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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 Préliminaire

D298/2/1/3

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 No.: 004/1/07-09-2009-ECCC/OCIJ (PTC28)

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

Date: 27 October 2016

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(PUBLIC REDACTED)

CONSIDERATIONS ON [REDACTED] APPLICATION FOR ANNULMENT OF TRANSCRIPTS AND WRITTEN RECORDS OF WITNESSES' INTERVIEWS

Co-Prosecutors

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Nicholas KOUMJIAN

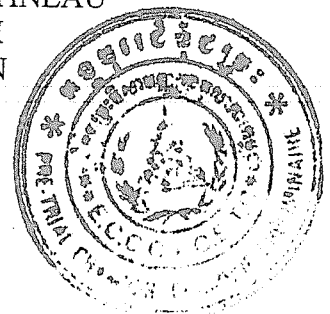
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia is seised of an application for annulment, entitled “██████████ Application to Seize the Pre-Trial Chamber with a View to Annuling Transcripts and Written Records of Witnesses’ Interviews” and dated 17 February 2016 (“Application for Annulment”),¹ which was filed by ██████████ Co-Lawyers (the “Co-Lawyers” and the “Applicant”, respectively).

I – INTRODUCTION

1. The Application for Annulment was in part forwarded to the Pre-Trial Chamber by the International Co-Investigating Judge on 9 May 2016² under Internal Rule 76(3), having regard to alleged falsification of four investigative actions relating to Witness ██████████³ and two written records of interview of Witness ██████████.⁴

II – BACKGROUND

2. On 7 September 2009, the Acting International Co-Prosecutor forwarded to the Office of the Co-Investigating Judges the Third Introductory Submission alleging that the Applicant is responsible for crimes within the jurisdiction of the Extraordinary Chambers.⁵ Further allegations were raised in two Supplementary Submissions.⁶

3. On 10 September 2011, Witness ██████████ allegedly told DC-Cam staff that he was contacted by three individuals⁷ following his interview by International Co-Investigating Judge BLUNK on 29 July 2011.⁸

¹ ██████████ Application to Seize the Pre-Trial Chamber with a View to Annuling Transcripts and Written Records of Witnesses’ Interviews, 17 February 2016, D298 (“Application for Annulment”).

² Decision on ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Transcripts and Written Records of Interviews, 9 May 2016, D298/2 (“Referral Decision”).

³ Written Record of Interview of Witness ██████████, 25 August 2011, D85/5.1.4.2; Written Record of Interview of Witness ██████████, 2 September 2011, D101/1.1; CD Recording of Interview of Witness ██████████, 2 September 2011, D101/1.1R; Transcript of Interview of ██████████, placed on the case file on 4 May 2012, D85/4.1.5. *See* Annex A of the Referral Decision.

⁴ Written Record of Interview of Witness ██████████, 12 January 2015, D219/140 (Written Record of Interview dated 12 January 2015); Written Record of Interview of Witness ██████████ dated 13 January 2015, D219/141. *See* Annex A of the Referral Decision.

⁵ 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.

⁶ Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65; Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.

⁷ DC-Cam, Interviews with ██████████. Field trip note by: Long Dany, 10-11 September 2011, available at www.dccam.org and placed on the case file as document number D115/1.1 (“DC-Cam Field Trip Note”). *See also* Referral Decision, para. 4 and footnote 5.



4. On 14 September 2011, International Co-Investigating Judge BLUNK, having “reason to believe” that persons may have tried to influence, among others, Witness ██████████ in the course of an off-the-record interview,⁹ decided to open an internal investigation under Internal Rule 35(2)(b) for interference with the administration of justice. The Co-Investigating Judge issued three rogatory letters delegating the mission of investigating the interference, dated 19 September 2011,¹⁰ 20 January 2012 (Rogatory Letter dated 20 January 2012)¹¹ and 19 April 2012,¹² respectively.

5. On 22 September 2011, a substantive rogatory letter dated 29 August 2011 delegating the mission of interviewing, among others, Witness ██████████ (“Rogatory Letter dated 29 August 2011”)¹³ was placed on the case file, along with a report of its execution,¹⁴ as well as a written record of interview of the witness, dated 2 September 2011 (“Written Record of Interview dated 2 September 2011”).¹⁵

6. With respect to the investigation into the interference with the administration of justice, an investigator of the Office of the Co-Investigating Judges submitted on 9 April 2012 a report of the execution of the Rogatory Letter dated 20 January 2012 (“Investigation Report”).¹⁶ In this connection, an unsigned written record of interview of ██████████ dated 25 August 2011 (“Written Record of Interview dated 25 August 2011”)¹⁷ was placed on the case file.

7. On 4 May 2012, Reserve International Co-Investigating Judge KASPER-ANSERMET declined jurisdiction and referred the results of his investigation into the interference with the administration of justice to the Office of the Royal Prosecutor of the Municipal Court of Phnom Penh.¹⁸

⁸ Written Record of Interview of Witness ██████████, 29 July 2011, D43.

⁹ Decision to Open an Investigation for Interference with the Administration of Justice under Internal Rule 35 of the ECCC, 14 September 2011, D85 (“Decision to Open an Investigation”).

¹⁰ Rogatory Letter dated 19 September 2011, D85/1.1. See also Decision to Correct the Rogatory Letter dated 19 September 2011, 6 October 2011, D85.1.

¹¹ Rogatory Letter, 20 January 2012, D85/2, amended by Rogatory Letter dated 17 April 2012, D85/2/1.

¹² Rogatory Letter, 19 April 2012, D85/3.

¹³ Rogatory Letter, 29 August 2011, D101.

¹⁴ Report of the Execution of Rogatory Letter, 3 September 2011, D101/1.

¹⁵ See *supra* footnote 3.

¹⁶ Report of the Execution of Rogatory Letter, 9 April 2012, D85/5.1.1 (“Investigation Report”).

¹⁷ See *supra* footnote 3.

¹⁸ Decision to Refer Interference with the Administration of Justice to the Relevant Authorities of the Kingdom of Cambodia, 4 May 2012, D85/8 (“Decision to Defer to Royal Prosecutor”).



8. On 3 March 2015, the International Co-Investigating Judge decided to charge the Applicant *in absentia* in Case 004.¹⁹
9. On 18 December 2015, the International Co-Investigating Judge informed the parties that the judicial investigation against the Applicant had been concluded.²⁰
10. On 5 February 2016, the Co-Investigating Judges severed the charges against the Applicant from Case 004.²¹
11. On 17 February 2016, the Applicant's Co-Lawyers filed their Application for Annulment, followed by an *addendum* on 3 March 2016 (the "Addendum").²²
12. On 9 May 2016, the International Co-Investigating Judge forwarded to the Pre-Trial Chamber the portion of the Application for Annulment concerning allegations of falsification of procedural acts relating to the interview of [REDACTED] and [REDACTED].²³
13. On 26 May 2016, in accordance with the Pre-Trial Chamber's instructions,²⁴ the Co-Lawyers informed the parties that they were standing by the arguments they put forward in their Application for Annulment as filed before the Office of the Co-Investigating Judges.²⁵
14. On 6 June 2016, the International Co-Prosecutor filed a response (the "Response")²⁶ to the Application for Annulment. The Co-Lawyers filed a reply on 13 June 2016 (the "Reply").²⁷
15. On 27 July 2016, the Co-Investigating Judges forwarded Case File 004/1 to the Co-Prosecutors with a view to issuing a final submission.²⁸

¹⁹ Decision to Charge [REDACTED] in Absentia, 3 March 2015, D239.

²⁰ Notice of Conclusion of Judicial Investigation Against [REDACTED], 18 December 2015, D285.

²¹ Order for Severance of [REDACTED] from Case 004, 5 February 2016, D286/7.

²² Addendum to [REDACTED] Application to Seize the Pre-Trial Chamber with a View to Annuling Transcripts and Written Records of Witnesses' Interviews, 3 March 2016, D298/1.

²³ See Referral Decision.

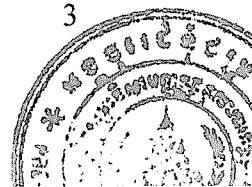
²⁴ Pre-Trial Chamber's email to the parties, NOTIFICATION: Pre-Trial Chamber's Instructions to the parties in Case File No. 004/1/07-09-2009-ECCC/OCIJ (PTC28), 19 May 2016.

²⁵ Email from the Defence Legal Officer to the Pre-Trial Chamber, RE: NOTIFICATION: Pre-Trial Chamber's Instructions to the parties in Case File No. 004/1/07-09-2009-ECCC/OCIJ (PTC28), 26 May 2016.

²⁶ International Co-Prosecutor's Response to [REDACTED] Application to Annul Records of Interview, 6 June 2016, D298/2/1/1 ("Response").

²⁷ [REDACTED] Reply to the International Co-Prosecutor's Response to Her Application for Annulment of Records of Interviews, 13 June 2016, D298/2/1/2 ("Reply").

²⁸ Forwarding Order Pursuant to Internal Rule 66(4), 27 July 2016, D304.



III – INTERNATIONAL CO-PROSECUTOR’S INTERLOCUTORY CLAIM

16. The International Co-Prosecutor, considering that the conclusion of the investigation should not be further delayed by the Application for Annulment, moves the Pre-Trial Chamber to issue a decision, with reasons to follow, or to notify the Office of the Co-Investigating Judges that it may proceed to close the investigation forthwith and order the parties to file their final submissions (the “Interlocutory Claim”).²⁹

17. The Co-Lawyers submit that closing the investigation and forwarding the case file are within the exclusive competence of the Co-Investigating Judges, as set out in Internal Rule 66.³⁰ According to them, it is not open to the Pre-Trial Chamber to notify the Co-Investigating Judges that they may proceed to close the investigation prior to a final determination on the annulment procedure,³¹ as that would leave a pending issue unresolved and potentially causing further delays.³²

18. In light of the 27 July 2016 Order by which the Co-Investigating Judges forwarded Case File No. 004/1 to the Co-Prosecutors requesting the filing a final submission,³³ the Pre-Trial Chamber rejects the Interlocutory Claim, as it is now moot.

IV – ADMISSIBILITY

19. The Co-Lawyers and the International Co-Prosecutor did not submit any arguments concerning the admissibility of the Application for Annulment.

20. The Pre-Trial Chamber has jurisdiction, under Internal Rule 76(4), over the admissibility of applications for annulment, and may declare an application inadmissible where it: (a) relates to an order that is open to appeal; b) is manifestly unfounded; or (c) does not set out sufficient reasons.³⁴

²⁹ Response, paras 1, 15-18.

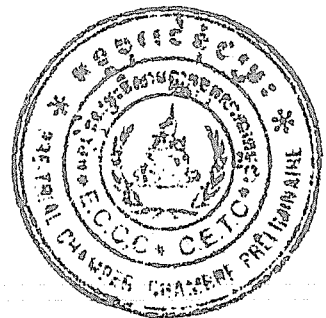
³⁰ Reply, para. 10.

³¹ *Ibid.*

³² Reply, paras 11, 12.

³³ See *supra* para. 15 and footnote 28.

³⁴ Case File No. 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC28), Decision Related to (1) [REDACTED] 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, para. 55.



21. The Pre-Trial Chamber notes that the Application for Annulment seeks the annulment of allegedly defective investigative actions, including written records of witnesses' interviews and the audio recordings and transcripts thereof, and does not relate to an order that is open to appeal within the meaning of Internal Rule 74(3). Further, the Pre-Trial Chamber considers that the Application for Annulment is not so obviously or very manifestly unfounded in law and fact that it stands no chance of being granted, and that it sets out sufficient reasons. Indeed, the Co-Lawyers put forward legally reasoned arguments and clearly identified factual elements in the case file in demonstrating the procedural defects stemming from the alleged falsification³⁵ and the prejudice caused to the Applicant.³⁶

22. The Pre-Trial Chamber therefore finds the Application for Annulment to be admissible pursuant to Internal Rule 76(4). The Pre-Trial Chamber will not address the issue of the admissibility of the Addendum, which relates only to interviews of Witness [REDACTED] whose application for annulment was not forwarded by the International Co-Investigating Judge.³⁷

V – CONSIDERATION OF THE MERITS

23. After deliberation, the Pre-Trial Chamber has not attained the required majority to reach a decision on the merits of the Application for Annulment. Pursuant to Rule 77(14) of the Internal Rules, the opinions of its various members are attached to these Considerations.

VI – DISPOSITION

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

- **REJECTS** the Interlocutory Claim;
- **FINDS** the Application for Annulment admissible;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges to reach a decision on the merits of the Application for Annulment.

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

³⁵ Application for Annulment, paras 27-32.

³⁶ Application for Annulment, paras 41-46.

³⁷ See Application for Annulment, paras 37-40, 45-46; Referral Decision, paras 25-27, 51-55, 57.



Pre-Trial Chamber having not been in a position to attain the requisite majority to reach a decision on the merits, the investigative action whose annulment was sought shall stand.

Phnom Penh, 27 October 2016

President

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.

**OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY
CONCERNING THE MERITS OF APPLICATION**

A. Publication of Considerations

24. The National Judges of the ECCC Pre-Trial Chamber ["PTC"] will present their views concerning ██████████ Application. At the outset, we wish to clarify our views on the publication of the PTC's decisions.

25. Article 3.12 of the ECCC Practice Direction authorises ██████████ to request that the PTC reclassify as "Public" any documents classified as "Confidential" or "Strictly Confidential", in accordance with the provisions of the Practice Direction on the Classification and Management of Case-related Information.

26. The second sentence of Article 3.12 of the Practice Direction states, "Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what the appropriate classification is."

27. For the foregoing reasons, the National Judges consider that it is not yet necessary to reclassify documents from "Confidential" to "Public" at the moment, and that ██████████ rights and interest are not affected because ██████ has access to documents classified as "Confidential." In this regard, the PTC should consider reclassification until the issuance of a Closing Order and the determination of any appeal against the Closing Order, pursuant to the second sentence of Article 3.12 of the Practice Direction.

B. Parties' Arguments

28. The Co-Lawyers for ██████████ ["Defence"] argued that Internal Rules 21(3) and 35 explicitly prohibit interferences with witnesses or potential witnesses or attempt to do so. In Case 004, evidence proves that at least one witness directly relevant to ██████████—█████████—was approached by one or more OCIJ investigators without any duly delivered



Rotatory Letter. The matter was referred to the Office of Royal Prosecutor of the Municipal Court of Phnom Penh (“Royal Prosecutor”) in accordance with Internal Rule 35.³⁸

29. The Defence stated that in addition to [REDACTED], two further witnesses—[REDACTED] and [REDACTED], also directly relevant to [REDACTED]—have indicated that they were approached, off the record, by unknown individuals. An investigation into interference with the administration of justice was opened within the OCIJ, and in this context, it was concluded that “it was not possible, until [the mission to investigate the interference], to establish that investigative actions had most certainly taken place outside the legal and authori[s]ed framework, and that official documents (Written Record of Witness Interview) relating to criminal investigations had been knowingly falsified.”³⁹

30. The Defence submitted that Internal Rule 55(5) sets out that the truth may only be discovered if a witness’s recollection of the events is personal and unaltered. The Trial Chamber forbids leading questions be put to witnesses at trial. There is therefore no justification that such techniques be adopted by OCIJ investigators when interviewing witnesses, contaminating the latter’s evidence from the outset by encouraging desired responses. Concerns over OCIJ investigators’ interview practices were raised in Case 002, notably by [REDACTED]—also a witness in Case 004—who indicated that he felt bombarded by investigators during the interview.⁴⁰

31. The Defence added that the specific role a witness plays in a judicial investigation—as a person who sees or has knowledge of an event—as opposed to a suspect, a charged person, or an accused, implies that witnesses must be heard by OCIJ investigators on their recollection of events rather than questioned. This is illustrated by the wording of the Internal Rules, according to which the Co-Investigation Judges “may take a statement” from witnesses, but “question” charged persons.”⁴¹

32. The International Co-Prosecutor submitted that while the ICP recognizes that any contact with witnesses outside the framework of the OCIJ’s investigation regarding matters under investigation is a cause for concern, there appears to be no evidence that [REDACTED] amended or changed his testimony after the off-the record approach to him by “unknown

³⁸ [REDACTED] Application to Seize the Pre-Trial Chamber with a view to Annulling Transcripts and Written Records of Witnesses’ Interviews, 16 February, 2016, Paragraph 30, D298 (“Application”).

³⁹ Application, Para.31.

⁴⁰ Application, Para.33.

⁴¹ Application, Para.34.



individuals” that occurred between 29 July and 10 September 2011 (“unauthorised contact”). The Annulment Application is based on speculation as to what the authorised contact involved and makes no reference to the substance of the evidence on the record.⁴²

33. The ICP argued that the OCIJ Decision and its annexes demonstrate that the defect alleged by ██████████ in relation to ██████████ WRIs is “very likely a clerical error”, namely, a misdated duplicative WRI being placed on the Case File. As noted by the OCIJ, thought one WRI is dated 25 August 2011 and the other 2 September 2011, they “are in essence identical.”⁴³

34. The ICP submitted that ██████████ right to a fair and impartial hearing has not been violated. ██████████ appears to allege objective partiality on the part of OCIJ investigators, but fails to identify whether she is making such an allegation against particular allegedly “biased” investigators or the OCIJ as a whole in respect of her investigation. In any event, ██████████ has failed to point to any evidence which would raise doubts as to the impartiality of the OCIJ’s investigation in her case.⁴⁴

C. Laws

35. Internal Rule 76 (2) states: “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order.” Internal Rule 48 states: “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”

36. The National Judges find 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.

⁴² International Co-Prosecutor’s Response to ██████████ Application to Annual Records of Interview, 6 June 2016, Para.6, D298/2/1/1 (“Response”).

⁴³ Response, Para. 11.

⁴⁴ Response, Para. 13.



37. 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 prosecution and judicial investigation against individuals.⁴⁵ 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, *individuals* “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”— are met.⁴⁶

38. The National Judges will therefore consider whether the International Co-Investigating Judge's judicial investigation regarding the WRIs violated the conditions specified in Paragraph 14, leading to procedural defect in the investigation as described in Paragraph 12 that infringes [REDACTED] rights and thus warrants annulment.

39. 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.”⁴⁷ The National and International Judges of the PTC also disagree over this matter. The National Judges support the National Co-Prosecutor's argument.⁴⁸

40. In light of the foregoing considerations, the National Judges are of the view that the Transcripts and WRIs must be annulled as requested by the Defence.

⁴⁵ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

⁴⁶ 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.

⁴⁷ 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).

⁴⁸ 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.



Phnom Penh, 27 October 2016



President **PRAK Kimsan**

A handwritten signature in black ink, appearing to be 'NEY Thol'.

Judge **NEY Thol**

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

Judge **HUOT Vuthy**

OPINION OF JUDGES BEAUVALLET AND BAIK
(THE “UNDERSIGNED JUDGES”)

I – APPLICABLE LAW

41. Internal Rule 73(b) establishes the Pre-Trial Chamber’s sole jurisdiction over applications for annulment.

42. The Undersigned Judges recall that in accordance with Internal Rule 48, consideration of an application for annulment requires two successive steps: 1) in the first place, determining whether a procedural irregularity exists; and 2) subsequently, where such a defect is found to exist, determining whether it is prejudicial to the applicant. Accordingly, a procedural irregularity which is not prejudicial to the applicant does not entail annulment.⁴⁹

II – SUBMISSIONS OF THE PARTIES

43. The Co-Lawyers are seeking, under Internal Rules 21(3) and 35, annulment of the record of interview of Witness ██████████, on the ground that he was interviewed by one or more investigators of the Office of the Co-Investigating Judges without a valid rogatory letter,⁵⁰ as well as annulment of the record of interview of ██████████, on the ground that he was interviewed, off the record, by unknown individuals.⁵¹ The Co-Lawyers rely mainly on Judge KASPER-ANSERMET’s “reason to believe” – in referring the matter to the Royal Prosecutor – that there had been an interference with the administration of justice “by several persons who work or worked at the ECCC by their involvement in the falsification of documents and attempts to diverge lines of enquiry and investigation by the Office of the Co-Investigating Judges away from a potential witness”, namely “██████████”, whose testimony has proven to be essential to the discovery of truth in Case File 004”.⁵²

44. The Co-Lawyers submit that the Applicant’s right to fair and transparent proceedings before an impartial tribunal has been infringed, in that the integrity of the process of gathering evidence against her has been called into question due to serious procedural

⁴⁹ Case 003 (PTC20), Decision on ██████████ Appeal against Co-Investigating Judge HARMON’s Decision against ██████████ Applications to Seize the Pre-Trial Chamber With Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“██████████ Decision”), paras 24-25.

⁵⁰ Application for Annulment, para. 30.

⁵¹ Application for Annulment, para. 31, *citing* the Decision to Open an Investigation.

⁵² Application for Annulment, para. 30, *citing* the Decision to Defer to Royal Prosecutor, para. 68.



flaws.⁵³ The Co-Lawyers contend that even though these witnesses were subsequently re-interviewed, their recollection of the events must have been contaminated,⁵⁴ and that there is legitimate reason to fear lack of impartiality on the part of the investigators.⁵⁵ The Co-Lawyers further submit that the Applicant's right to adequately prepare her defence and to examine witnesses against her implies that she should be provided with correct, unaltered, inculpatory and exculpatory evidence⁵⁶ and not with a reflection of the investigators' subjective account of the events.⁵⁷

45. Further, the Co-Lawyers argue that the investigation into the interference with the administration of justice was never concluded and that the Co-Investigating Judges did not bring an application for annulment before the Chamber.⁵⁸ Thus, the evidence provided by [REDACTED] and [REDACTED] remains on the case file and may be used at any stage of the proceedings against her.⁵⁹ The only appropriate remedy should be annulment of the defective procedural acts, as well as subsequent affected proceedings.⁶⁰

46. The International Co-Prosecutor responds that while any contact with witnesses outside the legal procedural framework may be a cause for concern, there was no procedural irregularity absent proof that [REDACTED] amended or changed his testimony after the off-the-record contacts.⁶¹ The International Co-Prosecutor emphasises that the witness gave a consistently incriminating account in his interviews.⁶² Further, the International Co-Prosecutor submits the alleged procedural irregularity in relation to [REDACTED] is very likely a clerical error.⁶³ The International Co-Prosecutor therefore contends that the Applicant's right to a fair and impartial hearing has not be violated and that the Applicant fails to point to any evidence which would raise doubts as to the impartiality of the investigators in her case.⁶⁴

⁵³ Application for Annulment, para. 41.

⁵⁴ Application for Annulment, paras 32, 42.

⁵⁵ Application for Annulment, para. 42.

⁵⁶ Application for Annulment, para. 44.

⁵⁷ Application for Annulment, paras 45, 46.

⁵⁸ Application for Annulment, para. 42.

⁵⁹ Application for Annulment, paras 42, 43.

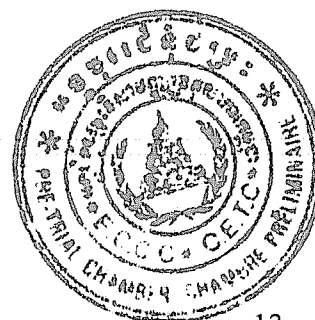
⁶⁰ Application for Annulment, para. 48 *citing* [REDACTED] Decision, para. 27.

⁶¹ Response, para. 6.

⁶² Response, paras 7-9, 14.

⁶³ Response, para. 11 *citing* the Referral Decision, para. 40.

⁶⁴ Response, para. 13.



47. The Co-Lawyers reply that doubt as to the impartiality of the investigation is highlighted by the Internal Rule 35 investigation, and there is no doubt as to whether witnesses were approached, off the record, by investigators of the Office of the Co-Investigating Judges.⁶⁵ The Co-Lawyers contend that the mere fact that an Internal Rule 35 investigation was opened and never properly concluded infringes the Applicant's right to fair and transparent proceedings.⁶⁶

III – DISCUSSION

48. The Undersigned Judges note the numerous doubts and suspicions of interference with the administration of justice raised during the Office of the Co-Investigating Judges internal investigation, a matter that was referred to the Cambodian authorities. The Undersigned Judges will only determine, in reliance on the evidence on record and notwithstanding the criminal proceedings relating to the alleged interference with the administration of justice, whether annulment of the investigative acts relating to [REDACTED] and [REDACTED] is justifiable under Internal Rule 48.

A. Investigative actions relating to Witness [REDACTED]

49. The Co-Lawyers argue that the investigative actions relating to [REDACTED] are flawed, as he was allegedly interviewed on 25 August 2011 and not on 2 September 2011, i.e. without a properly delivered rogatory letter, by one or more investigators of the Office of the Co-Investigating Judges.⁶⁷ The Undersigned Judges note that the case file contains two records of witness interview relating to [REDACTED] dated August and September 2011, the original content of which in Khmer is identical and only differ on three points, namely, the date of the interview, the venue of the interview and the witness' signature and thumbprint.

Written Record of Interview dated 25 August 2011

50. The Undersigned Judges observe that, contrary to the provisions of Internal Rules 55(7), 55(9) and 62, the Written Record of Interview dated 25 August 2011 is not signed by the witness concerned and pre-dates the Rogatory Letter dated 29 August 2011 authorising the interview of the witness. It therefore fails to meet the requirements of a written record of interview.

⁶⁵ Reply, para. 9.

⁶⁶ *Ibid.*

⁶⁷ Application for Annulment, para. 30.



51. The Undersigned Judges note, nonetheless, that the Written Record of Interview dated 25 August 2011 was not placed on the case file as evidence in support of the investigation in Case 004. Rather, it was prepared specifically for purposes of the investigation into the interference, which investigation was opened on 14 September 2011 pursuant to Internal Rule 35(2)(b), and was placed on the case file in May 2012 as an annex to the Interoffice Memorandum⁶⁸ and to the Investigation Report issued in execution of the Rogatory Letter dated 20 January 2012. In that sense, the Written Record of Interview dated 25 August 2011 amounts to evidence relating to the investigation into the interference and not to the International Co-Prosecutor's charges in Case File No. 004/1. Therefore, no prejudice is caused to the Applicant.

52. The Undersigned Judges recall in this regard that determining the existence of interference with the administration of justice requires proof of a criminal offence, whereas the applicable standard in regard to annulment requires proof of both a procedural irregularity and prejudice. The mere opening of an investigation into interference is not capable of establishing such a procedural irregularity or prejudice, especially where the investigation has not been properly concluded. Moreover, far from violating the Applicant's rights, opening an investigation into interference is aimed at ensuring that the proceedings against her are fair.

53. The Undersigned Judges therefore reject the application to annul the Written Record of Interview dated 25 August 2011 (D85/5.1.4.2) and, for the same reasons, the transcript thereof (D85/4.1.5), which was also placed on the case file for purposes of the investigation into interference. These documents are of no evidentiary value as to the charges against the Applicant.

Written Record of Interview dated 2 September 2011

54. The Undersigned Judges note that the Written Record of Interview dated 2 September 2011 in Case 004 is duly signed and that it post-dates the 29 August 2011 Rogatory Letter authorizing the interview of [REDACTED]. The Co-Lawyers fail to point to any concrete evidence on the case file – apart from suspicion of tampering and lack of impartiality on the part of the investigators – as proof of some procedural irregularity. In any event, the Undersigned Judges consider this insufficient ground to rebut the presumption of

⁶⁸ Interoffice Memorandum sent by Investigator STOCCHI to International Reserve Co-Investigating Judge KASPER-ANSERMET, 2 May 2012, D85/5.



reliability of written records of witness interviews.⁶⁹ The Undersigned Judges emphasise that the circumstances surrounding the witness interviews will be among the elements considered at a later stage during the assessment of evidence by the Co-Investigating Judges, and, where necessary, by the Pre-Trial Chamber and the Trial Chamber.

55. As it stands, the aforementioned written record of interview is not flawed. Accordingly, the Undersigned Judges reject the request to annul the Written Record of Interview dated 2 September 2011 (D101/1.1) and the audio recording thereof (D101/1.1R).

B. Investigative actions relating to ██████████

56. The Co-Lawyers mainly rely on a DC-Cam report dated September 2011⁷⁰ in arguing that the investigative actions concerning Witness ██████████ are flawed, alleging that he was approached, off-the-record, by unknown individuals⁷¹ in the period between his 29 July 2011 interview by Co-Investigating Judge BLUNK and his interview on 12 and 13 January 2015.

57. The Undersigned Judges observe that the allegations of such off-the-record contact are based on statements allegedly made by ██████████ which were indirectly reported in a DC-Cam report⁷² and in an Investigation Report prepared as part of the internal investigation into interference.⁷³ The Undersigned Judges also note the lack of probative evidence as to the identity of the three individuals who allegedly met the witness following his formal interview by Judge BLUNK.⁷⁴

⁶⁹ Case 002 (PTC34), Decision on NUON Chea's Appeal Against OCIJ Order on Request for Transcription, 20 April 2010, D194/3/2, para. 21.

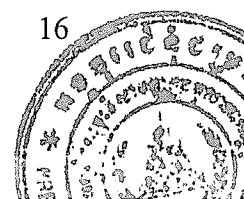
⁷⁰ See DC-Cam Field Trip Note.

⁷¹ Application for Annulment, para. 31 citing the Decision to Open an Investigation.

⁷² DC-Cam Field Trip Note, p. 2 ("████████ informed us that in 2011, two different teams came to interview him. The first consisted of six people (two foreigners and four Cambodians). This group invited ██████████ to Phnom Leap commune office and interviewed him concerning ██████████. The second interview was conducted by three people (one Cambodian woman and two foreigners), who arrived his home.").

⁷³ Investigation Report, p. 3 ("On 28 March 2012, we met with witness ██████████, who had been previously interviewed by Co-Investigating Judge Blunk on 28 July 2011 in the judicial investigation into Case 004, specifically in relation to the Phnom Trayoung Security Centre. This witness also claimed to have been subsequently approached by several individuals, including a team comprising of one woman and two men who said they were from the ECCC, and who handed him a copy of the DC-Cam magazine "Searching for the Truth" at the end of the interview.").

⁷⁴ They said that they were a team from the ECCC, but gave the witness a magazine from a different institution. See for example Investigation Report, p. 3 ("Based on the information gathered during this mission, it is abundantly clear that witnesses were approached and interviewed either by a team from the ECCC, or from DC-Cam.").



58. In any event, Witness ██████████ clearly stated during his formal interview on 12 and 13 January 2015 that he was interviewed first by the Office of the Co-Investigating Judges and, thereafter, by unknown individuals off the record, and subsequently by Judge BLUNK in July 2011.⁷⁵ He did not report any pressure being brought to bear on him or any interview after the one with Judge BLUNK, and expressly denied having had contact with anyone from DC-Cam, SOAS/HRW or Human Rights Watch.⁷⁶

59. In light of the evidence on the record, the Undersigned Judges are of the view that there is insufficient evidence of a procedural flaw in the interviews of the witness undertaken on 12 and 13 January 2015. Moreover, the Undersigned Judges recall that an Internal Rule 48 annulment is not the only remedy available and that the circumstances surrounding the recording of the testimony will be fully considered at the closing order stage, including eventually by the Pre-Trial Chamber, and, should the case go to trial, by the Trial Chamber.

60. For the foregoing reasons, the Undersigned Judges reject the Application for Annulment in respect of the investigative actions relating to ██████████ (D219/140 and D219/141).

61. For the foregoing reasons, the Undersigned Judges would **REJECT** the Application for Annulment in its entirety.

Phnom Penh, 27 October 2016



Olivier BEAUVALLET



Kang Jin BAIK



⁷⁵ Written Record of Witness Interview dated 12 January 2015, pp. 2-4.

⁷⁶ *Ibid.*