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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

**Royaume du Cambodge
Nation Religion Roi**

**Kingdom of Cambodia
Nation Religion King**

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges

Bureau des Co-juges d'instruction

Case Files No.: 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ

Before: **YOU Bunleng**
Laurent KASPER-ANSERMET
Date: **21 March 2012**
Original: **English**
Classification: **Public**

**NOTE OF THE INTERNATIONAL RESERVE CO-INVESTIGATING JUDGE
TO THE PARTIES ON THE EGREGIOUS DYSFUNCTIONS WITHIN THE
ECCC IMPEDING THE PROPER CONDUCT OF INVESTIGATIONS IN
CASES 003 AND 004**

Co-Prosecutors

Mrs. CHEA Leang
Mr. Andrew CAYLEY

We, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge at the Extraordinary Chambers in the Courts of Cambodia,

Noting the Agreement signed on 6 June 2003 between the United Nations and the Royal Government of Cambodia for the purpose of bringing to trial senior leaders of Democratic Kampuchea and those who were the most responsible for the crimes and serious violations of Cambodian and international law committed during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979 (“the ECCC Agreement”);

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“the ECCC Law”);

Noting Rules 21 and 55 of the ECCC Internal Rules (“the Internal Rules”);

Noting the judicial investigations against five suspects relating to charges of crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949, torture and murder, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code of Cambodia;

Noting the Co-Prosecutor’s Second and Third Introductory Submissions, dated 20 November 2008, relating respectively to Case Files 003 and 004;¹

Noting the Co-Prosecutors’ Supplementary Submissions in Case File 004, dated 15 June 2011 and 18 July 2011;²

I. PURPOSE OF NOTE

1. This Note demonstrates the existence of such serious irregularities and dysfunctional situations so as to impede the proper pursuit of investigations in Case Files 003 and 004, and will set out the Applicable Law (I) as well as an account of the incidents having occurred since the arrival in office of the International Reserve Co-Investigating Judge Laurent Kasper-Ansermet (II).

II. APPLICABLE LAW

2. All bodies of law applicable to the proceedings before the ECCC expressly provide for good administration of justice and due process of law, including at the pre-trial phase of the judicial investigation. Article 23 of the ECCC Law provides that “all investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force”.

3. Similarly, the Agreement on ECCC states that the Co-Investigating Judges “shall be responsible for the conduct of investigations [...], shall be persons of high moral character, impartiality and integrity [...], shall be independent in the performance of their functions and

¹ Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, CF003/07-09-2009-ECCC-OCIJ, D1; Co-Prosecutors’ Third Introductory Submission, 20 November 2008, CF004/20-11-2008-ECCC-OCIJ, D1.

² Co-Prosecutors’ Supplementary Submissions regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011 and 18 July 2011, CF004-07-09-2009-ECCC-OCIJ, D27 and D65.

shall not accept or seek instructions from any Government or any other source [and they] shall cooperate with a view to arriving at a common approach to the investigation”.

4. The Internal Rules of the ECCC, as well as the Law, are to “be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims *and so as to ensure legal certainty and transparency of proceedings*, in light of the inherent specificity of the ECCC”³. This fundamental principle must guide all decisions taken by the Co-Investigating Judges in the execution of their functions, which is to “take any investigative action *conducive to ascertaining the truth*”⁴.

5. Further, Internal Rule 21(1) also provides that the rights of the parties shall be respected at all times; this includes the right to information on the proceedings with which they are concerned.

6. Pursuant to these Rules, the International Reserve Co-Investigating Judge deems it his duty to inform the parties to both Cases 003 and 004 of the many dysfunctions that have affected the aforementioned judicial investigations and of the overall incapacity he and his office now face in performing their judicial obligations dutifully, diligently and efficiently.

7. It must be recalled, before presenting the facts hereby denounced, that the Co-Investigating Judges are not in a position to ascertain the truth with respect to the occurrence of the alleged crimes, or whether any individual is criminally responsible for the commission of any crimes until a genuine, impartial and effective investigation has been conducted. The extent to which any crimes have occurred and the actual degree of participation of any individual responsible cannot be determined without conducting both a full crime-based and a full suspect-based investigation.

8. Investigating all the facts set out in the Introductory Submission is an obligation for the Co-Investigating Judges, once seized of one or more alleged crimes. “As rightly recalled by the Co-Prosecutors, the Co-Investigating Judges have the obligation – as set forth in Rule 55(2) of the Internal Rules –to investigate *in rem* all the material facts (*faits*) set out in the Introductory Submission (and Supplementary Submissions) by which they are seized of such [...] Also, the obligation for the Co-Investigating Judges to decide, in the Closing Order, on all of the facts of which they have been regularly seized also implies an obligation to investigate all of the material facts.”⁵

9. Impeding the judicial investigation in both cases thus amounts to a breach of due process of law and the proper administration of justice, contrary to what the Parties to these proceedings, and more generally the Cambodian people, have a right to expect from the Extraordinary Chambers in the Courts of Cambodia.

III. INCIDENTS HAVING OCCURRED SINCE THE ARRIVAL OF INTERNATIONAL RESERVE CO-INVESTIGATING JUDGE LAURENT KASPER-ANSERMET

a) Judge You Bunleng’s refusal to acknowledge or support Judge Kasper-Ansermet’s standing as International Co-Investigating Judge

³ Internal Rule 21(1): Fundamental principles (emphasis added).

⁴ Internal Rule 55(5): General Provisions Concerning Investigations (emphasis added).

⁵ OCIJ, Order Concerning the Co-Prosecutor’s Request for Clarification of Charges, 20 November 2009, CF002/19-09-2007-ECCC-OCIJ, D198/1

10. The Office of the Co-Investigating Judges is composed of two parallel teams, one national and one international, each led by a Co-Investigating Judge. Until 31 October 2011, the International Co-Investigating Judge was Judge Blunk, who submitted his resignation on 9 October 2011, effective at the end of that month. Therefore, as of 1 November 2011, the International Reserve Co-Investigating Judge Kasper-Ansermet, appointed as such on 30 November 2010 by Royal Decree, with the approval of the Supreme Council of Magistracy of the Kingdom of Cambodia, and sworn in before the Plenary Assembly of the ECCC on 21 February 2011, was called upon under the law to replace the resigning Judge, as is the nature of a Reserve Judge.

11. Upon arrival in Phnom Penh, early December, Judge Kasper-Ansermet published a press release announcing his presence at the ECCC as well as his determination to “undertake any necessary investigative/judicial actions, as well as the measures for the administration of his Office”,⁶ both of which are encompassed in his duties as Co-Investigating Judge.

12. In response, the National Co-Investigating Judge You Bunleng issued another press statement, also on 6 December 2011, contesting Judge Kasper-Ansermet’s standing. He stated that, as of that date, “a new international Co-Investigating Judge has yet to be officially nominated until now”, and that “a reserve Co-Investigating Judge must first wait for an official nomination before commencing his duties. For this reason, any procedural action taken by Judge Kasper-Ansermet is not legally valid.”⁷

13. Judge You Bunleng has since then systematically opposed, on such grounds, any communication with the International Reserve Co-Investigating Judge, and opposed all actions his counterpart has attempted to take in order to forward the judicial investigations.⁸ In another press statement, on 10 February 2012, he declared “the National Co-Investigating Judge would like to reiterate that he has never discussed any procedural act with Mr Laurent Kasper-Ansermet.”⁹

14. In only one instance has Judge You Bunleng communicated directly with his international colleague, and once again, it was only to express his will not to communicate or collaborate in any way with the International Reserve Co-Investigating Judge: in a letter dated 5 December 2011, responding to the submission of a draft order to be discussed and agreed upon, he wrote to Judge Kasper-Ansermet “I would like to inform you I could only discuss about the substances of the proceedings with you only after you are officially nominated by the Supreme Council of Magistracy of the Kingdom of Cambodia”.¹⁰

15. Subsequently, Judge You Bunleng has systematically refused all communications coming from the International Reserve Co-Investigating Judge, emails, internal memorandums, and has refused to acknowledge notification of such documents, as well as of all Decisions and Orders issued by Judge Kasper-Ansermet. This determination to refuse all communications, and to ignore the fact that Judge Kasper-Ansermet has already been appointed as Reserve Co-Investigating Judge with the approval of said Supreme Council of Magistracy, and has, as such, standing to perform the tasks and duties set out for the Co-Investigating Judges by the ECCC Law, Agreement and Internal Rules in the absence of the resigning Judge, constitutes a violation of the national and international laws that define the conduct of proceedings at the ECCC.

⁶ Press Release by the International Reserve Co-Investigating Judge, 6 December 2011.

⁷ Press Statement by the National Co-Investigating Judge, 6 December 2011.

⁸ See Amnesty International, Public Statement, “Cambodia: Immediately appoint International Co-Investigating Judge at Khmer Rouge Tribunal”, 10 January 2012.

⁹ Press Statement by the National Co-Investigating Judge, 10 February 2012.

¹⁰ Internal Memorandum, National Co-Investigating Judge You Bunleng to International Reserve Co-Investigating Judge Laurent Kasper-Ansermet, 5 December 2011.

16. Furthermore, the participation of Judge You Bunleng in the deliberations of the Supreme Council of the Magistracy of Cambodia regarding the appointment of Judge Kasper-Ansermet after his repeated statements of opposition to such an appointment raise doubts as to his impartiality in these proceedings. Moreover, as stated by the Spokesperson for the Secretary-General of the United Nations on Cambodia, the decision not to appoint the Reserve International Co-Investigating Judge to the permanent position of Co-Investigating Judge at the ECCC “is a breach of article 5, paragraph 6, of the Agreement”¹¹ on the ECCC, and impairs the proper functioning of the Court.¹²

17. Judge You Bunleng’s opinion regarding the appointment of Judge Kasper-Ansermet by the Supreme Council of Magistracy has no legal basis. As it has already been said, Judge Kasper-Ansermet was appointed as Reserve International Co-Investigating Judge in November 2010, when Judge Blunk, then Reserve Judge, replaced Judge Lemonde. Upon Judge Blunk’s resignation in October 2011, Judge Kasper-Ansermet filled in the vacant post, as is the duty of a reserve judge. There need be no further appointment for a reserve official to become a standing official in case of vacancy of the position. Judges Downing and Chung of the Pre-Trial Chamber of the ECCC (“the PTC”) have stated as such in two separate Opinions: they “disagree with the opinion of Judges Prak, Ney and Huot to the effect that the Reserve International Co-Investigating Judge ‘does not have enough qualification [or standing] to undertake his duty according to legal procedure in force.’”¹³ They recall the proper procedure to follow in case of vacancy of post: “Following an absence of the appointed International Co-Investigating Judge and in the meantime, pursuant to the applicable law in ECCC, in order to ensure that court proceedings go on timely and smoothly, the functions of the International Co-Investigating Judge shall be undertaken by the Reserve International Co-Investigating Judge.”¹⁴ There are no further formalities necessary for this to happen, “these provisions exist in order to ensure that the absence of a judge would not distract or delay the proceedings and the very existence of the position of a reserve judge serves to safeguard this purpose”.¹⁵ The constant and active opposition of Judge You Bunleng to this simple and lawful replacement of a standing judge by the reserve, manifested both at the ECCC and at the Supreme Council of the Magistracy, impairs the timely proceedings of the ECCC, and affects the rights of all parties.

b) Disagreement procedure before the Pre-Trial Chamber pursuant to Internal Rule 72

18. Having assumed his duties as International Reserve Co-Investigating Judge as of 1 November 2011, Judge Kasper-Ansermet reassessed the state of the judicial investigation in Case 003¹⁶ and, having found that “the judicial investigation conducted so far appears to be defective and prejudicial to all parties”¹⁷, decided to reconsider the Notice of Conclusion and resume the judicial investigation. He forwarded the Resumption Order to his national

¹¹ United Nations, Spokesperson for the Secretary-General on Cambodia, Press Statement, 20 January 2012, available at <http://www.un.org/sg/statements/?nid=5815>.

¹² See also OSJI, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia”, February 2012, pp. 20-30.

¹³ CF003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72 (public document), 10 February 2012, para. 31.

¹⁴ *Ibid.*, para. 33.

¹⁵ *Ibid.*, para. 44.

¹⁶ CF003/07-09-2009-ECCC-OCIJ, Order on Resuming the Judicial Investigation, 2 December 2011, D28.

¹⁷ *Ibid.* para. 8.

counterpart for approbation on the same day, hoping to reach an agreement on the conduct of the judicial investigation for the future.¹⁸

19. Judge You Bunleng responded on 5 December 2011¹⁹ informing Judge Kasper-Ansermet that, in view of his opinion on his standing, he would not discuss “the substances of the proceedings” with him.

20. Taking notice of this refusal and in the absence of any further communication from the National Co-Investigation Judge, the International Reserve Co-Investigating Judge recorded the disagreement²⁰ in accordance with the procedures of ECCC Internal Rule 72 which provides for a method of settling such disagreements. All necessary documents were duly forwarded in a timely manner to the Pre-Trial Chamber for the purposes of the settlement.

21. Regarding Case 004, the International Reserve Co-Investigating Judge issued a Rogatory Letter delegating investigative powers and missions to the OCIJ investigators, in accordance with the ECCC Law and Internal Rules.²¹ The CIJ then forwarded²² this Letter to his national counterpart for “perusal and agreement”.

22. As there was no response from the national side of the OCIJ regarding this Rogatory Letter, the International Judge duly filed a Record of Disagreement, communicated to the Office of Administration on 19 January 2012²³ to seize the Pre-Trial Chamber of the matter, pursuant to Internal Rule 72 on the settlement of such disagreements.

23. Under Rule 72, once seized of a disagreement, the Pre-Trial Chamber must allow the Co-Investigating Judge to submit a response [IR 72(2)], hold hearings [IR 72(4)(a)]; and in some circumstances, the parties to the proceedings may be involved [IR 72(4)(b)], as well as experts [IR 72(4)(c)]. Rule 72 therefore sets out procedural forms that must be respected for the lawful settlement of a disagreement between the Co-Investigating Judges. At the conclusion of the procedure, the Pre-Trial Chamber issues a decision, reasoned and signed by its authors, including any dissenting opinions that may have been expressed [IR 72(4)(d) and 72(4)(e)].

24. In complete violation of all the aforementioned Rules, the President of the Pre-Trial Chamber Prak Kimsan returned the submitted documents to the Office of Administration on 3 February 2012, informing the Acting Director that both disagreements had been discussed in Chambers on 27 January 2012, but that “PTC judges [had] not reached their consent to take into their consideration the substance of those documents”, based on the fact that “Mr.

¹⁸ Letter from International Reserve Co-Investigating Judge Laurent Kasper-Ansermet to National Co-Investigating Judge You Bunleng, 2 December 2011, marked as “received” at 3:00 p.m. on the same date by Ham Hel, assistant to the National Greffier of OCIJ.

¹⁹ Internal Memorandum, National Co-Investigating Judge You Bunleng to International Reserve Co-Investigating Judge Laurent Kasper-Ansermet, 05 December 2011.

²⁰ OCIJ, Record of Disagreement, 15 December 2011.

²¹ Record of Disagreement, attachment 3.1, Rogatory Letter.

²² OCIJ, International Reserve Co-Investigating Judge Laurent Kasper-Ansermet to National Co-Investigating Judge You Bunleng, “Case no 004/ Rogatory Letter”, 22 December 2011, see Record of Disagreement, attachment 3.1.

²³ OCIJ, Record of Disagreement, 19 January 2012 ; Interoffice Memorandum, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, to Kranh Tony and Knut Rosandhaug, Office of Administration, “Transmission des documents de désaccord entre les Co-juges d’instruction”, 19 January 2012.

Kasper-Ansermet does not have enough qualifications to undertake his duty according to legal procedure in force".²⁴

25. However, the International Judges of the Pre-Trial Chamber have voiced their disagreement with the improper procedures followed by the President of the Chamber in dissenting opinions.²⁵ They reiterated the obligation imposed upon the Pre-Trial Chamber by the Internal Rules to issue a reasoned and legally sound decision: "the documents in a matter of this nature cannot be returned to the Administration of the Court as merely an administrative act. We are bound to provide a reasoned consideration of the matter before us in a proper and judicial manner." As for the matter itself, the International Judges supported Judge Kasper-Ansermet's view that "where a Co-Investigating Judge is absent, which includes instances of resignation, the reserve Co-Investigating Judge shall perform the functions of the absent Co-Investigating Judge."²⁶

26. Noting the procedural defects in President Prak Kimsan's response to both disagreements with which the Pre-Trial Chamber was seized, the International Reserve Co-Investigating Judge returned the Record of Disagreement to the Chamber, in order to have such defects remedied.²⁷ However he was served with an Acknowledgement of Service from that Chamber's Greffier stating that he "can't accept, the applicant has no legal authority".²⁸

27. The reasons given by both the President and the Greffier of the Pre-Trial Chamber to refuse these submissions repeatedly, or seem to have originated in, the dismissal of Judge Kasper-Ansermet's standing as International Co-Investigating Judge expressed by Judge You Bunleng in every one of his communications, or those of his subordinates.

c) Irregularities in the disqualification process of Judge Prak Kimsan

28. Noting the lack of due process in the disagreement settlement procedure, and the manifest partiality of Judge Prak Kimsan, President of the Pre-Trial Chamber and author of the decision to return the request without reasoned considerations, Judge Kasper-Ansermet has taken the necessary steps, in accordance with Rule 34 of the Internal Rules, and requested Judge Prak Kimsan's disqualification.²⁹

29. When Judge Prak Kimsan returned the documents pertaining to the request for settlement of disagreement submitted by the International Reserve Co-Investigating Judge to the Office of administration, outside of proper procedures, the international judges of the Pre-Trial Chamber manifested their disapproval of such irregular steps. They wrote a memorandum to the Acting Director of the Office of Administration,³⁰ on the same day,

²⁴ Interoffice Memorandum, Prak Kimsan, President of Pre-Trial Chamber to Kranh Tony, Acting Director of Office of Administration, "Returning documents communicated to Pre-Trial Chamber by the Office of Administration", 3 February 2012.

²⁵ CF003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012, paras. 14-16 ; CF004/19-01-2012-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 23 February 2012, paras. 12-14.

²⁶ Opinion, 10 February 2012, para. 34 ; Opinion, 23 February 2012, para. 32.

²⁷ Interoffice Memorandum, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, to Prak Kimsan, President of the Pre-Trial Chamber, "Settlement of Disagreements between the Co-Investigating Judges", 6 February 2012.

²⁸ Acknowledgement of service, 8 February 2012, signed by Kim San, Officer of Administration, with handwritten annotation by Kong Tarachhath, PTC Greffier.

²⁹ Application for Disqualification of Judge Prak Kimsan, President of the Pre-Trial Chamber, pursuant to Rule 34(2) of the ECCC Internal Rules, 8 February 2012.

³⁰ Interoffice memorandum (confidential), Judges Rowan Downing and Chang-Ho Chung, International Judges of the Pre-Trial Chamber, to H.E. Tony Kranh, Acting Director of the Office of Administration, "Today's memorandum from Judge Prak Kimsan signing in the capacity of the President of the Pre-

“informing him that the memorandum signed by the Pre-Trial Chamber’s President forwarding back the documents pertaining to the Disagreement was issued prior to informing the International Pre-Trial Chamber Judges, and that the Pre-Trial Chamber had yet to complete deliberations. The memorandum also noted that the communication by Judge Prak did not represent the opinion of or a decision of the full Pre-Trial Chamber”.³¹ As such, it “had no legal effect on the outcome of the Disagreement cases”.

30. In light of the application for Judge Prak Kimsan’s disqualification, and considering their own involvement in the proceedings that led to the request, the international judges of the Pre-Trial Chamber have considered it their duty, in accordance with Rule 34(1), to recuse themselves from the proceedings relating to the examination of that request, or all matters connected to it. They fear, legitimately, that, by publicly contesting Judge Prak Kimsan’s actions, they have taken a stance that may “objectively give rise to the appearance of bias”.

31. Rule 34(5) states that in such a case “a sitting Judge shall be replaced in the chamber by a reserve judge for the purposes of the application [for recusal] only. If, due to multiple disqualification applications, it is impossible to convene a Chamber to hear the applications, the Judicial Administration Committee shall choose additional judges from amongst the ECCC judges.”

32. Of the five Pre-Trial Chamber judges therefore, three may not participate in the examination of the application for Judge Prak Kimsan’s disqualification: Judge Prak Kimsan himself, and both International Judges, who have chosen to recuse themselves. Only Judges Ney and Huot remain sitting, rendering it “impossible to convene a Chamber”, and the appointment of additional judges is indispensable for the proceedings to advance. However, the Judicial Administration Committee of the ECCC, informed of the matter on 2 March 2012,³² has to date not convened to decide on such an appointment, nor stated in any way that it intends to do so in the near future. It is noted that, according to Rule 19, this Committee is “comprised of three national Judges, one of whom shall be the President, and two international Judges”: it can be surmised that the national/ international division that affects all components of the ECCC, is equally taking precedence over due process and proper administration of justice within the Judicial Administration Committee.

d) Refusal to place any document filed by International Reserve Co-Investigating Judge on Case File

33. On 9 February 2012, the International Reserve Co-Investigating Judge signed the Order on Resuming the Judicial Investigation, following the conclusion of the settlement of disagreement procedure initiated by the same Judge in December 2012. The OCIJ International Greffier took the original of this document to the Case File Officer to have it included in the Case File and notified.

34. After examining the Order, the Case File Officer refused to accept it on the basis that the National Co-Investigating Judge had not agreed to its placement on the case file. The International Reserve Co-Investigating Judge went in person to see the Case File Officer and explained to him that a procedure of disagreement had taken place and that, pursuant to the

Trial Chamber directed to you with subject: Returning the documents communicated to Pre-Trial Chamber by the Office of Administration”, 3 February 2012.

³¹ CF003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012, para. 14; See also CF004/19-01-2012-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges pursuant to Internal Rule 72, 23 February 2012.

³² Public Statement by Judges Downing and Chung, International Judges of the Pre-Trial Chamber, 20 March 2012.

applicable rules,³³ he was under the legal obligation to assist him in having the Order filed. The Officer refused to comply with the verbal instructions from the International Reserve Co-Investigating Judge and sought instructions from the National Co-Investigating Judge You Bunleng, the Head of the Court Management Section, as well as the OCIJ National Legal Team Leader.³⁴ The Head of the Court Management Section verbally refused to have the Order filed. As for the OCIJ National Legal Team Leader, he answered in an email that “*Judge You Bunleng instructs [him] to response to [the Case File Officer] that the filing of any document of OCIJ needs both judges to agree on. In the current situation, the office of the co-investigating judges could not file any document because there is no International Co-Investigating Judge to discuss or decide on the matter with judge You Bunleng*”³⁵. After which the Case File Officer reiterated his refusal to file the Order on Resuming Judicial Investigation “*based on the instruction from Judge You Bunleng*”³⁶.

35. From their own admission, all the national staff cited in the paragraph above, acted upon instructions from Judge You Bunleng to interfere with the execution of the decisions of Judge Kasper-Ansermet, despite the relevant provisions of the Internal Rules which provide for such measures to be taken.

36. This obstruction to the proper filing of documents was not limited to the Order on Resuming the Judicial Investigation, but extended to all documents filed by the International Reserve Co-Investigating Judge Kasper-Ansermet since his arrival, as was admitted on 9 March 2012 by the Records and Archives manager of the ECCC,³⁷ notwithstanding their existing legal basis.

37. Upon enquiring as to the reasons for this omission, the International Greffier of the OCIJ was told, on 11 March, that the Deputy Director of the Office of Administration had decided to remedy it by placing an electronic copy of the documents on the OCIJ drive. This measure does not remedy the issue, as it does not address the cause of the problem, that is the refusal of all national staff to implement Judge Kasper-Ansermet’s decisions, neither does it allow for the members of the OCIJ, who ought, by law, to have access to an electronic case file, to perform efficiently and dutifully their tasks. Furthermore, placing the documents on the OCIJ drive does not allow the other parties who have access to the Case File, the Prosecution, the defendants and the Civil Parties, to enjoy their rights in this respect³⁸. The Office of Administration is responsible for supporting the Co-Investigating Judges in the performance of their functions and shall be responsible for their administration and servicing [ECCC Internal Rule 9(1)], as well as for the preservation, storage and security of evidence including exhibits, statements and documents obtained in the course of judicial investigations [ECCC Internal Rule 9(6)].

38. In response, the International Reserve Co-investigating Judge has requested for an International Case File Manager to be appointed within a reasonable time, in order to ensure

³³ IR 9 (Functions of the Administration), IR72(4)(d) (Settlement of Disagreements between the Co-Investigating Judges).

³⁴ Email from Sann Rada to You Bunleng (CC: Nuon Pharat, Kong Sophy, Kranh Tony, Ly Chantola, Laurent Kasper-Ansermet), “Request for advice”, 09 February 2012.

³⁵ Email from Nuon Pharat to Sann Rada and You Bunleng (CC: Sophy Kong, Tony Kranh, Chantola Ly, Laurent Kasper-Ansermet, Knut Rosandhaug, Ratana Som), “Re: Request for advice”, 09 February 2012 (emphasis added).

³⁶ Email from Sann Rada to Laurent Kasper-Ansermet (CC: Sophy Kong, Tony Kranh, Chantola Ly, Knut Rosandhaug, Ratana Som, Nuon Pharat, You Bunleng), “Re: Request for advice”, 09 February 2012 (emphasis added).

³⁷ Email from Tola Peang (CMS, Records and Archives) to Chhay Chanlyda (OCIJ, International Assistant Greffier), “Re: Documents in case 003”, 09 March 2012 at 02:29 p.m.

³⁸ Internal Rule 55(6) and 55(11), the latter of which provides for the Co-Prosecutors and lawyers for other parties to being able to consult the *original* case file.

the neutrality and impartiality of the Office of Administration.³⁹ on 20 March 2012, the OCIJ was informed that the Legal Officer of the Court Management Section “has been tasked with performing the role of international case file manager as part of her terms of reference”.⁴⁰ However, upon verification by the International Reserve Co-Investigating Judge in person, this Legal Officer stated that she has not, on date, been given the means to perform these new tasks, including an office to be shared with the National Case File Manager.

e) Refusal for Civil Party to access Case File after an Order granting admissibility

39. Similarly, the execution of the legally binding decisions of Judge Kasper-Ansermet was obstructed by national staff within the Court Management Section, including by the Case File Officer and Section Head. On 24 February 2012, the OCIJ issued an Order⁴¹ reconsidering the previous Decision on Admissibility of Civil Party Applicant Robert Hamill, granting him Civil Party status and, as provided by Internal Rules 55(6) and 55(11), access to the case file of the judicial investigation. However, it has come to the attention of the international staff of the OCIJ that the lawyers for this Civil Party had not been able to access the file of case 003. The International Reserve Co-Investigating Judge then requested the Head of the OCIJ International Legal Unit to “undertake any necessary action before the Administration to implement the judicial decision”,⁴² upon which the latter went to enquire with the Office of Administration.

40. At the Office of Administration, the Head of the OCIJ International Legal Unit was informed that the Case File Officer had given instruction not to grant access to the Case File to Mr Hamill’s lawyers, even after being requested to do so by the International Co-Investigating Judge. The disagreement regarding this situation ended in the Head of OCIJ International Legal Unit being banned from the Records and Archives Unit by the Chief of Court Management Section, who invoked “professionalism and team work spirit” as his reasons for such a decision.⁴³ However later that day, the international staff of the same Section abided by the decision of Judge Kasper-Ansermet and granted effective access to Case File 003 to the Civil Party’s lawyers, finding it in accordance with the existing procedure.

f) Withdrawal of the OCIJ seal

41. According to Internal Rule 1(2), “unless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually”. It is clear from this Rule that each of the Co-Investigating Judges is endowed with the judicial authority belonging to the entire institution that is the Office of the Co-Investigating Judges before the ECCC. The symbol of this judicial authority is the seal of the Office, common to both Judges, indispensable for the proper filing of all judicial decisions, and which must be available to both Judges and both Greffiers. However, on 17 February 2012, the International Greffier of the OCIJ was turned down when he requested the rubber

³⁹ Interoffice Memorandum, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, to Knut Rosandhaug, Deputy Director of the Office of Administration, “Appointment of an International Case File Manager”, 12 March 2012.

⁴⁰ Interoffice Memorandum, Knut Rosandhaug, Deputy Director of the Office of Administration, to Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, “Appointment of an International Case File Manager”, 20 March 2012.

⁴¹ Order on Reconsideration of the Admissibility of the Civil Party Application of Robert Hamill, 24 February 2012, CF003/07-09-2009-ECCC-OCIJ, D11/2/5/1.

⁴² Ignacio Tredici, Head, OCIJ International Legal Unit, Note to the International Reserve Co-Investigating Judge, 5 March 2012.

⁴³ Email from Kong Sophy, Chief of CMS, to Ignacio Tredici, OCIJ, International Legal Team Leader (CC: You Bunleng, Nuon Pharat, Laurent Kasper-Ansermet, Bernard Brun, Krystal Thompson, Sann Rada, Peang Tola, Long Saroeurn, Keo Ratanak Kouv, Hiroko Fujii, Rajeev Kumra, Kranh Tony), “Warning Message of your behavior”, 02 March 2012, 12:15 p.m.

stamp with the seal from the National Greffier. Upon multiple requests, the National OCIJ Greffier persisted in his refusal to provide the stamp, stating he needed to seek advice from his superior, Judge You Bunleng, on the matter. Similarly, the Administrative Assistant to the National Co-Investigating Judge, declined to hand over the seal without authorisation from the National Judge.⁴⁴

42. By ordering his subordinates to hold the seal of the Office of the Co-Investigating Judges out of reach of the International Judge and his staff, Judge You Bunleng effectively renders half of the Office incapable of properly accomplishing their judicial mission, and is in violation of the ECCC Internal Rules, Law and Agreement.

43. A first request was made on 20 February 2012 by the International Reserve Co-Investigating Judge to the Ministry of Interior for a new rubber stamp to be provided to him in order to replace the one held by Judge You Bunleng.⁴⁵ A second request was issued on 28 February 2012, due to the lack of response to the first.⁴⁶ On 9 March, 2012, the International Greffier received a call from the Department of International Affairs of the Ministry of Interior informing him, verbally only, that the Ministry cannot approve the request as it was not signed by both Judges.⁴⁷ Therefore, not only did Judge You Bunleng deprive Judge Kasper-Ansermet of the seal of his function at the ECCC, but, in effect, he prevented anyone else from remedying the situation.

g) Obstruction to the internal investigation

44. On 10 February 2012, the International Reserve Co-Investigating Judge issued a Decision to Open an Investigation for Interference with the Administration of Justice under Internal Rule 35 of the ECCC⁴⁸, followed on 21 February 2012 by a Rogatory Letter⁴⁹ by which he gave a mandate to the investigators of the OCIJ to investigate into the acts and omissions of four persons employed by the national side of the ECCC. Rule 35(2)(b) confers on the Co-Investigating Judges the power to conduct such investigations, in order “to ascertain whether there are sufficient grounds for instigating proceedings”.

45. Two international investigators of the OCIJ thus set out to complete this investigation, but met with opposition from all the national staff concerned. In their Completion Report⁵⁰, the investigators declare that they have summoned the four persons mentioned in paragraph 45 above to present as interviewees in the Rule 35 investigation, first *via* an email addressed to them at their professional addresses.⁵¹ Three of these requests remained unanswered, only the OCIJ National Legal Team Leader replied to the investigators,

⁴⁴ OCIJ, Greffier’s Note to the International Reserve Co-Investigating Judge, 6 March 2012.

⁴⁵ OCIJ, Request for an Additional Rubber Stamp for the Office of the Co-investigating Judges to H.E. Deputy Prime Minister, Minister of Interior, 20 February 2012, delivered on 23 February 2012, 10:00.

⁴⁶ Letter from Ignacio Tredici, OCIJ, Officer-in-charge, to Office of the Minister of Interior, 28 February 2012, delivered on 29 February 2012 at 10:00.

⁴⁷ Email from Ly Chantola, International Greffier of the OCIJ, to Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge (CC: Knut Rosandhaug, Rajeev Kumra), “Request for additional OCIJ Stamp from Ministry of Interior (MOD)”, 12 March 2012.

⁴⁸ OCIJ, Decision to Open an Investigation for Interference with the Administration of Justice under Internal Rule 35 of the ECCC, 10 February 2012, Confidential, CF003/07-09-2009-ECCC-OCIJ, D29.

⁴⁹ OCIJ, Rogatory Letter, 21 February 2012, CF003/07-09-2009-ECCC-OCIJ, D29/1, delivered in accordance with Internal Rules 55(5), 55(9), 62.

⁵⁰ OCIJ, Rogatory Letter Completion Report, 5 February 2012, CF003/07-09-2009-ECCC-OCIJ.

⁵¹ Email from Paolo Pastore-Stocchi, OCIJ Investigator, “Witness Interview”, 22 February 2012, 01:24 p.m.; Email, Paolo Pastore-Stocchi, OCIJ Investigator, “Witness Interview”, 22 February 2012, 01:31 p.m.; Email, Paolo Pastore-Stocchi, OCIJ Investigator “Witness Interview”, 22 February 2012, 01:33 p.m.; Email, Paolo Pastore-Stocchi, OCIJ Investigator, “Witness Interview”, 22 February 2012, 01:34 p.m.

informing them he would not comply.⁵² Formal summonses were then issued to all four persons in accordance with the Internal Rules⁵³ and delivered by the ECCC postal clerk,⁵⁴ but all were returned unopened. In the one express rejection of the summons, the OCIJ National Legal Team Leader referred, three times, to the authority of National Co-Investigating Judge You Bunleng as being the sole decider of the policy within the OCIJ, and made it clear that he was working under the authority of the Judge.⁵⁵

46. Furthermore, the request made by the investigators for interpreters and transcribers to be present during the interviews of these witnesses was turned down, “following the instructions” of senior staff of the Court Management Section.⁵⁶

47. On the due dates, the investigators and support staff from the United Nations Assistance to the Khmer Rouge Trials (one interpreter and one analyst), were present in the room set out for the interviews, but none of the four witnesses arrived. When contacted, they simply stated they had no intention to comply with the summonses.⁵⁷ One of them also stated that “based on the instructions received from the National Senior Management of the Office of the Co-Investigating Judges, he was requested not to comply with the request from the OCIJ international investigators, and thus not to attend the interview.”⁵⁸ Furthermore, the same witness declared that he had received instructions from the Acting Director of Administration at the ECCC not to accept the letter of summons delivered to him. Considering the circumstances of this investigation, and the respective situations of the persons involved in it, it can be surmised that the three other witnesses received similar instructions from the same people. It is clear to the International Reserve Co-Investigating Judge that his national counterpart, Judge You Bunleng, was at the origin of these refusals to cooperate with the investigation, despite the investigation being in conformity with ECCC Internal Rules.

h) Unavailability of drivers and transcribers for investigative missions

48. OCIJ International investigators have been refused drivers and transcribers (national staff) upon requesting their services for investigative missions as authorised by Judge Kasper-Ansermet during the period from 13 February 2012 to date (approximately 11 missions). Notably, OCIJ investigators have also experienced difficulties in being allocated interpreters (international staff).

i) Non-cooperation from the Witnesses/Experts Support Unit

49. In March 2012, the International Reserve Co-Investigating Judge issued summonses to Civil Party Applicants and their lawyers for interviews, in the context of the judicial investigation of Case 003. Following the proper procedure, he has requested the assistance of the Witnesses/Experts Support Unit (“WESU”), to arrange for the summonses to be served and to facilitate the Applicant’s participation in the interviews. This request was turned down, and the OCIJ was told that “WESU is affected by an existing administrative arrangement that no ECCC national (non-UNAKRT) staff may be used to implement any activities of the OCIJ

⁵² Email, “RE: Witness Interview”, 23 February 2012, 11:32 a.m.

⁵³ Internal Rules 41, 55(5), 60.

⁵⁴ OCIJ, Rogatory Letter Completion Report, 5 February 2012, CF003/07-09-2009-ECCC-OCIJ, Annexes 13, 14, 15, 16.

⁵⁵ “It is clear in judge YOU Bunleng’s statement that Reserve Judge Kaspert (sic) Ansermet has not any legal authority...”, “...the National Co-Investigating Judge who is my direct superior in this Office...”, “...Only Working Under the Supervision of the Legally Accredited Investigating Judges”.

⁵⁶ Email from Transcription Unit OCIJ, International Investigator, “Re: Small Court Room for OCIJ Interviews 29 Feb and 01 Mar 2012”, 23 February 2012.

⁵⁷ Written Records of Investigative Action, CF003/07-09-2009-ECCC-OCIJ, 29 February 2012 and 1 March 2012.

⁵⁸ Written Record of Investigative Action, CF003/07-09-2009-ECCC-OCIJ, 29 February 2012, p.2.

when the request is made by the International Reserve Co-Investigating Judge solely.”⁵⁹ This statement was retracted shortly afterwards,⁶⁰ allowing apparently for scheduled interviews to take place. There were however no explanations as to why the decision was taken in the first place.

50. This illustrates the overall division of the ECCC along national/international lines, in breach of the spirit in which the ECCC was established, originating with Judge You Bunleng’s systematic and unfounded opposition to Judge Kasper-Ansermet’s appointment to OCIJ.

j) Improper procedures before the Rules and Procedure Committee

51. Another instance of the hostility expressed by national staff at the ECCC to the International Reserve Co-Investigating Judge’s attempts to perform his duties diligently and legitimately is to be found in the “rejection” of his proposal for an amendment to the Internal Rules, submitted on 18 January 2012, in accordance with existing procedural rules.

52. Rule 3 of the ECCC Internal Rules gives the Co-Investigating Judges the authority to individually make requests for amendments to the Rules of the Rules and Procedure Committee, which then submits formal proposals to the Plenary Session for adoption. Neither this Rule nor Internal Rule 20 (*Rules and Procedure Committee*) state that the Committee has the power to consider such requests; the Rules only provide that the Committee shall draw up propositions which must then be examined, for approval or rejection, by the Plenary Session.

53. Yet, contrary to the procedure presented here, the Rules and Procedure Committee has chosen to “reject” Judge Kasper-Ansermet’s request, without providing any legal justification. Nor was he duly informed of this by the Committee itself, or its Secretariat, but he was instead told of it informally, by another Judge at the ECCC.⁶¹

54. In light of the rules of procedure governing amendments to the Internal Rules, Judge Kasper-Ansermet has requested of the Committee to either submit his proposal to the Plenary Session or provide him with a reasoned decision presenting the motives of their rejection. If not, it can only be assumed that the Committee’s ill-founded decision is but another element demonstrating the general determination of the ECCC’s national staff to oppose any action or investigation undertaken by the International Reserve Co-Investigating Judge, following Judge You Bunleng’s public refusal to offer any cooperation or support to his colleague.

FOR THE REASONS STATED ABOVE, WE, THE UNDERSIGNED,

Note and inform the Parties that there exist within the ECCC, such serious irregularities, dysfunctions and violations of proper procedure that endanger and impede due process of law, and affect, as they have since our arrival into office, the proper conduct of the investigations in Case Files 003 and 004;

⁵⁹ Email from Wendy Lobwein, Witness/Expert Support Unit Coordinator, to Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, and Ly Chantola, OCIJ International Greffier (CC: Sophia Swart, Richard Harten, Kong Sophy, Krystal Thompson), “RE: Interviews of Civil Parties in CF003”, 14 March 2012 at 07:49 a.m.

⁶⁰ Email, Wendy Lobwein, Witnesses/Experts Support Unit Coordinator, to Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, “Re: Interviews of Civil Parties in CF003”, 14 March 2012 at 02:01 p.m.

⁶¹ Interoffice Memorandum, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge, to President and Members of the Rules and Procedure Committee, and Knut Rosandhaug, Deputy Director of the Office of Administration, “Proposed amendment to Rule 56 of ECCC Internal Rules”, 14 March 2012.

Declare that this document has been classified as public;

Instruct the International Greffier of the Office of Co-Investigating Judges and the relevant personnel of the Court Management Section of the ECCC to place this document on Case Files 003 and 004, where it will be accessible to all Parties.

Done in Phnom Penh, on 21 March 2012

សមាជិកមន្ត្រីបម្រុងអន្តរជាតិ
Co-juge d'instruction international suppléant
International Reserve Co- Investigating Judge

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