



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

D205/1/1/2

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 (PTC11)

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

Date: 13 November 2014

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N. Ch. Arun

PUBLIC (REDACTED VERSION)

DECISION ON [REDACTED] APPEAL AGAINST THE DECISION DENYING HIS REQUEST FOR CLARIFICATION

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Appellant

SO Mosseny
Suzana TOMANOVIC

Lawyers for the Civil Parties and Civil Party Applicants

CHET Vanly	Christine MARTINEAU
HONG Kimsuon	Barnabe NEKUI
KIM Mengkhy	Lyma NGUYEN
LOR Chunthy	Beini YE
SAM Sokong	Emmanuel JACOMY
SIN Sovorn	
TY Srinna	
VEN Pov	
Laure DESFORGES	
Herve DIAKIESE	
Ferdinand DJAMMEN-NZEPA	
Nicole DUMAS	
Isabelle DURAND	
François GAUTRY	
Martine JACQUIN	



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████” Appeal against the Decision denying his Request for clarification of the law should there be a disagreement between the Co-Investigating Judges when issuing the closing order” filed in English on 20 August 2014 and in Khmer on 25 September 2014 (the “Appellant” and the “Appeal”, respectively).¹

I- PROCEDURAL BACKGROUND

1. On 7 September 2009, the then Acting International Co-Prosecutor filed the Third Introductory Submission dated 20 November 2008 (the “Introductory Submission”) 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 2011³ and 24 April 2014.⁴
2. On 19 June 2014, the Appellant requested the Co-Investigating Judges to provide their understanding of the law i) in case of a disagreement between them on whether to dismiss the case against the Appellant or to indict him and ii) in case of a disagreement being brought to the Pre-Trial Chamber and the Pre-Trial Chamber failing to attain the majority required by Internal Rule 72 to issue a decision (the “Request”).⁵
3. On 1st August 2014, the International Co-Investigating Judge (the “ICIJ”) denied the Request as inadmissible, on the basis that “the Suspect’s Lawyers are requesting clarification about the law applicable to a scenario which is, at the moment, purely hypothetical” (the “Impugned Decision”).⁶ The ICIJ stressed that “the Suspect has not been

¹ D205/1/1/1.

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 ██████████ Request to the Co-Investigating Judges to provide their understanding of the law should there be a disagreement between the Co-Investigating Judges when issuing the closing order, 19 June 2014, D205.

⁶ Decision on the ██████████ Request for clarification regarding closing orders should there be a disagreement between the Co-Investigating Judges, 1 August 2014, D205/1, para. 3.



charged in the judicial investigation” and “the disagreement hypothesized by the Suspect’s Lawyers has not materialized”.⁷

4. On 20 August 2014 and 25 September 2014, the Appellant filed the Appeal in English and Khmer, respectively. The Appellant submits that the Appeal is admissible under Internal Rule 21. In particular, the Appellant asserts that there is evidence demonstrating that he is likely to be charged and that the Co-Investigating Judges may disagree on whether to indict him or dismiss the charges against him when issuing a Closing Order in Case 004. The Appellant argues that the law is unclear in setting out what will happen to him if such disagreement occurs, resulting in a violation of his fundamental right to legal certainty and transparency.⁸ On the merits, the Appellant submits that the ICIJ erred in finding that the Request was hypothetical and deciding not to entertain it, given that there is a real possibility that the Appellant be charged imminently⁹ and that the Co-Investigating Judges disagree when issuing the Closing Order in Case 004,¹⁰ making it necessary for the Appellant to obtain clarification on the applicable law.¹¹ The Appellant consequently requests the Pre-Trial Chamber to order the Co-Investigating Judges to provide their – or alternatively to provide its own – understanding of the law i) should there be a disagreement between the Co-Investigating Judges on whether to dismiss the case against the Appellant or to indict him and ii) should the disagreement come before the Pre-Trial Chamber and the Pre-Trial Chamber fail to achieve the super-majority when deciding on the disagreement.¹²
5. The Co-Prosecutors and the Civil Parties did not file any response to the Appeal within the legal deadline.

II- ADMISSIBILITY

6. The Appellant does not allege that the Appeal is admissible under Internal Rules 73 or 74, which set out the explicit jurisdiction of the Pre-Trial Chamber, but rather argues that the Pre-Trial Chamber should declare it admissible under Internal Rule 21. This Rule provides, in its relevant parts:

⁷ Impugned Decision, para. 3.

⁸ Appeal, para. 7.

⁹ Appeal, para. 15.

¹⁰ Appeal, paras 16-17.

¹¹ Appeal, paras 18-23.

¹² Appeal, Conclusion, p. 15.



Rule 21. Fundamental Principles

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.
7. 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,¹³ 35^{new} of the ECCC Law¹⁴ and 14(3) of the ICCPR,¹⁵ may 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.¹⁶ 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 assuming jurisdiction over appeals that did not fall within its explicit jurisdiction, on the basis of Internal Rule 21.¹⁷ The Pre-Trial Chamber recalls that Internal Rule 21 does not provide an automatic avenue for appeals raising arguments based on fair trial rights. For the Pre-Trial Chamber to exercise appellate jurisdiction under Internal Rule 21, the appellant must demonstrate that in the particular circumstances of the case at stake, the Pre-Trial Chamber’s intervention is necessary to prevent an irreparable damage to the fairness of the proceedings or the appellant’s fair trial rights.

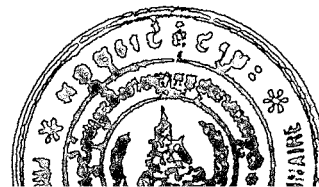
¹³ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea Democratic, 6 June 2003.

¹⁴ 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”).

¹⁵ 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.

¹⁶ 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, A190/1/20, 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.

¹⁷ 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.



8. The Pre-Trial Chamber finds that the Appellant has not demonstrated in the present case that the Impugned Decision, by refusing to provide clarification on the law, jeopardizes his fair trial rights. The Pre-Trial Chamber agrees with the ICIJ that the scenario envisaged in the Request and reiterated in the Appeal is hypothetical at this stage. Even if this scenario was to materialise, it is unclear what prejudice the Appellant would concretely suffer. The rights to legal certainty and transparency of proceedings do not require that judicial bodies settle legal issues before they actually arise, out of their factual and contextual background. The Pre-Trial Chamber has no jurisdiction to deal with hypothetical matters or provide advisory opinions.¹⁸
9. The Pre-Trial Chamber therefore finds the present Appeal inadmissible.

III- DISPOSITION

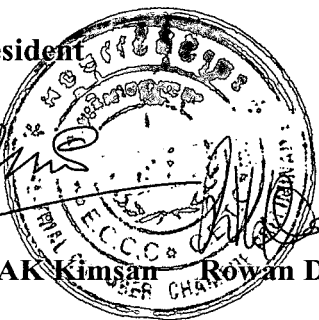
THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Appeal as inadmissible;

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

Phnom Penh, 13 November 2014

President



PRAK Kimsan
PRAK Kimsan
Rowan DOWNING

Pre-Trial Chamber

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

¹⁸ See, e.g., Decision on [REDACTED] Appeal against the Co-Investigating Judges' Constructive Denial of Fourteen of [REDACTED] Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, D87/2/2, para. 26 referring to Case 002 (PT60), Decision on Ieng Sary's Appeal against OCIJ's Order on Ieng Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, para. 11: "The Co-Investigating Judges are not obliged to give *declaratory decisions*, as has been effectively requested in the Motion, and the Pre-Trial Chamber will not provide advisory opinions."