



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០៤/២/០៧-០៩-២០០៩-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 004/2/07-09-2009-ECCC/SC

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 11-Aug-2020, 16:00
CMS/CFO: Sann Rada

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

Date: 11 August 2020
Language(s): Khmer/English
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DECISION ON THE CIVIL PARTY LAWYERS' REQUEST FOR NECESSARY MEASURES TO BE TAKEN BY THE SUPREME COURT CHAMBER TO SAFEGUARD THE CIVIL PARTIES FUNDAMENTAL RIGHT TO LEGAL REPRESENTATION BEFORE THE CHAMBER IN CASE 004/2

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Isabelle DURAND
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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seised of the Civil Party Lawyers’ request for necessary measures to be taken by the Supreme Court Chamber to safeguard the civil parties fundamental right to legal representation before the Chamber in Case 004/2.¹

I. PROCEDURAL HISTORY

2. On 30 March 2020, eight Civil Party Lawyers filed a request asking the Pre-Trial Chamber to take necessary measures to safeguard the rights of Case 004/2 Civil Parties.²

3. On 4 May 2020, the International Co-Prosecutor filed her Immediate Appeal to what she characterised as the Trial Chamber’s Effective Termination of Case 004/2.³

4. On the same day, the International Co-Prosecutor sent a courtesy copy of the Immediate Appeal by email to the Supreme Court Chamber, counsel for AO An and the Civil Party Lead Co-Lawyers,⁴ as well as to the Trial Chamber and Civil Party Lawyers.⁵

5. On 5 May 2020, the International Civil Party Lead Co-Lawyer responded to the International Co-Prosecutor’s email informing the Chamber and the parties that her status in Case 004/02 proceedings is still unclear, she has had no access to the Case 004/2 Case File, she understands her appointment is limited to Case 002 and that there are no Civil Party Lead Co-Lawyers on record for Case 004/2. She thus requested that the Civil Party Lawyers “continue to be copied on any correspondence”.⁶

¹ Civil Party Lawyers’ request for necessary measures to be taken by the Supreme Court Chamber to safeguard the civil parties fundamental right to legal representation before the Chamber in Case 004/2, 10 July 2020, E004/2/5 (“Request”).

² 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, 30 March 2020, D359/33 & D360/42.

³ International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1, notified on 19 May 2020 (“Immediate Appeal”).

⁴ Brenda HOLLIS’s email entitled “Courtesy Copy of ICP Immediate Appeal of the TC’s effective termination of Case 004/2, 4 May 2020, sent to the Chamber, the Co-Counsels for AO An, and the Civil Party Lead Co-Lawyers, see E004/2/5.1.2.

⁵ Brenda HOLLIS’s email entitled “Courtesy Copy of ICP Immediate Appeal of the TC’s effective termination of Case 004/2, 4 May 2020, sent to the Trial Chamber, the Co-Counsels for AO An, the Civil Party Lead Co-Lawyers and the Civil Party Lawyers, E004/2/5.1.1.

⁶ Megan HIRST’s email entitled “Re: Courtesy Copy of ICP Immediate Appeal of the TC’s effective termination of Case 004/2”, 5 May 2020, sent to the International Co-Prosecutor, the Chamber, the Co-Counsels for AO An and copying the Civil Party Lawyers, E004/2/5.1.2.

6. On 14 May 2020, AO An filed his response.⁷ On 26 May 2020, the International Co-Prosecutor replied.⁸
7. On 10 July 2020, the Civil Party Lawyers filed the present Request.⁹
8. On 17 July 2020, the Pre-Trial Chamber issued its decision on the Civil Party Lawyers' request, rejecting it in its entirety.¹⁰
9. On 10 August 2020, the Supreme Court Chamber issued its decision on the Immediate Appeal.¹¹

II. SUBMISSIONS

10. The Civil Party Lawyers recall that under the Internal Rules, Civil Parties are represented by Civil Party Lawyers at the pre-trial stage (i.e. before the Co-Investigating Judges and the Pre-Trial Chamber) and by the Civil Party Lead Co-Lawyers at the trial stage and beyond (i.e. before the Trial Chamber and the Supreme Court Chamber).¹² They submit that in Case 004/2 the Civil Parties have been left without legal representation to defend their fundamental rights to appear and be heard in the Immediate Appeal because the Internal Rules do not empower Civil Party Lawyers to appear before the Supreme Court Chamber and to date the Court has not recognised the Civil Party Lead Co-Lawyers' mandate in Case 004/2.¹³ As a result, Civil Parties have not, unlike the Defence, had the opportunity to be heard on the Immediate Appeal due to the lack of clarity of their legal representation.¹⁴ They submit that Civil Parties have the right to be heard in Case 004/2 proceedings before the Supreme Court Chamber,¹⁵ which implies a clear right to legal representation.¹⁶

⁷AO An's response to International Co-Prosecutor's Immediate Appeal of the Trial Chamber's effective termination of Case 004/2, transmitted on 14 May 2020, E004/2/1/1, notified on 26 May 2020 ("Response").

⁸ International Co-Prosecutor's Reply to AO An's letter regarding her immediate appeal of the Trial Chamber's effective termination of Case 004/2, E004/2/1/1/1, 26 May 2020 ("Reply").

⁹ Request, para. 1.

¹⁰ Decision on Civil Party Lawyers' Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties in Case 004/2, 17 July 2020, D359/39 and D360/48 ("Pre-Trial Chamber's Decision on Civil Party Lawyers' Request").

¹¹ Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's effective termination of Case 004/2, 10 August 2020, E004/2/1/1/2, ("Decision on the Immediate Appeal").

¹² Request, paras 3, 13, 15.

¹³ Request, paras 21, 23.

¹⁴ Request, paras 22-23.

¹⁵ Request, paras 24-28.

¹⁶ Request, paras 24, 29-32.

11. On this basis, the Civil Party Lawyers request that the Chamber recognise the Civil Party Lead Co-Lawyers as the proper Civil Party representatives to make submissions before it and order the Office of Administration to grant the Civil Party Lead Co-Lawyers access to the Case 004/2 case file (“Case File”). They also seek that the Civil Party Lead Co-Lawyers be granted a reasonable extension of time of 10 days to file their submission. In the alternative, the Civil Party Lawyers request the Chamber to recognise that they have standing to make submissions before it and to permit them to file their proposed annexed submission.¹⁷

12. No parties responded to the Request.

III. APPLICABLE LAW

13. Internal Rule 39 regarding ‘Time Limits and Conditions for Filing Documents’ provides:

1. All time limits set out in the applicable laws and these IRs, the applicable Practice Directions and, where appropriate, by decision of the judges, must be respected. Subject to this Rule, failure to do so shall lead to the invalidity of the action in question. [...]

[...]

4. The [...] Chambers may, at the request of the concerned party or on their own motion:

a) extend any time limits set by them; or

b) recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.

IV. DISCUSSION

1. Admissibility of the Request

14. The Chamber observes that the Civil Party Lawyers filed a similar request to the Pre-Trial Chamber on 30 March 2020 seeking for measures to be taken to safeguard the rights of Civil Parties to Case 004/2. In particular to have distributed to them all past and future filings and communications relating to Case 004/2 and for the Civil Party Lead Co-Lawyers to be granted access to the Case 004/2 Case File.¹⁸ It is noted that the Pre-Trial Chamber’s decision was pending at the time the Civil Party Lawyers filed their present Request.¹⁹ The Pre-Trial Chamber’s decision has since been issued on 17 July 2020 rejecting the Civil Party Lawyers’

¹⁷ Request, para. 40. *See also*, paras 24, 33-37, 39.

¹⁸ Civil Party Lawyers’ Request for Necessary Measures to be Taken by the Pre-Trial Chamber to Safeguard the Rights of Civil Parties in Case 004/2, 30 March 2020, D359/33 and D360/42.

¹⁹ Request, para. 5.

request in its entirety.²⁰ It also considered that the request to order that Civil Party Lead Co-Lawyers be granted access to the Case File “cannot be resolved by the Pre-Trial Chamber at this stage”.²¹

15. This Chamber recognises the extremely difficult and legally confusing situation created by the dichotomy of the Pre-Trial Chamber’s *Considerations on the Appeals against the Closing Orders* in unanimously declaring “that the Co-Investigating Judges’ issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC” and then pronouncing separately on the validity of those same previously impugned orders.²² The Chamber has dealt with this unprecedented position in our decision on the Immediate Appeal.²³

16. In relation to timing and the late filing, the Civil Party Lawyers mention:

“[T]he general atmosphere of procedural irregularity, unreliable communication and confusion [...] continues to prevail in Case 004/2 and in the proceedings now before the [Chamber]. Consequently, the interests of Civil Parties to be heard and enjoy equal and fair participation as parties to the proceedings have been gravely prejudiced, including their ability to receive notice of and respond to filings made by the other parties and chambers of the [C]ourt. In consideration of these circumstances, it is in the interests of justice that, notwithstanding any deadlines that the [Chamber] may find applicable to the [Civil Party Lawyers’] or [Civil Party Lead Co-Lawyers’] proposed submissions, that the [C]hamber rely on its inherent jurisdiction and/or Internal Rule 33 to grant the Civil Parties leave to file these documents before the [C]hamber”.²⁴

17. The Chamber notes the considerably late filing of the present Request. However, pursuant to Rule 39(4)(b), it accepts the reasons offered by the Civil Party Lawyers and will therefore exercise its discretion and determine the Request for the limited purpose of providing legal clarification on the issue of legal representation. The relief sought from the Supreme Court Chamber to grant the Civil Party Lead Co-Lawyers access to the Case File was also sought earlier from the Pre-Trial Chamber and was rejected by the Pre-Trial Chamber.²⁵ That decision is not subject to appeal.

²⁰ Pre-Trial Chamber’s Decision on Civil Party Lawyers’ Request.

²¹ Pre-Trial Chamber’s Decision on Civil Party Lawyers’ Request, paras 14(b), 17.

²² Pre-Trial Chamber, *Considerations on Appeals against Closing Orders*, 19 December 2019, D359/24 & D360/33, VII. Disposition (ERN 01634239) and separate opinions of the national judges (ERN 01634241-01634276) and of the international judges (ERN 01634277-01634444) (“Pre-Trial Chamber’s Considerations”).

²³ Decision on the Immediate Appeal, paras 67-71.

²⁴ Request, para. 38.

²⁵ Pre-Trial Chamber’s Decision on Civil Party Lawyers’ Request, paras 14(b), 17.

18. The Civil Party Lawyers deemed it necessary to protect the position of the Civil Parties in Case 004/02. The Chamber therefore receive the otherwise late Request for the limited reason stated above.

2. Merits of the Request

19. Turning to the particulars of the Request before this Chamber: two reliefs are sought by the Civil Party Lawyers. The primary request is to obtain clarity on who are the proper Civil Party representatives in the current circumstances as it is unclear which of the appropriate Civil Party representatives should apply to the Chamber. Their reasoning is that the legal representatives for victims differ in accordance with the Internal Rules at different stages of the proceedings.²⁶ They submit that the Civil Party Lead Co-Lawyers should be recognised as the proper Civil Party representatives to make submissions before the Supreme Court Chamber and be granted access to the Case File.²⁷ In the alternative, the Civil Party Lawyers seek to be recognised to have standing to make submissions before this Chamber.²⁸ The second relief sought is that the recognised Civil Party representatives be authorised to file their submissions, whether these be the Civil Party Lead Co-Lawyers' submissions to be filed within 10 days of the clarification,²⁹ or the Civil Party Lawyers proposed submission annexed to the Request.³⁰

20. In view of the Pre-Trial Chamber's unanimous declaration "that the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC",³¹ the Supreme Court Chamber determined in its decision on the Immediate Appeal, for the reasons provided therein, that "it followed that neither Closing Order was valid" and that "in the absence of a definite and enforceable indictment, the case against AO An is hereby terminated before the ECCC".³²

21. The natural corollary of those findings is that the Case 004/2 ended when the Pre-Trial Chamber delivered its Considerations on the 19 December 2019. While there could have been a more satisfactory outcome in that the Pre-Trial Chamber's Considerations may have been more immediately transparent and clear, the inescapable fact remains that a necessary valid

²⁶ Request, paras 21, 23, 24 (B), 29-32, 40 (A) and (D).

²⁷ Request, paras 33-37, 40 (A).

²⁸ Request, para. 40 (D).

²⁹ Request, para. 40 (C).

³⁰ Request, para. 40 (E); Annex A: Proposed Filing: Civil Parties' Submissions on the status of Case 004/2 and the rights of victims in these proceedings, E004/2/5.2.

³¹ Pre-Trial Chamber's Considerations, VII. Disposition, ERN 01634239.

³² Decision on the Immediate Appeal, para. 71 v. and vi.

Closing Order could not be reconciled with the Pre-Trial Chamber's unanimous findings and declarations. The Case File could not be transferred to the Trial Chamber and it remains unavailable even to the Supreme Court Chamber. Accordingly, it is no longer necessary for the Civil Party Lead Co-Lawyers to have access to the Case File. As the Case File was never transmitted from the Pre-Trial Chamber, the representative role of the Civil Party Lawyers in Case 004/2 was effectively terminated. The role of the Civil Party Lead Co-Lawyers was never triggered, as the Trial Chamber was never seised of Case 004/2.

22. The part of the Request seeking to clarify who the representatives of the Civil Parties has been overtaken by our Decision on the Immediate Appeal and does not require resolution. The Internal Rules provide clearly and adequately for when the Civil Party Lead Co-Lawyers step in to represent the Civil Parties. However, no representation is called for when a case has been terminated by operation of a decision of the Pre-Trial Chamber.

23. The Chamber accepts that it is the duty of lawyers for Civil Parties to protect the victims' interests and to bring to the attention of the appropriate chamber any violation or diminution of those legitimate interests. The Chamber has no criticism of either group of lawyers for the Civil Parties in the actions they were obliged to bring.

V. DISPOSITION

24. For the foregoing reasons, the Supreme Court Chamber:

FINDS the Request admissible;

REJECTS the Request.

Phnom Penh, 11 August 2020

President of the Supreme Court Chamber



KONG Srim