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 Préliminaire

Doc.No: D87/2/2

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° 003/07-09-2009-ECCC/OCIJ (PTC10)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-ho CHUNG
Judge HUOT Vuthy

Date: **23 April 2014**

PUBLIC (REDACTED VERSION)

DECISION ON [redacted] APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONSTRUCTIVE DENIAL OF FOURTEEN OF [redacted] SUBMISSIONS TO THE [OFFICE OF THE CO-INVESTIGATING JUDGES]

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Lawyers for the Civil Parties

HONG Kimsuon
KIM Mengkhy
SAM Sokong
Annie DELAHAIE
Laure DESFORGES
Ferdinand DJAMMEN-NZEPA
Nicole DUMAS

[redacted]
Co-Lawyers

ANG Udom
Michael KARNAVAS

Co-Investigating Judges

YOU Bunleng
Mark HARMON

Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI
Mahdev MOHAN

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "[redacted] Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen [redacted] Submissions to the OCIJ" filed by ANG Udom and Michael G. KARNAVAS (the "Co-Lawyers") on behalf of [redacted] on 5 November 2013 (the "Appeal").[1]

I. BACKGROUND

1. On 20 November 2008, the then Acting International Co-Prosecutor submitted to the Co-Investigating Judges the Second Introductory Submission regarding [redacted] (the "Introductory Submission"), opening a judicial investigation into, *inter alia*, crimes for which [redacted] is alleged to be responsible.[2]

2. On 6 March 2012, the Defence Support Section (the "DSS") was instructed to assist [redacted] in selecting a lawyer to represent him.[3] On 18 December 2012, the Head of the DSS informed the Office of the Co-Investigating Judges (the "OCIJ") that [redacted] had selected Mr. Ang Udom and Mr. Michael Karnavas as his Co-Lawyers (the "Co-Lawyers") and invited the OCIJ to note their assignment.[4] On 24 December 2012, the International Co-Prosecutor requested that the OCIJ reject the assignment of the Co-Lawyers to represent [redacted] alleging irreconcilable conflicts of interest issues (the "Co-Prosecutor's Request").[5] Following the Co-Prosecutor's Request, on 11 February 2013, the International Co-Investigating Judge (the "ICIJ") ordered that the Co-Lawyers and their associates "suspend any communication" with [redacted] until a decision confirming their assignment is rendered (the "Decision and Scheduling Order of 11 Feburary 2013").[6] On 10 January 2014, the ICIJ decided to admit and granted the Co-Prosecutor's Request to reject the assignment of the Co-Lawyers to represent [redacted]

[1] [redacted] Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of [redacted] Submissions to the OCIJ, 5 November 2013, D87/2/1.
[2] Co-Prosecutor's Second Introductory Submission regarding [redacted], 20 November 2008, D1; See also Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[3] Notification of Suspect's Rights (Rule 21(1)(D)) to the Defence Support Section, 23 March 2012, D33.
[4] Letter to the CIJ Regarding the Assignment of Co-Lawyers for a Suspect in Case 003, 19December 2012, D56.
[5] International Co-prosecutor's request that appointment of Co-lawyers-designate be rejected on the basis of irreconcilable conflicts of interest, 24 December 2012, D56/1.
[6] Decision and Scheduling Order concerning request for appointment of Co-lawyers designate, 11 February 2013, D56/3.

and instructed the DSS to take the necessary steps to assign new lawyers to represent [redacted] as soon as practicable (the "Conflict Decision").[7] On 13 January 2014, the Co-Lawyers filed, on behalf of [redacted], a notice of appeal indicating their intention to appeal the Conflict Decision before the Pre-Trial Chamber.[8] On 31 January 2014, the Pre-Trial Chamber declared "that any time limit to appeal the [Conflict] Decision is suspended until the issuance and receipt of the present decision" and "deferr[ed] its decision on the Request [from the Co-Lawyers] for Access to the Case File until it receives confirmation that [redacted] wishes to pursue the Appeal."[9] On 7 February 2014, [redacted] filed, through the Co-Lawyers, before the Pre-Trial Chamber, his Notice of Intent to Pursue the Appeal against the Conflict Decision,[10] reiterating his wish to be represented by the Co-Lawyers.[11] On 12 March 2014, the Co-Lawyers filed the Appeal against the Conflict Decision. The written proceedings on this appeal are ongoing, as provided in the Internal Rules.

3. While the issue of assignment of the Co-Lawyers to represent [redacted] was under consideration and the *communication between the Co-Lawyers and* [redacted] *was suspended*, between 29 August and 28 October 2013, the Co-Lawyers filed before the Co-Investigating Judges, on behalf of [redacted], a number of fourteen submissions (the "Fourteen Submissions").[12] On 25 October 2013, the ICIJ informed the Co-Lawyers that

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[7] Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, 10 January 2014, D56/18.

[8] [redacted] Notice of Appeal against the Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconciliable Conflicts of Interest, 13 January 2014, D56/19.

[9] Decision on Requests for Interim Measures, 31 January 2014, D 56/19/8.

[10] [redacted] Notice of Intent to Pursue Appeal Against Decision on the International Co-Prosecutor's Request to Reject Appointment of the Co-Lawyers for [redacted] on the Basis of Irreconcilable Conflicts of Interest, 7 February 2014, D56/19/13.

[11] D56/19/13.1.

[12] [redacted] Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82 and D87/2/1.2; [redacted] Request for Information Concerning the OCIJ's Investigative Approach and Methodology, 2 October 2013, D87/2/1.3; [redacted] Notice of Objection to Stephen Heder Having any Further Involvement in Case 003 & Request for the Work Product of Stephen Heder, 9 October 2013, D87/2/1.4; [redacted] Notice of Objection to David Boyle Having any Further Involvement in Case 003 & Request for the Work Product of David Boyle, 9 October 2013, D87/2/1.5; [redacted] Request to Be Provided with Correspondence from the Head of the OCIJ Legal Unit to the United Nations Secretary General and all Related Material and to have this Material Placed on the Case File, 9 October 2013, D872/1.6; [redacted] Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus with Armed Conflict, 17 October 2013, D87/2/1.7; [redacted] Request for the OCIJ to Place Full Transcripts of All Witness Interviews on the Case File, 17 October 2013, D87/2/1.8; [redacted] Request for the Work Product of OCIJ Investigators Involved

"[g]iven the possible implications of the conflict of interest allegations in the [Co-Prosecutor's Request] the above mentioned [submissions] will be dealt with in due course, subject to the outcome of the decision on [the conflict] matter."[13] On 4 November 2013, the Co-Lawyers filed before the OCIJ a "Notice of Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of [redacted] Submissions to the OCIJ."[14] On 8 November 2013, the Notice of Appeal was notified and the Case File 003 forwarded to the Pre-Trial Chamber by the OCIJ Greffier who informed as follows:

> "the International Co-Investigating Judge has taken the decision to postpone the placement on the case file of, and response to, the above mentioned [Submissions], pursuant to Internal Rule 55(10), subject to a decision on charging the Suspect for his alleged participation in the crimes described in the Second Introductory Submission and a decision on the International Co-Prosecutor's Request that Appointment of Co-Lawyers Designate Be Rejected on the Basis of Irreconcilable Conflicts of Interest (003-D56/1, dated 24 December 2012).
>
> I have been instructed by the International Co-Investigating Judge to inform you that the [Submissions] will be made available to the Pre-Trial Chamber upon request, should the Pre-Trial Chamber require them for a determination of the appeal."[15]

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in Improper Investigative Practices in Case 002, 2 October 2013, D87/2/1.9; [redacted] Request for the OCIJ's Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.10; [redacted] Request for the OCIJ to Compel the OCP to Provide the Defence with its Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.11; [redacted] Request for Clarification Concerning Whether the Defence May Conduct Investigations at the Current Stage of the Proceedings, 2 October 2013, D87/2/1.12; [redacted] Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes), 24 October 2013, D87/2/1.13; [redacted] Request for the OCIJ to Re-Interview Witnesses, 24 October 2013, D87/2/1.14; [redacted] Motion against the Application of JCE III, 28 October 2013, D87/2/1.15.

[13] ICIJ's Letter Concerning Submission Filed by the Co-Lawyers Designate in CF03, 25 October 2013, D87.

[14] Appeal Register of the Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of [redacted] Muth's Submissions to the OCIJ, 8 November 2013, D87/2.

[15] Ibid, paras 3 and 4. The fourteen submissions were placed in Case File 003, as attachments to the Appeal, on 30 Jaunary 2014. See email from the Case File Officer with subject: "NEW DOCUMENT(S): CASE FILE No.

4. On 5 November 2013, the Co-Lawyers filed, in the English language only, the Appeal which was notified on 14 November 2013. The translated version of the Appeal in the Khmer language was notified on 26 December 2013.

5. No Response to the Appeal has been filed by any party within the legal deadline.

II. PRELIMINARY OBSERVATIONS

Standing

6. The Co-Lawyers submit that this Appeal is made by [redacted], *through his Co-Lawyers*.[16] The Pre-Trial Chamber notes that, the Co-Lawyers were *engaged by* [redacted] on 18 July 2012 to act on his behalf.[17] As such, pursuant to *their professional oath* and *in the absence of any order to the contrary* issued by the ECCC, the Co-Lawyers are obliged to "*conduct the case* to finality."[18] The Pre-Trial Chamber considers that the ICIJ's Decision and Scheduling Order of 11 February 2013, which *suspended the communications* between the Co-Lawyers and [redacted] and *deferred* a decision on their assignment due to conflict of interest *allegations* raised by the Co-Prosecutors,[19] is not an ECCC order explicitly impairing the Co-Lawyers from *conducting the case* on behalf of [redacted]. Despite the fact that they were not *able to communicate with* [redacted], *the eligibility or suitability* of the Co-Lawyers to defend [redacted] at the *time subject of this Appeal* – from 29 August 2013, when the first Submission was filed, up to 5 November 2013, when this Appeal was filed - *was not yet removed* by the Co-Investigating Judges.[20] At present, the *eligibility of the Co-Lawyers to defend* [redacted] *remains practically* impugned – which does not mean removed - on grounds of conflict of interest until the ECCC has *finally* found otherwise. Given the following facts:

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003 [redacted] Appeal against the Co-Investigating Judges Constructive Denial of [redacted] [Submissions]," dated 30 January 2014.

[16] Appeal, introductory paragraph. The Co-Lawyers also state that the related fourteen submissions were each prepared based on [redacted] instructions for a "robust and sustained" defence and that such instructions were given to the Co-Lawyers as a condition for their selection, and *prior to the ban on communication* placed by the Co-Investigating Judge (Appeal, para 49).

[17] D56/13, para. 1 with reference to "Form 7."

[18] DSS Regulations, Article 7.1.

[19] Decision and Scheduling Order of 11 February 2013.

[20] See DSS Regulations, Article 7.4. Note that the ICIJ only granted the Co-Prosecutors allegations *later* when issuing the Conflict Decision on 10 January 2014.

1) that the Co-Investigating Judges Conflict Decision of 10 January 2014 has also been impugned by the filing on 13 January 2014 of a Notice of Appeal and on 14 March 2014 of the Appeal in respect of such decision;[21]

2) that, since 18 July 2012 and to date, there is no confirmation from [redacted] that he does not wish the Co-Lawyers to act on his behalf, in fact the contrary has been re-confirmed;[22] and

3) that, until the conflict issue has been finally determined, there is a presumption that the Co-Lawyers are acting pursuant to their professional oath and legal obligations;

without prejudice to a future decision on the Appeal against the Conflict Decision, the Pre-Trial Chamber finds no issues of standing with respect to the Co-Lawyers' eligibility and ability to act on behalf of [redacted] before the Pre-Trial Chamber for the purposes of the Appeal.

Request for Hearing[23]

7. Internal Rule 77(3)(b) provides that "[t]he Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal [...] on the basis of the written submissions of the parties only." Having considered the ample written submissions made in the Appeal, absent of any response filed by the Co-Prosecutors or Civil Parties, the Pre-Trial Chamber does not consider it necessary to hear oral arguments in this case.

III. ADMISSIBILITY OF THE APPEAL

8. The Co-Lawyers request the Pre-Trial Chamber to admit the Appeal and to order the Co-Investigating Judges to consider and decide on the fourteen submissions.[24] The Co-Lawyers submit that the Appeal is admissible on the following grounds: 1) the constructive denial by the Co-Investigating Judge of certain of the fourteen submissions

[21] See D56/19.
[22] To the contrary, it is noted that, as of 7 February 2014, [redacted] reiterated his wish to be represented by the Co-Lawyers. See D56/19/13.1.
[23] Appeal, introductory paragraph.
[24] Appeal, para. 53.

violates fair trial rights which must be safeguarded under *Internal Rule 21*;[25] and 2) certain other of the fourteen submissions are requests for investigation and, as such, the Appeal is admissible also under *Internal Rule 74(3)(2)*.[26]

9. The Co-Lawyers state that the Appeal is made necessary due the ICIJ's letters of 25 and 28 October 2013 informing them that "he would not decide on [redacted] pending submissions until he makes a decision on the conflict of interest matter."[27] Noting that, it is "unknown when the OCIJ will decide on the alleged conflict of interest,"[28] the Co-Lawyers submit that the fourteen submissions must be decided upon as soon as possible "*regardless of who ultimately represents* [redacted]"[29] and that failure to do so would deprive [redacted] of "the possibility of obtaining the benefit he seeks" through the submissions.[30] The Co-Lawyers also note that the ICIJ *failed to provide any legal basis or reasons* for the decision to delay deciding on the submissions.[31]

10. The Pre-Trial Chamber first considered the concept of constructive refusal in a July 2008 decision, where it stated that it is possible to appeal against a Co-Investigating Judge's failure to determine a request, since the conduct may be interpreted to amount to a constructive refusal of a request.[32] The Pre-Trial Chamber has clarified that the failure of the Co-Investigating Judges to rule on a request "as soon as possible, *in circumstances* where a delay in making a decision *deprives the Charged Person of the possibility of obtaining the benefit he seeks*, amounts to a constructive refusal of the application, which *can be appealed against under Internal Rule 74(3),*" *provided that the request is allowed under the Internal Rules.*[33] In respect of requests *not allowed* under the Internal Rules, the Pre-Trial Chamber has stated that it would be improper to use constructive refusal as

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[25] Appeal, paras. 23 and 32-35.
[26] Appeal, paras. 23 and 36.
[27] Appeal, introductory paragraph.
[28] Appeal, para. 25.
[29] Appeal, para. 29.
[30] Appeal, para 24 and 25.
[31] Appeal, para. 44.
[32] Written Version of Oral Decision of 30 June 2008 on Co-Lawyers' Request to Adjourn the Hearing on the Jurisdictional Issues, 2 July 2008, C22/I/49, para. 5.
[33] Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, paras. 14-24. In this particular case, the Pre-Trial Chamber emphasised that the request was *allowed under Internal Rules* (IR 30(10)), and that, *by its nature and by reference to the explicit deadline set in Article 170 of the Cambodian Code of Criminal Procedure*, it required timely attention.

a basis for an appeal of a denied or unmet request.[34] However, in relation to *particular appeals* filed against constructive refusal of a *request that is not expressly allowed under the Internal Rules but which may relate to fundamental rights of the parties*, the Pre-Trial Chamber has considered examining "whether *Internal Rule 21* requires that it adopts a broader interpretation of the [..] right to appeal in order to ensure that proceedings are fair and the rights [...] are safeguarded."[35] The Pre-Trial Chamber has stated that the *Co-Investigating Judges' investigations are conducted independently* and that the Pre-Trial Chamber will not dictate the "methodology or nature of an investigation which falls within the Co-Investigating Judges' discretionary power, unless and until it is satisfied that an investigative act impacts upon *due process or other rights*."[36] In the following cases, the Pre-Trial Chamber has found that it will not interfere with the Co-Investigating Judges' discretion in decision-making: (i) where the Co-Investigating Judges have taken sufficient action in pursuing an investigative action but were unsuccessful in completing the request;[37] (ii) where the Co-Investigating Judges are not obliged by the Internal Rules to decide a matter before a particular time, but the issuance of such a decision will occur imminently;[38] (iii) where "taking into account their purpose, the requests are not requests for investigative action within the ambit of Internal Rule 74(3);[39] and (iv) where the fundamental rights provided for in Internal Rule 21 are sufficiently safeguarded by the existing legal framework.[40]

11. The Pre-Trial Chamber now turns its attention to the admissibility arguments in the Appeal and to each of the related fourteen submissions. It is to be noted that, notwithstanding the observations below, the Pre-Trial Chamber is of the view that for a

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[34] Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Constructive Denial of Ieng Sary's Third Request for Investigative Action, 22 December 2009, D171/4/5, para. 9.
[35] Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Request Concerning the OCIJ's Identification of an Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, para. 28.
[36] Decision on Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request for Investigative Action), 14 July 2010, D300/1/5, para, 22.
[37] Decision on Appeal Against Constructive Refusal of the Seventh Request for Investigative Action, 27 August 2009, D122/4/3, para.
[38] Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Order on Ieng Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, para. 11.
[39] Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Request Concerning the OCIJ's Identification of an Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, paras 23-24.
[40] *Ibid*, at paras 26-30.

matter to be considered as being appealable on the basis of constructive refusal alone more than a reasonable time must have past since the request was made. This is not the case in respect of all of the matters currently before the Pre-Trial Chamber, with the exception of the request for access to the case file. Notwithstannding, it is appropriate to also examine the legal foundation of each request in respect of a claimed right to relief under Internal Rule 21.

Request for Access to Case File and Participation in the Investigation[41]

12. The Co-Lawyers submit in the Appeal that [redacted] Request to Access the Case File and to Participate in the Judicial Investigation was "necessary to respect [redacted] right to *adequate time and facilities to prepare his defence*"[42] and that Internal Rule 21 "requires the Appeal to be admited in order to protect [*inter alia*, this fair trial right] and to ensure the fairness of proceedings."[43]

13. Without prejudice to [redacted] status in the investigative proceedings, given that:

    a. If a person's status in the investigations allows for such, the Internal Rules provide for access to the case file *through the lawyers only,* and that

    b. [redacted] Co-Lawyers are currently challenging the Conflict Decision,

    the Pre-Trial Chamber finds it appropriate to defer a decision on the Appeal, in respect of the Request for Access to the Case File, until it decides on the appeal against the Conflict Decision.

Request for Information on OCIJ's Investigative Approach and Methodology[44]

14. The Co-Lawyers submit in the Appeal that [redacted] request for information concerning the investigative approaches and methodologies "was necessary because it is indiscernible whether a *fair, diligent and thorough judicial investigation* is being

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[41] [redacted] request to access the case file and participate in the judicial investigation, 29 August 2013, D82.
[42] Appeal, para. 19(A).
[43] Appeal, para. 21(a) and (b). See also D82, introductory paragraph.
[44] [redacted] request for information concerning the OCIJ's investigative approach and methodology, 6 November 2013, D87/2/1.3.

conducted and whether there is a uniform investigative approach (i.e. modalities that are fair, consistent, and transparent) in place that is being scrupulously followed by OCIJ Investigators."[45] The Co-Lawyers suggest that *Internal Rule 21* requires the Appeal to be admited, in respect of this Request, in order to protect [redacted] right to *a fair, independent and impartial judicial investigation.*[46]

15. The Pre-Trial Chamber has stated that the Co-Investigating Judges' investigations are conducted independently and that the Pre-Trial Chamber will not dictate the "methodology or nature of an investigation which falls within the Co-Investigating Judges' discretionary power, unless and until it is satisfied that *an* investigative act impacts upon *due process or other rights* of the Charged Persons. It would be *inappropriate to extend the concept of constructive refusal* such that the Pre-Trial Chamber would *scrutinize the adequacy* of investigative actions performed by the [Co-Investigating Judges] as such an extension would see this Chamber intruding into the investigative discretion vested in the [Co-Investigating Judges] by Internal Rule 55(5)."[47] The Pre-Trial Chamber observes that, in the present Request, the Co-Lawyers did not specifically identify "any investigative act(s)" that may impact upon [redacted] rights, they rather request information of a *general nature* in respect of investigation methodologies of the Co-Investigating Judges. As such, this Request does not make the Appeal admissible on the grounds of constructive refusal or upon the basis of and rights asserted to be derived fron Internal Rule 21.

Request to not Involve Stephen Heder[48] and David Boyle[49]

16. The Co-Lawyers submit in the Appeal that "[these requests for n]otification [were] necessary because [redacted] is entitled to a *fair and impartial investigation.*"[50] In the Requests, the Co-Lawyers allege that Mr. Heder and Mr. Boyle are *biased* and that

[45] Appeal, para 19(B). See also D87/2/1.3, paras. 29, 35, 38 and 48.
[46] Appeal, para. 23. See also D87/2/1.3, introductory paragraph *referring to* Internal Rule 21.
[47] Decision on Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request for Investigative Action), 14 July 2010, D300/1/5, para, 22.
[48] [redacted] notice of objection to Stephen Heder having any further involvement in Case 003 and request for the work product of Stephen Heder, 6 November 2013, D87/2/1.4.
[49] [redacted] notice of objection to DAVID Boyle having any further involvement in case 003 and request for the work product of DAVID Boyle, 6 November 2013, D87/2/1.5.
[50] Appeal, paras 19(C) and (D).

consequently any involvement by each of them in any capacity within the OCIJ would taint the investigation. The Co-Lawyers aver that the Requests were necessary because the Defence, in exercising its *due diligence* obligations, must review Mr. Heder's and Mr. Boyle's work product in order *to determine whether applications to annul investigative action* pursuant to Rule 76 *may* be necessary."[51] The Co-Lawyers suggest that *Internal Rule 21* requires the Appeal to be admited, in respect of this Request, in order to protect [redacted] right to a *fair, independent and impartial judicial investigation.*[52]

17. The Pre-Trial Chamber observes that in these Requests the Co-Lawyers impugn the fairness of investigations, which are conducted by the Co-Investigating Judges, by alledging bias of *staff members* and, on those grounds, the Co-Lawyers *suggest* that access to the work product of such staff members is necessary because it *may* be found to be irregular or inappropriate, such as to warrant annulment. In respect of Mr. Heder, the bias allegations are based on *articles* published by him; on his more recent personal choises as to whether to continue to work for the OCIJ or whether to testify during the trial in Case 002; and that he is "an advisor at the Documentation Center of Cambodia" and "reportedly working for the Human Rights Watch in a research capacity."[53] In respect of Mr. Boyle, the bias allegations are based on articles published by him and on his personal opinions on how the court should work.[54]

18. The Pre-Trial Chamber first observes that these Requests, including the references to the latest actions of Mr. Heder and Mr. Boyle, are repetitious of previous requests filed by the same Co-Lawyers in Case 002 with reference to the same staff members.[55] The Pre-Trial Chamber has already stated that it "does not find that any of the claims made by the

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[51] Appeal, paras 19(C) and 19(D).
[52] Appeal, para. 23. See also D87/2/1.4 and D87/2/1.5, introductory paragraphs *referring to* Internal Rule 21.
[53] D87/2/1.4, paras. 5-11.
[54] D87/2/1.5, paras. 1-10.
[55] See Ieng Sary's Application for Disqualification of OCIJ Investigator Stephen Header and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, Doc. No. 1. See also Decision on IENG Sary's Appeal against the OCIJ's Order Rejecting IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 30 November 2010, D402/1/4 (the "Decision related to Annulment Request").

Co-Lawyers demonstrates the existence of a procedural defect or violation of Article 14 of the ICCPR," that "fundamentally, the Co-Lawyers base their application on their position that the *very employment* of Dr. Heder and Mr. Boyle requires annulment of an *unidentified* portion of the judicial investigation" and that "the Co-Lawyers cannot succeed in their application by citing academic research and related materials to substantiate a claim of bias."[56] The final consideration of the Pre-Trial Chamber in that Decision related to the Co-Lawyers' argument that "the allegedly biased members of the Office of the Co-Investigating Judges are infecting the impartial judicial investigation."[57] In this respect, the Pre-Trial Chamber considered that "the argument is without merit for familiar reasons."[58] The Pre-Trial Chamber found in relation to the application filed by the Charged Person to disqualify Dr. Heder and Mr. Boyle that:

> "[t]he role and functions of investigators or legal officers are distinct from those of the Co-Investigating Judges. Pursuant to the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Agreement"), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law") and the Internal Rules, *the Co-Investigating Judges have sole authority and responsibility to conduct the judicial investigation and determine what they will rely upon* in their decisions and orders. In these circumstances, the independence and impartiality of the Co-Investigating Judges *safeguard the fair trial rights* of the Charged Person."[59]

The facts forming the foundation of the Heder and Boyle Request are repetitious of the "allegations in the Disqualification Application"[60] Absent of new facts, the Pre-Trial Chamber will not consider this request further.

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[56] Decision related to Annulment Request, para. 33.
[57] Decision related to Annulment Request, para 35.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid*, paras. 35-36.

19. In respect of the Co-Lawyers' argument, in both these requests, referring to their *due diligence* obligations, the Pre-Trial Chamber clarifies, that such obligations are part of the right to prepare a defence as guaranteed by Article 14(3)(b) of the International Convenant on Civil and Political Rights (ICCPR) which is directly applicable at the ECCC.[61] The right to prepare a defence includes the right of an accused to acquaint him/herself with the "results of the investigation" which consists of "documents and records placed in the case file."[62] Notedly, the right to acquaint oneself with the "results of the investigation" does not include a right to be notified with *any* work product of a particular staff member. In the event that the work product of a particular staff member would fall under the definition "document or record placed in the case file" – i.e. records of investigations or interview reports prepared as directed by the Co-Investigating judges in their rogatory letters - it is only once the Co-Lawyers are granted access to the Case File, that they will be able to see *concrete* records of the investigation and, only then, would they be able to identify from the contents of concrete documents anything that, in their opinion, may be inappropriate or irregular so as to warrant an application for annulment.[63]

20. For all the abovementioned reasons, the Pre-Trial Chamber finds that a delayed answer by the OCIJ to these Requests does not irreparably prevent the requestor from ultimately obtaining the benefit sought, which is: to be able to prepare applications for annulment of investigative action(s) pursuant to Rule 76 *if* necessary. Notwithstanding it's deferred decision on the Appeal in relation to the Request for Access to the Case File, the Pre-Trial Chamber finds that these Requests, as put, do not make the Appeal admissible on grounds of constructive refusal.

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[61] Agreement between the Royal Government of Cambodia and the United Nations Concerning the Prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, (the "Agreement"), Article 12(2).

[62] Decision on Admissibility of Ieng Sary's Appeal Against the OCIJ's Constructive Denial of Ieng Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2010, D130/7/3/5, ERN: 00512912-00512924, PTC31, para. 31 referring to Article 14(3)(b) of the ICCPR and to jurisprudence from the Human Rights Committee and from the European Court of Human Rights.

[63] In this respect, the Pre-Trial Chamber has clarified that the anulment procedure is not designed to nullify investigations in general but *portions* of the proceedings that harm the defendant's interests/rights which have to be *specified*. See Decision on Khieu Samphan's Appeal against the Order on the Request for Annulment for Abuse of Process, 4 May 2010, D197/5/8, ERN 00507486-00507495, PTC 30, para. 24.

Request related to Correspondence from the Head of OCIJ Legal Unit to the United Nations[64]

21. The Co-Lawyers submit in the Appeal that "this Request was necessary because Mr. [redacted] *right to a fair, independent and impartial investigation* may have been, and *may* continue to be, compromised by the fact that the international OCIJ legal team has called on the United Nations "to interfere in the Co-Investigating Judges' decisions" concerning the judicial investigations."[65] They allege *that the OCIJ legal team's actions* call into question the independence and impartiality of the Co-Investigating Judges and the investigation as a whole and that, in the event "any credible information exists demonstrating a *lack of independence or impartiality within the OCIJ,*" [redacted] has the *right to be informed.*[66] The Co-Lawyers suggest that *Internal Rule 21* requires the Appeal to be admitted, in respect of this Request, in order to protect [redacted] right to a fair, independent and impartial judicial investigation.[67] In the Request, the Co-Lawyers allege that the Head of OCIJ's Legal Team in an alleged letter, dated 29 April 2011 and directed to the United Nations Under Secretary General for Legal Affairs, has "expressed the international OCIJ legal team's dissatisfaction with the Co-Investigating Judges' investigation into Case 003 and decision to close the investigation, in their view, *prematurely*" (the "alleged letter").[68] The Co-Lawyers see the alleged letter as "information that *may* cast doubt on the investigative process"[69] and, in order for [redacted] to be able to fully enjoy his right to fair, independent and impartial judicial investigations, they ask *to be provided with a copy of it and of any related material* and that all be placed in the Case File.[70]

22. In respect of the Co-Lawyers submission that actions of OCIJ's *staff members* taint the independence and impartiality of the Co-Investigating Judges themselves, the Pre-Trial Chamber has already considered that "the argument is without merit" and that "[t]he role

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[64] [redacted] request to be provided with correspondence from the head of the OCIJ legal unit to the United Nations Secretary General and all related material and to have this material placed on the case file, 6 November 2013, D87/2/1.6.
[65] Appeal, para 19(E).
[66] *Ibid.*
[67] Appeal, para. 23. See also D87/2/1.6, introductory paragraph referring to Internal Rule 21.
[68] D87/2/1.6, paras 2-3.
[69] D87/2/1.6, para. 4.
[70] D87/2/1.6, conclusive paragraph.

and functions of [staff members] are distinct from those of the Co-Investigating Judges [who, pursuant to the applicable law] have *sole authority* and responsibility to conduct the judicial investigation[...]. In these circumstances, the independence and impartiality of the Co-Investigating Judges safeguard the fair trial rights of the Charged Person."[71] As also submitted by the Co-Lawyers, the Pre-Trial Chamber further observes that the Co-Investigating Judges have similarly expressed that they have "sole responsibility" in respect of the investigations.[72] Moreover, as also submited by the Co-Lawyers, the United Nations has already stated that it "will not comment on issues which remain the subject of judicial consideration, nor speculate on actions that should or should not be taken by the judges or prosecutors in any case."[73] The Pre-Trial Chamber therefore finds that a delayed answer by the OCIJ to this Request, as it is put, does not prevent [redacted] from getting the benefit that he seeks which is a fair, independent and impartial judicial investigation. The Appeal is not admissible on grounds of constructive refusal.

Request for Clarification – Whether OCIJ Considers itself Bound by Pre-Trial Chamber's Jurisprudence in that Crimes Against Humanity Required a Nexus with Armed Conflict (the "nexus issue")[74]

23. The Co-Lawyers submit in the Appeal that this Request "was necessary in the interest of legal certainty since this issue of law - *the nexus issue - remains unsettled at the ECCC*" by virtue of the split oppinions between the Pre-Trial Chamber and the Trial Chamber in decisions rendered in Case 002.[75] The Co-Lawyers suggest that *Internal Rule 21* requires the Appeal to be admitted, in respect of this Request, in order to protect [redacted] *right to legal certainty*.[76] In the Request the Co-Lawyers' ask for clarification from the

[71] See Ieng Sary's Application for Disqualification of OCIJ Investigator Stephen Header and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, Doc. No. 1. See also Decision on IENG Sary's Appeal against the OCIJ's Order Rejecting IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 30 November 2010, D402/1/4, paras. 35-36.
[72] D87/2/1.6, para. 11.
[73] D87/2/1.6, para. 12.
[74] [redacted] request for clarification of whether the OCIJ considers itself bound by Pre-Trial Chamber jurisprudence that crimes against humanity requires a nexus with armed conflict, 6 November 2013, D87/2/1.7.
[75] Appeal, para 19(F).
[76] Appeal, para 23. See also D87/2/1.7, introductory paragraph referring to Internal Rule 21.

OCIJ on its position in relation to existing ECCC jurisprudence on the nexus issue (the "auxilliary part of the request"),[77] and to be allowed to make legal submissions "on the issue of *whether the definition of crimes against humanity in customary international law in 1975-79 required a nexus with armed conflict* (the "ultimate part of the request")."[78]

24. The Pre- Trial Chamber observes that, in the Appeal or in the Request, the Co-Lawyers do not elaborate how the right to legal certainty is affected by the Co-Investigating Judges not making a declaration, *at this stage of the investigations,* in respect of *one element* - such as the "nexus" element for crimes against humanity - of a crime(s) that [redacted] is suspected of. They simply raise their concern that "this issue of law remains unsettled at the ECCC".[79] The Co-Lawyers also express their desire to side with the opinion of one of the ECCC's Chambers with regards to the *definition* of the crimes against humanity.

25. The Pre-Trial Chamber notes that the issue of the *definition* of crimes is one that limits the exercise of jurisdiction by the ECCC.[80] Bearing in mind the purpose and nature of the *ultimate part of this request* - where the Co-Lawyers seek to file submissions arguing upon the very existence in law in 1975-79 of an element of the crimes against humanity - the Pre-Trial Chamber considers that such arguments go to the very essence of the test for compliance with the principle of legality and, as such, depending on how they are put before the ECCC, may represent jurisdictional challenges.[81] In this respect, the Pre-Trial Chamber has aready observed, in relation to a similar appeal which was also filed by the Ieng Sary Defence while the investigations in Case 002 were ongoing, that:

> "the Internal Rules do not oblige the Co-Investigating Judges to decide on *[jurisdictional]* matter[s] before the Closing Order [.....]. [I]f the Closing Order confirms the jurisdiction of ECCC [...], the Charged Person may

[77] D87/2/1.7, last paragraph (A) and (B).
[78] D87/2/1.7, last paragraph (C).
[79] D87/2/1.7, introductory paragraph.
[80] Appeal Judgment in Case 001, para. 100.
[81] See Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para 84.

consider the effect of Internal Rule 67 (5) when read in conjunction with Internal Rule 74(3) (a).

At this point, it is speculative as to what, if any, consideration the Co-Investigating Judges may give to the jurisdiction of the ECCC [...]. The Co-Investigating Judges *are not obliged to give declaratory decisions*, as has been effectively requested in the Motion, and the Pre-Trial Chamber will not provide advisory opinions and cannot fetter the exercise of the discretions of the Co-Investigating Judges in respect of their decisions to be expressed in the Closing Order.

The Pre-Trial Chamber finds that no fundamental rights of the Charged Person are harmed by declaring the appeal inadmissible at this stage of the proceedings and that Internal Rule 21 does not compel the Pre-Trial Chamber to render the Appeal admissible."[82]

26. The Pre-Trial Chamber, having already admitted appeals on properly raised jurisdictional challenges filed by the Charged Persons *against the Closing Order* in Case 002, finds that the existing legal and jurisprudential framework protects the rights of [redacted]. Therefore, Internal Rule 21 does not warrant that the Pre-Trial Chamber adopt, *at this stage in the proceedings,* a broader interpretation of the right to appeal in order to admit the Appeal on grounds of constructive refusal upon the assertion of any rights provided for in Internal Rule 21.

27. In respect of the *auxiliary* part of the request, the Pre-Trial Chamber *clarifies*, by unanimously concurring with the opinion of Judges Downing and Chung, which was also noted by the Co-Lawyers:[83]

"With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part

[82] Decision on Ieng Sary's Appeal against OCIJ's Order on Ieng Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, para. 11.
[83] D87/2/1.7, para. 18.

of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases. This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system and is also in the interest of judicial economy and expediency in the proceedings given that decisions of the Co-Investigating Judges are subject to appeal before the Pre-Trial Chamber which, in principle, follows its previous decisions according to the standard set out above and will therefore overturn decisions of the Co-Investigating Judges departing from its existing jurisprudence."[84]

The Requests: To Place Full Transcripts of all Witness Interviews on the Case File;[85] For the work product of OCIJ investigators involved in improper investigative practices in Case 002;[86] and For the OCIJ to re-interview witnesses[87]

28. The Co-Lawyers submit in the Appeal that these Requests were necessary: "because [redacted] has the fair trial *right to examine the evidence against him*" which, they argue, he cannot exercise *if* "the witness statements on the Case File do not reflect the statements witnesses actually made to OCIJ Investigators;"[88] and "because the Defence must review the work product of those OCIJ Investigators in Case 003 [who, according to the Co-Lawyers, were allegedly involved in irregular and improper investigation practices in Case 002 in order] *to determine whether it may be necessary to make any applications to annul investigative action pursuant to [Internal] Rule 76.*"[89] The Co-Lawyers suggest that *Internal Rule 21* requires the Appeal to be admitted, in respect of these Requests, in order to protect [redacted] right to examine the evidence against

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[84] Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [redacted], 13 February 2013, D11/3/4/2, para. 17.
[85] [redacted] request for the OCIJ to place full transcripts of all witness interviews on the case file, 6 November 2013, D87/2/1.8.
[86] [redacted] request for the work product of OCIJ investigators involved in improper investigative practices in case 002, 6 November 2013, D87/2/1.9.
[87] [redacted] request for the OCIJ to re-interview witnesses, 6 November 2013, D87/2/1.14.
[88] Appeal, paras. 19(G) and (M).
[89] Appeal, para. 19 (H).

him[90] and the right to fair and transparent proceedings.[91] In the Requests the Co-Lawyers' ask: that the OCIJ places full transcripts of all witness interviews on the Case File and *provide them to the Defence*;[92] that the OCIJ *provides the Defence with the work product of all* OCIJ investigators who, the OCIJ has reason to believe, may have employed irregular and improper investigation techniques;[93] and that the OCIJ examines all witness interviews in the Case File, determines whether, and to what extent, any witnesses may need to be re-interviewed, conduct new interviews if necessary and *place the results of this assessment* on the Case File.[94]

29. Firstly, the Pre-Trial Chamber observes that the Co-Lawyers do not have access to the Case File in Case 003 at this moment in time. Second, the Pre-Trial Chamber observes that the Co-Lawyers' *allegations* for irregular or improper investigation practices used by OCIJ Investigators in Case 003 find their basis in a statement made by the International Co-Prosecutor Cayley,[95] when asking the *Trial* Chamber's directions regarding the disclosure of statements obtained in Cases 003 and 004 – which reads:

> "in the International Co-Prosecutor's review of these new statements of Case 002 witnesses, he has noted *a number of inconsistencies or omissions when comparing the written statements in Cases 003 and 004 to the audio recordings of those interviews*, therefore any disclosures directed by the Trial Chamber should also include the audio recordings of these interviews."[96]

30. Following this statement from the International Co-Prosecutor, the Co-Laywers argue in their Requests that "the Defence thus has good *reason to believe* that *some* investigative action performed in Case 003 *may* be tainted by improper investigative techniques and therefore contain procedural defects.[97]

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[90] Appeal, para. 23. See also D87/2/1.8 and D87/2/1.14, introductory paragraphs.
[91] Appeal, para 23. See also D87/2/1.9 and D87/2/1.14, introductory paragraphs.
[92] D87/2/1.8, para. 20.
[93] D87/2/1.9, para. 17.
[94] D87/2/1.14, para 6.
[95] D87/2/1.8, para 1 referring to E127; D87/2/1.9, para 1 referring to E127; D87/2/114, para 1 referring to E127.
[96] E127, para. 14.
[97] D87/2/1.9, para. 13.

31. Similar to the submissions of the Co-Lawyers in the Request, the Pre-Trial Chamber notes that the Trial Chamber in Case 002 declined to conduct Rule 35 investigations and found that the Defence had not satisfied it that the alleged discrepancies could not have been discovered during the investigative stage *or that OCIJ personel knowingly or willfully falsified* the investigation record.[98] In respect of the current allegations, the Pre-Trial Chamber observes that the Co-Lawyers, having no access to the Case File in Case 003, are not yet in a position to make *specific* requests of any kind, either regading alleged improper investigative practices or regarding annulment of any *identifiable* portion of the investigation. Therefore, the Pre-Trial Chamber finds that these requests, as put, are pre-mature on any veiw.

32. The Pe-Trial Chamber finds that a delayed answer by the OCIJ to these Requests does not irreparably prevent the requestor from ultimately getting the benefit sought, which is to be able to review the Case File and, if necessary, to prepare applications for annulment of investigative action(s) pursuant to Rule 76, once access to the Case File is granted. Notwithstanding it's deferred decision on the Appeal in relation to the Request for Access to the Case File, the Pre-Trial Chamber finds that these Requests, as put, do not make the Appeal admissible on grounds of constructive refusal or upon the basis of and rights asserted to be derived from Internal Rule 21.

Request for the OCIJ Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible"[99]

33. The Co-Lawyers submit in the Appeal that this Request was necessary: "because the Defence, in the exercise of its *due diligence* obligations, *may need to make submissions* challenging any *abuse of discretion by the OCIJ* in its decision *to investigate* [redacted], as permitted by ECCC jurisprudence."[100] The Co-Lawyers suggest that Internal Rule 21 requires the Appeal to be admitted, in respect of this Request, in order to protect [redacted] right to fair and transparent proceedings.[101] In the Request the Co-

[98] D87/2/1.8, para 3 referring to E142/3, paras. 8, 13.
[99] [redacted] request for the OCIJ's criteria concerning "Senior Leaders of Democratic Kampuchea and those who were most responsible," 6 November 2013, D87/2/1.10.
[100] Appeal, para. 19(I).
[101] Appeal, para 23. See also D87/2/1.10, introductory paragraph.

Lawyers' ask: That the OCIJ provides *"it's"* criteria for determining whether suspects may be considered senior leaders of the Democratic Kampuchea and those who were most responsible, including criteria set out and used by *each* Co-Investigating Judge; and that the OCIJ places these *criteria on the Case File.*[102]

34. The Pre-Trial Chamber observes that the investigations are ongoing and finds that the applicable law does not oblige the Co-Investigating Judges, at this stage of the proceedings before an Indictment is issued, if any, to make declaratory statements or decide as to the criteria employed in selecting whom *to indict,* if at all. Once an Indictment is issued, if any, any Charged Person may consider the effect of ECCC's jurisprudence to appeal, as and where they see fit, against any alleged abuse of discretion by the Co-Investigating Judge(s) in their application of the prosecution policy. The Pre-Trial Chamber considers the existence of such remedy sufficient to ultimately safeguard the rights of [redacted] to fair proceedings and that the Co-Lawyers have not demonstrated that the remedy they sought is frustrated by the OCIJ's delay in deciding on the Request.

35. Therefore, the Pre-Trial Chamber finds that, at this point in time, the Request is premature and that Internal Rule 21 does not compel it to render the Appeal admissible on grounds of constructive refusal.

Request for the OCIJ to Compel the OCP to Provide the Defence with its Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible"[103]

36. The Co-Lawyers submit in the Appeal that this Request was necessary: "because the Defence, in the exercise of its due diligence obligations, may need to make submissions challenging any abuse of discretion by the OCP in its *decision to prosecute* [redacted], as permitted by ECCC jurisprudence."[104] The Co-Lawyers suggest that Internal Rule 21 requires the Appeal to be admitted, in respect of this Request, in order to protect

[102] D87/2/1.10, p. 9, para 22(A) and (B).
[103] [redacted] request for the OCIJ to compel the OCP to provide the Defence with its criteria concerning "Senior Leaders of Democratic Kampuchea and those who were most responsible," 6 November 2013, D87/2/1.11.
[104] Appeal, para 19(J).

[redacted] right to fair and transparent proceedings.[105] In the Request the Co-Lawyers' ask the OCIJ to compel the Co-Prosecutors to provide their criteria for determining whether Suspects may be considered "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible" including any legal memoranda; and to place this material in the Case File.[106] The Co-Lawyers submit that "the requested material is essential in the determination of whether either of the Co-Prosecutors has acted with bad faith or according to unsound professional judgment *concerning the issue of whether* [redacted] can be considered a senior leader or one of those most responsible."[107]

37. The Pre-Trial Chamber, for the reasons that follow, finds that this Request (D87/2/1.11) is subsumed by the previous Request (D87/2/1.10) and that, at this stage of the proceedings they are both premature.

38. At the outset, the Pre-Trial Chamber notes that "provided the alleged *crimes* fall within the jurisdiction of the ECCC, the Co-Investigating Judges and Co-Prosecutors have a *wide discretion* to perform their *statutory duties*."[108] The Co-Prosecutors statutory duty under the ECCC regime goes to the extent of issuing an Introductory Submission if they "have reason to believe that *crimes* within the jurisdiction of the ECCC have been committed."[109] Where they make such finding during their *preliminary investigations*, the Co-Prosecutors shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges. The Pre-Trial Chamber observes that it is apparent from the legal framework at the ECCC that the Co-Prosecutors' primary focus of their preliminary investigations is to determine whether evidence indicates that *crimes* under ECCC's jurisdiction have been committed, the *identification of suspects* being a secondary[110] or optional[111] focus.

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[105] Appeal, para 23. See also D87/2/1.11, introductory paragraph.
[106] D87/2/1.11, para 13(A) and (B).
[107] D87/2/1.11, para. 12.
[108] Appeal Judgment in Case 001, 3 February 2012, Supreme Court Chamber, F28 (the "Appeal Judgment in Case 001"), para. 80.
[109] Internal Rule 53(1).
[110] Internal Rule 50(1), last part of the sentence.
[111] Internal Rule 53(1)(d): "the name of any person to be investigated, *if applicable*" (emphasis added).

39. Where the Co-Prosecutors reach a common approach to open a judicial investigation for crimes under ECCC's jurisdiction and *identify suspects* in the Introductory Submission, the contents[112] of the Introductory Submission is sufficient for anyone to comprehend how they exercised their discretion. The Pre-Trial Chamber notes that the Co-Lawyers have already been notified with a copy of the Co-Prosecutor's Introductory Submission.

40. Where the Co-Prosecutors cannot reach a common approach, notwithstanding the nature of the difference, Article 6(4) of the Agreement and Article 20 (second and third paragraph) of the ECCC Law direct that "the prosecution *shall proceed*" unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled by the Pre-Trial Chamber.

41. Where the difference is brought before the Pre-Trial Chamber and there is no majority, as required for a decision, Article 7(4) of the Agreement and Article 20 (seventh paragraph) of the ECCC Law direct that the investigation or prosecution *shall proceed.*"[113] Unless the Co-Prosecutors reach a common approach, the end result, under any circumstances, is that the Introductory Submission shall be submited to the Co-Investigating Judges in order to open a judicial investigation. Such Introductory Submission may, *if applicable*, contain names *of identified* suspects. Again, the contents of the Introductory Submission is sufficient for anyone to comprehend how the Co-Prosecutors exercised their discretion.

42. Further, where a difference is brought before the Pre-Trial Chamber, the Pre-Trial Chamber's role is *to settle the specific issue* upon which the Co-Prosecutors disagree *by considering facts and reasons raised* before it.[114] "The Pre-Trial Chamber's role in settling disagreements does not alter the conclusion that the term "most responsible" is not a jurisdictional requirement of the ECCC."[115] If there is majority, as required for a decision of the Pre-Trial Chamber on the Co-Prosecutors difference, the contents of such decision are sufficient for anyone to comprehend how the difference is settled.

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[112] See Internal Rule 53(1)(a), (b), (c) and (d).
[113] See also Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009 (the "Considerations Regarding the Disagreement Between the Co-Prosecutors").
[114] Considerations Regarding the Disagreement Between the Co-Prosecutors, para. 24.
[115] Appeal Judgment in Case 001, para 65.

43. The Pre-Trial Chamber further notes, however, that it is important to keep in mind that under the ECCC legal regime, distinct from the common law system, it is the Co-Investigating Judges, not the Co-Prosecutors, who *have the ultimate power to decide whether to indict persons* or not and that, in exercising such power, they "are *not bound* by the Co-Prosecutors' submissions."[116] Although they must seek the advice of the Co-Prosecutors before charging *anyone that is unnamed* in the Introductory Submission,[117] the ultimate *power to send anyone to trial* rests with the Co-Investigating Judges.[118] Under these circumstances, the discretion initially used by the Co-Prosecutors in deciding whom *to suspect and to lay preliminary charges against*[119] is ultimately overtaken by the by the Co-Investigating Judges, at the end of the judicial investigation, in deciding whom *to indict, if at all,* in the event that: 1) the acts in question amount to crimes within the jurisdiction of the ECCC, and that 2) from the number of those identified as the perpetrators of those acts, they choose to indict only a limited number of persons.

44. Therefore, for all these reasons and for those expressed in paragraph 34 above, the Pre-Trial Chamber finds that: Request D87/2/1.11 is subsumed by Request D87/2/1.10; that at this stage of the proceedings, these Requests are premature; that the legal and jurisprudental framework protects the rights of [redacted] for fair proceedings by providing for a remedy; and that, therefore, Internal Rule 21 does not lead the Chamber to render the Appeal admissible on grounds of constructive refusal or otherwise consider this matter at this stage.

Request for Clarification Whether the Defence may Conduct Investigations at the Current Stage of the Proceedings[120]

45. The Co-Lawyers submit in the Appeal that this Request was necessary: "to [protect] [redacted] right to *adequate time and facilities to prepare his defence* and his right to *equality of arms* [...] because the OCIJ does not recognize [redacted] as a party

[116] Internal Rule 67(1).
[117] Internal Rule 55(4).
[118] Internal Rules 67(1).
[119] Internal Rule 50(1).
[120] [redacted] request for clarification concerning whether the Defence may conduct investigations at the current stage of the proceedings, 6 November 2013, D87/2/1.12.

to the proceedings and is denying him access to the Case File and the ability to participate in the judicial investigation, it logically follows that [redacted] and his Co-Lawyers *should be free to conduct their own investigations* concerning all relevant matters reflected in the Case 003 Introductory Submission."[121] The Co-Lawyers suggest that *Internal Rule 21 requires the Appeal to be admitted*, in respect of this Request, in order to protect [redacted] rights to adequate time and facilities to prepare his defence and his right to equality of arms.[122] In the Request the Co-Lawyers' ask the Co-Investigating Judges to "clarify whether the Defence may investigate during the current stage of the proceedings."[123] Noting the Co-Investigating Judges clarification issued to the parties of the investigation in Case 002 that "before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to *the parties*,"[124] the Co-Lawyers argue that the circumstances of [redacted] Defence are "drastically different" because [redacted] *is not considered a party and does not have acccess to the Case File.* Making comparisons with the DC-Cam activities, the Co-Lawyers argue that non-parties are not restricted from investigating and that, being the target of investigation, despite being a non-party, [redacted] should be allowed to investigate *independently.*[125]

46. The Pre-Trial Chamber considers that, without prejudice to [redacted] status in the investigative proceedings, there is no provision in the applicable laws which authorises parties or non-parties to accomplish investigative action in place of the Co-Investigating Judges who are in charge of the judicial investigation. Moreover, in respect of parties, the Pre-Trial Chamber has also concurred with the Co-Investigating Judges by emphasising that "the capacity of the parties to intervene is thus *limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action*" drawing the Co-Lawyers' attention to the provisions of Internal Rules 35 (interferences with administration of justice) and 38 (misconduct of a

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[121] Appeal, para 19(K).
[122] Appeal, para 23. See also D87/2/1.12, introductory paragraph.
[123] D87/2/1.12, para 19.
[124] D87/2/1.12, para 15 referring to Case 002, Letter from the OCIJ to Nuon Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/1, p.2.
[125] D87/2/1.12.

lawyer) where and as applicable.[126] Attention is also drawn to the fact that the provisions of Internal Rule 35 apply to "any person." Given the fact that [redacted] Co-Lawyers were also working as Co-Lawyers for Ieng Sary in Case 002, they are well aware of all these pronouncements and of the applicable law before the ECCC.

47. Therefore, the Pre-Trial Chamber finds that, while the judicial investigation is ongoing, a delayed answer by the OCIJ to this Request, as it is put, does not violate [redacted] fundamental rights. The Appeal, therefore, is not admissible on grounds of constructive refusal or otherwise under Internal Rule 21.

Motion Against the Application of Crimes Listed in Article 3 New of the Establishment Law (National Crimes)[127]

48. The Co-Lawyers submit that this Motion was made necessary and that *Internal Rule 21* requires the Appeal to be admited in respect of this Motion "because the application of Article 3 new would violate [redacted] *right to equal treatment before the ECCC.*"[128] In the Request the Co-Lawyers' ask the Co-Investigating Judges "to *decline to apply the national crimes* listed in Article 3 new to [redacted]."[129] They argue that the application of Article 3 (new) of the ECCC Law violates [redacted] right to be treated equally before the law which is guaranteed in Article 31 of the Cambodian Constitution, Article 3 of the CPC, Article 7 of the Universal Declaration of Human Rights ("UDHR") and Article 14(1) of the ICCPR.[130] The Co-Lawyers submit that because "the *application* of Article 3 new [of the ECCC Law] was *rejected in Cases 001 and 002 purely as a matter of law,*" there is "no reasonable or objective criteria which

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[126] Decision on Nuon Chea's and Khieu Samphan's Appeal against OCIJ Order Regarding Foreign States, 7 June 2010, D315/1/5 , para 15.
[127] [redacted] motion against the application of crimes listed in article 3 new of the establishment law (national crimes), 6 November 2013, D87/2/1.13.
[128] Appeal, paras 19(I) and 23. See also D87/2/1.13, introductory paragraph. The Co-Lawyers explain that the "right of Accused at the ECCC to be *treated equally to accused persons in other Cambodian courts*" will not be addressed in this Appeal. The Co-Lawyers also state that they will not address in this Request their argument that the application of Article 3 new of the ECCC law violates the principle of retroactivity.
[129] D87/2/1.13, para. 44.
[130] D87/2/1.13, para. 38.

would permit *applying Article 3 new against* [redacted] when it *could not be applied* against Duch, Nuon Chea, Ieng Sary, Ieng Thirith, or Khieu Samphan."[131]

49. Firstly, the Pre-Trial Chamber observes that it is not clear from the Request what the Co-Lawyers mean by stating that "the *application* of Article 3 new was rejected *as a matter of law*." The Pre-Trial Chamber notes the Co-Lawyers' explanation that they will not address in this Request their argument that the *application* of Article 3 new of the ECCC law violates the principle of *retroactivity*.

50. Second, the Pre-Trial Chamber observes that in Case 001 the Trial Chamber *could not evaluate the guilt*[132] of Duch *in respect of national crimes* because it "*failed to reach agreement* on whether or not the applicable limitation period was interrupted or suspended between 1979 and 1993 and thus whether this period had extinguished by the time Article 3 and Article 3 (new) were promulgated."[133] The fact that the Trial Chamber failed to reach such agreement does not mean that *the ECCC,* as opposed to simply the *Trial Chamber of the ECCC,* cannot apply or has no jurisdiction over national crimes: "The absence of the required majority consequently creates a barrier to the *continuation of the prosecution* of the Accused for domestic crimes *before the Trial Chamber* of the ECCC."[134] In addition, the Pre-Trial Chamber makes note of the fact that the Trial Chamber did find in the Judgment in Case 001 that "*the crimes charged in the Amended Closing Order [- which included the national crimes -] are within the scope of the subject-matter, temporal and territorial jurisdiction of the ECCC.*"[135]

51. In Case 002, the Trial Chamber *did not see it necessary to determine the merits of objections related to the applicability of Art 3 new of the ECCC Law* because of the *defect* in the Closing Order relating to *insufficiency of facts* regarding national crimes.[136] The fact that this decision of the Trial Chamber was not appealed at the time it was

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[131] D87/2/1.13, para. 42.
[132] Judgment in Case 001, 26 July 2010, E188, Trial Chamber (the "Judgment in Case 001"), para 678.
[133] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 (the "Decision on Defence Preliminary Objection in Case 001 "), para 14
[134] Decision on Defence Preliminary Objection in Case 001, E 187, para. 56.
[135] Judgment in Case 001, para 16 and 11.
[136] Decision on Defence Preliminary Objections, 22 September 2011, E122 (the "Decision on Defence Preliminary Objection in Case 002 "), para 23

rendered does not mean that it cannot be appealed at the same time as an appeal against the judgment on the merits in Case 002.[137]

52. These facts do not amount to the Co-Lawyers' suggestion that "the application of Article 3 new *was rejected as a matter of law* in Cases 001 and 002." Moreover, the Pre-Trial Chamber has confirmed in fully reasoned decisions, rendered in relation to both Cases 001 and 002, that the ECCC has jurisdiction over national crimes.[138] Although, in the Closing Order in Case 002, the Co-Investigating Judges could not agree as to the applicability of Article 3 new,[139] the Pre-Trial Chamber did, on appeal, find that ECCC has jurisdiction over national crimes and, on that ground, endeavoured to address *the defect* in the Closing Order by pointing at existing facts.[140] The lack of facts that would allow one chamber to legally characterise them as national crimes – as prescribed in Article 3(new) of the ECCC Law - in one case against one defendant does not mean that Article 3(new) can not be applied in another case against another defendant, provided such facts exist. While the ECCC has jurisdiction over national crimes, in order to ensure equal treatment before the ECCC, Article 3(new) of the ECCC Law has to be applied in the same manner to all those subject to it. This means that the guilt of all those brought to trial before the ECCC on account of charges for, allegedly, having committed national crimes, can only be evaluated where facts to that effect have been discovered by the investigation and properly laid out in the indictment in a way that allows for their correct legal characterisation. In this respect, the Pre-Trial Chamber notes that the investigations in Case 003 are still ongoing and that the applicable law does not oblige the Co-Investigating Judges to make a legal characterization of the facts they discover during the investigation. Such obligation only arises upon the issue of a Closing Order, if any.

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[137] Internal Rule 104(4).
[138] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, paras. 278-292, 297. See also Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch," 5 December 2008, D99/3/42, paras 89-95.
[139] See D87/2/1.13, para 43.
[140] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, paras. 293-296. Note also that the Pre-Trial Chamber has the final say in respect of the Indictment where the Closing Order has been appealed and that, in such cases, the Trial Chamber is seised of both the Co- Investigating Judges' Closing Order and the Pre-Trial Chamber's decision on appeal(s).

53. Therefore, the Pre-Trial Chamber finds that the Request is premature and as such does not warrant the admissibility of the Appeal on grounds of constructive refusal or otherwise pursuant to Internal Rule 21.

Motion against the application of JCE III[141]

54. The Co-Lawyers submit that this Motion was made necessary "because the Introductory Submission alleges that [redacted] is alternately responsible for committing crimes through JCE III, a form of liability not recognized at the ECCC."[142] The Co-Lawyers argue that Internal Rule 21 requires the Appeal to be admited in respect of this Motion in order to protect [redacted] right to fair and transparent proceedings.[143] In the Request the Co-Lawyers' ask the Co-Investigating Judges to reject the application of JCE III against [redacted][144] because both the Pre-Trial Chamber and the Trial Chamber have found that it does not apply at the ECCC, because their findings are binding and because the Co-Prosecutors did not appeal against such findings of the Trial Chamber in Case 002. The Co-Lawyers add that the application of JCE III to [redacted] would also violate his right to equal treatment.

55. As a preliminary remark, the Pre-Trial Chamber notes that the fact that the Co-Prosecutors did not appeal the Trial Chamber's Decision[145] on the Applicability of Joint Criminal Enterprise at the time when it was rendered does not mean that they cannot appeal it at the same time as an appeal against the judgment on the merits in Case 002.

56. Further, the Pre-Trial Chamber finds that this Motion is premature as the Internal Rules do not oblige the Co-Investigating Judges to decide or to make declaratory statements on jurisdictional matters before they issue a Closing Order, if any. Morover, if a Closing Order in Case 003, if any, confirms the jurisdiction of ECCC in a manner that may detrimentally affect their rights, the Charged Person(s), as already established in jurisprudence, may consider the effect of Internal Rule 67 (5) when read in conjunction with Internal Rule 74(3) (a).

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[141] [redacted] motion against the application of JCE III, 6 November 2013, D87/2/1.15.
[142] Appeal, para. 19 (N).
[143] Appeal, para. 23. See also D87/2/1.15, introductory paragraph.
[144] D87/2/1.15, para 26.
[145] E100/6.

57. For these reasons, the Pre-Trial Chamber finds that no fundamental rights of [redacted] are harmed by declaring the appeal inadmissible *at this stage of the proceedings* and that Internal Rule 21 does not compel the Pre-Trial Chamber to render the Appeal admissible on grounds of constructive refusal or for any other reason provided for in Internal Rule 21.

IV. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DEFERS a decision on the Appeal, in respect of the Request for Access to the Case File, until it decides on the appeal against the Conflict Decision;

FINDS THE APPEAL INADMISSIBLE in respect of the rest of the Requests.

Phnom Penh, 23 April 2014

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Chang-ho CHUNG** **HUOT Vuthy**