



**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

D350/1/1/4

*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° 004/2/07-09-2009-ECCC/OCIJ (PTC43)

**THE PRE-TRIAL CHAMBER**

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

**Date:** 5 September 2017

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**PUBLIC REDACTED**

**DECISION ON APPEAL AGAINST THE DECISION ON [REDACTED] APPLICATION TO ANNUL THE ENTIRE INVESTIGATION**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

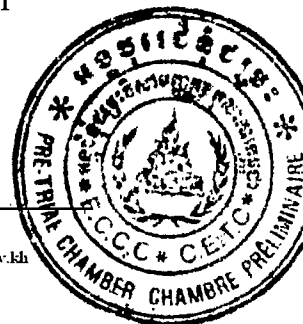
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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of an “Appeal Against the Decision on [REDACTED] Application to Annul the Entire Investigation”, filed by the Co-Lawyers for [REDACTED] (respectively the “Co-Lawyers” and the “Appellant”) on 8 June 2017 (the “Appeal”).<sup>1</sup>

## I. INTRODUCTION

1. This Appeal concerns a decision issued by the International Co-Investigating Judge (the “ICIJ”) denying the Appellant’s application to annul the entire investigation (the “Impugned Decision”).<sup>2</sup>

## II. PROCEDURAL HISTORY

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

3. On 16 December 2016, the Co-Investigating Judges (the “CIJs”) issued a Notice of Conclusion of the judicial investigation against the Appellant,<sup>4</sup> followed by a second Notice of Conclusion on 29 March 2017.<sup>5</sup>

4. On 3 May 2017, the Co-Lawyers filed an application to seise the Pre-Trial Chamber with a view to annulment of the entire investigation pursuant to Internal Rule 76(2) (the “Application”).<sup>6</sup> On 8 May 2017, the ICIJ issued the Impugned Decision.<sup>7</sup> On 11 May 2017, the Co-Lawyers filed a Notice of Appeal against the Impugned Decision.<sup>8</sup> On 31 May 2017,

<sup>1</sup> Appeal Against the Decision on [REDACTED] Application to Annul the Entire Investigation, 8 June 2017, D350/1/1/2 (“Appeal”), notified in English on 16 June 2017 and in Khmer on 27 June 2017.

<sup>2</sup> Decision on [REDACTED] Application to Annul the Entire Investigation, 8 May 2017, D350/1 (“Impugned Decision”), notified in English on 8 May 2017 and in Khmer on 23 May 2017.

<sup>3</sup> Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1; Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

<sup>4</sup> Case 004, Notice of Conclusion of Judicial Investigation Against [REDACTED], 16 December 2016, D334.

<sup>5</sup> Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”), Second Notice of Conclusion of Judicial Investigation Against [REDACTED], 29 March 2017, D334/2.

<sup>6</sup> Application to Seise the Pre-Trial Chamber with a View to Annulment of the Investigation, 3 May 2017, D350

<sup>7</sup> See *supra* footnote 2.

<sup>8</sup> Notice of Appeal Against Decision on [REDACTED] Application to Annul the Entire Investigation, 11 May 2017, D350



the Co-Lawyers filed a request to file the Appeal in English first, with the Khmer translation to follow.<sup>9</sup> The Appeal was filed in English only on 8 June 2017 and in Khmer on 27 June 2017.<sup>10</sup> The International Co-Prosecutor (the “ICP”) filed his Response on 7 July 2017.<sup>11</sup> The Co-Lawyers did not file a reply to the Response.

5. On 19 May 2017, the ICIJ filed an Internal Rule 66(4) Forwarding Order (the “Forwarding Order”),<sup>12</sup> against which the Co-Lawyers filed a notice of appeal on 29 May 2017<sup>13</sup> and their submissions on appeal on 16 June 2017.<sup>14</sup>

### III. ADMISSIBILITY

6. The Co-Lawyers submit that the Appeal is admissible under Internal Rule 74(3)(g),<sup>15</sup> and further state that the right to appeal is confirmed in Internal Rule 76(2).<sup>16</sup> The ICP does not contest the admissibility of the Appeal.<sup>17</sup> The Pre-Trial Chamber finds that the Notice of Appeal and Appeal were filed within the timeframes prescribed in Internal Rules 75(1) and (3) respectively and that the Appeal is admissible under Internal Rule 74(3)(g).

### IV. MERITS

#### A. Submissions

7. The Co-Lawyers request the Pre-Trial Chamber to: i) overturn the Impugned Decision; ii) consider the Application on its merits; and iii) hold that the Forwarding Order cannot be lawfully issued until the determination of the Appeal.<sup>18</sup> They put forward two main

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D350/1/1, notified on 12 May 2017.

<sup>9</sup> Request to File in English First the Appeal Against the Decision on [REDACTED] Application to Annul the Entire Investigation, 31 May 2017, D350/1/1/1.

<sup>10</sup> See *supra* footnote 1.

<sup>11</sup> International Co-Prosecutor’s Response to [REDACTED] Appeal Against the Decision on his Application to Annul the Entire Investigation, 7 July 2017, D350/1/1/3 (“Response”), notified on 10 July 2017.

<sup>12</sup> Case 004/2, Forwarding Order Pursuant to Internal Rule 66(4), 19 May 2017, D351 (“Forwarding Order”).

<sup>13</sup> Case 004/2, Notice of Appeal Against Co-Investigating Judges’ Forwarding Order Pursuant to Internal Rule 66(4), 29 May 2017, D351/2, notified on 30 May 2017.

<sup>14</sup> Case 004/2, Appeal Against Internal Rule 66(4) Forwarding Order, 16 June 2017, D351/2/2, notified in English on 20 June 2017 and in Khmer on 17 July 2017.

<sup>15</sup> Appeal, paras 22, 24.

<sup>16</sup> Appeal, para. 23.

<sup>17</sup> Response, para. 9.

<sup>18</sup> Appeal, para. 62.



arguments, namely that: A) The ICIJ erred in law and/or fact in finding that the Application was “manifestly unfounded” (the “First Argument”);<sup>19</sup> and B) The ICIJ erred in finding that it is not necessary to wait until the determination of this Appeal to forward the case to the Co-Prosecutors (the “Second Argument”).<sup>20</sup>

8. The First Argument is based on three grounds, including: i) The ICIJ’s ruling that the alleged defect has already been sanctioned by the Pre-Trial Chamber is based on errors of fact and/or law because, the violation raised in the Application has never been put before the Pre-Trial Chamber prior to this filing, has never expressly been considered by the Chamber and, in any event, *obiter dicta* in minority opinions do not amount to binding decisions;<sup>21</sup> ii) The ICIJ’s finding that the alleged violation of ██████ rights does not qualify as a defect for the purposes of an Internal Rule 76 application is based on errors of fact and/or law because “the violation of an [I]nternal [R]ule and/or [rights under the International Covenant on Civil and Political Rights] amounts to a defect for the purposes of [a Rule] 76 application”;<sup>22</sup> and iii) The ICIJ’s finding that the alleged violation cannot justify an application to annul the entire investigation is based on errors of fact and/or law because the Application “raises an arguable case for the existence of a violation which has affected the fairness of the entire investigation.”<sup>23</sup>

9. In the Second Argument, the Co-Lawyers assert that, in finding that it is not necessary to wait until the determination of this Appeal to forward the case to the Co-Prosecutors, the ICIJ “failed to consider that this appeal raises an issue of fundamental importance – that of the correct interpretation on the binding nature of separate opinions by [Pre-Trial Chamber] judges”, which may require the parties to modify their submissions.<sup>24</sup>

10. In his Response, the ICP requests the Pre-Trial Chamber to reject the Appeal, the request for stay of the Forwarding Order and the Application in their entirety.<sup>25</sup> The ICP

<sup>19</sup> Appeal, paras 39-55.

<sup>20</sup> Appeal, paras 56-59.

<sup>21</sup> Appeal, paras 40-51 *referring to* Impugned Decision, paras 7-8.

<sup>22</sup> Appeal, paras 52-54.

<sup>23</sup> Appeal, para. 55 *referring to* Impugned Decision, paras 8-9, 14.

<sup>24</sup> Appeal, paras 56-58.

<sup>25</sup> Response, para. 24.



submits that the ICIJ “correctly decided not to seise the [Pre-Trial Chamber] with the [...] Application on the basis that it is ‘manifestly unfounded’.”<sup>26</sup> The ICP asserts that the Application “discloses no identifiable procedural defect”<sup>27</sup> because it is characterised as a “request to annul the entire investigation” to which the Pre-Trial Chamber has already responded.<sup>28</sup> The ICP argues that in essence the Application is a complaint against ICIJ’s decisions denying particular investigative requests, which being open to appeal, are not amenable to the annulment procedure.<sup>29</sup> The ICP adds, the Appellant is “long out of time to appeal those decisions”<sup>30</sup> and that in other appeals, the Co-Lawyers already argued that “the ICIJ erred in setting the specificity and relevance thresholds prohibitively high in light of the restrictions placed on [REDACTED] ability to conduct investigations,”<sup>31</sup> which argument has been considered by Pre-Trial Chamber Judges.<sup>32</sup>

11. The ICP further submits that the Internal Rules do not require the CIJs “to suspend the issuance of a forwarding order simply because a Party has requested annulment of investigative actions”<sup>33</sup> and that “[Internal] Rule 76(2) demands only that the CIJs rule on annulment requests before issuing a Closing Order [and] Rules 66(2)-(4) only require that appeals against decisions rejecting requests for investigative action, not annulment requests, be heard before issuance of a Rule 66(4) forwarding order.”<sup>34</sup>

## B. Discussion

### *Criteria to be applied by the Co-Investigating Judges:*

12. In accordance with Internal Rule 48 and the jurisprudence of the Pre-Trial Chamber, the CIJs must consider applications to seise the Pre-Trial Chamber with a view to annulment

<sup>26</sup> Response, para. 10.

<sup>27</sup> Response, para. 12.

<sup>28</sup> *Ibid.* referring to Pre-Trial Chamber’s jurisprudence in Case 002 stating that “the annulment procedure [...] is not designed to nullify investigations in general”.

<sup>29</sup> Response, paras 13-14.

<sup>30</sup> Response, para. 14.

<sup>31</sup> Response, para. 15 referring to Appeal, footnote 70.

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

<sup>33</sup> Response, para. 22.

<sup>34</sup> *Ibid.*



in two respects: first, as to whether the application identifies a procedural defect, and second, as to whether the application identifies the prejudice caused by such defect to the applicant.<sup>35</sup>

13. Faced with appeals, brought under Internal Rule 74(3)(g) against OCIJ decisions issued pursuant to Internal Rule 76(2), the Pre-Trial Chamber had occasions to introduce the “arguable case” criterion when defining the test which the CIJs must satisfy<sup>36</sup> and considered that OCIJ’s “determination as to whether a case is ‘arguable’ amounts precisely to ascertaining that the request is not ‘manifestly unfounded’ within the meaning of Internal Rule 76(4). A request is ‘manifestly unfounded’ only where it is particularly *evident or very apparent* that it has no legal or factual foundation and hence no prospect of success. Further, the Chamber recalls that the [CIJs] must assess only whether the request *prima facie* or *on the face of it* sets forth a ‘reasoned argument’ which asserts procedural defect and prejudice, but [must] not adjudge the grounds advanced in the request for annulment.”<sup>37</sup> Hence, “a determination that an ‘arguable case’ was made presupposes only that the [CIJs] satisfy themselves that: (1) the request *prima facie* sets forth a reasoned argument; and (2) the request is not manifestly unfounded.”<sup>38</sup>

*The Standard for Review of OCIJ decisions:*

<sup>35</sup> Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC28), Decision Related to (1) ██████████ Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) The Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26 (“Decision on Nine Applications”), para. 38 referring to Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC06), Decision on NUON Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 23; 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 (D263/1), 25 June 2010, D263/2/6 (“IENG Thirith Decision”), para. 18; Case 003 (PTC20), 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, D134/1/10, para. 19.

<sup>36</sup> Decision on Nine Applications, para. 39 referring to Case 002 (PTC72), Decision on IENG Sary’s Appeal Against the OCIJ’s Order Rejecting IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen HEDER & David BOYLE and IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 30 November 2010, D402/1/4 (“IENG Sary Decision”), para. 19 referring to IENG Thirith Decision, para. 17.

<sup>37</sup> Decision on Nine Applications, para. 40 referring to IENG Sary Decision, para. 18.

<sup>38</sup> Decision on Nine Applications, para. 41.



14. Pursuant to the Pre-Trial Chamber's jurisprudence, the OCIJs' 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>39</sup>

*The Case at hand:*

15. The Co-Lawyers submit that the ICIJ's finding, that the Application is "manifestly unfounded", "hinges on the ICIJ's erroneous assessment that the defect or violation raised in the Annulment Application has been 'sanctioned' by the [Pre-Trial Chamber]."<sup>40</sup> Having looked at the Impugned Decision, the Pre-Trial Chamber observes that the ICIJ did not rely exclusively on the finding that "the [Co-Lawyers] ask the [Pre-Trial Chamber] to reconsider its view". Rather, this finding is an isolated part of the whole reasoning provided in the Impugned Decision. More importantly, the Impugned Decision also found that: "the Defence have *neither identified a procedural defect regarding a particular investigative act, nor regarding a part of the proceedings* within the meaning of [Internal] Rule 76";<sup>41</sup> and that "[t]he reference made in the Application to a previous decision by the [Pre-Trial Chamber] is [...] misplaced [and] omits one important sentence [that] *annulment procedure [...] is 'not designed to nullify investigations in general [...]'*";<sup>42</sup> and concluded that: "the *legal basis for an annulment of the entire investigation is already manifestly lacking*";<sup>43</sup> and that "[s]hould the [Pre-Trial Chamber] decide to annul the investigation in its entirety[...] I see *no real prospect* of that occurring".<sup>44</sup>

16. The Pre-Trial Chamber, therefore, finds that: i) ICIJ's finding that the Application is "manifestly unfounded" does not "hinge" on his statement that the defect or violation raised in the Application has been "sanctioned" by the Pre-Trial Chamber; and that ii) ICIJ's finding was rather based on determinations that the Application has, neither *prima facie* set forth a

<sup>39</sup> See, e.g., Case 004 (PTC24), Considerations on Appeal Against Decision on ██████████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, para. 15.

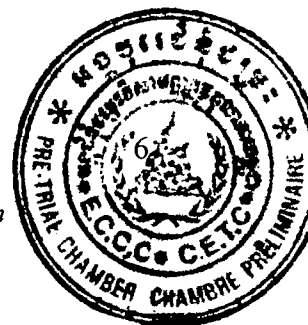
<sup>40</sup> Appeal, para. 40.

<sup>41</sup> Impugned Decision, para. 8 (emphasis added).

<sup>42</sup> Impugned Decision, para. 9 referring to IENG Thirith Decision, para. 24 (emphasis added).

<sup>43</sup> Impugned Decision, para. 13 (emphasis added).

<sup>44</sup> Impugned Decision, para. 14 (emphasis added).



reasoned argument by asserting procedural defect and prejudice, nor made a request that has apparent legal or factual foundations, which is clearly in accordance with Internal Rule 48 and the jurisprudence of the Pre-Trial Chamber as regards criteria to be applied by the CIJs.

17. The Pre-Trial Chamber concurs with ICIJ's findings and conclusion in the Impugned Decision in that by challenging only ICIJ's legal view, as opposed to challenging parts of the investigation, the Co-Lawyers have failed to put forward a legally or factually founded argument for a procedural defect.

18. Furthermore, the Pre-Trial Chamber recalls that it has unanimously dismissed<sup>45</sup> another appeal filed against an ICIJ Decision that rejected the Co-Lawyers' substantially same argument, namely that: "[t]he OCIJ cannot on the one hand severely curtail the defence's ability to gather information, and on the other hand, deny the defence's investigative requests on the basis that such information is missing. This situation *makes it impossible* for the defence to participate effectively in the investigation and undermines his right to a fair process."<sup>46</sup> Consequent upon that unanimous dismissal of the appeal, the ICIJ Decision denying the investigative requests stands. The Pre-Trial Chamber is not persuaded by the Co-Lawyers' argument that the alleged issue of "interplay" between ICIJ's interpretation of the standard for investigative requests and the ban on the Defence conducting its own investigations,<sup>47</sup> or of "irreconcilability" of the two positions<sup>48</sup> is newly raised by this Application.<sup>49</sup> In the instant Application, the Co-Lawyers raise in essence the same as their conclusive argument in the previous appeal, but the relief requested is now differently termed as a request for the annulment of the entire investigation. An application for annulment of the entire investigation is not the proper avenue for challenging ICIJ's alleged errors in law made in decisions rejecting requests for investigation.

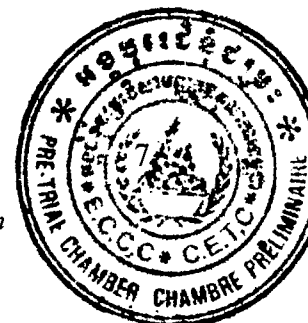
<sup>45</sup> Case 004/2 (PTC33), Decision on Appeal Against the Decision on ██████████ Sixth Request for Investigative Action, 16 March 2017, D276/1/1/3 ("Decision on Sixth Request Appeal"), p. 8 (Disposition). *See also* Decision on Sixth Request Appeal, para. 24: "considering that it is not necessary to undertake the requested investigative actions."

<sup>46</sup> Case 004, Appeal Against the Decision on ██████████ Sixth Request for Investigative Action, 9 November 2016, D276/1/1/1, para. 32 (Conclusion and Requested Relief) (emphasis added).

<sup>47</sup> Appeal, paras 42, 53.

<sup>48</sup> Appeal, para. 42.

<sup>49</sup> Appeal, paras 42, 54.





19. Thus, the Pre-Trial Chamber is not convinced by the Co-Lawyers' First Argument.

20. The Pre-Trial Chamber further agrees with the ICIJ, that it was not necessary to wait until the determination of this Appeal to forward the case to the Co-Prosecutors.<sup>50</sup> The issue raised in the Appeal, regarding the interpretation on the binding nature of opinions by Pre-Trial Chamber Judges, is not determinative to the Impugned Decision<sup>51</sup> and to the final submissions by parties. Moreover, as the ICP also states, the Pre-Trial Chamber notes that Internal Rules 66(1)-(4) require that only appeals against decisions rejecting requests for investigative action be heard before the issuance of a Rule 66(4) Forwarding Order. Annulment requests, on the other hand, can be disposed of "before the Closing Order".<sup>52</sup> Therefore, the procedural fairness was not put at stake when the ICIJ issued the Forwarding Order. The Pre-Trial Chamber finds no merit in the Co-Lawyers' Second Argument, as well.

21. In conclusion, the Pre-Trial Chamber dismisses the Appeal in its entirety.

**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, 5 September 2017

President

Pre-Trial Chamber



*[Handwritten signature of PRAK Kimsa]*  
PRAK Kimsa

*[Handwritten signature of Olivier BEAUVALLET]*  
Olivier BEAUVALLET

*[Handwritten signature of NEY Thol]*  
NEY Thol

*[Handwritten signature of Kang Jin BAIK]*  
Kang Jin BAIK

*[Handwritten signature of HUOT Vuthy]*  
HUOT Vuthy

<sup>50</sup> See Impugned Decision, para. 14.

<sup>51</sup> See *supra* para. 15.

<sup>52</sup> Internal Rule 76(2).