



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 Préliminaire

D299/3/2

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° 004/07-09-2009-ECCC/OCIJ (PTC27)

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

Date: 14 December 2016

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PUBLIC REDACTED

CONSIDERATIONS ON [REDACTED] APPLICATION TO SEIZE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF INVESTIGATION OF TUOL BENG AND WAT ANGKUONH DEI AND CHARGES RELATING TO TUOL BENG

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Applicant

MOM Luch
Richard ROGERS
Göran SLUITER

Lawyers for Civil Parties and Civil Party Applicants

CHET Vanly	Christine MARTINEAU
HONG Kimsuon	Barnabe NEKUI
KIM Mengkhy	Lyma NGUYEN
LOR Chunthy	Emmanuel JACOMY
SAM Sokong	Beini YE
SIN Soworn	
TY Srinna	
VEN Pov	
Linda Behnke	
Laure DESFORGES	
Herve DIAKIESE	
Ferdinand DJAMMEN-NZEPA	
Nicole DUMAS	
Isabelle DURAND	
Françoise GAUTRY	
Martine JACQUIN	



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seized of an “Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng”, filed by the Co-Lawyers for ██████ (the “Defence”) on 18 February 2016 (the “Application”).¹

I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber by the International Co-Investigating Judge (the “ICIJ”), pursuant to Internal Rule 76(3) (the “Referral Decision”).²

II. PROCEDURAL HISTORY

2. On 3 December 2008, a disagreement between the Co-Prosecutors on two fresh introductory submissions and one supplementary submission was brought before the Pre-Trial Chamber.³ The International Co-Prosecutor intended to forward the submissions to the Co-Investigating Judges to open judicial investigations, to which the National Co-Prosecutor objected. On 18 August 2009, the Pre-Trial Chamber declared that it had not achieved the requisite majority for a decision on the disagreement and unanimously concluded that, pursuant to Internal Rule 71(4)(c), the “action of the International Co-Prosecutor shall be executed”.⁴

3. On 7 September 2009, the Acting International Co-Prosecutor (the “ICP”) filed the Third Introductory Submission (the “Introductory Submission”) with the Office of the Co-Investigating Judges (the “OCIJ”), alleging ██████ An’s (█████ ██████ and ██████) involvement in criminal acts.⁵ On 18 July 2011, the ICP filed a Supplementary Submission

¹ ██████ Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng, 18 February 2016, D299.

² Decision on ██████ Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng, 27 April 2016, D299/1 (the “Referral Decision”), para 37. *See also* Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D299/1, 28 April 2016, D299/3.

³ International Co-Prosecutor’s Explanatory Note Accompanying New Introductory and Supplementary Submissions, 3 December 2008, Doc. No. 1.

⁴ Considerations of the Pre-Trial Chamber regarding the Disagreement Between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 45.

⁵ Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1, para. 117(c); *See also* Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.



regarding Sector 1 crime sites and persecution of Khmer Krom.⁶ On 24 April 2014, the ICP filed a second Supplementary Submission clarifying that “the ongoing investigation of the Phnom Pros and Kok Pring crime sites in Kampong Siem District, as described in paragraphs 30-33 of the [Introductory Submission], is intended to include the Kampong Siem District security office located at Wat Angkuonh Dei pagoda in Krala commune and the related execution site in Tuol Beng village that have been identified in interviews conducted by OCIJ investigators” (the “Second Supplementary Submission”).⁷

4. On 5 February 2015, the ICIJ issued a Forwarding Order seeking clarification from the Co-Prosecutors as to whether the Tuol Beng site falls within the scope of the judicial investigation being carried into Kok Pring and Phnom Pros (the “Forwarding Order”).⁸ The ICIJ noted, contrary to the allegations in the Second Supplementary Submission, the recent evidence suggests that Angkuonh Dei pagoda was not a formally designated security office and that the security centre for Kampong Siem district was located at a separate site in Tuol Beng village. Thus, the ICIJ requested the Co-Prosecutors for clarification noting that their ability to continue to investigate the Tuol Beng site which served as not only an execution site but also as a security centre, as well as crimes possibly committed at Angkuonh Dei pagoda, depended on whether the Tuol Beng site falls within the scope of the aforementioned judicial investigation.⁹ The ICIJ noted ICP’s previous statement that “[j]urisdiction over particular sites named in the Introductory Submission extends beyond the physical compound, to related sites.”¹⁰

5. On 4 March 2015, the ICP submitted a Response to the Forwarding Order confirming that the Tuol Beng site falls within the scope of the judicial investigation (the “Response to Forwarding Order”).¹¹

⁶ Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.

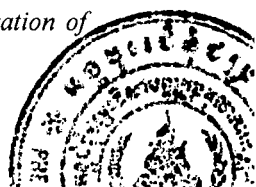
⁷ Co-Prosecutor’s Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191, para. 11.

⁸ Forwarding Order, 5 February 2015, D237, p. 3.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Response to Forwarding Order D237, 4 March 2015, D237/1, para. 2.



6. On 24 March 2015, ██████ was summoned for an initial appearance before the ICIJ and, on 27 March 2015 he was charged with, *inter alia*, crimes against humanity and premeditated homicide allegedly committed at the Tuol Beng security centre.¹²

7. On 18 February 2016, the Defence filed the Application requesting the Pre-Trial Chamber to annul the investigative actions, in relation to Tuol Beng and Wat Angkuonh Dei, that were conducted: 1) from February 2012 to 24 April 2014, when the Second Supplementary Submission was filed, arguing that these sites in question are not listed at paragraphs 23-36 and 49-53 of the Introductory Submission;¹³ 2) after the filing, on 24 April 2014, of the Second Supplementary Submission and until the filing on 4 March 2015 of the Response to Forwarding Order, contending that the ICP's clarification in the Second Supplementary Submission is insufficient to constitute an authorization extending the scope of the investigation;¹⁴ and 3) after 4 March 2015, because the ICP's Response to Forwarding Order does not qualify as a valid supplementary submission on the sites in question.¹⁵ ██████ further requests the Pre-Trial Chamber to annul the Charges relating to Tuol Beng, because they were based on an unauthorised and procedurally defective investigation.¹⁶

8. On 14 March 2016, the ICIJ held a further appearance at which he notified ██████ that there is clear and consistent evidence indicating that ██████ may be criminally responsible for the commission of crimes referred to in the Submissions at a number of sites including Tuol Beng Security Centre and Execution Site, and Angkuonh Dei Pagoda.¹⁷

9. On 27 April 2016, the ICIJ issued the Referral Decision, granting the Application insofar as it relates to the request for annulment of investigative actions conducted during the period from February 2012 to 24 April 2014 and denying the remainder of the Application.¹⁸ On 28 April 2016, the ICIJ ordered the OCIJ Greffier to forward a copy of Case File 004 to the Pre-Trial Chamber for the purposes of reviewing the referred Application.¹⁹

¹² Written Record of Initial Appearance, 27 March 2015, D242, pp. 6-7.

¹³ Application, paras 41- 43.

¹⁴ *Ibid.*, para. 45.

¹⁵ *Ibid.*, paras 48-53.

¹⁶ *Ibid.*, paras 54-55.

¹⁷ Written Record of Further Appearance, 14 March 2016, D303, pp. 3, 5-6 and 8.

¹⁸ Referral Decision, paras 37-38. *See also* Annex A to the Referral Decision.

¹⁹ Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D299/1, 28 April 2016, D299/3.



10. On 17 May 2016, the Pre-Trial Chamber issued Instructions to the Parties, which were notified by a Case Filing Officer's email, instructing [REDACTED] Defence that they must file an application before the Pre-Trial Chamber within 10 days from the notification and that, if an Application is not filed before the Pre-Trial Chamber within the set deadline, the Pre-Trial Chamber shall take note of the Application as filed before the Office of the Co-Investigating Judges.²⁰ No Application was filed within the deadline before the Pre-Trial Chamber.

11. On 6 June 2016, the Co-Prosecutors filed a Response to the Application requesting the Pre-Trial Chamber to dismiss the Application as unfounded since there was no procedural defect or breach of [REDACTED] fair trial rights and submitting that, even if there had been a breach, annulment would not be the appropriate remedy (the "OCP Response").²¹

12. No Reply was filed by the Defence within the legal deadline.

III. SCOPE OF THE PRE-TRIAL CHAMBER'S CONSIDERATION

13. The Pre-Trial Chamber shall only examine the propriety of the investigative actions relating to Tuol Beng and Wat Angkuonh Dei conducted during the period from February 2012 to 24 April 2014 (the "Impugned Investigative Actions"), as the ICIJ denied and did not refer the remainder of the Application to the Pre-Trial Chamber²² and no appeal has been filed as regards ICIJ's rejection.

14. "Annulment is foreseen under Internal Rule 48, which provides: 'Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application'. Accordingly, a procedural irregularity which is not prejudicial to an applicant does not result in annulment."²³

²⁰ Case File Officer Notification, 17 May 2016, Pre-Trial Chamber's Instruction to the Parties in Case File N 004/07-09-2009- ECCC/OCIJ (PTC27).

²¹ International Co-Prosecutor's Response to [REDACTED] Application To Annul The Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng, 6 June 2016, D299/3/1.

²² Referral Decision, paras 37-38. *See also* Annex A to the Referral Decision.

²³ Case 003/07-09-2009-ECCC/OCIJ ("Case 003") (PTC20), Decision on [REDACTED] Appeal Against Co-Investigating Judge Harmon's Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 ("[REDACTED] Decision on Two Applications"), para. 26 referring to Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC41), Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request



15. Internal Rule 76(5) further provides: “Where the Chamber decides to annul an investigative action, it shall decide whether the annulment affects other actions or orders”. The final step, once prejudice is established, concerns the identification of the parts of the proceedings to be annulled. Where one of the three cumulative elements is not established, annulment cannot proceed and the subsequent assessment need not be undertaken. Accordingly, the Pre-Trial Chamber will consider whether the Charges in relation to Tuol Beng are procedurally defective only if it decides that the underlying investigative actions should be annulled.

IV. ADMISSIBILITY

16. Internal Rule 76(4) directs that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: i) does not set out sufficient reasons; ii) relates to an order that is open to appeal; or iii) is manifestly unfounded. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the rights and interests of the applicant;²⁴ (ii) has clearly articulated the prejudice;²⁵ and (iii) where necessary, has adduced sufficient evidence to sustain the allegations.²⁶

17. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met. The contested investigative actions and the charges²⁷ do not concern orders that are open to appeal under the rules. Nothing in the application suggests that it is evidently or very apparently unfounded in fact or in law such as to deprive it of any prospect of success. The Pre-Trial Chamber is of the further view that the reasoning set forth in the application is sufficient

to Seize the Pre-Trial Chamber with a View to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6, (the “IENG Thirith Decision”), para. 21.

²⁴ See IENG Thirith Decision, para. 24 (“An annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective [...]).

²⁵ See Case 002 (PTC06), Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8 (the “NUON Chea Decision”), para. 40 (“a proven violation of a right [...], recognized in the ICCPR would qualify as a procedural defect [...]. In such cases, the investigative or judicial action may be annulled”), and para. 42 (“[In other cases] the party making the application will have to demonstrate that its interests were harmed by the procedural defect”).

²⁶ See IENG Thirith Decision, para. 32.

²⁷ See Case 003 (PTC29), Considerations on [REDACTED] Appeal against the International Co-Investigating Judge’s Decision to Charge [REDACTED] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4.



since it contains logically consistent submissions underpinned by legal reasoning, whose grounds are set forth, or by factual material pinpointed in the case file.

18. The Pre-Trial Chamber therefore finds the application admissible.

V. CONSIDERATION OF THE MERITS

19. Upon deliberation, the Judges of the Pre-Trial Chamber could not reach a majority of votes for a decision on the merits of this Application.

20. Therefore, while the decision of the Pre-Trial Chamber in respect of the admissibility of the Application is expressed in the preceding paragraphs, the separate opinions of the various Judges of the Pre-Trial Chamber in respect of the merits of the Application are appended, as required by Internal Rule 77(14).

DISPOSITION

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

1. FINDS the Application admissible;
2. DECLARES that it has not assembled an affirmative vote of at least four Judges to issue a decision on the merits of the Application.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal. The Pre-Trial Chamber having not been in a position to attain the requisite majority to reach a decision on the merits, the investigative action whose annulment was sought shall stand.

Phnom Penh, 14 December 2016

President

Pre-Trial Chamber



[Handwritten signatures]
*PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion with regard to the Merits of the Application.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion with regard to the Merits of the Application.



OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY**1. Procedural History**

21. On 18 February 2016, the Co-Lawyers for [REDACTED] (Defence) submitted an Application to Seise the Pre-Trial Chamber (PTC) with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng as the investigative actions undertaken by the International Co-Investigating Judge (ICIJ) in relation to Tuol Beng and Wat Angkuonh Dei and the charges relating to Tuol Beng are defective²⁸ (Application).

22. On 27 April 2016, the ICIJ issued a Decision on [REDACTED] Application to Seise the PTC with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, granting the Application insofar as it relates to the annulment of investigative action conducted prior to the Supplementary Submission dated 24 April 2014²⁹. (Decision on [REDACTED] Application)

23. On 27 April 2016, the Defence submitted an Additional Request concerning [REDACTED] Application to Seise the PTC with a View to Annulment of Investigative of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, seising the PTC with a view to annulment of the charges related to Wat Angkuonh Dei and joining the application with the Tuol Beng and Wat Angkuonh Dei Annulment Application³⁰.

24. On 6 June 2016, the International Co-Prosecutor (ICP) responded to [REDACTED] application to annul the investigation of facts related to Tuol Beng and Wat Angkuonh Dei and charges related to Tuol Beng (Response)³¹.

25. On 17 May 2016, the ICIJ issued a Consolidated Decision on [REDACTED] Additional Applications to Seise the PTC with a View to Annulment of Investigation of Wat Ta Meak and Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng³².

²⁸ Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, D299.

²⁹ Decision on [REDACTED] Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, D299/1.

³⁰ Additional Request concerning [REDACTED] Application to Seise the PTC with a View to Annulment of Investigative of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, D299/2.

³¹ Response, D299/3 [D299/3/1].



26. The PTC declares that the appeal is admissible, but limited to the investigative action conducted prior to the Supplementary Submission, in accordance with the Decision on ■■■■■ Application³³.

2. Arguments of the Parties

27. The Defence submits that the Investigative Actions relating to Tuol Beng and Wat Angkunn Dei are procedurally defective as they fall outside the scope of the investigation initiated by the Third Introductory Submission, and there is no valid supplementary submission permitting the CIJs to investigate these new crime sites, as required by IR 55(3)³⁴.

28. The Defence further submits that by the Civil Party applications filed on 15 January 2010 the ICIJ investigated Wat Angkunn Dei and Tuol Beng Sites prior to the Supplementary Submission on Forced Marriage dated 24 April 2014³⁵. During that period, the ICIJ conducted at least 15 Witness or Civil Party applicant interviews relating to Tuol Beng and Wat Angkunn Dei³⁶. The Third Introductory Submission identifies and requests the CIJs to investigate 11 specific crime sites, described in detail in paragraphs 23-36 and 49-53, Wat Angkunn Dei and Tuol Beng are not listed in these paragraphs. The fact that the Third Introductory Submission includes two alleged crime sites in the same district is too remote and does not qualify as an exception under Article 125 of the Criminal Procedure Code of Cambodia³⁷.

29. The ICP submits that ■■■■■ misinterprets the scope of the judicial investigation because he ignores the first five paragraphs of the Introductory Submission relating to crimes committed in the Central Zone and [these paragraphs] then go on to describe the worsening of conditions and the dramatic increase in arrests, killings and disappearances after ■■■■■

³² Consolidated Decision on ■■■■■ Additional Applications to Seize the PTC with a View to Annulment of Investigation of Wat Ta Meak and Tuol Beng and Wat Angkunn Dei and Charges relating to Tuol Beng, D299/4.

³³ Decision on ■■■■■ Application, para. 37

³⁴ Application, para. 40.

³⁵ Ibid. para. 41.

³⁶ Ibid. para. 42.

³⁷ Ibid. para. 43



takeover. The facts described in these five paragraphs unambiguously relate to the entire territory of the Central Zone³⁸.

30. The ICP further submits that paragraph 22 makes two things clear. First, the CIJs were seized with arrests, killings and disappearances through the entire territory of the Central Zone. Second, this paragraph explicitly says that the named locations “were some of the crime sites at which [victims] were detained and executed during the period that [REDACTED] and the Southwest cadre were in control of the Central Zone³⁹.”

31. The ICP submits that [REDACTED] Annulment Application focuses solely on paragraphs 23 to 36 and 49 to 53 and concludes that because Wat Angkunh Dei and Tuol Beng are not included within those paragraphs, they must therefore fall outside the scope of the judicial investigation⁴⁰.

32. The ICP further submits that [REDACTED] has failed to demonstrate any harm by the errors he alleges; and IR 48 states, “investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”⁴¹.

33. The ICP stated that annulment would not be a proper remedy should the PTC annul any investigative action in regard to the Subject Sites; nothing would prevent the CIJs from obtaining identical evidence again. The only effect of annulment would be to waste the time and resources of the ECCC, and delay the right of all interested parties to a timely resolution of the investigation in Case 004⁴².

3. Law

34. IR 76(2) provides that, “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the CIJs requesting them to seize the Chamber with a view to annulment. The CIJs shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order, while IR 48 provides that, “Investigative or judicial action

³⁸ Response, paras 19-20.

³⁹ *Ibid.* paras 22-23.

⁴⁰ *Ibid.* para. 24

⁴¹ *Ibid.* para. 27.

⁴² *Ibid.* para. 32



may be annulled for procedural defect only where the defect infringes the rights of the party making the application”.

35. The National PTC Judges find that the ECCC was established under the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Agreement), and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the ECCC Law) and the IRs are applied.

36. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from the Cambodia’s national courts. The prosecution and judicial investigation under the national courts merely concern facts, i.e. not prosecution and judicial investigation of an individual⁴³. On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions—first, facts, “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, individuals, “senior leaders of Democratic Kampuchea and those most responsible for the crimes⁴⁴” – are met.

37. Therefore, the National PTC Judges will consider whether or not the ICIJ’s investigative action conducted prior to the Supplementary Submission violates the conditions mentioned in paragraph 36, resulting in infringement of provision of investigative action as explained in paragraph 34 above, thus affecting ██████ rights and leading to annulment.

38. The National Co-Prosecutor (NCP) and ICP expressed their dissenting opinions on the issuance of the Introductory Submission in Case 004, in which the ICP requested to submit the Third Introductory Submission, while the NCP rejected it, on the grounds that “these suspects are not senior leaders and/or those most responsible⁴⁵” and the National and

⁴³ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

⁴⁴ Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea; and Internal Rule 53.

⁴⁵ National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observations, dated 22 May 2009, para. 86(A).



International PTC Judges also expressed their dissenting opinions, in which the National PTC Judges are in favour of the NCP's arguments⁴⁶.

39. For the foregoing reasons, the National PTC Judges are of the view that the investigation in relation to Tuol Beng and Wat Angkunnh Dei must be annulled.

Phnom Penh 14 December 2016



Judge PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy



⁴⁶ Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy, dated 17 August 2009, "■ is not a senior leader of Democratic Kampuchea nor one of those most responsible for the crimes".

OPINION ON MERIT OF THE APPLICATION
BY JUDGES BAIK AND BEAUVALLET

I. SUBMISSIONS OF THE PARTIES

1. [REDACTED] Application

40. [REDACTED] requests that the Pre-Trial Chamber annul the impugned investigative actions and the charges related to Tuol Beng.⁴⁷ [REDACTED] request is based on the grounds that such investigative actions and the charges are procedurally defective, and that these procedural defects have violated [REDACTED] fundamental rights to know the case against him and to prepare his defence.⁴⁸

41. [REDACTED] submits that the impugned investigative actions, conducted prior to the Second Supplementary Submission, were undertaken without authorization by the Co-Prosecutors and thus are procedurally defective, because (1) neither Tuol Beng or Wat Angkuonh Dei is listed as one of the 11 specific crime sites in the Introductory Submission,⁴⁹ and (2) the fact that the Introductory Submission lists two alleged crime sites, such as Kok Pring and Phnom Pros, which are in the same district of Kampong Siem as Tuol Beng and Wat Angkuonh Dei, is too remote to qualify, what may have happened at the latter sites, as “aggravating circumstances” of facts already under judicial investigation.⁵⁰ Thus, [REDACTED] contends, the allegations that Tuol Beng and Wat Angkuoh Dei were security centres or execution sites are new facts requiring a supplementary submission.⁵¹

42. [REDACTED] further submits that in the absence of a sufficiently detailed supplementary submission, the expansion of the judicial investigation to include Tuol Beng and Wat Angkuonh Dei violates [REDACTED] rights, guaranteed by Article 14 of the International Covenant on Civil and Political Rights (the “ICCPR”), to be informed promptly and in detail of the case against him and, consequently, the right to adequate time and facilities to prepare

⁴⁷ Application, para. 66.

⁴⁸ *Ibid.*, paras 2, 66.

⁴⁹ *Ibid.*, para. 43.

⁵⁰ *Ibid.*, para. 43 and footnote 46: “The alleged existence of Tuol Beng and Wat Angkuonh Dei in Kampong Siem District does not constitute an ‘aggravating factor’ of the alleged crimes in Kok Pring and Phnom Pros.”

⁵¹ Application, para. 44.



his case.⁵² ██████ notes that the above mentioned procedural defects and the ICP's "ad-hoc" means to expand the investigation lack substantive consistency and have created uncertainty as to which crime sites they are investigating and the role that these crime sites are alleged to have played in the accusations levied against him.⁵³

2. The Co-Prosecutor's Response

43. The International Co-Prosecutor requests the Pre-Trial Chamber to deny ██████ request to annul the impugned investigative actions.⁵⁴

44. The ICP submits that there was no procedural defect, because the crimes committed at Wat Angkuonh Dei and Tuol Beng clearly fall within the scope of the Introductory Submission.⁵⁵ The ICP notes that ██████ misinterprets the scope of the judicial investigation by ignoring paragraphs 18-22 of the Introductory Submission relating to crimes committed in the Central Zone, which describe the worsening of conditions and the dramatic increase in arrests, killings and disappearances after ██████ take over.⁵⁶ The ICP asserts that unambiguous language of paragraph 22 makes it clear that (1) the Co-Investigating Judges were seised with arrests, killings and disappearances through the entire territory of the Central Zone,⁵⁷ and (2) the list of specifically named crime sites is not exhaustive as it explicitly states that the named locations were "some of the crimes sites at which [victims] were detained and executed during the period that ██████ and the Southwest cadre were in control of the Central Zone."⁵⁸

45. The ICP contends that there was no infringement of ██████ fundamental rights and thus no annulment is merited, because ██████ has failed to meet his burden to show any harm by the alleged errors, had procedural defect been established.⁵⁹

⁵² *Ibid.*, paras 60-65.

⁵³ *Ibid.*, para. 64.

⁵⁴ OCP Response, para. 34.

⁵⁵ *Ibid.*, paras 19-24.

⁵⁶ *Ibid.*, para. 19.

⁵⁷ *Ibid.*, para. 22.

⁵⁸ *Ibid.*, para. 23.

⁵⁹ *Ibid.*, paras 27-29.



46. Lastly, the ICP submits that, even if existence of procedural defect and harm were established, under the circumstances of this case, annulment would be a drastic and disproportionate remedy.⁶⁰

II. DISCUSSION

47. The Pre-Trial Chamber has stated that the scope of the Co-Investigating Judges' judicial investigation is defined by Internal Rules 53(1) and (2), and 55(1), (2) and (3).⁶¹ Internal Rule 55(2) states:⁶² "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission." The Co-Investigating Judges are thus barred from investigating facts which fall outside the Introductory Submission.⁶³

48. Internal Rule 55(3) provides:⁶⁴ "If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission." A 'new fact' "denote[s] an event which arose or came to light subsequent to the Introductory Submission."⁶⁵ Any new fact unmentioned or unrelated to the Introductory Submission falls outside the jurisdiction of the Co-Investigating Judges, unless a Supplementary Submission extends the scope of the judicial investigation.⁶⁶

⁶⁰ *Ibid.*, paras 30-33.

⁶¹ NUON Chea Decision, para.16; Case 001/18-07-2007-ECCC/OCIJ (PTC02), Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, D99/3/42 ("Duch Decision"), para. 34. *See also* Internal Rules 53(1) and (2), which provide in relevant part: "(1) [T]he Co-Prosecutors [...] shall open a judicial investigation by sending an Introductory Submission to the Co-investigating Judges [...], (2) The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors [...]"; Internal Rule 55(1) ("A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.").

⁶² *See also* Cambodian Code of Procedure, Article 124(3) ("An investigating judge may not conduct any investigative acts in the absence of an introductory submission").

⁶³ [REDACTED] Decision on Two Applications (Opinion of Judges Beauvallet and Bwana), para. 9.

⁶⁴ *See also* Cambodian Code of Procedure, Article 125; French Code of Criminal Code, Article 80 ("[TRANSLATION] The investigating judge may only investigate by virtue of a submission made by the Public Prosecutor.").

⁶⁵ [REDACTED] Decision on Two Applications (Opinion of Judges Beauvallet and Bwana), para. 11.

⁶⁶ *Ibid.*, para. 9.



49. The Pre-Trial Chamber has previously noted that “the Co-Investigating Judges have a duty to investigate all the facts alleged in the Introductory Submission or any Supplementary Submission”,⁶⁷ and, more significantly, that “the Co-Investigating Judges are also seized of the *circumstances surrounding the acts mentioned* in the Introductory or a Supplementary Submission”.⁶⁸ The Pre-Trial Chamber has defined such surrounding circumstances as “[t]he circumstances in which *the alleged crime was committed and that contribute to the determination of its legal characterisation*”.⁶⁹ The Pre-Trial Chamber has further noted that those circumstances are “not considered as being new facts and are thus parts of the investigation.”⁷⁰

50. Specifically as regards locations that are not explicitly mentioned in the Introductory Submission, “the *locus in quo* is a circumstance which identifies the location of the fact, but is not a fact *per se*”.⁷¹ While “the Co-Investigating Judges’ investigation is limited by the alleged criminal acts defined by the Co-Prosecutors”, “it rests with the [Judges] to elicit the circumstances of their commission, and the *locus in quo* in particular.”⁷² Furthermore, without knowing all the crime sites, the International Co-Prosecutor had reason to believe that the crimes, of which the Co-Investigating Judges are seised by the Introductory Submission, were committed not only in the places explicitly mentioned in the Introductory Submission, but also in other locations that the Co-Investigating Judges are tasked to discover.⁷³

51. Therefore, the Undersigned Judges maintain the view that when locations, that are unmentioned in the Introductory Submission, contribute to the determination of the alleged crime’s legal characterization by identifying and fleshing out the facts of the alleged crime, the facts regarding those sites are not new facts requiring a supplementary submission. Rather, they constitute surrounding circumstances relating to facts that fall squarely within the scope of the judicial investigation.

⁶⁷ Duch Decision, para. 35.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ [REDACTED] Decision on Two Applications (Opinion of Judges Beauvallet and Bwana), para. 19.

⁷² *Ibid.*, para. 14.

⁷³ Case 003 (PTC28), Decision Related to (1) [REDACTED] Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber With Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26 (“[REDACTED] Decision on Nine Applications”) (Opinion of Judges Beauvallet and Baik), para. 198.



52. Furthermore, “the Introductory Submission *and its annexes*” are both equally examined when analyzing whether the investigative actions of the Co-Investigating Judges fall within the scope of the judicial investigation.⁷⁴ Where the “sites are not explicitly enfolded by the Introductory Submission, the acts committed at those sites may, nonetheless, be encompassed by the matter laid before the Investigating judge if implicitly adverted *to* in said Submission.”⁷⁵ Thus, facts provided in evidence, attached to an Introductory Submission, fall squarely within the scope of the judicial investigation.⁷⁶

53. The Undersigned Judges shall examine whether Tuol Beng and Wat Angkuonh Dei are encompassed within the allegations presented in the Introductory Submission and in its attachments in order to determine whether the impugned investigative actions fall within the scope of the judicial investigation.⁷⁷

54. The Undersigned Judges observe that the ICP requested that the OCIJ opens a judicial investigation “into the facts specified in paragraphs 18-53” of the Introductory Submission in relation to, amongst other charges, crimes against humanity, namely: “Murder; Extermination; Enslavement; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds of former officials of the Khmer Republic, feudalists, capitalists and bourgeoisie, “new people”, suspected “bad elements”, Cham, and persons of Vietnamese ethnicity; and other inhumane Acts.”⁷⁸ Such crimes are alleged to have taken place in the Central Zone, Kampong Cham province, and were allegedly carried out under ██████████ control as the Chief of Sector 41, who “planned, instigated, ordered, aided and abetted or committed” them.⁷⁹ ██████████, the chief of Kampong Siem District in Kampong Cham province, was alleged to be amongst those who “reported to” and were “closely connected to” ██████████.⁸⁰

55. The Introductory Submission sets forth a non-exhaustive list of the crime sites at which these alleged crimes occurred by providing “some of the crime sites”, which include

⁷⁴ ██████████ Decision on Two Applications (Opinion of Judges Beauvallet and Bwana) , para. 4; ██████████ Decision on Nine Applications (Opinion of Judges Beauvallet and Baik), para. 150.

⁷⁵ ██████████ Decision on Two Applications (Opinion of Judges Beauvallet and Bwana), para. 19.

⁷⁶ See also Rule 53(2) “The submission *shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co- Prosecutors [...].*”

⁷⁷ *Ibid.*

⁷⁸ Introductory Submission, para. 117.

⁷⁹ *Ibid.*, paras 109 and 18-53.

⁸⁰ *Ibid.*, paras 30-33 (emphasis added).



the Phnom Pros Security Centre and Kok Pring execution site in Kampong Siem District.⁸¹ While the senior leaders of the Central Zone were taken to S-21,⁸² more than 10,000 people with “old society connections” and those linked to suspect cadre were killed at Phnom Pros which was “probably a Zone, if not only a Regional prison”,⁸³ and around 1,000 “1975 people” were executed at Kok Pring.⁸⁴

56. The Undersigned Judges note that while neither Tuol Beng nor Wat Angkuonh Dei is explicitly listed as one of the exemplary crime sites in the Introductory Submission, both sites are mentioned in the attachments thereof as possible locations related to sites at which the alleged crimes may have been carried out in Kampong Siem District.⁸⁵ Namely, attachment D1.3.11.13 indicates that there may have been a security centre at Tuol Beng and the District Office for Kampong Siem District at Wat Angkuonh Dei.⁸⁶ More significantly, the witnesses state that most of the people, who were taken away to Angkounh Dei village, were transferred to Kok Pring execution site to be killed.⁸⁷

57. The Undersigned Judges thus find that, upon careful analysis of Introductory Submission and its attachments, the arrests, detentions and the killings occurring at each site in Kampong Siem District were operationally linked.⁸⁸ More specifically, while Phnom Pros was a “Security Centre” in the Kampong Siem District of the Central Zone where the people with “old society connections” and those linked to suspect cadre were detained and killed,⁸⁹ the Wat Angkuonh Dei site functioned as a District Office for Kampong Siem District at

⁸¹ *Ibid.*, para. 22 and paras 30-33

⁸² *Ibid.*, para.20.

⁸³ Report on CGP Mapping Team Visit to Kampong Cham Province, 20 November 2008, D1.3.10.5, ERN 00208307-00208313 (ENG), at p. 3 or ERN 00208309; Introductory Submission, paras 30-31.

⁸⁴ Introductory Submission, paras 32-33.

⁸⁵ See Interview of ██████████ (Witness OCP-00022 Interview), 4 August 2008, D1.3.11.13, ERN 00210445-00210449 (ENG), at pp. 3, 5 or ERN 00210447 and 00210449, cited in the Introductory Submission at footnotes 38, 42, 91, 94, 98, 99, 363 (“Interview of ██████████”); Mission Report on OCP Mission to Sector 41 (Operation Riverland), 20 November 2008, D1.3.10.23, ERN 00211152-00211171 (ENG), at p. 10 or ERN 00211161, cited in the Introductory Submission at footnotes 83, 85, 90.

⁸⁶ Interview of ██████████, at p. 5 or ERN 00210449: “I do not know if there was a security center in Angkuon Dei village. [An individual who has been watching the interview, ██████████, interjects that *there was a security center at Tuol Beng (which appears on our map to be the village next to Angkounh Dei).*]” See also Interview of ██████████, p. 10: “During the Khmer Rouge period, the District Office for Kompong Siem District was in Angkuon Dei village, Krala commune.”

⁸⁷ Interview of ██████████, p. 5: “‘Taken away’ meant you were being executed. [...] [*M*]ost of the people taken away were taken to Kok Pring and killed there.[...] [*M*y brother] may have been taken to Angkounh Dei village. [...] [*H*]e never returned.”) See also Introductory Submission, para. 32.

⁸⁸ Introductory Submission, paras 20-22, 31-32.

⁸⁹ *Ibid.*, para. 31; Report on CGP Mapping Team Visit to Kampong Cham Province, 20 November 2008, D1.3.10.5, ERN 00208307-00208313 (ENG), at p. 3 or ERN 00208309.



which the perceived enemies of the DK regime were interrogated and temporarily detained before being forcibly taken to the security centres or the execution sites in the same District such as Phnom Pros⁹⁰, Kok Pring⁹¹ and Tuol Beng.⁹²

58. Moreover, the Introductory Submission clearly demonstrates that [REDACTED] was [REDACTED] subordinate and exercised and maintained control over the alleged crimes in Kampong Siem District.⁹³ [REDACTED] was closely connected to [REDACTED],⁹⁴ as she was the representative of the Southwest Zone Peasants, along with [REDACTED], in the March 1976 People's Representative Assembly, and worked with him in Sector 35 of Southwest Zone, before she travelled with him to the Central Zone in early 1977.⁹⁵ Furthermore, [REDACTED], as the District Chief of Kampong Siem District, worked in the District Office in Angkuonh Dei village.⁹⁶ It is explicitly provided in the Introductory Submission that the *chhlop* who took the people to Kok Pring were chosen by and worked for [REDACTED],⁹⁷ and that she reported to the Sector Chief [REDACTED].⁹⁸

59. The Undersigned Judges also note the geographical proximity between the sites and the fact that the District Office in the Angkuonh Dei village was strategically located between the Phnom Pros and Kok Pring sites.⁹⁹ The four sites — Tuol Beng and Wat Angkuonh Dei in Krala commune, Phnom Pros in Ampil and Krala communes, and Kok Pring in Vihear Thom commune — are located within a few kilometres away from each other, and Ampil, Krala and Vihear Thom communes are directly next to each other.¹⁰⁰ Considering the systematic nature of the alleged crimes and the scope of [REDACTED] authority over the

⁹⁰ Introductory Submission, paras 30-31.

⁹¹ *Ibid.*, paras 32-33.

⁹² *Ibid.*, para. 32 referring in footnotes 91 and 94 to Interview of [REDACTED].

⁹³ See Introductory Submission, paras 31, 33; Annex B: Witness List, 20 November 2008, D1.2, pp. 23-24; Interview of [REDACTED], p. 2.

⁹⁴ Introductory Submission, para. 31.

⁹⁵ *Ibid.*; Annex B: Witness List, 20 November 2008, D1.2, pp. 23-24.

⁹⁶ Introductory Submission, para. 31; Interview of [REDACTED], p. 3 (“[t]he District Office in the Khmer Rouge period was in Angkuonh Dei village”) and 5 (“I cannot remember the names of any of the people who worked in the district office with [REDACTED].”).

⁹⁷ Introductory Submission, para. 33.

⁹⁸ *Ibid.*; See also Interview of [REDACTED], 20 November 2008, D1.3.11.11, cited in the Introductory Submission, at p. 2 and at footnotes 25, 39, 41, 88, 93, 99, 354, 364, 373, 392.

⁹⁹ See Report of the Execution of Rogatory Letter, dated 15 May 2014: Site Identification Report, 16 May 2014, D117/48, p. 2; Report of the Execution of Rogatory Letter, dated 28 February 2012: Site Identification Report, 27 April 2012, D107/16, pp. 1-2; Report of the Execution of Rogatory Letter, dated 01 December 2010: Site Identification Report, 9 March 2011, D3/23, p. 1.

¹⁰⁰ *Ibid.*



Kampong Siem District, it is inferred that the District Office for the Kampong Siem District at the Wat Angkuonh Dei functioned as a command centre for the alleged crimes in Kampong Siem District. The Undersigned Judges thus find that a direct and indivisible operational link existed between the Tuol Beng and Wat Angkuonh Dei sites, and the Phnom Pros and Kok Pring sites.

60. Therefore, the Undersigned Judges find that the International Co-Prosecutor had reason to believe that the alleged crimes, of which the Co-Investigating Judges were seized by the Introductory Submission, had been committed not only in the places explicitly mentioned in the Introductory Submission such as the Phnom Pros and Kok Pring sites, but also in other intrinsically connected locations, found in Tuol Beng and Wat Angkuonh Dei, where the Co-Investigating Judges were tasked to investigate.

61. The Undersigned Judges, upon careful examination of the impugned investigative actions, find that they do not reveal new facts requiring a supplementary submission. Rather, they provide evidence that merely corroborate and elaborate the circumstances of the alleged crimes that were carried out under ██████████ control in Kampong Siem District. More specifically, the new evidence discovered through the impugned investigative actions corroborate the allegations contained in the Introductory Submission that the arrests, detentions and the killings occurred in a systematic manner in Kampong Siem District and that the alleged crimes in Kampong Siem District occurred upon the orders of ██████████.¹⁰¹ While the exact location, size and nature of the Wat Angkuonh Dei and the Tuol Beng sites,¹⁰² and the specifics of ██████████ orders,¹⁰³ were discovered through the investigative

¹⁰¹ See e.g. Written Record of Interview of ██████████, 20 January 2015, D117/71, ERN 01056221-01056232 (ENG), at p. 8 or ERN 01056228 (answer A44). See also Written Record of Interview of ██████████, 27 April 2012, D107/5, ERN 00787222-00787228 (ENG), at p. 6 or ERN 00787227 (“██████████ was responsible for arresting people in Kampong Siem district. She had her own military unit called the district military for arresting people. The military commander of that unit was ██████████, [...]. [...] ██████████ [...] was then the chairwoman of the Angkuonh Dei commune. All of these people were under ██████████ control”).


¹⁰² See e.g. Written Record of Interview of ██████████, 3 January 2014, D117/34, ERN 00967607-00967612 (ENG), at pp. 4-5 or ERN 00967610-00967611 (“the security center, which was located near [Wat] Angkuonh Dei Pagoda. [...] It was a small place, [...] there were more than 10 prisoners.”); Written Record of Interview of ██████████, 24 December 2013, D117/32, ERN 00966994-00967001 (ENG), at p. 5 or ERN 00966998 (“On the left hand side was located the district office of Kampong Siem run by ██████████, which is about 200m from the current commune office of Krala. The district hospital was located on the left hand side as well, next to the district office. In front of the district hospital located Wat Angkuonh Dei Pagoda. And next to the pagoda was the District Security Centre, [...]. The then old District Security Centre was located to the west of the pagoda, which was located in Tuol Beng village, [...]. It was an execution site.”); Written Record of Interview of Civil Party ██████████, 9 March 2015, D117/37, ERN 01072502-01072511 (ENG), at p. 8 or ERN 01072509 (“[C]lose to Tuol Beng [...]. [...] I saw a well and two pits full of swollen corpses.”).



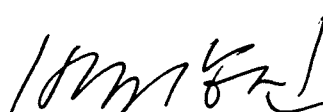
actions following the Introductory Submission, these findings are not new facts requiring a supplementary submission, as the Co-Investigating Judges were already seized of the existence of a District prison and execution site in Kampong Siem District that are directly linked with the Phnom Pros and Kok Pring sites. The Undersigned Judges note that these testimonies are, in fact, evidence clarifying the circumstances in which the alleged crimes were committed and that contribute to the determination of their legal characterisation.

62. The Undersigned Judges, therefore, find that upon the filing of the Introductory Submission, Tuol Beng and Wat Angkuonh Dei fell within the scope of the judicial investigation, and thus the Co-Investigating Judges' investigative actions relating to the sites in question prior to 24 April 2014 are not procedurally defective. Accordingly, the Undersigned Judges need not consider the questions of whether said investigative actions violated [REDACTED] fair trial rights nor whether the charges relating to Tuol Beng were procedurally defective. The Undersigned Judges would dismiss this application for annulment.

Phnom Penh, 14 December 2016



Judge Olivier BEAUVALLET



Judge Kang Jin BAIK

¹⁰³ See e.g. Written Record of Interview of [REDACTED], 20 January 2015, D117/71, ERN 01056221-01056232 (ENG), at pp. 8-9 or ERN 01056228-01056229 (“I was Kampong Siem District Secretary. [...] During a monthly meeting, *Grandfather* [REDACTED] ordered me to identify Cham people and Lon Nol soldiers in each commune. [...] I had a meeting with the commune chiefs to tell them to identify and make a list of Cham people and former LON Nol soldiers [...]. [...] After I reported to *Grandfather* [REDACTED], he gave an order to me, and I ordered [REDACTED] to organize the arrests. People were arrested from the base to be sent to the district security, and I sent them to the sector security.”); Written Record of Interview of Civil Party [REDACTED], 19 November 2014, D191.1.112 (D219/119.1.3), ERN 00797019-00797026 (ENG), at p. 3 or ERN 00797021 (“[REDACTED] called us to a meeting at which she talked about enemies who were inside the Organisation. That they had to be unmasked and their networks had to be dismantled. If brothers or sisters were considered as Enemies, the whole family would be taken away.”); See also Written Record of Interview of [REDACTED], 27 April 2012, D107/4, ERN 00787234-00787240 (ENG), at p.3 or ERN 00787236; Written Record of Interview of [REDACTED], 27 April 2012, D107/5, ERN 00787222-00787228 (ENG), at p. 6 or ERN 00787227; Written Record of Interview of [REDACTED], 27 April 2012, D107/7, ERN 00787211-00787216, at p.4 or 00787214.

