



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Preliminaire

D343/4

*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 (PTC36)

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

**Date:** 26 April 2017

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**PUBLIC REDACTED**

**DECISION ON APPEAL AGAINST THE DECISION ON [REDACTED] TENTH REQUEST FOR INVESTIGATIVE ACTION**

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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 the Decision on ██████ Tenth Request for Investigative Action”, filed by ██████ Co-Lawyers (respectively, the “Appellant” and “Defence”) on 16 January 2017 (the “Appeal”).<sup>1</sup>

## I. INTRODUCTION

1. This Appeal concerns a decision of the International Co-Investigating Judge (the “ICIJ”) issued on 16 December 2016 partially rejecting the Appellant’s Tenth Request for investigative action (the “Impugned Decision”).<sup>2</sup>

## II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him (the “Introductory Submission”).<sup>3</sup>

3. On 27 March 2015, the ICIJ notified the Appellant of charges and granted the Defence access to the case file.<sup>4</sup>

4. On 29 September 2015, the ICIJ issued a memorandum, *inter alia*, directing all Investigators to limit screening conversations of potential witnesses or civil parties to the person’s: identity; address; and ability and willingness to give information on the topic(s) of the intended interview (the “Memorandum”).<sup>5</sup>

5. On 18 May 2016, the Defence filed before the Office of the Co-Investigating Judges (the “OCIJ”) a request, “pursuant to [Internal] Rules 21, 55(10) and 58(6)”, asking the CIJs to either: i) locate and place in the Case File allegedly missing records of interview, of names of unidentified witnesses, of details of screening conversations and of sources for assertions made by the investigators; or ii) where the above-requested information does not exist, to

<sup>1</sup> Appeal Against the Decision On ██████ Tenth Request for Investigative Action, 16 January 2017, D343/2.

<sup>2</sup> Decision on ██████ Tenth Request for Investigative Action, 16 December 2016, D311/1.

<sup>3</sup> Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1. Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

<sup>4</sup> Written Record of Initial Appearance of ██████ 27 March 2015, D242.

<sup>5</sup> 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, D269 (“Memorandum”), para. 1.



confirm the same and to place on the Case File the notes of the investigators, interpreters, analysts, transcribers or others present during reported missions (the “Tenth Request”).<sup>6</sup>

6. On 16 December 2016, the ICIJ issued the Impugned Decision informing the Defence that the Tenth Request had been performed in part and denying its remainder.<sup>7</sup>

7. On the 16 December 2016, the Co-Investigating Judges (the “CIJs”) notified the parties that they “consider that the investigation against [REDACTED] has been concluded”,<sup>8</sup> and ordered the “severance of [REDACTED] from Case 004.”<sup>9</sup>

8. On 23 December 2016, the Defence filed a Notice of Appeal against the Impugned Decision.<sup>10</sup> On 9 January 2017, the Defence filed a request to file the Appeal in English first, with the Khmer translation to follow (the “Defence Language Request”).<sup>11</sup> The Appeal was filed in English only on 16 January 2017 and in Khmer on 8 February 2017.

9. On 20 February 2017, the ICP filed their response to the Appeal (the “Response”).<sup>12</sup> The Defence did not file any reply to the Response.

### III. ADMISSIBILITY

10. The Appellant filed the Notice of Appeal in accordance with the time limit in Internal Rule 75(1). Furthermore, on 23 January 2017, having considered that: i) the Defence Language Request provided acceptable reasons; ii) the ICP did not raise any objections; and iii) the English version of the Appeal was filed as soon as 16 January 2017, the Pre-Trial Chamber granted the Defence Language Request and allowed notification of the Appeal.

<sup>6</sup> Tenth Request for Investigative Action, 18 May 2016, D311.

<sup>7</sup> Impugned Decision, paras. 151-152.

<sup>8</sup> Notice of Conclusion of Judicial Investigation Against [REDACTED], 16 December 2016, D334.

<sup>9</sup> Order for Severance of [REDACTED] from Case 004, 16 December 2016, D334/1.

<sup>10</sup> Notice of Appeal, 23 December 2016, D343.

<sup>11</sup> Request to File in English First the Appeal Against the Decision on [REDACTED] Tenth Request for Investigative Action, 9 January 2017, D343/1.

<sup>12</sup> International Co-Prosecutor’s Response to [REDACTED] Appeal Against the Decision on His Tenth Request for Investigative Action, 20 February 2017, D343/3.



11. The Pre-Trial Chamber agrees with the Appellant<sup>13</sup> that the Appeal is admissible under Internal Rule 74(3)(b), which provides in relevant part:

**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[.]

**IV. STANDARD OF REVIEW**

12. Pursuant to the Pre-Trial Chamber's jurisprudence, the 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.<sup>14</sup> 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.<sup>15</sup> For 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 discretion leading to the appealed decision being made.<sup>16</sup>

**V. MERITS**

13. The Pre-Trial Chamber, after having reviewed the Appeal, considers that it is not necessary to undertake the requested investigative actions. The opinions of the Judges of the Pre-Trial Chamber are appended.

<sup>13</sup> Appeal, paras. 13-15. See also Tenth Request, para. 1.

<sup>14</sup> See, e.g., Case 004/07-09-2009-ECCC/OCIJ ("Case 004") (PTC24) Considerations on Appeal Against Decision on ██████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3 ("Considerations on Fifth Request for Investigative Action"), para. 15.

<sup>15</sup> Considerations on Fifth Request for Investigative Action, para. 16.

<sup>16</sup> *Ibid.*



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

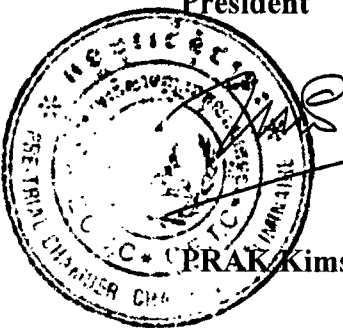
- **FINDS** the Appeal admissible;
- **DISMISSES** the Appeal.

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

**Phnom Penh, 26 April 2017**

**President**

**Pre-Trial Chamber**



*[Handwritten signature of PRAK Kimsan]*      *[Handwritten signature of Olivier Beauvallet]*      *[Handwritten signature of Ney Thol]*      *[Handwritten signature of Kang Jin Baik]*      *[Handwritten signature of Huot Vuthy]*

**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.



**OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY**

14. The National Judges of the Pre-Trial Chamber (“PTC”) are presenting their opinions concerning [REDACTED] appeal against the decision on his tenth request for investigative action.

15. The National Judges of the PTC are of the view that the ECCC was established in accordance with 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 (“Agreement”), and the Law on the Establishment of the ECCC (“ECCC Law”), and applies its Internal Rules.

16. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia’s national courts. Prosecution and judicial investigation under the national courts merely concern facts, not persons.<sup>17</sup> On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions - first, facts “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, persons “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” - are met.<sup>18</sup>

17. The National and International Co-Prosecutors disagreed over the issuance of the Third Introductory Submission in Case 004. While the International Co-Prosecutor requested to submit the Third Introductory Submission, the National Co-Prosecutor rejected it on the ground that “the suspects are not senior leaders and/or those who were most responsible.”<sup>19</sup>

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<sup>17</sup> Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

<sup>18</sup> 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.

<sup>19</sup> National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observation, 22 May 2009, para. 86(a).



The National and International Judges of the PTC also disagreed over this matter. The National Judges of the PTC supported the National Co-Prosecutor's argument.<sup>20</sup>

18. The National Judges of the PTC have previously decided that it is not necessary for the International Co-Investigating Judge to take any investigative action or any supplementary investigative action in Case 004.<sup>21</sup> Therefore, the National Judges find it unnecessary to consider any request or appeal whose subject is the same.

19. In light of the foregoing, the National Judges of the PTC reject this appeal.



President PRAK Kimsan

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Judge NEY Thol

Phnom Penh, 26 April 2017

A handwritten signature in black ink, appearing to be 'HUOT Vuthy'.

Judge HUOT Vuthy

<sup>20</sup> Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009, "[redacted] is not a senior leader of Democratic Kampuchea or among those who were most responsible for the crimes."

<sup>21</sup> Considerations on Appeal against Decision on [redacted] Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, para. 30.



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

**A. SUBMISSIONS**

*The Appeal*

20. The Defence requests the Pre-Trial Chamber to: i) overturn the parts of the Impugned Decision affected by the alleged errors of law; and to ii) order the ICIJ to place on the Case File the notes of investigators, interpreters, analysts, transcribers, or others present during the relevant ‘interviews’ listed in Annex A and Annex B, of the Tenth Request, where the ICIJ has indicated no written record of interviews (“WRIs”) or audio recordings exist.<sup>22</sup> The Defence puts forward two grounds of appeal arguing that the ICIJ has erred in law by: i) characterising the Memorandum as ‘best practice’ that ‘does not create a legal obligation’;<sup>23</sup> and ii) in denying the Defence request to place on the Case File notes of the investigators, interpreters, analysts, transcribers or others present during the screening conversations (the “request for notes”), by holding that such notes amount to ‘internal work product’ and are not subject to disclosure.<sup>24</sup>

21. In the first ground of appeal, the Defence submits that, the ICIJ’s characterization of the Memorandum as ‘best practice’ that ‘does not create a legal obligation’ is ‘at odds with the procedural law’.<sup>25</sup> According to the Defence, the “Memorandum must be seen as the means by which the ICIJ exercises his supervisory functions, as mandated by Internal Rule 62”,<sup>26</sup> and the wording of the Memorandum “constitutes an unambiguous statement of mandatory direction that must be followed from the date of issuance.”<sup>27</sup> Furthermore, the Defence argues, the ICIJ’s interpretation, of Pre-Trial Chamber’s interpretation of the Memorandum as ‘discretionary instructions’, amounts to an error of law because “[t]he discretion referred to by the [Pre-]Trial Chamber, is the ICIJ’s inherent discretion in issuing

<sup>22</sup> Appeal, para. 43.

<sup>23</sup> Appeal, paras. 25-33 referring to the Impugned Decision, para. 15 and to the Memorandum, paras. 1 and 2.

<sup>24</sup> Appeal, paras 34 - 41. See also Appeal, para. 3 referring to the Impugned Decision, para. 18.

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

<sup>26</sup> Appeal, paras 26-27.

<sup>27</sup> Appeal, paras 28-29, referring to the Memorandum, paras 1-2.





the instructions, not the investigators' discretion in following them."<sup>28</sup> Moreover, the Defence asserts that "the wording of the Memorandum where the ICIJ holds that the instructions contained within the Memorandum are to be followed 'in addition to the procedure in [Internal Rule] 55(7)' [...] suggests they are to be accorded binding status."<sup>29</sup> Lastly, the Defence submits, the wording of the Memorandum creates a legitimate expectation, on the part of the Appellant, that the instructions would be followed and "[c]hanging the nature of the procedures at the end of the investigation undermines the ability of the Defence to analyse the Case File and, therefore, participate in the investigation."<sup>30</sup> Any "other interpretation amounts to a breach of the requirement for legal certainty pursuant to Internal Rule 21"<sup>31</sup> and "the Pre-Trial Chamber's intervention is thus necessary to prevent irreparable damage to the fairness of the proceedings and [REDACTED] fair trial rights."<sup>32</sup>

22. In the second ground of appeal, the Defence contends that the reasoning, used in the Impugned Decision to support the denial of the request for notes, "amounts to a blanket assertion that any steps prior to the written record of investigative action ("WRIA") are protected by the 'internal work product' doctrine"<sup>33</sup> and that "such an approach: (1) precludes the Defence from access to information that may assist in understanding and challenging the evidence of specific witnesses; (2) prevents the Defence from examining further whether the screening conversations went beyond what is allowed; and (3) undermines the ability of the Defence to assess issues related to witness contamination."<sup>34</sup> The Defence submits that, the ICIJ's position is at odds with the jurisprudence of other international courts, according to which "the internal work product doctrine [...] is confined to what has been created by the party and its agents, [...] it has no application to the statements of witnesses."<sup>35</sup> According to

<sup>28</sup> Appeal, para. 30, referring to Case 004 (PTC31), Decision on [REDACTED] Application to Annul Non-Audio Recorded Written Records of Interview, D296/1/1/4, 30 Nov. 2016, para. 25.

<sup>29</sup> Appeal, para. 31.

<sup>30</sup> Appeal, para. 32.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Appeal, para. 34.

<sup>34</sup> Appeal, para. 34.

<sup>35</sup> Appeal, paras 35-38, citing *Eliézer Niyitegeka v. Prosecutor*, ICTR-96-14-A, 'Judgement', Appeals Chamber, 9 July 2004, paras 34-35; In the *Matter of El Sayed*, CH/AC/2011/01, 'Decision on the Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011', Appeals Chamber, 19 July 2011, paras 73, 85; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kani*, SCSL-04-16-T, 'Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rule 66 and/or 68', Trial Chamber II, 4 May 2005, para. 16.



the Defence, in the instant case, conversations that go beyond screening questions are ‘statements’ and therefore cannot be classified as ‘work product’ and must be disclosed.<sup>36</sup> The Defence further claims that the jurisprudence of the Pre-Trial Chamber, relied upon by the ICIJ in the Impugned Decision, does not provide the ICIJ with “the power to impose a blanket ban on the disclosure of information, which should and would be considered part of a WRIA, without proper examination.”<sup>37</sup> According to the Defence, the information sought in the Tenth Request “is specifically related to key evidence and its disclosure is conducive to ascertaining the truth in the investigation and may lead to exculpatory evidence.”<sup>38</sup>

### *The Response*

23. In response, the ICP asks the Pre-Trial Chamber to dismiss the Appeal.<sup>39</sup> With regards to the first ground of appeal, the ICP submits that the Appellant “ignores the fact that the [CIJs] have broad discretion in the conduct of their investigation,”<sup>40</sup> and that “the guidelines that the ICIJ provides to his staff on the conduct of the investigation do not confer on [REDACTED] the right to have the investigation conducted in any particular way”.<sup>41</sup> With regards to the second ground of appeal, the ICP contends that the Appellant fails to demonstrate how the denial of the request for notes has prejudiced his case.<sup>42</sup> According to the ICP, the Impugned Decision indicates that “investigators’ conversations with potential witnesses are recorded in WRIAs,”<sup>43</sup> and the Appellant “has not shown that there is any reason to believe that the summaries of screening conversations contained in WRIAs are incomplete or inaccurate.”<sup>44</sup> Moreover, the ICP submits, the ICIJ’s statement in the Impugned Decision that he will not use any information contained in summaries of screening conversations for inculpatory purposes, is a “further safeguard against prejudice.”<sup>45</sup>

<sup>36</sup> Appeal. Para. 39.

<sup>37</sup> Appeal, para. 40.

<sup>38</sup> *Ibid.*

<sup>39</sup> Response, para. 5.

<sup>40</sup> Response, para. 2 *referring to* Appeal, paras 24-33.

<sup>41</sup> Response, para. 2.

<sup>42</sup> Response, para. 4 *referring to* the Appeal, paras. 24, 34-41.

<sup>43</sup> Response, para. 4 *referring to* the Impugned Decision, para. 16.

<sup>44</sup> Response, para. 4.

<sup>45</sup> *Ibid.*



**B. DISCUSSION**

24. To start with, the Undersigned Judges note that the scope of the Appeal is limited only to Annexes A and B of the Tenth Request.<sup>46</sup> The Undersigned Judges shall now consider each ground of appeal in turn.

**1. The instructions contained within the Memorandum**

25. In the Tenth Request, with respect to Annexes A and B, the Defence asked the OCIJ to either: i) locate and place the corresponding WRIs and audio files on the Case File, and identify an individual in question; or ii) where the information requested above does not exist, to confirm the same and to place on the Case File the notes taken by investigators, interpreters, analysts, transcribers or others present during reported missions. In the Impugned Decision, the ICIJ confirmed the non existence of corresponding WRIs and audio recordings, identified the individuals as requested, and rejected the request to place the notes on the Case File.

26. In the Appeal, the Defence seeks to overturn parts of the Impugned Decision, which they argue, are affected by errors in law “in characterizing the Memorandum as ‘best practice’ that ‘does not create a legal obligation’.”<sup>47</sup> An examination of the Impugned Decision reveals that ICIJ’s characterization of the Memoandum as ‘best practice’ was only aimed at explaining that the “memorandum does not create a legal obligation for investigators or *affect the procedural validity* of investigative actions.”<sup>48</sup> Hence, the discussion, over the legal effect of the Memorandum, was not the *ratio decidendi* in deciding whether to grant Defence’s requests. The ICIJ nonetheless did perform the requested investigative actions, except for the placement of the ‘notes’ on the Case File. The Undersigned Judges find that, while putting forward an argument alleging error in law by the ICIJ - in his characterization of the Memorandum – nowhere in the Appeal does the Defence explain how the alleged error, if confirmed, would invalidate the ICIJ’s decision to deny Defence’s request for placement in the Case File of the ‘notes.’

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<sup>46</sup> Appeal, para. 43.

<sup>47</sup> Appeal, para. 25 referring to Impugned Decision, para 15.

<sup>48</sup> Impugned Decision, para. 15.



27. Therefore, the Undersigned Judges conclude that, in this ground of appeal, the Defence has not presented a complete case for the Pre-Trial Chamber to set aside the Impugned Decision.

28. The Undersigned Judges would dismiss the first ground of appeal.

## 2. The notes taken by the OCIJ's Investigators

29. At the outset, the Undersigned Judges note that, unlike at the international tribunals where investigations are carried out by the parties,<sup>49</sup> at the ECCC the investigations are carried out by *judicial* authorities, such as the Investigating Judges,<sup>50</sup> who are required by law to “conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.”<sup>51</sup> Whereas in those other legal systems, the applicable rules require *the parties* to disclose evidence to each other,<sup>52</sup> at the ECCC, the Investigating *Judges* have wide discretion in deciding what investigatigative action is useful for the conduct of the investigation and what evidence is placed in the Case File.<sup>53</sup> It is important to recall that, at the ECCC, evidence for use at trial is placed on the Case File, which is the only procedural record, and while the rules allow for the parties to file requests for investigative action to the OCIJ, there are no rules providing for any procedural right to request disclosure. Therefore, any law and practice, relevant to disclosure before those other international tribunals, is not comparable to the law and practice, relevant to Defence’s participation in the investigation and access to the Case File, at the ECCC.

30. In this regard, the Undersigned Judges find no merit in Defence’s request to disclose “conversations between investigators, witnesses and civil parties that go beyond screening

<sup>49</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute, Article 18; International Criminal Tribunal for Ruanda (ICTR) Statute, Article 15; Special Tribunal for Lebanon (STL) Statute, Article 11; Special Court for Sierra Leone (SCSL) Statute, Article 15; Rome Statute of the International Criminal Court (ICC), Article 54.

<sup>50</sup> 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, 6 June 2003 (“ECCC Agreement”), Article 5(1); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), (“ECCC Law”), Article 23 new.

<sup>51</sup> ECCC Agreement, Article 5(1); ECCC Law, Article 25. Internal Rule, 55(5).

<sup>52</sup> ICTY Rules of Procedure and Evidence (RPEs), Part Five, Section Four, Rules 66-70; ICTR RPEs, Part Five, Section 3, Rules 66-70; STL RPEs, Part Five, Section Seven, Rules 110 - 121; SCSL RPEs, Part five, Section Three, Rules 66-70; ICC RPEs, Chapter IV, Section II, Rules 76 – 84.

<sup>53</sup> Internal Rule 55(10).



questions” because “they are ‘statements’.”<sup>54</sup> Whereas the rules applicable before the international tribunals stipulate that some ‘witness statements’ must be subject to disclosure,<sup>55</sup> no such rules exist or apply within the ECCC’s legal context. The Undersigned Judges recall that, at the ECCC, regardless whether the sought information concerns witness statements, the only criteria a party, requesting investigative action, has to satisfy are: (i) the precision and (ii) the *prima facie* relevance requirements.<sup>56</sup> The Pre-Trial Chamber has established that “it is implicit from the text of Internal Rule 55(10), which shall be read in conjunction with Internal Rule 58(6), that a party who files a request under Internal Rule 55(10) shall identify specifically the investigative action requested and explain the reasons why he or she considers the said action to be necessary for the conduct of the investigation”.<sup>57</sup> Furthermore, where a request for investigative action is also based on the Co-Investigating Judges duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence, it is not sufficient for the Defence to only refer to the documents as “relevant” and “necessary to the defence” and merely assert that they contain exculpatory evidence without any further explanation as to how they may suggest innocence or mitigate the personal responsibility of a Charged Person.<sup>58</sup>

31. The Undersigned Judges note that, with respect to Annex B of the Tenth Request, the ICIJ has already addressed the requests for names of individuals.<sup>59</sup> As regards the other requests, in Annex B, for records of potential witnesses who, according to the Defence, may

<sup>54</sup> Appeal, para. 39.

<sup>55</sup> ICTY & ICTR RPEs, Rule 66(A)(ii), SCSL RPEs, Rule 66(A)(i), STL RPEs, Rule 110(A)(i), ICC RPEs, Rule 76.

<sup>56</sup> Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC63), Decision on the Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. KHIEU Samphan’s Real Activity’, 7 July 2010, D370/2/11, para. 22.

<sup>57</sup> Case 002 (PTC24), 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 (Decision on the SMD), para. 44 and footnote 56.

<sup>58</sup> Case 002 (PTC49), Decision on the Appeal Against Order on Nuon Chea’s Request for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for KHIEU Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/1/5, para. 21; Case 002 (PTC54), Decision on the Appeal Against Order on NUON Chea’s Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/2/2, para. 21.

<sup>59</sup> Impugned Decision, paras. 68 – 81 referring to Annex B.



have exculpatory evidence, the Undersigned Judges observe that, in the Impugned Decision, the ICIJ also confirmed the existence in the Case File of WRIs of such witnesses.<sup>60</sup>

32. Concerning Annex A of the Tenth Request, the Undersigned Judges firstly note that, in the Impugned Decision, the ICIJ has addressed each Defence request for records of potential witnesses who may have exculpatory evidence,<sup>61</sup> and has disposed of them on various grounds, including: i) because, at the conclusion of the investigation, the ICIJ intends to exclude all allegations relating to crime sites in Sector 42;<sup>62</sup> ii) because, for expressed reasons, the ICIJ was not persuaded by the Defence request;<sup>63</sup> iii) because the ICIJ has interviewed the witness in question;<sup>64</sup> and iv) because the ICIJ takes note of, and reassures that in his assessment he will take into account, the information of exculpatory value.<sup>65</sup> Secondly, the Undersigned Judges find that, in the Appeal, apart from putting forward arguments of a general and hypothetical nature,<sup>66</sup> the Defence does not concretely challenge any of ICIJ's said dispositions.

33. To conclude, the Undersigned Judges are not persuaded that the Impugned Decision contains errors that would invalidate it.

34. The Undersigned Judges would also dismiss the second ground of appeal.

35. Accordingly, the Undersigned Judges dismiss the Appeal in its entirety.

**Phnom Penh, 26 April 2017**



**Judge Olivier BEAUVALLET**



**Judge Kang Jin BAIK**

<sup>60</sup> Impugned Decision, paras. 74, 75 and 77 referring to Annex B, entries 2 and 3.

<sup>61</sup> See Tenth Request, para. 40.

<sup>62</sup> Impugned Decision, paras. 30 (referring to Annex A, entry 4), 47 (referring to Annex A, entry 23), 59-60 (referring to Annex A, entry 49), 62 (referring to Annex A, entry 50).

<sup>63</sup> Impugned Decision, paras. 32 (referring to Annex A, entry 6), 40 (referring to Annex A, entry 12), 45 (referring to Annex A, entry 17), 55 (referring to Annex A, entry 43), 62 (referring to Annex A, entry 50), 64-65 (referring to Annex A, entry 52).

<sup>64</sup> Impugned Decision, paras. 41 (referring to Annex A, entry 13), 67 (referring to Annex A, entry 66).

<sup>65</sup> Impugned Decision, paras. 34 (referring to Annex A, entry 7).

<sup>66</sup> Appeal, para. 40: "information which was sought in the Tenth Request is specifically related to key evidence and its disclosure is conducive to ascertaining the truth in the investigation and may lead to exculpatory evidence."

