



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

D103/4

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° 003/07-09-2009-ECCC/OCIJ (PTC12)

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

Date: 20 August 2014

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Public (Redacted Version)
**DECISION ON [REDACTED] APPEAL AGAINST INTERNATIONAL CO-
INVESTIGATING JUDGE'S CONTINUING REFUSAL TO PLACE [REDACTED]
SUBMISSIONS ON THE CASE FILE AND TO ACT UPON THEM**

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Appellant

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Michael G. KARNAVAS

Lawyers for the Civil Parties and Civil Party Applicants

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Mahdev MOHAN
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI
Fabienne TRUSSES



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seized of [REDACTED] Appeal Against Co-Investigating Judge Harmon’s Continuing Refusal to Place [REDACTED] Submissions on the Case File and to Act upon them” filed on 3 June 2014 (the “Appellant” and the “Appeal”, respectively).¹

I. INTRODUCTION

1. The Appeal is against the International Co-Investigating Judge (the “ICIJ”)’s refusal to place in the Case File 20 submissions filed by the Co-Lawyers on behalf of the Appellant and to act upon them, on the basis that the Co-Lawyers were not, at the time, recognised as legal representatives for the Appellant.

a. Procedural Background

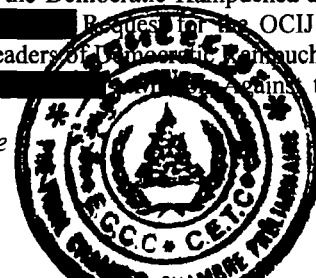
2. On 18 December 2012, the Head of the Defence Support Section (the “DSS”) informed the Office of the Co-Investigating Judges (the “OCIJ”) that the Appellant selected ANG Udom and Michael G. KARNAVAS as his Co-Lawyers.² On 24 December 2012, the International Co-Prosecutor challenged the Co-Lawyers’ appointment on the basis of an alleged irreconcilable conflict of interest.³
3. Between 29 August and 28 October 2013, the Co-Lawyers filed fourteen submissions to the OCIJ;⁴ only one of them, the Request to Access the Case File and Participate in the

¹ D103/1.

² Letter to the Co-Investigating Judges Regarding the Assignment of Co-Lawyers for a Suspect in Case 003, 18 December 2012, D56.

³ International Co-Prosecutor’s Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflict of Interest, 24 December 2012, D56/1.

[REDACTED] Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82 and D87/2/1.2; [REDACTED] Request for Information Concerning the OCIJ’s Investigative Approach and Methodology, 2 October 2013, D87/2/1.3; [REDACTED] Request for the Work Product of OCIJ Investigators Involved in Improper Investigative Practices in Case 002, 2 October 2013, D87/2/1.9; [REDACTED] Request for Clarification Concerning Whether the Defence may Conduct Investigations at the Current Stage of the Proceedings, 2 October 2013, D87/2/1.12; [REDACTED] Notice of Objection to Stephen Heder Having any Further Involvement in Case 003 and Request for the Work Product of Stephen Heder, 9 October 2013, D87/2/1.4; [REDACTED] Notice of Objection to David Boyle Having any Further Involvement in Case 003 and Request for the Work Product of David Boyle, 9 October 2013, D87/2/1.5; [REDACTED] Request to be Provided with Correspondence from the Head of the OCIJ Legal Unit to the United Nations Secretary General and all Related Material and to have this Material Placed on the Case File, 9 October 2013, D87/2/1.6; [REDACTED] Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus with Armed Conflict, 17 October 2013, D87/2/1.7; [REDACTED] Request for the OCIJ to Place Full Transcripts of all Witness Interviews on the Case File, 17 October 2013, D87/2/1.8; [REDACTED] Request for the OCIJ’s Criteria Concerning “Senior Leaders of the Democratic Kampuchea and Those Who Were Most Responsible”, 17 October 2013, D87/2/1.10; [REDACTED] Request for the OCIJ to Compel the OCP to Provide the Defence With its Criteria Concerning “Senior Leaders of the Democratic Kampuchea and Those Who Were Most Responsible”, 17 October 2013, D87/2/1.13; [REDACTED] Request for the OCIJ to



Judicial Investigation (the “Request for Access to Case File”) was placed on the Case File at the time. On 25 October 2013, the ICIJ informed the Co-Lawyers that given the possible implications of the alleged conflict of interest, the fourteen submissions will be dealt with in due course, subject to the outcome of the ICIJ’s ruling on the matter (the “ICIJ Letter of 25 October 2013”).⁵ On 4 November 2013, the Co-Lawyers appealed the ICIJ’s refusal to consider the fourteen submissions prior to deciding on the conflict of interest issue (the “Constructive Refusal Appeal”).⁶ The thirteen submissions that were initially not placed on the Case File were then placed therein by the Pre-Trial Chamber, as annexes to the Constructive Refusal Appeal.

4. Between 11 November 2013 and 2 January 2014, the Co-Lawyers filed four additional submissions to the OCIJ, which were not placed on the Case File at the time but were placed therein by the Pre-Trial Chamber as annexes to the present Appeal.⁷
5. On 10 January 2014, the ICIJ found that the Co-Lawyers cannot represent the Appellant on the basis of an irreconcilable conflict of interest stemming from their past representation of IENG Sary in Case 002, rejected the Co-Lawyers’ assignment and ordered the DSS to appoint new counsel to the Appellant (the “Conflict Decision”).⁸ On 13 January 2014, the Co-Lawyers filed a Notice of Appeal against the Conflict Decision on behalf of the Appellant and, on 7 February 2014, the Appellant confirmed his intention to appeal the

Application of Crimes Listed in Article 3 New of the Establishment Law (National Crimes), 24 October 2013, D87/2/1.14; October 2013, D87/2/1.15.

⁵ ICIJ’s Letter Concerning Submission File by the Co-Lawyers Designate in CF003, 25 October 2013, D87. On 28 October 2013, the ICIJ sent a follow-up letter confirming that he was also in receipt of [REDACTED] Motion Against the Application of the JCE III and one of the other motion that the Co-Investigating Judge had omitted from the list set out in his first letter. See Letter from ICIJ to the Co-Lawyers, Corrigendum and Addition to the Letter Titled “Submissions Filed by the Co-Lawyers-Designate in CF003,” Dated 25 October 2013, 28 October 2013, D87/1.

⁶ [REDACTED] Appeal Against the Co-Investigating Judges’ Constructive Denial of Fourteen of [REDACTED] Submissions to the OCIJ, 4 November 2013, D87/2/1.

⁷ [REDACTED] Notice That He Intends to Exercise His Right to Remain Silent and Any Contact With Him Must Be Made Through His Co-Lawyers, 11 November 2013, D87/2/1.2; [REDACTED] Motion Against the Application of Grave Breaches of the Geneva Conventions Due to Expiry of the Applicable Statute of Limitations, 12 December 2013, D87/2/1.3; [REDACTED] Request for Clarification Concerning the Status of the Judicial Investigation, 30 December 2013, D87/2/1.4; [REDACTED] Request for the Co-Investigating Judges to Explain their Understanding of What Will Occur in the Event of the Co-Investigating Judges and Pre-Trial Chamber Judges Split as to Whether to Close the Investigation or Whether to Arrest, Charge, or Indict [REDACTED] 2 January 2014, D87/2/1.5.

⁸ Decision on the International Co-Prosecutor’s Request to Reject Appointment of the Co-Lawyers for [REDACTED] on the Basis of Irreconcilable Conflicts of Interest, 10 January 2014, D56/18.

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Conflict Decision (the “Conflict Appeal”).⁹ The Appeal Brief was filed on 12 March 2014.¹⁰

6. On 22 January 2014, the ICIJ ordered the DSS to provisionally assign counsel to the Appellant on the basis that procedural issues may arise before the resolution of the Conflict Appeal which could require the Appellant to be represented by counsel and to avoid undue delays in the investigation (the “Order to Appoint Provisional Counsel”).¹¹ On 24 January 2014, the Co-Lawyers requested the Pre-Trial Chamber to stay this order.¹²
7. On 3 February and 7 February 2014, the Co-Lawyers filed two additional submissions, which were not placed on the Case File at the time but were placed therein by the Pre-Trial Chamber as annexes to the present Appeal.¹³
8. On 11 February 2014, the Pre-Trial Chamber held that it lacked jurisdiction to stay the Order to Appoint Provisional Counsel because implementing the order would not harm the Appellant’s right to appeal the Conflict Decision (the “Decision on Request for Stay the Order to Appoint Provisional Counsel”).¹⁴
9. On 23 April 2014, the Pre-Trial Chamber issued its decision on the Constructive Refusal Appeal (the “Constructive Refusal Decision”),¹⁵ holding that there was “no issues of standing with respect to the Co-Lawyers’ eligibility and ability to act on behalf of [the Appellant]” because the Appeal was filed before the Co-Lawyers’ appointment was rejected by the ICIJ.¹⁶ The Pre-Trial Chamber found the appeal inadmissible insofar as it concerns thirteen out of fourteen requests. The Pre-Trial Chamber, however, deferred its

⁹ [REDACTED] Notice of Appeal of Decision Rejecting the Assignment of Co-Lawyers, 13 January 2014, D56/19; [REDACTED] Notice of Intent to Pursue Appeal against *Decision on the International Co-Prosecutor’s Request to Reject the Appointment of the Co-Lawyers for [REDACTED] on the Basis of Irreconcilable Conflicts of Interest*, 7 February 2014, D56/19/13.

¹⁰ [REDACTED] Appeal Against Co-Investigating Judge Harmon’s Decision on the International Co-Prosecutor’s Request to Request the Appointment of the Co-Lawyers for [REDACTED] on the Basis of Irreconcilable Conflicts of Interest, 12 March 2014, D56/19/24.

¹¹ Order to Provisionally Assign Lawyers to Suspect, 22 January 2014, D56/21.

¹² [REDACTED] Co-Lawyers’ Amended Urgent and Expedited Request to Stay the Execution of Co-Investigating Judge Harmon’s Confidential Order to DSS to Assign New Co-Lawyers to Represent [REDACTED] 24 January 2014, D56/19/4.

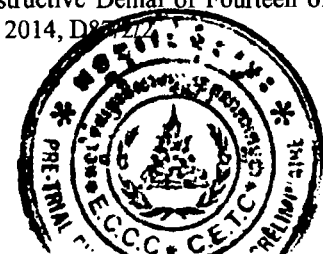
¹³ [REDACTED] Application to Seize the Pre-Trial Chamber With a Request for Annulment of All Investigative Action Concerning Two Alleged Crime Sites, 3 February 2014, D103/1.6; [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Religious Persecution, 7 February 2014, D103/1.7.

¹⁴ Decision on Co-Lawyers’ Request to Stay the Order for Assignment of Provisional Counsel to [REDACTED] 11 February 2014, D56/19/14.

¹⁵ Decision on [REDACTED] Appeal against the Co-Investigating Judges’ Constructive Denial of Fourteen of [REDACTED] Submission to the [Office of the Co-Investigating Judges], 23 April 2014, D88/2/22.

¹⁶ *Ibid.*, para. 6.

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decision on the Appeal insofar as it concerns the ICIJ's refusal to decide on the Request for Access to Case File until the Conflict Appeal had been resolved.¹⁷

10. On 27 May 2014, the Defence filed a Notice signed by the Appellant, in which he expressed that he wished to be represented by the Co-Lawyers and that he intended to exercise his right to remain silent; this Notice was not placed on the Case File at the time but was placed therein by the Pre-Trial Chamber as an annex to the present Appeal.¹⁸
11. On 28 May 2014, the ICIJ issued a decision recognizing the provisional assignment of Co-Lawyers KET Ky and Alan YATVIN as the Appellant's provisional counsel.¹⁹

b. The Appeal

12. On 3 June 2014, the Co-Lawyers filed the Appeal, wherein they request the Pre-Trial Chamber to assume jurisdiction under Internal Rule 21, order the OCIJ to place all submissions on the Case File and to act on all pending submissions.²⁰ The Co-Lawyers argue that an "integral part of the right to prepare a defence is the making of a record to preserve errors of law, fact, or abuse of discretion" and consequently such a record cannot exist if submissions are not placed on the Case File.²¹ Moreover, the Co-lawyers argue that Article 81 of the French Code of Criminal Procedural instructs that where a party makes a written and reasoned application to an investigating judge, "the investigating judge must make a reasoned order within one month from receiving the application if he decides not to defer to the application".²²
13. On 20 June 2014, the International Co-Prosecutor filed a Response,²³ arguing that the Co-Lawyers lack standing to represent the Appellant as the ICIJ and the Pre-Trial Chamber have issued "orders" preventing the Co-Lawyers from conducting the case on issues concerning the investigation in Case 003.²⁴ The International Co-Prosecutor cites a memorandum that the ICIJ issued on 9 June 2014 to the Appellant's Provisional Counsel,

¹⁷ *Ibid.*, para. 13.

¹⁸ [REDACTED] Notice Regarding His Counsel of Choice Pending a Pre-Trial Chamber Decision on the Conflict of Interest Appeal and Notice Reaffirming Intent to Exercise Right to Remain Silent, 27 May 2014, D103/1.8.

¹⁹ Decision on the Recognition of Counsel for Suspect in Case 003, 28 May 2014, D56/21/8/1.

²⁰ Appeal, para. 17.

²¹ *Ibid.*, para. 20.

²² *Ibid.*, para. 29.

²³ International Co-Prosecutor's Joint Response to the Co-Lawyers-Designates': (1) "Appeal Against Co-Investigating Judges Harmon's Continuing Refusal to Place [REDACTED] Submissions on the Case File and to Act upon them"; and (2) "Urgent and Expedited Request for Clarification of the Co-Lawyers Standing to Represent [REDACTED] Pending a Final Decision on Conflict of Interest", 20 June 2014, D103/2 (the "Response").

²⁴ *Ibid.*, para. 15.



in which he states that “[the Co-Lawyers] no longer have standing to defend the Suspect since the [ICIJ] issued the conflict of interest decision on 10 January 2014 and since [the Appellant’s Provisional Counsel] full recognition”.²⁵ The International Co-Prosecutor also relies on the Pre-Trial Chamber’s Decision on Request for Stay the Order to Appoint Provisional Counsel, in which the Chamber held that Provisional Counsel would represent the Appellant for the purposes of the judicial investigation until the Conflict Appeal was resolved.²⁶

14. On 25 June 2014, the Co-Lawyers filed a Reply,²⁷ wherein they argue that the International Co-Prosecutor misrepresented the Pre-Trial Chamber’s holding as an “order” that Co-Lawyers did not have standing to bring this Appeal. Instead, the Co-Lawyers argue that the Pre-Trial Chamber found that it lacked jurisdiction to stay the Order to Appoint Provisional Counsel and, in *dicta*, explained its understanding of the order because it did not implicate the appellate proceedings of which the Pre-Trial Chamber was seized.²⁸ Therefore, the Pre-Trial Chamber’s explanation of the implementation of the order did not amount to an order prohibiting the Co-Lawyers from representing the Appellant and instead reinforced the Co-Lawyers ethical obligation to conduct the case to finality.²⁹

c. Further Developments

15. On 30 June 2014, the Pre-Trial Chamber announced its disposition of the Conflict Appeal, reversing the Conflict Decision and recognising the Co-Lawyers as legal representatives for the Appellant. The reasons for this decision were issued on 17 July 2014.³⁰
16. On 1 July 2014, the Co-Lawyers submitted to the OCIJ a request to have “all Defence submissions” placed on the Case File (the “Request for Placement on the Case File”).³¹

²⁵ Memorandum on Legal Representation of Suspect ██████████ in Case 003, 9 June 2014, A41, p.2, referred to in Response, p. 2.

²⁶ Decision on Request for Stay the Order to Appoint Provisional Counsel, D56/19/14, para. 17, referred to in Response, para. 15.

²⁷ ██████████ Reply to International Co-Prosecutor’s Joint Response to the Co-Lawyers-Designates’: (1) “Appeal Against Co-Investigating Judges Harmon’s Continuing Refusal to Place ██████████ Submissions on the Case File and to Act upon them”; and (2) “Urgent and Expedited Request for Clarification of the Co-Lawyers Standing to Represent Mr. ██████████ Pending a Final Decision on Conflict of Interest”, 25 June 2014, D103/3 (the “Reply”).

²⁸ *Ibid.*, paras 1-2.

²⁹ *Ibid.*, para. 3.

³⁰ Decision on ██████████ Appeal Against the International Co-Investigating Judge’s Decision Rejecting the Appointment of ANG Udom and Michael KARNAVAS as His Co-Lawyers, 30 June 2014 (short form) and 17 July 2014 (fully reasoned), D56/19/36 and D56/19/38, respectively.

³¹ ██████████ Request to Place All Submissions on the Case File, 1 July 2014, D108.

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17. On 10 July 2014, the ICIJ notified the Appellant and the Co-Prosecutors that he is now reconsidering the Request for Access to Case File and invited further submissions as the examination of this request involves reconsideration of previous decisions issued by the former reserved International Co-Investigating Judge.³²
18. On 28 July 2014, the ICIJ disposed of the Co-Lawyers' Request for Placement on the Case File, holding that "the extent of the Applicant's standing to file submissions depends, *inter alia*, on his status as a suspect or charged person during the judicial investigation", which is currently under consideration in the context of the examination of the Request for Access to Case File.³³ Accordingly, the ICIJ decided that "placement of the Suspect's submissions on the substantive portion of the case file and responses thereto may only be considered on a case by case basis once his status has been clarified".³⁴ The ICIJ, however, instructed the OCIJ Greffier to place "all as yet unfiled submissions" on the "administrative partition" of the case file "pending a final determination of the Suspect's status", in order to preserve the record.³⁵ The ICIJ stressed that all the submissions concerned by the present Appeal "have already been filed as annexes" to this Appeal or the previous one on Constructive Refusal.³⁶

II. CONSIDERATIONS

19. The Pre-Trial Chamber notes that its decision on the Conflict Appeal, whereby the Co-Lawyers were recognized as legal representatives for the Appellant, has removed the reason for the ICIJ's initial refusal to place the submissions concerned by the present Appeal on the Case File. Following the issuance of the decision on the Conflict Appeal, the Co-Lawyers requested the OCIJ to place "all Defence submissions" on the Case File. This request led the ICIJ to review his position as to the fate of the submissions concerned by the present Appeal and to issue a new decision on the matter. The ICIJ acknowledged that the submissions are now part of the Case File, as they have been filed as annexes to the appeals before the Pre-Trial Chamber, thereby resolving the issue of creating a "record" raised by the Co-Lawyers. The ICIJ further announced that he is currently considering the Co-Lawyers' standing to file the concerned submissions, which will be examined on a case by

³² Notification Concerning Suspect's Request to Access the Case File and Participate in the Judicial Investigation (D82) and the Full Introductory Submission and Supporting Material (D82/2), 10 July 2014, D82/3.

³³ Decision on [REDACTED] Request to Place all Submissions on the Case File, 28 July 2014, D108/1, para. 3.

³⁴ *Ibid.*, para. 4.

³⁵ *Ibid.*, para. 7.

³⁶ *Ibid.*, para. 4.



case basis once the Appellant's legal status has been determined. The decision(s) that the Appeal sought to challenge, *i.e.* the ICIJ Letter of 25 October 2013 and the consequent refusal to place each of the twenty individual submissions on the Case File based on the lack of recognition of the Co-Lawyers, are therefore no longer in force. In these circumstances, the Appeal, as formulated, is moot.

III. DISPOSITION

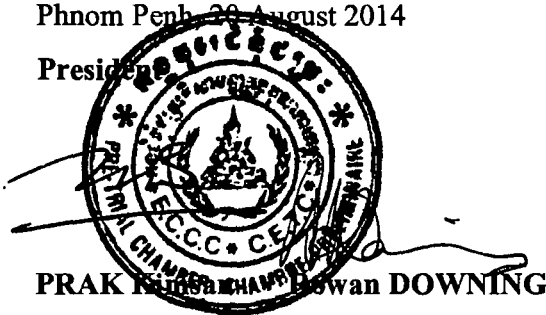
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Appeal is dismissed, without prejudice to any further rights.

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


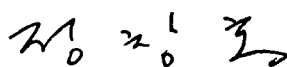

Phnom Penh, 28 August 2014

President



PRAK KHAING CHAMRYN
Rowan DOWNING

Pre-Trial Chamber

NEY Thol

Chang-ho CHUNG

HUOT Vuthy