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

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

D353/2/3

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 No: **002/19-09-2007-ECCC/OCIJ (PTC62)**
Before : **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date : **14 June 2010**

PUBLIC [REDACTED]

DECISION ON THE IENG THIRITH DEFENCE APPEAL AGAINST 'ORDER ON REQUESTS FOR INVESTIGATIVE ACTION BY THE DEFENCE FOR IENG THIRITH' OF 15 MARCH 2010

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") notes the filing on 19 April 2010 of the "Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010"[1] ("the Appeal") by Ieng Thirith ("the Appellant").

I. PROCEDURAL BACKGROUND

1. On 12 February 2010, the Appellant filed the "Defence Request to Investigate Potential Witness"[2] ("the Request"), in which she requested the Co-Investigating Judges to interview [redacted].[3]

2. On 16 March 2010, the Co-Investigating Judges filed their "Order on Requests for Investigative Action by the Defence for IENG Thirith"[4] ("the Order"), rejecting the Appellant's Request. The Order is dated 15 March 2010 and was notified to the Appellant on 16 March 2010. The Appellant filed a Notice of Appeal against the Order on 22 March 2010.[5] Submissions on Appeal were filed by the Appellant on 19 April 2010.

3. No Response to the Appeal was filed pursuant to Article 8.3 of the Practice Direction "Filing of Documents before the ECCC".[6]

4. On 11 May 2010, the Appellant was notified of the Pre-Trial Chamber's Decision to Determine the Appeal on Written Submissions Only.[7]

II. ADMISSIBILITY OF THE APPEAL

5. The Appellant filed the Notice of Appeal in accordance with the time limit in Rule 75(1) of the Internal Rules (Rev. 5). The Submissions on Appeal were also filed by the Appellant within the time limit provided for in Rule 75(3).

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[1] Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 19 April 2010, D353/2/1 ("the Appeal").
[2] Defence Request to Investigate Potential Witnesses, 12 February 2010, D352 ("the Request").
[3] Request, para. 1.
[4] Order on Requests for Investigative Action by the Defence for IENG Thirith, 16 March 2010, D353/1 ("the Order").
[5] Ieng Thirith Defence Notice of Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith', 22 March 2010, D353/2.
[6] ECCC/01/2007/Rev.4.
[7] Decision to Determine the Appeal on Written Submissions Only, 11 May 2010, D353/2/2.

6. The Pre-Trial Chamber finds that a request to interview an individual qualifies as a request for "investigative action" within the meaning of Rule 74(3)(b).[8]

7. The Pre-Trial Chamber agrees with the Appellant[9] that the Appeal is admissible under Rule 74(3)(b), which provides:

> The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: . . . (b) refusing requests for investigative action allowed under these IRs.

III. GROUNDS OF THE APPEAL CONSIDERED

Standard of Appellate Review

8. The Pre-Trial Chamber recalls that an order by the Co-Investigating Judges on a request for investigative action is discretionary. For the Pre-Trial Chamber to overturn the Co-Investigating Judges' exercise of discretion, the Appellant must demonstrate that the impugned Order is: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion.[10] It is further noted that not all errors will cause the Pre-Trial Chamber to set aside the decision of the Co-Investigating Judges. An error must have been fundamentally determinative of the exercise of the discretion leading to the appealed decision being made.

9. The Appeal challenges the Order "principally"[11] under the first standard of appellate review, namely, that the Order is based on an incorrect interpretation of governing law.[12] Nevertheless, the Pre-Trial Chamber will determine the Appeal on the basis of the three standards of appellate review.

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[8] Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, paras. 21-28.
[9] Appeal, para. 8.
[10] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 25-27.
[11] Request, para. 9.
[12] Appeal, para. 9.

Appellant's Request

10. In the Appellant's Request she seeks to have [redacted] interviewed. She states:

> [15] The defence submits that these [redacted] have the capacity to provide the OCIJ with relevant information on the Ministry itself as well as on the role and responsibilities of the Charged Person. In particular, one of these individuals was [redacted] and can therefore provide the OCIJ with relevant information.
>
> [16] Further, these specific individuals can also provide potential exculpatory evidence to the OCIJ in relation to the role and responsibilities of the Charged Person within her Ministry. The defence further submits that these individuals may be able to provide further clarification on the Charged Person's likely access to details of events which took place during the relevant time period, while exercising her role as Minister.
>
> [17] Finally, the defence requests the OCIJ to consult with the defence prior to the requested investigation in order to discuss the most effective means of obtaining the requested information and in order that further details may be provided regarding these potential witnesses.

11. Other than their names, the only other (alleged) factual information provided by the Appellant in the Request about these [redacted] is their positions during Democratic Kampuchea ("DK"), which are:

> [redacted], which was under the supervision of the Ministry of Social Affairs ("Ministry");
>
> [redacted], which was under the supervision of the Ministry;
>
> [redacted], which was under the supervision of the Ministry;
>
> [redacted] of the Ministry;
>
> [redacted] in the Ministry;
>
> [redacted], which was under the supervision of the Ministry;
>
> [redacted], under the supervision of the Ministry as well as [redacted];

[redacted] of the Ministry;

[redacted], which was under the supervision of the Ministry.[13]

Reasons of the Co-Investigating Judges

12. The following are the reasons given by the Co-Investigating Judges for rejecting the Appellant's Request:

> [3] The Co-Investigating Judges have reviewed the list of [redacted] submitted in the . . . Request. The Co-Investigating Judges note that the . . . Request does not provide contact details or any indication of the expected evidence from each of these individuals. Mere reference to a name and alleged employment during the time period under investigation is a narrow basis upon which an assessment can be made as to whether to interview an individual.
>
> [4] In reviewing the names and employment of the persons listed in the . . . Request, the Co-Investigating Judges find that the persons to hold positions relatively low within the hierarchy of the Ministry of Social Affairs. In the absence of further information, the Co-Investigating Judges find that these particular individuals named in the Request are not likely to provide sufficient details on the line of investigation which forms the basis of the . . . Request. Considering the current stage of investigation and information already existing on the Case File, the Co-Investigating Judges find it has not been demonstrated how such individuals could otherwise assist in the ascertaining of the truth. The . . . Request is therefore rejected.
>
> . . .
>
> [9] [T]he Co-Investigating Judges recall that neither the ECCC Law, nor the ECCC Agreement nor the Internal Rules require consultation with the parties prior to conducting investigative acts. The Co-Investigating judges see no grounds to conduct consultations at this stage.

13. For the purposes of deciding this Appeal, it is useful to separate the reasons given by the Co-Investigating Judges into the following six reasons:

> 1) Absence of contact details of the [redacted];
>
> 2) No indication of their expected evidence;

[13] Request, para. 14.

3) Their relatively low positions within the hierarchy of the Ministry;

4) Absence of further information;

5) The current stage of investigation; and

6) The information already existing on the Case File.

Preliminary Issue: Duty of the Co-Investigating Judges to Consult a Requesting Party

14. Under the first ground of appeal, but also throughout the Appeal,[14] the Appellant submits that the Co-Investigating Judges "should have responded to the defence request to be consulted if any further details were required on these [redacted]."[15] Since this submission by the Appellant appears to underlie the entire Appeal, the Pre-Trial Chamber will therefore consider it first.

15. The Appellant cites[16] the decision by this Chamber in *Decision to Determine the Appeal on Written Submissions and to Invite the Co-Prosecutors to Clarify their Position*[17] to support her submission that the Co-Investigating Judges were under a duty to accept the Appellant's request to be consulted. This decision does not establish such a duty.

16. The context of the Pre-Trial Chamber decision cited by the Appellant is that it was unclear to this Chamber whether the Co-Prosecutors ("CP") intended their First Request to be a request for investigative action under Rule 55(10) or a Supplementary Submission under Rule 55(3). It was in this context that the Pre-Trial Chamber stated:

> [G]iven the importance of the matter, it would have been sensible for the CIJs to seek clarification from the Co-Prosecutors as to what the Co-Prosecutors First Request purported to be. It is unclear from the Impugned Order that the CIJs did so . . . The Pre-Trial Chamber is of the view that the interest of justice require that it

[14] Appeal, paras. 43, 73.
[15] Appeal, para. 33.
[16] Appeal, paras. 33, 73.
[17] 29 March 2010, D250/3/2/1/2.

seek clarification from the Co-Prosecutors in this respect prior to disposing of the said appeals.[18]

17. Two features of these statements of the Pre-Trial Chamber do not support the Appellant's submission that the Co-Investigating Judges were under a legal duty to consult the Appellant. First, the Pre-Trial Chamber did not state that the Co-Investigating Judges had a legal duty to seek clarification from the CP; only that it would have been "sensible" for the Co-Investigating Judges to do so. Second, contrary to the Appellant's quotation of the decision,[19] the Pre-Trial Chamber did not say that the interests of justice required the Co-Investigating Judges to seek clarification from the CP. Rather, the interests of justice required the Pre-Trial Chamber itself to seek clarification from the CP prior to disposing of the appeals in question.[20]

18. The Co-Investigating Judges are correct that there is no provision in the ECCC Law, Agreement, or Internal Rules that explicitly imposes a duty on the Co-Investigating Judges to consult a requesting party prior to conducting investigative acts. Nevertheless, "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims . . . In this respect: a) ECCC proceedings shall be fair . . ."[21] The ECCC Agreement also requires the Co-Investigating Judges to exercise their jurisdiction in accordance with Articles 14-15 of the International Covenant on Civil and Political Rights ("ICCPR").[22]

19. There are three reasons why the Pre-Trial Chamber declines to opine in this Decision on whether and to what extent the Co-Investigating Judges are under a duty to consult a requesting party under Rule 55(10) or Rule 58(6). First, the Appeal contains no submissions on whether and to what extent fairness or the ICCPR (or any other national or international law) imposes on the Co-Investigating Judges a duty to consult in the

[18] Decision to Determine the Appeal on Written Submissions and to Invite the Co-Prosecutors to Clarify their Position, 29 March 2010, D250/3/2/1/2, para. 13.
[19] Appeal, para. 33.
[20] Hence why the Pre-Trial Chamber hereby "Invites the Co-Prosecutors to clarify the matter . . ." (Decision to Determine the Appeal on Written Submissions and to Invite the Co-Prosecutors to Clarify their Position, 29 March 2010, D250/3/2/1/2, page 8).
[21] Rule 21(1)(a), Internal Rules.
[22] Articles 12-13, ECCC Agreement. *See also* Article 47 bis new, ECCC Law.

circumstances of this Appeal. It is not for the Pre-Trial Chamber to substitute such absence on appeal. Second, the Pre-Trial Chamber doubts that the Appellant acted diligently by omitting to include the "further details . . . regarding these potential [redacted]" in the Request. In the Appeal, the Appellant explains that "[T]he defence acted in the interest of the [redacted] by not including their confidential details in the request for investigative action, so as to preserve their confidentiality. This is an important component of the protection of witnesses. This is the main reason why the defence requested the OCIJ to consult with the defence . . ."[23] The Appellant does not explain why she could not have included this explanation in the Request, or why she could not have included the alleged confidential details in a strictly confidential annex to the Request pursuant to Article 3 of the Practice Direction "Filing of Documents before the ECCC."

20. The third and final reason why the Pre-Trial Chamber declines to answer the questions of whether and to what extent the Co-Investigating Judges were under a duty to consult the Appellant is that the Appellant has not demonstrated to the Pre-Trial Chamber a *prima facie* reason for it to believe that consultations, if they occurred, would have caused the Co-Investigating Judges – exercising their discretion - to accept the Request. The "further details . . . regarding these potential [redacted]" that the Appellant claims she would have provided the Co-Investigating Judges in consultations are "their background and occupation prior [to] 1975, between 1975-1979 and post-1975 [*sic*]"[24] and other "confidential details" that presumably include their "contact details."[25] A contextual reading of the Order shows that there is no *prima facie* reason for the Pre-Trial Chamber to believe that the Co-Investigating Judges would have accepted the Request had they considered this information.

First Ground of Appeal - Insufficiently Reasoned Order

21. The Appellant submits that the Order "lacks sufficient reasoning in contravention of Rule 55(10) and this forms an infringement of the general principle of law that a judicial decision needs to be reasoned. This failure should lead to the quashing of the Impugned

[23] Appeal, para. 72.
[24] Appeal, para. 32.
[25] Appeal, paras. 71-73.

Order."[26] Specifically, the Appellant submits that the "OCIJ" (taken to be a reference to the Co-Investigating Judges):

> [32] [F]ails to reason its conclusion that these [redacted] . . . were not likely to provide the OCIJ with sufficient details on the line of investigation . . . [T]he OCIJ declined to accept the defence offer to be consulted and instead ordered that the defence did not give sufficient information regarding these potential witnesses and denied the Request. Further, the OCIJ failed to provide reasons as to why it came to this decision.
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> . . .
>
> [35] The OCIJ did not provide the defence with any reference or source to what this 'information already existing on the Case File' could be. Instead, the OCIJ generally refers to the Case File as a whole.
>
> . . .
>
> [37] [T]he Impugned Order lacks reasoning and makes unsubstantiated general assertions. Further, it fails to demonstrate in sufficient detail that the exculpatory evidence suggested by the defence is already available on the Case File. For this reason, the Impugned Order should be quashed.

22. Rule 55(10) requires the Co-Investigating Judges to "set out the reasons for [their] rejection" of a request for investigative action. The French version of Rule 55(10) is translated into English as "the [rejection] order must be reasoned." The Khmer version of Rule 55(10) reads the same as the English version ("reasons"). Rule 58(6) prescribes, in English, that an order rejecting a Charged Person's request for investigative action "shall state the factual reasons for rejection." The French version of Rule 58(6)[27] does not contain the modifier "factual", but rather contains the same wording as the French version of Rule 55(10). The French version of Rule 58(6) appears to be more consistent with Cambodian and French Law[28] than the English version of Rule 58(6). The Pre-Trial Chamber shall proceed upon the basis of the French the Khmer versions of the rule.

23. The question before the Pre-Trial Chamber is how detailed the Co-Investigating Judges' reasons must be under Rule 55(10). Some guidance to answering this question is found in

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[26] Appeal, para. 38.
[27] "La demande est formulée par écrit et motivée."
[28] Article 133 of the Code of Criminal Procedure of the Kingdom of Cambodia provides that a rejection order "shall state the reasons", and Article 82-1 of the Code of Criminal Procedure of France provides that "the investigating judge must make a reasoned order."

the Rules. First, for the Charged Person's right to appeal under Rule 74(3)(b) to be meaningful, s/he must know why the Co-Investigating Judges rejected his/her request. This requires the Co-Investigating Judges to reason their rejection with sufficient detail to disclose the basis of a decision and thus place the Charged Person in a position to be able to decide whether and against which of the Co-Investigating Judges' reasons an appeal may be brought and to draw appropriate submissions in support of any appeal. Second, Rule 77(14) requires the Pre-Trial Chamber to issue a "reasoned" decision on an appeal against the Co-Investigating Judges' exercise of discretion under Rule 55(10). The Pre-Trial Chamber is prevented from affirming the Co-Investigating Judges' exercise of discretion to reject a request if the Pre-Trial Chamber does not know why the Co-Investigating Judges rejected it. This also requires the Co-Investigating Judges to reason its rejection with sufficient detail to allow the Pre-Trial Chamber to conduct an effective appellate review.

24. Some guidance is also found in a recent unanimous judgment of a Chamber of the European Court of Human Rights referred to in the Appeal.[29] In *Taxquet v. Belgium*,[30] the Liège Assize Court, sitting with a jury, convicted the applicant of murdering a government minister and attempting to murder the minister's partner. Belgian law did not require the jury to give reasons for its verdict, and neither the jury nor the Assize Court provided such reasons. The Court of Cassation dismissed the applicant's appeal.

25. Before the European Court of Human Rights, the applicant alleged, *inter alia*, that his right to a fair trial had not been respected due to the fact that his conviction by the Assize Court had not included a statement of reasons. The applicant relied on Article 6(1) of the European Convention on Human Rights ("ECHR"), the relevant part of which reads as follows:

> In the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing . . . by [a] . . . tribunal . . .

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[29] Appeal, para. 59.

[30] Application no. 926/05, 13 January 2009 ("*Taxquet*"). On 5 June 2009, a Grand Chamber panel of five judges accepted the case for referral to the Grand Chamber pursuant to article 43 of the European Convention on Human Rights. A hearing before the Grand Chamber was held on 21 October 2009. Judgment will be delivered at a later date.

26. For the following reasons, the Chamber concluded[31] that there had been a violation of the right to a fair trial as guaranteed by Article 6(1) of the ECHR:

> [40] The [European] Court [of Human Rights] reiterates that, according to its settled case-law, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case . . . Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument . . .
>
> . . .
>
> [43] [S]ince the *Zarouali* case[32] there has been a perceptible change in both the [European] Court's case-law and the Contracting States' legislation. In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.
>
> . . .
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> [48] In the instant case, the questions to the jury were formulated in such a way that the applicant could legitimately complain that he did not know why each of them had been answered in the affirmative when he had denied all personal involvement in the alleged offences. The Court considers that such laconic answers to vague and general questions could have left the applicant with an impression of arbitrary justice lacking in transparency . . .
>
> [49] In these circumstances, the Court of Cassation was prevented from carrying out an effective review and from identifying, for example, any insufficiency or inconsistency in the reasoning.

27. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has similarly interpreted the requirement in Article 23(2) of the Statute of the ICTY and Rule 98 *ter* (C) of the ICTY Rules of Procedure and Evidence that the judgment of a Trial Chamber be "accompanied [or followed as soon as possible] by a reasoned opinion in writing." The ICTY Appeals Chamber noted that:

> [384] [T]he Trial Chamber did not in most cases make specific explicit factual findings with regard to each element of the crimes, but expressly concluded that the crimes were established. The Appeals Chamber considers that by finding that the

[31] *Taxquet*, para. 50.
[32] *Zarouali v. Belgium*, Application no. 20664/92, Commission decision of 29 June 1994.

> crimes were established, the Trial Chamber implicitly found all the relevant factual findings required to cover the elements of the crimes.
>
> [385] However, the Appeals Chamber considers that such an approach falls short of what is required. The Trial Judgement must enable the Appeals Chamber to discharge its task pursuant to Article 25 of the Statute based on a sufficient determination as to what evidence has been accepted as proof of all elements of the crimes charged, and, if discussed, its assessment of, *inter alia*, the credibility and demeanour of a witness. Relying in part on a catch-all phrase[33] cannot substitute the Trial Chamber's obligation to give 'a reasoned opinion in writing' as envisaged in the aforementioned Article 23(2), sentence 2, of the Statute.

28. Although this case law of the European Court of Human Rights[34] and the ICTY relates to verdicts on guilt, their import is relevant to the pre-trial context at the ECCC. Both the party whose request is rejected by the Co-Investigating Judges and the Pre-Trial Chamber need to know the reasons for rejection in sufficient detail in order to permit an appellant to decide whether or not to appeal and on what basis such appeal should be founded, and for the Pre-Trial Chamber to be able to determine whether or not the Co-Investigating Judges erred.

29. The Pre-Trial Chamber considers that the Co-Investigating Judges' conclusion that "information" already exists on the case file is "formulated in such a way" that the Appellant "could legitimately complain" that she does not know the reasons for the conclusion. The Pre-Trial Chamber also considers that such an insufficiently reasoned conclusion does not enable the Pre-Trial Chamber to discharge its task of "carrying out an effective review" of the conclusion and prevents it from "identifying" a proper exercise of the Co-Investigating Judges' discretion.

30. The Pre-Trial Chamber therefore decides that the Co-Investigating Judges incorrectly interpreted applicable law by making no attempt to specify the "information already

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[33] Footnote 583 in Appeals Judgment to paragraph 20 of the Trial Judgment, which reads: "In its discussion the Trial Chamber will only deal with such evidence as is necessary for the purposes of the Judgement. It will, thus, concentrate on the most salient parts and briefly summarise (or not mention at all) much of the peripheral evidence. A vast amount of detail has been presented in this case (too much, in the view of the Trial Chamber). The fact that a matter is not mentioned in the Judgement does not mean that it has been ignored. All the evidence has been considered by the Trial Chamber and the weight to be given it duly apportioned. However, only such matter as is necessary for the purposes of the Judgement is included in it."

[34] *See also* United Nations Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 49, UN Doc. CCPR/C/GC/32 (23 August 2007), and *Smith v. Jamaica*, Views of the United Nations Human Rights Committee, para. 10.5, UN Doc. CCPR/C/47/D/282/1988 (31 March 1993).

existing on the Case File." The Co-Investigating Judges have the discretion – reviewable by the Pre-Trial Chamber upon an admissible appeal - to determine the degree of specific detail that is required by the legal framework of the ECCC. The Co-Investigating Judges must be guided in their discretion by the purposes of the requirement in Rule 55(10) to issue a reasoned rejection of a request, as stated above. The Pre-Trial Chamber does not take the position that the Co-Investigating Judges should have exhaustively presented every detail of all the "information already existing on the Case File." Rather, the Pre-Trial Chamber decides that the Co-Investigating Judges should have provided, at a minimum, a representative sample of such information, including, where appropriate, the relevant Document numbers. If a Document number is not available, then the Co-Investigating Judges must provide sufficient details on the source, location, and content of a representative sample of information already on the case file.

31. The error of law committed by the Co-Investigating Judges would require the Pre-Trial Chamber to overturn the Co-Investigating Judges' Order if there were no other valid reason for their Order. As is explained below, the Pre-Trial Chamber decides that there are other valid reasons for the Co-Investigating Judges' Order. Therefore, the Pre-Trial Chamber will not overturn the Co-Investigating Judges' Order due to this error of law.

Second Ground of Appeal – Application of the Wrong Legal Standards

32. The Appellant challenges four of the six reasons listed in paragraph 13 above that were relied upon by the Co-Investigating Judges to reject the Request. The Pre-Trial Chamber will consider each challenge separately.

Absence of contact details of the [redacted]

33. The Appellant submits that "inserting the contact details of potential witnesses in the investigative request itself is not a requirement for accepting such a request . . . At no point has it been directed [by the Co-Investigating Judges or the Pre-Trial Chamber] that a party shall provide contact details of potential witnesses as part of the request itself."[35]

[35] Appeal, paras. 40-41.

34. The Appellant is correct that a request for investigative action under Rule 55(10) to interview an individual is not required to include the individual's current contact details,[36] however the Pre-Trial Chamber notes that in their Order the Co-Investigating Judges do not take a contrary position, either implicitly or explicitly. A contextual reading of the Order also shows that the Co-Investigating Judges did not consider the absence of current contact details to be determinative in their rejection of the Request. In fact, it is possible that the Co-Investigating Judges did not rely even in part on the absence of contact details to reject the Request. The Co-Investigating Judges' reference to the absence of contact details is followed by their statement that "Mere reference to a name and alleged employment during the time period under investigation is a narrow basis upon which an assessment can be made as to whether to interview an individual."[37] The Pre-Trial Chamber agrees with this statement to the extent that mere reference to an individual's name and general position in or under the Ministry during DK does not amount to a *prima facie* reason to believe that the individual may have exculpatory evidence or information that is relevant to ascertaining the truth. The Co-Investigating Judges' preceding reference to the absence of contact details appears to have been only to highlight the want of information provided by the Appellant about the [redacted].

The current stage of investigation

35. The Appellant submits the following with respect to this next reason of the Co-Investigating Judges:

> [T]he OCIJ wrongly took into account the 'current stage of investigation' when assessing whether the [redacted] could assist in the ascertaining of the truth . . . The defence submits that the only way the stage of investigation could properly influence the OCIJ when deciding whether to interview some individuals is if the OCIJ had already gathered a considerable body of evidence on the Case File and the defence's suggested evidence would duplicate the information which is already on the Case File. This is not the case here. The OCIJ has only interviewed a small number of individuals who used to work within the Ministry of Social

[36] Appeal, para. 41.
[37] Order, para. 3.

Affairs at the relevant time and, therefore, is in possession of little evidence on the matter.[38]

36. The Pre-Trial Chamber notes that the Appellant does not cite authority for her submission that the Co-Investigating Judges "wrongly took into account the 'current stage of investigation'", or for her submission that there is only one circumstance in which the Co-Investigating Judges may "properly" attach weight to the current stage of investigation to reject a request under Rule 55(10). The Pre-Trial Chamber agrees with the Appellant to extent that the Co-Investigating Judges may not reject a request under Rule 55(10) solely or primarily because the investigation is in its final stages.[39] That is not, however, the situation in this Appeal. The Co-Investigating Judges may rely, in part, on the latter stage of an investigation in combination with other valid reasons to reject a request.

Expected evidence

37. The Appellant submits that the Co-Investigating Judges erred in basing their Order, in part, on the reason that the Request did not provide "any indication of the expected evidence from each of these [redacted]."[40] The Appellant submits, "At no point did the OCIJ or the PTC require requests for investigative action to indicate the 'expected evidence' sought to be investigated, but the 'information sought', which is a different, lower, standard. The OCIJ has therefore applied the wrong standard . . ."[41]

38. The Pre-Trial Chamber recalls that the standard the Co-Investigating Judges were obliged to apply in determining the Request under Rule 55(10) is whether the Appellant demonstrated a *prima facie* reason for the Co-Investigating Judges to believe that one or more of the [redacted] possesses information that is relevant to ascertaining the truth.[42]

39. The Co-Investigating Judges are familiar with and often remind parties of the feature of the ECCC context whereby the parties cannot interview the persons they propose to be

[38] Appeal, para. 44.
[39] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 36-38.
[40] Order, para. 3.
[41] Appeal, para. 47.
[42] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 36, 44.

called as witnesses.[43] The Pre-Trial Chamber therefore considers it unlikely that the Co-Investigating Judges used the phrase "expected evidence" to mean that the Appellant is required under Rule 55(10) to provide the Co-Investigating Judges with her expectation of what the [redacted] will likely say if interviewed by the Co-Investigating Judges. It is apparent from the context that the Co-Investigating Judges used the phrase "expected evidence" to mean that, based on the information in the possession of the Appellant, the Appellant should have identified the areas of the Introductory or Supplementary Submissions that she has reasons to believe the [redacted] are in a position to testify about and the basis of such belief.

40. The [redacted] allegedly worked under the supervision of the Ministry, yet in the Request the Appellant did not provide her specific knowledge of why these particular individuals "have the capacity to provide the OCIJ with relevant information."[44] In this respect the Co-Investigating Judges did not err by relying, in part, on the fact that the Appellant failed to provide the "expected evidence" of the individuals.

Relatively low positions within the hierarchy of the Ministry

41. The Appellant submits that the Co-Investigating Judges committed an error of law by relying on the "relatively low"[45] positions of the [redacted] to reject the Request.[46] The Appellant "stresses that former positions held by individuals should not be decisive"[47] for the Co-Investigating Judges in determining a request under Rule 55(10). A contextual reading of the Order shows that the relatively low positions of the [redacted] was not necessarily "decisive" for the Co-Investigating Judges. Even if the relatively low positions of the [redacted] were "decisive" or determinative for the Co-Investigating Judges, the Pre-Trial Chamber does not consider that to constitute an improper exercise of discretion.

42. Specifically, it is not an improper exercise of discretion for the Co-Investigating Judges to conclude that an individual who held a relatively low position in the Ministry is, absent a

[43] E.g., [redacted]
[44] Request, paras. 15-16.
[45] Order, para. 4.
[46] Appeal, para. 52.
[47] Appeal, para. 54.

prima facie reason to the contrary, "not likely to provide sufficient details" on the role and responsibilities of the Appellant during her tenure as Minister, or on the Appellant's "access to details of events which took place during the relevant time period, while exercising her role as Minister." The Appellant submits that the former position of an individual "is not necessarily relevant."[48] This choice of language by the Appellant suggests that she agrees that partial reliance on the relatively low position of an individual may be relevant in some circumstances. The Pre-Trial Chamber considers that this Appeal is one of those circumstances.

43. With respect of one of the [redacted] who was allegedly [redacted] for an unspecified time period during DK, the Pre-Trial Chamber considers that such a position does not, as the Appellant seems to suggest, *ipso facto* constitute a *prima facie* basis that the individual has information conducive to ascertaining the truth. The Pre-Trial Chamber considers it to be within the discretion of the Co-Investigating Judges to reject the request to interview the individual given that the Appellant did not provide any other information about him or her that might demonstrate a *prima facie* reason to accept the request.

Disposition of Second Ground of Appeal

44. The Pre-Trial Chamber thus decides that the Co-Investigating Judges' Order was based on two valid reasons: 1) the relatively low positions held by the [redacted] in the Ministry and 2) the absence of any other information about the individuals that constitutes a *prima facie* basis for the Co-Investigating Judges to believe that one or more of them has information that is conducive to ascertaining the truth. The Pre-Trial Chamber finds that there was no improper exercise of the Co-Investigating Judges' discretion to reject the Request on the basis of these two reasons alone.

Third Ground of Appeal – Infringement of the Right to a Fair Trial

45. The Appellant submits that the Order "is so unfair as to constitute an abuse of the OCIJ's discretion. By refusing to investigate exculpatory evidence, the OCIJ has infringed the

[48] Appeal, para. 52.

right to the Charged Person to have a fair trial."[49] The Pre-Trial Chamber agrees that such a circumstance would constitute an incorrect interpretation of governing law, a patently incorrect conclusion of fact, and/or an abuse of discretion. The Pre-Trial Chamber finds that such a circumstance does not exist in this Appeal.

46. The Appellant is correct that the Co-Investigating Judges have a duty to investigate exculpatory evidence.[50] The Appellant incorrectly formulates the standard of proof required under Rule 55(10) to satisfy the Co-Investigating Judges that the investigative action may yield exculpatory evidence.

47. The correct standard of proof requires the Appellant to demonstrate a *prima facie* reason for the Co-Investigating Judges to believe that one or more of the [redacted] may possess exculpatory evidence.[51] The Appellant incorrectly formulate the test as follows: "Where the defence has conducted preliminary inquiries which have led the defence to reasonably believe that those persons may have information of an exculpatory nature, and which information does not yet form part of the existing information available on the Case File, the OCIJ has an obligation to pursue those leads."[52] This formulation of the standard incorrectly suggests that the determinative factor is whether the Appellant "reasonably believe[s] that those persons may have information of an exculpatory nature." Regardless of the strength with which the Appellant believes in the merits of her Request, the determinative factor is whether the Co-Investigating Judges are satisfied that the Appellant has demonstrated a *prima facie* reason for the Co-Investigating Judges to believe that the investigative action may yield exculpatory evidence.

48. The Appellant submits that the Co-Investigating Judges should have applied the following standard as approved by the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in assessing whether one or more of the [redacted] has exculpatory evidence:[53]

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[49] Appeal, para. 58.
[50] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36.
[51] Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 36.
[52] Appeal, para. 24.
[53] Appeal, para. 64.

> [W]hether [the] information 'may suggest the innocence or mitigate the guilt of the accused' must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.[54]

49. The Appellant is correct that the ICTR Appeals Chamber approved this as "the correct standard for assessing whether certain material is to be considered as exculpatory within the meaning of Rule 68(A) of the [ICTR] Rules."[55] However, it is clear from its reasons for decision that the Appeals Chamber considered this standard to be consistent with, and not lower than, presenting "a *prima facie* showing of its probable exculpatory nature."[56]

50. The Appellant asserts, without support, that "The defence has provided prima facie evidence that these [redacted] may have exculpatory information that is not yet available on the Case File."[57] Given that the Appellant, in fact, provided only their names and general positions in the Ministry, the Pre-Trial Chamber considers that it was not an improper exercise of discretion for the Co-Investigating Judges to conclude that the Appellant did not satisfy the *prima facie* threshold.

51. The third ground of appeal is therefore dismissed.

Allegations against the Co-Investigating Judges of Partiality

52. In the Appeal, the Appellant alleges that the Order "call[s] into question the impartiality of the OCIJ" and that the Co-Investigating Judges are "more concerned in gathering inculpatory evidence against the Charged Person than exculpatory evidence."[58] The Appellant and her Co-Lawyers attempt to "support" such serious allegations by citing and quoting from a pending application under Rule 34(2).[59] The Pre-Trial Chamber considers this approach to be highly inappropriate.

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[54] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.13, "Decision on 'Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion'", Appeals Chamber, 14 May 2008 ("*Karemera*"), para. 12.
[55] *Karemera*, para. 12.
[56] *Karemera*, paras. 9, 14.
[57] Appeal, para. 36.
[58] Appeal, paras. 66-70.
[59] Appeal, para. 67.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

(1) **The Appeal is admissible;**

(2) **The Appeal is granted in part (paragraphs 29-31 above);**

(3) **The remainder of the Appeal is dismissed.**

Phnom Penh, 14 June 2010

Pre-Trial Chamber

President

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