ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

No: D190/1/2

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 (PTC07)

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

Date: **30 September 2014**

PUBLIC (REDACTED VERSION)

DECISION ON [redacted]'S APPEAL AGAINST INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISION DENYING REQUESTS FOR INVESTIGATIVE ACTIONS

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "[redacted]'s Appeal against Decision on [redacted]'s Requests for Investigation" filed in English on 16 May 2014 and in Khmer on 9 June 2014 (the "Appellant" and the "Appeal", respectively).[1]

I. INTRODUCTION

1. The Appeal concerns a decision issued by the International Co-Investigating Judge (the "ICIJ") on 23 April 2014 denying three requests for investigative actions filed by the Appellant on the basis that the Appellant, who is not a "Charged Person" within the meaning of the Internal Rules, does not have standing to file the requests (the "Impugned Decision").

a. Background

2. On 7 September 2009, the then Acting International Co-Prosecutor filed the Third Introductory Submission dated 20 November 2008 with the Co-Investigating Judges, thereby opening and formally commencing a judicial investigation into crimes for which the Appellant, together with others, is alleged to be responsible.[2] The International Co-Prosecutor filed Supplementary Submissions on 18 July 2011[3] and 24 April 2014.[4]

3. On 29 July 2010 and on 20 September 2010, the Defence Support Section (the "DSS") requested access to the case file for the "Suspects" in Case 004 and the granting of other procedural rights, including the right to participate in the judicial investigation as set out in Internal Rules 55(8) and 55(10).[5] On 23 September 2010, the Co-Investigating Judges (Judges YOU and BLUNK) rejected the requests since the "Suspects", including the Appellant, had not been officially charged following the procedure set forth in Internal

[1] D190/1/1.
[2] 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.
[3] Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.
[4] Co-Prosecutors' Supplementary Submissions Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.
[5] 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.

Rule 57, thus were not "party to the proceedings," nor had their interests been "substantially affected" by the investigation.[6]

4. On 29 February 2012, the then Reserve International Co-Investigating Judge (Judge KASPER-ANSERMET) notified the Appellant, in writing and orally, that "he is named as a suspect in the ongoing judicial investigation" and that "in accordance with the Internal Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of Suspect notably include the right to be defended by a lawyer of his [...] choice [and] to have access to the case file" (the "29 February Notification").[7]

5. On 14 December 2012, the Appellant requested the Co-Investigating Judges to order the Office of Administration to provide him access to the case file in Case 004 (the "Request for Access to the Case File").[8] The request was reiterated in a letter sent to the Co-Investigating Judges on 20 December 2012,[9] and then again on 17 June 2013.[10] On 12 March 2013, the Appellant further requested the Co-Investigating Judges to be allowed to participate in the judicial investigation in Case 004, by being present during witnesses' interviews and allowed to submit questions to witnesses (the "Request for Participation in the Investigation").[11]

6. On 31 July 2013, the International Co-Investigating Judge dismissed the Requests for Access to the Case File and for Participation in the Investigation (the "ICIJ Participation Decision").[12] First, the ICIJ reconsidered the portions of the 29 February Notification granting the Appellant access to the case file and vacated them.[13] Then, the ICIJ found that the Appellant, who has not been officially charged, is not a party to the proceedings and therefore not entitled to take part in the investigation nor to have access to the case file

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[6] 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.
[7] Notification of Suspect's Rights [Rule 21(1)(D)], dated 24 February 2012 and notified on 29 February 2012, D110. *See also* Letter to the Defence Support Section on Notification of Suspect's Rights [Rule 21(1)(D)], 6 March 2012, D111, para. 4.
[8] Urgent Motion Requesting Order for Access to the Case File, 14 December 2012, D121/2/1.1.1.
[9] Letter from MOM Luch, Richard ROGERS and Göran SLUITER to the Co-Investigating Judges entitled "[redacted]'s Right to Information as to the Nature and Cause of the Charge Against Him and His Right to Adequate Facilities to Prepare his Defence", 20 December 2012, D121/1.
[10] Letter from MOM Luch and Göran SLUITER to the Co-Investigating Judges and the Co-Prosecutors "concerning the failure of the Co-Investigating Judges to grant access to the case file to the Co-Lawyers for [redacted]", 17 June 2013, D122/7.
[11] Letter from MOM Luch, Richard ROGERS and Göran SLUITER to the Co-Investigating Judges entitled "Participation by the Defence in judicial investigations in Case 004", 12 March 2013, D121/3.
[12] Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4.
[13] ICIJ Participation Decision, para. 49.

pursuant to the ECCC Internal Rules.[14] The ICIJ further found that in the absence of formal charges against the Appellant, there is no other reason making access to the case file necessary to safeguard his fair trial rights.[15]

7. On 30 August 2013, the Defence appealed the ICIJ Participation Decision to the Pre-Trial Chamber (the "Participation Appeal").[16] On 15 January 2014, the Pre-Trial Chamber declared that it has not attained the required majority of four affirmative votes to reach a decision on the appeal and that, pursuant to Internal Rule 77(13), the ICIJ Participation Decision "shall stand" (the "Appeal Considerations").[17] The Pre-Trial Chamber's Judges did not agree on the Appellant's legal status and the extent of his rights at this stage of the proceedings. Judges PRAK, NEY and HUOT held that the Appellant is a "Suspect" owing to the fact that he has not been formally charged and concluded that the Appellant does not have standing to appeal decisions refusing requests for investigative actions under Internal Rule 74(3)(b), which only allows appeals by "Charged Person" or "Accused" ("Judges PRAK, NEY and HUOT Opinion").[18] In contrast, Judges CHUNG and DOWNING found that the Appellant, who has been named in the Introductory Submission filed with the Co-Investigating Judges, is a "Charged Person" within the meaning of the Internal Rules and, as such, is entitled to have access to the case file, through his counsel and subject to possible limitations set out by the Co-Investigating Judges, and to participate in the judicial investigation ("Judges CHUNG and DOWNING Opinion").[19] Judges CHUNG and DOWNING also expressed the view that the Appellant should be given the opportunity to participate in the judicial investigation, at this stage of the proceedings, to safeguard his fair trial rights, notably his right to prepare a defence guaranteed by Article 14(3)(b) of the International Covenant on Civil and Political Rights (the "ICCPR").[20]

8. On 18 February 2014, the Appellant requested reconsideration of the ICIJ Participation Decision (the Request for Reconsideration"),[21] on the basis that: (i) Judges CHUNG and

[14] ICIJ Participation Decision, paras 36-49.
[15] *Ibid.*, paras 50-60.
[16] Appeal against the Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 30 August 2013, D121/4/1/1.
[17] Considerations on [redacted]'s Appeal Against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4, paras 15-16.
[18] *Ibid,* Opinion of Judges PRAK Kimsan, NEY Thol and HUOT Vuthy, para. 8.
[19] *Ibid.*, Opinion of Judges CHUNG and DOWNING, para. 28.
[20] *Ibid.*, Opinion of Judges CHUNG and DOWNING, paras 25-27.
[21] [redacted]'s Motion Requesting Reconsideration of ICIJ's Decision on the [redacted] Defence Requests to Access the Case File and Take Part in Judicial Investigation, 18 February 2014, D121/4/4.

DOWNING Opinion constitutes a change in circumstances;[22] (ii) the ICIJ erred in not considering the Appellant to be a "Charged Person" and instead focusing strictly on the formal requirements for charging at the ECCC;[23] and (iii) denying the Appellant the ability to have access to the case file caused injustice, in violation of Internal Rule 21.[24]

9. On 8 April 2014, the Appellant submitted a request for investigative action pursuant to Internal Rule 55(10) (the "First Request for Investigative Action")[25] requesting the Co-Investigating Judges to investigate [redacted][26] insisting that the thorough conduct of the above-mentioned investigation is "likely to provide exculpatory evidence and alternative versions of events essential to ascertaining the truth in the Appellant's case".[27]

10. On 9 April 2014, the Appellant submitted a second request for investigative action (the "Second Request for Investigative Action")[28] requesting the Co-Investigating Judges to investigate [redacted]

[22] *Ibid*, para. 23.
[23] *Ibid*, para. 28.
[24] *Ibid*, para. 35.
[25] [redacted]'s First Request for Investigative Action Pursuant to Internal Rule 55(10), 8 April 2014, D187.
[26] *Ibid*, para. 33.
[27] *Ibid*, para. 18.
[28] [redacted]'s Second Request for Investigative Action Pursuant to Internal Rule 55(10), 9 April 2014, D188.
[29] *Ibid*, para. 1.

[redacted][30]

11. On 17 April 2014, the Defence submitted a third request for investigative action (the "Third Request for Investigative Action")[31] requesting the Co-Investigating Judges "to fully investigate [redacted][33]

12. On 22 April 2014, the ICIJ rejected the Request for Reconsideration (the "Reconsideration Decision"),[34] as he found no change of circumstances, injustice or error in reasoning that would justify reconsidering his Participation Decision, which became binding following the inability of the Pre-Trial Chamber to reach a decision on the Participation Appeal.

13. On 23 April 2014, the ICIJ issued the Impugned Decision denying the Appellant's Three Requests for Investigative Actions, on the basis that the Appellant, who is a "Suspect", is not entitled to file requests for investigative actions.[35] The ICIJ considered that since the Appellant's status has been the subject of two decisions, was not overturned on appeal and no change of circumstances has warranted reconsideration, the re-submission of the Appellant's arguments was contrary to judicial economy.[36] The ICIJ stated that "[u]nless there is a change in the Suspect's status, [he] will not entertain, nor place on the Case File, further requests filed on behalf of the Suspect for the exercise of rights reserved by the Internal Rules to charged persons".[37] He concluded that should a change in the relevant

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[30] *Ibid.*
[31] [redacted]'s Third Request for Investigative Action Pursuant to Internal Rule 55(10), 17 April 2014, D189.
[32] *Ibid,* para. 1.
[33] *Ibid.*
[34] Decision on Request for Reconsideration of ICIJ's Decision on the [redacted] Defence Requests to Access the Case File and Take Part in Judicial Investigation, 22 April 2014, D121/4/6.
[35] Impugned Decision, para. 5.
[36] *Ibid.*, paras 5-6.
[37] *Ibid.*, para. 6.

circumstances occur, the Appellant will be able to re-submit the Requests for Investigative Actions.[38]

b. The Appeal

14. The Appellant filed his Appeal in English on 16 May 2014 and in Khmer on 9 June 2014. The Appellant submits that the Appeal is admissible under Internal Rules 21, 73(a) and 74(3)(b) as it challenges a decision denying requests for investigative actions[39] and "involves serious violations of [the Appellant's] fundamental rights, which go to the heart of the proceedings' fairness, as well as the equality of arms."[40] The Appellant submits that admissibility of the Appeal should not be denied based on the ICIJ's "erroneous claim that [the Appellant] 'is not a charged person and, as such, he is not entitled to file requests for investigative action'."[41] The Appellant insists that he is not relitigating his status; rather, he argues that as a "Suspect", he should be allowed to submit requests for investigative actions to protect his fundamental rights guaranteed by Article 14 of the ICCPR and Internal Rule 21.[42] On the merits, the Appellant argues that the Impugned Decision contains errors of law because (i) the ICIJ did not provide any legitimate interest for restricting the Appellant's rights to an effective defence and to access the Court under Internal Rule 21 and Article 14 of the ICCPR[43]; (ii) the Impugned Decision jeopardizes the integrity and quality of the investigation and risks the loss of exculpatory evidence;[44] (iii) the Impugned Decision risks denying the Appellant the chance to respond to the allegations against him and therefore causes him prejudice;[45] and (iv) the Impugned Decision fails to provide adequate reasoning and to address any of the arguments raised by the Appellant as required for judicial opinions under ECCC law and international standards.[46] Consequently, the Appellant requests the Pre-Trial Chamber to "overturn the Impugned Decision, order the ICIJ to accept the three requests for investigative action that are subject of the Appeal,

[38] *Ibid.*, para. 7.
[39] *Ibid.*, para. 36.
[40] *Ibid.*, para. 38.
[41] *Ibid.*, para. 38.
[42] *Ibid.*, paras 2 and 41.
[43] *Ibid.*, paras 43-48.
[44] *Ibid.*, paras 49-53.
[45] *Ibid.*, paras 54-57.
[46] *Ibid.*, paras 58-59.

and instruct the ICIJ to allow the Appellant to participate in the judicial investigation by filing additional investigative requests as necessary to protect his interests".[47]

15. The Co-Prosecutors and the Civil Parties did not file any response to the Appeal within the legal deadline.

c. Oral Arguments

16. The Appellant requested the Pre-Trial Chamber to hold a public hearing on the Appeal, arguing that it is in the interests of justice given that the Impugned Decision resulted in a violation of his fair trial rights.[48]

17. Internal Rule 77(3)(b) provides that "[t]he Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal [...] on the basis of the written submissions of the parties only". Having considered the ample written submissions made by the Appellant and absent any response filed by the Co-Prosecutors or any civil parties, the Pre-Trial Chamber does not consider it necessary to hear oral arguments in this case and hereby renders its decision on the Appeal.

II. ANALYSIS

18. As recalled above, the ICIJ has determined in his Participation Decision that the Appellant, who is not a charged person, has no *right* to participate in the judicial investigation at this stage stemming from the Internal Rules[49] or more generally from fair trial rights.[50] This finding, although expressed in general terms, necessarily covers the filing of requests for investigative actions.[51] The Appellant already appealed the ICIJ Participation Decision to the Pre-Trial Chamber but was unsuccessful in getting it overturned as the Pre-Trial Chamber could not assemble the majority of four votes required by Internal Rule 77(13) to reach a decision. Consequently, the ICIJ Participation Decision became final. The Appellant requested reconsideration of the said decision to the ICIJ, on the basis of the Opinion expressed by Judges CHUNG and DOWNING, but this request was rejected and the ICIJ reiterated his initial position.

[47] *Ibid*, para. 1.
[48] *Ibid.*, paras 3 and 4.
[49] *See* ICIJ Participation Decision, paras 36-49 and 62.
[50] *Ibid.*, paras 50-62.
[51] *Ibid.*, paras 37, 46, 55, 59 and 62.

19. Although the present Appeal challenges a decision by the ICIJ denying three specific requests for investigative actions, the argumentation set forth thereto concerns the Appellant's "right" to file requests for investigation, irrespective of their content. In particular, the Appellant asserts in the present Appeal that respect of his fair trial rights commands that he be allowed to file requests for investigative actions.[52] The Appellant argues that denying him the opportunity to file requests for investigative actions may result in the loss of exculpatory evidence, should potential witnesses become unavailable,[53] and creates a risk that investigative actions may not be executed prior to the closing of the investigation, due to possible lack of resources.[54] The Pre-Trial Chamber notes that these arguments are of a general nature and purely speculative as there is no assertion being made that any of the Three Requests for Investigative Actions concerned by the present Appeal seeks interviews of witnesses for whom there is concrete reason to fear that they may become unavailable or otherwise justifying a pressing need to undertake the requested investigation. The Appellant does not otherwise argue that the ICIJ's refusal to decide on the Three Requests for Investigative Actions, *at this stage,* concretely impairs his fair trial rights. The Pre-Trial Chamber further notes that the Appeal does not bring any new fact or circumstances but rather reiterates arguments that were already put forward in the Participation Appeal.[55] Therefore, the Pre-Trial Chamber finds that the Appeal seeks to bring before the Pre-Trial Chamber the same issue, in fact and law, that it has already examined in its Appeal Considerations (*i.e.* the Appellant's right to participate in the judicial investigation) and upon which it could not attain a supermajority of four votes to issue a decision.

20. Should the Chamber consider the present Appeal, it is to be presumed that its five members would follow their previous opinion and each reach the same conclusion, which would trigger the same result for the Appellant, *i.e.* that the Impugned Decision would stand by application of Internal Rule 77(13). This situation renders the Appeal pointless and creates a potential for endless litigation. The Pre-Trial Chamber emphasises that the supermajority rule and the default position envisaged by the Internal Rules are unique

[52] *See, e.g.,* Appeal, paras 2; 39-42; 47. *See also* the conclusion, at para. 60(d), which requests the Pre-Trial Chamber to order the ICIJ to allow the Appellant to submit "any additional investigative requests necessary to protect his interests".
[53] *Ibid.*, para. 52.
[54] *Ibid.*, paras 54-56.
[55] *See, e.g.,* Participation Appeal, paras 17-24; 61-80.

features of the ECCC, which may result in the Chamber not being able to reach a decision on a specific issue. In this respect, Internal Rule 77(13) states:

> "13. A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows:
> a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.
> b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges."

When the Pre-Trial Chamber could not decide on an issue raised before it, re-examination of a matter that is substantially the same, in fact and law, through a renewed application or appeal filed by the same party, would be contrary to the principles of legal certainty[56] and judicial economy, and more generally against the interests of justice as it would not advance the proceedings but rather risk causing delays. Seeking guidance in the procedural rules established at the international level, in accordance with Article 12(1) of the Agreement between the United Nations and the government of Cambodia for the establishment of the ECCC, Articles 23*new* and 33*new* of the ECCC Law and Internal Rule 2, the Pre-Trial Chamber notes, by analogy, that it is common practice at other tribunals of international character to dismiss motions or applications on the basis that they raise issues that have already been determined by a final decision binding upon the concerned parties (and are as such *res judicata*), unless presented in the context of requests for reconsideration. [57] Therefore, the Pre-Trial Chamber holds that it may dismiss an appeal or

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[56] *See* Internal Rule 21(1). *See also Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, para. 97 (where the ICTY Appeals Chamber recalled that the need for "consistency, certainty and predictability" in the law is generally recognized in national jurisdictions, both of common law and civil law traditions, as well as before international tribunals.")

[57] *See, e.g., Prosecutor v. Simic and al.*, IT-95-9, Decision on (1) Application by Steven Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, Trial Chamber III, 28 February 2000, para. 9 ("The principle of *res judicata* would prevent the prosecution from raising that specific issue again in any interlocutory proceedings between it and the ICRC unless the Trial Chamber itself were prepared to reconsider its decision."); *Prosecutor v. Prlic and al.*, IT-04-74-T, Decision on Prlic Defence Request for Certification to Appeal, Trial Chamber III, 7 December 2009, p. 3 (which applies the principle of *res judicata* to a procedural issue that had been previously resolved); *Prosecutor v. Ruto and al.*, ICC-01/09-01/11, Decision on the "Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings", Pre-Trial Chamber II, 1 September 2011, para. 8 (finding the Kenyan Government challenge on the admissibility of the case "*res judicata*".); *Prosecutor v. Nyiramasuhuko and al.*, ICTR-96-10-I and ICTR-96-17-T, Decision on the Prosecutor's Motion to Join the Indictment ICTR-96-10-I and ICTR 96-17-T, Trial Chamber, 22 February 2001, para. 11 ("if a Chamber has already determined the factual

application, without considering its formal admissibility under Internal Rules 73, 74 and/or 21 or its merits, when it raises an issue that is substantially the same (in fact and law) as a matter already examined by the Chamber in respect of the same party and upon which it could not reach a majority of four votes to issue a decision.

21. Therefore, the Pre-Trial Chamber dismisses the Appeal, without consideration of its admissibility under Internal Rules 73, 74 and 21 or its merits.

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Appeal;

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

Phnom Penh, 30 September 2014

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Chang-ho CHUNG** **HUOT Vuthy**

issue, even if such determination was in pursuit of a different application or a different Rule, then the Chamber will not revisit the issue again, subject to fresh grounds being argued"). *See also*, on the principle of *res judicata* (as applied to "judgements" on merits or on preliminary objections concerning jurisdiction): International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, p. 43 at paras 114-120. Similarly, at the European Court of Human Rights (the "ECtHR"), an application shall be declared inadmissible when it is "substantially the same as a matter that has already been examined by the Court", *i.e.* "where the parties, the complaints and the facts are identical". *See* Article 35(2)(b) of the European Convention on Human Rights and ECtHR, Practical Guide on Admissibility Criteria, 31 March 2011, para. 105.