



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

សេចក្តី/No: ០២៦៣/២/៦

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.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 41)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 25 June 2010

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PUBLIC

DECISION ON IENG THIRITH'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER REJECTING THE REQUEST TO SEIZE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF ALL INVESTIGATIONS (D263/1)

Co-Prosecutors

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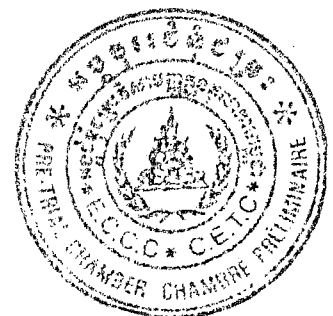
Charged Person

IENG Thirith

Co-Lawyers for the Defence

PHAT Pouy Seang
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ឯកសារច្បាប់ចម្លងត្រឹមត្រូវតាមច្បាប់ដើម	
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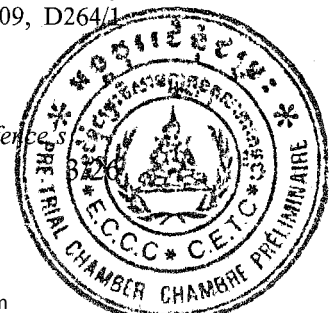
THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Defence Appeal against ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’”¹ (“the Annulment Appeal” and “the Abuse of Process Appeal” jointly referred to as “the Appeals”) filed on 2 February 2010 by the Co-Lawyers of the charged person Ieng Thirith (“the Charged Person” or “the Appellant”) against the Co-Investigating Judges’ (“CIJs”) “Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith,”² (“the Impugned Annulment Order” and “the Impugned Abuse of Process Order” jointly referred to as “the Impugned Orders”) dated 31 December 2009 and notified on 4 January 2010.

I. PRELIMINARY CONSIDERATION

1. The Pre-Trial Chamber observes that the Office of the Co-Investigating Judges issued a single decision and filed an identical document in both the Impugned Annulment Order and in the Impugned Abuse of Process Order, which has resulted in both Impugned Orders being treated together in subsequent submissions before the Pre-Trial Chamber. Whilst the Annulment Appeal and the Abuse of Process Appeal are each based upon similar grounds of appeal, the consequences of the applications are different, with an annulment resulting in material being expunged from the case file, as opposed to a permanent stay of the proceedings being the relief in respect of finding of an abuse of process. The Pre-Trial Chamber will therefore determine the Appeals in separate judgments in order to avoid confusion.

¹ Defence Appeal against ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’ (D263/1) of 31 December 2009, 2 February 2010, D263/2/1 (“Annulment Appeal”) and Defence Appeal against ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith’ (D264/1) of 31 December 2009, 2 February 2010, D264/2/1 (“Abuse of Process Appeal”) (jointly referred to as the “Appeals”).

² Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, dated 31 December 2009 and notified on 4 January 2010, D263/1 (“Impugned Annulment Order”) and Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, 31 December 2009, D264/1 (“Impugned Abuse of Process Order”) (jointly referred to as the “Impugned Orders”).



This decision will cover only the Pre-Trial Chamber's determination of the Annulment Appeal.

II. PROCEDURAL BACKGROUND AND SUMMARY OF SUBMISSIONS

2. On 7 December 2009, the Co-Lawyers of the Appellant filed two requests: (i) the "Request to the Co-Investigating Judges to Seize the Pre-Trial Chamber with a view to Annulment of All Investigations" ("the Annulment Request");³ and (ii) the "Defence Request for Stay of Proceedings on the Basis of Abuse of Process" ("the Abuse of Process Request").⁴ The Annulment Request sought to have the Office of the Co-Investigating Judges ("the OCIJ") "seize the Pre-Trial Chamber with a view to the annulment of all investigations on the basis of violation of several procedural provisions"⁵ that "have infringed the right of the Charged Person to have a fair and impartial hearing"⁶ as guaranteed by Article 14 of the International Covenant on Civil and Political Rights ("the ICCPR")⁷ and imbued within Internal Rule 21.
3. The Co-Lawyers for the Charged Person alleged: (i) a lack of impartiality;⁸ (ii) a violation of the mandatory separation between prosecutorial and adjudicatory offices and a lack of independence;⁹ (iii) the withholding of information by the 'International Side' from the 'National Side' of the OCIJ;¹⁰ and (iv) a breach of confidentiality whereby a documentary crew was allowed to film a witness interview.¹¹

³ Request to the Co-Investigating Judges to Seize the Pre Trial Chamber with a view to Annulment of All Investigations, 7 December 2009, D263 (the "Annulment Request").

⁴ Defence Request for Stay of Proceedings on the Basis of Abuse of Process, 7 December 2009, D264 (the "Abuse of Process Request").

⁵ Annulment Request, para. 1.

⁶ Annulment Request, paras 3 and 52.

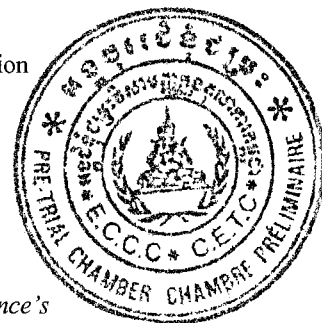
⁷ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A [XXI], 16 December 1966, Article 14.

⁸ Annulment Request, paras 12-22.

⁹ Annulment Request, paras 23-30.

¹⁰ Annulment Request, paras 31-39.

¹¹ Annulment Request, paras 40-51.



4. On 4 January 2010, the CIJs issued the Impugned Annulment Order, which declared there was “nothing to justify” seising the Pre-Trial Chamber with a view to the annulment of the proceedings given that “absent any procedural defect, there has been no infringement of any of the rights of the Defence under the [ICCPR] or under [Internal] Rule 21.”¹² The Impugned Annulment Order rejected all four grounds raised by the Annulment Request on the basis that:

- (i) the allegations of partiality do not discharge the burden of proof;¹³
- (ii) the Co-Investigating Judges both considered that the confusing statements of Mr Bastin cannot, in any way, substantiate the allegation that a document was provided to the International side of the OCIJ by a staff member in the Office of the Co-Prosecutors (OCP), suggesting certain avenues not in the course of the Introductory Submission or a supplementary submission is unsubstantiated;¹⁴
- (iii) “in OCIJ practice, any work conducted unilaterally by the national or international teams is only considered to be preparatory work and [...] all investigative action must be conducted jointly”;¹⁵ and
- (iv) “as part of an agreement entered into with the Office of Administration of the ECCC, a documentary film crew has been authorised to produce a film for pedagogical and historical purposes”¹⁶ that has “received the approval of the two Co-Investigating Judges” and will “only be broadcast or released after the conclusion of all pending trials [...]”.¹⁷

5. On 2 February 2010, the Co-Lawyers for the Charged Person filed their Appeals. The Annulment Appeal raises seven grounds of appeal against the Impugned Annulment Order, alleging that: (i) the CIJs applied the wrong standard of proof in its overall assessment of the Annulment Request by examining the request on its

¹² Impugned Annulment Order, para. 42.

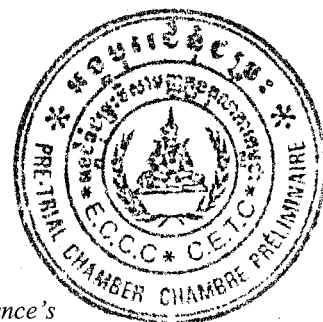
¹³ Impugned Annulment Order, paras 13-14.

¹⁴ Impugned Annulment Order, para. 26.

¹⁵ Impugned Annulment Order, para. 21.

¹⁶ Impugned Annulment Order, para. 23.

¹⁷ Impugned Annulment Order, para. 24.



merits instead of applying a *prima facie* test;¹⁸ (ii) the CIJs also applied the wrong standard of proof in assessing the underlying evidence presented in the Annulment Request;¹⁹ (iii) the CIJs failed to address certain issues raised by the defence in the Annulment Request;²⁰ (iv) the CIJs erred in the interpretation and application of Internal Rule 56(2)(b);²¹ (v) the CIJs failed to address the specific argument on surreptitious filming raised by the defence, which “further presents an erroneous interpretation of Internal Rule 56(2)(b)”;²² (vi) the CIJs failed to deny receipt of the document from an investigator in the OCP;²³ and (vii) part of the Annulment Order is “made by Judge Lemonde without Judge You Bunleng’s cooperation”, which is “in breach of the OCIJ’s obligation to act jointly”.²⁴ The Annulment Appeal moves the Pre-Trial Chamber to quash the Impugned Annulment Order and to consider itself seised of the Annulment Request.

6. On 19 February 2010, the Co-Prosecutors filed their combined response to the Defence’s Annulment Appeal and Abuse of Process Appeal (the “Co-Prosecutors’ Response”).²⁵ The Co-Prosecutors request that the Pre-Trial Chamber dismiss both appeals and confirm the CIJ’s Impugned Orders, as both appeals and underlying motions:

(i) provide evidence that is unconvincing, does not substantiate what they purport to prove, and/or do not show a violation of the Charged Person’s rights; (ii) fail to satisfy the very high burden of the abuse of process doctrine and the standard for the annulment of all investigations, which are extreme judicial remedies reserved for the most severe of circumstances; (iii) raise unfounded suggestions regarding the lack of cooperation between the International and National CIJs, which are irrelevant, inconsequential, or, at best, more appropriately handled by the dispute resolution mechanism available to the CIJs under Internal Rule 72;

¹⁸ Annulment Appeal, paras 24-33.

¹⁹ Annulment Appeal, paras 34-42.

²⁰ Annulment Appeal, para. 43-54.

²¹ Annulment Appeal, paras 55-64.

²² Annulment Appeal, para. 69. See also paras 65-70.

²³ Annulment Appeal, paras 71-76.

²⁴ Annulment Appeal, para. 77. See also paras 78-82.

²⁵ Co-Prosecutors’ Combined Response to Defence’s Appeals against the ‘Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis on Abuse of Process Filed by Ieng Thirith’ (D263/1 and D264/1) of 31 December 2009, 19 February 2010, D263/2/2 (the “Co-Prosecutors’ Response”); see in particular para. 4, where the CoPs explained that their response was intended to be equally applicable in both the Annulment Appeal and the Abuse of Process Appeal.



and (iv) fail to prove that the CIJs incorrectly applied governing law in making its Order.²⁶

The Co-Prosecutors note that Internal Rule 48 states that an annulment of “an ‘investigative or judicial action’ may only occur where the ‘procedural defect ... infringes the rights of the party making the application.’”²⁷ They also observe that the scope of an annulment is within the judges’ discretion, as envisaged by the limited annulment in Internal Rule 76(5),²⁸ and consequently, “only in *exceptional* circumstances would an entire proceeding or investigation be annulled for a procedural defect, as that defect would have to contaminate every aspect of the investigation.”²⁹

7. On 15 March 2010, the Pre-Trial Chamber issued its “Decision to Determine the Appeal on Written Submissions and Direction for Reply”³⁰ denying the Co-Lawyers for the Charged Person’s request for a public hearing and directing the Co-Lawyers to reply to the Co-Prosecutors’ Response within the time limit specified by Article 8.4 of the Practice Direction on Filing Documents.³¹
8. On 19 March 2010 the Co-Lawyers filed their “Defence Reply to Joint Co-Prosecutors’ Response to Defence Appeals against the Orders on Abuse of Process and Annulment” (the “Defence Reply”).³² The Defence Reply maintains that: (i) all investigations must be annulled because the defects have tainted the whole investigation,³³ “the French case law relied upon in the OCP Response is incomplete”,³⁴ the Internal Rules do not provide for a requirement of “exceptional circumstances” but that it is “incontrovertible that a lack of impartiality [...] would

²⁶ Co-Prosecutors’ Response, para. 3.

²⁷ Co-Prosecutors’ Response, para. 11.

²⁸ Co-Prosecutors’ Response, para. 13.

²⁹ Co-Prosecutors’ Response, para. 14.

³⁰ Decision to Determine the Appeal on Written Submissions and Direction for Reply, 15 March 2010, D263/2/3.

³¹ Practice Direction on Filing of Documents Before the ECCC, ECCC/01/2007/Rev. 4, Article 8.4.

³² Defence Reply to Joint Co-Prosecutors’ Response to Defence Appeals against Orders on Abuse of Process and Annulment, 19 March 2010, D263/2/4 (the “Defence Reply”).

³³ Defence Reply, para. 5.

³⁴ Defence Reply, para. 6. See also paras 7-9.



amount to exceptional circumstances”³⁵ and the Co-Prosecutors have confused “the reliefs requested in the two defence Appeals”;³⁶ (ii) the CIJs fail to sufficiently reason the Impugned Orders, which breaches the Charged Person’s right to a fair trial;³⁷ (iii) the Co-Prosecutors have not denied that a document was exchanged between the OCP and the OCIJ;³⁸ and (iv) the OCIJ did not exercise “strict control” over the documentary film crew.³⁹

9. On 11 June 2010, the Pre-Trial Chamber announced its determination of the final disposition of the Appeal indicating that “a reasoned decision in respect of the Appeal shall follow in due course.

**THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY
HEREBY:**

DECIDES that the Annulment Appeal is admissible.

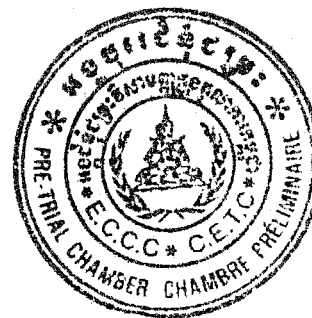
UPHOLDS the first ground of the Annulment Appeal and **QUASHES** the Impugned Annulment Order and **DECIDES** that the matter will be determined on the grounds set out in the Annulment Request.

DISMISSES the Annulment Request.”⁴⁰

REASONS FOR THE DECISION

III. ADMISSIBILITY OF THE APPEAL

10. The Impugned Annulment Order was notified on 4 January 2010. The Notice of Appeal was filed on 14 January 2010,⁴¹ with the Appeal Brief being filed on 2 February 2010. The Appeal has been commenced in a timely manner.



³⁵ Defence Reply, paras 10-11.

³⁶ Defence Reply, para. 12.

³⁷ Defence Reply, paras 13-15.

³⁸ Defence Reply, paras 16-17.

³⁹ Defence Reply, paras 18-20.

⁴⁰ Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1), 11 June 2010, D263/2/5.

⁴¹ Appeal Register of Ieng Thirith’s Lawyer Order Rejecting Request for Annulment and the Stay of Proceedings on the Basis of Abuse of Process Filed By Ieng Thirith, 14 January 2010, D263/2.

11. The Appeal is filed pursuant to Internal Rule 76(2) providing for a right of appeal when a request to seise the Pre Trial Chamber with an application for annulment is refused. The Annulment Appeal is contemplated in Internal Rule 74(3)(g) and is admissible.

IV. ALLEGED ERROR OF LAW BY THE CO-INVESTIGATING JUDGES WHEN REVIEWING APPLICATION UNDER RULE 76(2)

(GROUND 1)

12. The first ground in the Annulment Appeal is based upon an assertion that the Co-Investigating Judges applied the wrong standard of proof when considering the application pursuant to Internal Rule 76(2). This sub-rule provides:

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 Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.⁴²

Internal Rule 48 is directive of matters being annulled for procedural defect only. It provides:

Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.⁴³

13. In the Order, the Co-Investigating Judges have directed themselves in respect of the Application before them in the following manner:

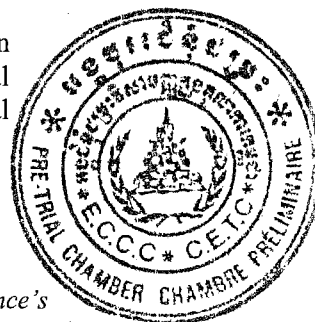
8. [...] the Co-Investigating Judges will jointly address all the arguments raised by the Defence, both in the Request for Annulment and in the Request for a Stay of Proceedings, including common or individual reasoning, depending on the arguments raised. Thus, any reasoning that is not specified to be the individual reasoning of one of the Co-Investigating Judges is adopted by both of them.

[...]

9. Apart from the situation in which non-compliance with an expressly prescribed formality vitiates a procedure, a procedural defect can only lead to annulment of one or more procedural

⁴² Internal Rule (Rev. 5) 76(2).

⁴³ Internal Rule (Rev. 5) 48.



actions if there is proof that there has been an infringement of the rights of the Defence within the meaning of the International Covenant on Civil and Political Rights (ICCPR). These rights are reflected in Rule 21 of the Internal Rules.

10. Under Rule 48 of the Internal Rules [...] accordingly, when considering a request for annulment, the Co-Investigating Judges must:
 - determine whether there has been a procedural defect; and
 - in the affirmative, they must determine whether or not the defect infringes the rights of the party making the application.
11. These are the principles against which the Co-Investigating Judges will consider the merits of the Defence claims in this case.⁴⁴

14. At paragraphs 26 and 27 of the Annulment Appeal the Appellant submits:

26. The OCIJ applied the wrong standard of proof. The standard required at the stage of the OCIJ is not the one described above; rather the assessment at that level should be limited to a *prima facie* test whether or not the Pre-Trial Chamber should be seised with the request for annulment, i.e. whether the grounds raised by the applicant provide adequate, as opposed to conclusive, evidence to warrant the belief that there are grounds for annulment as raised by the applicant. The merits are not subject to the jurisdiction of the OCIJ, but the Pre-Trial Chamber.
27. A *prima facie* test, or 'reasonable grounds for believing', is applied for instance at the level of the confirmation of an indictment before the *ad hoc* tribunals. In explaining the *prima facie* test at the stage of the confirmation of the indictment, ICTY Judge Sidhwa concludes in the *Rajic* case:

"The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression 'sufficient evidence' is thus not synonymous with 'conclusive evidence' or 'evidence beyond reasonable doubt'.⁴⁵



15. In the Response, the Co-Prosecutors have submitted:

20. While Rules 76(2) and (4) stipulate that annulment application must be reasoned and set forth grounds for the PTC to accept or dismiss an application, the standard of proof that the CIJs apply when deciding to accept or refuse to seise the PTC with an annulment application is not mentioned in the Rules. The Defence fail to cite any authority to support their contention that annulment applications should be judged by the same standard of proof as indictments at *ad hoc* international criminal

⁴⁴ Impugned Annulment Order, paras 8-11.

⁴⁵ Annulment Appeal, paras 26-27 (footnote omitted).

tribunals. Therefore the CPs do not believe a *prima facie* test, as proposed by the Defence, is clearly applicable. However, the CPs do agree with the Defence that the CIJs should apply a low standard of proof at this stage, especially when the impartiality of one of the CIJs is raised in the annulment application.⁴⁶

16. Internal Rule 76(2) provides for the Co-Investigating Judges to consider a “request” “to seise the Chamber” with an application for annulment. The sub-Rule does not provide for the Co-Investigating Judges to determine the merits of the application, which is clearly the task they have undertaken and stated to be their intention when referring to the consideration of “the merits of the Defence claims in this case.”⁴⁷ It is not for the Co-Investigating Judges to determine the annulment application on its merits, this is the role of the Pre-Trial Chamber, which is made clear from Internal Rule 73(b). Internal Rule 73, insofar as it is relevant, provides:

[...] the Chamber shall have sole jurisdiction over:

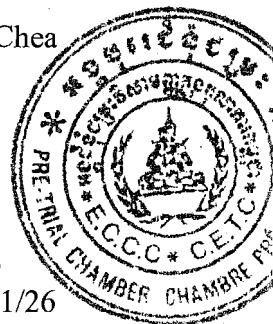
- a) appeals against decisions of the Co-Investigating Judges, as provided in Rule 74;
 - b) applications to annul investigative action, as provided in Rule 76; and
- [...]⁴⁸

17. It is to be noted that the procedural defects alleged to be null and void is the consequence of investigations directed by the Co-Investigating Judges. It may be alleged that their delegates, being investigators or others, have procedurally erred, or that they may themselves have erred directly in some way in respect of the procedures the subject of an application. In the instant case, there is also an allegation made directly against one of the Co-Investigating Judges who is said to have caused a defect and infringed the rights of the Charged Person.
18. The standard of proof to be applied by the Co-Investigating Judges when deciding whether to seise or not the Pre-Trial Chamber with an annulment application is not specified in the Internal Rules. The Pre-Trial Chamber has however specified the test to be applied by the Co-Investigating Judges in its Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment (“the Nuon Chea

⁴⁶ Co-Prosecutors’ Response, para. 20.

⁴⁷ Impugned Annulment Order, para. 11.

⁴⁸ Internal Rule (Rev. 5) 73.



Decision”),⁴⁹ namely that the Co-Investigating Judges should consider whether there is a reasoned application that there has been: (i) a procedural defect; and (ii) such “defect infringes the rights of the party making the application.”⁵⁰ The Co-Investigating Judges have indeed applied the correct test as laid out by the Pre-Trial Chamber,⁵¹ however to the wrong standard of proof, since the Co-Investigating Judges were to determine only whether there was an arguable case and not examine the merits of the application. When considering an application under Internal Rule 76(2), the Co-Investigating Judges must only be formally satisfied that there is an application supported by a reasoned argument making assertions that there has been a procedural defect and that such defect infringes the rights of the party making the application. Where the Co-Investigating Judges apply the correct standard, and the application, as in the instant case, is directed to the personal conduct of a Co-Investigating Judge, there is no requirement for the judge in question to disqualify himself from reviewing the application, because such review is as to form alone and any consideration of the merit of the application is for the Pre-Trial Chamber.

19. The Pre-Trial Chamber finds that by applying the proper test in this particular matter using the proper standard of review, there is a reasoned application raising an arguable case that there has been: (i) a procedural defect; and (ii) such “defect infringes the rights of the party making the application.”⁵² Thus the first ground of the Appeal is made out.
20. Consequent upon this, the Pre-Trial Chamber finds that it is appropriate to consider this matter as if the Co-Investigating Judges had seised the Pre-Trial Chamber with the Annulment Request at first instance. The Pre-Trial Chamber shall not consider this matter on the basis of the Annulment Appeal but on the basis of the Annulment Request and its supporting material.

⁴⁹ Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, 002/19-07-2007-ECCC/OCIJ(PTC06), D55/I/8, (“Nuon Chea Decision”), paras 22-23.

⁵⁰ Internal Rule (Rev. 5) 48.

⁵¹ Impugned Annulment Order, par. 10.

⁵² Internal Rule (Rev. 5) 48.



V. APPLICABLE LAW TO ANNULMENT PROCEDURE BEFORE THE PRE-TRIAL CHAMBER

21. Under Internal Rule 48, for an investigative or judicial action to be annulled, the Charged Person must prove the existence of the alleged procedural defects that resulted in an infringement upon her rights. The Pre-Trial Chamber will interpret “an infringement of rights”,⁵³ as referred to in Internal Rule 48, as “a harmed interest”.⁵⁴ The Pre-Trial Chamber has previously considered in its Nuon Chea Decision that as such, a violation of the Charged Person’s rights under the ICCPR or Internal Rules is considered a procedural defect that creates a harmed interest and can thus lead to an annulment. Alternatively, where a procedural defect is not prescribed as void in the Internal Rules and where there has been no violation of rights under the ICCPR, the applicant must prove the existence of a procedural defect that has harmed their interests in order to satisfy the threshold for annulment.⁵⁵
22. In respect of the procedure provided for in Internal Rule 76(2), the Pre-Trial Chamber has previously found in its Nuon Chea Decision that since there is no provision in the Internal Rules stating that the Pre-Trial Chamber can declare investigative action null and void on its own initiative, the Pre-Trial Chamber is bound by the application made by the party, which shall state which part of the proceedings is null and void and provide grounds for making such an assertion.⁵⁶
23. In the Annulment Request the Co-Lawyers submit that all investigations should be annulled “as clear and repetitive infringement of the Internal Rules and other provisions governing the ECCC proceedings have occurred, and the Charged Person’s right to a fair trial has been affected.”⁵⁷ The Applicant is therefore seeking

⁵³ Noun Chea Decision, para. 36.

⁵⁴ Noun Chea Decision, para. 36.

⁵⁵ Noun Chea Decision, paras 40-42 (footnotes omitted).

⁵⁶ Nuon Chea Decision, para. 35.

⁵⁷ Annulment Request, para. 51.



the annulment of the entire investigation, not merely “any part” of the proceedings.⁵⁸

24. The Pre-Trial Chamber found that the annulment procedure, as applied in the Nuon Chea Decision, is “not designed to nullify investigations in general [...] but is designed to nullify those portions of the proceedings that harm the Charged Person’s interests which have to be specified.”⁵⁹ An annulment application therefore needs to be reasoned, specific as to which investigative or judicial actions are procedurally defective and, when applicable, prove the harmed interest. In the latter situation, if the annulment of all investigative or judicial actions is requested, the applicant must prove the existence of a procedural defect that has harmed their interests in the entire case. When a violation of the Charged Person’s rights under the ICCPR or Internal Rules is proven, the procedural defect creates a harmed interest and will lead to annulment of that specific investigative or judicial action, although the Pre-Trial Chamber has the discretion to appreciate the consequences of this annulment on the entirety of the case.
25. It is indeed for the Pre-Trial Chamber to appreciate the consequences on the entirety of the case of a particular procedural defect, in accordance with Internal Rule 76(5) which states that

Where the Chamber decides to annul an investigative action it shall decide whether the annulment affects other actions or orders.⁶⁰
26. The Pre-Trial Chamber notes that in a case where a party requests the annulment of substantial or several parts of the proceedings, this might, in effect, lead to the annulment of all investigations depending of the extent of the harmed interest. Further, the annulment of “any part of the proceedings” may, when the harmed interest has serious consequences on the proceedings or other investigative or

⁵⁸ Annulment Request, para. 59.

⁵⁹ Decision on Khieu Samphan’s Appeal against the Order on the Request for Annulment for Abuse of Process, 4 May 2010, 002/19-09-2007-ECCC/OCIJ(PTC 30), D197/5/8, (“Khieu Samphan Decision” para. 24 (footnotes omitted).

⁶⁰ Internal Rule (Rev. 5) 76(5).



judicial actions, have consequences on the entirety of the proceedings. The Pre-Trial Chamber will make such determination as to the remedy to apply following a proven procedural defect on a case by case basis.

27. The Pre-Trial Chamber notes that when an application for annulment is granted, the investigative or judicial action(s) declared null and void is (or are) expunged from the material on the case file. Consequently, if the entire investigation is annulled, all the material will be expunged from the case file, which leads to a consequence which must be differentiated from that of a stay of proceedings for abuse of process. Both procedures apply different standards and result in different consequences. If an annulment is ordered, even of the entire investigation, there is nothing to prevent a new investigation from placing new material, which is untainted by those defects, on the case file. In the case of a stay of proceedings, the whole proceedings would cease because the abuse has been found to be so egregious as to damage the integrity of the entire process, there will no longer be any case to answer.

VI. CONSIDERATION OF THE GROUNDS ON WHICH ANNULMENT IS REQUESTED

28. The Pre-Trial Chamber notes that the Annulment Request raises four grounds, requesting annulment on the basis of procedural defect, one of which includes an allegation of bias.

A. Lack of Impartiality

29. The Co-Lawyers rely solely on a statement provided Mr Wayne Bastin on 8 October 2009 (First Bastin Statement)⁶¹ for this ground of the Request. They argue that the comment made by Judge Lemonde evinces a preference for inculpatory rather than exculpatory evidence and demonstrates a partial and biased approach.⁶² The Annulment Request notes that in the Consolidated Response of

⁶¹ First Bastin Statement, 8 October 2009, D263.3 – Exhibit 1 to the Annulment Request.

⁶² Annulment Request, paras 13-14.



Judge Lemonde⁶³ there is no evidence adduced to refute the fact that the comment was made,⁶⁴ instead Judge Lemonde suggests that, “if said, the comment was made in jest and understood by those present as such.”⁶⁵ The Co-Lawyers contend that the reaction of some staff members of the OCIJ illustrates that they did not consider the comment to be a joke.⁶⁶ They further submit that such a comment is inappropriate for a person in Judge Lemonde’s position because it conveys a position of partiality to OCIJ staff and goes against the interests of the Charged Person, who is entitled to an impartial investigation that “equally enthusiastically seeks exculpatory evidence”.⁶⁷

30. The test applied by the Co-Lawyers is one of a “reasonable observer”, who they submit would consider the comment to be a “conscious statement” representative of a “subconscious discriminatory approach to the search for evidence.”⁶⁸ The Co-Lawyers submit that by appearing to have acted partially, Judge Lemonde, and therefore the OCIJ, have violated Internal Rule 55(5), Article 13 of the Agreement, which in turn refers to Article 14 of the ICCPR, Article 25 of the ECCC Law, Articles 2, 7 and 8 of the ECCC Code of Judicial Ethics, and Articles 7 and 8 of the Cambodian Code of Judicial Ethics.⁶⁹
31. The Pre-Trial Chamber has previously determined the appropriate standard to be applied in respect of bias, applying the Internal Rules and international jurisprudence within the context of Internal Rule 34.⁷⁰ The Pre-Trial Chamber has

⁶³ Consolidated Response of Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of Ieng Sary and Khieu Samphan, 5 November 2009, D263.5 – Exhibit 3 to the Annulment Request (the “Consolidated Response”).

⁶⁴ Annulment Request, para. 14.

⁶⁵ Annulment Request, para. 12.

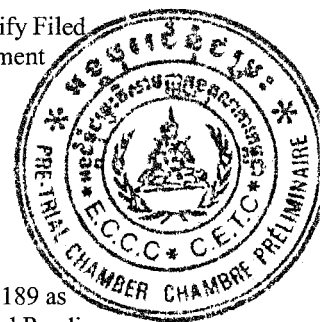
⁶⁶ Annulment Request, para. 15.

⁶⁷ Annulment Request, para. 16.

⁶⁸ Annulment Request, para. 17.

⁶⁹ Annulment Request, para. 19.

⁷⁰ *Prosecutor v. Furundzija*, IT-95-17/1-A, “Judgement”, Appeals Chamber, 21 July 2000, para. 189 as quoted in Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, 002/19-09-2007-ECCC/OCIJ (PTC01), C11/29, (“Ney Thol Decision”), para. 20.



held that where an applicant claims bias, the applicant has the burden to overcome a presumption of the Judge's impartiality:

'This presumption derives from [the Judges'] oath to office and the qualifications for their appointment [...], and places a high burden on the party moving for the disqualification to displace that presumption.'
[...]

It is for the applicant to adduce sufficient evidence to satisfy the Pre-Trial Chamber that the Judge in question can be objectively perceived to be biased. There is a high threshold to reach in order to rebut the presumption of impartiality.⁷¹

32. Whilst this Pre-Trial Chamber's decision has previously been specific to disqualification applications, the Pre-Trial Chamber finds it is equally applicable where an applicant alleges partiality as a basis for an application under Rule 76(2). It is for the applicant under this rule to prove the existence of a procedural defect and either actual (or objective) bias or apprehended (or subjective) bias. In the present case, the applicant is contending that lack of impartiality, i.e. bias, is a procedural defect; therefore sufficient evidence must be adduced to reverse the presumption of impartiality of Judge Lemonde. In that context, if the alleged bias is proven, it could lead to a procedural defect and the Pre-Trial Chamber will have to examine which judicial or investigative actions are concerned by the allegation of partiality and what are the consequences of the defect, i.e. bias, on the overall case considering that the investigations performed by the OCIJ were approved, unless otherwise proven, by the national Co-Investigating Judge.
33. The Pre-Trial Chamber has considered the specific allegations raised in this ground and determined that the evidence provided on this point was insufficient in its Decision on Ieng Sary's Application to Disqualify⁷² and its Decision on Khieu Samphan's Application to Disqualify.⁷³ The allegations in this matter are repetitious of the allegations in both those matters and are based on the same statement provided by Mr Bastin. No new matters have been raised in this ground

⁷¹ Ney Thol Decision, paras 15 & 19 (footnotes omitted).

⁷² Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 9 December 2009, 002/09-10-2009-ECCC/PTC(01), Doc. No. 7.

⁷³ Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, 002/13-10-2009-ECCC/PTC(02), Doc. No. 7.



and the Pre-Trial Chamber will not reconsider its earlier decisions unless new evidence is adduced which warrants reversing the presumption of impartiality attached to Judge Lemonde.

34. The Pre-Trial Chamber notes that the Co-Lawyers annexed to the Appeal additional material attesting to the identity of Mr Bastin and the fact that he is the author of the statement, including a Statutory Declaration, Mr Bastin's half page 'dot-notes' taken during the August 2009 meeting and an explanation of these 'dot-notes' by Mr Bastin himself. That material is not considered here because, as determined in paragraph 19 above, the Pre-Trial Chamber is seised of this matter on the basis of the Annulment Request and not the Appeal. If the Pre-Trial Chamber were to be seised of this material, it has determined in another decision on requests for disqualification of Judge Lemonde that this further evidence "does not provide further factual basis necessary to reverse the presumption of impartiality which attaches to Judge Lemonde".⁷⁴

35. Accordingly, since the procedural defect based on bias is not proven, the Pre-Trial Chamber will not consider the matter further. This first ground is dismissed.

B. Violation of Mandatory Separation between Prosecutorial and Adjudicatory Offices and Lack of Independence

36. On 2 December 2009 Mr Bastin provided another statement to the Co-Lawyers ("the Second Bastin Statement")⁷⁵ which recalled, in particular, a meeting at the OCIJ that occurred in November or December 2008 during which a document was distributed to the persons present at this meeting, amongst whom, was Judge Lemonde. According to Mr Bastin, the staff member of the OCIJ who distributed this document explained that it had been provided directly by a staff member of the

⁷⁴ Decision on Ieng Sary's and on Ieng Thirith's Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, 15 June 2010, 002/07-12-2009-ECCC/(PTC05), Doc. No. 8, and 002/11-12-2007-ECCC/(PTC07), Doc. No. 6, ("Decision on Ieng Sary's and Ieng Thirith's Applications to Disqualify") para. 41.

⁷⁵ Second Bastin Statement, 2 December 2009, D263.4 – Exhibit 2 to the Annulment Request.



Office of the Co-Prosecutors (“the OCP”). Mr Bastin explained that the document was unofficial and most of those present received a copy.⁷⁶

37. The Co-Lawyers submit that the receipt of this document constitutes behaviour that is in direct violation of “the general obligation to act independently”, as enshrined in ICCPR Article 14, and “the specific obligation to ‘not communicate with any party during the case proceedings in the absence of another party except where the law permits or with consent of another party’” as enunciated in Article 9 of the Cambodian Code of Judicial Ethics.⁷⁷ Furthermore, the Co-Lawyers contend that the obligation to guarantee separation between prosecuting and adjudicating authorities, as specified by Internal Rule 21, has been violated by the OCIJ making use of an unofficial document provided by the OCP.⁷⁸
38. The Co-Lawyers then rely on the “rationale behind Internal Rules 50, 53 and 55”⁷⁹ to argue that there should have been no “direct informal contact” between the OCP and the OCIJ and that “[n]o documents should be exchanged between these two separate organs of the court outside of the Case File.”⁸⁰ The Co-Lawyers admit that there is no basis for this claim in either the Internal Rules or any other instruments governing the ECCC, however, they contend such an action is in fact prohibited through the various impartiality and independence clauses.⁸¹
39. The Pre-Trial Chamber considers that the allegations contained in this ground of the Request are allegations that the OCIJ violated his obligation to act independently under, in particular, Internal Rules 21 and 55(2). If proven, such would amount to a procedural defect, which does amount to a violation of rights.
40. The Pre-Trial Chamber notes that the Second Bastin Statement is the only evidence adduced by the Co-Lawyers in support of their request for annulment on this

⁷⁶ Second Bastin Statement, p.3.

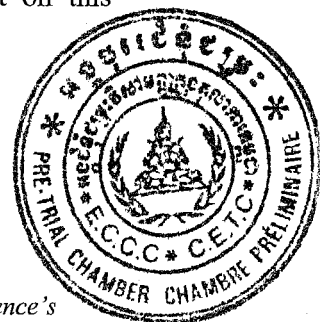
⁷⁷ Annulment Request, para. 24.

⁷⁸ Annulment Request, para. 25.

⁷⁹ Annulment Request, para. 28.

⁸⁰ Annulment Request, para. 29.

⁸¹ Annulment Request, para. 29.



ground. None of the individuals alleged to be present during the meeting, or involved directly or indirectly with the events, have been approached to provide evidence. The statement contradicts itself on who actually received the document at the meeting, citing in the same paragraph that “all members present” and “most of those present” received a copy.⁸² Whilst Mr Bastin alleges the document “dealt with avenues of inquiry” and states that he “returned to [his] office and read the document”, the actual document is not provided, nor are the contents of the document elucidated upon further.⁸³

41. The Pre-Trial Chamber finds that the allegations contained in the Second Bastin Statement are merely assertions and the Co-Lawyers have failed to adduce enough evidence to prove the *existence* of a procedural defect. The second ground of the Annulment Request is therefore dismissed.

C. Withholding of Information by ‘International Side’ from ‘National Side’

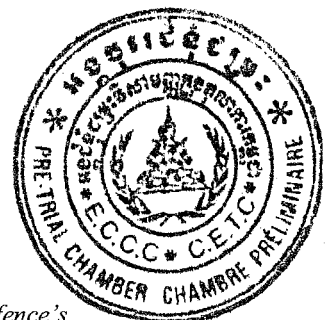
42. The Co-Lawyers rely on the Second Bastin Statement to provide “several examples of the International Co-Investigating Judge and staff of the OCIJ withholding information from their national counterparts.” The following examples are provided by the Applicant:

- (i) in relation to the document said to have been provided to the OCIJ by the OCP, “it was stressed, a number of times, how important it was that it was not shared with the Cambodian staff”;
- (ii) Judge You Bunleng had not approved the film crew accompanying investigators, which he found out only after it had happened since Judge Lemonde had not discussed this with him; and
- (iii) Judge Lemonde had expressed an intention that national staff should not be granted access to the insider witness database.⁸⁴

⁸² Second Bastin Statement, p. 3.

⁸³ Second Bastin Statement, p. 4.

⁸⁴ Annulment Request, para. 31.



The Co-Lawyers submit that these incidents “show that the ‘international side’ of the OCIJ attempted to control the information that was provided to the ‘national side’ [...] and to deny the ‘national side’ access to all information as it became available.”⁸⁵

43. The Co-Lawyers contend that these incidents lead to an infringement of the Charged Person’s right to be tried by an independent and impartial tribunal as guaranteed by Article 14 of the ICCPR. They further submit that the doctrine of mutuality of decision making is a fundamental tenet of the ECCC:

The Preamble to the Court’s Establishing Agreement at paragraph 3 stipulates that ‘the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of the Democratic Kampuchea [...]; Article 1 of the Agreement specifically provides for the central principle of ‘co-operation’. Article 5(4) of the Agreement specifically provides ‘[t]he co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation’. Similarly, Article 23 new of the Establishment Law provides that ‘[a]ll investigations shall be the joint responsibility of the two investigating judges, one Cambodian and one foreign [...] and shall follow existing procedures in force’.⁸⁶

The Co-Lawyers then conclude that by withholding information from the national side, the international side of the OCIJ is “in breach of the Agreement, its Law and its Rules.”⁸⁷

44. The Co-Lawyers submit that Cambodian staff within the OCIJ “can be presumed to have more knowledge of the events that occurred during Democratic Kampuchea and of Cambodia in general” with “a wealth of knowledge as to the history, culture and politics of Cambodia”.⁸⁸ The Co-Lawyers further submit that this “privileged position in terms of knowledge” means that Cambodian staff are “better placed to point to the existence of exculpatory material” and their exclusion must therefore “be detrimental to the Charged Person.”⁸⁹ The rights guaranteed in Article 14 of the ICCPR, Article 5(4) of the Agreement and Article 23 new of the ECCC Law are, according to the Applicant:

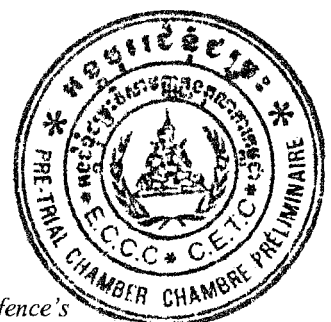
⁸⁵ Annulment Request, para. 32.

⁸⁶ Annulment Request, para. 35.

⁸⁷ Annulment Request, para. 36.

⁸⁸ Annulment Request, para. 38.

⁸⁹ Annulment Request, para. 38.



[A]imed at protecting the Charged Person's right to a fair trial, which, in the particular case of the ECCC, includes the right to have [the Charged Person's] case investigated by both 'Cambodian' and 'international sides'.⁹⁰

45. The Co-Lawyers state that the violation of such a fundamental right should result in the annulment of the investigations.⁹¹
46. The Pre-Trial Chamber already found in examining the previous ground that the Co-Lawyers have not adduced sufficient evidence to support the allegations contained in sub-ground (i), namely that instructions were given at the meeting for the document not to be distributed to Cambodian staff members.⁹²
47. Sub-ground (ii) relies upon Mr Bastin's recollection of a conversation that took place between himself and Judge You Bunleng, during which the latter is alleged to have "informed [Mr Bastin] that he had heard of this film crew accompanying investigators on mission only after it had happened. He had not approved the course of action and Judge LEMONDE had not discussed it with him".⁹³ Mr Bastin then states that Judge You Bunleng had informed him that there was no agreement between the ECCC and the film crew and that "he himself would never sign an agreement to allow a film crew to be within the OCIJ".⁹⁴ The Co-Lawyers base their argument on the hearsay contained in Mr Bastin's Second Statement, which is an assertion and not a proven fact.
48. The Pre-Trial Chamber therefore finds that the Second Bastin Statement does not provide sufficient factual basis to prove that there has been a procedural defect. Furthermore, the Pre-Trial Chamber has already determined that the joint public statement released by both Co-Investigating Judges on 3 March 2008 contradicts the Co-Lawyers allegations of a disagreement between them on this issue.⁹⁵

⁹⁰ Annulment Request, para. 39.

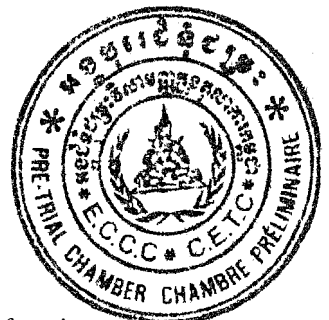
⁹¹ Annulment Request, para. 39.

⁹² *Supra*, para. 40.

⁹³ Second Bastin Statement, p. 8.

⁹⁴ Second Bastin Statement, p. 8.

⁹⁵ Decision on Ieng Sary's and Ieng Thirith's Applications to Disqualify, para. 63.



49. Sub ground (iii) of this ground of the Request relies upon the allegation that Judge Lemonde gave instructions that national staff were not to be given access to the insider witness database. The Pre-Trial Chamber notes that in the Second Statement Mr Bastin states that:

In fact both Judge YOU Bunleng and his legal advisor, [...] had been given access to the insider database shortly after it was created by [...] in 2007.⁹⁶

The Second Bastin Statement merely alleges that the decision to restrict access to the insider witness database was communicated to Mr Bastin by Judge Lemonde. It does not adduce any evidence to indicate that the decision was made unilaterally by Judge Lemonde. The Co-Lawyers do not provide sufficient basis for alleging that the international side of the OCIJ had withheld information from the national side. The alleged decision to restrict access to members of the national side is an internal determination that could have been made jointly by both CIJs for a variety of reasons, and the Pre-Trial Chamber does not find that a policy regarding access to an internal database of the OCIJ could exemplify the existence of a procedural defect that harms the interests of the Charged Person.

50. Accordingly, the third ground in the Annulment Request is dismissed.

D. Breach of Confidentiality

51. The Co-Lawyers rely on the Second Bastin Statement to allege a breach of confidentiality as a result of the presence of a French documentary film crew. They argued that “[w]ithout the witness’s knowledge or permission [the witness] was filmed and covertly recorded”.⁹⁷ The Co-Lawyers also use the Second Bastin Statement to allege that Judge You Bunleng was not a party to the decision to allow the film crew to “covertly record the interview”⁹⁸ and that the same film crew was provided with a chart relating to S-21 that named certain witnesses.⁹⁹

⁹⁶ Second Bastin Statement, p. 10.

⁹⁷ Annulment Request, para. 40.

⁹⁸ Annulment Request, para. 50.

⁹⁹ Annulment Request, para. 41 refers to the Second Bastin Statement pp. 4 & 6.



52. In his Second Statement, Mr Bastin states that during a field mission in November 2008 he was informed by a subordinate that a film crew was accompanying the investigator and recording a witness' interview. Mr Bastin states that according to his subordinate, the witness was unaware that the interview was being recorded by the film crew. Mr Bastin then says that he approached the Chief of Investigations, who in turn stated that he had been informed by Judge Lemonde and the then Chief Legal Advisor that:

a French film crew would accompany the investigators and that there was a written agreement between the ECCC and the film crew that they could have open access to the investigation.¹⁰⁰

Mr Bastin relays his opinion, as expressed contemporaneously, that the film crew should not have recorded the interview, especially without the witness' permission. Mr Bastin recounts that the Chief of Investigations explained that he was following the directions of Judge Lemonde and the then Chief Legal Advisor, who had allowed the film crew to accompany the investigators on the field mission.¹⁰¹

53. According to Mr Bastin, other colleagues were not aware of this, although one colleague did remember two instances that occurred before Mr Bastin began working at the OCIJ; one where another colleague was instructed by the then Chief Legal Advisor to show the film crew documents on the database, and another when the film crew was provided with a chart of S-21 that contained the names of witnesses.¹⁰² Mr Bastin recounts that he expressed his concerns about the events that had occurred on the field mission to a meeting of OCIJ staff which included Judge Lemonde.¹⁰³ According to Mr Bastin, his subordinate was requested to make a statement to Judge You Bunleng in relation to what had happened during the field mission.¹⁰⁴ Mr Bastin then recollects a meeting that occurred between himself, the film crew, Judge Lemonde and the then Chief Legal Advisor, where it was

¹⁰⁰ Second Bastin Statement, p. 5.

¹⁰¹ Second Bastin Statement, pp. 4-5.

¹⁰² Second Bastin Statement, pp. 5-6.

¹⁰³ Second Bastin Statement, p. 7.

¹⁰⁴ Second Bastin Statement, p. 7.



explained that the video and audio recordings of the witness interview were to be given to the Court Management Section “for safe keeping” and that the “Defence Support Section had been advised and were informed and in agreement with what had happened”.¹⁰⁵

54. It is submitted by the Co-Lawyers that Internal Rule 60(2), which states that, “[e]xcept where a confrontation is organised,” the OCIJ is to interview witnesses “in the absence of the Charged Person, any other party, or their lawyers, in a place and manner that protects confidentiality”,¹⁰⁶ has been violated by the presence of the film crew. The Co-Lawyers also contend that Internal Rule 56(1) has been violated because it states that “judicial investigations shall not be conducted in public.”¹⁰⁷ Internal Rule 56(2)(b) provides that the CIJs may:

[J]ointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 and 38.¹⁰⁸

The Co-Lawyers assert that this sub rule will only allow for an exemption from the general rule of confidentiality if the two Co-Investigating Judges act jointly. It is also submitted that Article 19 of the Cambodian Code of Ethics for Judges, which provides that confidential information acquired by a judge “shall not be used for such activity that is not related to judicial or prosecutorial duty”, has been breached because the provision of confidential information to the film crew “is not related to a judicial duty.”¹⁰⁹

55. The Pre-Trial Chamber notes that the Second Bastin Statement relays information on these issues as received by Mr Bastin, often representing hearsay upon hearsay. The only evidence of what occurred during the field mission is the information as accounted to Mr Bastin, instead of the accounts of his subordinate, other members

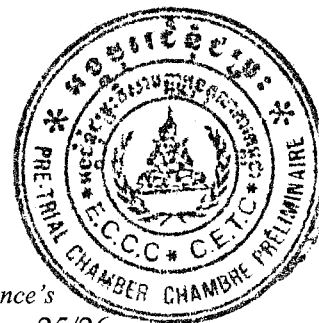
¹⁰⁵ Second Bastin Statement, p. 8.

¹⁰⁶ Annulment Request, para. 42 refers to Internal Rule 60(2).

¹⁰⁷ Internal Rule 56(1).

¹⁰⁸ Internal Rule 56(2)(b).

¹⁰⁹ Annulment Request, para. 45.



of that mission, the Chief of Investigations or the then Chief Legal Advisor. It stems from Mr Bastin's statement that his subordinate was required to make a statement to Judge You Bunleng and that the Defence Support Section had been advised of events; no evidence was adduced in support of these facts. Furthermore, the provision of the S-21 chart took place prior to Mr Bastin's arrival and his account is limited to what another colleague heard and believed; therefore, there is no evidence that instructions in this regard were actually given by Judge Lemonde himself. Mr Bastin's evidence on that point again represents hearsay upon hearsay and is not sufficient to prove the allegation.

56. The final ground of the Annulment Request is therefore dismissed.

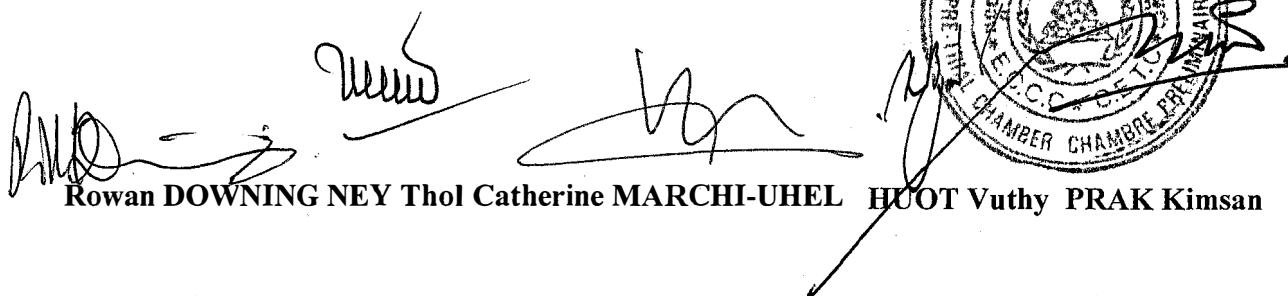
For all the abovementioned reasons, the Pre-Trial Chamber decided as announced in its determination on 11 June 2010.

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

Phnom Penh, 25 June 2010 ^{CR}

Pre-Trial Chamber

President



Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan