



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិស័យក្នុងតុលាការកម្ពុជា

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: 004/07-09-2009-ECCC-OCIJ

<b>ឯកសារដើម</b>
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 31 / 08 / 2016
ម៉ោង (Time/Heure) : 15:30
ចម្រៀមទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: <b>SANN RADA</b>

Before: **The Co-Investigating Judges**  
 Date: **31 August 2016**  
 Language(s): **English [Original]**  
 Classification: **CONFIDENTIAL**

**DECISION ON INTERNATIONAL CO-PROSECUTOR'S  
 REQUEST TO DISCLOSE CASE 004 DOCUMENTS (D193/84)  
 AND URGENT REQUEST TO VARY RECOMMENDATIONS ON  
 PREVIOUSLY DISCLOSED DOCUMENTS (D193/95)**

**Distribution:**

**Trial Chamber**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Ao An Defence**

MOM Luch  
Richard ROGERS  
Göran SLUITER

**Yim Tith Defence**

SO Mosseny  
Suzana TOMANOVIĆ

**Civil Party Lawyers:**

CHET Vanly  
HONG Kimsuon  
KIM Mengkhy  
LOR Chunthy  
SAM Sokong  
SIN Soworn  
TY Srinna  
VEN Pov  
Linda BEHNKE  
Laure DESFORGES  
Herve DIAKIESE

Ferdinand DJAMMEN-  
NZEPA  
Nicole DUMAS  
Isabelle DURAND  
Françoise GAUTRY  
Emmanuel JACOMY  
Martine JACQUIN  
Christine MARTINEAU  
Barnabe NEKUI  
Lyma NGUYEN  
Beini YE



## I. PROCEDURAL HISTORY & SUBMISSIONS

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013 and 26 June 2014.
2. On 14 October 2014, my predecessor issued the *Decision on Co-Prosecutors’ Urgent Request to Disclose Case 004 Interviews Relevant to 1<sup>st</sup> Segment of Case 002/02 Trial*.<sup>1</sup> I incorporate by reference paragraphs 1 to 7 of that decision.
3. On 6 November 2015, I issued the *Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber concerning “Disclosure of material from Cases 003 and 004 to Case 002”* in which I adopted a range of restrictions and modalities for disclosure.<sup>2</sup>
4. On 23 June 2016, the ICP filed a request for authorisation to disclose 34 documents relevant to Case 002/02 proceedings (“Request D193/84”).<sup>3</sup> Only the Yim Tith Defence informed the International CIJ by email that they did not intend to respond and no other Defence response was filed.
5. On 26 August 2016, the ICP filed an urgent request to vary the restrictions, from Decision D193/63, on previously disclosed Case 004 statements of two civil parties who are scheduled to testify in Case 002/02 (“Request to Reconsider”).<sup>4</sup> Due to the urgency caused by their scheduled testimony, the ICP requested the Defence to respond by email. The Defence of Im Chaem, Ao An and Yim Tith responded by emailing to state that they did not intend to respond. The emails from the Defence in response to both the requests are attached here as Annex A.
6. On 29 August 2016, the International CIJ responded by email, as a courtesy to allow for effective trial management, stating that the restrictions requiring the use of pseudonyms and other references calculated to avoid identifying the individuals will be varied in a written decision to follow and permitted the use of the email to inform the Trial Chamber and Case 002/02 Parties.<sup>5</sup> This email is attached here as Annex B.
7. On 26 August 2016, the Trial Chamber wrote to the International CIJ asking whether the restrictions placed on the testimony of a civil party were necessary in light of the ICP submissions in court that the individual had already testified in Case 002/01, records of which were available publicly, and that the civil party did not himself object to testifying in open court.<sup>6</sup> The International CIJ responded

<sup>1</sup> Case File No. 004-D193/4, *Decision on Co-Prosecutors’ Urgent Request to Disclose Case 004 Interviews Relevant to 1<sup>st</sup> Segment of Case 002/02 Trial*, 14 October 2014.

<sup>2</sup> Case File No. 004-D273, *Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber concerning “Disclosure of material from Cases 003 and 004 to Case 002”*, 6 November 2015.

<sup>3</sup> Case File No. 004-D193/84, *International Co-Prosecutors’ Request to Disclose Attachments to Disclosed Documents into Case 002*, 10 May 2016, para. 1.

<sup>4</sup> Case File No. 004-D193/95, *International Co-Prosecutor’s Urgent Request to Reconsider Recommendations Attached to Disclosure of Case 004 Statements*, 26 August 2016.

<sup>5</sup>

<sup>6</sup> Email from Trial Chamber, 26 August 2016, citing Transcript of 25 August 2016, pp. 48-51.



that, as previously done, the restrictions on the disclosing the identity of the civil party in question could be varied.<sup>7</sup> These emails are attached here as Annex C.

## II. DISCUSSION

8. With respect to Request D193/84, the 34 documents requested therein: three Written Records of Interviews (“WRIs”); three Investigative Action Reports (“IARs”); and 28 attachments to which are underlying documents to a report, by Rochelle Braaf on sexual violence, admitted into evidence in Case 002.<sup>8</sup> All 34 of the requested documents are *prima facie* relevant to Case 002, as they are all sought to be admitted into evidence, and their disclosure will not jeopardise the integrity and confidentiality of the investigations. In so far as their evidence concerns ongoing investigation in Case 004, the three witnesses can be categorised as Category A. The documents attached to the report by Rochelle Braaf, which is already available in Case 002, contain information available publicly through other sources and therefore, no restrictions need be placed on their use in Case 002.
9. With respect to the Request to Reconsider, I note that the information about the evidence of the two civil parties being previously available in Case 002 was not submitted in the original request for the disclosure of their documents (D193/38) and hence, the decision authorising their disclosure and use placed restrictions designed to protect the integrity of evidence generated in Case 004 as Category A (D193/61).<sup>9</sup> As already indicated in the email response, I believe that this information obviates the need to use pseudonyms or other measures designed to keep confidential the identities of these individuals.
10. Similarly, the information provided by the ICP in court to the Trial Chamber, as communicated to me by email, obviates the need for the use of pseudonym or other measures designed to keep confidential the identity of the one civil party who testified on 25 August 2016.
11. The ICP made oral submissions in open session before the Trial Chamber which criticised the original disclosure conditions, while glossing over the fact that the relevant information had been available to the ICP and could have been provided at the time of the original request and thus there was no need for engaging in email correspondence at the eleventh hour and with unnecessary urgency, to which moreover all parties in Cases 003 and 004 had to respond in order to assist with supporting the schedule of the trial proceedings. This has resulted in avoidable and disproportionate use of time and resources for not just my office.
12. This Order is filed in English, with a Khmer translation to follow, due to the urgency of the matter and the logistical constraints of the translation section.

<sup>7</sup> Email from International CIJ, 26 august 2016. See also, Case File no. 004-D193/94, *Consolidated Decision on International Co-Prosecutor’s Requests to Disclose Case 004 Documents to Case 002 (D193/92 & D193/93)*, 25 August 2016, para. 8

<sup>8</sup> Request D193/84, para. 1.

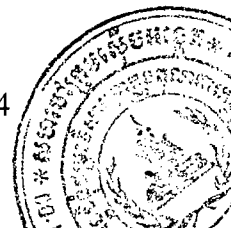
<sup>9</sup> Request to Reconsider, Annex A.



**FOR THE FOREGOING REASONS, I:**

13. **AUTHORISE** disclosure of 34 documents listed in **Annex D** to the Trial Chamber and the Parties in Case 002. Owing to the confidential and sensitive nature of the ongoing investigations in Case 004, these documents are authorised for disclosure as indicated in **Annex D** with the following modalities and restrictions:

- (a) that all material provided from Case 004 be treated as confidential;
- (b) in the event that the material provided pursuant to this decision is admitted as evidence in Case 002, it shall be marked confidential;
- (c) in the event the witnesses or civil parties whose documents are authorised for disclosure are called to testify, they can do so in open sessions of the court provided their names and identities are kept confidential, with the exception of Rochelle Braaf who is an independent researcher;
- (d) no material provided pursuant to this decision shall be disseminated beyond those explicitly identified herein;
- (e) no material provided pursuant to this decision shall be disseminated to the public, in any format or via any form of media whatsoever, beyond the evidence presented in open sessions of the court;
- (f) any party, counsel, or other individual who reads from, cites, or otherwise uses any of the documents disclosed shall identify the witnesses/ civil party applicants only by their assigned pseudonym for Case 002 and use descriptions reasonably calculated to avoid identifying the witnesses by other information;
- (g) the disclosed documents shall be provided to the Defence Counsel of both the Accused, Standby Counsel of Khieu Samphan (“Standby Counsel”) and Civil Party Lead Co-Lawyers through electronic copies;
- (h) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall disclose the material provided pursuant to this decision only to those members of their teams that are officially retained under Internal Rule 22(5) and 12<sup>ter</sup> (4), respectively, along with their officially assigned interns;
- (i) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers are not authorised to print, reproduce, photo-copy, scan, or otherwise make duplicate copies of the originals provided to them other than for the internal use of the material by those members of their respective teams who are instructed or authorised to have access to confidential material;
- (j) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall maintain a written record, in a manner that can be reviewed, of the copies that they print, reproduce, photo-copy, scan, or otherwise duplicate for their internal use; and
- (k) should any member of the Trial Chamber or Parties in Case 002 learn of an unauthorised copy of the material disclosed, he/ she shall immediately take all measures to secure and return the copy to the CIJs; and



(l) should any member of the Trial Chamber or Parties in Case 002 learn of a breach of these conditions and restrictions, he/ she shall immediately report such breach to the CIJs.

- 14. **CLARIFY** that for the purposes of this decision, "public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Trial Chamber, the staff of the Court Management Section, the Co-Prosecutors and his representatives, the Accused, any employees who have been officially retained under Internal Rules 22(5) and 12ter (4) authorised by the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers, respectively, to have access to the confidential material. "The public" also includes, without limitation, members of the Accused's family, friends, and associates; suspects, defence counsel, and members of their respective staff in other cases or proceedings before the ECCC; the media; and journalists;
- 15. **VARY** the conditions in paragraphs 32 (d) and 32 (f) in Decision D193/61 with respect to CHEA Dieb, PEN Sochan, and YOS Phal;
- 16. **STATE** that the foregoing conditions and restrictions remain in place until such time as they are varied by an explicit order to that effect by the CIJs or a Closing Order is issued in Case 004; and
- 17. **REQUEST** the Trial Chamber to ensure the compliance by all Parties with this Decision.

Dated 31 August 2016, Phnom Penh



The image shows a circular official seal of the International Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The seal contains text in Khmer and English, including 'អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា' and 'INTERNATIONAL CO-INVESTIGATING JUDGES'. Overlaid on the seal is a handwritten signature in black ink.

**Judge Michael Bohlander**  
**សមាជិកអង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
**International Co-Investigating Judge**  
**Co-juge d'instruction internationale**