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

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

D296/1/1/4

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 (PTC31)

Before:

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

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30 November 2016

(CONFIDENTIAL)

DECISION ON AO AN'S APPLICATION TO ANNUL NON-AUDIO-RECORDED WRITTEN RECORDS OF INTERVIEW

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Application to Annul Non-Audio-Recorded Written Records of Interview” (the “Application”)¹ filed by the Co-Lawyers for AO An’s (respectively the “Co-Lawyers” and “Applicant”) on 9 September 2016.

I – INTRODUCTION

1. The Applicant’s request to annul all non-audio-recorded written records of interview was referred to the Pre-Trial Chamber by the International Co-Investigating Judge on 19 August 2016, pursuant to Rules 76(2) and 76(3).²

II – 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 Applicant in criminal acts and proposing to press charges against him.³

3. On 3 December 2012, the Co-Investigating Judges HARMON and YOU issued a memorandum stating that it was no longer compulsory to audio-record witness and civil party interviews (the “2012 Memorandum from Judges HARMON and YOU”).⁴

4. On 27 March 2015, the Applicant attended an initial appearance hearing and was charged with, amongst others, crimes against humanity.⁵

5. On 22 September 2015, the International Co-Investigating Judge BOHLANDER issued a memorandum reinstating the practice of audio-recording witness and civil party interviews (the “2015 Memorandum from Judge BOHLANDER”).⁶

¹ Application to Annul Non-Audio-Recorded Written Records of Interview, filed on 9 September 2016 and notified on 13 September 2016, D296/1/1/1 (“Application”).

² Decision on AO An’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Non-Audio-Recorded Written Records of Interview, 19 August 2016, D296/1.

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 Internal Memorandum from the Co-Investigating Judges to the investigators of the Office of the Co-Investigating Judges, “Instructions on Conduct of Witness Interviews”, 3 December 2012, D116.

⁵ Written Record of Initial Appearance of AO An, filed 30 March 2015, D242.

⁶ Internal Memorandum from the International Co-Investigating Judge to the investigators of the Office of the Co-Investigating Judges, “Instructions on the Recording of Witness and Civil Party Interviews”, 22 September 2015, D266.



6. On 4 February 2016, the Co-Lawyers filed an application to seize the Pre-Trial Chamber with a view to annulment of non-audio-recorded written records of interview,⁷ which was granted by the International Co-Investigating Judge on 19 August 2016.⁸ On 24 August 2016, the Greffier of the Office of the Co-Investigating Judges forwarded a copy of the case file to the Pre-Trial Chamber.⁹

7. On 9 September 2016, pursuant to the Chamber's instructions,¹⁰ the Co-Lawyers filed the Application before the Pre-Trial Chamber.

8. On 22 September 2016, the International Co-Prosecutor filed a response (the "Response"),¹¹ to which the Co-Lawyers replied on 27 September 2016 (the "Reply").¹²

III – ADMISSIBILITY

9. Internal Rule 76(4) vests the Pre-Trial Chamber with jurisdiction to determine the admissibility of an application for annulment, which it may declare inadmissible where the application relates to an order that is open to appeal; is manifestly unfounded; or does not set out sufficient reasons.¹³ Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment specified the parts of the proceedings which are prejudicial to the rights and interests of the applicant, made plain the prejudice, and, if so, adduced evidence to sustain the allegations.¹⁴ The annulment application needs to be specific as to which portions

⁷ Application to Seize the Pre-Trial Chamber with a View to Annulment of Non-Audio-Recorded Written Records of Interview, 4 February 2016, D296.

⁸ See *supra* para. 1.

⁹ Letter from the Greffier of the Office of the Co-Investigating Judges to the Case File officer, "Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D296/1", 24 August 2016, D296/1/1.

¹⁰ Email from the Pre-Trial Chamber addressed to the parties, "NOTIFICATION: Pre-Trial Chamber's Instructions to the parties in Case File N° 004/07-09-2009-ECCC/OCIJ (PTC31)", 31 August 2016.

¹¹ International Co-Prosecutor's Response to AO An's Application to Annul Non-Audio-Recorded Written Records of Interview, 22 September 2016, D296/1/1/2 ("Response").

¹² Reply to International Co-Prosecutor's Response to AO An's Application to Annul Non-Audio-Recorded Written Records of Interview, 27 September 2016, D296/1/1/3 ("Reply").

¹³ Case No. 003/07-09-2009-ECCC/OCIJ ("Case 003") (PTC28), Decision Related to (1) MEAS Muth's Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber With Requests for Annulment and (2) the Two Requests for Annulment Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26 ("MEAS Muth Decision"), para. 55.

¹⁴ Case 003 (PTC20), Decision on MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 22.



of the investigative or judicial actions are procedurally defective and harm the charged person's interests.¹⁵

10. The Co-Lawyers made no submission as to the admissibility of the Application.

11. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met, in the sense that the Application does not concern an order or decision from which appeal lies, is not manifestly unfounded and provides sufficient reasoned arguments. However, as to the portions of the proceedings allegedly defective and prejudicial, the Application merely points to "all written records of interview [...] that do not have a corresponding audio recording"¹⁶ and states that "[o]f the 354 [written records of interview] that the Defence has determined as being relevant to the case against AO An, at least 195 have no corresponding audio."¹⁷ The Pre-Trial Chamber cannot determine with certitude the specific written records of interview that are considered by the Co-Lawyers "offending"¹⁸ or "relevant to the case against AO An",¹⁹ nor identify amongst them the "at least" 195 records of interview which annulment is sought.

12. The Pre-Trial Chamber, which cannot be expected to consider a party's contention if it does not provide precise references,²⁰ considers the request vague. It will nonetheless, in the interests of justice and expediency, consider the general contentions as raised in the Application and, wherever appropriate, require further submissions.

13. For the foregoing reasons, the Pre-Trial Chamber finds the Application admissible.

IV – MERITS

A. Submissions

14. The Co-Lawyers submit that the practice not to audio-record witness interviews, as implemented by the 2012 Memorandum from Judges HARMON and YOU, constitutes a

¹⁵ Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC41), Decision on IENG Thirith's Appeal against the Co-Investigating judges' Order Rejecting the Request to Seize the Pre-trial Chamber with a view to Annulment of all Investigations, 25 June 2010, D263/2/6, para. 24. *See also* Case 002 (PTC30), Decision on KHIEU Samphan's Appeal against the Order on the Request for Annulment for Abuse of Process, 4 May 2010, D197/5/8, para. 24.

¹⁶ Application, para. 3.

¹⁷ Application, para. 26 [footnote omitted].

¹⁸ Application, para. 43.

¹⁹ *Ibid.*

²⁰ *See, e.g.*, Decision on Appeal against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4, para. 18.



procedural defect.²¹ They contend that the non-recording of these interviews render it impossible for the Co-Investigating Judges to ascertain whether the written records reflect accurately what occurred during the interviews²² and to verify that interviews were conducted impartially.²³ The Co-Lawyers assert that, although the audio-recording of witness interviews is discretionary pursuant to Rule 25(4), unique circumstances of the case and Rule 21 support the contention of procedural defect.²⁴ In particular, they rely on a defence transcription request, and related decision, describing instances where written records of interview were found to be inaccurate when compared with existing audio recordings and transcripts.²⁵ According to the Co-Lawyers, those deficiencies reveal “systematic and pervasive problems within the judicial investigation with respect to appropriate interview technique and procedure”, thus rebutting the presumption of regularity attached to investigative action.²⁶ They further underline the unfairness created by a dichotomous practice in the case, as well as the challenges raised by the investigation of remote facts across cultural and linguistic boundaries, which allegedly restrict the exercise of the discretion afforded to the Co-Investigating Judges.²⁷

15. The Co-Lawyers contend that this procedural defect infringes the Applicant’s right to fair and transparent proceedings, his right to adequate time and facilities for the preparation of his defence, and his right to examine witnesses against him.²⁸ Since the presumption of regularity has allegedly been rebutted, the requirements of fairness and transparency demand that the Applicant get information on the conduct of the judicial investigation and on what actually happened during the interviews.²⁹ They further assert that the policy of non-audio-recording witness interviews prevents the Applicant from accessing potentially exculpatory evidence and material necessary for the preparation of the defence,³⁰ and that it infringes his

²¹ Application, paras 2, 20-32.

²² Application, paras 20, 31.

²³ Application, para. 22.

²⁴ Application, paras 23, 28.

²⁵ Application, paras 21, 24-25 referring to Request for the Translation and Transcription of Audio Recordings and to Place Certain Documents on the Case File, 11 November 2015, D274; Decision on AO An’s Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File, 9 August 2016, D274/1.

²⁶ Application, para. 25.

²⁷ Application, para. 26-28.

²⁸ Application, paras 3, 33-41.

²⁹ Application, para. 34.

³⁰ Application, para. 36.



right to examine witnesses against him, in particular when it comes to challenging the accuracy of statements and discrepancies.³¹

16. The International Co-Prosecutor responds that the Applicant failed to rebut the presumption of reliability or to establish a procedural defect or breach of his fair trial rights³² which would justify an extraordinary remedy such as the annulment of the product of years of work.³³ He stresses that the decision as to whether to audio-record interviews is a discretionary one³⁴ and that the Applicant misunderstood the principles governing the preparation of written records of interview, which are simply required to provide a fair representation of the exchange between the investigator and witness.³⁵

17. The International Co-Prosecutor further underlines that, among the numerous alleged defects that the Applicant claimed to have identified in his prior transcription request, only a few may be found to have some degree of merit.³⁶ There is therefore no fundamental flaw or “systematic and pervasive problems with the judicial investigation” that would require heightened scrutiny as contended,³⁷ and no breach of the Applicant’s rights.³⁸ To the contrary, the evidence shows that the Case 004 investigation has been conducted to a high standard of professionalism.³⁹ The International Co-Prosecutor finally contends that the unique temporal, cultural and linguistic circumstances of the case were duly contemplated by the drafters of the Internal Rules and hence that the argument that the Co-Investigating Judges did not have discretion because of these sole circumstances should equally fail.

18. The Co-Lawyers reply that the demonstration of certain inaccuracies, from a comparative analysis between the written records of interview and their respective audio recordings, was sufficient to rebut the presumption of reliability.⁴⁰ They insist that their assertions are not speculative but based on the only available evidence since, without audio recordings, it is impossible to assess the accuracy and reliability of all written statements.⁴¹ They further submit that the time and cost spent on the investigative actions are irrelevant to

³¹ Application, paras 37-39.

³² Response, paras 1, 33.

³³ Response, paras 16-17.

³⁴ Response, para. 24.

³⁵ Response, para. 21.

³⁶ Response, paras 20-22.

³⁷ Response, paras 25, 26.

³⁸ Response, paras 30-31.

³⁹ Response, para. 18.

⁴⁰ Reply, para. 5.

⁴¹ Reply, para. 6.



the determination of annulment requests under Internal Rules 48 and 76 and should not be taken into account.⁴²

B. Discussion

19. The Pre-Trial Chamber recalls that the Internal Rules do not mandate the recording of witness interviews. Internal Rule 25(1), which makes provision for the recording of interviews where possible, concerns only the interview of a Suspect or Charged Person. In turn, Internal Rule 25(4), which governs the recording of interviews of other persons, including witnesses, reads: “[t]he Co-Prosecutors or Co-Investigating Judges *may choose* to follow the procedure in this Rule [...], in particular where the use of such procedures could assist in reducing any subsequent traumatising of a victim of sexual or gender violence, a child, an elderly person or a person with disabilities in providing their evidence”.⁴³

20. Hence the recording of witness interviews is left to the unfettered discretion of the Co-Investigating Judges, who are advised to record interviews of particularly vulnerable persons but not duty-bound. Internal Rule 55(7) only casts a duty on the Co-Investigating Judges to make a written record of every interview.

21. The Internal Rules mirror Articles 93 and 115 of the Cambodian Code of Criminal Procedure, which provide:

For each interrogation, a written record shall be established.

The written record shall be an accurate account of the interrogated person’s responses. If it is necessary, judicial police officers may use an interpreter/translator who shall take an oath according to his own religion or beliefs. The interpreter/translator shall not be chosen from among the police or military police or any person with a connection to the case.

The interrogated person shall sign or affix his finger-print to each page of the written record.

Before signing or affixing the finger-print on the written record, the interrogated person shall re-read the record. If necessary, a judicial police officer shall read the record aloud. Judicial police officers may call for an interpreter/translator. If the interrogated person refuses to sign or affix his finger-print on the written record, the judicial police officer shall so note on the written record.

⁴² Reply, para. 4.

⁴³ [Emphasis added].



22. The Pre-Trial Chamber therefore concludes, in accordance with its previous rulings⁴⁴ and that of the Trial Chamber,⁴⁵ that audio- or video-recording of witness interviews is not mandatory. In this connection, the Pre-Trial Chamber recalls the principle concerning the presumption of reliability which attaches to investigative action, including interviews of witness.⁴⁶ The presumption is rebuttable and a movant may challenge the veracity of an interview by establishing that the content of a written record had been altered and by showing that the presumption no longer holds true.⁴⁷

23. In the present case, the fact that the impugned witness interviews were not recorded does not of itself refute the presumption of reliability which attaches to the interviews. Provided that written records of the interviews were made pursuant to Internal Rule 55(7), and having regard to the foregoing principles, the Pre-Trial Chamber does not find the procedural defect established.

24. Furthermore, with regards to the scope of the two memoranda at issue, the Pre-Trial Chamber recalls that delegates executing rogatory letters shall act under the supervision of the Co-Investigating Judges.⁴⁸ Therefore, it is up to the Co-Investigating Judges to give instructions to the investigators, even *ultra legem*, to record witness interviews for instance. This was the case in both memoranda discussed by the Applicant. The 2012 Memorandum from Judges HARMON and YOU instructed not to record as a general practice, but only in the cases foreseen in Internal Rule 25(4), while the 2015 Memorandum from Judge BOHLANDER adopted “the view that audio-recording interviews is good practice as it allows transparency without compromising efficiency in the judicial investigation”. In doing so, the Co-Investigative Judges acted in accordance with the discretion they have in leading the investigation.

25. This being said, these discretionary instructions issued by the Co-Investigative Judges

⁴⁴ See, e.g., MEAS Muth Decision, paras 231-235.

⁴⁵ Case 002/19-09-2007/ECCC/TC, Decision on Defence requests concerning irregularities alleged to have occurred during the judicial investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251 (“Decision on Procedural Defect during Judicial Investigation”), para. 16; Case 002/19-09-2007/ECCC/TC, Decision on NUON Chea’s request for a Rule 35 investigation regarding inconsistencies in the audio and written records of OCIJ witness interviews, 26 March 2012, E142/3 (“Decision on Inconsistencies between Audio and Written Records”), para. 6.

⁴⁶ MEAS Muth Decision, para. 235; Case 002 (PTC34), Decision on NUON Chea’s Appeal Against OCIJ Order on Request for Transcription, 20 April 2012, D194/3/2, para. 21.

⁴⁷ MEAS Muth Decision, para. 235; Decision on Procedural Defect during Judicial Investigation, para. 22; Decision on Inconsistencies between Audio and Written Records, paras 7, 10.

⁴⁸ Internal Rule 62(3).



do not supersede the applicable law. In other words, the non-compliance with the memoranda would not constitute a procedural defect if not contradicting the Internal Rules, the Cambodian Code of Criminal Procedure or any other relevant legal disposition.

26. Finally, the Pre-Trial Chamber is not convinced that unique circumstances in Case 004 justify, under a broad interpretation of Internal Rule 21, restrictions to the Co-Investigating Judges' discretion or the annulment of all non-audio-recorded witness interviews. In particular, the allegation of "systematic and pervasive problems within the judicial investigation with respect to appropriate interview technique and procedure" is highly speculative and not capable of rebutting the presumption of reliability or establishing a procedural defect.

27. Accordingly, the Application is denied.

V – DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Application.

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

Phnom Penh, 30 November 2016

President



PRAK Kimsan

Pre-Trial Chamber

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy