



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D351/2/3

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/2/07-09-2009-ECCC/OCIJ (PTC44)

THE PRE-TRIAL CHAMBER

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

Date: 6 September 2017

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PUBLIC REDACTED

DECISION ON [REDACTED] APPEAL AGAINST INTERNAL RULE 66(4) FORWARDING ORDER

Co-Prosecutors

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Co-Lawyers for the Appellant

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “██████████ Appeal Against Against Internal Rule 66(4) Forwarding Order”, filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and the “Appellant”) on 16 June 2017 (the “Appeal”).¹

I. INTRODUCTION

1. This Appeal concerns the order issued by the Co-Investigating Judges, pursuant to Internal Rule 66(4), forwarding Case File 004/2 of the judicial investigation against the Appellant to the Co-Prosecutors for the purpose of their final submission (the “Forwarding Order”).²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him.³

3. On 16 December 2016, the Co-Investigating Judges notified the conclusion of the judicial investigation against the Appellant,⁴ followed by a second notice of conclusion on 29 March 2017.⁵

4. On 3 May 2017, the Co-Lawyers filed an application to seize the Pre-Trial Chamber with a view to annulment of the entire investigation,⁶ which was denied by the International

¹ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”), ██████████ Appeal Appeal Against Against Internal Rule 66(4) Forwarding Order, 16 June 2017, D351/2/2 (“Appeal”), notified in English on 20 June 2017 and in Khmer on 17 July 2017. *See also* Request to File in English First the Appeal Against Internal Rule 66(4) Forwarding Order, 9 June 2017, D351/2/1.

² Case 004/2, Forwarding Order Pursuant to Internal Rule 66(4), 19 May 2017, D351 (“Forwarding Order”).

³ Case 004/2, Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Case 004/2, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Case 004/2, Notice of Conclusion of Judicial Investigation Against ██████████, 16 December 2016, D334.

⁵ Case 004/2, Second Notice of Conclusion of Judicial Investigation Against ██████████, 29 March 2017, D334/2.

⁶ Case 004/2, Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigation, 3 May 2017, D350.



Co-Investigating Judge in a decision dated 8 May 2017.⁷ The Co-Lawyers filed an appeal against this decision on 8 June 2017 (the “Appeal on Annulment of the Investigation”).⁸

5. On 19 May 2017, the Co-Investigating Judges issued the Forwarding Order. On 29 May 2017, the Co-Lawyers filed a notice of appeal against the Forwarding Order⁹ and, on 16 June 2017, their submissions on appeal.¹⁰ The Co-Prosecutors did not file any response within the prescribed deadline.

6. On 5 September 2017, the Pre-Trial Chamber dismissed the Appeal on Annulment of the Investigation.¹¹

III. ADMISSIBILITY

7. The Co-Lawyers submit that the Appeal is admissible under a broad interpretation of the right to appeal under Internal Rules 74(3) and 21 or, in the alternative, directly under Internal Rule 21.¹² They contend that, although the applicable law is silent on the issue raised in the Appeal, it should be found admissible to ensure procedural fairness, expediency and protection of fundamental rights, since the decision on the Appeal on Annulment of the Investigation is likely to affect the parties’ case strategies and content of final submissions.¹³

8. The Pre-Trial Chamber observes that the Appeal against the Forwarding Order does not fall within its subject-matter jurisdiction under Internal Rule 74. Furthermore, while Internal Rule 21 may warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial, it does not provide an automatic avenue for appeals raising arguments based on fair trial rights. The appellant must demonstrate that, in the particular circumstances of the case at stake, the Pre-Trial Chamber’s

⁷ Case 004/2, Decision on [REDACTED] Application to Annul the Entire Investigation, 8 May 2017, D350/1.

⁸ Case 004/2, Appeal Against the Decision on [REDACTED] Application to Annul the Entire Investigation, 8 June 2017, D350/1/1/2, notified in English on 16 June 2017 and in Khmer on 27 June 2017.

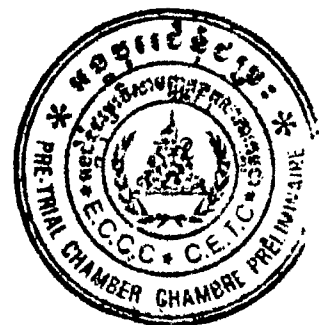
⁹ Case 004/2, Notice of Appeal Against Co-Investigating Judges’ Forwarding Order Pursuant to Internal Rule 66(4), 29 May 2017, D351/2, notified on 30 May 2017.

¹⁰ See *supra* footnote 1.

¹¹ Case 004/2 (PTC43), Decision on Appeal Against the Decision on [REDACTED] Application to Annul the Entire Investigation, 5 September 2017, D350/1/1/4.

¹² Appeal, para. 17.

¹³ Appeal, para. 18.



intervention is necessary to prevent *irremediable damage* to the fairness of the proceedings or the appellant's fair trial rights.¹⁴

9. In the present case, the Appellant has not demonstrated that his asserted rights under Internal Rule 21 would be at risk of being irremediably impaired if the Forwarding Order is not reversed. The consequence of a potential annulment of the entire investigation would precisely be the cancellation and removal from the case file of the alleged illegal evidence, thus securing the basic rights of the Appellant. In these circumstances, the Pre-Trial Chamber finds that the right of the Appellant to procedural fairness at the present stage of the investigation, with regards to the content of final submissions and definition of his case strategy, is not at risk to be irremediably infringed, especially in light of the Forwarding Order which expressly provided that he "will [...] be given adequate time to respond"¹⁵ to the Co-Prosecutors' final submissions. In any event, the Pre-Trial Chamber notes that the Appeal on Annulment of the Investigation has been dismissed on 5 September 2017¹⁶ and thus considers the issue moot.

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

- **DISMISSES** the Appeal as inadmissible.

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

Phnom Penh, 6 September 2017

President

Pre-Trial Chamber

PRAK Kimsan

QUÉRET BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy

¹⁴ See, e.g., Case 004/07-09-2009-ECCC/OCIJ (PTC25), Decision on Appeal Against Order on [REDACTED] Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4, para. 21.

¹⁵ Forwarding Order, para. 11.

¹⁶ See *supra* para. 6.