



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

D87/2/3

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 (PTC10/1)

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

Date: 09 September 2014

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PUBLIC REDACTED

DECISION ON [REDACTED] APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONSTRUCTIVE DENIAL OF [REDACTED] REQUEST TO ACCESS THE CASE FILE AND TO PARTICIPATE IN THE JUDICIAL INVESTIGATION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) remains seized¹ of ██████████ Appeal against the Co-Investigating Judges’ constructive denial of “██████████ Request to Access the Case File and to Participate in the Judicial Investigation” (the “Request”)² filed by ANG Udom and Michael G. KARNAVAS (the “Co-Lawyers”) on behalf of ██████████ on 5 November 2013 (the “Appeal”) as part of their “Appeal against the Co-Investigating Judges Constructive Denial of Fourteen of ██████████ Submissions to the OCIJ” (the “Appeal”).³

I. PROCEDURAL BACKGROUND

1. On 20 November 2008, the then Acting International Co-Prosecutor submitted to the Office of the Co-Investigating Judges (“OCIJ”) the Second Introductory Submission ██████████ ██████████ opening a judicial investigation into, *inter alia*, crimes for which ██████████ is alleged to be responsible.⁴
2. On 24 February 2012, the former International Reserve Co-Investigating Judge (the “IRCIJ”) issued a *Notification of Suspect Rights* informing ██████████ that he is a *named Suspect* in the ongoing judicial investigation initiated by the Co-Prosecutor’s Introductory Submission dated 20 November 2008 *for planning, instigating, ordering, aiding and abetting or committing individually or by participating in a joint criminal enterprise the following crimes: crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code* (the “Written Notification”).⁵ In the Written Notification, the IRCIJ referred to ██████████ as “a *suspect* in the ongoing judicial investigation” and attached to him *procedural rights by making reference to Internal “Rules 55(6), 55(1) and 58.”*⁶ The IRCIJ informed ██████████ that “these *charges* are

¹ See Decision on ██████████ Appeal against the Co-Investigating Judges Constructive Denial of Fourteen of ██████████ Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, D87/2/2, paras 12, 13 and the disposition.

² ██████████ Request to access the case file and to participate in the judicial investigation, 29 August 2013, D82 (the “Request”).

³ ██████████ Appeal against the Co-Investigating Judges’ Constructive Denial of Fourteen of ██████████ Submissions to the OCIJ, (the “Appeal”) 5 November 2013, D87/2/1.

⁴ Second Introductory Submission ██████████, 20 November 2008, D1, paras 96-99; See also Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

⁵ Notification of Suspect Rights [Internal Rule 21(1)(d)] in Case File 003, 23 March 2012, D30 (the “Notification”).

⁶ Notification, introductory paragraph and para. 4.

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██████████ Request to Access the Case File and to Participate in the Judicial Investigation ██████████



based on both the facts alleged by the Co-Prosecutors and those uncovered thus far during the course of the investigation.”⁷ The RCIJ informed ██████████ that he has certain rights, including the right to access the Case File.⁸ The Written Notification was served by the OCIJ Greffier to the son of ██████████, ██████████, on 1 March 2012 at 10:30 am.⁹ On the same day of 1 March 2012 at 10:57 am, the OCIJ Greffier confirmed that he was “unable to serve the [Notification]” to ██████████ for the following reasons: “We have read out the notification to the suspect; after the notification was read out, the suspect refused to sign it. He said he will cooperate with the co-investigating judge when the disagreements between the national and the international co-investigating judges have been resolved and when he is free.”¹⁰

3. On 6 March 2012, the DSS was instructed by the RCIJ to assist ██████████ in selecting a lawyer to represent him.¹¹
4. On 2 May 2012 the RCIJ issued a “Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect ██████████,” (the “Personal Jurisdiction Decision”).¹² In this Decision, the RCIJ stated that “in light of the evidence made available to the Co-Investigating Judges during the judicial investigation, the personal jurisdiction of the ECCC over the Suspect ██████████, a ‘Khmer Rouge official’, is established in a sufficient and reliable manner.¹³ The RCIJ decided that “Suspect ██████████ is to be considered as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979.” The RCIJ made this decision public and noted that “the Suspect has been notified of the charges against him in under Internal Rule 21(1)(d).”¹⁴

The Co-Lawyers’ engagement and recognition:

5. On 18 December 2012, the Head of the DSS informed the Office of the Co-Investigating Judges (the “OCIJ”) that ██████████ had selected Mr. ANG Udom and Mr. Michael

⁷ Notification, para 2.

⁸ Notification, para. 3.

⁹ Acknowledgment of Service, 23 March 2012, D30.1.

¹⁰ Notice of non-service, 23 March 2012, D31.1.

¹¹ Notification of Suspect’s Rights (Rule 21(1)(D)) to the Defence Support Section, 23 March 2012, D33.

¹² Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect ██████████, 2 May 2012, D48.

¹³ *Ibid*, para. 10.

¹⁴ *Ibid*, disposition.

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KARNAVAS as his Co-Lawyers and invited the OCIJ to note their assignment.¹⁵ On 24 December 2012 the International Co-Prosecutor requested from the OCIJ to reject the appointment of the Co-Lawyers alledging conflict of interest between their representation of ██████████ and that of Ieng Sary (The “OCP Request on Conflict”).¹⁶ The issue of judicial recognition of the assignment the Co-Lawyers was not finalized until on 30 June 2014 when the Pre-Trial Chamber rendered its Decision on the Conflict Appeal¹⁷ which was rendered necessary due to an appeal filed against a decision of the current International Co-Investigating Judge (the “ICIJ”),¹⁸ dated 10 January 2014, granting the International Co-Prosecutors’ Request on Conflict. The Pre-Trial Chamber granted the Co-Lawyers appeal and recognized them as the legal representatives of ██████████.¹⁹

The Request and Appeal:

6. On 29 August 2013, the Co-Lawyers for ██████████ filed before the OCIJ the Request. On 25 October 2013, the ICIJ informed the Co-Lawyers that “[g]iven the possible implications of the conflict of interest allegations [brought up by the International Co-Prosecutor] *the [Request for Access] will be dealt with in due course, subject to the outcome of the decision on [the conflict] matter.*”²⁰ On 4 November 2013, the Co-Lawyers filed before the OCIJ a “Notice of Appeal against the Co-Investigating Judges’ *Constructive Denial* of Fourteen of ██████████ Submissions to the OCIJ.”²¹ One of these Fourteen Submissions is the Request.²² On 5 November 2013, the Co-Lawyers filed, in the English language only, the Appeal which was notified on 14 November 2013. The translated version of the Appeal in the Khmer language was notified on 26 December 2013. No Response to the Appeal was filed by any party within the legal deadline.

¹⁵ Letter to the CIJ Regarding the Assignment of Co-Lawyers for a Suspect in Case 003, 19 December 2012, D56.

¹⁶ International Co-prosecutor’s request that appointment of Co-lawyers-designate be rejected on the basis of irreconcilable conflicts of interest, 24 December 2012, D56/1.

¹⁷ 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, D56/19/36 (the “Decision on Conflict Appeal”).

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

¹⁹ Decision on Conflict Appeal.

²⁰ ICIJ’s Letter Concerning Submission Filed by the Co-Lawyers Designate in CF03, 25 October 2013, D87.

²¹ Appeal Register of the Appeal Against the Co-Investigating Judges’ *Constructive Denial* of Fourteen of ██████████ ██████████ Submissions to the OCIJ, 8 November 2013, D87/2.

²² See *fn*t. 1 *supra*.

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7. On 23 April 2014 the Pre-Trial Chamber rendered its Decision on the Co-Lawyers Appeal against the Constructive Refusal of the Fourteen Submissions.²³ In that decision, noting that “[w]ithout prejudice to [REDACTED] status in the investigative proceedings, given that:

a. If a person’s status in the investigations allows for such, the Internal Rules provide for access to the case file through the lawyers only, and that

b. [REDACTED] Co-Lawyers are currently challenging the Conflict Decision,”

The Pre-Trial Chamber found it appropriate to defer a decision on the Appeal, *in respect of the Request for Access to the Case File*, “until it decides on the appeal against the Conflict Decision.”²⁴

8. On 10 July 2014, the ICIJ, taking note of the recognition of the Suspect's Co-Lawyers in the dispositive of the PTC Decision on the Conflict Appeal, found that “it is now appropriate to consider the Suspect's Lawyers' Request [for Access].”²⁵ However, the ICIJ further found that “the Notification of Suspect's Rights and the Personal Jurisdiction Decision are both relevant to his adjudication of the Request [for Access...], since both decisions make evidentiary findings concerning the Suspect and the Notification purports to grant the Suspect access to Case File 003.”²⁶ Therefore, the ICIJ notified the Suspect's Co-Lawyers and the parties to Case 003 that, upon recognition of the Suspect's Lawyers by the Pre-Trial Chamber, he is now in the process of reconsidering the Notification of Suspect's Rights and the Personal Jurisdiction Decision with a view to adjudicating the Request and invited them to submit any further observations they may have on this matter.²⁷ Therefore, the ICIJ deferred a decision on the Request for Access until he decides on whether to reconsider the related Notification and Personal Jurisdiction Decision.²⁸

²³ 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, DD87/2/2.

²⁴ *Ibid.*

²⁵ Notification Concerning Suspect's Requests To Access The Case File And Participate In The Judicial Investigation (D82) And The Full Introductory Submission And Supporting Material , 16 July 2014, D82/3.

²⁶ *Ibid*, para. 15.

²⁷ *Ibid*, para. 16.

²⁸ *Ibid*, dispositive.



9. On 15 August 2014 the ICIJ issued a Second Notification Concerning The Possible Reconsideration Of Two Decisions instructing the OCIJ Greffier to provide access to [REDACTED] Co-Lawyers to the Prosecution's submissions on point in order to allow the Co-Lawyers to respond.²⁹

II. CONSIDERATIONS

10. The Co-Lawyers have filed the Appeal on the grounds of the doctrine of "constructive refusal" and request the Pre-Trial Chamber to admit the Appeal on such grounds and to order the Co-Investigating Judges to consider and decide on the Request.³⁰
11. Considering the grounds on which the Appeal is filed and the relief requested and noting, as described in the procedural history above, that the ICIJ is in the process of actively considering the Request, the Pre-Trial Chamber finds that the argument that the ICIJ has *constructively refused* the Request fails. In these circumstances, the Appeal, as formulated, is moot.

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

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, 09 September 2014

President



[Signature]
PRAK KHEAN
CHAMBER CHAIRMAN
DOWNING

Pre-Trial Chamber

[Signature]
NEY Thol

정창호

Chang-ho CHUNG

[Signature]

HUOT Vuthy

²⁹ Second Notification Concerning The Possible Reconsideration Of Two Decisions, 15 August 2014, D82/3/3/3.

³⁰ Appeal, para. 53.