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Kingdom of Cambodia
Nation Religion King

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

Royaume du Cambodge
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DECISION ON AO AN'S APPLICATION TO SEISE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF NON-AUDIO RECORDED WRITTEN RECORDS OF INTERVIEW

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 22 January 2015.
2. On 3 December 2012, CIJs Mark Harmon and You Bunleng issued instructions to all investigators in the Office of the Co-Investigating Judges (“OCIJ”), stating that it was no longer compulsory for investigators to audio or video record witness interviews, given it was not a mandatory practice under the Internal Rules (“3 December 2012 Instructions”).¹
3. On 22 September 2015, having discussed the matter with Judge You Bunleng, I issued instructions to OCIJ investigators reinstating the practice of audio-recording all witness and Civil Party interviews (“22 September 2015 Instructions”).²
4. On 29 September 2015, I issued further instructions to OCIJ investigators on the screening of civil parties and witnesses and on the format of the written records of interview (“29 September 2015 Instructions”).³
5. On 11 November 2015, the Ao An Defence (“Defence”) filed a request for the translation and transcription of audio recordings and to place certain documents on the Case File (“Transcription Request”).⁴
6. On 4 February 2016, the Defence filed an application to seize the Pre-Trial Chamber (“PTC”) with a view to annulment of all non-audio-recorded written records of interview (“Annulment Request”).⁵
7. On 9 August 2016, I issued a decision denying the Transcription Request (“Transcription Decision”).⁶

II. SUBMISSIONS

8. In the Annulment Request, the Defence submit that the OCIJ’s practice of not audio-recording witness interviews constitutes a procedural defect, as the lack of audio recordings renders it “*impossible*” for the CIJs to ascertain whether written records of interviews (“WRIs”) truthfully reflect what was stated in witness interviews.⁷
9. The Defence submit that, while the audio-recording of interviews is discretionary under Internal Rule 25(4), “*unique circumstances*” of Case 004 require that the CIJs’ discretion not to audio record interviews be restricted by the requirements

¹ Case File No. 004-D116, *Memorandum entitled “Instructions on conduct of witness interviews”*, 3 December 2012, p. 1.

² Case File No. 004-D266, *Memorandum from ICIJ to all OCIJ investigators concerning “Instructions on the recording of witness and civil party interviews”*, 22 September 2015, p. 1.

³ Case File No. 004-D269, *Memorandum from ICIJ to all OCIJ investigators concerning “Instructions on screenings of civil parties and other witnesses and on the format of the procès verbal”*, 29 September 2015.

⁴ Case File No. 004-D274, *Request for the Translation and Transcription of Audio Recordings and to Place Certain Documents on the Case File*, 11 November 2015.

⁵ Case File No. 004-D296, *Application to Seize the Pre-Trial Chamber with a View to Annulment of Non-Audio-Recorded Written Records of Interview*, 4 February 2016.

⁶ Case File No. 004-D274/1, *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.

⁷ Annulment Request, paras 2, 20, 27.



for impartial and truth-seeking investigations and for transparent proceedings.⁸ The unique circumstances alleged by the Defence are: (i) the Defence's identification in the Transcription Request of a number of inaccuracies in audio-recorded interviews which constitute instances of the judicial investigation being conducted outside the applicable legal framework and which call into question the propriety of the judicial investigation and substantive reliability of the witnesses' evidence;⁹ (ii) the issuance of the 3 December 2012 Instructions which failed to strike an appropriate balance between Ao An's rights pursuant to Internal Rule 21 and the need for expeditious proceedings;¹⁰ and (iii) the issuance of the 22 September 2015 Instructions which created an unfair dichotomous state of affairs concerning the CIJs' ability to verify the accuracy of WRIs in respect of witness interviews relevant to the allegations against Ao An.¹¹

10. The Defence assert that the deficiencies they identified in the Transcription Request revealed "*systemic and pervasive problems*" in the OCIJ's interview procedure and technique which rebut the presumption of regularity attached to OCIJ investigations.¹² In light of such alleged circumstances, any interviews that were not audio-recorded must be considered procedurally defective.¹³
11. The Defence submit that the alleged procedural defect violates Ao An's rights to fair and transparent proceedings, to adequate time and facilities for the preparation of his defence, and the right to examine witnesses against him under Article 14(3)(e) of the *International Covenant on Civil and Political Rights* ("ICCPR").¹⁴ This is on the basis that the lack of audio-recordings prevents Ao An from examining the OCIJ's conduct, from accessing potentially exculpatory evidence or other material necessary for the preparation of Ao An's defence, and from organising his defence in an appropriate way without restriction as to the possibility to put all defence arguments before the Trial Chamber.¹⁵
12. The Defence assert that annulment of all non-audio-recorded witness interviews relevant to the case against Ao An, pursuant to Internal Rule 76(2), is the only appropriate remedy in the circumstances.¹⁶ Of the 354 WRIs the Defence consider relevant to the case against Ao An, they submit that at least 195 (i.e. 55%) have no corresponding audio-recording.¹⁷

III. DISCUSSION

13. Upon being seised with an application submitted pursuant to Internal Rule 76(2), the CIJs need to be satisfied that the applications are supported by reasoned arguments making assertions that (i) there have been procedural defects, and (ii) that such defects infringe the rights of the party making the application.¹⁸ This test

⁸ Annulment Request, paras 21, 24, 26.

⁹ Annulment Request, paras 21, 22, 31.

¹⁰ Annulment Request, paras 21, 25, 37.

¹¹ Annulment Request, paras 21, 23.

¹² Annulment Request, para. 22.

¹³ Annulment Request, para. 26.

¹⁴ Annulment Request, paras 3, 14, 29.

¹⁵ Annulment Request, paras 30, 32.

¹⁶ Annulment Request, paras 3, 40.

¹⁷ Annulment Request, para. 23.

¹⁸ Case File No. 002-D263/2/6, *Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations*, 25 June 2010, para. 18; Case File No. 003-D134/1/10, [REDACTED] *Decision on*



involves a determination of whether the application makes an “*arguable case*” but does not allow examination of the merits of the application.¹⁹ In assessing whether an arguable case has been made, it is appropriate for the CIJs to satisfy themselves that, “*the arguments advanced in the applications could be sustained before the Pre-Trial Chamber, by setting out the alleged procedural defects and the ensuing prejudice, if any, to the charged person.*”²⁰

14. In the Annulment Request, the Defence identify as a broad procedural defect the fact that they cannot verify the truthfulness of WRIs in Case 004 that are relevant to the allegations against Ao An where there is no corresponding audio-recording.
15. At the outset, I note it is not mandatory under the Internal Rules to audio-record all witness and civil party interviews. A decision not to audio-record such interviews would not of itself amount to a procedural defect. That said, the PTC has stated that, “*a proven violation of a right of the Charged Person, recognised in the ICCPR, would qualify as a procedural defect and would harm the interests of the Charged Person*”.²¹
16. In this instance, the broad defect alleged is the result of extrapolation from the Defence’s review in the Transcription Request of 26 WRIs, in which the Defence identified 112 alleged discrepancies between the WRIs and the audio-recordings of the interviews. I determined those allegations to be largely unfounded: my review of the 112 defects alleged in the Transcription Request found only a small number of instances of actual discrepancies between the audio-recordings and WRIs where evidence had been misrepresented or relevant evidence had been excluded from the WRI, but even in those instances I found that the discrepancies were often not of a grave or material nature.²² I concluded that the Defence had failed to establish the existence of “*numerous and egregious*” examples of “*investigative malpractice*”, and I considered the WRIs listed in the Transcription Request to be generally accurate, complete, reliable, and adherent to the rules governing WRIs at the ECCC.²³
17. I am satisfied that the Defence make reasoned arguments in support of the assertion that the non-audio recording of certain interviews in Case 004 has violated Ao An’s rights guaranteed in the ICCPR and that the Annulment Request meets the test for referral to the PTC under Internal Rule 76(2).

Appeal Against Co-Investigating Judge Harmon’s Decision on Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, para. 19.

¹⁹ *Ibid.*

²⁰ Case File No. 003-D134/1/10, [REDACTED] *Decision on Appeal Against Co-Investigating Judge Harmon’s Decision on Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action*, 23 December 2015, para. 20.

²¹ Case File No. 002-D55/1/8, *Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment*, 26 August 2008; para. 40; see also Case File No. 002-D263/2/6, *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 (D263/1)*, 25 June 2010, para. 21; Case File No. 004-D257/1/8, *Considerations on Ao An’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, 17 May 2016, para. 34.

²² Transcription Decision, paras 97-98.

²³ Transcription Decision, para. 100.



FOR THE FOREGOING REASONS, I:

- 18. **GRANT** the Annulment Request; and
- 19. **INSTRUCT** the OCIJ Greffier to forward Case File 004 to the Pre-Trial Chamber pursuant to Internal Rule 76(3).

Dated 19 August 2016, Phnom Penh



Judge Michael Bohlander
មហាស្រីកូមស៊ែបអន្តរជាតិ
International Co-Investigating Judge
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