the threshold requirements have been met. A request might satisfy the first prong of the *prima facie* relevance requirement as a threshold matter. The Co-Investigating Judges possess the discretion to determine whether the request is conducive to ascertaining the truth, taking into account such things as the present stage of the investigation. In this respect the Pre-Trial Chamber has found that the Co-Investigating Judges have discretion when “considering what they view as being relevantly within the scope of their investigation to ascertain the truth”<sup>150</sup> and therefore “it is not unreasonable for the Co-Investigating Judges to have reduced and refined the matters in respect of which they are now investigating.”<sup>151</sup>

58. The Pre-Trial Chamber has previously established that for purposes of determining the proper standard of review, decisions on whether or not the precision and *prima facie* relevance requirements have been satisfied are discretionary decisions.<sup>152</sup> As such, in the case of an appeal against such a decision by the Co-Investigating Judges, the Pre-Trial Chamber applies the standard of review noted above in Part VII.<sup>153</sup>

## 2. Erroneous Interpretation of the Co-Investigating Judges

59. As noted above, the Co-Investigating Judges and the Co-Prosecutors each rely on the 20 May 2010 Decision as the authority for their submissions on the proper standard to be applied to requests for orders made pursuant to Rule 55(10).<sup>154</sup> Both believe that the standard approved in the 20 May 2010 Decision is the standard to be applied by the Co-Investigating Judges to the instant Request. For that reason, the Pre-Trial Chamber finds that no prejudice to the Co-Prosecutors or the Co-Investigating Judges could have resulted based on our express restatement, at this time, of the standard first enunciated in PTC 43. Having clarified the standard for consideration of requests of

<sup>148</sup> Foreign States Decision, para. 21.

<sup>149</sup> 20 May 2010 Decision, para. 29.

<sup>150</sup> 20 May 2010 Decision, para. 29.

<sup>151</sup> 20 May 2010 Decision, para 29.

<sup>152</sup> SMD Decision, para. 26; *See also* 20 May 2010 Decision, para. 15-16.

<sup>153</sup> SMD Decision, paras 21-26.

<sup>154</sup> Second Impugned Order, para. 4, Reconsideration Submission, paras 17-19.



this type, the Pre-Trial Chamber will now consider the submissions of the Co-Prosecutors and the Co-Investigating Judges related to Ground 1 of appeal.

60. The Pre-Trial Chamber agrees with the Co-Investigating Judges that they do not have an obligation to establish the truth of “manifestly irrelevant matters.”<sup>155</sup> The Pre-Trial Chamber also agrees that in order for the investigators to establish the truth, they shall “focus solely on the seized matters upon which the truth is required.”<sup>156</sup> The Co-Investigating Judges use their justifiable refusal to investigate manifestly irrelevant matters and to focus on matters for which the truth is not required to assert that they may restrict consideration of requests to those that relate to probative facts.<sup>157</sup> While the Co-Investigating Judges have not defined the term probative facts, such defined term, as interpreted in each case by the Co-Investigating Judges, likely includes facts falling into each of the following categories, as explained by the Co-Investigating Judges in the Second Impugned Order: (i) facts related to the 26 specific crime sites in the Introductory and Supplementary Submissions, (ii) any facts of which the Co-Investigating Judges are seized nationwide, (iii) facts linked to jurisdictional elements, and (iv) facts linked to forms of responsibility.<sup>158</sup> Based on the reasons provided in the First Impugned Order, the Co-Investigating Judges have also suggested that they consider admissible those press articles that specifically relate to the treatment of Buddhists, the practice of forced marriage, the evacuation of Phnom Penh, rape, enforced disappearances, the potential responsibility of any of the Charged Persons, the existence of an international armed conflict with Vietnam and any articles written by a witness of the Co-Investigating Judges during the investigation.<sup>159</sup>

61. The interpretation of the Co-Investigating Judges ignores the plain language of the decision. The Pre-Trial Chamber agrees with the Co-Prosecutors that the Co-Investigating Judges’ interpretation of the 20 May 2010 Decision is contrary to the letter and spirit of the decision. Whether the Co-Investigating Judges specifically limit the scope of the investigation to the enumerated matters in the preceding paragraph or to the enumerated matters and other matters deemed to be probative, such limitations may, in practice, operate to unduly restrict the admission of evidence to the Case File. The standard that was approved in the 20 May 2010 Decision for the threshold review by the Co-Investigating Judges of such requests is simply “relevance within the

<sup>155</sup> Second Impugned Order, para. 4.

<sup>156</sup> Second Impugned Order, para. 4.

<sup>157</sup> Second Impugned Order, para. 4.

<sup>158</sup> Second Impugned Order, para. 6.

<sup>159</sup> First Impugned Order, para. 4.



scope of the investigation to ascertain the truth.”<sup>160</sup> A restrictive standard that, at the stage of meeting the threshold to be considered for admission, prevents or inhibits consideration of relevant material within the scope of the investigation for admission to the Case File, is an inappropriate limitation. The use of any standard, including the standard of “probative facts” applied by the Co-Investigating Judges to requests made pursuant to Rule 55(10), is impermissible if it narrows the standard from “relevant within the scope of the investigation.” In this regard, the Pre-Trial Chamber observes that the Co-Prosecutors have identified several topics addressed in the press articles that are the subject of the Request that they allege have been excluded by the Co-Investigating Judges through the application of an unduly restrictive standard for placement on the Case File. These topics include: (a) the existence of jurisdictional requirements for the crimes alleged in the Introductory and Supplementary Submissions, (b) the charged persons’ awareness of, and criminal responsibility for, these crimes, (c) evidence required to prove inquiry notice for establishing superior responsibility of the charged persons, (d) evidence to prove the existence of a joint criminal enterprise that persisted throughout Cambodia for a period of three years, eight months and twenty days and extended before and after that period, (e) the contextual elements of these crimes, such as the pattern of consistent criminal conduct of the Khmer Rouge, and (f) evidence corroborative of other documentary and testimonial evidence on the Case File.<sup>161</sup> If evidence that is relevant within the scope of the investigation is the subject of a request before the Co-Investigating Judges, the Co-Investigating Judges may not, at the stage of meeting the threshold for consideration of placement on the Case File, adopt an unduly restrictive standard that functions to exclude such material. If, instead, the Co-Investigating Judges determine that, in the exercise of their discretion, they will not consider such evidence for placement though the request describing the same meets the threshold requirements, including through the application of the proper standard, the Co-Investigating Judges must provide the Co-Prosecutors with the reasoning for excluding each such press article. The Pre-Trial Chamber considers that the Co-Investigating Judges erred in law by adopting an unduly restrictive standard. The Pre-Trial Chamber will consider further below whether the Appellant has demonstrated that this error of law requires the Pre-Trial Chamber to overturn the First and Second Impugned Orders.

### 3. Treatment of Discretion of the Co-Investigating Judges by the Co-Prosecutors

62. The Pre-Trial Chamber observes that the Co-Prosecutors, in setting out their views on the standard and the application of the standard to the Request, failed to consider that the Co-

<sup>160</sup> 20 May 2010 Decision, para. 28.

<sup>161</sup> Reconsideration Submission, para. 17.



Investigating Judges have discretion in admitting or refusing the placement of evidence on the Case File. In the 20 May 2010 Decision, the Pre-Trial Chamber emphasised that the decisions made by the Co-Investigating Judges in respect of requests made pursuant to Rule 55(10) are discretionary. This discretion does not give the Co-Investigating Judges the right to unduly narrow or restrict the possibility of admission at the threshold stage through the use of an unduly restrictive standard. Nor does it allow the Co-Investigating Judges to reject a request that it finds meets the threshold requirements for admission and then fail to provide reasons why each aspect of the Request, in this case, each document, was rejected. It does, however, give the Co-Investigating Judges discretion to assess the request in light of their familiarity with the investigation and the Case File. The PTC has previously held that:

It is further noted that the decision of the Co-Investigating Judges is a discretionary one. At this stage of the investigation, having been conducted for more than two and a half years, it is not unreasonable for the Co-Investigating Judges to have reduced and refined the matters in respect of which they are now investigating. The decisions that they now make will be considering what they view as being relevantly within the scope of their investigation to ascertain the truth.<sup>162</sup>

63. The failure of the Co-Prosecutors to identify and apply the proper standard as part of its submission on appeal is noted in order to clarify the applicable principles, promote legal certainty and explain the reasons why the Pre-Trial Chamber does not accept the Co-Prosecutors' submissions related to the use of the correct legal standard.

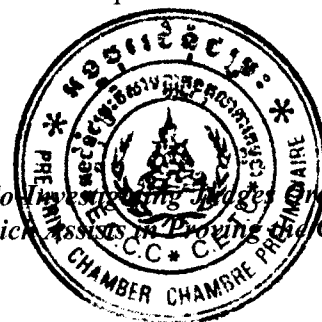
### **C. Ground 2. Incorrect Assessment of Facts**

64. The Co-Prosecutors appeal the First Impugned Order on the basis of an incorrect assessment of facts. The Co-Prosecutors characterise the error of fact as failing to consider how the documents that are the subject of the Request corroborate or establish the charged persons' knowledge of the crimes resulting in an erroneous assessment of fact.<sup>163</sup> This appeal ground asserts that the Appellants believe that the Co-Investigating Judges have reached an erroneous factual conclusion on the admissibility of the press articles.

65. Both the Co-Prosecutors and the Co-Investigating Judges have applied an incorrect legal standard and drawn conclusions on the admissibility of the documents included in the Request after applying such incorrect legal standard to the documents included in the Request. For this reason, the

<sup>162</sup> 20 May 2010 Decision, para. 29.

<sup>163</sup> Appeal Brief, para. 63.



Pre-Trial Chamber cannot accept the conclusions of fact that may have been drawn in the First and Second Impugned Orders by the Co-Investigating Judges in determining that the press articles should not be admitted. The Pre-Trial Chamber also cannot adopt the conclusion urged by the Co-Prosecutors that it would constitute an error of fact for the Co-Investigating Judges to deny the Request because the Appellants employed an incorrect legal standard to draw factual conclusions on the admissibility of the press articles.

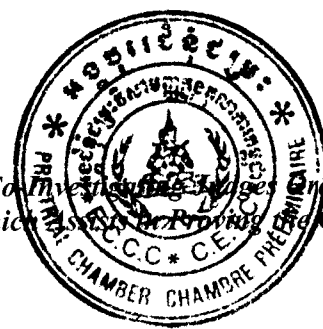
66. As the Co-Investigating Judges are in the “best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files,”<sup>164</sup> the Pre-Trial Chamber may direct the Co-Investigating Judges to consider a request anew in light of directions provided by the Pre-Trial Chamber upon consideration of an appeal. The Pre-Trial Chamber has already considered the Appeal once and noted that there was an error of law in the First Impugned Order due to the lack of reasoning given by the Co-Investigating Judges. The Pre-Trial Chamber directed that the Co-Investigating Judges address certain points raised by the Appellants, in particular, to provide reasoning for refusing each of the rejected documents. The Pre-Trial Chamber agrees with the Co-Prosecutors that the Co-Investigating Judges have not complied with the directions of the Chamber in the 15 June 2010 Decision. In the Second Impugned Order, the Co-Investigating Judges state that they have assessed each of the documents and admitted some, but have rejected other documents on the bases noted above, namely that: (i) the evidence provided falls outside the scope of the investigation or (ii) the evidence provided falls within the scope of the investigation but is so general that it cannot be considered conducive to establishment of the truth.<sup>165</sup> As noted by the Appellants, the Co-Investigating Judges failed to provide a comprehensive listing of the rejected documents which specifies why each rejected document was rejected including, where applicable, by noting which particular rejected documents are within the scope of the investigation and which are not in accordance with the Second Impugned Order.<sup>166</sup>

67. Given the failure of the Co-Investigating Judges to comply with the previous direction of this Chamber to provide reasoning for the rejection of each rejected document, the Pre-Trial Chamber has no choice but to acknowledge that remitting the matter to the Co-Investigating Judges and awaiting a third order may not produce the concrete factual analysis required for orders of this sort. In general, this Chamber, as an appellate body, declines to substitute its decisions for those of

<sup>164</sup> SMD Decision, para. 24.

<sup>165</sup> Second Impugned Order, paras 6, 8-9.

<sup>166</sup> Reconsideration Submission, para. 9.





the Co-Investigating Judges. The Pre-Trial Chamber does not substitute its own discretion for that of the Co-Investigating Judges.<sup>167</sup> While the Pre-Trial Chamber may come to the same conclusions as the Co-Investigating Judges on whether a request meets the precision and *prima facie* relevance requirements, the Pre-Trial Chamber considers that if the document that is the subject of a request meets the threshold for consideration for admission, the next step in the analysis, which requires the exercise of discretion as to whether to accept or reject the document, is a competency best left to the Co-Investigating Judges who are most familiar with the Case File. The exercise of informed discretion by the Co-Investigating Judges is the best measure in place to ensure that evidence of questionable significance is not admitted to the Case File. The Pre-Trial Chamber finds other than in exceptional circumstances, the Co-Investigating Judges are the judicial officers who should make this discretionary assessment as they have in-depth, intimate knowledge of the Case File.

68. The Pre-Trial Chamber finds that there are exceptional circumstances in this Appeal. In light of the Co-Investigating Judges' non-compliance with the 15 June 2010 Decision and failure to meet their obligation to provide reasoned orders, the Pre-Trial Chamber finds that, having already identified an erroneous application of the applicable legal standard in the First Impugned Order and Second Impugned Order and in the interests of justice, it shall itself review the Request. In order to determine whether the evidence meets the threshold requirements for admissibility, the Pre-Trial Chamber will review the rejected documents and the submissions of the Co-Prosecutors as to each rejected document. Reviewing each rejected document will permit the Pre-Trial Chamber to determine whether the ultimate conclusions of the Co-Investigating Judges reflect an error of fact and whether the conclusions drawn by the Co-Investigating Judges were so unfair or unreasonable such that it may be concluded that they failed to exercise or abused their discretion, as asserted by the Appellants.<sup>168</sup>

### 1. Assessment of the Request

69. This Chamber has previously held that all requests for investigative action and for orders for placement of documents on the Case File must (i) be sufficiently precise so as to permit the Co-Investigating Judges to understand the precise action to be taken, and (ii) contain submissions by the requesting party as to the relevance and purpose of the action on the basis of the request only. Further, the Pre-Trial Chamber has affirmed that the Co-Investigating Judges shall not be required to infer the specific action to be taken nor the nexus between the requested action and a matter

<sup>167</sup> SMD Decision, para. 24.

<sup>168</sup> Appeal Brief, para. 4.



within the scope of the investigation. The Co-Investigating Judges have discretion in the determinations made in respect of precision and *prima facie* relevance and further have discretion to consider whether granting the request is conducive to ascertaining the truth.

70. On its face, the Request appears to comply with the requirements for consideration. The Co-Prosecutors, having recognised, in part, the standard or criterion of the 20 May 2010 Decision, have provided support for their Request by providing general statements of relevance and application to the crimes within the scope of the investigation. These general statements include noting that press articles are conducive to ascertaining the truth for several facts under investigation and provide evidence of the following:

- (a) the criminal acts alleged in the [Introductory Submission] and [Supplementary Submissions], such as inhumane acts (including physical violence, forced labour, mistreatment of children), forced movement, destruction and serious damage to property, persecution, torture and killings;
- (b) the existence of jurisdictional elements of crimes, such as a widespread and/or systematic attack against the civilian population, and an armed conflict with the Socialist Republic of Vietnam;
- (c) the Charged Persons' awareness of, and criminal responsibility for, the crimes; and
- (d) contextual elements such as consistent patterns of conduct by Khmer Rouge forces and the DK authorities.<sup>169</sup>

71. The Co-Prosecutors further submit that evidence that supports an inference of the charged persons' knowledge of the crimes may support findings of liability under theories of liability including joint criminal enterprise and superior or command responsibility.<sup>170</sup> In addition, the Co-Prosecutors submit that the press articles are relevant because they provide a continuous, chronological account of events in Democratic Kampuchea during the relevant period.<sup>171</sup> Finally, the Co-Prosecutors submit that the articles corroborate other evidence on the Case File.<sup>172</sup>

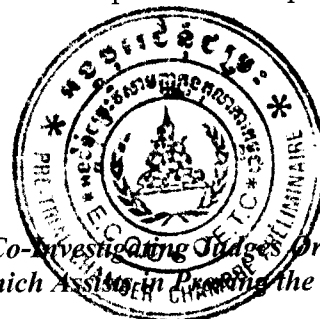
72. The Co-Prosecutors also include an article by article annex to the Request ("Annex A") that purports to contain descriptions of each article that highlight the relevance and probative value of each article. To supplement Annex A, the Co-Prosecutors prepared, in Section II of the Request, an overview of a representative sample of the criminal acts as reported by the foreign press. The criminal acts included in the overview are among the criminal acts included in the Introductory Submission and Supplementary Submissions. The criminal acts that are part of the representative

<sup>169</sup> Request, para. 6.

<sup>170</sup> Request, para. 7.

<sup>171</sup> Request, para. 8.

<sup>172</sup> Request, para. 9.



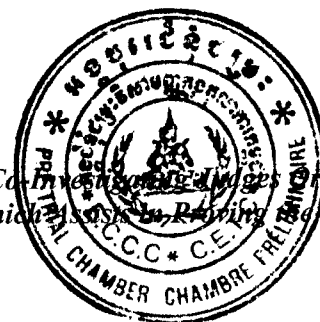
sample, broken down by category in the overview, are described using the press articles. In addition to suggesting the occurrence of the event itself, the Co-Prosecutors have requested the inclusion of the articles for other purposes, including supporting their argument that the existence of extensive reporting on the crimes supports a finding of knowledge of the charged persons. For each criminal act in the overview, the Co-Prosecutors have described the event, as reported, and provided a list of the media outlets that published reports on the event.

73. A cursory review of these materials and descriptions in the Request might suggest that the Co-Prosecutors have discharged their obligation in respect of this particular request for placement of documents on the Case File. Upon closer examination, however, the Pre-Trial Chamber has concluded that the Co-Prosecutors' descriptions in the Request and the descriptions in Annex A to the Request do not make the relevance and probative value of the articles "self-evident," as claimed by the Co-Prosecutors.<sup>173</sup> The descriptions in Annex A, while arguably technically accurate, are too general and imprecise to permit placement of the press articles on the Case File by the Co-Investigating Judges or the Pre-Trial Chamber. The Co-Prosecutors have not demonstrated, in respect of every article, how material contained in the article supports either a particular part of the Introductory Submission or any Supplementary Submissions or otherwise supports a particular element in the Co-Prosecutors' theory of the case, such as identifying a certain article as being relevant because it contains support for a particular mode of liability or jurisdictional element. The Pre-Trial Chamber observes that in the Request itself, the Co-Prosecutors state that "[a]s a whole, the materials attached to this request are relevant and have probative value in relation to a number of allegations contained in the Introductory Submission and the Supplementary Submissions."<sup>174</sup> This statement, which is the opening submission of the Co-Prosecutors, shows that the Co-Prosecutors have taken a holistic approach to the relevance and probative value of the subject matter of the Request.

74. The failure by the Co-Prosecutors to detail the relevance of each press article prohibits the Pre-Trial Chamber from being able to determine whether the press articles meet the threshold for consideration for admission. If the Pre-Trial Chamber determined that the press articles met the threshold requirements and admitted them on the basis of the descriptions contained in the Request and Annex A thereto, it would be on the basis of conclusions drawn by the Pre-Trial Chamber of the intentions of the Co-Prosecutors and the theory of the Co-Prosecutors' case. The Pre-Trial

<sup>173</sup> Request, para. 10.

<sup>174</sup> Request, para. 1 (emphasis added).



Chamber will not contemplate such matters. The Pre-Trial Chamber cannot grant the Appeal on the basis of the Request and Annex A thereto because to do so would be to disregard the obligations of the party seeking admission.

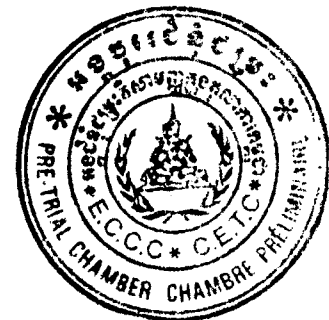
75. The Pre-Trial Chamber observes that the defect in the Co-Prosecutors' submissions originates in the Request. When first presented with this Appeal, the Pre-Trial Chamber accepted the conclusion of the Co-Investigating Judges in the First Impugned Order that "the Request is sufficiently specific to be considered."<sup>175</sup> On the basis of the Co-Investigating Judges' view as to the sufficiency of the Request, the Pre-Trial Chamber ordered the Co-Investigating Judges to provide reasoning for rejecting the rejected documents, as the Chamber found that failure to provide reasoning constitutes an error of law.<sup>176</sup> At the same time, the Pre-Trial Chamber gave the Co-Prosecutors the right to respond to the Second Impugned Order. In our 15 June 2010 Decision outlining the future response rights of the parties, the Pre-Trial Chamber implicitly invited the Co-Prosecutors to respond to the reasoning provided by the Co-Investigating Judges and make the case as to why the documents that are the subject of this Appeal, the rejected documents, should have been placed on the Case File. In the ordinary course, it would not be the case that the party seeking admission of documents to the Case File could supplement and/or refine its submissions on appeal in respect of a request made pursuant to Rule 55(10). The Pre-Trial Chamber has noted that filing an appeal from the denial of a request made pursuant to Rule 55(10) is not an opportunity to supplement an original request for the Pre-Trial Chamber to then consider.<sup>177</sup> In previous decisions, this Chamber has not "reconsider[ed] [a request] on the merits" when presented with new arguments on appeal.<sup>178</sup> However, in the unique circumstances of this appeal, with special regard being given to the fact that (i) the First Impugned Order was deficient in reasoning, (ii) the Pre-Trial Chamber asked the Co-Investigating Judges to provide reasoning, and (iii) in anticipation of reasoning from the Co-Investigating Judges, the Pre-Trial Chamber provided the framework for responses and replies by the parties, the Pre-Trial Chamber has concluded that it shall, in this case only, consider the additional submissions of all parties in determining whether to grant the Appeal.

<sup>175</sup> First Impugned Order, para. 2.

<sup>176</sup> 15 June 2010 Decision, para. 26.

<sup>177</sup> Foreign States Decision, para. 33.

<sup>178</sup> Foreign States Decision, para. 33.



## 2. Inclusion of the Additional Submissions

76. As a preliminary matter, the Pre-Trial Chamber observes that the Co-Prosecutors and the defence teams of Khieu Samphan and Nuon Chea, when given the opportunity to respond to the Second Impugned Order of the Co-Investigating Judges, have each restated, in part, their views on the alleged errors found in the First Impugned Order. The Co-Prosecutors restate several of their submissions made in the Appeal Brief and all parties reiterate, in part, their submissions from the in camera hearings held on 26 and 27 May 2010. While the Pre-Trial Chamber did not intend for the parties to use the opportunity to respond to the second and presumably reconsidered order of the Co-Investigating Judges by restating previous submissions, the Pre-Trial Chamber notes that the Second Impugned Order lacks the precision and clarity that would permit the parties to gain a fresh understanding of the reasoning of the Co-Investigating Judges and make submissions in response thereto, as appropriate.

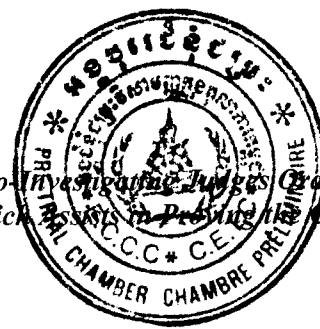
77. The Co-Prosecutors seek admission of the press articles on the basis of the Request and the submissions in the Reconsideration Submission, namely: (i) the Co-Investigating Judges failed to comply with the 15 June 2010 Decision, (ii) the additional reasoning provided in the Second Impugned Order is arbitrary and internally contradictory, (iii) the Co-Investigating Judges have misconstrued the 20 May 2010 Decision and relied on the erroneous interpretation in issuing the Second Impugned Order and (iv) the rejected documents are relevant.<sup>179</sup> The Co-Prosecutors note that the charged persons will not be prejudiced by the inclusion of the rejected documents.<sup>180</sup>

78. The reasons cited by the Appellants for concluding that the press articles should be admitted because the Request meets the requirements of precision and *prima facie* relevance have been stated above in Part VI of this decision and are briefly restated herein. To support their assertion that the rejected documents are relevant and should be placed on the Case File by order of the Pre-Trial Chamber, the Appellants note that unlike the case of Kaing Geuk Eav, the four charged persons in Case 002 are contesting responsibility. The Co-Prosecutors suggest that since the four charged persons have denied responsibility, or are exhibiting indicators of such denial, the press articles are part of the “strong, cogent and relevant evidence” that will support the crime base, criminal responsibility and jurisdictional elements that need to be proven beyond a reasonable doubt by the Co-Prosecutors.<sup>181</sup> The Co-Prosecutors submit that the press articles further corroborate other

<sup>179</sup> Reconsideration Submission, paras 9-26.

<sup>180</sup> Reconsideration Submission, para. 27.

<sup>181</sup> Reconsideration Submission, paras 21-22.



evidence already available on the Case File.<sup>182</sup> The Appellants observe that, as previously explained in greater detail in the Appeal, the press articles can be further assessed by considering their assignment into categories covering five distinct time periods and in respect of specific crimes or the modes of liability that must be proven.<sup>183</sup> Finally, the Co-Prosecutors reiterate that the press articles should be considered in the context of all other evidence in the case, in particular given the Co-Prosecutors' submissions on the cumulative effect of a large body of like evidence.<sup>184</sup> In support of their position on the cumulative effect of the rejected documents, the Co-Prosecutors included a time-sheet as Annex I that purports to show how the rejected documents relate to different crimes during the time period relevant to the judicial investigation.<sup>185</sup>

79. The defence of Nuon Chea responded to the Reconsideration Submission and made the following arguments as additional submissions: (i) the Second Impugned Order contains insufficient reasoning, (ii) the Co-Investigating Judges position that media reports, *in abstracto*, possess 'lesser probative value' is not legally sustainable, and (iii) the Co-Investigating Judges have inappropriately excluded from the case file material related to the 'contextual elements of [the alleged] crimes.'<sup>186</sup> The Nuon Chea Defence also notes that they disagree with a comment made in the Reconsideration Submission by the Co-Prosecutors concerning any possible prejudicial effect to the defence teams if the press articles are admitted and the defence teams are not afforded the opportunity to submit requests for investigative action in response thereto.<sup>187</sup>

80. The Co-Lawyers of Khieu Samphan agree with the Co-Prosecutors and the Nuon Chea Defence that the Second Impugned Order (i) does not comply with the 15 June 2010 Decision and is a flagrant violation of the directions of the Pre-Trial Chamber, (ii) the reasoning contained therein is arbitrary, internally contradictory, and erroneous, and (iii) "[i]n the same way as the Co-Prosecutors, who consider that the Co-Investigating Judges 'impermissibly restricted [sic] scope of [the] investigation [which] will undermine both the judicial investigation and the Co-Prosecutors' mandate to prove the case beyond a reasonable doubt,' the Co-Lawyers for the Defence consider that this approach also conflicts with the rights of the Defence."<sup>188</sup> The Khieu Samphan Defence also states that not admitting documents to the Case File is at odds with the Co-Investigating

<sup>182</sup> Reconsideration Submission, para. 23.

<sup>183</sup> Reconsideration Submission, para. 24.

<sup>184</sup> Reconsideration Submission, para. 25.

<sup>185</sup> Reconsideration Submission, para. 26.

<sup>186</sup> Nuon Chea Response, para. 11.

<sup>187</sup> Nuon Chea Response, para. 12.

<sup>188</sup> Khieu Samphan Response, paras 11-12, 18.



Judges' obligation to establish the truth<sup>189</sup> and that it contravenes the requirements for a fair trial for the Co-Prosecutors to be able to place evidence on the Case File without permitting the defence teams to make additional investigative requests.<sup>190</sup> In addition, the Khieu Samphan Defence seeks a finding and declaration from the Pre-Trial Chamber that the rights of the charged person have been violated as certain documents related to the instant appeal have not been translated in French.<sup>191</sup>

### 3. Consideration on the Merits

81. The Pre-Trial Chamber agrees with the Co-Prosecutors that (i) the Co-Investigating Judges applied an incorrect legal standard in determining whether a request made pursuant to Rule 55(10) meets the threshold requirements for consideration, (ii) the Co-Investigating Judges failed to comply with the 15 June 2010 Decision, (iii) the additional reasoning provided in the Second Impugned Order is arbitrary and internally contradictory, and (iv) the Co-Investigating Judges have misconstrued the 20 May 2010 Decision and relied on the erroneous interpretation in issuing the Second Impugned Order. Notwithstanding these conclusions of the Pre-Trial Chamber, the Pre-Trial Chamber has decided that it will not grant the Co-Prosecutors' appeal and order that the rejected documents be admitted to the Case File without further examination of the Co-Prosecutors' submissions. The Pre-Trial Chamber will not further remit the Request to the Co-Investigating Judges for further consideration on the basis of the identified errors in light of the fact that the Pre-Trial Chamber remitted certain matters for reconsideration to the Co-Investigating Judges in the 15 June 2010 Decision and has found that the Second Impugned Order did not reflect that the Co-Investigating Judges addressed the issues identified by the Pre-Trial Chamber.

82. The Pre-Trial Chamber has explained that it cannot determine whether the conclusions of the Co-Investigating Judges to admit 70 and reject 198 documents are erroneous, without itself conducting a review of the Request and applying the correct legal standard in such review. The Pre-Trial Chamber has undertaken a consideration of the subject matter of the Request in light of all of the submissions made to make a determination as to one of the last remaining appeal grounds of the Appellants, whether the rejected press articles meet the relevance requirement and should be admitted to the Case File. This analysis was a necessary step in determining whether to uphold any of (i) the reasoning, or (ii) the conclusions of the Co-Investigating Judges with respect to the rejected documents.

<sup>189</sup> Khieu Samphan Response, para. 21.

<sup>190</sup> Khieu Samphan Response, para. 26.

<sup>191</sup> Khieu Samphan Response, paras 5-10, 32.



83. The Pre-Trial Chamber finds that the Co-Prosecutors have not directed the Co-Investigating Judges or Pre-Trial Chamber to any analysis or attachment to the Reconsideration Submission that would allow the Chamber to (i) examine the press articles that are the subject of the Appeal and confirm that the Request itself, or in combination with the additional submissions of the Appellants, has described the articles in a manner that meets the requirements for threshold consideration for each article, namely precision and *prima facie* relevance, and (ii) undertake any discretionary review of the request, as the Co-Investigating Judges may so undertake when presented with a request made pursuant to Rule 55(10). Annex I to the Reconsideration Submission, which purports to demonstrate how the rejected documents relate to different crimes at different points during the relevant time period, does not assist the Pre-Trial Chamber.

84. The Pre-Trial Chamber further observes that the Co-Prosecutors have not taken the opportunity given to them in the unique circumstances of this Appeal to be more specific in order to meet the threshold requirements for consideration for placement of evidence on the Case File. A submission on appeal is not an opportunity to make new arguments or refine the original request. The Co-Prosecutors have, however, devised an opportunity to make additional detailed submissions on *prima facie* relevance by arguing in their fourth appeal ground that even if the standard is “relevance” and not “conduciveness to ascertaining the truth,” the rejected documents are relevant.<sup>192</sup> This appeal ground provides the Co-Prosecutors with an opportunity to make the case for the relevance of each of the rejected documents. In support of this claim, the Co-Prosecutors provide an overview in the Appeal Brief of a representative sample of the rejected documents. The Pre-Trial Chamber notes that the Co-Prosecutors have not, as suggested, attached an Annex B to the Appeal Brief that contains dates, descriptions and sources of each rejected document.<sup>193</sup> The Annex B that was filed and notified with the Appeal Brief is a table of authorities for the sources cited in the Appeal Brief and is not an accounting of the relevance of the rejected documents.<sup>194</sup> The representative sample does not allow the Pre-Trial Chamber to determine that each rejected document meets the threshold requirements for consideration for admission to the Case File. The Pre-Trial Chamber observes that in the case of a request for an order for placement on the Case File of publicly available published press articles, the requesting party has had total accessibility to the materials and full capacity to analyse the materials. In this case, the Pre-Trial Chamber can find no reason why the Co-Prosecutors could not have stated the *prima facie* nexus between the information

<sup>192</sup> Appeal Brief, para. 4.

<sup>193</sup> Appeal Brief, para. 26.

<sup>194</sup> Annex B (D365/2/1.1, ERN 00508949-00508952).





that is the subject of any potential order made pursuant to Rule 55(10) and the scope of the investigation. The Pre-Trial Chamber recognises that this instance is not one in which the degree of detail needed to satisfy the second sub-requirement for *prima facie* relevance must be considered in light of logistical or other obstacles to the requesting party.

85. The Pre-Trial Chamber finds that the Co-Prosecutors have not informed the Chamber of the precise asserted error of the Co-Investigating Judges in not admitting each document. The Co-Prosecutors had the opportunity to specify whether a given rejected document should have been admitted because, inter alia, such document relates to part of the Introductory Submission or any Supplementary Submission for which no press articles have been admitted, or rather because the rejected document, while relating to the same event or crime within the scope of the investigation as other press articles that have been admitted, supports the Co-Prosecutors' view in a distinguishable manner.

86. In the Reconsideration Submission, the Co-Prosecutors fail to describe the rejected articles in terms that demonstrate why each particular rejected article should be admitted, given that 70 press articles were admitted by the Co-Investigating Judges at the outset. Further, the Co-Prosecutors do not directly respond to the specific examples used by the Co-Investigating Judges in the Second Impugned Order to explain why the press articles were not considered admissible. The Co-Prosecutors make the following submission on the Second Impugned Order:

[the Second Impugned Order] fails to provide findings of fact on each of the 198 rejected documents. It only considers, "by way of illustration," two randomly selected documents. These two documents then form the basis of the Co-Investigating Judges' global conclusion that each of the 198 documents "addressed facts in such a general manner [that while] they may have fallen within the scope of investigation [...] they may not assist in establishing the truth beyond a mere superficial understanding of the facts."<sup>195</sup>

87. The Co-Prosecutors' criticism of the use of two articles to justify the wholesale rejection of the rejected documents in the Second Impugned Order may be understandable if the Co-Prosecutors used the Reconsideration Submission as an opportunity to respond with any explanation as to why the Co-Investigating Judges have mischaracterised the articles, thereby shedding light on why those specific articles should have been admitted in the first instance. While the Co-Investigating Judges committed an error of law in not providing sufficient reasoning, the Pre-Trial Chamber finds that it is also unclear as to the relevance of the two press articles cited by the Co-Investigating Judges. The

<sup>195</sup> Reconsideration Submission, para. 9.



Co-Prosecutors' failure to respond to direct questioning of the relevance of an article that is part of the Request is curious, especially since the Co-Prosecutors criticise the selection of two articles as indicative of the faulty methodology employed by the Co-Investigating Judges in rejecting the Request. This failure to respond suggests that the Co-Prosecutors cannot explain why the Co-Investigating Judges have erred with respect to these two articles. Thus, the Co-Prosecutors have not demonstrated that each article is relevant.

#### **D. Ground 3. Failure to Address Cumulative Effect of Like Evidence**

88. The Pre-Trial Chamber is mindful that the Co-Prosecutors have submitted on appeal that the press articles should be admitted because of the cumulative effect of like evidence. At the outset, the Pre-Trial Chamber observes that the Co-Prosecutors did not inform the Co-Investigating Judges in the Request that they sought admission of the press articles on the basis of the cumulative effect of like evidence, in this case to bolster their submission that the articles are "particularly probative in proving the knowledge or awareness of the Charged Persons of the crimes occurring in DK."<sup>196</sup> Therefore, failure by the Co-Investigating Judges to admit the documents on that basis cannot be an error or found to be so unreasonable an exercise of discretion as to support a finding that the Co-Investigating Judges have abused their discretion or failed to properly exercise their discretion.

89. In the Appeal Brief, the Co-Prosecutors have gone a step further by stating the utility of considering a large number of press articles and the cumulative effect of like evidence. The Co-Prosecutors state that "[i]n their totality, the [r]ejected [d]ocuments provide relevant and probative evidence to establish the requisite intent or state of mind for the criminal liability of the Charged Persons under the modes of responsibility described in article 28 of the Law on the establishment of the ECCC."<sup>197</sup> The Co-Prosecutors highlight the "detail, consistency and quantity" of the articles in supporting the assertion that the charged persons had actual or constructive knowledge that crimes within the scope of the investigation were being committed.<sup>198</sup> The Co-Prosecutors state that the Co-Investigating Judges erred in "discounting a cumulative body of like evidence by incorrectly assessing its factual relevance."<sup>199</sup> The Co-Prosecutors envisage that the press articles will assist the Trial Chamber in the following ways: (i) by providing a panoramic view of the crime scene that a single witness can rarely give, (ii) by assisting the Trial Chamber in evaluating the relevant state of

<sup>196</sup> Request, para. 30.

<sup>197</sup> Appeal Brief, para. 58. The Pre-Trial Chamber considers that the reference to Article 28 of the Law on the Establishment of the ECCC is an error and understands that the Co-Prosecutors intended to refer to Article 27.

<sup>198</sup> Appeal Brief, para. 58.

<sup>199</sup> Appeal Brief, para. 25.



mind of the charged persons, and (iii) by corroborating the evidence of individual witnesses testifying as to widespread knowledge of the crimes.<sup>200</sup>

90. In the Reconsideration Submission, the Co-Prosecutors again state that the Co-Investigating Judges erred by failing to consider the cumulative nature of the evidence provided by the press articles.<sup>201</sup> The Co-Prosecutors distinguish cumulative evidence from duplicate evidence and suggest that as cumulative evidence, the press articles pertain to “different criminal acts occurring over a vast geographical and time span leading to the proof of a widespread and systematic nature of criminality.”<sup>202</sup>

91. The Pre-Trial Chamber finds that the requirements for the Co-Prosecutors to have the press articles admitted on the basis of the cumulative effect of like evidence cannot be significantly less stringent than admission on other bases. The Appellants observe that the jurisprudence on cumulative effect of like evidence cited by the Appellants requires that the evidence be relevant.<sup>203</sup> The failure of the Co-Prosecutors to meet the threshold requirements related to relevance in the context of Rule 55(10) requests, that is *prima facie* relevance, including the two sub-requirements therein, cannot be overcome by noting that other courts have found that certain “evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution”<sup>204</sup> but that the cumulative effect of the evidence must be taken into account. The Pre-Trial Chamber finds that it is unable to conclude that the rejected articles meet the threshold for consideration for admission to the Case File. The Pre-Trial Chamber finds that the particular failure of the Appellants that has been identified above, that is to make submissions as to the particular relevance of each article including by stating the nexus between the information that is sought and a matter within the scope of the investigation, cannot be overcome by stating on appeal that the Co-Investigating Judges failed to reach conclusions on the admissibility of the evidence based on its cumulative effect.

92. If the Appellants strongly believe that the evidence is admissible based on the cumulative effect of like, relevant evidence, the Co-Prosecutors should have considered that this argument is, as noted above, undermined by their failure to address, when given the opportunity in the form of the Reconsideration Submission, the identification and characterisation of two of the rejected documents by the Co-Investigating Judges in the Second Impugned Order.

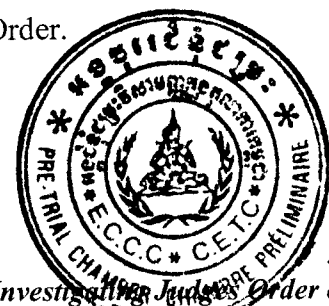
<sup>200</sup> Appeal Brief, para. 65.

<sup>201</sup> Reconsideration Submission, para. 25.

<sup>202</sup> Reconsideration Submission, para. 26.

<sup>203</sup> Appeal Brief, para. 16; Reconsideration Submission, para. 25.

<sup>204</sup> Appeal Brief, para. 16; Reconsideration Submission, para. 25.

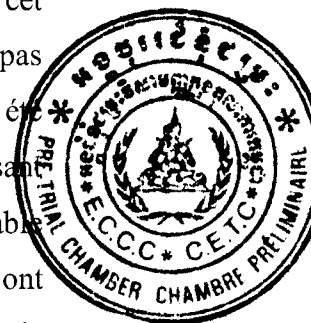


93. Having considered the seven grounds of appeal found in the Appeal Brief and the Reconsideration Submission and having conducted an assessment of the admissibility of the rejected documents, the Pre-Trial Chamber decided as announced in its 14 July 2010 Decision. In these circumstances, the error of law made by the Co-Investigating Judges does not lead the Pre-Trial Chamber to overturn the First and Second Impugned Orders and grant the Request, however the reasoning of the Co-Investigating Judges for rejecting the rejected documents shall be substituted by that of the Pre-Trial Chamber as enumerated in this decision. Therefore, the Pre-Trial Chamber upholds the partial denial of the Request. The Co-Prosecutors' Appeal is denied.

#### **E. Other Matters**

94. The Pre-Trial Chamber has observed that an administrative error occurred in the preparation of the French version of the 15 June 2010 Decision. The French version contains an additional sentence in paragraph 21 that was included by mistake and is not present in the English and Khmer versions of the notified decision. The Pre-Trial Chamber has reviewed this administrative error and concluded that the fact that the English, Khmer and French versions were inconsistent in this manner was not prejudicial to the parties or to the Co-Investigating Judges. The Pre-Trial Chamber hereby issues, as part of this decision, the corrigendum to the French version of the 15 June 2010 Decision. Paragraph 21 of the French version of the 15 June 2010 Decision is deleted and replaced in its entirety with the following:

21. Les Appelants soutiennent que la référence au test de « pertinence » est erronée et que la décision discrétionnaire aurait dû porter sur le point de savoir si les documents étaient « utiles à la manifestation de la vérité ». Au paragraphe trois de l'Ordonnance, les co-juges d'instruction ont correctement indiqué « [qu'ils] réitérent qu'ils conduisent leur propre analyse juridique des dits documents afin de déterminer s'ils sont susceptibles d'être utiles à la manifestation de la vérité ». Ils étaient donc conscients de leur obligation à cet égard. En tant qu'il se réfère à la « pertinence », le Paragraphe cinq ne révèle pas qu'en fait, malgré l'indication précitée au paragraphe trois, les documents ont été analysés à l'aune du correct test. La brièveté du paragraphe déterminant s'agissant du rejet des documents, le paragraphe cinq, ne permet pas de saisir la véritable base du rejet. Il n'est par exemple pas possible de déterminer quels documents ont été rejetés en raison de leur défaut de « pertinence au regard du cadre de



l'instruction », ni le fondement de cette conclusion, et quels documents ont été  
« considérés comme portant sur des questions de nature trop générale ».

The Pre-Trial Chamber will also file a correction notice to the 15 June 2010 Decision.

For the above-mentioned reasons, the Pre-Trial Chamber decided as announced in its determination on 14 July 2010.

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

Phnom Penh, 27 September 2010<sup>CR</sup>

Pre-Trial Chamber







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