



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

D370/1/1/6

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 (PTC51)

THE PRE-TRIAL CHAMBER

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

Date: 20 August 2018

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DECISION ON [REDACTED] APPLICATION TO ANNUL THE REQUESTS FOR AND USE OF CIVIL PARTIES' SUPPLEMENTARY INFORMATION AND ASSOCIATED INVESTIGATIVE PRODUCTS IN CASE 004

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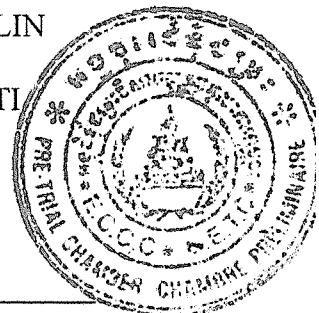
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “██████████’s Application for Annulment of the Requests for and Use of Civil Parties’ Supplementary Information and Associated Investigative Products in Case 004”, filed by the Co-Lawyers for ██████████ (respectively “Co-Lawyers” and “Applicant”) on 2 October 2017 (“Application”).¹

I. PROCEDURAL HISTORY

1. On 13 October 2014 and 18 December 2014, the former International Co-Investigating Judge Mark HARMON sent four letters to the Head of the Victims Support Section, requesting additional information from a number of civil party applicants whose applications did not provide “sufficient, detailed information about the alleged criminal acts” (“Requests”).²

2. On 12 September 2017, the Co-Lawyers filed an application to seize the Pre-Trial Chamber with a view to annul the Requests and resulting investigative products,³ which was granted by the International Co-Investigating Judge on 25 September 2017.⁴

3. On 2 October 2017, as instructed by the Pre-Trial Chamber,⁵ the Co-Lawyers filed the Application to annul the Requests and resulting investigative products. On 26 October 2017,

¹ Case No. 004/07-09-2009-ECCC-OCIJ (“Case 004”), ██████████’s Application to Annul the Requests for and Use of Civil Parties’ Supplementary Information and Associated Investigative Products in Case 004, dated 2 October 2017 and notified on 16 October 2017, D370/1/1/2 (“Application”). *See also* Case 004, Urgent Request to File ██████████’s Application to Annul the Requests for and Use of Civil Parties Supplementary Information and Associated Investigative Products in Case 004 in One Language, 2 October 2017, D370/1/1/1.

² Case 004, Letter from Judge Mark HARMON to Head of the Victims Support Section ██████████: Request for Additional Information from Civil Party Applicants without Lawyers, 13 October 2014, D222 (“Letter to VSS (D222)”); Case 004, Letter from Judge Mark HARMON to Head of the Victims Support Section ██████████: Request for Additional Information from Civil Party Applicants with Lawyers, 13 October 2014, D223 (“Letter to VSS (D223)”); Case 004, Letter from Judge Mark HARMON to Head of the Victims Support Section ██████████: Second Request for Additional Information from Civil Party Applicants, 18 December 2014, D234 (“Letter to VSS (D234)”); Case 004, Letter from Judge Mark HARMON to Head of the Victims Support Section ██████████: Third Request for Additional Information from Civil Party Applicants, 18 December 2014, D235 (“Letter to VSS (D235)”).

³ Case 004, ██████████’s Application to Seize the Pre-Trial Chamber with a View to Annulment of the Requests for and Use of Civil Parties Supplementary Information from Civil Parties and Associated Investigative Products in Case 004, 12 September 2017, D370.

⁴ Case 004, Decision on ██████████’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Certain Documents relating to Civil Parties, 25 September 2017, D370/1.

⁵ *See* Case 004, Email from the Pre-Trial Chamber addressed to the parties in Case 004, 28 September 2017.



the International Co-Prosecutor filed his response,⁶ and, on 30 October 2017, the Co-Lawyers filed a reply.⁷

II. ADMISSIBILITY

4. The Co-Lawyers submit that the Application is admissible since it is sufficiently reasoned, concerns procedural defects not subject to appeal, and is “well-founded”.⁸ They argue that they have set out the legal basis for the application, “taken pains” to identify the procedurally defective material, and that the International Co-Investigating Judge did not find it manifestly unfounded.⁹

5. The International Co-Prosecutor responds that the Application is untimely and thus inadmissible, stressing that the application to seize the Pre-Trial Chamber was filed one week after the second notice of conclusion of judicial investigation on 5 September 2017, while the impugned materials have been available to the Applicant since December 2015.¹⁰ He argues that, under Internal Rule 76(2), applications to seize the Pre-Trial Chamber with annulment requests are to be filed during the judicial investigation, and that allowing the filing of later applications would be “inconsistent with the requirement for efficient proceedings”.¹¹

6. The Co-Lawyers reply that the International Co-Prosecutor erroneously imports an additional criterion into the consideration of admissibility.¹² The temporal scope in Internal Rule 76(2) only defines when the parties may submit the application to seize the Pre-Trial Chamber.¹³ The timing of the submission of an annulment application should thus be the

⁶ Case 004, International Co-Prosecutor’s Response to ██████’s Application to Annul Certain Civil Party Materials, 26 October 2017, D370/1/1/3 (“Response”).

⁷ Case 004, ██████’s Reply to the International Co-Prosecutor’s Response to His Application to Annul the Requests for and Use of Civil Parties’ Supplementary Information and Associated Investigative Products in Case 004, 30 October 2017, D370/1/1/5 (“Reply”).

⁸ Application, paras 20-22.

⁹ Application, para. 22.

¹⁰ Response, para. 2 referring to Case 004, Second Notice of Conclusion of Judicial Investigation against ██████, 5 September 2017, D368.

¹¹ Response, para. 2.

¹² Reply, para. 5.

¹³ Reply, para. 6.



concern of the Co-Investigating Judges alone.¹⁴ The International Co-Prosecutor further failed to challenge the decision to grant the application to seize the Pre-Trial Chamber.¹⁵

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.¹⁶ The Pre-Trial Chamber is satisfied that the Application is sufficiently reasoned, does not concern any order open to appeal, and is not manifestly unfounded as to deprive it of any prospect of success.

8. The Pre-Trial Chamber further recently held, under a combined reading of Internal Rules 66(1), 67(1) and 76(2) and in light of Internal Rule 21(1), that the “judicial investigation” is officially concluded by the issuance of the Closing Order, and not at the time the Co-Investigating Judges notify the parties of their intent to conclude it.¹⁷ Limiting the filing of annulment applications between the forwarding of the Case File to the Co-Prosecutors and the issuance of the Closing Order would deprive the Charged Person of a remedy for procedural defects that may occur during this period. The Pre-Trial Chamber thus considers the Application timely.

9. Accordingly, the Pre-Trial Chamber finds the Application admissible.

III. MERITS

A. Submissions

10. The Co-Lawyers request the Pre-Trial Chamber to annul, pursuant to Internal Rules 21, 48 and 76, the Requests and 248 associated investigative products collected from civil party applicants.¹⁸ They contend that the delegation of questioning of civil party applicants to the

¹⁴ Reply, paras 6-7.

¹⁵ Reply, para. 8.

¹⁶ Case 003/07-09-2009-ECCC/OCIJ (PTC34), Decision on ██████████'s Application for the Annulment of Torture-Derived Written Records of Interview, 24 July 2018, D257/1/8 (“Decision on Application for the Annulment of Torture-Derived Evidence”), para. 10.

¹⁷ Decision on Application for the Annulment of Torture-Derived Evidence, paras 11-12.

¹⁸ See Application, p. 1. See also Case 004, ██████████'s Application to Annul the Requests for and Use of Civil Parties' Supplementary Information and Associated Investigative Products in Case 004 – Annex A,



Victims Support Section was made *ultra vires* and in violation of Internal Rules 23(4), 23bis(2), 59 and 62, rendering the investigative material collected through the Requests procedurally defective and unreliable.¹⁹ They stress that civil party applicants cannot be questioned as simple witnesses under Internal Rules 23bis(2) and 23(4) and that the Co-Investigating Judges may not exercise discretion in the conduct of such interviews.²⁰ The questioning of civil party applicants undermined the integrity of investigation and harmed the rights of the Applicant and other parties.²¹

11. The Co-Lawyers argue that the Requests constituted “investigative action” in accordance with Internal Rule 48, since they concerned the procurement of “evidential material” that was eventually placed on the Case File.²² Therefore, the Requests resulted in the *ultra vires* delegation of investigative action to the Victims Support Section, which “play[s] a purely administrative role”.²³ They claim that the Co-Investigating Judges’ discretion in the conduct of the judicial investigation is not absolute,²⁴ and that they may only delegate their investigative functions to ECCC investigators or the judicial police upon the issuance of rogatory letters and fulfilment of certain conditions pursuant to Internal Rules 55(9) and 62.²⁵ Internal Rule 55(5) is further superseded by the *lex specialis* provisions of Internal Rule 59(6),²⁶ which provides that civil party interviews commissioned by rogatory letters may only be delegated to ECCC investigators.²⁷

12. The Co-Lawyers also argue that the mode of questioning the civil party applicants was inappropriate and contaminated the investigation.²⁸ They emphasise that civil party applicants have a “clear vested interest” in demonstrating criminality and the link to alleged perpetrators, and their applications have been accorded an “inherently lower probative value”

2 October 2017, D370/1/1/2.2; Case 004, ██████████’s Application to Annul the Requests for and Use of Civil Parties’ Supplementary Information and Associated Investigative Products in Case 004 – Annex B, 2 October 2017, D370/1/1/2.3.

¹⁹ Application, paras 23-24.

²⁰ Application, para. 23.

²¹ Application, para. 24.

²² Application, paras 25-26.

²³ Application, para. 29.

²⁴ Application, para. 27.

²⁵ Application, paras 28-30.

²⁶ Application, para. 31.

²⁷ Application, para. 30.

²⁸ Application, paras 36-44.



at the ECCC.²⁹ They express their concern about the indicative list of questions provided as annexes to the Requests,³⁰ and the fact that the conduct of questioning was not recorded in accordance with Rule 25.³¹ They submit that the placement of the additional information on the Case File violated the Applicant's right to fair proceedings and the guarantee of separation between the authorities responsible for prosecution and adjudication.³²

13. The International Co-Prosecutor responds that the Requests and the filing of supplementary information were consistent with the Internal Rules.³³ It is clear that the former International Co-Investigating Judge never intended to treat as formal interviews additional information obtained through the Victims Support Section, which simply provided the assistance sought in accordance with Internal Rule 12*bis*(1)(b).³⁴ This approach was conducive to an efficient investigation and well within the discretion of the Co-Investigating Judges.³⁵

14. The International Co-Prosecutor adds that neither the former International Co-Investigating Judge nor the Victims Support Section acted in a biased manner and that the suggested questions follow appropriate investigative techniques.³⁶ The claims of prejudice are generally premature and speculative, since the mere presence of the supplementary information on the Case File does not imply it would be given undue evidentiary weight.³⁷ The Co-Lawyers' approach would "in essence foreclose participation in the proceedings to civil parties".³⁸

15. The Co-Lawyers reply that the International Co-Prosecutor fails to demonstrate that the former International Co-Investigating Judge acted within his lawful powers in delegating the investigative action to the Victims Support Section.³⁹ They reiterate that the questioning of

²⁹ Application, paras 37-38.

³⁰ Application, para. 40.

³¹ Application, para. 43.

³² Application, para. 45.

³³ Response, paras 3-6.

³⁴ Response, paras 3-4.

³⁵ Response, para. 6.

³⁶ Response, paras 7-10.

³⁷ Response, paras 11-13.

³⁸ Response, para. 15.

³⁹ Reply, para. 11.



civil party applicants is strictly governed by the *lex specialis* provisions of Internal Rules 23(4) and 59.⁴⁰ The Co-Investigating Judges had no means to ensure that the questioning of civil party applicants was conducted impartially and it is only possible to speculate that it was conducted ethically.⁴¹ The Co-Lawyers finally claim that the International Co-Prosecutor mischaracterises their arguments regarding the contamination of the investigation and the prejudice caused by the presence of the “contaminated material” on the Case File.⁴² The inherent unreliability of civil party applications and the alleged procedural defect in obtaining the additional information militates in favour of annulment, which is the appropriate and only remedy for procedural defects.⁴³

B. Discussion

16. 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 application for annulment requires the determination of: 1) whether a procedural irregularity exists; and, 2) where such a defect is found to exist, whether it is prejudicial to the applicant.⁴⁴

17. At the outset, the Pre-Trial Chamber recalls that the gathering of evidence during the investigation is ruled by the principle of freedom of evidence, pursuant to which all evidence is admissible and generally has the same probative value.⁴⁵ Article 23 *new* of the ECCC Law reflects this principle by establishing that “[t]he Co-Investigating Judges shall conduct investigations on the basis of information *obtained from any institution*”.⁴⁶ Internal Rule 55(5), in turn, expressly authorises the Co-Investigating Judges to “take any investigative

⁴⁰ Reply, para. 13.

⁴¹ Reply, paras 17-18.

⁴² Reply, paras 16-23.

⁴³ Reply, para. 24.

⁴⁴ See, e.g., Decision on Application for the Annulment of Torture-Derived Evidence, para. 14.

⁴⁵ Case No. 004/1/07-09-2009-ECCC-OCIJ (“Case 004/1”) (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (“Considerations on the Appeal of Closing Order in Case 004/1”), para. 44 referring to Cambodian Code of Criminal Procedure, Art. 321; French Code of Criminal Procedure, Art. 427; J. PRADEL, *Procédure pénale*, Cujas, 14th ed., 2008-2009, p. 364; F. DEBOVE, F. FALLETTI and E. DUPIC, *Précis de droit pénal et de procédure pénale*, Presses Universitaires de France, 5th ed., 2013, p. 697.

⁴⁶ ECCC Law, Art. 23 *new* (emphasis added). See also Considerations on the Appeal of Closing Order in Case 004/1, para. 44.



action conducive to ascertaining the truth” and to “[s]eek information and assistance from any State, the United Nations or any other intergovernmental or non-government organization, *or other sources that they deem appropriate*”.⁴⁷

18. There is thus no provision in the applicable law before the ECCC prohibiting the Co-Investigating Judges from requesting assistance or gathering information from other institutions, including from the Victims Support Section, which is specifically tasked with assisting victims in submitting civil party applications under the Judges’ supervision.⁴⁸

19. Turning to the nature of the assistance requested from the Victims Support Section, the Pre-Trial Chamber does not consider that the questioning of civil party applicants requested by the former International Co-Investigating Judge can be characterised as a delegation of the power to conduct formal interviews, which are subject to the procedural requirements of Internal Rules 23(4) and 59. It is evident that that the former International Co-Investigating Judge did not treat or intend to treat the questioning of applicants by the Victims Support Section as formal civil party interviews. Although he suggested an “indicative list of questions” to be asked by the Victims Support Section,⁴⁹ the information sought under his supervision was expressly intended to aid in the assessment of the admissibility of the applications and to serve as a preliminary screening process, in order to determine whether the applicants should be formally interviewed.⁵⁰ The fact that he requested the Victims Support Section to submit inter-office memoranda summarising the supplementary information,⁵¹ rather than transcriptions of the questioning, also shows that he did not intend the resulting material to carry the same weight as formal civil party interviews.

20. The Pre-Trial Chamber further notes that the former International Co-Investigating Judge explicitly instructed the Victims Support Section to liaise with the civil party applicants in order “to complete their applications” and “the missing information”.⁵² The

⁴⁷ Internal Rule 55(5)(c) (emphasis added).

⁴⁸ Internal Rule 12*bis*(1)(b).

⁴⁹ Letter to VSS (D222), at ERN (EN) 01030139-01030141.

⁵⁰ Letter to VSS (D222), at ERN (EN) 10130136.

⁵¹ Letter to VSS (D222), at ERN (EN) 01030142.

⁵² Letter to VSS (D222), at ERN (EN) 10130136; Letter to VSS (D223), at ERN (EN) 10130155; Letter to VSS (D234), at ERN (EN) 10148055; Letter to VSS (D235), at ERN (EN) 01047998.



resulting supplementary information was accordingly appended to the corresponding civil party applications and never treated as formal interviews.

21. In light of the foregoing, the Pre-Trial Chamber considers that the Victims Support Section did not undertake any delegated investigative action in place of the Co-Investigating Judges, in the sense of Internal Rules 55(9), 59(6) and 62, but instead properly assisted victims in submitting civil party applications, under the former International Co-Investigating Judge's supervision, pursuant to Internal Rule 12*bis*(1)(b).

22. Accordingly, no procedural defect has been established that would justify the annulment of the Requests and associated investigative products. Any concern relating to the reliability of the supplementary information sought would not affect the validity of the civil party applications as such, but merely their probative value, which is to be fully assessed at a later stage.

IV. DISPOSITION

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

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

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

Phnom Penh, 20 August 2018

Pre-Trial Chamber

President



BRUN Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

