



**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: A157/2/1/2

*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 (PTC13)

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

**Date:** 21 November 2014

<b>ឯកសារដើម</b>
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**PUBLIC**

**CONSIDERATIONS OF THE PRE-TRIAL CHAMBER ON [REDACTED] APPEAL AGAINST THE DECISION DENYING HIS APPLICATION TO THE CO-INVESTIGATING JUDGES REQUESTING THEM TO SEIZE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNUL THE JUDICIAL INVESTIGATION**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████ Appeal against the Decision Denying his Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with a View to Annul the Judicial Investigation,” filed by the Defence on 4 September 2014 (the “Appeal”).<sup>1</sup>

## 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>2</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>3</sup>
2. On 29 July 2010 and on 20 September 2010, the Defence Support Section (the “DSS”) requested access to the case files for the suspects in Cases 003 and 004, and the granting of other procedural rights as set out in Internal Rules (the “IRs”) 55(8), 55(10) and 21.<sup>4</sup> On 23 September 2010, the Co-Investigating Judges (the “CIJs” Judges YOU and BLUNK) declined to grant access to Case Files since they *did not consider the Suspects to be party to the proceedings as they had not been officially charged*.<sup>5</sup>
3. On 24 February 2012, the Reserve International Co-Investigating (“RICIJ” Judge Kasper-Ansermet) issued the Notification of Suspect’s Rights whereby the RICIJ informed ██████████ ██████████ that he is a named suspect in Case 004 (the “RICIJ Notification”).<sup>6</sup> The RICIJ also informed ██████████ that, in accordance with Rule 21(1)(d), he has certain rights including the right to have access to Case File 004 (application, by analogy, of Rule 55(6), 55(1) and

<sup>1</sup> ██████████ Appeal Against the Decision Denying his Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with a View to Annul the Judicial Investigation, 3 September 2014, A157/2/1/1.

<sup>2</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>3</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.

<sup>4</sup> Letter from the Chief of the DSS to the Co-Investigating Judges entitled “DSS letter on defence rights in case 003 and 004”, 29 July 2010, D4.1.29; Follow-up to DSS letter on defence rights in case 003 and 004, 20 September 2010, A1/1.

<sup>5</sup> Letter from the Co-Investigating Judges to the Chief of the DSS entitled “Response of the CIJs on Defence rights in Case File 003 and 004,” 23 September 2010, D4.1.31.

<sup>6</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D109, para.1.

58, *except for the provision of Rule 58(6) of the ECCC*.<sup>7</sup> On 4 May 2012, the RICIJ issued a Press Release in which he informed the public that the suspects, including [REDACTED], had been granted access to the Case File.<sup>8</sup>

4. On 6 March 2014, the Co-Lawyers for [REDACTED], 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>9</sup>
5. On 22 April 2014, the ICIJ issued a Notification in Relation to the Appellant’s Urgent Motion (the “Deferral Notice”).<sup>10</sup> In the Deferral Notice, informing that the RICJ 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 RICJ Notification only in this respect<sup>11</sup> and, as this part of the RICJ 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 RICIJ Notification.<sup>12</sup>
6. On 7 May 2014, the Co-Lawyers filed to the Co-Investigating Judges [REDACTED] Submission on the reconsideration of the Decision to grant [REDACTED] access to the Case File (the “Submission on Reconsideration”).<sup>13</sup> They argued that there is no legitimate basis to reconsider the access to the Case File.<sup>14</sup> Second, they took the view that [REDACTED] should have the same rights as a Charged Person<sup>15</sup> and that the denial to access the Case File violates his rights to a fair trial.<sup>16</sup> *Moreover, they requested the parial annullment of the investigations carried out against him during the time that he did not have access.*<sup>17</sup>

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

<sup>8</sup> ECCC Press Release, “Press Release by the Reserve International Co-Investigating Judge,” 4 May 2012, available at <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20IntOCIJ%204%20May%202012En-corrected.pdf>.

<sup>9</sup> [REDACTED] Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 6 March 2014, D186.

<sup>10</sup> Notification in Relation to [REDACTED] Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation, 22 April 2014, D186/1.

<sup>11</sup> *Ibid.*, paras. 1, 7.

<sup>12</sup> *Ibid.*, p. 4.

<sup>13</sup> [REDACTED] Submission on the Reconsideration of the Decision to Grant [REDACTED] Access to the Case File, 7 May 2014, D186/2.

<sup>14</sup> *Ibid.*, paras. 9-17.

<sup>15</sup> *Ibid.*, paras. 18-27.

<sup>16</sup> *Ibid.*, paras. 18-27.

<sup>17</sup> *Ibid.*, paras. 18-27.

7. On 20 May 2014, the Co-Lawyers filed before the Co-Investigating Judges the Application in which they request the latter *to seize the Pre-Trial Chamber with a view of annulling the Judicial Investigation* by arguing that *ECCC lacks personal jurisdiction over* [REDACTED] (the “Application”).<sup>18</sup>
8. On 17 July 2014, the International Co-Investigating Judge issued his Decision on the [REDACTED] Defence Urgent Motion to Access the Case File and take part in the Judicial Investigation (the “Access Decision”).<sup>19</sup> In the Access Decision, the ICIJ *declared that* [REDACTED] *is not a party to the proceedings and therefore is denied access to the Case File.*<sup>20</sup> Based on the same grounds, for lack of standing, the ICIJ found that [REDACTED] *does not have standing to submit applications for annulment pursuant to Internal Rule 76* either.<sup>21</sup>
9. On 4 August 2014, the ICIJ issued a Decision on [REDACTED] Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File (the “Filings Decision”).<sup>22</sup> In the Filings Decision, the ICIJ drew attention to the fact that, *as regards the Application, “a judicial determination has already been made in the Access Decision that suspects do not have standing to submit such applications.”*<sup>23</sup> The ICIJ, then decided to place the Application in the administrative (“A”) partition of the Case File “pending any change in the suspect's status.”<sup>24</sup>
10. On 6 August 2014, the Defence filed to the Co-Investigating Judges an Urgent Request for Clarification (“Request for Clarification”).<sup>25</sup> In the Request for Clarification the Defence, noticing that the Access Decision and the Filings Decision imply that a decision on the Annulment Request has been made to deny it on the basis that [REDACTED] is a Suspect and therefore has no standing to bring a request for annulment, indicate that it is not clear

<sup>18</sup> [REDACTED] Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with a view to Annul the Judicial Investigation, A157, 9 May 2014,

<sup>19</sup> Decision on the [REDACTED] Defence Urgent Motion to Access the Case File and take part in the Judicial Investigation, 17 July 2014, D186/3

<sup>20</sup> *Ibid.*, Para. 33.

<sup>21</sup> *Ibid.*, para 32. This decision pertains to [REDACTED] previous request for annulment, filed as part of their Submission on Reconsideration on 7 May 2014.

<sup>22</sup> Decision On [REDACTED] Request To The Co-Investigating Judges To Order The OCIJ Greffier To Immediately Place The Defence’s Filings On The Case File, 4 August 2014, D202/2.

<sup>23</sup> The Filings Decision, para. 14.

<sup>24</sup> The Filings Decision, para. 15.

<sup>25</sup> [REDACTED] Urgent Request For Clarification As To Whether A Decision Has Been Issued On His Annulment Request, A157/1, 6 August 2014.

whether there has been a specific decision on the Annulment Request which, they request, they need to know in order to proceed with an appeal.<sup>26</sup>

11. On 8 August 2014, the ICIJ responded to the Request for Clarification by noting that he had already determined in the Filings Decision, as also previously determined in the Access Decision, that “suspects do not have standing to file applications pursuant rule 76” and clarifying that “the Application has been rejected as inadmissible” (“the Impugned Decision”).<sup>27</sup>
12. On 13 August 2014, the Co-Lawyers filed [REDACTED] Appeal against the Access Decision in which they requested the Pre-Trial Chamber to admit the Appeal; to order the OCIJ to grant the Defence immediate access to the Case File *and to annul the investigation from 9 January until the date the Defence is granted access to the Case File* (the “Access Appeal”).<sup>28</sup>
13. On 15 August 2014, the Defence gave notice of the intention to appeal<sup>29</sup> the Impugned Decision and on 4 September 2014 they filed the Appeal. The Defence does not make a request for hearing on the Appeal and no response to the Appeal was filed within the legal deadline.
14. On 31 October 2014 the Pre-Trial Chamber issued its Considerations on [REDACTED] Appeal against the Access Decision (the “Access Appeal Considerations”).<sup>30</sup> In the Access Appeal Considerations, the Pre-Trial Chamber declared that “[d]espite its efforts, [it] ha[d] not attained the required majority of four affirmative votes in order to reach a decision on the Appeal.”<sup>31</sup> The Pre-Trial Chamber stated that it remained “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

<sup>26</sup> Request for Clarification, para. 8.

<sup>27</sup> Response To [REDACTED] Urgent Request For Clarification As To Whether A Decision Has Been Issued On His Annulment Request, A157/2, 8 August 2014.3.

<sup>28</sup> [REDACTED] Appeal against the Decision on his Urgent Motion to access the case file and take part in the judicial investigation, 13 August 2014, D186/3/1/1.

<sup>29</sup> Appeal Register of Appeal Against ICIJ's Response To [REDACTED] Urgent Request For Clarification As To Whether A Decision Has Been Issued On His Annulment Request, A157/2/1, 15 August 2014.

<sup>30</sup> Considerations of the Pre-Trial Chamber on [REDACTED] Appeals Against the International Co-Investigating Judges' Decisions Denying His Requests to Access the Case File and to Take Part in the Investigation, D192/1/1/2 and D186/3/1/2, 31 October 2014.

<sup>31</sup> *Ibid.*, disposition.

forth in Internal Rule 57.”<sup>32</sup> As the Pre-Trial Chamber did not reach a decision on the Access Appeal, Internal Rule 77(13) dictates that the Access Decision stands.<sup>33</sup>

### The Appeal

15. In the Appeal the Defence requests the Pre-Trial Chamber to admit the Appeal and to annul the entire investigation on the grounds that the ECCC does not have personal jurisdiction over ██████████.<sup>34</sup> The Defence submits that the Appeal is admissible under three options.
16. First, the Defence states, the Appeal is admissible under Internal Rule 74(3)(g) because at the time the Application was filed the RICIJ Notification had not been reconsidered and as such, according to the Defence, ██████████ was considered *de jure* to be taking part in the judicial investigation, which would include making applications requesting the Co-Investigating Judges to seize the Pre-Trial Chamber with an application for annulment in accordance with Internal Rule 76(2).<sup>35</sup>
17. Second, the Defence adds, the Appeal is admissible under Internal Rule 74(3)(g) through a broad interpretation of ██████████ right to appeal under Internal Rule 21 which is also applicable to Suspects and because ██████████ rights under Article 14(1) of the ICCPR are being violated due to him being investigated by, as the Defence submits, an incompetent tribunal.<sup>36</sup>
18. Lastly, making reference to the jurisprudence of the Pre-Trial Chamber, the Defence argues that, as it raises issues of fundamental fair trial rights, the Appeal is also admissible solely on the basis of Internal Rule 21.<sup>37</sup>
19. The Defence argues, in the first ground of Appeal, that the ICIJ erred in finding the Application inadmissible on the grounds of a “*restrictive definition* of who can bring an application for annulment” which excludes suspects, because such definition, the Defence submits, fails to take into account the fundamental rights of ██████████.<sup>38</sup> Secondly, the Defence contends, the judicial investigation must be annulled as it violates ██████████ right

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<sup>32</sup> *Ibid.*, para. 31.

<sup>33</sup> *Ibid.*, para. 33.

<sup>34</sup> Appeal, Relief Requested.

<sup>35</sup> Appeal, para. 17.

<sup>36</sup> Appeal, para. 18.

<sup>37</sup> Appeal, para. 19.

<sup>38</sup> Appeal, paras. 26-29.

to be investigated and tried by a *competent court*.<sup>39</sup> Lastly, referring to the jurisprudence of the Pre-Trial Chamber, the Defence argues that “it is possible to annul an entire investigation” and requests that the *entire* judicial investigation must be annulled.<sup>40</sup>

## II. CONSIDERATIONS

20. Notwithstanding whether the admissibility of the Appeal is argued under Internal Rules 74 and 76 or Internal Rule 21, the Pre-Trial Chamber notes that, at the heart of the admissibility arguments lies the issue *whether the Appellant, being a Suspect named in the Introductory Submission, is entitled to file motions*, be these applications or appeals, seeking to exercise procedural rights such as: 1) submitting applications to the Co-Investigating Judges requesting them to seize the Pre-Trial Chamber with a view to annulment and 2) appealing against the orders or decisions of the Co-Investigating Judges refusing such applications.
21. The Pre-Trial Chamber notes that the issue of standing, or whether a motion is properly raised, “has been previously considered by the Pre-Trial Chamber and it is also part of the jurisprudence of other international tribunals’ in their *examination of admissibility* for motions.”<sup>41</sup>
22. The Pre-Trial Chamber is divided on the issue of whether the Appellant has standing to bring appeals under Internal Rules, 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

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<sup>39</sup> Appeal, paras. 30-59.

<sup>40</sup> Appeal, paras. 60-62.

<sup>41</sup> Decision on Motion for Reconsideration of the Decision on the Defence Support Section Request for a Stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures pertaining to the Effective Representation of Suspects in Case 004, 4 October 2012, Doc. No. 5 (Appeal No. PTC 01), para. 4 referring to previous ECCC and international jurisprudence on point.

trial rights mandate that he be granted the same procedural rights as those provided for Charged Persons. The Pre-Trial Chamber Judges remain divided in their opinions and maintain their respective interpretations on this issue which is central to these Appeals. 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 Appeal.<sup>42</sup>

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

### III. 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 Appeal.

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

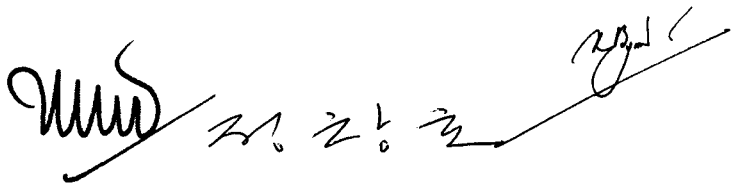
Phnom Penh, 21 November 2014

President

Pre-Trial Chamber



PRAK KITSAN CHAN Rowan DOWNING



NEY Thol Chang-Ho CHUNG HUOT Vuthy

<sup>42</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.