



**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

**D351/1/4**

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC40)

**THE PRE-TRIAL CHAMBER**

**Before:**

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

**Date:**

**25 August 2017**

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**PUBLIC REDACTED**

**DECISION ON [REDACTED] APPLICATION TO ANNUL THE INVESTIGATIVE MATERIAL PRODUCED BY PAOLO STOCCHI**

**Co-Prosecutors**

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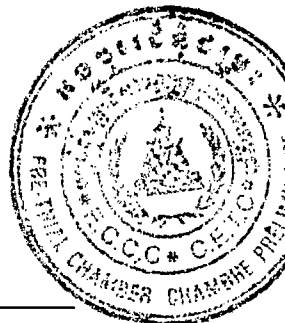
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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “██████████ Application to Annul the Investigative Material Produced by Paolo STOCCHI”, filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and the “Applicant”) on 27 April 2017 (the “Application”).<sup>1</sup>

## I. INTRODUCTION

1. The Applicant’s request to annul the investigative material produced by Paolo STOCCHI (the “Investigator”) was referred to the Pre-Trial Chamber by the International Co-Investigating Judge on 11 April 2017.<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 Third Introductory Submission, alleging the involvement of the Applicant in criminal acts and proposing to press charges against him.<sup>3</sup>

3. On 31 March 2017, the Co-Lawyers filed an application to seize the Pre-Trial Chamber with a view to annulling the investigative material produced by the Investigator,<sup>4</sup> which was granted by the International Co-Investigating Judge on 11 April 2017.<sup>5</sup>

4. On 27 April 2017, pursuant to the Chamber’s instructions,<sup>6</sup> the Co-Lawyers filed the Application before the Pre-Trial Chamber.

5. On 8 May 2017, the International Co-Prosecutor filed his response.<sup>7</sup> The Co-Lawyers did not file any reply within the prescribed deadline.

<sup>1</sup> Case 004/07-09-2009-ECCC-OCIJ (“Case 004”), ██████████ Application to Annul the Investigative Material Produced by Paolo STOCCHI, 27 April 2017, D351/1/2 (“Application”), notified on 28 April 2017.

<sup>2</sup> Case 004, Decision on ██████████ Application to Annul Investigative Material Produced by an Investigator, 11 April 2017, D351/1.

<sup>3</sup> Case 004, Co-Prosecutor’s 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, ██████████ Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigative Material Produced by Paolo STOCCHI, 31 March 2017, D351.

<sup>5</sup> See *supra* footnote 2.

<sup>6</sup> Case 004, Email from the Pre-Trial Chamber addressed to the parties, 18 April 2017.

<sup>7</sup> Case 004, International Co-Prosecutor’s Response to ██████████ Application to Annul the Investigative Material Produced by Paolo STOCCHI, 8 May 2017, D351/1/3 (“Response”), notified on 9 May 2017.



### III. ADMISSIBILITY

6. The Co-Lawyers submit that the Application is admissible under Internal Rule 76(4).<sup>8</sup> The International Co-Prosecutor does not dispute it.
7. Internal Rule 76(4) vests the Pre-Trial Chamber with jurisdiction to determine the admissibility of an application for annulment, which it may declare inadmissible where the application relates to an order that is open to appeal; is manifestly unfounded; or does not set out sufficient reasons.<sup>9</sup> The Pre-Trial Chamber is satisfied that, in the present case, the conditions of Internal Rule 76(4) are met and that the portions of the proceedings which are challenged are sufficiently specified through the annex to the Application.
8. The Pre-Trial Chamber thus finds the Application admissible.

### IV. MERITS

#### A. Submissions

9. The Co-Lawyers request the annulment of allegedly defective parts of written records produced by the Investigator, as identified in an annex to the Application.<sup>10</sup> They rely on the Applicant's right to an impartial investigation, as provided for *inter alia* in Article 14 of the International Covenant on Civil and Political Rights (the "ICCPR") and Internal Rule 55(5), and stress that the Co-Investigating Judges' duty to act fairly and impartially pursuant to Article 128 of the Cambodian Constitution shall extend by delegation to their investigators, who act, in effect, as their proxies and upon oath.<sup>11</sup>

<sup>8</sup> Application, paras 1-2.

<sup>9</sup> Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2") (PTC37), Decision on ██████████ Application to Annul Written Records of Interview of Three Investigators, 11 May 2017, D338/1/5 ("Decision on Three Investigators WRI"), para. 8; Case 004 (PTC31), Decision on ██████████ Application to Annul Non-Audio-Recorded Written Records of Interview, 30 November 2016, D296/1/1/4 ("Decision on Non-Audio-Recorded WRI"), para. 9; 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 Annulment Applications"), para. 55.

<sup>10</sup> Application, para. 20; Case 004, Annex – ██████████ Application to Annul the Investigative Material Produced by Paolo STOCCHI, 27 April 2017, D351/1/2.2 ("Annex").

<sup>11</sup> Application, paras 16-19.



10. The alleged procedural defects include: i) failure to follow up on exculpatory leads; ii) feeding of inculpatory information; iii) use of leading questions; iv) failure to objectively test inculpatory information; v) conduct of, or reference to, off-the-record conversations; vi) failure to adequately record evidence; and vii) use of bullying or intimidation.<sup>12</sup> In the Co-Lawyers' view, these defects individually and cumulatively render the material procedurally defective<sup>13</sup> and prejudice the Applicant by giving a real or perceived impression of bias on the part of the Investigator, suggesting that the investigation aims at building a case against him.<sup>14</sup> They assert that, considering the advance stage of the proceedings and the fact that the defects have such an adverse effect on the fairness of the proceedings, annulment is the only adequate and practical remedy.<sup>15</sup>

11. The International Co-Prosecutor responds that the Application should be read with caution since it misrepresents the substance of interviews by simply extracting excerpts which, when put back in context, actually show that the Investigator's approach was impartial, professional and aiming at resolving confusion or challenging the evidence.<sup>16</sup> The International Co-Prosecutor insists on the high burden of persuasion that must be beared by the Applicant regarding allegations of bias or misconduct<sup>17</sup> and stresses that rebutting the presumption of regularity requires demonstrating a real and consistent pattern of conduct, based on the totality of the Investigator's work, rather than cherry-picking mischaracterised examples.<sup>18</sup> He further submits that allegations of intimidation are unfounded,<sup>19</sup> since repeating a question to a witness who does not answer,<sup>20</sup> reminding about the oath or confronting witnesses<sup>21</sup> are simply good investigative practices and do not constitute bullying.

## B. Applicable Law

12. Internal Rule 73(b) establishes the Pre-Trial Chamber's sole jurisdiction over applications for annulment. In accordance with Internal Rule 48, consideration of an

<sup>12</sup> Application, para. 20.

<sup>13</sup> *Ibid.*

<sup>14</sup> Application, paras 45-47.

<sup>15</sup> Application, paras 48-49.

<sup>16</sup> Response, paras 6-18.

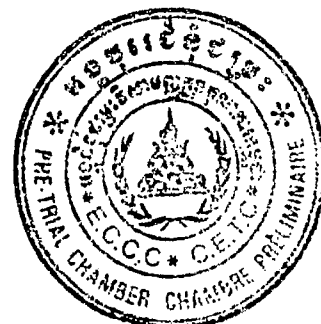
<sup>17</sup> Response, paras 17-18.

<sup>18</sup> Response, paras 19-22.

<sup>19</sup> Response, paras 23-25.

<sup>20</sup> Response, paras 15-16.

<sup>21</sup> Response, paras 24-25.



application for annulment requires two steps: 1) determining whether a procedural irregularity exists; and 2) 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.<sup>22</sup>

13. At the outset, the Pre-Trial Chamber recalls the presumption of reliability attached to investigative action, which is rebuttable,<sup>23</sup> and the wide discretion of Co-Investigating Judges in conducting the investigation and in conducting witness and civil party interviews in a way conducive to ascertaining the truth.<sup>24</sup>

14. The Pre-Trial Chamber further recalls the established distinction between procedural defects, which are explicitly foreseen by a legal provision, and substantive procedural defects, which are not explicitly prescribed and aim to sanction serious procedural irregularities in case of breach of an “essential” or “substantial” formality.<sup>25</sup> As to whether alleged bias in conducting interviews would amount to a violation of an “essential formality”, the Pre-Trial Chamber previously held that a proven violation of a right of the charged person recognised in the ICCPR would qualify as a procedural defect and harm the interests of a charged person<sup>26</sup> and that a breach of impartiality by an investigative judge or investigator, if proven, would amount to a cause of a substantive nullity of the investigative actions performed by them.<sup>27</sup> The Pre-Trial Chamber has defined the appropriate standard to be applied in respect of bias and emphasises that there is a high threshold to reach in order to

<sup>22</sup> See Decision on Three Investigators WRI, paras 14-15; Case 003 (PTC20), Decision on [REDACTED] Appeal against Co-Investigating Judge HARMON’s Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber With Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, paras 24-25.

<sup>23</sup> See Decision on Three Investigators WRI, para. 20; Decision on Non-Audio-Recorded WRI, para. 22..

<sup>24</sup> See Decision on Three Investigators WRI, para. 16 referring to, *inter alia*, Case 004/2 (PTC36), Decision on Appeal Against the Decision on [REDACTED] Tenth Request for Investigative Action, 26 April 2017, D343/4 (“Decision on Appeal Against Decision on Tenth Request”), para. 29; 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, art. 5(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, art. 25; Internal Rules 55(5) and 55(10).

<sup>25</sup> See Decision on Three Investigators WRI, para. 17 referring to, *inter alia*, Cambodian Code of Criminal Procedure, art. 252; French Code of Criminal Procedure, art. 171.

<sup>26</sup> See Decision on Three Investigators WRI, para. 19 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/I/8, para. 40.

<sup>27</sup> See Decision on Three Investigators WRI, para. 19 referring to French Cass. Crim., 23 March 2004, Case No. 03-87854; French Cass. Crim., 14 May 2008, Case No. 08-80483.



rebut the presumption of impartiality. It is for the applicant to adduce sufficient evidence to satisfy the Pre-Trial Chamber of the existence of a procedural defect and either actual (or objective) bias or apprehended (or subjective) bias.<sup>28</sup>

### C. Discussion

#### 1. Approach to Inculpatory / Exculpatory Evidence

15. The Co-Lawyers claim to have identified 452 instances of malpractice when the Investigator allegedly used leading questions to obtain inculpatory evidence,<sup>29</sup> fed interviewees with inculpatory information,<sup>30</sup> failed to follow up on exculpatory leads<sup>31</sup> or failed to objectively test inculpatory information.<sup>32</sup>

16. The Pre-Trial Chamber recalls that there are no prescribed requirements on pain of nullity, in the applicable law before the ECCC, regarding the nature and form of questions asked during witness interviews, and that the format of questioning and conduct of witness and civil party interviews is left to the unfettered discretion of the Co-Investigating Judges.<sup>33</sup> The Pre-Trial Chamber further stresses that records of interviews have to be read as a whole to assess their regularity and that it will exercise the utmost caution when examining isolated excerpts of an investigator's work.<sup>34</sup>

17. In the case at hand, the Pre-Trial Chamber has carefully reviewed the alleged shortcomings and finds that the Applicant has failed to demonstrate any bias or procedural defect warranting its intervention. In particular, the Pre-Trial Chamber is not convinced that the Investigator exceeded his discretion by not following up on certain leads or not testing inculpatory statements, such as to demonstrate any bias or appearance of bias to the requisite standard. Excerpts of records where the Investigator chose to explore certain leads in details,

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<sup>28</sup> See Decision on Three Investigators WRI, para. 20. See also 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, paras 31-32.

<sup>29</sup> Application, paras 28-29.

<sup>30</sup> Application, paras 25-27.

<sup>31</sup> Application, paras 22-24.

<sup>32</sup> Application, paras 30-33.

<sup>33</sup> See Decision on Three Investigators WRI, para. 18.

<sup>34</sup> See Decision on Three Investigators WRI, para. 22.



and not other leads preferred by the Applicant,<sup>35</sup> do not constitute sufficient indicia of partiality, especially in light of the Investigator's knowledge of evidence already on the case file.

18. Similarly, a close scrutiny of impugned interviews where inculpatory information was purportedly fed through leading or closed questions does not reveal any improper exercise of the Investigator's discretion in the conduct of interviews. The alleged feeding of "preconceptions" of the case corresponds in fact to instances where the Investigator directed the interview to topics relevant to the Charged Person<sup>36</sup> and to the crime base,<sup>37</sup> after a series of open questions, and does not evince any biased approach. The Pre-Trial Chamber also summarily dismisses the argument that the Investigator's practice of thanking interviewees after answering a question would support the showing that he was, in fact, expressing gratitude to them for "giving the answer he wants".<sup>38</sup>

19. The Pre-Trial Chamber further reiterates that the practice of confronting witnesses or civil parties to other narratives or incriminating evidence<sup>39</sup> on the record is a legitimate

<sup>35</sup> Application, paras 22-24, 30-33.

<sup>36</sup> See, e.g., Application, paras 26, 29; Annex, p. 21 and Written Record of Civil Party Interview of [REDACTED], 22 April 2014, D118/225, pp. 10-11 (asking the witness about his knowledge of a cadre named [REDACTED] after a series of open questions, such as to resolve the confusion after the witness asked "[w]hich [REDACTED] [...]?" and evoked an ordinary citizen); Annex, p. 160 and Written Record of Witness Interview of [REDACTED], 18 January 2016, D219/653, pp. 13-14 (similarly asking the witness about his knowledge of a cadre named [REDACTED] after a series of open questions, such as to resolve the confusion after the witness asked "[t]here were many [REDACTED]. To whom did you refer?"); Annex, p. 15 and Written Record of Interview of Witness [REDACTED], 14 February 2013, D118/19, p. 4 (asking the witness whether he knew that [REDACTED] came from the Southwest after three open questions); Annex, pp. 149-150 and Written Record of Witness Interview of [REDACTED], 3 December 2015, D219/613, pp. 6-7 (asking the witness whether [REDACTED] was [REDACTED] subordinate, after a series of open questions about the administrative structure of the Southwest Zone at that time and identity of [REDACTED] subordinates); Annex, pp. 42-43 and Written Record of Witness Interview of [REDACTED], 21 May 2014, D118/242, pp. 9-14 (asking to the witness some specific questions about the role of the Applicant amongst a series of open questions – "Did you ever meet [REDACTED]?", "Where did you hear of [REDACTED]?", "Did you ever meet [REDACTED] in you entire life?", "Where did you meet him?", "When did this happen?", "How many times did you meet [REDACTED] [...]?", etc.).

<sup>37</sup> See, e.g., Application, para. 29; Annex, p. 37 and Written Record of Witness Interview of [REDACTED], 15 May 2014, D118/237, pp. 6-7 (summarizing in one sentence – "Can we say that the Khmer Rouge persecuted the Cham people, and that in general the Khmer Rouge did not want religion to exist?" – what the witness actually answered to a previous series of open questions – that "Cham people [...] were forced to eat pork", that "[t]he Khmer Rouge said that the Cham people did not have their own country" and that "[t]hey said in general that religion did not exist" –, therefore not feeding him with any new information or preconception); Annex, p. 5 and Written Record of Witness Interview of [REDACTED], 22 March 2012, D105/9, p. 8 (directing the witness to the specific issue of the replacement of North-western cadres, at the end of the interview and after series of open questions about chiefs of prisons and those who gave them orders).

<sup>38</sup> Annex, pp. 190-191 and Written Record of Witness Interview of [REDACTED], 8 November 2016, D219/861.

<sup>39</sup> See, e.g., Application, para. 25; Annex, p. 160 and Written Record of Witness Interview of [REDACTED], 21 January 2016, D219/657; Annex, pp. 42-44 and Written Record of Witness Interview of [REDACTED].



investigative practice, which actually aims to test the inculpatory evidence on the record and thus does not demonstrate any bias.<sup>40</sup> The Pre-Trial Chamber finally does not identify any misconduct in the established practice of having a witness confirming or infirming previous statements, and does not find any misrepresentation by the Investigator of the evidence at his disposition when confronting it to witnesses.<sup>41</sup>

## 2. Off-the-record Interviews

20. The Co-Lawyers contend that they have identified 11 instances of off-the-record interviews<sup>42</sup> with eight witnesses, two civil parties and Professor Taylor.

### *a) Interviews With Eight Witnesses and Two Civil Parties*

21. The Pre-Trial Chamber observes that, contrary to the Applicant's contention,<sup>43</sup> Internal Rule 25 concerns audio and video-recording and does not impose any obligation on the Office of the Co-Investigating Judges to record interviews of persons other than a Suspect or Charged Person.<sup>44</sup> By contrast, Internal Rule 55(7) does cast a duty on the Co-Investigating Judges to make a written record of every interview, while Internal Rule 55(8) provides that Greffiers shall accompany the Co-Investigating Judges during site visits and

21 May 2014, D118/242, pp. 9-14.

<sup>40</sup> See Decision on Three Investigators WRI, para. 21.

<sup>41</sup> See, e.g., Application, para. 27; Annex, pp. 8-9 and Written Record of Witness Interview of ██████████, 6 December 2013, D118/166, pp. 9-10 (confronting the witness with a document of the Documentation Center of Cambodia, accurately identified by the Investigator as a record of evidence given by him); Annex, pp. 78-79 and Written Record of Witness Interview of ██████████, 3 August 2013, D134/1, p. 4 (asking the witness whether investigators came to ask him whether Veal Boeng Bak Chonh Ching was a killing field and then confronting him to a previous interview where he made such assertion); Annex, pp. 4-5 and Written Record of Witness Interview of ██████████, 20 March 2012, D105/8, pp. 3-4 (asking the witness whether in a former statement he was "asked about [the Applicant]" and whether he said that the Applicant "ordered cadres to be killed because he held a high position"), *to be compared with* Written Record of Witness Interview of ██████████, 21 May 2011, D20, pp. 2-4 (where the Investigator reasonably interpreted that the witness was interviewed about the Applicant and answered *inter alia* that he "thought [such an order to kill Khmer] only came from [the Applicant] because survivors [...] talked about the plan by the Khmer Rouge to kill Khmer Rouge [cadres] – the plan was ordered from the upper level, so those at the upper level must have been [the Applicant]"); Annex, p. 35 and Written Record of Civil Party Interview of ██████████, 14 May 2014, D118/235, p. 11 (asking the civil party to confirm or infirm his civil party application, according to which he had seen three militiamen kill a teacher in the forest, after he answered by the negative to an open question about whether he knew that the Khmer Rouge killed teachers in a forest); Annex, p. 93 and Written Record of Witness Interview of ██████████, 10 March 2015, D219/221, pp. 19-22 (confronting the witness to what he said in a documentary film, to which he confirmed he participated).

<sup>42</sup> Application, paras 34-35.

<sup>43</sup> Application, para. 34.

<sup>44</sup> See Internal Rule 25(4).





make a written record. Article 115 of the Cambodian Code of Criminal Procedure similarly provides that “[a] written record shall be established for every interrogation. The record shall accurately reflect the responses of the relevant person.” The Pre-Trial Chamber previously held, however, that this duty does not encompass an obligation to keep record of initial contact with witnesses<sup>45</sup> or of ‘screening’ questions asked before the interview pursuant to Internal Rule 24.<sup>46</sup>

22. In the present case, the Pre-Trial Chamber finds that the presumption of reliability attached to written records of interview is not rebutted when the Investigator asked the witness to repeat relevant information given before the interview, during screening questions,<sup>47</sup> or during a break.<sup>48</sup> It is actually an appropriate investigative practice, which does not evince any bias, to have witnesses repeating information given off-the-record, solicited or not, for the purpose of having an accurate record of their evidence. The Pre-Trial Chamber also identifies no malpractice or indicia of bias in the written record of interview D118/179,<sup>49</sup> in which the Investigator refers to a previous interview duly recorded and referenced,<sup>50</sup> and in the records of interviews D118/228<sup>51</sup> and D118/125,<sup>52</sup> in which the impugned questions properly refer to the content of the interviewees’ civil party applications and not to off-the-record conversations.<sup>53</sup>

<sup>45</sup> See Decision on Nine Annulment Applications, para. 242. The International Co-Investigating Judge’s instructions to investigators on initial contact, restricting their content and requiring their recording in an investigative action report, do not supersede the applicable law. Non-compliance with such discretionary instructions would not constitute a procedural defect if not contradicting the Internal Rules, the Cambodian Code of Criminal Procedure or any other relevant legal disposition. See Decision on Nine Annulment Applications, para. 242 referring to Case 003, Memorandum, Instructions on Screenings of Civil Parties and Other Witnesses and on the Format of the *Procès-Verbal*, 29 September 2015, D157; Decision on Non-Audio-Recorded WRI, para. 25.

<sup>46</sup> See Decision on Three Investigators WRI, para. 24 referring to Decision on Appeal Against Decision on Tenth Request, para. 30.

<sup>47</sup> See Application, para. 36; Annex, p. 1 and Written Record of Witness Interview of [REDACTED], 14 February 2012, D105/2; Annex, p. 4 and Written Record of Witness Interview of [REDACTED], 20 March 2012, D105/8; Annex, p. 41 (listed under “Failure to adequately record evidence”) and Written Record of Witness Interview of [REDACTED], 21 May 2014, D118/242.

<sup>48</sup> See Application, para. 35; Annex, p. 158 and Written Record of Interview of [REDACTED], 18 January 2016, D219/653.

<sup>49</sup> See Annex, pp. 13-14 and Written Record of Witness Interview of [REDACTED], 13 February 2014, D118/179.

<sup>50</sup> Written Record of Witness Interview of [REDACTED], 13 February 2014, D118/179, pp. 3, 4, 6, 15-20. See also Case 003, Written Record of Witness Interview of [REDACTED], 25 March 2010, D4.1.1048.

<sup>51</sup> See Annex, pp. 24-25 and Written Record of Civil Party Interview of [REDACTED], 24 April 2014, D118/228.

<sup>52</sup> See Annex, p. 6 and Written Record of Civil Party Interview of [REDACTED], 10 October 2013, D118/125.

<sup>53</sup> Written Record of Civil Party Interview of [REDACTED], 24 April 2014, D118/228, pp. 6, 8, 13; Victims



23. Concerning the records of interviews D105/6<sup>54</sup> and D105/9,<sup>55</sup> the Pre-Trial Chamber observes that the Investigator referred to evidence given “th[e] morning” of the interview,<sup>56</sup> which the Co-Lawyers suggest happened following a site visit,<sup>57</sup> or to “people” talking about graves during a field visit.<sup>58</sup> Similarly, the Co-Lawyers argue that the evidence mentioned in interview D105/4<sup>59</sup> may “imply” the existence of an off-the-record conversation.<sup>60</sup> While the Pre-Trial Chamber acknowledges some uncertainty concerning the sources of evidence used by the Investigator during those interviews, it recalls that the onus rests with the movant to prove that the presumption of reliability no longer applies.<sup>61</sup> In this case, based on the excerpts presented in the Application, it would be highly speculative to infer that actual “interviews” in the sense of Internal Rule 24, exceeding mere initial contact or preliminary information, were conducted and not recorded, in breach of Internal Rule 55(7), or that site visits failed to be adequately recorded pursuant to Internal Rule 55(8).

24. The Pre-Trial Chamber further considers that the existence of off-the-record conversations, even if proven, would not affect the validity of the impugned interviews but merely their probative value. The Pre-Trial Chamber therefore finds that the presumption of reliability has not been rebutted and that no procedural defect has been established that would justify the annulment of the impugned interviews.

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Unit Report on Civil Party Application of ██████████, 31 January 2013, D5/647/1. *See also* Written Record of Civil Party Interview of ██████████, 10 October 2013, D118/125, p. 14; Victim Information Form of ██████████, 30 October 2008, D11/170, p. 6; Victims Unit Report on Civil Party Application of ██████████, 29 June 2011, D11/170/1, p. 2

<sup>54</sup> *See* Application, para. 37; Annex, p. 3 and Written Record of Witness Interview of ██████████, 19 March 2012, D105/6.

<sup>55</sup> *See* Annex, p. 5 and Written Record of Witness Interview of ██████████, 22 March 2012, D105/9.

<sup>56</sup> Written Record of Witness Interview of ██████████, 19 March 2012, D105/6,

<sup>57</sup> Application, para. 37.

<sup>58</sup> Written Record of Witness Interview of ██████████, 22 March 2012, D105/9, p. 8 (Q/A 58).

<sup>59</sup> *See* Application, para. 35; Annex, p. 2 and Written Record of Witness Interview of ██████████, 16 February 2012, D105/4.

<sup>60</sup> Written Record of Witness Interview of ██████████, 16 February 2012, D105/4, p. 7 (Q/A 56: “You said that you never witnessed any killing, but you saw human livers and gall bladders hanging out to dry, is that correct? Yes, I saw that.”), *to be compared with* p. 6 (Q/A 48: “Did you witness any killings? [...] I never saw that personally; I just heard prisoners screaming while they were taken away to be killed.”).

<sup>61</sup> *See* Decision on Three Investigators WRI, para. 20; Decision on Nine Annulment Applications, paras 235, 243 referring to Case 002/19-09-2007/ECCC/TC, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251, para. 22; Case No. 002/19-09-2007/ECCC/TC, Decision on NUON Chea’s request for a Rule 35 investigation regarding inconsistencies in the audio and written records of OCIJ witness interviews, 26 March 2012, E142/3, paras 7, 10.



*b) Interview With [REDACTED]*

25. Turning to the written record of investigative action D117/25,<sup>62</sup> the Pre-Trial Chamber observes that it contains two distinct sections.

26. The first part of D117/25,<sup>63</sup> not challenged in the Application, relates to a public lecture given by [REDACTED] on [REDACTED] at the Meta House Cultural Center in Phnom Penh (the “Meta House”). This lecture was attended by the Investigator and a legal officer of the Office of the Co-Investigating Judges, summarised in the impugned document and audio recorded.<sup>64</sup> The Pre-Trial Chamber considers that such investigative action was performed in accordance with Internal Rule 55(5), pursuant to which the Co-Investigating Judges may take “any investigative action conducive to ascertaining the truth”, and that it is not affected by any defect.

27. The second part of D117/25<sup>65</sup> corresponds to a “Summary of the topics discussed with [REDACTED]” after a meeting which took place on 29 August 2013. The Pre-Trial Chamber will examine in turn: (i) whether this meeting amounted to an interview; (ii) whether it is procedurally defective; and (iii) the prejudice and consequences of procedural defects, if any.

*i) Nature of the off-the-record meeting dated 29 August 2013*

28. The Pre-Trial Chamber recalls that, while Internal Rule 24 sets a clear legal framework for the conduct of witness interviews, it does not give any definition of what amounts to an interview and does not explicitly prohibit other ways of interacting with witnesses in order to verify any information they may have. The issue of the validity of contact of investigators with witnesses, in order to prepare for a witness interview for instance, has already been raised in other cases.<sup>66</sup>

<sup>62</sup> See Application, para. 34; Annex, pp. 5-6 and Written Record of Investigative Action, 18 September 2013, D117/25.

<sup>63</sup> Written Record of Investigative Action, 18 September 2013, D117/25, p. 1, para. 2 (“On [REDACTED] [...]”) to p. 2, para. 2 (“[...] matters related the Persecution of Khmer Krom.”).

<sup>64</sup> The audio record has consequently been filed. See D117/25.1R.

<sup>65</sup> Written Record of Investigative Action, 18 September 2013, D117/25, p. 2, para. 3 (“On 29 August 2013 [...]”) to p. 4, para. 2 (“[...] as well as the Khmer Krom ethnic group.”).

<sup>66</sup> Decision on Nine Annulment Applications, para 12; Case 004 (PTC39), Considerations on [REDACTED]



29. In the present case, the impugned meeting with [REDACTED] took place on 29 August 2013, after an appointment was made [REDACTED] at the Meta House. The object of the meeting was “to further discuss together [with] him matters related [to] the Persecution of Khmer Krom.”<sup>67</sup> Accordingly, the Pre-Trial Chamber considers that the meeting was duly scheduled and aimed at collecting more evidence about the criminal allegations involving the Applicant. The Pre-Trial Chamber further notes that the meeting with [REDACTED] was conducted face-to-face by two staff members of the Office of the Co-Investigating Judges, that it took place in the very premises of the ECCC, and that it lasted two hours and twenty minutes. It also stresses that the impugned written record of investigative action explicitly states that the staff members of the Office of the Co-Investigating Judges were conducting an “*off-the-record* interview”<sup>68</sup> with [REDACTED].

30. In light of these circumstances, the Pre-Trial Chamber considers that the off-the-record meeting with [REDACTED], conducted on 29 August 2013, amounts to an interview in the sense of Internal Rule 24.

*ii) Analysis of the procedural defects*

31. The Pre-Trial Chamber recalls that Internal Rules 24, 55 and 60 provide for substantial requirements for witness interviews, such as the duty for the Co-Investigating Judges to make a written record of every interview,<sup>69</sup> which mirrors Article 115 of the Cambodian Code of Criminal Procedure, as well as the duties to take the oath of the witness before being interviewed,<sup>70</sup> to establish whether he or she has a relationship with the Charged Person or a Civil Party<sup>71</sup> or to have the written record of interview signed or finger-printed by the interviewee.<sup>72</sup>

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Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 11 August 2017, D345/1/6, paras 59-70.

<sup>67</sup> Written Record of Investigative Action, 18 September 2013, D117/25, p. 2, para. 2.

<sup>68</sup> Written Record of Investigative Action, 18 September 2013, D117/25, p. 2, para. 3 [emphasis added].

<sup>69</sup> Internal Rule 55(7).

<sup>70</sup> Internal Rule 24(1).

<sup>71</sup> Internal Rule 24(3).

<sup>72</sup> Internal Rule 55(7).



32. The Pre-Trial Chamber underlines that the impugned record, by explicitly referring in two occasions to the meeting with [REDACTED] as an “off-the-record” interview or talk,<sup>73</sup> shows that the staff members of the Office of the Co-Investigating Judges acknowledged they were actually conducting an interview and that they were doing so without recording it. Although it is not completely clear what they meant by “off-the-record”, the Pre-Trial Chamber considers that such an interview had to be legally undertaken. It further notes that, in the case at hand, the investigator in charge was duly reminded of his legal duties through the Rogatory Letter issued by the International Co-Investigating Judge, which expressly instructed to “[i]dentify, locate and interview witnesses [...] in accordance with all legal formalities, in particular Internal Rules 25(4), 55(7) and 59(6) [...]”.<sup>74</sup>

33. After having carefully reviewed the impugned written record of investigative action, the Pre-Trial Chamber concludes that it is affected by several procedural defects which, cumulatively, are substantial and invalidate the part of the document summarising the interview with [REDACTED] on 29 August 2013. In particular, neither the formal requirements of Internal Rules 24(1) and (3) nor those of Internal Rule 55(7) have been observed.

*iii) Prejudice and legal consequences*

34. The Pre-Trial Chamber, recalling that substantive nullities may be established when a breach of an “essential” or “substantial” formality has harmed the interests of the party it concerns,<sup>75</sup> finds that the procedural defects identified above are substantive and that they rebut the presumption of regularity attached to written records of investigation.

35. The Pre-Trial Chamber further recalls that Internal Rule 76(5) provides:

“Where the Chamber decides to annul an investigative action, it shall decide whether the annulment affects other actions or orders. Where actions or orders are annulled in part, such part shall be cancelled after making a certified copy of the original. All such annulled actions or orders, and certified copies, shall be removed from the case file and archived by the Greffier of the Chamber. After any such annulment or cancellation, the Chamber shall return the case file to the Co-Investigating Judges. It is

<sup>73</sup> Written Record of Investigative Action, 18 September 2013, D117/25, p. 2, para. 3 and p. 3, para. 8.

<sup>74</sup> Rogatory Letter, 3 December 2012, D118, p. 2.

<sup>75</sup> See *supra* para. 14.



prohibited to draw any inference against the parties from such annulled actions or orders or from the cancelled parts thereof. Any Judge, Co-Prosecutor or lawyer who engages in such activities shall be subject to disciplinary proceedings as provided in Rules 6 and 35 of these IRs.”

36. Accordingly, the Pre-Trial Chamber annuls the off-the-record interview with [REDACTED] conducted on 29 August 2013 and orders the cancellation and the removal from the case file of the part of the written record of investigative action D117/25 summarising the topics discussed during this interview. The Pre-Trial Chamber has not, at this point, identified in the case file other actions or orders affected by such annulment.

### 3. Recording of Evidence

37. The Co-Lawyers submit that they have identified 74 instances where the Investigator allegedly failed to record or identify evidence.<sup>76</sup>

38. The Pre-Trial Chamber has not identified, after a close review of the alleged shortcomings, any procedural defect or malpractice of the Investigator that may support a finding of bias. All excerpts but two listed by the Co-Lawyers<sup>77</sup> relate to the alleged failure of the Investigator to identify evidence to which he confronted witnesses “with a basic degree of specificity which would allow the witness to respond properly to [his] questions and enable the Defence to find the evidence being referred to.”<sup>78</sup> The Pre-Trial Chamber summarily rejects this argument. It recalls the unfettered discretion of Co-Investigating Judges in the conduct of interviews<sup>79</sup> and considers it reasonable for an investigator to confront interviewees to other evidence on the record without specifying each and every reference, especially in light of confidentiality and witness protection constraints.

39. The Co-Lawyers further challenge document D118/117 as corresponding to “summaries of interviews in a [written record of investigative action], where [...] witnesses were questioned on substantive issues in the case and gave evidence relevant to facts disputed

<sup>76</sup> Application, paras 38-40.

<sup>77</sup> Annex, pp. 18, 21, 26, 38, 47-48, 51, 55-56, 59-60, 62-66, 74-76, 78, 84, 86-88, 91-93, 99, 101, 106, 111, 114, 116-117, 119, 123-125, 127-128, 132-133, 135-136, 141-146, 150-151, 157, 159-160, 163, 168, 170, 172-177, 181-182, 186-189, 191, 195-198, 200, 202, 204-206.

<sup>78</sup> Application, para. 40.

<sup>79</sup> See Decision on Three Investigators WRI, para. 18.



by the Defence”.<sup>80</sup> The Pre-Trial Chamber, however, finds it clear from a reading of the document that the conversation of the Investigator with ██████████ constitutes no more than an initial contact aiming at determining whether the witness is able to give information on the topic(s) of the intended interview. It recalls that there is no obligation to keep record of such initial contact<sup>81</sup> in the form prescribed by Internal Rules 24 and 55(7), and certainly no breach of Internal Rule 25(2),<sup>82</sup> which deals with reasons for not audio or video-recording a Suspect or Charged Person’s interview. The Investigator also properly exercised his discretion in light of his knowledge of the case to recommend that “[n]o further actions [...] be taken”<sup>83</sup> and not subsequently obtaining a full written record of interview from the witness. The Pre-Trial Chamber concludes that no malpractice or procedural defect is established in this case.

40. The Co-Lawyers also criticise the written record of interview D219/587 for presenting “no statement of the witness provided, but only summary by Investigator.”<sup>84</sup> The Pre-Trial Chamber, recalling that the practice in Cambodia does not require records of interviews to be verbatim records but only to accurately reflect the responses of the interviewee,<sup>85</sup> observes that the written record of interview does contain a full record of questions and answers, except for two notes reporting comments made by the witness during his reading of the record.<sup>86</sup> It is actually a prescription of Internal Rule 55(7) to have the interviewee read over the record before signing it, thereby ensuring that it is consistent with his or her statements,<sup>87</sup> and a good investigative practice to record any comment made during such reading.

#### 4. Bullying and Intimidation

41. The Co-Lawyers contend that they have identified 23 instances where the Investigator “bullied” or “intimidated” interviewees, including by referring to witness confrontation as a

<sup>80</sup> Application, para. 39; Annex, p. 6 and Written Record of Investigative Action, 24 October 2013, D118/117.

<sup>81</sup> See Decision on Nine Annulment Applications, para. 242.

<sup>82</sup> Application, para. 39.

<sup>83</sup> Written record of investigative action, 24 October 2013, D118/117, p. 2.

<sup>84</sup> Annex, pp. 138-139 and Written Record of Witness Interview of ██████████, 4 November 2015, D219/587.

<sup>85</sup> *Ibid.* See also Cambodian Code of Criminal Procedure, art. 115.

<sup>86</sup> Written Record of Witness Interview of ██████████, 4 November 2015, D219/587, p. 16.

<sup>87</sup> Decision on Nine Annulment Applications, para. 239.



sanction, by reminding them that they are under oath or by pressuring them to provide the evidence he was looking for.<sup>88</sup>

42. The Pre-Trial Chamber has carefully reviewed the alleged intimidations and rejects the argument according to which reminding the witnesses that they are under oath<sup>89</sup> or mentioning that confrontations with other witnesses may be organised<sup>90</sup> amount to threats or sanctions. As underlined by the International Co-Prosecutor, Internal Rule 36(1) on false testimony provides that the Co-Investigating Judges may “remind a witness of their duty to tell the truth and the consequences that may result from failure to do so.”<sup>91</sup> Confrontations between witnesses, explicitly provided for in Article 153 of the Cambodian Code of Criminal Procedure,<sup>92</sup> are also legitimately used by the Co-Investigating Judges who, pursuant to Internal Rule 55(5), “may take any investigative action conducive to ascertaining the truth.” It was thus proper for the Investigator, when confronted to apparent contradictions in the evidence, to remind interviewees of their oath or of the possibility to organise a confrontation.

43. Finally, while the Pre-Trial Chamber agrees that certain comments from the Investigator may, out of context, seem to express an opinion on the evidence or the sincerity of the witness,<sup>93</sup> it finds those isolated excerpts insufficient to establish any bullying or

<sup>88</sup> Application, paras 41-44. The Pre-Trial Chamber will not address examples in the Annex when reasons for which they are listed under the “bullying/intimidating” chapeau are unclear. *See* Annex, p. 88 and Written Record of Witness Interview of [REDACTED], 14 February 2015, D219/185; Annex, p. 99 and Written Record of Witness Interview of [REDACTED], 8 April 2015, D219/267; Annex, pp. 193-194 and Written Record of Witness Interview of [REDACTED], 8 November 2016, D219/861; Annex, p. 199 and Written Record of Witness Interview of [REDACTED], 10 November 2016, D219/869.

<sup>89</sup> Application, para. 43; Annex, pp. 66-67 and Written Record of Witness Interview of [REDACTED], 27 June 2014, D118/266; Annex, p. 98 and Written Record of Witness Interview of [REDACTED], 29 March 2015, D219/244; Annex, pp. 114-115 and Written Record of Witness Interview of [REDACTED], 13 October 2014, D219/43; Annex, pp. 117-118 and Written Record of Witness Interview of [REDACTED], 16 October 2014, D219/45; Annex, p. 153 and Written Record of Witness Interview of [REDACTED], 16 December 2015, D219/628; Annex, pp. 167-168 and Written Record of Witness Interview of [REDACTED], 4 February 2016, D219/678

<sup>90</sup> Application, para. 42; Annex, pp. 60-61 and Written Record of Witness Interview of [REDACTED], 19 June 2014, D118/259.

<sup>91</sup> Response, para. 24.

<sup>92</sup> “The investigating judge questions witnesses separately, without any presence of the charged person and any civil party. The investigating judge may also arrange a confrontation between the charged person, civil parties and witnesses.” *See also* French Code of Criminal Procedure, art. 102 (“The witnesses are heard either separately and outwith the presence of the parties, or in the context of a confrontation between themselves or with one or other of the parties, by the investigating judge with the assistance of his clerk.”).

<sup>93</sup> *See, e.g.*, Annex, p. 117 and Written Record of Witness Interview of [REDACTED], 14 October 2014, D219/43, p. 11 (“But you had ears to hear and eyes to see.”); Annex, pp. 117-118 and Written Record of Witness Interview of [REDACTED], 16 October 2014, D219/45, pp. 7-8 (“Do you think we believe what you said? [...] Once again we still do not believe in what you have answered.”); Annex, pp. 148-149 and Written Record of Witness





intimidation. Rather, having reviewed each impugned interview and the Investigator's work as a whole, it considers that it was not inappropriate for the Investigator, taking into account factors such as the willingness of the witness to cooperate, former statements or positions allegedly held during Democratic Kampuchea,<sup>94</sup> to insist or repeat questions to obtain complete answers<sup>95</sup> or to confront the witness with contradicting or incriminating evidence on the record.<sup>96</sup> A full reading of the same impugned interviews actually reveals that the Investigator, when coming to sensitive issues, did not try to intimidate but rather to build trust with the interviewees.<sup>97</sup>

## 5. Conclusion

44. In light of the foregoing, and bearing in mind the high threshold to reach in order to rebut the presumption of impartiality and the wide discretion of investigators in conducting interviews in a way conducive to ascertaining the truth,<sup>98</sup> the Pre-Trial Chamber considers that the Applicant has not adduced sufficient evidence to demonstrate any malpractice – other than the off-the-record interview with ██████████ on 29 August 2013 – which, individually or cumulatively, would demonstrate bias. There is thus no violation of Internal Rule 55(5) and Article 14 of the ICCPR and no need to address any related prejudice.

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Interview of ██████████, 1 December 2015, D219/612, p. 16 (“Saying ‘I do not know’ is not an answer.”).

<sup>94</sup> See, e.g., Written Record of Witness Interview of ██████████, 16 October 2014, D219/45, pp. 7-8 (the Investigator has evidence of the witness' duties as former Commune Chairman, which he denies); Written Record of Witness Interview of ██████████, 1 December 2015, D219/612, p. 7 (the Investigator has evidence that the witness was a unit chief, which he denies); Annex, pp. 183-184 and Written Record of Witness Interview of ██████████, D219/860, pp. 5-8 (the Investigator has evidence that the witness was on a district committee, which she denies).

<sup>95</sup> See, e.g., Application, para. 44; Annex, pp. 11-12 and Written Record of Witness Interview of ██████████, 23 January 2014, D118/171; Annex, pp. 70-71 and Written Record of Witness Interview of ██████████, 9 July 2014, D118/273; Annex, p. 165 and Written Record of Witness Interview of ██████████, 27 January 2016, D219/671.

<sup>96</sup> See, e.g., Written Record of Witness Interview of ██████████, 16 October 2014, D219/45, p. 8 (“We cannot believe what you said because we have other evidence.”); Annex, p. 153 and Written Record of Witness Interview of ██████████, 16 December 2015, D219/628, p. 7 (“You worked for many years in Kiri Vong District, so we find it hard to believe that you do not know anything about ██████████.”).

<sup>97</sup> See, e.g., Written Record of Witness Interview of ██████████, 16 October 2014, D219/45, p. 9 (“We want to clarify to you that you are a witness, and there is nothing that you should be afraid to answer.”); Written Record of Witness Interview of ██████████, D219/860, pp. 6 (“I would like to inform you that you are protected against self-incrimination. For me, I have the rights to ask you questions, but you also have the rights not to answer my questions.”), 8 (“You will not face any punishment for what you tell us because you are protected against self-incrimination.”).

<sup>98</sup> See *supra* paras 13-14.



45. Finally, the Pre-Trial Chamber generally recalls that annulment would not be the only remedy available for the alleged shortcomings. The circumstances in which evidence is obtained, including the reliability of the interviews in light of the nature of the questions asked to the witnesses and civil parties, will be fully assessed at the closing order stage, including eventually by the Pre-Trial Chamber, and, should the case go to trial, by the Trial Chamber.

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

- **ANNULS** the off-the-record interview with [REDACTED] conducted on 29 August 2013;
- **ORDERS** the cancellation and the removal from the case file of the second part of the written record of investigative action D117/25 ranging from page 2, paragraph 4 (“Summary of the topics [...]”) (excluded) to page 4, paragraph 2 (“[...] Khmer Krom ethnic group.”) (included);
- **DISMISSES** the remainder of the Application.

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

Phnom Penh, 25 August 2017

President

Pre-Trial Chamber

     
PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy