



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 Préliminaire

D359/39 and D360/48

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 (PTC60)

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

Date: 17 July 2020

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PUBLIC

DECISION ON CIVIL PARTY LAWYERS' REQUEST FOR NECESSARY MEASURES TO BE TAKEN BY THE PRE-TRIAL CHAMBER TO SAFEGUARD THE RIGHTS OF CIVIL PARTIES TO CASE 004/2

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties to Case 004/2”, filed by the Lawyers for Civil Parties on 31 March 2020 (the “Civil Party Request”).¹

I. PROCEDURAL HISTORY

1. On 19 December 2019, the Pre-Trial Chamber issued its “Considerations on Appeals Against Closing Orders” in Case 004/2 (the “Considerations”); this was notified to the Pre-Trial Chamber, the Office of the Co-Investigating Judges, the Office of the Co-Prosecutors, the Defence for AO An and the Civil Parties in Case 004/2.² On 28 January 2020, a Greffier of the Pre-Trial Chamber submitted by email to the Records and Archives Unit (“RAU”) instructions not to notify the Trial Chamber of the Considerations and to archive Case 004/2.³ That same day, another Greffier of the Pre-Trial Chamber submitted a form instructing RAU to notify the Trial Chamber of the Considerations.⁴

2. On 29 January 2020, Judge PRAK Kimsan, the President of the Pre-Trial Chamber, issued his first interoffice memorandum to the Chief of the Court Management Section (“CMS”), copying the Pre-Trial Chamber, the Acting Director and Deputy Director of the Office of Administration, stating that only the joint disposition unanimously decided shall have applicable effect.⁵ On the same day, the International Judges of the Chamber issued their first interoffice memorandum to the Acting Director and Deputy Director of the Office of Administration and the Chief of the CMS, copying the Pre-Trial Chamber, stating that the Trial Chamber is seised of Case 004/2 under Internal Rule 77(13)(b) and that the Office of

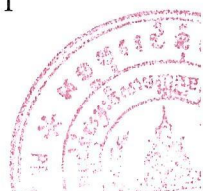
¹ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC60), Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties to Case 004/2, 31 March 2020, D359/33 and D360/42 (the “Civil Party Request (D359/33 and D360/42)”). The Chamber remarks that eight of the fifteen Civil Party Lawyers filed this Request: namely, HONG Kimuon, LOR Chunthy, SAM Sokong, SIN Soworn, Emmanuel JACOMY, Martine JACQUIN, Daniel MCLAUGHLIN and Nushin SARKARATI.

² Case 004/2 (PTC60), Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 and D360/33.

³ Case 004/2 (PTC60), Annex 5 to the Interoffice Memorandum of the International Judges, ROS Bophana Greffier of the Pre-Trial Chamber, Instructions Concerning Non-Notification of the Considerations to the Trial Chamber and Archival in Case 004/2, 28 January 2020, D359/35.5 and D360/44.5, p. 2.

⁴ Case 004/2 (PTC60), Annex 3 to the Interoffice Memorandum of the International Judges, Kristina O’YOUNG Greffier of the Pre-Trial Chamber, Instructions Concerning Notification of the Considerations to the Trial Chamber in Case 004/2, 28 January 2020, D359/35.3 and D360/44.3.

⁵ Case 004/2 (PTC60), Interoffice Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, 29 January 2020, D359/34 and D360/43 (“First Interoffice Memorandum of Judge PRAK Kimsan (D359/34 and D360/43)”).



Administration is instructed to notify the Trial Chamber.⁶ On 31 January 2020, the Office of Administration sent an interoffice memorandum to the Pre-Trial Chamber requesting clarification on which instruction concerning notification of the Considerations to the Trial Chamber should be implemented or, alternatively, an actionable instruction.⁷

3. On 4 February 2020, the International Co-Prosecutor filed the “International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber”.⁸ On 24 February 2020, the Co-Lawyers for AO An similarly filed their “Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/2”.⁹

4. On 12 March 2020, the International Judges of the Chamber disseminated to the parties, copying the Pre-Trial Chamber, the Greffier of the Trial Chamber and the Acting Director and Deputy Director of the Office of Administration, the second interoffice memorandum of the International Judges along with the appended Annexes related to the events within the Chamber since the Considerations; therein, the International Judges clarified that the Pre-Trial Chamber has taken all the required administrative actions to transfer the Closing Order (Indictment) and the Case File 004/2 to the Trial Chamber.¹⁰ On 16 March 2020, the President of the Pre-Trial Chamber issued a second interoffice memorandum reasserting that only the unanimously decided portion of the Considerations shall have applicable effect.¹¹

5. On 20 March 2020, the International Co-Prosecutor filed her “Request to Add the 12 and 16 March [Pre-Trial Chamber] Memoranda to Case File 004/2” to preserve a transparent and complete record of the case, including the “details of the procedural stalemate occurring

⁶ Case 004/2 (PTC60), Interoffice Memorandum issued by Judge Kang Jin BAIK and Judge Olivier BEAUVALLET, International Judges of the Pre-Trial Chamber, 29 January 2020, D359/35 and D360/44 (“First Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLET (D359/35 and D360/44)”).

⁷ Interoffice Memorandum issued by the Office of Administration, 31 January 2020.

⁸ Case 004/2 (PTC60), International Co-Prosecutor’s Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, 4 February 2020, D359/25 and D360/34.

⁹ Case 004/2 (PTC60), Request for Confirmation that All Required Administrative Actions Have Been Taken to Archive Case File 004/2, 24 February 2020, D359/27 and D360/36.

¹⁰ Second Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLET, 12 March 2020, D359/36 and D360/45 (“Second Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLET (D359/36 and D360/45)”).

¹¹ Case 004/2 (PTC60), Second Interoffice Memorandum issued by Judge PRAK Kimsan, President of the Pre-Trial Chamber, 16 March 2020, D359/37 and D360/46 (“Second Interoffice Memorandum of Judge PRAK Kimsan (D359/37 and D360/46)”).



behind the scenes at the ECCC.”¹² On 31 March 2020, the Civil Party Lawyers filed the instant Civil Party Request.¹³ On 13 April 2020, the Pre-Trial Chamber filed all the aforementioned memoranda into the Case File (collectively, the “Memoranda of the Pre-Trial Chamber”) and classified them as public.¹⁴

6. On 3 April 2020, the Judges of the Trial Chamber issued a joint public statement concerning Case 004/2 stating that it has no access to Case 004/2 without notification and transfer to the Trial Chamber.¹⁵ Further, while the International Judges of the Trial Chamber believe that their Chamber holds “inherent authority” to address certain matters, the National Judges believe that the matter was closed before the Pre-Trial Chamber and that “there will not be a trial of AO An now or in the future.”¹⁶ On 4 May 2020, the International Co-Prosecutor filed her immediate Appeal of the Trial Chamber’s effective termination of Case 004/2, which was notified by the Supreme Court Chamber on 21 May 2020.¹⁷

7. On 18 March 2020, the Co-Lawyers for AO An filed their “Request to Seal and Archive Case File 004/02” to the Office of the Co-Investigating Judges.¹⁸ On 22 April 2020, the Secretary General of the United Nations reinstated Mr. Michael BOHLANDER as the International Co-Investigating Judge within the Office of the Co-Investigating Judges at the ECCC.¹⁹ On 1 June 2020, the Co-Investigating Judges issued a memorandum informing that

¹² Case 004/2 (PTC60), The International Co-Prosecutor’s Request to Add the 12 and 16 March [Pre-Trial Chamber] Memoranda to Case File 004/2, 20 March 2020, D359/32 and D360/41.

¹³ Civil Party Request (D359/33 and D360/42).

¹⁴ See First Interoffice Memorandum of Judge PRAK Kimsan (D359/34 and D360/43); First Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLET (D359/35 and D360/44); Second Interoffice Memorandum of the International Judges Kang Jin BAIK and Olivier BEAUVALLET (D359/36 and D360/45); Second Interoffice Memorandum of Judge PRAK Kimsan (D359/37 and D360/46) (Collectively, the “Memoranda of the Pre-Trial Chamber (D359/34 and D360/43; D359/35 and D360/44; D359/36 and D360/45; D359/37 and D360/46)”).

¹⁵ Case 004/2 Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An, 3 April 2020, <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (accessed on 8 July 2020)

¹⁶ Case 004/2 Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An, 3 April 2020, <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> (accessed on 8 July 2020)

¹⁷ Case 004/2, International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1 (“International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2 (E004/2/1)”).

¹⁸ Case 004/2, Request to Seal and Archive Case File 004/02, 18 March 2020, D363.

¹⁹ Statement: International Co-Investigating Reinstated, 24 April 2020, <https://eccc.gov.kh/en/articles/statement-international-co-investigating-judge-reinstated> (accessed on 8 July 2020)



they will hold their decision on the Request of the Co-Lawyers for AO An in abeyance, pending the decision of the Supreme Court Chamber on the immediate Appeal.²⁰

8. On 30 June 2020, the Pre-Trial Chamber issued its “Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants”.²¹ The Pre-Trial Chamber unanimously held that it had not reached an affirmative vote of at least four judges.²² The National Judges considered that all Civil Party Applicants shall be rejected.²³ The International Judges concluded that the International Co-Investigating Judge erred in certain aspects and should have admitted twelve Civil Party Applicants.²⁴ In accordance with Internal Rule 77(13)(a), the International Judges considered that the default position is that the Order—the International Co-Investigating Judge’s Order on Admissibility of Civil Party Applicants—shall stand.²⁵

II. SUBMISSIONS

9. The Civil Party Lawyers submit that they are “obliged to raise the serious and repeated violations of the rights of Civil Parties to be heard, to representation, to legal certainty, and to the transparency and publicity of these proceedings.”²⁶ The Civil Party Lawyers contend that the Office of Administration has failed to take the “necessary administrative steps” to transfer the Case 004/2 Indictment and underlying Case File to the Trial Chamber²⁷ and that Case 004/2 is caught in a procedural limbo with “devastating impacts on the rights of victims enshrined in the ECCC legal texts.”²⁸

10. The Civil Party Lawyers outline the Procedural History, interspersing within it certain alleged violations of their rights since the issuance of the Considerations.²⁹ This includes the failure and/or confusion over communications such as *inter alia*: the failure to be copied on communications between the International Co-Prosecutor, the Co-Lawyers for AO An and/or

²⁰ Memorandum of the Office of the Co-Investigating Judges, 1 June 2020, D364.

²¹ Case 004/2, Considerations on Appeal Against Order on the Admissibility of Civil Party Applicants, D362/6, (“Considerations on Appeal Against Order on Admissibility (D362/6)”), 30 June 2020.

²² Considerations on Appeal Against Order on Admissibility (D362/6), VI. DISPOSITION, p. 12.

²³ Considerations on Appeal Against Order on Admissibility (D362/6), paras. 41-43.

²⁴ Considerations on Appeal Against Order on Admissibility (D362/6), para. 118 (*see, e.g.*, the International Judges holding that the Civil Party Appeal was admissible and dismissing Grounds 1(a), 1(b) and 3, while upholding in part and dismissing in part Grounds 2, 4 and 5).

²⁵ Considerations on Appeal Against Order on Admissibility (D362/6), paras. 116-118.

²⁶ Civil Party Request (D359/33 and D360/42), paras. 2, 4.

²⁷ Civil Party Request (D359/33 and D360/42), para. 3.

²⁸ Civil Party Request (D359/33 and D360/42), paras. 3-4.

²⁹ Civil Party Request (D359/33 and D360/42), paras. 5-16.



the Trial Chamber concerning witness lists, a potential trial management meeting or preliminary objections;³⁰ the failure to be properly notified of filings made in hard copy through CMS by the International Co-Prosecutor and/or the Co-Lawyers for AO An and that the Civil Party Lawyers merely received informal notification;³¹ the failure to be notified of various emails from the Greffier of the Trial Chamber concerning case status, including the Trial Chamber not being able to take action on Case 004/2;³² and that not all Civil Party Lawyers were copied at the time on the various Memoranda of the Pre-Trial Chamber.³³

11. Respect for the rights of victims is “an essential component of national reconciliation” and, should the case not proceed, the rights of Civil Parties before the ECCC would be “extinguished”.³⁴ The Civil Party Lawyers further contend that the Civil Parties have a right to legal certainty, which requires that the Pre-Trial Chamber render a reasoned decision,³⁵ arguing that the “Considerations did not provide legal certainty”.³⁶ Since the Considerations were issued, neither the Pre-Trial Chamber nor any body of the ECCC “has issued a clear, public explanation regarding the status of Case 004/2 or the way forward”, explaining that the Memoranda of the Pre-Trial Chamber “have simply continued the deadlock.”³⁷

12. The Civil Party Lawyers assert that victims “have fundamental rights to meaningful and fair participation in all stages”,³⁸ including through representation by Civil Party Lawyers at the pre-trial stage and Civil Party Lead Co-Lawyers at the trial stage.³⁹ Invoking Internal Rule 21, which requires that “victims are kept informed and that their rights are respected throughout the proceedings”, the Civil Party Lawyers allege that due to the lack of an administrative framework for submissions made before the Trial Chamber, they were not notified of essential developments.⁴⁰

13. The Civil Party Lawyers also raise the issue that the Office of Administration and the Pre-Trial Chamber “do not recogni[s]e” the Court’s only Civil Party Lead Co-Lawyers in Case

³⁰ Civil Party Request (D359/33 and D360/42), para. 9.

³¹ Civil Party Request (D359/33 and D360/42), para. 10.

³² Civil Party Request (D359/33 and D360/42), paras. 11, 13.

³³ Civil Party Request (D359/33 and D360/42), paras. 15-16, 34.

³⁴ Civil Party Request (D359/33 and D360/42), para. 23.

³⁵ Civil Party Request (D359/33 and D360/42), paras. 27, 29.

³⁶ Civil Party Request (D359/33 and D360/42), para. 30.

³⁷ Civil Party Request (D359/33 and D360/42), para. 30.

³⁸ Civil Party Request (D359/33 and D360/42), para. 31.

³⁹ Civil Party Request (D359/33 and D360/42), para. 31.

⁴⁰ Civil Party Request (D359/33 and D360/42), paras. 32, 34.



004/2, jeopardizing the rights of victims.⁴¹ This leaves the Civil Party Lawyers as the only Civil Party representatives recognised but Civil Party Lawyers “do not have automatic standing to make submissions” before the Trial Chamber.⁴² Moreover, Internal Rule 69(3) anticipates the involvement of the Civil Party Lead Co-Lawyers, through access to the case file, even before the case has been forwarded to the Trial Chamber.⁴³ Preventing the Civil Party Lead Co-Lawyers from accessing the case file leaves the Civil Parties “without legal representation as key advances in the proceedings take place”.⁴⁴

14. The Civil Party Lawyers make Requests A, B, C and D of the Pre-Trial Chamber with the following:

- a. Issue or order issued by the appropriate ECCC body a clear public statement on the status of Case 004/2 and anticipated next steps to resolve the current procedural deadlock;
- b. Order that the [Civil Party Lead Co-Lawyers] be granted access to the Case 004/2 [C]ase [F]ile at this stage;
- c. Order that parties, chambers, and all other bodies of the ECCC distribute to Case 004/2 [Civil Party Lawyers] all previous communications and filings concerning Case 004/2 proceedings which were not previously distributed to them, including filings and communications to the Trial Chamber, and
- d. Order that, henceforth, parties, chambers, and all other bodies of the ECCC must distribute all communications and filings concerning Case 004/2 proceedings to Case 004/2 [Civil Party Lawyers] unless and until the ECCC has officially recogni[s]ed [Civil Party Lead Co-Lawyers] in Case 004/2.⁴⁵

15. No parties filed responses to the Civil Party Lawyers’ Request.

⁴¹ Civil Party Request (D359/33 and D360/42), paras. 37, 39.

⁴² Civil Party Request (D359/33 and D360/42), para. 37.

⁴³ Civil Party Request (D359/33 and D360/42), para. 39, citing Internal Rule 69(3).

⁴⁴ Civil Party Request (D359/33 and D360/42), para. 40.

⁴⁵ Civil Party Request (D359/33 and D360/42), para. 58.



III. DISCUSSION

16. Regarding Request A, the Chamber has made it clear in the Memoranda of the Pre-Trial Chamber that it has exhausted all the measures to unanimously order the transfer of the Case File to the Trial Chamber.⁴⁶

17. In light of this situation, the Chamber considers that the issue of Request B, on whether to grant the Civil Party Lead Co-Lawyers access to the Case 004/2 Case File, cannot be resolved by the Pre-Trial Chamber at this stage.

18. Concerning Request C, the Pre-Trial Chamber recalls that it has made public the Memoranda of the Pre-Trial Chamber along with the Annexes on 13 April 2020, thereby effectively distributing to Case 004/2 Civil Party Lawyers all the previous communications and filings concerning the Case 004/2 proceedings at issue.⁴⁷

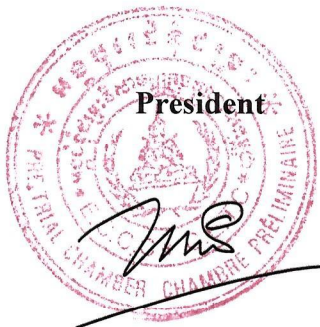
19. Concerning Request D, the Chamber considers that objections to possible non-action are speculative, unripe and must thus be rejected.

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

REJECTS the Civil Party Request in its entirety.

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

Phnom Penh, 17 JULY 2020



President

Pre-Trial Chamber

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

⁴⁶ The Memoranda of the Pre-Trial Chamber (D359/34 and D360/43; D359/35 and D360/44; D359/36 and D360/45; D359/37 and D360/46). The Chamber notes that the Supreme Court Chamber is seised of the immediate Appeal by the International Co-Prosecutor for the issues related to Request A in the present case.

⁴⁷ The Chamber notes that the alleged failure to notify the Civil Party Lawyers of communications and filings is restricted to those involving the Trial Chamber, after the issuance of the Considerations of 19 December 2019.