



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 13-Apr-2020, 13:00
CMS/CFO: Sann Rada

INTEROFFICE MEMORANDUM

TO: HE TONY Kranh ADOA, Knut ROSANDHAUG DDOA,
KONG Sophy, Chief of the Court Management Section

COPY TO: Judge PRAK Kimsan (President), Judge NEY Thol,
Judge HUOT Vuthy

FROM: Judge Olivier BEAUVALLET and Judge Kang Jin BAIK

DATE: 29 January 2020

SUBJECT: **Notification of the Pre-Trial Chamber’s Considerations in Case 004/2**

On 19 December 2019, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) delivered its Considerations on Appeal against Closing Orders in Case 004/2, the case against AO An (the “Considerations”). Although the International and the National Co-Investigating Judges issued two separate and conflicting Closing Orders, neither the Indictment nor the Dismissal Order has been reversed by a supermajority vote.

This memorandum addresses the relevant law for notification of the Considerations (I), the current obstacles (II) and the International Judges’ solution (III). It concludes with presenting the current situation (IV).

I- Basic Rules for Notification of Pre-Trial Chamber’s Decision on Appeals against Closing Order

a. Internal Rule 77(14)

With regards to the decisions of the Pre-Trial Chamber on the parties’ appeals against the Co-Investigating Judges’ closing orders, Internal Rule 77(14) provides that:



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

[s]uch decisions shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the other parties by the Greffier of the Chamber. The Co-Investigating Judges shall immediately proceed in accordance with the decision of the Chamber.

b. Internal Rule 69

Internal Rule 69 contemplates two hypotheses by stating:

1. Where an appeal is filed against a Closing Order, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Pre-Trial Chamber as provided in Rule 77.
2. Where no appeal is filed against a Closing Order, the Co-Investigating Judges shall seal the case file, and:
 - a) If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set; or
 - b) If a Dismissal Order is issued, the case file shall be archived after the expiry of the time limit for appeal.

II- Obstacles at Hand

a. Rule on the Notification of Decision

Internal Rule 77(14) provides that the Pre-Trial Chamber’s decision on appeals against closing order shall be notified to the Co-Investing Judges, the Co-Prosecutors and the other parties. However, the Rule is silent on whether the Chamber may notify its decisions or considerations beyond what is mandated in the Rule. This is easily understandable, bearing in mind that the Rule does not specifically address notification of decision on appeals against closing orders. Consequently, Internal Rule 74(13) cannot be interpreted to limit the notification of the Chamber’s decision. Hence, it does not require that the decision shall not be notified to others that are not specified in the Rule. Furthermore, as evidenced by the fact that the Considerations were classified as public and notified to the public by the Pre-Trial Chamber, a mere reference to Internal Rule 77(14) in the Considerations cannot and do not have any dispositive effect on this matter.

b. Decision on Appeals against Closing Order

However, Internal Rule 77(13) does foresee the consequences of such a decision. It states, in relevant part:

A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows:



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

[...]

b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

In the case at hand, no supermajority vote has reversed the Indictment against the Charged Person. Therefore, in regular circumstances for such a case, the Pre-Trial Chamber would have notified its Considerations to the Office of the Co-Investigating Judges, which then would have immediately transferred the case to the Trial Chamber.

c. Absence of Hybridity and International Staff at the Office of the Co-Investigating Judges

The International Judges of the Pre-Trial Chamber note not only the circumstances that led to the Co-Investigating Judges’ split and unlawful simultaneous issuance of two conflicting Closing Orders, but also the fact that the Office of the Co-Investigating Judges has been without staff since August 2019.

The Office of the Co-Investigating Judges has been notified of the Pre-Trial Chamber’s Considerations, pursuant to Internal Rule 77(14), on 19 December 2019. Yet, the Office has not taken any steps so far.

III- International Judges’ Solution

Pursuant to Internal Rule 21(1), it is the Pre-Trial Chamber’s duty 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.” Furthermore, the “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.” No rights will be preserved, if the Pre-Trial Chamber does not clarify the possibility for the parties to access to the competent judges, namely the Trial Chamber.

a. The Pre-Trial Chamber Possesses the Same Investigative Powers and Does Not Have Obligations to Remit the Case to the Greffier of the Subordinate Jurisdiction

In light of the circumstances and the situation created by two conflicting Closing Orders, the Pre-Trial Chamber has decided not to remit the case to the Office of the Co-Investigating Judges. As thoroughly exposed in the common part of the Considerations, the Pre-Trial Chamber performs the same functions within the ECCC legal system as that of a Cambodian Investigation Chamber (D359/24 and D360/33, para. 44).



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Further, the third paragraph of Article 282 of the Cambodian Code of Criminal Procedure provides that the Investigation Chamber shall end an investigation by a closing order. The provisions of Articles 247 to 250 of the Code, concerning termination of a judicial investigation by an investigating judge, shall apply in the instant case as the Indictment stands. Article 250 dictates that when an investigating judge decides to issue a closing order, forwarding the case for trial, the investigating judge shall send the case immediately to the court president to set the schedule for the trial.

b. The Trial Chamber is Seised of the Case

As noted above, the duty to transfer the case to the Trial Chamber would have primarily rested upon the Office of the Co-Investigating Judges. Accordingly, while the Pre-Trial Chamber may have the power to notify the case, there is no legal duty to do so.

Nonetheless, the Pre-Trial Chamber, with its obligation to safeguard the legal certainty and the transparency of the proceedings duly in mind, must take steps in this regard in order to prevent the situation of its decision being unimplemented and the case being lost in limbo.

On Tuesday 21 January 2020, the Pre-Trial Chamber Judges were informed of the following:¹

The Trial Chamber is aware of the publicly available Considerations on Appeals against Closing Orders issued by the Pre-Trial Chamber on December 19, 2019 and documents sent [by the parties] to the Trial Chamber. However, these Considerations have so far not been notified to the Trial Chamber and neither the Indictment nor the Casefile have been forwarded yet.

While the parties have been notified of the Pre-Trial Chamber Considerations and have acted since then, the Trial Chamber apparently stays in an exceptional situation where it has not been granted access to the Case File and not been able to work on the pending requests from the parties.

Consequently, considering the vacuum of the Office of the Co-Investigating Judges, the Pre-Trial Chamber’s overall investigative powers, well-functioning of the judicial process as well as the rights of the parties, it is recommended that the Trial Chamber is notified of the Pre-Trial Chamber’s Considerations. The International Judges of the Pre-Trial Chamber note that in practice, notification enables forwarding of the Case File and that instructions of notification to the CMS can be given by a Greffier of the Pre-Trial Chamber.

¹ Email from Suy-Hong Lim, Greffier of the Trial Chamber, entitled “Information”, dated 21 January 2020, 01:00PM.



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

IV- Current Situation

On 28 January 2020, Ms. Kristina O'YOUNG, a Greffier of the Pre-Trial Chamber, submitted a form instructing the CMS to notify the Trial Chamber of the Pre-Trial Chamber's Considerations in Case 004/2. She was informed that the CMS had already received contradicting instructions from Ms. ROS Bophana, another Greffier of the Pre-Trial Chamber, not to notify the Trial Chamber of the Considerations and to archive the case.²

On 29 January 2020 at around 11:20AM, without a prior notice, the International Judges were served with an internal memorandum issued by Judge PRAK Kimsan, the President of the Pre-Trial Chamber.³ At the outset, it is worth recalling that the President, being the *primus inter pares*, has limited *ex officio* powers since his exercise of such power in any extent poses a potential risk to the hybrid court. His limited powers are set forth in Internal Rule 77 and notably, none of them gives him the authority to instruct the CMS. Exercise of any powers beyond what is prescribed by the Rule is in direct conflict with the collegial set up in the International Agreement (Article 4(1)), the ECCC Law (Article 12) and Internal Rules (Internal Rule 77(13)).

The President's internal memorandum states that "[t]he personal opinions and decision of each judge shall have no applicable effect". Consequently, the email dated 28 January 2020, 02:56PM, instructing the CMS to archive Case 004/2 is void. Such a memorandum in no way can be interpreted in a way to obstruct the Trial Chamber's consideration of the case of which it is seised of.

Moreover, the President's internal memorandum provides that "[o]nly the joint disposition part unanimously decided and signed by all 5 judges shall have the applicable effect." Accordingly, the Indictment, seising the Trial Chamber, stands.

To conclude, the International Judges of the Pre-Trial Chamber find the following:

- The Pre-Trial Chamber has legally notified its Considerations to the parties in Case 004/2, on 19 December 2019.
- The Administration is currently instructed to notify the Trial Chamber of the Pre-Trial Chamber's Considerations.

² Email from Ms. Hyuree KIM to the Above Signed Judges, *forwarding* (i) the CMS' Request for a Single Final Instruction regarding the Notification of the Considerations and (ii) Ms ROS Bophana's Instructions to the CMS, dated 28 January 2020, 02:56 PM.

³ Internal Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, dated 29 January 2020.



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

- Irrespective of the legal force of the Dismissal Order in the case at hand, since the Indictment has not been reversed by a supermajority vote, the Indictment stands.
- Irrespective of any instructions (now apparently void) not to notify the Trial Chamber and to archive the Case 004/2, the Trial-Chamber is seised of the Case 004/2 pursuant to Internal Rule 77(13)(b).
- Foreclosing the Trial Chamber’s ability to resolve the present impasse would be contrary to the principles of sound judicial administration.

Attachments:

- 1. Notification of the Pre-Trial Chamber’s Considerations in Case 004/2, dated 19 December 2019.
- 2. Email from Suy-Hong Lim, Greffier of the Trial Chamber, entitled “Information”, dated 21 January 2020. 01:00 PM.
- 3. Notification Instructions for Notification of the Pre-Trial Chamber’s Considerations to the Trial Chamber in Case 004/2, dated 28 January 2020.
- 4. Records of Ms. Kristina O’YOUNG, dated 28 January 2020.
- 5. Email from Ms. Hyuree KIM to the Above Signed Judges, *forwarding* (i) the CMS’ Request for a Single Final Instruction regarding the Notification of the Considerations and (ii) Ms ROS Bophana’s Instructions to the CMS, dated 28 January 2020, 02:56 PM.
- 6. Internal Memorandum Issued by Judge PRAK Kimsan, the President of the Pre-Trial Chamber, dated 29 January 2020.