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

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ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D260/1/1/3

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

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC24)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 16 June 2016

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CONSIDERATIONS ON APPEAL AGAINST DECISION ON [REDACTED] FIFTH REQUEST FOR INVESTIGATIVE ACTION

Co-Prosecutors

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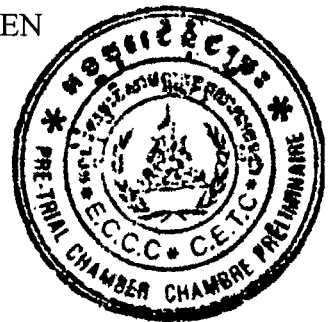
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Appeal against Decision on ██████ Fifth Request for Investigative Action” filed on 9 December 2015 (the “Appeal”).¹

I – INTRODUCTION

1. This Appeal concerns a decision of the International Co-Investigating Judge issued on 10 November 2015 denying in part ██████ fifth request for investigative action into, *inter alia*, the pre-1977 living conditions in the Central Zone (the “Impugned Decision”).²

a. Background

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of ██████ (the “Appellant”) in criminal acts and proposing to press charges against him.³
3. On 23 April 2014, the International Co-Investigating Judge denied three requests for investigative actions filed by the Appellant, on the basis that a Suspect does not have standing to file requests for investigative actions.⁴ On 30 September 2014, the Pre-Trial Chamber dismissed the appeal against this decision as raising an issue already examined by the Chamber.⁵
4. On 27 May 2014, the Appellant was notified by the Greffier of the Office of the Co-Investigating Judges that his fourth request for investigative action had not been placed on the substantive portion of Case File 004 because his status remained that of a Suspect.⁶

¹ D260/1/1/2 (“Appeal”).

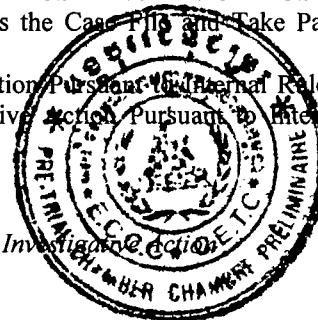
² Decision on ██████ Fifth Request for Investigative Action, 10 November 2015, D260/1 (“Impugned Decision”).

³ Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1 (“Third Introductory Submission”); Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Decision on ██████ Requests for Investigation, 23 April 2014, D190. *See also* ██████ First Request for Investigative Action Pursuant to Internal Rule 55(10), 8 April 2014, D187; ██████ Second Request for Investigative Action Pursuant to Internal Rule 55(10), 9 April 2014, D188; ██████ Third Request for Investigative Action Pursuant to Internal Rule 55(10), 17 April 2014, D189.

⁵ Decision on ██████ Appeal against International Co-Investigating Judge’s Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2. *See also* Considerations of the Pre-Trial Chamber on ██████ Appeal Against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4.

⁶ Notification Concerning ██████ Fourth Request for Investigative Action Pursuant to Internal Rule 55(10), 27 May 2014, A117. *See also* ██████ Fourth Request for Investigative Action Pursuant to Internal Rule 55(10), 21 May 2014, A117/1.



On 22 October 2014, the Pre-Trial Chamber dismissed as inadmissible the Appellant's appeal against constructive dismissal of his fourth request.⁷

5. On 27 March 2015, the Appellant attended an initial appearance hearing and was charged with, amongst others, crimes against humanity.⁸
6. On 7 May 2015, the Co-Lawyers filed amended versions of the four requests for investigative action.⁹
7. On 12 August 2015, the Co-Lawyers filed a fifth request for investigative action pursuant to Internal Rules 21, 31(10), 55(5), 55(10) and 58(6) (the "Fifth Request"), in which they requested the appointment of an expert and the conduct of investigations by the Co-Investigating Judges in relation to: (a) the pre-1977 living conditions in the Central Zone (the "First Sub-Request"); (b) any pre-1977 Khmer Rouge activities that may have affected post-1977 living conditions in the Central Zone (the "Second Sub-Request"); and (c) any action taken by the Appellant and Southwest cadres to improve living conditions (the "Third Sub-Request").¹⁰
8. On 10 November 2015, the International Co-Investigating Judge issued the Impugned Decision, denying in part the Appellant's request and stating that evidence related to pre-1977 conditions of living "has been gathered, and will continue to be gathered" and that investigations on the conduct of the Appellant and Southwest cadres "are routinely carried out by OCIJ investigators".¹¹



⁷ Decision on Appeal Against Constructive Dismissal of ██████ Fourth Request for Investigative Action, 22 October 2014, A117/2/2.

⁸ Written Record of Initial Appearance of ██████, filed 30 March 2015, D242.

⁹ Amended First Request for Investigative Action, 7 May 2015, D187/1; Amended Second Request for Investigative Action, 7 May 2015, D188/1; Amended Third Request for Investigative Action, 7 May 2015, D189/1; Amended Fourth Request for Investigative Action, 7 May 2015, D244.

¹⁰ Fifth Request for Investigative Action and Request for Expert, 12 August 2015, D260 ("Fifth Request").

¹¹ Impugned Decision, paras 26, 27 (disposition).

b. The Appeal

9. On 16 November 2015, the Co-Lawyers filed the Appellant's Notice of Appeal against the Impugned Decision.¹²
10. On 8 December 2015, the Co-Lawyers filed a request for authorisation to file in English first with the Khmer translation to follow.¹³
11. On 9 December 2015, the Co-Lawyers filed the Appeal in English. The Appeal was notified to the parties in English alone on 22 December 2015 and in Khmer on 13 January 2016. The Appellant submits that the Appeal is admissible pursuant to Internal Rule 74(3)(b), (d) and (e)¹⁴ and raises five grounds of appeal based on alleged errors of law and fact.¹⁵
12. No response was filed by the Co-Prosecutors or the Lawyers for the Civil Parties or Civil Party Applicants within the legal deadline.

II – ADMISSIBILITY

13. The Appellant filed the Notice of Appeal in accordance with the time limit in Internal Rule 75(1). The Appeal was also filed within the time limit provided for in Internal Rule 75(3).
14. The Pre-Trial Chamber agrees with the Appellant¹⁶ that the Appeal is admissible under Internal Rule 74(3)(b), (d) and (e), which provides in relevant parts:

Rule 74. Grounds for Pre-Trial Appeals

3. 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; [...]
 - d) refusing requests for expert reports allowed under these IRs; [...]
 - e) refusing requests for additional expert investigation allowed under these IRs; [...].”

¹² Notice of Appeal Against Decision on ██████ Fifth Request for Investigative Action, 16 November 2015, D260/1/1.

¹³ Request to File in English First the Appeal Against the Decision on ██████ Fifth Request for Investigative Action, 8 December 2015, D260/1/1/1.

¹⁴ Appeal, para. 14.

¹⁵ Appeal, para. 45.

¹⁶ Appeal, para. 14.



III – STANDARD OF REVIEW

15. Pursuant to the Pre-Trial Chamber’s jurisprudence, Co-Investigating Judges’ decisions may be overturned if they are a) based on an error of law invalidating the decision; b) based on an error of fact occasioning a miscarriage of justice; or c) so unfair or unreasonable as to constitute an abuse of the judges’ discretion.¹⁷
16. The Pre-Trial Chamber further recalls that a decision by the Co-Investigating Judges on a request for investigative action is discretionary as, in light of their overall duties and their familiarity with the case files, they are best able to assess whether the request is indeed conducive to ascertaining the truth.¹⁸ 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.¹⁹ Not all errors will cause the Pre-Trial Chamber to set aside the decision of the Co-Investigating Judges. The error must have been fundamentally determinative of the exercise of the discretion leading to the appealed decision being made.²⁰

IV – MERITS

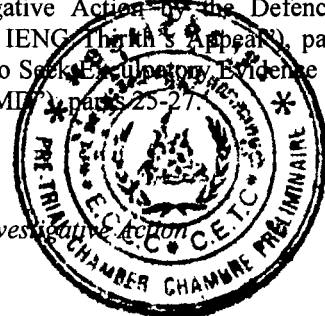
17. The Pre-Trial Chamber has not attained the required majority of four affirmative votes to reach a decision based on a common reasoning, despite unanimously finding that the Appeal should be dismissed on its merits. Pursuant to Rule 77(14) of the Internal Rules, the opinions of its various members are attached to these Considerations.

¹⁷ See, e.g., Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22.

¹⁸ Case 002 (PTC67), 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, 28 September 2010, D365/2/17 (“Decision on Reconsideration of Co-Prosecutors’ Appeal”), paras 36, 55-58.

¹⁹ Decision on Reconsideration of Co-Prosecutors’ Appeal, para. 36; Case 002 (PTC62), Decision on the IENG Thirith Defence Appeal Against ‘Order on Requests for Investigative Action by the Defence for IENG Thirith’ of 15 March 2010, 14 June 2010, D353/2/3 (“Decision on IENG Thirith’s Appeal”), para. 8; Case 002 (PTC25), Decision on the Appeal from the Order on the Request to Seek Additional Evidence in the Shared Materials Drive, 12 November 2009, D164/4/13 (“Decision on the SMID”), paras 25-27.

²⁰ Decision on IENG Thirith’s Appeal, D353/2/3, para. 8.



DISPOSITION**THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:****DISMISSES** the Appeal;**DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision based on a common reasoning.

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

Phnom Penh, 16 June 2016**Pre-Trial Chamber**






PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.

OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



²¹ Appeal against Decision on [REDACTED] Fifth Request for Investigative Action dated 9 December 2015, para 7, document D260/1/1/2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



²² *Ibid.*, para. 27.
²³ *Ibid.*, para. 31.
²⁴ *Ibid.*, para. 33.
²⁵ *Ibid.*, para. 49.
²⁶ *Ibid.*, para. 50.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



²⁷ *Ibid.*, para. 61.

²⁸ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

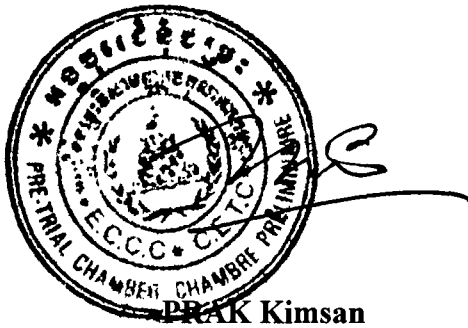
²⁹ Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.

³⁰ [REDACTED]

[REDACTED]

30. In light of the foregoing, the National Judges of the Pre-Trial Chamber are of the view that it is not necessary for the International Co-Investigating Judge to take any investigative action or any supplementary investigative action (including [REDACTED] fifth request for investigative action) in Case 004.

Phnom Penh, 16 June 2016



PRAK Kimsan



NEY Thol



HUOT Vuthy

[REDACTED]

**OPINION OF JUDGES BEAUVALLET AND BAIK (THE “UNDERSIGNED
JUDGES”) REGARDING THE MERITS OF THE APPEAL**

31. The Appellant submits that the International Co-Investigating Judge erred by: (a) misinterpreting the applicable test for investigative requests; (b) applying an incorrect standard of proof; (c) holding that the evidence sought has no *prima facie* exculpatory value; (d) failing to provide a reasoned opinion with regards to the expert request; and (e) holding that the Co-Lawyers did not request to re-interview certain witnesses.³²
32. The Undersigned Judges will examine each ground in turn.

I. First Ground of Appeal Related to the Applicable Test

33. The Appellant submits that the International Co-Investigating Judge erred in law in paragraphs 12 to 14 of the Impugned Decision by misinterpreting the applicable test for investigative requests.³³ The Appellant contends that the International Co-Investigating Judge applied a restricted test by requiring him to show that the information sought is relevant to determining whether his conduct satisfied the elements of ECCC crimes. In doing so, the International Co-Investigating Judge improperly excluded an inquiry into contextual and jurisdictional elements,³⁴ which is inconsistent with the concept of the ‘truth’.³⁵ The Appellant adds that this restricted test precluded the collection of important evidence relating to the responsibility of other individuals for crimes “such as persecution and extermination”, the circumstances of the harm, the causal link between the harm and alleged conduct, and the *mens rea*.³⁶
34. The Undersigned Judges recall that a request for investigative action may satisfy the *prima facie* relevance requirement by seeking information that falls within the temporal and geographical scope of the alleged facts and crimes, or by seeking information that bears on the criminal responsibility, jurisdictional elements of the crimes or “certain other contextual elements”.³⁷ The Undersigned Judges agree with the Appellant’s submission³⁸ that the applicable standard of review is the “relevance [of the investigative request]

³² Appeal, para. 45.

³³ Appeal, paras 46-62.

³⁴ Appeal, paras 47, 49-55.

³⁵ Appeal, paras 56-62.

³⁶ See, e.g., Appeal, paras 53, 54.

³⁷ Decision on Reconsideration of Co-Prosecutors’ Appeal, para. 49.

³⁸ Appeal, paras 21-26, 50-51.



within the scope of the investigation to ascertain the truth” and that limiting it to investigating “matters deemed to be probative” would be an error of law.³⁹ The Undersigned Judges, however, stress that the relevance to the scope of the investigation has yet to be determined by the limitations and parameters set by the Introductory and Supplementary Submissions⁴⁰ and that only certain limited contextual elements falling outside of the temporal scope of the alleged crimes have been found to satisfy the relevance requirement.⁴¹

35. The Undersigned Judges note that the International Co-Investigating Judge correctly referred to Internal Rules 55(1), 55(5) and 67(1) as requiring him to investigate the allegations in the Introductory and Supplementary Submissions, in the view of issuing a Closing Order, and to take investigative action conducive to ascertaining the truth.⁴² The International Co-Investigating Judge then proceeded to examine whether the evidence sought in the First Sub-Request is relevant to the scope of the investigation, noting that it does not fit within the temporal scope of the alleged crimes⁴³ and that the worsening of living conditions would not be a crime in itself.⁴⁴
36. The Undersigned Judges concur that, if taken in isolation, the International Co-Investigating Judge’s conclusion according to which “[w]hat matters is whether the conduct of [the Appellant] satisfies the elements of the crimes over which the ECCC has jurisdiction”⁴⁵ may suggest the application of a restrictive standard. By contrast, the use of expressions such as “relevant to the investigation”, “relevant to determining [...] allegations”⁴⁶ or, regarding the Third Sub-Request, “marginal to ascertaining [...] criminal responsibility”⁴⁷ are in line with the relevant standard and do not exemplify any inappropriate limitation, insofar as information regarding criminal responsibility might include evidence supporting or disproving the commission of the alleged crimes or of the modes of liability employed.⁴⁸ The Undersigned Judges, recalling that decisions must be

³⁹ Decision on Reconsideration of Co-Prosecutors’ Appeal, para. 61.

⁴⁰ *Ibid.*, para. 49.

⁴¹ *Ibid.*, fn. 129.

⁴² Impugned Decision, para. 12.

⁴³ Impugned Decision, para. 13.

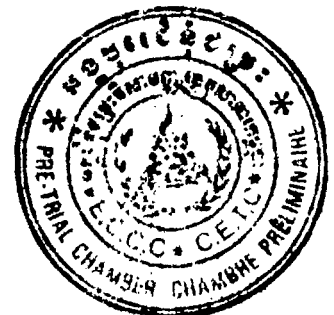
⁴⁴ Impugned Decision, para. 14.

⁴⁵ Impugned Decision, para. 14.

⁴⁶ Impugned Decision, para. 13.

⁴⁷ Impugned Decision, para. 24.

⁴⁸ *See, e.g.*, Decision on Reconsideration of Co-Prosecutors’ Appeal, fn. 126.



read as a whole to ascertain what was in the mind of the Co-Investigating Judges,⁴⁹ are therefore not convinced that the standard applied in the present case was erroneous.

37. The Undersigned Judges, nonetheless, find merit in the Appellant's submission that the pre-1977 living conditions may be relevant to assessing the causal link between deaths and suffering in the Central Zone and the Appellant's conduct, under the charges of extermination, murder and persecutions.⁵⁰ The International Co-Investigating Judge noted that "the Defence [have not] specified what elements of the alleged crimes and modes of liability this evidence would be relevant to".⁵¹ The Undersigned Judges concur that the Appellant's submissions could have been clearer. Nonetheless, the Appellant did refer in his Fifth Request to the crimes related to the purge of the Central Zone, pleaded *inter alia* under the charges of extermination, murder and persecutions, as well as to the joint criminal enterprise, the object of which was to purge and execute all perceived enemies in the Central Zone.⁵² The Fifth Request also argues that the evidence sought is "relevant [...] to determine which alleged crimes, if any, are attributable to the pre-1977 Khmer Rouge cadres as opposed to the Southwest Zone cadres."⁵³
38. Therefore, the Undersigned Judges consider that the International Co-Investigating Judge erred in finding the evidence sought to be merely "contextual"⁵⁴ and not relevant to elements of crimes pleaded in the Third Introductory Submission.
39. The Undersigned Judges will now turn to examine whether this error in qualifying the nature of the evidence sought invalidates the decision. Contrary to the Appellant's submission, the Undersigned Judges do not find that the International Co-Investigating Judge abusively "excluded" or "refused" to investigate this evidence which he defined as

⁴⁹ See, e.g., Case 002 (PTC43), Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material [*sic*] on the Case File Dated 31 December 2009, 20 May 2010, D313/2/2 ("Decision on Additional Evidentiary Material"), para. 28.

⁵⁰ Appeal, paras 54 ("the ICIJ is restricting the admission of important information pertaining to harm, the causal link between the harm and the alleged conduct and *mens rea* [referring in footnote to case law relating to elements of the crimes of persecution, murder and extermination]"), 61 referring to Third Introductory Submission, paras 22 and 35 ("the requested actions may assist with the determination of elements of alleged crimes – ascertaining whether the alleged harm took place and whether there is a causal link between the harm and [redacted] alleged conduct"), 66 referring to Third Introductory Submission, paras 11 and 22 ("[w]hether deaths and suffering occasioned from a lack of food resulted from actions and policies implemented before or after the arrival of the Southwest Zone cadres is directly relevant to ascertaining the truth of ICP's allegations that such deaths resulted from [redacted] conduct").

⁵¹ Impugned Decision, para. 17.

⁵² Fifth Request, para. 46 referring to Third Introductory Submission, paras 22 and 35. See also Third Introductory Submission, para. 117(c).

⁵³ Fifth Request, para. 45.

⁵⁴ Impugned Decision, para. 15.



contextual.⁵⁵ Rather, the International Co-Investigating Judge took into account the fact that the type of evidence sought in the First Sub-Request is “already on the Case File”⁵⁶ and that he “do[es] not find it necessary to collect and place [it] on the Case File”.⁵⁷ The International Co-Investigating Judge concluded in similar terms for the Second and Third Sub-Requests that the evidence sought is not necessary⁵⁸ and that witnesses are already “routinely asked about the Southwest cadres and [the Appellant]’s conduct”.⁵⁹ The International Co-Investigating Judge further indicated that “to the extent that establishing pre-1977 conditions is relevant to the investigation of Case 004, evidence of such conditions has been gathered, and will continue to be gathered, by interviewing people who personally experienced life in the Central Zone during that time.”⁶⁰

40. In these circumstances, the Undersigned Judges find that the error identified does not invalidate the decision, since it did not lead the International Co-Investigating Judge to improperly “exclude” or “refuse” to investigate the evidence sought. The International Co-Investigating Judge rather exercised his discretion in refusing investigative action on the basis that he was in possession of adequate material to satisfy himself of a point in issue⁶¹ or that he would address this issue by continuing to collect witnesses’ statements instead of an expertise.

41. The First Ground of Appeal is therefore dismissed.

II. Second Ground of Appeal Related to the Applicable Standard of Proof

42. The Appellant submits that the International Co-Investigating Judge erred in law by applying an incorrect standard of proof⁶² and improperly referred, in paragraphs 18 and 19 of the Impugned Decision, to existing evidence on the case file as being “more

⁵⁵ See, e.g., Appeal, paras 50-52, 55.

⁵⁶ Impugned Decision, para. 15.

⁵⁷ Impugned Decision, para. 16.

⁵⁸ Impugned Decision, para. 23.

⁵⁹ Impugned Decision, para. 25. See also Impugned Decision, para. 27.

⁶⁰ Impugned Decision, para. 26.

⁶¹ See, e.g., Case 002 (PTC46), Decision on NUON Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7 (“Decision on NUON Chea’s Appeal”), para. 26. See also Decision on Reconsideration of Co-Prosecutors’ Appeal, para. 57 (“[t]he 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”).

⁶² Appeal, paras 63-66.



conducive to ascertaining the truth” than the requested lines of inquiry.⁶³ The Appellant contends that the International Co-Investigating Judge should have examined whether the requested line of inquiry was, on the face of it, capable of producing evidence relevant to ascertaining the truth or likely to reveal exculpatory evidence.⁶⁴

43. The Undersigned Judges do not find that the International Co-Investigating Judge erred by relying on existing evidence on the case file to determine whether the exculpatory requirement was fulfilled. The Undersigned Judges consider that paragraphs 18 and 19, referring to evidence of post-1977 living conditions, have to be read in conjunction with paragraphs 17 and 20 of the Impugned Decision, in which the International Co-Investigating Judge duly addressed the *prima facie* exculpatory value of the proposed investigation into pre-1977 living conditions. The Undersigned Judges recall that, if the Co-Investigating Judge’s discretion does not give him the right to apply a restrictive standard, it does give him discretion to assess the request in light of his familiarity with the investigation and the case file.⁶⁵ In the present case, the International Co-Investigating Judge rightly relied on the factual circumstances of the case, illustrated by evidence already on the case file, to conclude that the evidence sought would not, in and of itself, fulfil the *prima facie* exculpatory requirement.
44. The Undersigned Judges also do not consider, contrary to the Appellant’s submission,⁶⁶ that the International Co-Investigating Judge made an improper balance between the materials already on the case file and the evidence sought, or that he found one of the lines of inquiry “more conducive” to ascertaining the truth. In particular, the findings that the evidence sought is in itself “not determinative”⁶⁷ and that detailed investigation would not, as such, be “conducive to determining the allegations against [the Appellant]”⁶⁸ are in line with the established standard and do not show any improper balance in favour of evidence already on the case file.
45. The Undersigned Judges thus cannot find any error regarding the standard of proof applied and dismisses the second ground of appeal. The Undersigned Judges will now

⁶³ Appeal, paras 63, 64.

⁶⁴ Appeal, paras 65, 66.

⁶⁵ Decision on Reconsideration of Co-Prosecutors’ Appeal, para. 62.

⁶⁶ Appeal, para. 64.

⁶⁷ Impugned Decision, para. 17.

⁶⁸ Impugned Decision, para. 20.



turn to the alleged errors regarding the assessment of the exculpatory value of the evidence sought.

III. Third Ground of Appeal Related to the Exculpatory Value of the Evidence Sought

46. The Appellant contends that the International Co-Investigating Judge erred in law by holding, in paragraphs 17-19 and 21 of the Impugned Decision, that the evidence sought has no *prima facie* exculpatory value.⁶⁹ In the Appellant's submissions, the International Co-Investigating Judge: (i) applied an incorrect definition of 'exculpatory evidence'; (ii) relied on ICTY jurisprudence which was distinguishable from the case at hand; and (iii) made premature factual determinations.⁷⁰

a) Definition of 'exculpatory evidence'

47. In the first sub-ground, the Appellant infers from the Impugned Decision's findings that 'exculpatory evidence' was too narrowly defined as evidence which would "fully exonerate" or "on its own prove[] the innocence of an accused".⁷¹ The Appellant contends that this position is inconsistent with the presumption of innocence⁷² and that the definition of exculpatory evidence should rather depend on an evaluation of whether the information could be relevant to the defence of the accused, as set forth by the ICTR Appeals Chamber.⁷³

48. The Undersigned Judges concur with the ICTR Appeals Chamber's standard, as recalled by the Appellant,⁷⁴ that "whether [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."⁷⁵ The Undersigned Judges yet underline that this

⁶⁹ Appeal, paras 67-79.

⁷⁰ Appeal, para. 67.

⁷¹ Appeal, para. 68.

⁷² Appeal, para. 70.

⁷³ Appeal, para. 69.

⁷⁴ *Ibid.*

⁷⁵ Decision on IENG Thirith's Appeal, para. 48 referring to ICTR, *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 ("ICTR Decision on Nzirorera's Appeal"), para. 12.



standard of review is consistent, and not lower than, presenting “a *prima facie* showing of its probable exculpatory nature.”⁷⁶

49. The Appellant specifically challenges the finding at paragraph 21 that:

“[E]ven if the scarcity of resources after 1977 were to be partly attributable to prior events, this circumstance would not exonerate a charged person of his or her responsibility, should the evidence show that his or her conduct amounted to one of the crimes under the jurisdiction of the ECCC.”⁷⁷

50. The Undersigned Judges, recalling that decisions must be read as a whole,⁷⁸ are of the view that this finding should not be isolated and interpreted as requiring a showing that the evidence sought would, on its own, prove the innocence of the charged person. When considered altogether, the International Co-Investigating Judge’s approach is noticeably consistent with the definition of ‘exculpatory evidence’ previously recalled. In particular, the International Co-Investigating Judge duly examined, in light of the submissions he had before him, whether the Appellant had demonstrated how the requested investigation “could rebut allegations” or, more generally, “how it would impact on [his] alleged criminal responsibility.”⁷⁹ The International Co-Investigating Judge further held, in line with the relevant test,⁸⁰ that he was not convinced that the requested investigative actions “would be conducive to determining”⁸¹ the allegations. In this light, it is clear that the International Co-Investigating Judge did not require, at paragraph 21, that the Appellant demonstrate that the evidence sought would fully exonerate him. Rather, he concluded that the proposed line of enquiry would, at best, demonstrate how the pre-1977 conditions affected the post-1977 living conditions, but would not have any impact on the causal link between deaths and suffering in the Central Zone and the Appellant’s conduct.

51. The Undersigned Judges thus cannot identify any error in the definition of ‘exculpatory evidence’ applied in the Impugned Decision. The Undersigned Judges further find that the Appellant has not demonstrated that such error would invalidate the decision and

⁷⁶ Decision on IENG Thirith’s Appeal, para. 49 referring to ICTR Decision on Nzirorera’s Appeal, paras 9, 14.

⁷⁷ Impugned Decision, para. 21.

⁷⁸ See, e.g., Decision on Additional Evidentiary Material, para. 28.

⁷⁹ Impugned Decision, para. 17.

⁸⁰ See, e.g., Case 002 (PTC58), Decision on Appeal Against OCIJ Order on NUCW Genca’s Eighth Request for Investigative Action, 10 June 2010, D273/3/5, para. 17.

⁸¹ Impugned Decision, para. 20.



recalls that the International Co-Investigating Judge has not ultimately “excluded” or “refused” to investigate the evidence sought.⁸²

b) Reliance on ICTY findings in Delalić

52. Turning to the second issue, the Appellant submits that the International Co-Investigating Judge erred in relying on the findings of the ICTY Chamber in *Delalić* to conclude that a general lack of resources cannot constitute exculpatory evidence.⁸³ The Appellant contends that the findings in *Delalić* are distinguishable from the case at hand because they concern war crimes and, more particularly, war crimes committed against prisoners detained in camps.⁸⁴
53. The Undersigned Judges find merit in the Appellant’s argument that the analogy operated between duties of warring parties or detaining powers, on one hand, and civilian authorities during peacetime, on the other hand, is disputable. However, a reading of the decision as a whole shows that the reliance by the International Co-Investigating Judge on the *Delalić* case was only accessory in his determination of the exculpatory value of the evidence sought. As discussed above, the International Co-Investigating Judge articulated reasoned justifications and relied on the factual circumstances of the case to conclude, in light of his familiarity with the evidence, that the *prima facie* exculpatory requirement was not met.
54. The Undersigned Judges therefore consider that the Appellant has not demonstrated any error of law which would invalidate the decision.

c) Premature factual determinations

55. The Appellant contends that the International Co-Investigating Judge made premature factual determinations, in paragraphs 18 and 19 of the Impugned Decision, when he found sufficient the evidence on the case file, allegedly structured around the International Co-Prosecutor narrative, and improperly compared it to the evidence sought.⁸⁵

⁸² See *supra* paras 39, 40.

⁸³ Appeal, paras 73-76.

⁸⁴ Appeal, paras 74, 75.

⁸⁵ Appeal, paras 77, 78.



56. At the outset, the Undersigned Judges note the International Co-Investigating Judge's express acknowledgement that the final determination of the issues at stake would only be made at the end of the investigation.⁸⁶ The Undersigned Judges also recall their conclusion that the International Co-Investigating Judge did not err in relying on existing evidence on the case file, or in making an improper balance between these materials and the evidence sought, to determine whether the exculpatory requirement was fulfilled.⁸⁷
57. The Undersigned Judges further recall that the Co-Investigating Judges have a broad discretion in the subject matter⁸⁸ and that, at an advanced stage of the investigation, it is not unreasonable for them "to have reduced and refined the matters in respect of which they are now investigating" and thus to make "decisions that [...] will be considering what they view as being relevant[.]".⁸⁹ It was equally reasonable for the International Co-Investigating Judge to take into account, especially after several years of investigations, the sufficiency of the material in his possession to assess the *prima facie* exculpatory value of the evidence sought and to satisfy himself of the point in issue,⁹⁰ without making untimely factual determinations.
58. The Undersigned Judges therefore conclude that the Appellant has not shown any error in the International Co-Investigating Judge's approach to the exculpatory requirement and dismisses the third ground of appeal in its entirety.

IV. Fourth Ground of Appeal Related to the Expert Request

59. The Appellant contends that the International Co-Investigating Judge erred in law by failing to provide a reasoned opinion with regards to the request to appoint an expert.⁹¹ As a result, it renders impossible to know why the request was refused and to determine on what grounds to appeal.⁹²
60. Internal Rule 55(10) requires the Co-Investigating Judges to "set out the reasons for [their] rejection" of a request to make an order or undertake investigative action. Internal

⁸⁶ Impugned Decision, para. 20.

⁸⁷ See *supra* paras 43, 44.

⁸⁸ See, e.g., Case 002 (PTC50), Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8, para. 28; Decision on the SMD, para. 21.

⁸⁹ Decision on Additional Evidentiary Material, para. 29.

⁹⁰ See, e.g., Decision on NUON Chea's Appeal, para. 26.

⁹¹ Appeal, paras 80-82.

⁹² Appeal, para. 82.



Rule 58(6) also provides, with regards to requests for investigations or for expertise, that the Co-Investigating Judges “shall state the factual reasons” in case of rejection. The Pre-Trial Chamber clarified in the past, with regards to investigation requests, that Internal Rule 74(3)(b) requires, to be meaningful, sufficient detail to place the Charged Person in a position to be able to decide whether to lodge an appeal and to draw appropriate submissions. The Pre-Trial Chamber found further guidance in the case law of the European Court of Human Rights and of the ICTY regarding the right to a reasoned opinion, which it found relevant to the pre-trial context at the ECCC.⁹³ The Undersigned Judges consider that these principles should apply *mutatis mutandis* to challenges regarding expert requests under Internal Rules 31(10) and 74(3)(d).

61. The Undersigned Judges note that, in the Fifth Request, the Appellant requested the appointment of an expert, Dr Epstein, to assist the Co-Investigating Judges on investigations related to the First Sub-Request,⁹⁴ to ensure that “any measurements of living conditions between 1970 and 1977, as well as post-1977, be both accurate and reliable.”⁹⁵ The Co-Lawyers indicated that the proposed expert would “prepare a report on the living conditions in the Central Zone from 1970-1977, the methodologies applied, and an analysis of the impact of the pre-1977 living conditions on the post-1977 living standards.”⁹⁶
62. The Undersigned Judges observe that the International Co-Investigating Judge included the expert request within his review of the First Sub-Request for investigations into the pre-1977 living conditions in the Central Zone.⁹⁷ As previously held, the International Co-Investigating Judge duly examined the *prima facie* relevance and exculpatory value of the evidence sought by the Co-Lawyers in relation to these pre-1977 living conditions,⁹⁸ which was the object of the proposed expertise, before denying the First Sub-Request as a whole as unnecessary.⁹⁹ To reach this conclusion, the International Co-Investigating Judge pointed to specific evidence that post-1977 living conditions were not the consequence of a lack of resources¹⁰⁰ and held, *inter alia*, that “the Defence have not

⁹³ See, e.g., Decision on IENG Thirith’s Appeal, paras 23-28.

⁹⁴ Fifth Request, para. 38.

⁹⁵ Fifth Request, para. 39.

⁹⁶ Fifth Request, para. 41.

⁹⁷ Impugned Decision, para. 7.

⁹⁸ Impugned Decision, paras 12-22.

⁹⁹ Impugned Decision, paras 16, 22.

¹⁰⁰ Impugned Decision, paras 18, 19.



demonstrated how investigating the pre-1977 events could rebut allegations of poor living conditions after 1977 [...] [and] how it would impact on [the Appellant]’s alleged criminal responsibility”.¹⁰¹ The Undersigned Judges consider that the International Co-Investigating Judge provided a sufficiently reasoned opinion as to the necessity to collect the evidence sought through the expert.

63. The Undersigned Judges, having found no error in the International Co-Investigating Judge’s approach warranting its intervention, dismiss the Appellant’s fourth ground of appeal.

V. Fifth Ground of Appeal Related to the Interpretation of the Request to Interview Witnesses

64. The Appellant submits that the International Co-Investigating Judge committed an error of fact when holding that he did not request to re-interview the witnesses listed at paragraph 33 of the Fifth Request.¹⁰²

65. The Undersigned Judges cannot identify in the Appellant’s Fifth Request any explicit request to re-interview the witnesses listed in paragraph 33(a) to (g). Although the Undersigned Judges take note of the clarification given in the Appeal,¹⁰³ they find that the International Co-Investigating Judge reasonably interpreted the request he had before him at that time to “identify and interview witnesses, such as the following [...]”¹⁰⁴ as a request to “identify and interview witnesses similar to other witnesses already interviewed.”¹⁰⁵

66. In any case, such misinterpretation would not amount to an error of fact occasioning a miscarriage of justice. The Undersigned Judges recall that the International Co-Investigating Judge was not convinced that “detailed investigations of the pre-1977 events [...] would be conducive to determining the allegations against [the Appellant]”¹⁰⁶ and made clear that, to the extent that it is relevant to the investigation of Case 004, “evidence of such conditions has been gathered, and will continue to be gathered”.¹⁰⁷ The

¹⁰¹ Impugned Decision, para. 17.

¹⁰² Appeal, paras 83-86.

¹⁰³ Appeal, para. 85.

¹⁰⁴ Fifth Request, para. 33.

¹⁰⁵ Impugned Decision, para. 5.

¹⁰⁶ Impugned Decision, para. 20.

¹⁰⁷ Impugned Decision, para. 26.



Appellant does not demonstrate that the consideration of a distinct request to re-interview witnesses instead of identifying similar witnesses would have been determinative in the International Co-Investigating Judge's rejection of the First Sub-Request.

67. The Undersigned Judges thus deny the Appellant's fifth ground of appeal.

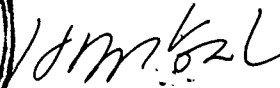
VI. Conclusion

68. For the foregoing reasons, the Undersigned Judges dismiss the Appeal in its entirety.

Phnom Penh, 16 June 2016



Olivier BEAUVALLET



Kang Jin BAIK