ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D360/1/1/6

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 (PTC45)

THE PRE-TRIAL CHAMBER

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

Date: **26 October 2017**

PUBLIC REDACTED

DECISION ON [redacted] APPLICATION TO ANNUL THE PLACEMENT OF CASE 002 ORAL TESTIMONIES ONTO CASE FILE 004

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of the "[redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004", filed by the Co-Lawyers for [redacted] (the "Co-Lawyers") on 30 June 2017 (the "Application").[1]

I. INTRODUCTION

1. 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.[2]

2. On 14 June 2017, the Co-Lawyers filed an application to seise the Pre-Trial Chamber with a view to annulling the placement of Case 002 oral testimonies onto Case File 004,[3] which was granted by the International Co-Investigating Judge on 16 June 2017.[4]

3. On 30 June 2017, the Co-Lawyers filed their Application before the Pre-Trial Chamber. On 20 July 2017, the International Co-Prosecutor filed his response[5] and, on 26 July 2017, the Co-Lawyers filed their reply.[6]

II. ADMISSIBILITY

4. The Co-Lawyers submit that the Application is admissible under Rule 76(4).[7] They contend that it sets out sufficient reasons and is not manifestly unfounded,[8] that the impugned

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[1] Case No. 004/07-09-2009-ECCC-OCIJ ("Case 004"), [redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004, 30 June 2017, D360/1/1/2 ("Application"), notified in English on 11 July 2017 and in Khmer on 18 July 2017. *See also* Case 004, Urgent Request to File [redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004 in One Language, 30 June 2017, D360/1/1/1.

[2] Case 004, Co-Prosecutor's Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

[3] Case 004, [redacted] Application to Seise the Pre-Trial Chamber with a View to Annulment of the Placement of Case 002 Oral Testimonies onto Case File 004, 14 June 2017, D360.

[4] Case 004, Decision on [redacted] Application to Seise the Pre-Trial Chamber with a View to Annulment of the Placement of Case 002 Testimonies onto Case File 004, 16 June 2017, D360/1.

[5] Case 004, International Co-Prosecutor's Response to [redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004, 20 July 2017, D360/1/1/3, notified on 21 July 2017.

[6] Case 004, [redacted] Reply to the International Co-Prosecutor's Response to [redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004, 26 July 2017, D360/1/1/5 ("Reply"), notified in English on 7 August 2017 and in Khmer on 29 August 2017. *See also* Case 004, Request to File [redacted] Reply to the International Co-Prosecutor's Response to [redacted] Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004 in One Language, 25 July 2017, D360/1/1/4.

material is sufficiently identified in annexes,[9] and that the Application does not relate to any orders currently open to appeal.[10] The International Co-Prosecutor does not dispute the admissibility of the Application.

5. The Pre-Trial Chamber recalls that Internal Rule 76(2) casts a screening role in annulment proceedings on the Co-Investigating Judges, who must satisfy themselves that an "arguable case" exists in the sense that the request for referral sets forth a *prima facie* reasoned argument, identifying a procedural defect and prejudice, and is not manifestly unfounded.[11] 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.[12]

6. Internal Rule 55(5) reads:

> "In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. [...]"

7. This provision mirrors Article 127 of the Cambodian Code of Criminal Procedure:

> "An investigating judge, in accordance with the law, performs all investigations that he deems useful to ascertaining the truth. [...]"

8. In turn, Internal Rule 60(1) provides that "[t]he Co-Investigating Judges may take statements from any person whom they consider conducive to ascertaining the truth, subject only to the provisions of Rule 28." In other words, it confirms the Co-Investigating Judges' broad discretion as to how they want to collect evidence, through an interview taken by

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[7] Application, paras 16-21.
[8] Application, paras 17-18.
[9] Application, para. 18.
[10] Application, para. 19.
[11] Case 003/07-09-2009-ECCC/OCIJ (PTC28), Decision Related to (1) [redacted] Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber With Requests for Annulment and (2) the Two Requests Annulment Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26 ("Decision on Nine Applications"), paras 38-41.
[12] *See, e.g.*, Case 004 (PTC40), Decision on [redacted] Application to Annul the Investigative Material Produced by Paolo STOCCHI, 25 August 2017, D351/1/4, para. 7.

themselves, by delegated investigators upon a rogatory letter, or by any other investigative action conducive to ascertaining the truth.

9. In the present case, the Pre-Trial Chamber observes that the Co-Lawyers request the annulment of decisions, orders and written records of investigative action placing oral testimonies from Case 002 onto Case 004, as well as related Case 002 trial transcripts,[13] arguing that the transfer of testimonial evidence from Case 002 proceedings violates Internal Rule 60 and that witness evidence should have been obtained by the Co-Investigating Judges in judicial interviews.[14]

10. The Pre-Trial Chamber notes, however, that the Application concerns the transfer of evidence legally admitted in judicial proceedings, which was ordered pursuant to Internal Rule 55(5) and falls under the Co-Investigating Judges' discretion to take any investigative action conducive to ascertaining the truth. The Co-Investigating Judges are neither bound to take interviews pursuant to Internal Rule 60 nor required to obtain testimonial evidence through confidential interviews conducted by themselves.[15]

11. Accordingly, the Pre-Trial Chamber finds the Application manifestly unfounded in the sense that it is particularly evident or very apparent that it has no legal foundation and hence no prospect of success.[16] The Pre-Trial Chamber thus dismisses the Application as inadmissible and, in the absence of arguable case, holds that it should not have been referred to its jurisdiction.

[13] Application, para. 22.
[14] Application, paras 23-24.
[15] *Ibid.*
[16] Decision on Nine Applications, para. 40.

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

- **DISMISSES** the Application as inadmissible.

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

Phnom Penh, 26 October 2017

President **Pre-Trial Chamber**

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy