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

D185/1/1/2

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 (PTC08)

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

Date: **13 October 2014**

PUBLIC (REDACTED VERSION)
DECISION ON [redacted] APPEAL AGAINST INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISION DENYING ANNULMENT MOTION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "[redacted] Appeal against the International Co-Investigating Judge's Decision on [redacted] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76", filed by the Defence on 19 May 2014 (the "Appeal").[1]

I. PROCEDURAL BACKGROUD

1. On 7 September 2009, the Acting International Co-Prosecutor filed the *Third Introductory Submission* with the Co-Investigating Judges (the "*CIJs*") alleging crimes for which [redacted] may be responsible.[2] On 18 July 2011 and on 24 April 2014 the International Co-Prosecutor filed two Supplementary Submissions alleging other crimes for which [redacted] may also be responsible.[3]

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.[4] On 23 September 2010, the Co-Investigating Judges (the "CIJs" YOU and BLUNK) declined to grant access to Case Files since they did not consider the Suspects, including [redacted], to be party to the proceedings as they had not been officially charged following the procedure provided in Internal Rule 57, nor had their interests been "substantially affected" by the investigations to the degree that would allow such.[5]

3. On 24 February 2012, the then Reserve International Co-Investigating Judge (the "*RICIJ*" KASPER-ANSERMET) issued the document Notification of Suspect's Rights informing [redacted] that "he is named as a suspect in the ongoing judicial investigation [... and] has the

[1] Appeal against the Decision on [redacted] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 16 May 2013, D185/1/1/1.
[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 and Co-Prosecutors Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.
[4] 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.
[5] 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.

right to access to the case file", which was conveyed orally to [redacted] on 29 February 2012.[6]

4. On 14 December 2012, [redacted] filed an Urgent Motion requesting Access to the Case File and asking the CIJs to order the Office of the Administration to provide [redacted] with access to all relevant investigation files, recalling that [redacted] as "the Charged Person has been informed by the RICIJ that he has the right to access the case file."[7] On 12 March 2013, [redacted] also requested the CIJs to be allowed to take part in the judicial investigation specifically asking for confrontation with all witnesses interviewed by the CIJs and to be allowed to submit questions to them.[8]

5. On 31 July 2013, the International Co-Investigating Judge (the "ICIJ" HARMON) issued the *Decision on the* [redacted] *Defence Requests to Access the Case File and Take Part in the Judicial Investigation* (the "*ICIJ Decision on Access and Paricipation*"), which declared that [redacted], in the absence of charges against him, is not a party to the proceedings and therefore does not have the right to access case files and to participate in the judicial investigation.[9]

6. On 30 August 2013, the Defence filed an Appeal against the ICIJ Decision on Access and Participation requesting the Pre-Trial Chamber to overturn it and to order that [redacted] recognised lawyers be given access to the case file and allowed to take part in the investigation.[10]

7. On 15 January 2014, the Pre-Trial Chamber issued its *Considerations on* [redacted] *Appeal Against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation* (the "*PTC Considerations*") in which it declared that it could not assemble an affirmative supermajority vote necessary for a decision on the Appeal.[11] Three of the Pre-Trial Chamber Judges "agreed with the findings of CIJs" that "[redacted] is a

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[6] Notification of Suspect's Rights [Rule 21 (1)(D)], 23 March 2012, D110. Acknowledgment of Service, 29 March 2012, D110.1.
[7] Urgent Motion Requesting Order for Access to the Case File, 14 December 2012, D121/2/1.1.1.
[8] Letter from the Defence to the CIJs on participation in judicial investigations in Case 004, 12 March 2013, D121/3.
[9] Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4.
[10] 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.
[11] Considerations on [redacted] 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.

suspect" and therefore not a party, thus finding the Appeal inadmissible."[12] In contrast, two of the Pre-Trial Chamber Judges concluded that the *ICIJ Decision on Access and Participation* should be overturned since "[redacted] became subject to prosecution from the time the Introuctory Submission was filed on 9 September 2009," and thus must be provided with rights similar to those afforded by the Internal Rules to Charged Persons.[13] The default decision following the split in the opinions of the Pre-Trial Chamber Judges was, pursuant to Internal Rule 77(13), that the impugned ICIJ Decision on Access and Participation, which denied [redacted] requests on the basis that he is not a party, shall stand.[14]

8. On the same day of 15 January 2014, the Defence filed [redacted] *Motion Requesting an Annulment of Investigative Action Pursuant to Internal Rule 76* (the "*Annulment Motion*").[15]

9. On 18 February 2014, the Defence filed another Motion Requesting the Reconsideration of the ICIJ Decision on Access and Participation (the "*Reconsideration Motion*")[16] arguing that "the finding of the PTC International Judges in the *PTC Considerations* constitute a significant change of circumstances"[17] and that "the *ICIJ Decision [on Access and Participation]* erred in considering [redacted] *as a suspect* by focusing strictly on the formal requirements for charging at the ECCC".[18]

10. On 22 April 2014, the ICIJ issued two decisions: i) the *Decision on Request for Reconsideration of ICIJ's Decision on Access and Participation* (the "*Reconsideration Decision*")[19]; and ii) the *Decision on* [redacted] *Motion for Annulment of Investigative Action Pursuant to Internal Rule 76* (the "*Impugned Decision*").[20] First, in the *Reconsideration Decision*, the ICIJ found no change in circumstances warranting reconsideration of the

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[12] *Ibid,* Opinion of Judges PRAK Kimsan, NEY Thol and HUOT Vuthy, paras. 15-16.
[13] *Ibid,* Opinion of Judges Chang-ho CHUNG and Rowan DOWNING, para. 24.
[14] *Ibid.*
[15] [redacted] Motion Requesting an Annulment of Investigative Action Pursuant to Internal Rule 76, 15 January 2014, D185.
[16] [redacted] 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.
[17] *Ibid,* para. 23.
[18] *Ibid,* paras. 28.
[19] 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.
[20] Decision on [redacted] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 April 2014, D185/1.

Decision on Access and Participation and, *maintaining that* [redacted] *is a suspect* and not a charged person, upheld that [redacted] has no rights to access the case file or to participate in the investigation.[21]

11. Second, in the *Impugned Decision*, the ICIJ found the *Annulment Motion* inadmissible since [redacted] *has no standing to file such motions as he is not a party* to the proceedings and since *Internal Rule 21(1) does not provide* [redacted] *with an alternative avenue* to file the Motion either. The ICIJ further found that "a [personal] jurisdictional determination at this stage of judicial investigation would be premature". The ICIJ also concluded that the relief requested by the Defence is inadmissible—since the Defence has not identified any specific investigating act to be annulled—and unavailable pursuant to IR 76 since the power to annul investigative acts does not rest with the CIJs but rather with the PTC."[22]

12. On 19 May 2014, the Defence submitted the *Appeal* requesting the Pre-Trial Chamber to find the Appeal admissible, to overturn the *Impugned Decision*, to consider itself seised of the Anulment Motion and to anul the investigation as requested.[23]

II. THE PRELIMINARY ISSUE OF STANDING

13. 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 before entering into the merits."[24]

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[21] *Reconsideration Decision,* paras. 24-26.
[22] *Impugned Decision,* paras. 33.
[23] Appeal, para 72.
[24] 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:* Case File No. 002/07-12-2009-ECCC/PTC (05), Decision on Ieng Sary and Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, Doc. No. 8., 15 June 2010, para. 20; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, D250/3/2/1/5, 27 April 2010, para. 17; Case File, No. 002/19-09-2007-ECCC/OCIJ (PTC 43), Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Matterial on the Case File dated 31 December 2009, D3/3/2/2, 20 May 2010, paras. 13 – 14; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 57), Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, D193/5/5, 4 August 2010, paras. 15 – 16; Application No. 002/08-07-2009-ECCC-PTC, Decision on the Charged Person's Application for Disqualification of Stephen Heder and David Boyle, Doc. No. 3, 22 September 2009, paras. 20, 22 *and to:* Special Tribunal for Lebanon (STL), Decision on Appeal of Pre-Trial Judge's Order

14. In the instant Appeal, the Defence contend that the Impugned Decision erroneously finds that [redacted] has no standing to file the Annulment Motion.[25] To sustain such contention, the Defence reiterate substantially the same arguments as those put forward in their Appeal against the Decision on Access and Participation[26] on which the Pre-Trial Chamber could not attain the supermajority of votes necessary for a decision on the Appeal, the default decision being that the ICIJ's Decision stands. In addition to this, the ICIJ rejected a request for the reconsideration of the Decision on Access and Participation. Under these circumstances and considering that the five Judges of the Pre-Trial Chamber would follow their previous opinions on the matter of standing as the underlying issues for the separate opinions expressed remain, the current Appeal would triger the same result for the Appellant i.e. that the Impugned Decision would stand by application of Internal Rule 77(13). As already noted in the Decision on the Appeal PTC07, this situation renders the Appeal pointless and creates a potential for endless litigation.[27]

15. Adopting its observations already made in its Decision on Appeal PTC07,[28] the Pre-Trial Chamber decides to dismis the Appeal, without consideration of its admissibility under Internal Rules 73, 74 and 21 or its merits.

Regarding Jurisdiction and Standing, CH/AC/2010/02, Appeals Chamber, 10 November 2010, para. 55; Prosecutor v. Tadić, IT-94-1, In the Case of Dragan Opačić Decision on Application for Leave to Appeal, Appeals Chamber, p. 2 (noting that to the extent resolution of the matter based on standing appears "overly legalistic, any other ruling would open up the Tribunal's appeals to non-parties ... who might nurse a grievance...This could not be"); Prosecutor v. Brima et al., SCSL-04-16-AR77, Decision on Joint Defence Appeal Against the Decision of the Report of the Independent Counsel pursuant to Rule 77(C)(iii) and 77(D), Appeals Chamber, 17 August 2005; Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and whether Mr El Sayed has standing before the Tribunal, STL, 17 September 2010, CH/PTJ/2010/005; Prosecutor v. Kordic et al, IT-95-14/2, "Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence", Trial Chamber, 25 June 1999; Prosecutor v Bobetko, IT-02-62-AR54bis & IT-02-62-AR108bis, "Decision on Challenge by Croatia to Decision and Orders of Confirming Judge", Appeals Chamber, 29 November 2002, paras 10 – 12; Situation in the Democratic Republic of the Congo, ICC-01/04, "Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV", Pre-Trial Chamber I, 18 January 2008, last paragraph; The Prosecutor v Ndayambaje et al, ICTR-98-42-AR73, "Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List", Appeals Chamber, 21 August 2007, para 14 reapplied in The Prosecutor v Nyiramasuhuko et al, Case No. ICTR-97-21-T, and The Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Joint Case No. ICTR-98-42-T, "Decision On Nyiramasuhuko's Motion For Certification To Appeal The Decision Of 5 November 2007 And Ntahobali's Motion For Certification To Appeal The Decisions Of 5 And 12 November 2007", Trial Chamber II, 7 Decemebr 2007, para 44.

[25] Appeal, paras. 50-58.

[26] See, e.g., 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, paras 17-24 and 61-80.

[27] Decision on [redacted] Appeal Against Co-Investigating Judge's Decision Denying Requests for Investigative Action, 30 September 2014, D190/1/2, para 20.

[28] Ibid.

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, 13 October 2014

President **Pre-Trial Chamber**

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