



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

A117/2/2

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 (PTC12)

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

Date: 22 October 2014

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PUBLIC (REDACTED VERSION)
DECISION ON APPEAL AGAINST CONSTRUCTIVE DISMISSAL OF [REDACTED]'S FOURTH REQUEST FOR INVESTIGATIVE ACTION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Appeal against Constructive Dismissal of [REDACTED]’s Fourth Request for Investigative Action” filed on 2 September 2014 (the “Appeal”).¹

I. INTRODUCTION

1. The Appeal concerns a request for investigative action filed by [REDACTED] (the “Appellant”) on 21 May 2014 that the International Co-Investigating Judge (the “ICIJ”) instructed the Greffier not to place on the substantive portion of the Case File for consideration by the Co-Investigating Judges, on the basis of his previous finding that the Appellant does not have standing to file requests for investigative actions.

a. Background

2. On 23 April 2014, the ICIJ denied three requests for investigative actions filed by the Appellant on the basis that as a “Suspect”, he does not have standing to file requests for investigative actions at this stage (the “Three Requests Decision”).² 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”.³ This decision follows two previous decisions where the ICIJ held that the Appellant, who is not a “Charged Person”, is not entitled to participate in the judicial investigation at this stage,⁴ as well as an unsuccessful appeal by the Appellant to the Pre-Trial Chamber on this issue.⁵ On 16 May 2014, the Appellant appealed the Three Requests Decision to the Pre-Trial Chamber (the “Three Requests Appeal”).⁶

[REDACTED] On 21 May 2014, the Appellant filed a fourth request for investigative action (the “Fourth Request”),⁷ asking the Co-Investigating Judges to [REDACTED]

¹ A117/2/1.

² Impugned Decision, para. 5.

³ *Ibid.*, para. 6.

⁴ Decision on the [REDACTED] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4; 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.

⁵ 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.

⁶ [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, D190/1/1.

⁷ Fourth Request for Investigative Action, 21 May 2014, A117/1.



4. On 27 May 2014, the Greffier of the Office of the Co-Investigating Judges notified the Appellant that he has been instructed by the ICIJ “not to place the Fourth Request on the substantive portion of Case File 004 at this time” (the “Notification”).⁹ The Notification recalls the ICIJ’s holding in his Three Requests Decision and notes that the Appellant’s status has not changed.¹⁰ The Notification further states that pursuant to Internal Rule 77(11), the pending appeal against the Three Requests Decision does not have the effect of suspending the said decision.¹¹ The Fourth Request has been placed on the administrative portion of the Case File 004 by the Greffier of the Office of the Co-Investigating Judges, as an annex to the Notification. This follows a practice recently adopted by the ICIJ to place in the administrative portion of the Case File “all submissions by suspects”, “in order to preserve the record should a suspect be found to have standing in a particular case or should his or her status change at a later stage”.¹²

b. The Appeal

5. The Appellant filed the Appeal on 2 September 2014, arguing that by placing the Fourth Request in the administrative portion of the Case File and not deciding upon it after three months, the ICIJ has “constructively” dismissed it.¹³ The Appellant submits that the Appeal is admissible under Internal Rules 73(a) and 74(3)(b), interpreted in the light of Internal Rule 21, as it concerns the constructive dismissal of a request for investigative action.¹⁴ He further submits that the Appeal is also admissible under Internal Rule 21 alone, because it “concerns the equality and fairness of the investigation, as well as [the Appellant’s] right to an effective defence and right to a fair and speedy trial”.¹⁵ On the merits, the Appellant avers that the ICIJ erred “in adopting a blanket policy” to “ignore” all

⁸ Appeal, para. 7.

⁹ Memorandum from the Greffier of the Office of the Co-Investigating Judges to the Co-Lawyers for the Appellant entitled “Notification Concerning [REDACTED]’s Fourth Request for Investigative Action Pursuant to Internal Rule 55(10), dated 23 May 2014 but filed and notified on 27 May 2014, A117.

¹⁰ Notification, paras 2-3.

¹¹ Notification, para. 3.

¹² Decision on [Suspect]’s Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence’s Filings on the Case File, 4 August 2014, D202/2. *See also* Case 003/07-09-2009-ECCC/OCIJ, Decision on [Suspect’s] Request to Place All Submissions on the Case File, 28 July 2014, D108/1.

¹³ Appeal, paras 2; 17-19.

¹⁴ Appeal, para. 17-19.

¹⁵ Appeal, para. 20.



his requests for investigative actions¹⁶ and in incorrectly placing the Fourth Request in the administrative part of the Case File instead of the substantive one.¹⁷ The Appellant also incorporates by reference his arguments submitted to the Pre-Trial Chamber in his Three Requests Appeal.¹⁸

6. No response was filed by the Co-Prosecutors or the Lawyers for the Civil Parties or Civil Party Applicants within the legal deadline.

c. Further Developments

7. On 13 October 2014, the Pre-Trial Chamber dismissed the Three Requests Appeal, on the basis that it raised again the issue of the Appellant's right to participate in the judicial investigation, a matter that has already been considered by the Pre-Trial Chamber and upon which it could not reach the required majority to issue a decision.¹⁹

II. ADMISSIBILITY

8. The Pre-Trial Chamber recalls that the notion of constructive refusal has been developed by the Chamber to cover situations where the Co-Investigating Judges fail to rule on a request within the set legal deadline, when applicable, or where the Co-Investigating Judges' delay in making their decision could deprive the requesting party of the benefit sought.²⁰ The Appellant argues that the second prong applies to the present situation.
9. The Pre-Trial Chamber finds that the present case does not display a delay in the Co-Investigating Judges' consideration of the Fourth Request; rather, the ICIJ has decided not to entertain the Fourth Request at this stage, on the basis of his previous finding that the Appellant is not entitled to file requests for investigative actions. This decision is expressed in the Notification, which shall be read in conjunction with the Three Requests Decision. In these circumstances, the constructive refusal doctrine does not apply and any challenge to the course of action adopted by the ICIJ must be directed against the Notification and/or the Three Request Decision. In this respect, the Pre-Trial Chamber notes that the Appeal,

¹⁶ Appeal, paras 21-25.

¹⁷ Appeal, paras 21; 26-27.

¹⁸ Appeal, para. 21.

¹⁹ Decision on ██████'s Appeal Against International Co-Investigating Judge Decision Denying Annulment Motion, 13 October 2014, D185/1/1/2.

²⁰ See *inter alia*: Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC46), Decision on Appeal against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (NUON Chea's Twelfth Request for Investigative Action), 14 July 2010, D300/1/5 ("Appeal Decision on Twelfth Request for Investigative Action"), para. 20 referring to Case 002 (PTC10), Decision on Ieng Sary's Appeal regarding the Appointment of a Psychiatric Expert, A189/I/8, 21 October 2008 ("Appeal Decision on Appointment of Psychiatric Expert"), paras. 22-24.



in essence, seeks to challenge the ICIJ decision not to place the Fourth Request on the case file and, more generally, his “policy” not to entertain the Appellant’s requests for investigative actions, expressed in the Notification and the Three Requests Decision. The Pre-Trial Chamber finds that the Appeal is tantamount to an appeal against the Notification and its admissibility will therefore be examined in this context.

10. Pursuant to Internal Rule 75(3), appeals before the Pre-Trial Chamber shall be filed within 30 days from the notification of the impugned decision. The Notification was communicated to the Appellant on 27 May 2014 and the Appeal was filed on 2 September 2014. The Appeal is therefore out of time. Pursuant to Internal Rule 39(4)(b), the Pre-Trial Chamber “may, at the request of the concerned party or on [its] own motion [...] recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.”²¹ Absent any request for an extension of time from the Appellant, the Pre-Trial Chamber shall examine if the circumstances of the present case warrants that it recognises the validity of the Appeal filed out of time.
11. The Pre-Trial Chamber finds that the constructive refusal doctrine, which has been applied by the Pre-Trial Chamber to cover exceptional situations where the inaction of the Office of the Co-Investigating Judges or the delay in acting may cause prejudice, cannot be used to circumvent the time limit to appeal under the Internal Rules. The mischaracterisation of the Appeal is therefore not a good cause to accept its filing out of time, absent any further justification being provided by the Appellant.

III. DISPOSITION

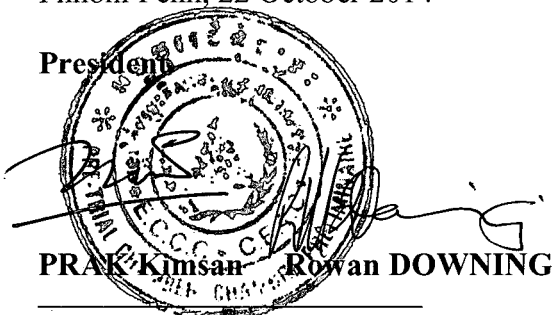
THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Appeal as inadmissible.

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

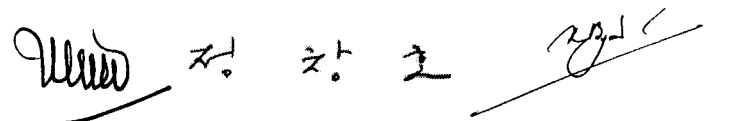
Phnom Penh, 22 October 2014

President



PRAK Kimsan **Rowan DOWNING**

Pre-Trial Chamber



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

²¹ See also Internal Rule 75(3), which allows the Pre-Trial Chamber to extend the time-limit to appeal under “exceptional circumstances”.