



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 Preliminaire

D347.1/1/7

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° 004/2/07-09-2009-ECCC/OCIJ (PTC42)

THE PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 30 June 2017

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PUBLIC REDACTED

DECISION ON [REDACTED] APPEAL AGAINST THE NOTIFICATION ON THE INTERPRETATION OF 'ATTACK AGAINST THE CIVILIAN POPULATION' IN THE CONTEXT OF CRIMES AGAINST HUMANITY WITH REGARD TO A STATE'S OR REGIME'S OWN ARMED FORCES

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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 the International Co-Investigative Judge’s Notification on the Interpretation of ‘Attack Against the Civilian Population’ in the Context of Crimes Against Humanity with Regard to a State’s or Regime’s Own Armed Forces”, filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and the “Appellant”) on 1 May 2017 (the “Appeal”).¹

I. INTRODUCTION

1. This Appeal concerns a notification of the International Co-Investigating Judge, placed on the case file of Case 004/2 on 10 February 2017, regarding the interpretation of “attack against the civilian population” in the context of crimes against humanity with regard to a State’s or regime’s own armed forces (the “Impugned Notification”).²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him.³

3. On 19 April 2016, the International Co-Investigating Judge invited the parties in Cases 003 and 004, as well as qualified scholars and organisations, to make submissions and submit written *amicus curiae* briefs on the issue of whether under customary international law in 1975-1979 an attack by a state or organization against its own armed forces could

¹ Case No. 004/2/07-09-2009-ECCC-OCIJ (“Case 004/2”), ██████████ Appeal Against the International Co-Investigative Judge’s Notification on the Interpretation of ‘Attack Against the Civilian Population’ in the Context of Crimes Against Humanity with Regard to a State’s or Regime’s Own Armed Forces, filed on 1 May 2017 and notified on 2 May 2017, D347.1/1/3 (“Appeal”).

² Case 004/2, Notification on the Interpretation of ‘Attack Against the Civilian Population’ in the Context of Crimes Against Humanity with Regard to a State’s or Regime’s Own Armed Forces, filed in English on 10 February 2017 and in Khmer on 30 March 2017, D347.1 (“Impugned Notification”).

³ Case 004, Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1/1.



amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law (the “Call for Submissions”).⁴

4. On 19 May 2016, written submissions were filed by the International Co-Prosecutor⁵ and by the Co-Lawyers for ██████████,⁶ ██████████⁷ and ██████████.⁸ Eleven *amicus curiae* briefs were submitted by external organizations and legal practitioners.⁹ On 11 July 2016, the Co-Lawyers for ██████████¹⁰ and ██████████¹¹ filed combined responses.

⁴ Call For Submissions by the Parties in Cases 003 and 004 And Call for *Amicus Curiae* Briefs, 19 April 2016, filed in Case No. 003/07-09-2009-ECCC-OCIJ (“Case 003”) (D191) and in Case No. 004/07-09-2009-ECCC-OCIJ (“Case 004”) (D306).

⁵ International Co-Prosecutor’s Response to the International Co-Investigating Judge’s Call for Submissions Regarding Crimes Against Humanity, 19 May 2016, filed in Case 003 (D191/1) and in Case 004 (D306/2) (“Call for Submissions”).

⁶ Case 004, ██████████ Submission on the Interpretation of the Term ‘Civilian Population’ for the Purpose of Article 5 of the Establishment Law, 19 May 2016, D306/1.

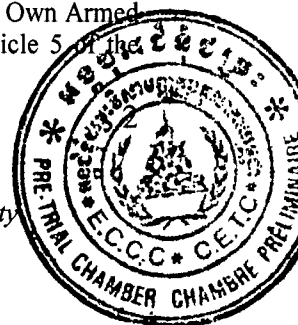
⁷ Case 003, ██████████ Submission on the Question of Whether Under Customary International Law in 1975-1979 an Attack by a State or Organization Against its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5 of the Establishment Law, 19 May 2016, D191/2.

⁸ Case 004, ██████████ Submission on Whether an Attack by a State or Organisation Against Members of its Own Armed Forces Could Qualify as a Crime Against Humanity Under Customary International Law in 1975-1979, 19 May 2016, D306/3.

⁹ *Amicus Curiae* Brief in Cases 003 and 004 – Professor Ben Saul, 19 May 2016, filed in Case 003 (D191/3) and in Case 004 (D306/4); *Amicus Curiae* Brief for Cases 003 and 004 – Catherine Drummond, Philippa Webb and Dapo Akande, 19 May 2016, filed in Case 003 (D191/4) and in Case 004 (D306/5); *Amicus Curiae* Brief for Cases 003 and 004 – TRIAL (Track Impunity Always), 19 May 2016, filed in Case 003 (D191/5) and in Case 004 (D306/6); *Amicus Curiae* Brief of Professors Robinson, deGuzman, Jalloh and Cryer on Crimes against Humanity (Cases 003 and 004), 17 May 2016, filed in Case 003 (D191/6) and in Case 004 (D306/7); *Amicus Curiae* Brief for Cases 003 and 004 – Ido Rosenzweig, 19 May 2016, filed in Case 003 (D191/7) and in Case 004 (D306/8); *Amicus Curiae* Brief for Cases 003 and 004 – Dr. Joanna Nicholson, 19 May 2016, filed in Case 003 (D191/8) and in Case 004 (D306/9); *Amicus Curiae* Brief for Cases 003 and 004 – Professor Nicholas Tsagourias, 17 May 2016, filed in Case 003 (D191/9) and in Case 004 (D306/10); *Amicus Curiae* Brief for Cases 003 and 004 – Oliver Windridge, 19 May 2016, filed in Case 003 (D191/10) and in Case 004 (D306/11); *Amicus Curiae* Brief Filed by Drs Williams and Grey in Response to Call for *Amicus Curiae* Briefs in Cases 003 and 004 Dated 19 April 2016, 19 May 2016, filed in Case 003 (D191/11) and in Case 004 (D306/12); *Amicus* Brief filed by the Center for International and Comparative Law, University of Baltimore School of Law on the Legality of Targeting Members of One’s Own Military, 18 May 2016, filed in Case 003 (D191/12) and in Case 004 (D306/13); Queen’s University Belfast Human Rights Centre Response to the ECCC Office of the Co-Investigating Judges’ ‘Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs’, 12 May 2016, filed in Case 003 (D191/13) and in Case 004 (D306/14).

¹⁰ Case 004, ██████████ Combined Response to Brief Submitted by *Amici Curiae* Pursuant to D306, 11 July 2016, D306/16.

¹¹ Case 003, ██████████ Combined Response to *Amici Curiae* Submissions on the Question of Whether Under Customary International Law in 1975-1979 an Attack by a State or Organization Against Its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5



5. On 16 December 2016, the Co-Investigating Judges notified the conclusion of the judicial investigation against the Appellant,¹² followed by a second notice of conclusion on 29 March 2017.¹³
6. On 10 February 2017, the International Co-Investigating Judge placed the Impugned Notification on the case file of Case 004/2.
7. On 15 February 2017, the Co-Lawyers for ██████ filed a notice of appeal against the Impugned Notification¹⁴ and, on 1 May 2017, submissions on appeal.¹⁵
8. On 23 May 2017, pursuant to the Pre-Trial Chamber's instructions,¹⁶ the International Co-Prosecutor filed his response to the Appeal (the "Response").¹⁷ The Co-Lawyers did not file any reply within the prescribed deadline.

III. ADMISSIBILITY

A. Submissions

9. The Co-Lawyers submit that the Appeal is admissible under Internal Rules 74(3)(a) and 21.¹⁸ They contend that it is admissible as a jurisdictional challenge under Internal Rule 74(3)(a) since the Impugned Notification concerns whether the ECCC has jurisdiction to investigate and prosecute individuals for attacks by a state or regime against its armed forces

Establishment Law, 11 July 2016, D191/17.

¹² Case 004/2, Notice of Conclusion of Judicial Investigation Against ██████, 16 December 2016, D334.

¹³ Case 004/2, Second Notice of Conclusion of Judicial Investigation Against ██████, 29 March 2017, D334/2.

¹⁴ Notice of Appeal Against Notification on the Interpretation of 'Attack Against the Civilian Population' in the Context of Crimes Against Humanity with Regard to a State's or Regime's Own Armed Forces, filed on 15 February 2017 and notified on 16 February 2017, D347.1/1.

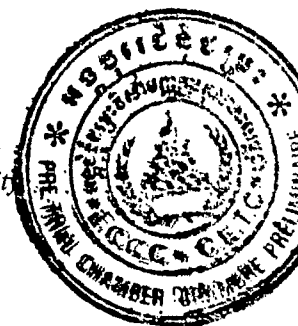
¹⁵ See *supra* footnote 1.

¹⁶ Case 004/2, Order on International Co-Prosecutor's Request for Extension of Time to Respond to ██████ Appeal Against the International Co-Investigating Judge's Civilian Population Decision, 11 May 2017, D347.1/1/5.

¹⁷ Case 004/2, International Co-Prosecutor's Response to ██████ Appeal Against the International Co-Investigating Judge's Civilian Population Decision, 23 May 2017, D347.1/1/6 ("Response"), notified on 25 May 2017.

¹⁸ Appeal, para. 15.

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as a crime against humanity, which if applied would violate the principle of legality.¹⁹ They further assert that the Appeal is admissible under Internal Rule 21 because it breaches the Appellant's right to legal certainty.²⁰

10. The International Co-Prosecutor does not dispute, in his Response, that the Impugned Notification constitutes an "order or decision" within the meaning of Internal Rule 74(3) and that the International Co-Investigating Judge intends to apply his finding in Cases 003 and 004.²¹ He further acknowledges that the issue at stake raises questions pertaining to the principle of legality and to whether the ECCC may prosecute as crimes against humanity crimes committed against an entire category of a state's population, such that it potentially falls within Internal Rule 74(3)(a).²² However, he upholds that the Appeal is seeking declaratory relief and, as such, is premature and should be addressed only if the Appellant is indicted for crimes against humanity pertaining to an attack on military personnel.²³

B. Discussion

11. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 74(3)(a), a charged person may appeal against orders or decisions of the Co-Investigating Judges "confirming the jurisdiction of the ECCC". Challenges to the very existence in law of a crime and its elements at the time relevant to the indictment, which if applied would result in a violation of the principle of legality, raise admissible subject matter jurisdiction challenges.²⁴ In order to determine the admissibility of the Appeal, the Pre-Trial Chamber will ascertain whether the Impugned Notification constitute an appealable "decision" within the meaning of Internal Rule 74(3) and, in the affirmative, whether it is admissible under Internal Rule 74(3)(a) as an

¹⁹ Appeal, paras 16-19.

²⁰ Appeal, para. 20.

²¹ Response, para. 9.

²² Response, para. 12.

²³ Response, para. 13.

²⁴ Case 003 (PTC30), Decision on [REDACTED] Appeal Against the International Co-Investigating Judge's Decision on [REDACTED] Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, D87/2/1.7/1/1/7 ("Decision on the Nexus"), para. 12 referring to Case 002 (PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 117; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, Appeals Chamber, 6 June 2007, paras 15, 18.

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order confirming the jurisdiction of the ECCC. Alternatively, it will consider whether it is admissible under Internal Rule 21.

1. Admissibility under Internal Rule 74(3)(a)

12. The Pre-Trial Chamber considers that both the title and the form and substance of the Impugned Notification suggest that it does not amount to a “decision” appealable under Internal Rule 74(3)(a), but rather to an opinion from which declaratory relief is sought.

13. In particular, the Pre-Trial Chamber notes that the International Co-Investigating Judge did not explicitly indicate in the Impugned Notification whether he will apply his legal conclusions to the present case, either during the investigation or when determining the allegations against the charged person.²⁵ Rather, he made findings “as a matter of principle”,²⁶ called for submissions “in the abstract as a question of law”,²⁷ with the aim to “benefit international criminal law as a whole”.²⁸ The International Co-Investigating Judge further recognised that the relevance of the Impugned Notification to the determination of allegations against the Appellant remains hypothetical (“may be relevant to the allegations”) and, besides, limited (“to a lesser extent”) with regards to Case 004.²⁹

14. The title, content and use of terms such as “a matter of principle”³⁰ or “in the abstract”³¹ therefore strongly suggest that the Impugned Notification is merely an advisory opinion regarding a disagreement on the applicable law, the resolution of which the Pre-Trial

²⁵ See, *a contrario*, Case 003, Decision on [REDACTED] Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, para. 78 (“[I will not] require proof of the Nexus in making my determinations on the allegations against [REDACTED].”); Case 002, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, paras 21 (“the Co-Investigating Judges find that there is a basis under international law for applying JCE [...]”), 23 (“[t]hese aspects were adequately pled in the Introductory Submission, in particular under the sections relating to alleged common criminal plan (paras 5-16), the paragraphs relating to the alleged participation and knowledge of the Charged Persons and paragraph 116”).

²⁶ Impugned Notification, para. 69 (Disposition).

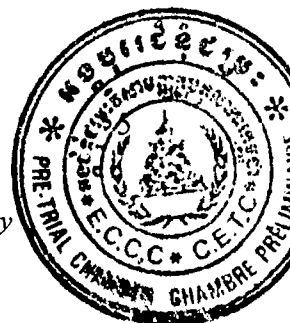
²⁷ Call for Submissions, para. 9.

²⁸ Call for Submissions, para. 6.

²⁹ *Ibid.*

³⁰ Impugned Notification, para. 69 (Disposition).

³¹ Call for Submissions, para. 9.



Chamber does not consider essential at this stage for the determination of allegations in Case 004.³² Indeed, since it is a mixed issue of law and fact,³³ absent any specific factual basis, it is only possible to speculate as to what consideration, if any, the Co-Investigating Judges may give to an attack by a state or organization against its own armed forces in the drafting of the closing order, which is appealable.³⁴ In the Call for Submissions, the International Co-Investigating Judge further stressed that case specific submissions by the parties may be made in the final submissions, once he has taken a view on the law and notified the parties accordingly.³⁵

15. For the foregoing reasons, the Pre-Trial Chamber concludes that the Impugned Notification does not constitute an appealable “decision” within the meaning of Internal Rule 74(3). Furthermore, the Pre-Trial Chamber considers that the relief sought by the Co-Lawyers is declaratory and that the impact of any ruling it would make on the issue at stake with regards to the charges would be speculative. There is thus no need to examine whether the interpretation of “attack against the civilian population” in the context of crimes against humanity with regard to a State’s or regime’s own armed forces constitutes a jurisdictional challenge under Internal Rule 74(3)(a).

³² See, albeit in a different context and under distinct provisions, the definition of the notion of appealable issue by the Appeals Chamber of the International Criminal Court: ICC, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9 (“[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An [appealable] issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”).

³³ The Pre-Trial Chamber notes for instance that the Impugned Notification indicates that “the finding [...] above does not apply insofar as the attacked armed forces were *in fact* allied with or otherwise providing militarily relevant support to an opposing side to an armed conflict” (emphasis added). See Impugned Notification, para. 69 (Disposition).

³⁴ See, e.g., Case 002 (PTC60), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order on IENG Sary’s Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11 (“Decision on Command Responsibility”), para. 11.

³⁵ Call for Submissions, para. 9.



2. Admissibility under Internal Rule 21

16. The Pre-Trial Chamber recalls that Internal Rule 21 does not open an automatic avenue for appeal, even where an appeal raises fair trial issues, and that the appellant must demonstrate that the particular circumstances of the case require the Chamber's intervention to avoid *irremediable* damage to the fairness of the investigation or proceedings, or to the appellant's fundamental rights.³⁶ In the present case, the Pre-Trial Chamber is not convinced that exceptional circumstances require its intervention. As previously observed, the fact that the appeal concerns a definition of crimes against humanity which will be used to determine the allegations against the Appellant is purely hypothetical, as is the need to expedite a potential appeal on related issues in the closing order. The Pre-Trial Chamber reiterates that it will not provide advisory opinion and cannot fetter the exercise of the discretion of the Co-Investigating Judges in respect of their decisions to be expressed in a closing order.³⁷

17. The Pre-Trial Chamber thus finds the Appeal inadmissible.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- DISMISSES the Appeal as inadmissible.

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

Phnom Penh, 30 June 2017

President

Pre-Trial Chamber



PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

³⁶ See, e.g., Case 004 (PTC16), Decision on [REDACTED] Appeal against the Decision Rejecting His Request for Information concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para. 8.

³⁷ See, e.g., Decision on Command Responsibility, para. 11.