



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 004/2/07-09-2009-ECCC-OCIJ

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Before: The Co-Investigating Judges
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DECISION ON AO AN'S APPLICATION TO SEISE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF WRITTEN RECORDS OF INTERVIEW OF THREE INVESTIGATORS

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 22 January 2015.
2. On 16 December 2016, the Ao An Defence (“Defence”) filed the *Application to Seize the Pre-Trial Chamber with a View to Annulment of Written Records of Interview of Three Investigators* to request the CIJs to seize the Pre-Trial Chamber (“PTC”) with a view to annulment of parts of several written records of interview (“WRIs”) created by three investigators from the Office of the Co-Investigating Judges (“OCIJ”) that are allegedly defective (“Request”).¹ The Defence enumerate the parts of the WRIs that they wish to annul in Annex A to the Request and provide further details specific to each investigator in Annexes B to D (collectively, “Defence Annexes”).²
3. On 17 January 2017, staff of the International Co-Prosecutor (“ICP”) informed my office that the ICP did not intend to file a response to the Request.³

II. SUBMISSIONS

4. The Defence submit that the impugned parts of the WRIs identified in the Defence Annexes are affected by bias or the appearance of bias on substantive contentious issues concerning Ao An.⁴ Specifically, the Defence Annexes list instances in the WRIs when OCIJ investigators Christian Baudesson, Isobel Granger, and Andrea Ewing allegedly: (i) fed inculpatory information to witnesses or civil party applicants; (ii) failed to follow up on exculpatory leads; (iii) failed to objectively test inculpatory statements; or (iv) conducted improper off-the-record conversations.⁵ The Defence submit that these instances demonstrate that the investigators conducted their interviews with preconceptions on a number of contentious issues in the case, thus violating both their duty of impartially under Internal Rule 55(5) and Ao An’s fair trial rights under Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) to fair proceedings by a competent and impartial tribunal and to be presumed innocent until proven guilty.⁶
5. The Defence submit that the only appropriate remedy is to remove the impugned parts of the WRIs from the Case File and, therefore, request that the CIJs seize the PTC with a view to annulment of the impugned parts of the WRIs.⁷

¹ Case File No. 004/2-D338, *Application to Seize the Pre-Trial Chamber with a View to Annulment of Written Records of Interview of Three Investigators*, 19 December 2016, para. 1.

² Case File No. 004/2-D338.2, *Annex A*, 19 December 2016; Case File No. 004/2-D338.3, *Annex B: OCIJ Investigator Christian Baudesson*, 19 December 2016; Case File No. 004/2-D338.4, *Annex C: OCIJ Investigator Isobel Granger*, 19 December 2016; Case File No. 004/2-D338.5, *Annex D: OCIJ Investigator Andrea Ewing*, 19 December 2016.

³ Case File No. 004/2-D338/1.1, *Annex: Email from Travis Michael FARR to Filippo DE Minicis re: CF004/2-D338 Application to seize the PTC with annulment of WRIs*, 17 January 2017.

⁴ Request, paras 1-4, 21, 23, 26-27, 32, 52, 57, 63.

⁵ *Ibid.*, paras 3, 22, 28-31.

⁶ *Ibid.*, paras 2, 21, 27, 32, 52-58, 62-63.

⁷ *Ibid.*, paras 4, 21, 55, 59-61, 63.



III. DISCUSSION

6. Upon being seised with an application submitted pursuant to Internal Rule 76(2), the CIJs need be satisfied that the application identifies a procedural defect and the ensuing prejudice caused by the defect to the applicant.⁸ This test requires a determination that: (i) the request *prima facie* sets out a reasoned argument; and (ii) the request is not manifestly unfounded, in other words, it is not particularly evident or very apparent that the application has no legal or factual foundation, and hence no prospects of success.⁹
7. The PTC has stated that a proven violation of a charged person's right in the ICCPR qualifies as a procedural defect that harms the charged person's interests.¹⁰
8. I am satisfied that the Defence have identified a procedural defect, namely the parts of the WRIs that are allegedly affected by bias or the appearance of bias on contentious issues regarding Ao An. I am also satisfied that the Defence have identified the ensuing prejudice caused by the defect to Ao An, the prejudice being the alleged violation of Ao An's rights under ICCPR Article 14 to fair proceedings by a competent and impartial tribunal and to be presumed innocent until proven guilty. Taking into account the submissions made in the Request and the supporting analysis set out in the Defence Annexes, I am also satisfied that the Defence make reasoned arguments in support of their assertion. Furthermore, I do not find the Request to be manifestly unfounded. The Request accordingly meets the test for referral to the PTC under Internal Rule 76(2).

⁸ Case File No. 003-D165/2/26, *Decision related to (1) Meas Muth's Appeal against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge*, 13 September 2016, para. 38.

⁹ *Ibid.*, paras 40, 42.

¹⁰ Case File No. 002-D55/1/8, *Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment*, 26 August 2008, para. 40; *see also* Case File No. 002-D263/2/6, *Decision on leng 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)*, 25 June 2010, para. 21; Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, 17 May 2016, para. 34.

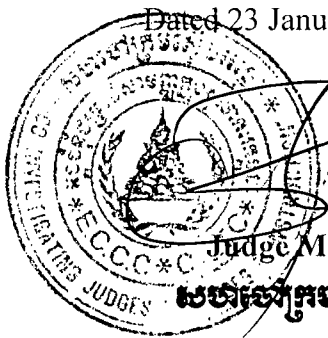
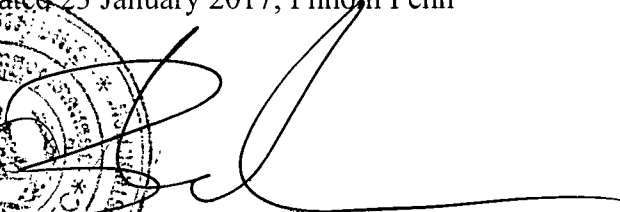


FOR THE FOREGOING REASONS, I:

- 9. **GRANT** the Request; and
- 10. **INSTRUCT** the OCIJ Greffier to forward Case File 004/2 to the Pre-Trial Chamber pursuant to Internal Rule 76(3).

This decision is filed in English, with a Khmer translation to follow.

Dated 23 January 2017, Phnom Penh



Judge Michael Bohlander
សមាជិកក្រុមស៊ើបអង្កេតអន្តរជាតិ
International Co-Investigating Judge
Co-juge d’instruction international