



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

D229/1/2

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 (PTC17)

Before: Judge PRAK Kimsan, President
Judge Steven J. BWANA
Judge NEY Thol
Judge Chang-ho CHUNG
Judge HUOT Vuthy

Date: 27 February 2015

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 03 / 03 / 2015
ម៉ោង (Time/Heure): 14:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Sann Rada

PUBLIC (REDACTED VERSION)

DECISION ON [REDACTED] APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONSTRUCTIVE DENIAL OF HIS REQUEST FOR THE INTERNATIONAL CO-INVESTIGATING JUDGE TO RECONSIDER THE DISCLOSURE OF CASE 004 WITNESS STATEMENTS IN CASE 002/02

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of ██████████ “Urgent Appeal Against the [Office of the Co-Investigating Judges’] Constructive Denial of His Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02” filed on 15 January 2015 (the “Appellant” and the “Appeal”, respectively).¹

I. PROCEDURAL BACKGROUND

1. On 20 October 2014, the International Co-Prosecutor filed publicly in Case 002/19-09-2007-ECCC (“Case 002”) the “International Co-Prosecutor’s Disclosure of Statements from Case File 004”, wherein he states that he has been authorised by the International Co-Investigating Judge to disclose 27 witnesses statements collected in Case 004 (the “27 witnesses statements”) which are relevant to the first segment of the trial in Case 002/02 to the Trial Chamber, Defence Counsel and Lead Co-Lawyers in Case 002 (the “Disclosure”).²
2. On 24 October 2014, the Appellant requested the International Co-Investigating Judge to provide him access to five documents referred to in the Disclosure, consisting of three requests by the International Co-Prosecutor for the disclosure in Case 002 of witness interviews conducted in Case 004 and two decisions of the International Co-Investigating Judge in relation to these requests, asserting that these documents were necessary for him to assess the apparent inequality of treatment between the non-parties to Case 004 (the “Request for Five Documents”).³
3. On 3 November 2014, the International Co-Investigating Judge dismissed the Request for Five Documents. The International Co-Investigating Judge explained that his decision to authorise the disclosure of the 27 witnesses statements was based on the Co-Prosecutors’ obligation to disclose to the Accused in Case 002 exculpatory evidence and other evidence that may assist in the preparation of their defence, which he had balanced against the need to preserve the confidentiality of the investigation in Case 004.⁴ In this respect, the International Co-Investigating Judge stated that he had considered, *inter alia*,

¹ D229/1/1.

² Case 002/19-09-2007-ECCC/TC, International Co-Prosecutor’s Disclosure of Statements from Case 004, 20 October 2014, E319, para. 2.

³ ██████████ Urgent Request for the Five Documents Referred to in the “International Co-Prosecutor’s Disclosure Statements from Case File 004”, 24 October 2014, D226.

⁴ Decision on Suspect’s Request for Five Documents, 3 November 2014, D226/1, paras 8-9.

*Decision on Appeal against Constructive Refusal of Request for Reconsideration of
Witness Statements*



“developments in the Case 004 investigation which diminished certain confidentiality concerns in relation to the requested material”.⁵ The International Co-Investigating Judge stated that the five documents requested by the Appellant are classified as confidential or strictly confidential and contain numerous references to Case 004 witnesses and their evidence. The International Co-Investigating Judge held that because the Appellant, if eventually charged, will be entitled to review any decision issued by the Co-Investigating Judges and seek appropriate remedy if he considers that his rights have been violated, he was not satisfied that the disclosure of the Five Documents was necessary at this stage to safeguard the Appellant’s rights.⁶

4. On 17 November 2014, the Appellant requested the International Co-Investigating Judge to either a) reconsider, by way of revoking, the disclosure of the 27 witness statements or b) reconsider his decision revoking the Defence’s access to the Case File in Case 004,⁷ on the ground that it is necessary to safeguard his right to equal treatment between the non-parties to Case 004, legal certainty and the transparency of proceedings (the “Request for Reconsideration”).⁸
5. On 24 December 2014, the Trial Chamber authorised the use of the 27 witnesses statements in Case 002/02.⁹

II. THE APPEAL

6. On 5 January 2015, the Appellant filed a notice of appeal against the International Co-Investigating Judge’s constructive denial of his Request for Reconsideration,¹⁰ and on 15 January 2015, he filed his appeal brief. The Appellant argues that the International Co-Investigating Judge’s delay in deciding on his Request for Reconsideration amounts to a constructive refusal of such and leads to a continuing violation of his rights to equality, legal certainty and transparency of proceedings. He also argues that a decision on his

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*, para. 12.

⁷ [REDACTED] Urgent Request for the International-Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 17 November 2014, D229.

⁸ *Ibid.*, paras 10-11.

⁹ Decision on International Co-Prosecutor’s Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, E319/7.

¹⁰ [REDACTED] Notice of the Appeal Against the OCIJ’s Constructive Denial of His Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 29 December 2014, D229/1.

Decision on Appeal against Constructive Refusal of Request for Reconsideration of Disclosure of Witness Statements



Request for Reconsideration was needed prior to 8 January 2015, at which date the trial in Case 002/02 was scheduled to start, “in order to avoid the use of potentially inadmissible Witness Statements in Case 002/02.”¹¹ The Appellant argues that his appeal is admissible under Internal Rule 21, to ensure respect of his right to equality, legal certainty and transparency of proceedings. The Appellant asserts that the International Co-Investigating Judge is not transparent as to whether he considers the disclosure of material from Case 004 to non-parties to be a danger for the investigation in this case, on the basis that the International Co-Investigating previously considered the disclosure of material on the Case 004 Case File to non-parties to be a danger to the Case 004 investigation, whereas he recently authorised the disclosure of the 27 witness statements to non-parties and stated that “developments in the Case 004 investigation [have] diminished certain confidentiality concerns in relation to the requested materials”, without any further explanation.¹² The Appellant further argues that the International Co-Investigating Judge is imposing different disclosure restrictions on non-parties in Case 004, which impairs the right of non-parties to Case 004 to equal treatment before the law and results in legal uncertainty.¹³ The Appellant requests the Pre-Trial Chamber to admit the Appeal and either a) revoke the disclosure of the 27 witness statements or b) provide the Defence access to the Case 004 Case File.

7. No response has been filed by the Co-Prosecutors or the lawyers for the civil parties or civil party applicants within the applicable legal deadline.

III. ADMISSIBILITY OF THE APPEAL

8. The Appellant does not challenge a decision of the Co-Investigating Judges but rather argues that their delay in deciding on his Request for Reconsideration amounts to a constructive denial of the said request and opens a possibility to appeal. The Pre-Trial Chamber recalls that pursuant to Internal Rules 73 and 74, it has jurisdiction to hear appeals against decisions or orders issued by the Co-Investigating Judges. However, the Pre-Trial Chamber has held that when the Co-Investigating Judges fail to rule on a request within the set legal deadline, if applicable, or when their delay in making a decision is unreasonable and deprives the requesting party of the possibility of obtaining the benefit

¹¹ Appeal, para. 9.

¹² *Ibid.*, paras 12-13.

¹³ *Ibid.*, para. 14.



sought, the matter may exceptionally be brought before the Pre-Trial Chamber if it falls within its subject-matter jurisdiction.¹⁴ The Appellant argues that the second prong applies to the present situation, on the grounds that an immediate resolution of the matter raised in his Request for Reconsideration is necessary to avoid the Trial Chamber using the Case 002 witness statements that may later be found inadmissible, and to put an end to the continuing violation of his rights to equal treatment, legal certainty and transparency of proceedings.¹⁵ The Pre-Trial Chamber finds both arguments unconvincing. As to the first argument, the Pre-Trial Chamber finds that the Appellant, who is not a party in Case 002/02, has no standing to raise issues related to the admissibility of evidence in this case and would not suffer any prejudice if the evidence is later found inadmissible. As to the second argument, the Pre-Trial Chamber finds that the delay in deciding on the Request for Reconsideration is not unreasonable in the circumstances and that the Appellant has not demonstrated that his asserted rights are at risk of being irretrievably impaired.

9. Therefore, the Pre-Trial Chamber finds the Appeal inadmissible.

IV. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

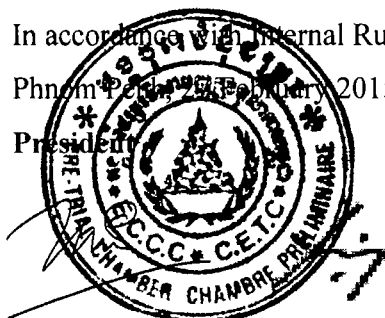
DISMISS the Appeal as inadmissible;

In accordance with Internal Rule 77(13), this decision is not subject to appeal. ¹⁶

Phnom Penh, 20 July 2015.

President

Pre-Trial Chamber



PRAK Kimsan Steven J. Bwana NEY Thol Chang-ho CHUNG HUOT Vuthy

¹⁴ Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC10), Decision on IENG Sary’s Appeal regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, paras 22-24. *See also, e.g.* Case 004 (PTC12), Decision on Appeal against Constructive Dismissal of ██████ Fourth Request for Investigative Action, 22 October 2014, para. 8; Case 003/07-09-2009-ECCC/OCIJ (PTC10), Decision on ██████ Appeal against the Co-Investigating Judges’ Denial of Fourteen of ██████ Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2, paras 10-11; 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, para. 20.

¹⁵ Appeal, paras 7 and 9.