



**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 Preliminaire

D347/2/1/4

*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 (PTC47)

**THE PRE-TRIAL CHAMBER**

Before:

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

Date:

25 October 2017

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
26 / 10 / 2017	
ម៉ោង (Time/Heure):	
13:00	
អង្គបុរេជំនុំជម្រះ/Case File Officer/L'agent chargé du dossier:	
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PUBLIC REDACTED

**DECISION ON [REDACTED] APPEAL OF THE DECISION ON REQUEST TO PLACE MATERIALS ON CASE FILE 004**

**Co-Prosecutors**

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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “██████████ Appeal of the Decision on the International Co-Prosecutor’s Request to Place Materials on Case File 004”, filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and the “Appellant”) on 17 July 2017 (the “Appeal”).<sup>1</sup>

## I. INTRODUCTION

1. The Appellant requests the Pre-Trial Chamber to overturn the decision issued by the International Co-Investigating Judge instructing to place materials, including Case File 002/02 videos and trial transcripts, as well as a Case File 003 written record of interview and maps, on Case File 004 (the “Impugned Decision”).<sup>2</sup>

## II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him.<sup>3</sup>

3. On 15 March 2017, the International Co-Prosecutor filed a request for investigative action seeking the placement of materials on Case File 004.<sup>4</sup>

4. On 30 May 2017, the International Co-Investigating Judge issued the Impugned Decision.<sup>5</sup>

<sup>1</sup> Case No. 004/07-09-2009-ECCC-OCIJ (“Case 004”), ██████████ Appeal of the Decision on the International Co-Prosecutor’s Request to Place Materials on Case File 004, 17 July 2017, D347/2/1/2 (“Appeal”), notified in English on 24 July 2017 and in Khmer on 1 August 2017. *See also* Case 004, Request to File ██████████ Appeal of the Decision on the International Co-Prosecutor’s Request to Place Materials on Case File 004 in One Language, 13 July 2017, D347/2/1/1.

<sup>2</sup> Case 004, Decision on the International Co-Prosecutor’s Request to Place Materials on Case File 004, 30 May 2017, D347/2 (“Impugned Decision”).

<sup>3</sup> Case 004, Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

<sup>4</sup> Case 004, International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 and 003 Materials onto Case 004, 15 March 2017, D347. *See also* Case 004, ██████████ Response to the International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 and 003 Materials onto Case 004 (D347), 27 March 2017, D347/1.

<sup>5</sup> *See supra* footnote 2.



5. On 21 June 2017, the Co-Lawyers filed a notice of appeal<sup>6</sup> and, on 17 July 2017, their submissions on appeal.<sup>7</sup> The International Co-Prosecutor filed a response on 11 August 2017.<sup>8</sup> No reply was filed within the prescribed deadline.

### III. ADMISSIBILITY

#### A. Submissions

6. The Co-Lawyers submit that the Appeal is admissible under Internal Rule 21,<sup>9</sup> since the situation addressed in the Impugned Decision does not fall within the applicable rules<sup>10</sup> and allegedly violates the Appellant's right to participate in the proceedings against him and right to equality of arms.<sup>11</sup> They contend that the violation has an immediate and irremediable detrimental impact as adverse findings could be made against the Appellant, on the basis of Case 002 transcripts placed onto Case File 004, in the closing order.<sup>12</sup> They further stress that the Case 002 transcripts have already been placed onto Case File 004 and that the matter is thus not hypothetical.<sup>13</sup>

7. The International Co-Prosecutor responds that the Appeal is inadmissible,<sup>14</sup> since the alleged harm is hypothetical and, even if proven, would not meet the gravity threshold to necessitate the intervention of the Pre-Trial Chamber.<sup>15</sup> He underlines that the consequence that adverse findings "could" be made and that the Appellant "could" be charged on the basis of Case 002 transcripts placed on Case File 004 is pure speculation<sup>16</sup> and that the placement of inculpatory evidence on the Case File is not a cognisable harm.<sup>17</sup> He further submits that

<sup>6</sup> Case 004, ██████████ Notice of Appeal against the Decision on International Co-Prosecutor's Request to Place Materials on Case File 004, 21 June 2017, D347/2/1.

<sup>7</sup> See *supra* footnote 1.

<sup>8</sup> Case 004, International Co-Prosecutor's Response to ██████████ Appeal against the Decision to Place Materials on Case File 004, 11 August 2017, D347/2/1/3 ("Response").

<sup>9</sup> Appeal, para. 10.

<sup>10</sup> Appeal, para. 11.

<sup>11</sup> Appeal, para. 12.

<sup>12</sup> *Ibid.*

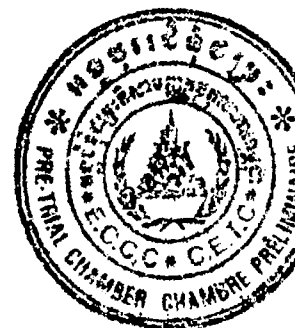
<sup>13</sup> Appeal, para. 13.

<sup>14</sup> Response, paras 2-6.

<sup>15</sup> Response, para. 2.

<sup>16</sup> Response, para. 3.

<sup>17</sup> Response, para. 4.



Internal Rule 21 should not be used to find admissible an appeal seeking to supplement arguments raised in a distinct annulment procedure already pursued by the Appellant.<sup>18</sup>

## B. Discussion

8. The Pre-Trial Chamber observes that the Appeal does not fall within its subject-matter jurisdiction under Internal Rule 74. It further recalls that, while Internal Rule 21 may warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial, it does not provide an automatic avenue for appeals raising arguments based on fair trial rights. The appellant must demonstrate that, in the particular circumstances of the case at stake, the Pre-Trial Chamber's intervention is necessary to prevent *irremediable damage* to the fairness of the proceedings or the appellant's fair trial rights.<sup>19</sup>

9. In the present case, the Appellant has not demonstrated that his rights under Internal Rule 21 would be at risk of being irremediably impaired if the Impugned Decision is not reversed. The Pre-Trial Chamber considers that no irremediable damage to the appellant's fair trial rights arises from the mere placement of inculpatory evidence on the Case File. It is indeed, at this stage, only possible to speculate whether the Co-Investigating Judges will rely on the material placed onto Case File 004 in the drafting of the closing order, which is appealable. The Pre-Trial Chamber observes, in particular, that the Impugned Decision states that the Case 002 transcripts placed onto Case File 004 "*may* be an appropriate and efficient means for corroboration and for undertaking a reliability assessment of evidence already on the Case File"<sup>20</sup> and "*may* assist the [Co-Investigating Judges] in assessing the reliability and credibility of [written records of interview already on the Case File]".<sup>21</sup> The Pre-Trial Chamber thus finds the alleged harm hypothetical and the Appeal inadmissible.

<sup>18</sup> Response, para. 5 referring to Case 004, ██████████ Application to Annul the Placement of Case 002 Oral Testimonies onto Case File 004, 30 June 2017, D360/1/1/2.

<sup>19</sup> See, e.g., Case 004/2/07-09-2009-ECCC/OCIJ (PTC44), Decision on ██████████ Appeal Against Internal Rule 66(4) Forwarding Order, 6 September 2017, D351/2/3, para. 8; Case 004 (PTC25), Decision on Appeal Against Order on ██████████ Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4, para. 21.

<sup>20</sup> Impugned Decision, para. 31 [emphasis added].

<sup>21</sup> Impugned Decision, para. 33 [emphasis added].



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


- **DISMISSES** the Appeal as inadmissible.

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

**Phnom Penh, 25 October 2017**

President

Pre-Trial Chamber



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**PRAK Kimsan**

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**NEY Thol Kang Jin BAIK HUOT Vuthy**