



**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

No: D192/11/2 and D186/3/1/2

*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° 004/07-09-2009-ECCC/OCIJ (PTC06) and **(PTC10)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Chang-Ho CHUNG  
Judge HUOT Vuthy

**Date:** 31 October 2014

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**PUBLIC (REDACTED VERSION)**  
**CONSIDERATIONS OF THE PRE-TRIAL CHAMBER ON [REDACTED]**  
**APPEALS AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISIONS**  
**DENYING HIS REQUESTS TO ACCESS THE CASE FILE AND TO TAKE**  
**PART IN THE INVESTIGATION**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of two Appeals filed by the Co-Lawyers for [REDACTED] (the “Appellant”) against two orders issued by the International Co-Investigating Judge (the “ICIJ”) in the same process of considering requests for access to the case file and for participatory rights in the investigation. The first Appeal is “[REDACTED] Appeal Against the International Co-Investigating Judge’s Denial of His *Urgent Request for Relief Based on New Information*” filed by [REDACTED] Co-Lawyers on 9 May 2014 (the “First Appeal”).<sup>1</sup> The Second Appeal is “[REDACTED] Appeal against the International Co-Investigating Judge’s Denial of his Urgent Motion to Access the Case File and Take Part in the Judicial Investigation” filed on 13 August 2014 (the “Second Appeal”).<sup>2</sup> As can be seen in more detail in the parts entitled “Procedural Background” and “Submissions on Appeal” of these Considerations, both Appeals impugn decisions made by the ICIJ, each denying the requested rights on the grounds that, being a Suspect, the Appellant is not party to the proceedings and, as such, the applicable law does not entitle him to such rights. The Pre-Trial Chamber considers that, although issued at different points in time, both impugned ICIJ Orders relate to the same process and to the same central issues raised by the Co-Lawyers for [REDACTED] and deny the related motions on substantially similar grounds. Therefore, the Pre-Trial Chamber shall address both Appeals together.

## I. PROCEDURAL BACKGROUND

1. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, dated 20 November 2008, opening a judicial investigation into, *inter alia*, crimes for which the Appellant is alleged to be responsible.<sup>3</sup> On 18 July 2011 and on 24 April 2014 the International Co-Prosecutor filed two Supplementary Submissions alleging other crimes for which the Appellant may also be responsible.<sup>4</sup>

<sup>1</sup> [REDACTED] Appeal Against the International Co-Investigating Judge’s Denial of His Urgent Request for Relief on New Information, 9 May 2014, D192/1/1/1.

<sup>2</sup> [REDACTED] Appeal against the International Co-Investigating Judge’s Denial of his Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 13 August 2014, D186/3/1/1 (the “Second Appeal”).

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

<sup>4</sup> Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 and Co-Prosecutors Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.



On 24 February 2012, the Reserve International Co-Investigating Judge (the “RICIJ”) issued a document titled Notification of Suspect’s Rights (the “RICIJ Notification”), whereby the RICIJ informed the Appellant that he is a named suspect in an ongoing judicial investigation, for planning, instigating, ordering, aiding and abetting or committing, individually or by participating in a joint criminal enterprise the following crimes: violations of the 1956 Penal Code, genocide, crimes against humanity and grave breaches of the Geneva Conventions.<sup>5</sup> The RICIJ informed the Appellant that “these charges are based on both the facts alleged by the Co-Prosecutors in the Introductory Submission and those uncovered thus far during the course of the investigation.”<sup>6</sup> The RICIJ informed the Appellant that, in accordance with Internal Rule 21(1)(d) he, as a suspect, has certain rights, including the right to access the Case File “(application, *by analogy*, of Rules 55(6), 55(1) and 58[.]).”<sup>7</sup> The RICIJ Notification was served by the Greffier of the Office of the Co-Investigating Judges (the “OCIJ”) to the Suspect’s grandchild, [REDACTED], and nephew, [REDACTED], on 29 February 2012 at 17:50 and 16:10 hrs., respectively.<sup>8</sup>

3. On 6 March 2012, the RICIJ informed the Defence Support Section (the “DSS”) of the RICIJ Notification and instructed, *inter alia*, that the DSS provide the Suspect with a list of lawyers and assist him pursuant to Internal Rule 11.<sup>9</sup>
4. On 16 December 2013, the Head of DSS assigned Mr. SO Mosseny provisionally as [REDACTED] national Co-Lawyer.<sup>10</sup> On 20 December 2013, the Head of DSS forwarded a request to the OCIJ asking the Co-Investigating Judges to issue an order recognizing Mr. SO Mosseny as [REDACTED] provisionally assigned Co-Lawyer in terms of Article 21(1) of the Agreement.<sup>11</sup>

<sup>5</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D109.

<sup>6</sup> *Ibid*, para. 2.

<sup>7</sup> *Ibid*, para 4.

<sup>8</sup> Notice of non-service, 29 March 2012, D109.1.

<sup>9</sup> Notification of Suspect’s Rights (Rule 21(1)(D)) to the Defence Support Section, 23 March 2012, D111, paras. 3 and 6.

<sup>10</sup> ECCC Press Release, “Mr. Bit Seanglim and Mr. SO Mosseny assigned as defence counsel represent two suspects in Case 004,” 16 December 2013, available at: <http://www.eccc.gov.kh/en/articles/mr-bit-seanglim-and-mrso-mosseny-assigned-defence-counsel-represent-two-suspects-case-004>.

<sup>11</sup> Email from Isaac ENDELEY to SO Mosseny and Neville SORAB, “Letters to the OCIJ,” 3 March 2014, D186.1.2.



5. On 9 January 2014, Mr. SO Mosseny submitted to the Greffier of the OCIJ a form requesting access to the Case File of case 004. The OCIJ Greffier replied to Mr. SO as follows: “the OCIJ has yet to receive from DSS any document concerning [Mr. SO’s] appointment as National Co-lawyer for a named suspect in Case 004. [The Greffier] said he heard of the assignment on the news on 16 December 2013 but as normal practice, DSS would send the appointment document to the OCIJ and OCIJ will decide on the recognition and the access to Zylab.”<sup>12</sup>
6. On 7 February 2014, the DSS offered a provisional contract to Ms. Suzana TOMANOVIĆ for the purposes of legally representing ██████████ as his international Co-Lawyer.<sup>13</sup>
7. On 5 March 2014, Mr. SO followed up with the OCIJ Greffier on the requests for access to the Case File.<sup>14</sup> The OCIJ Greffier, acknowledging receipt of the requests, informed Mr. SO that he was waiting for the response of the ICIJ.<sup>15</sup>
8. On 6 March 2014, Mr. SO and Ms. TOMANOVIĆ filed, before the OCIJ, an Urgent Motion requesting to get access to the Case File of case 004 and to take part in the judicial investigation (the “Urgent Motion”).<sup>16</sup> In the Urgent Motion, making note of the fact that the OCIJ has not yet issued an order to formally recognize their assignment,<sup>17</sup> Mr. SO and Ms. TOMANOVIC requested from the OCIJ “to order the [Office of Administration] to provide them with access to the Case File.”<sup>18</sup> They argued that a lack of response from the OCIJ constituted a constructive denial of access to the Case File of case 004,<sup>19</sup> that individuals named in the Introductory Submission, being “subject to prosecution,” should automatically enjoy the same rights as a “Charged Person,”<sup>20</sup> that the Appellant must be

<sup>12</sup> Email from SO Mosseny, “Re: Appointment Documents,” 9 January 2014, D186.1.3.

<sup>13</sup> ██████████ Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation, 6 March 2014, D186/2, para. 4.

<sup>14</sup> Email from SO Mosseny to Ly Chantola, “Follow up request for access to zylab,” 5 March 2014, D186.1.6.

<sup>15</sup> Email from LY Chantola to SO Mosseny, “RE: Follow up request for access to zylab,” 5 March 2014, D186.1.6.

<sup>16</sup> ██████████ Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 6 March 2014, D186.

<sup>17</sup> *Ibid*, para. 16.

<sup>18</sup> *Ibid*, last paragraph.

<sup>19</sup> *Ibid.*, para. 17.

<sup>20</sup> *Ibid.*, paras. 18-27.



afforded the right to prepare a defence in accordance with Internal Rule 21<sup>21</sup> and that, if otherwise, his rights to legal certainty and to equal treatment would be violated.<sup>22</sup>

9. On 18 March 2014, the ICIJ recognised the assignment of Mr. SO and of Ms. TOMANOVIC as Co-Lawyers for ██████████.<sup>23</sup> The ICIJ noted that this assignment is provisional, pending determination by DSS on ██████████ indigence.
10. On 22 April 2014, the ICIJ issued a Notification in Relation to the Appellant's Urgent Motion (the "Deferral Notice").<sup>24</sup> In the Deferral Notice, informing that the RICIJ Notification granted the Suspect, *inter alia*, access to the Case File of case 004, the ICIJ notified the Appellant of the intention to reconsider the RICIJ Notification only in this respect<sup>25</sup> and, as this part of the RICIJ Notification is relevant to the Urgent Motion, to defer a decision on the Urgent Motion until having received the Appellant's and the parties' submissions in relation to a reconsideration of the Written Notification.<sup>26</sup>
11. On 24 April 2014, the Co-Lawyers filed, before the OCIJ, ██████████ Urgent Request for Relief Based on New Information (the "Relief Request") requesting *immediate* access to Case File 004 pending the ICIJ's reconsideration of the RICIJ Notification.<sup>27</sup> The Co-Lawyers argued that the Deferral Notice had provided new information, previously unavailable to the Co-Lawyers, namely that the RICIJ Notification granted access to the Case File and that it had not been previously reconsidered, rescinded or vacated.<sup>28</sup> Accordingly, the Co-Lawyers stated, the access rights that were granted *de jure* had been "arbitrarily" denied *de facto*.<sup>29</sup>

<sup>21</sup> *Ibid*, para. 28 and 34-36..

<sup>22</sup> *Ibid*, paras. 29 – 33.

<sup>23</sup> Decision on the recognition of Co-lawyers for suspect ██████████, 18 March 2014, D122/9/6.

<sup>24</sup> Notification in Relation to ██████████ Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation, 22 April 2014, D186/1.

<sup>25</sup> *Ibid.*, paras. 1, 7.

<sup>26</sup> *Ibid.*, p. 4.

<sup>27</sup> ██████████ Urgent Request for Relief Based on New Information, 24 April 2014, D192.

<sup>28</sup> *Ibid.*, para. 7.

<sup>29</sup> *Ibid.*, p. 1.



12. On 25 April 2014, the ICIJ denied the Relief Request, without prejudice to the Urgent Motion (“the First Impugned Decision”).<sup>30</sup> The ICIJ reminded that, although he had already reconsidered and vacated the RICIJ Notification and denied access to the case File to *another* suspect in Case 004 (the “[REDACTED] Decision”),<sup>31</sup> he had yet to receive further submissions from the Appellant and the Parties on the issue of the reconsideration of the RICIJ Notification directed to the Appellant.<sup>32</sup> However, the ICIJ *already held, in the First Impugned Decision*, that the RICIJ Notification amounted to an abuse of judicial discretion because the Appellant was granted a right not accorded to him by the Internal Rules and the RICIJ had failed to provide any reasoning in support of the RICIJ Notification.<sup>33</sup> The ICIJ stated that the Appellant is not a Charged Person and, as such, the applicable provisions do not entitle him to access the Case File.<sup>34</sup> Furthermore, the ICIJ maintained, since Internal Rule 56 prescribes that the judicial investigation is confidential, granting access to a Suspect is not in the interest of justice and may endanger the confidentiality of the investigation.<sup>35</sup> The ICIJ further considered in the First Impugned Decision that the Appellant’s lack of access to the Case File is not prejudicial to the Suspect since he is “not detained, has no case to answer, and does not have a defence to prepare.”<sup>36</sup>

13. On 7 May 2014, the Co-Lawyers followed by filing before the OCIJ their Submissions in response to the Deferral Notice (the “Co-Lawyers’ Submissions on Reconsideration”),<sup>37</sup> requesting: a) immediate access to the Case File; b) that the ICIJ does not reconsider the RICIJ Notification; and c) that the ICIJ seizes the Pre-Trial Chamber with an application to annul the investigation from 9 January 2014, when access was requested, until access to the Case File is granted.<sup>38</sup> In their Submissions on Reconsideration the Co-Lawyers made three observations. First, the Co-Lawyers argued that the Appellant should be granted access to the Case File because the ICIJ has no legitimate basis to reconsider the RICIJ

<sup>30</sup> Decision On [REDACTED] Urgent Request for Relief Based on New Information, 25 April 2014, D192/1 (the “First Impugned Decision”).

<sup>31</sup> *Ibid.*, para. 7 referring to Decision on [REDACTED] Defence Request to Access the Case File and Take part in the Judicial Investigation, 31 July 2013, D121/4 (the “[REDACTED] Decision”) paras. 36 – 49 and 61.

<sup>32</sup> *Ibid.*, para. 12.

<sup>33</sup> First Impugned Decision.

<sup>34</sup> *Ibid.*, para. 8.

<sup>35</sup> *Ibid.*, para. 9.

<sup>36</sup> *Ibid.*, para. 10.

<sup>37</sup> [REDACTED] Submission on the Reconsideration of the Decision to Grant [REDACTED] Access to the Case File, 7 May 2014, D186/2.

<sup>38</sup> *Ibid.*, conclusive paragraph.



Notification<sup>39</sup> as it is done *proprio motu*, it is not prompted by any change in circumstance and it does not remedy but is the cause of an injustice.<sup>40</sup> Second, the Co-Lawyers argue that the Appellant, being subject to prosecution, is automatically entitled to the same rights as a Charged Person, and since the investigation has been ongoing for four and a half years, any further delay in granting access will infringe on his fair trial rights to legal certainty, transparency of proceedings, equality of arms and to adequate time and facilities to prepare his defence.<sup>41</sup> Lastly, the Co-Lawyers argue that the *de facto* denial of *de jure* granted access amounts to a procedural defect and, referring to the provisions of Internal Rules 48 and 76(2), request that the investigation be annulled from 9 January 2014, which is when access was requested, until when the Appellant is granted access to the Case File.<sup>42</sup> No party to the investigative proceedings made any other submission before the OCIJ in relation to the issue of reconsideration of the RICIJ Notification for the Appellant.

14. On 9 May 2014, the Co-Lawyers filed, before the Pre-Trial Chamber, the First Appeal against the First Impugned Decision, requesting it to reverse the First Impugned Decision and to order the OCIJ to grant the Defence *immediate* access to the Case File *pending any reconsideration* by the ICIJ of the RICIJ Notification.<sup>43</sup>
15. On 17 July 2014 the ICIJ issued a Decision *vacating* “the grant of case file access to the Suspect” and denying the Urgent Motion and the relief requested in the Co-Lawyers Submissions Reconsideration (The “Second Impugned Decision”).<sup>44</sup> The ICIJ reasoned the Second Impugned Decision as follows: First,<sup>45</sup> relying on inherent powers, the ICIJ proceeded to reconsider and vacate the part of the RICIJ Notification that granted access to the case file because, as the ICIJ stated, it was done without reasons provided and it is not supported by the provisions of the Internal Rules which do not give such rights to Suspects who may or may not be charged. The ICIJ added that the granting of such rights to non-parties to the proceedings is not in the interests of justice and may endanger the

<sup>39</sup> *Ibid.*, paras. 9-10.

<sup>40</sup> *Ibid.*, paras. 11-17.

<sup>41</sup> *Ibid.*, paras. 18 -42.

<sup>42</sup> *Ibid.*, paras. 43-48.

<sup>43</sup> First Appeal, conclusive paragraph.

<sup>44</sup> Decision on the ██████████ Defence Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 17 July 2014, D186/3 (the “Second Impugned Decision”).

<sup>45</sup> Second Impugned Decision, paras. 20-25.



confidentiality of the investigation. The ICIJ also noted the fact that the RICIJ Notification did not grant to the Suspect any right to participate in the judicial investigation. Second,<sup>46</sup> the ICIJ reiterated his opinion, previously maintained in his Decision rejecting the request for access to another Suspect,<sup>47</sup> that the Suspect is not a charged person as provided in the Internal Rules, nor is he “substantially affected” by the investigation and that the Internal Rules, which distinguish between the rights of a suspect and those of a charged person, do not give the Suspect access rights. Third,<sup>48</sup> the ICIJ found that the Co-Lawyers argument that access to the Case file is necessary for meaningful participation in the investigation fails to take into account that Internal Rule 55(10) grants participatory rights only to charged persons and not to suspects. The ICIJ also stated that he will ensure that all parties have sufficient time to effectively exercise such rights before closing the investigation. Fourth,<sup>49</sup> the ICIJ found that the difference in the timing of charging in Case 002 and 004 does not constitute a violation of the Suspect’s right to equal treatment as such timing depends on the assessment of the evidence gathered in each case. Further, making reference to jurisprudence from other international courts and tribunals, the ICIJ found that the right to adequate time does not require that a suspect, charged person or accused be given the same amount of time as the Co-Prosecutors or other parties. Fifth,<sup>50</sup> making reference to previous similar findings, the ICIJ found that this Suspect also, not being a party to the proceedings, does not have standing to submit an application for annulment pursuant to Internal Rule 76.

16. On 21 July 2014, the Co-Lawyers filed a Notice of Appeal against the Second Impugned Decision and on 13 August 2014 they filed the Second Appeal. The Second Appeal was notified in English on 15 August 2014 and in Khmer language on 2 September 2014.
17. The Appellant does not make any request for a hearing on appeals and no Responses to the Appeals were filed within the legal deadline.

<sup>46</sup> Second Impugned Decision, paras. 26-28.

<sup>47</sup> Decision on the ██████ Defence requests to access the Case File and take part in the Judicial Investigation, 31 July 2013, D121/4.

<sup>48</sup> Second Impugned Decision, para. 29.

<sup>49</sup> Second Impugned Decision, paras. 30-31.

<sup>50</sup> Second Impugned Decision, para. 32.





## II. SUBMISSIONS ON APPEAL

### The First Appeal:

18. In the First Appeal, the Co-Lawyers ask the Pre-Trial Chamber to: 1) Find the First Appeal admissible 2) Reverse the First Impugned Decision<sup>51</sup> and 3) Order the OCIJ to grant the Defence *immediate* access to the Case File *pending any reconsideration* by the ICIJ of the RICIJ Notification.<sup>52</sup>
19. The Co-Lawyers, submitting that the provisions of Internal Rule 21(1)(a), which require that ECCC proceedings are fair and adversarial and preserve a balance between the rights of the parties, are also applicable to Suspects, argue that the First Appeal is admissible under Internal Rule 21 which warrants a broader interpretation<sup>53</sup> of the right to appeal in order to ensure that the Appellant's rights are safeguarded. If the First Appeal is not allowed, the Co-Lawyers add, the Appellant's fair trial rights to equality of arms and adequate time and facilities to prepare his defence "will be severely affected."<sup>54</sup>
20. The Co-Lawyers then argue that since ICIJ did not reconsider, rescind or vacate the RICIJ Notification, it still stands and the Appellant has *de jure* access to the Case File.<sup>55</sup> As such, the Co-Lawyers further argue, the Appellant merits *de facto* access and its denial by the ICIJ is "not based on any law or legal provision; it is arbitrary, violates the principle of natural justice and procedural fairness" and infringes upon "[the Appellant's] fundamental right to legal certainty."<sup>56</sup>
21. Thirdly, the Co-Lawyers argue, the lack of access to the Case File prejudices the Appellant in three ways.<sup>57</sup> First, the Co-Lawyers submit that they are unable to safeguard the interest of of the Appellant in the investigation because they are not yet allowed to actively participate in the investigation which opportunity, they argue, should be offered at the

<sup>51</sup> First Appeal, introductory paragraph.

<sup>52</sup> *Ibid.*

<sup>53</sup> First Appeal, para. 6 referring in footnote 15 to related Pre-Trial Chamber jurisprudence.

<sup>54</sup> First Appeal, paras. 6-7.

<sup>55</sup> First Appeal, para. 8.

<sup>56</sup> First Appeal, paras. 9-10.

<sup>57</sup> First Appeal, paras. 11-22.



earliest opportunity in order to ensure that the Appellant's rights have full effect.<sup>58</sup> Second, The Co-Lawyers argue, since the Appellant has been notified that he is a Suspect, he is automatically entitled to adequate time and facilities to prepare his defence under Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR) and the *de facto* denial of access infringes upon this right.<sup>59</sup> Third, the Co-Lawyers state, the principle of equality of arms, enshrined in Article 14(3) of the ICCPR, which was adopted in Internal Rule 21(1)(a), requires that individuals subject to prosecution are afforded a reasonable opportunity to present their case under conditions that do not place them at a "substantial disadvantage" in relation the other parties. Noting that the Co-Prosecutors have had access to the Case File since 7 September 2009 and the Civil Parties since 8 August 2011, the Co-Lawyers argue that a difference in timing for granting access to the Case File and in being allowed to participate in the judicial investigation has created an imbalance "between the ability of the parties to state their case".<sup>60</sup>

22. Lastly, the Co-Lawyers argue that granting *de facto* access to the Appellant is in the interests of justice and does not endanger the confidentiality of the investigation.<sup>61</sup> The Co-Lawyers submit that the granting of *de facto* access to the Appellant is in the interests of justice because it will stop the ongoing violation of his rights.<sup>62</sup> Further, the Co-Lawyers argue, the ICIJ has not reasoned or specified how or provided any proof to demonstrate that access by the Appellant will endanger the confidentiality. As such, the Co-Lawyers argue, the ICIJ's assertion in this respect is an abuse of his judicial discretion.<sup>63</sup>

### **The Second Appeal**

23. In the Second Appeal, the Defence requests the Pre-Trial Chamber to: "1) Admit the Appeal; 2) Order the OCIJ to grant the Defence immediate access to the Case File; and 3) Annul the OCIJ Investigative Action from 9 January 2014 until the date the Defence is granted access to the Case File."<sup>64</sup>

<sup>58</sup> First Appeal, paras. 13-16.

<sup>59</sup> First Appeal, paras.17-19.

<sup>60</sup> First Appeal, paras. 20-22.

<sup>61</sup> First Appeal, paras. 23 – 25.

<sup>62</sup> First Appeal. Para. 24.

<sup>63</sup> *Ibid.*, 25.

<sup>64</sup> Second Appeal, p. 25.



24. The Defence argues that the Second Appeal is admissible solely on the basis of Internal Rule 21 as the Appellant's fundamental rights to legal certainty, transparency of proceedings, equality of arms and adequate time and facilities to prepare his defence will be severely affected if there is no right to appeal. They propose that, as Internal Rule 21 is also applicable to Suspects, the Pre-Trial Chamber could adopt a broader interpretation of the right to appeal in order to ensure that the fair trial rights of Suspects are safeguarded in a similar fashion as it has previously done in regards to the rights of Charged Persons.<sup>65</sup> The Defence seeks to impugn the Second Decision on three grounds.
25. Firstly, the Defence argues that the ICIJ erred in finding that the RICIJ abused his discretion and committed an error of reasoning in granting access to the Appellant.<sup>66</sup> They submit that the ICIJ did not meet the standard for reconsideration of RICIJ's Notification and argue that, in any event, the RICIJ did not commit an error of reasoning in granting access to the case file to the Appellant. Disagreeing with the findings in the Second Decision, they argue that the Appellant, who is "subject to prosecution," should be considered a Charged Person and therefore afforded access rights. The Appellant need not be formally charged in order to be granted access because, to the Defence's understanding, the ICIJ should follow the position of the CIJs in Case 002 which was that "any person named in the Introductory Submission is referred to as the Charged Person"<sup>67</sup> and also because the Appellant is subject to "criminal charges" within the meaning of the jurisprudence of the European Court of Human Rights (ECHR). Further, the Defence argues that, since the Appellant is already named in the Introductory Submission, the ICIJ does not need "clear and consistent evidence" against him in order to consider the Appellant a Charged Person and to allow him access to the case file. Lastly, the Defence contends that the ICIJ's assertion that the Appellant's access to the Case File, as a non-party, may endanger the confidentiality of the investigation is arbitrary because, they state, the ICIJ has already granted access rights to other non-parties, the Civil Party Applicants in Case 004.

<sup>65</sup> Second Appeal, paras. 15-16.

<sup>66</sup> Second Appeal, paras 28 – 41.

<sup>67</sup> Second Appeal, para 37 and footnote 67.



26. Secondly, the Defence argues that the ICIJ erred in finding that the Appellant's fundamental rights are not violated by revoking access to the case file.<sup>68</sup> The Defence submits that contrary to the ICIJ assertions in the Impugned Decision, the RICIJ did provide reasoning for granting access, "clearly stating that, inter alia, access to the Case File was given in *accordance with Internal Rule 21*",<sup>69</sup> which requires the ECCC to safeguard the rights and interests of Suspects. Access to the Case File ensures that the Appellant is treated similarly to those investigated in Case 002 and is necessary, states the Defence, in order for the Appellant to participate in the investigation. A difference in timing for access to the Case File and to participate in the investigation has also created, according to the Defence, an imbalance between the ability of the parties (referring to the Appellant, the Co-Prosecutors and the Civil Parties) to state their case and therefore violates the Appellant's right to equality of arms. The Defence contends that revoking the Appellant's access to the case file violates his right to adequate time and facilities to prepare a defence which has to be guaranteed as provided in Article 14(3)(b) of the ICCPR and pursuant to ECHR jurisprudence means an entitlement of an individual "to have knowledge of and comment on the observations filed and evidence adduced by the other party' before a decision to indict him is taken, if this is eventually the case",<sup>70</sup> which would require more time for the Defence to acquire in Case 004 than it did in Case 002 where the number of crime sites was half of that in Case 004.
27. Thirdly, the Defence submits that the ICIJ erred in finding that the Appellant does not have standing to submit an application for annulment pursuant to Internal Rule 76.<sup>71</sup> The Defence maintains that the Appellant who is subject to prosecution is entitled to the rights of a party to the proceedings.

### III. EXPRESSION OF OPINION AND CONCLUSION

28. The Defence argues that the Appeals must be admitted solely on the basis of Internal Rule 21 as the Appellant's fundamental rights to legal certainty, to transparency of proceedings, to equality of arms and to adequate time and facilities to prepare his defence will be severely affected if there is no right to appeal. The Defence proposes that, as Internal Rule

<sup>68</sup> Second Appeal, paras. 42 – 52.

<sup>69</sup> Second Appeal, para 44, referring to the RICIJ Notification, para. 4.

<sup>70</sup> Second Appeal, para. 50.

<sup>71</sup> Second Appeal, paras. 53 – 56.



21 is also applicable to Suspects, the Pre-Trial Chamber could adopt a broader interpretation of the right to appeal in order to ensure that the fair trial rights of Suspects are safeguarded in a similar fashion as it has previously done in regards to the rights of Charged Persons. The ultimate benefit that the Appellant seeks to gain through the Appeals is to get access to the whole Case File in Case 004, to be allowed to participate in the investigation and to be allowed to make requests for annulment pursuant to the Internal Rules. At the heart of the Appeals lies the issue whether the Appellant, being a Suspect named in the Introductory Submission, is entitled to these rights at this stage of the proceedings. The Impugned Decisions prevent the Appellant from enjoying these rights until he is formally charged.

29. Reference is made to Internal Rules 48, 55(10) and 76 which provide on procedures applicable for submission of requests for investigation and applications for annulment. Reference is also made to Internal Rule 55(6) which provides on procedures applicable for access to the Case File. Each of these Rules which describe rights of a procedural nature and make explicit reference to the term “Charged Person” and not to the term “Suspect.” In turn, Internal Rules 73 and 74 which provide on the jurisdiction of the Pre-Trial Chamber to hear appeals or applications in respect of ICIJ Decisions rejecting requests for investigation or annulment, also make explicit reference to the term “Charged Person” and not to the term “Suspect.” Reference is, finally, made to Internal Rule 21 which lays the fundamental principles for the procedure applicable before the ECCC.

30. The Pre-Trial Chamber previously held that the fundamental principles expressed in Internal Rule 21, which reflect the fair trial requirements that the ECCC is bound to apply pursuant to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia,<sup>72</sup> 35<sup>new</sup> of the ECCC Law<sup>73</sup> and 14(3) of the ICCPR,<sup>74</sup> may

<sup>72</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea Democratic, 6 June 2003.

<sup>73</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Kampuchea Democratic, with inclusion of amendments as promulgated on 27 October 2004 (“ECCC Law”).

<sup>74</sup> See, e.g., Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, paras. 13-18; 27 (“It is clear that Article 14(3) of the ICCPR provides that a person facing criminal charges enjoys certain minimum guarantees, including the right to have adequate time and facilities to prepare his defence [...]. The Pre-Trial Chamber is specifically directed to take into account Article 14 of the ICCPR by the operation of Article 13 of the Agreement and by Article 35 new of the



warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of the parties.<sup>75</sup> Where the particular facts and circumstances of a case required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or “serious issue[s] of fairness”, by either adopting a broad interpretation of a specific provision granting a right to appeal<sup>76</sup> or even by assuming jurisdiction over appeals that did not fall within its explicit jurisdiction, on the basis of Internal Rule 21.<sup>77</sup>

31. The Pre-Trial Chamber is divided on the issue of whether the Appellant has standing to bring appeals under Internal Rules 74 and 76, given that he has not been officially notified of the charges against him pursuant to the procedure set forth in Internal Rule 57. Judges PRAK, HUOT and NEY hold that the Appellant, being neither a “Charged Person” nor an “Accused” under the Internal Rules, cannot lodge appeals under Internal Rules 74 and 76. By contrast, Judges CHUNG and DOWNING, adopting a different interpretation of Internal Rules 74 and 76, in the light of Internal Rule 21, find that the Appellant has standing to bring such appeals, given that what is specifically challenged is the interpretation of the notion of “Charged Person” adopted by the ICIJ in the Impugned Decisions, and opine that, at this stage of the proceedings, the Appellant’s fundamental fair trial rights mandate that he be granted the same procedural rights as those provided for Charged Persons. The Pre-Trial Chamber’s Judges remain divided in their opinions and maintain their respective interpretations on this issue which is central to these Appeals.<sup>78</sup>

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ECCC Law. In the instant matter the Pre-Trial Chamber must determine whether, contrary to Rule 21, the Impugned Order deprives the Appellant of the rights guaranteed by Article 14 of the ICCPR.”)

<sup>75</sup> See, e.g., Case 002 (PTC11), Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; Case 002 (PTC71), Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4 (“Decision on IENG Sary’s Response”), para. 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No. 2 (“Decision on Errors in Translation”), para. 3; Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

<sup>76</sup> See, e.g. Case 002 (PTC05), Decision on the Admissibility of the Appeal Lodged by IENG Sary on Visitation Rights, 21 March 2008, A104/II/4, para. 10.

<sup>77</sup> See, e.g., Case 002 (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary’s Response, para. 13 and Decision on Errors in Translations, paras 2-6.

<sup>78</sup> For a full count of the different interpretations and opinions of the Pre-Trial Chamber Judges on point, please look at: Considerations of the Pre-Trial Chamber on [REDACTED] Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation, D121/4/1/4, 15 January 2014, which are made available to the public.

*Considerations of the Pre-Trial Chamber on [REDACTED] Appeals against the International Co-Prosecutors’ Investigating Judge’s Decisions Denying his Requests to Access the Case File and Take Part in the Judicial Investigation*



Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the Appeals.

32. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Decisions shall stand.

#### IV DISPOSITION

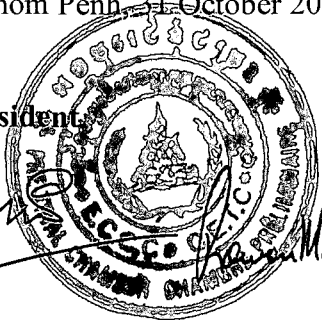
**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of at least four judges for a decision on the Appeals.

In accordance with Internal Rule 77(13), there is no possibility to appeal.

Phnom Penh, 31 October 2014

President



Pre-Trial Chamber

*[Handwritten signature of PRAK Kimsan]*

**PRAK Kimsan**    **Rowan DOWNING**

*[Handwritten signatures of NEY Thol, Chang-ho CHUNG, and HUOT Vuthy]*

**NEY Thol**    **Chang-ho CHUNG**    **HUOT Vuthy**