



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

D377/1/1/3

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° 004/07-09-2009-ECCC/OCIJ (PTC55)

THE PRE-TRIAL CHAMBER

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

Date: 19 October 2018

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PUBLIC REDACTED

DECISION ON [REDACTED]'S APPEAL OF THE DECISION ON [REDACTED]'S REQUEST FOR CORRECTION OF TRANSLATION ERRORS IN WRITTEN RECORDS OF INTERVIEW

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “██████████’s Appeal of the Decision on ██████████’s Request for Correction of Translation Errors in Written Records of Interview”, filed by the Co-Lawyers for ██████████ (“Co-Lawyers” and “Appellant”, respectively) on 4 June 2018 (“Appeal”).¹

I. PROCEDURAL HISTORY

1. 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.²
2. On 9 December 2015, the International Co-Investigating Judge charged the Appellant with violations of Articles 501 and 506 of the 1956 Penal Code (homicide), genocide, crimes against humanity, and grave breaches of the Geneva Conventions of 1949.³
3. On 5 September 2017, the Co-Investigating Judges issued the second notice of conclusion of judicial investigation against the Appellant.⁴
4. On 9 February 2018, the Co-Lawyers filed a request asking the Co-Investigating Judges to correct errors in the English translations of written records of interview (“WRIs”) on Case File 004 (“Request”),⁵ as listed in Annex A to the Request.⁶ The Co-Prosecutors did not respond to this Request.

¹ Case No. 004/07-09-2009-ECCC-OCIJ (“Case 004”), ██████████’s Appeal of the Decision on ██████████’s Request for Correction of Translation Errors in Written Records of Interview, filed in English on 4 June 2018 and notified on 19 June 2018, and filed in Khmer on 26 June 2018 and notified on 27 June 2018, D377/1/1/2 (“Appeal”).

² Case 004, Co-Prosecutors’ 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.

³ Case 004, Written Record of Initial Appearance, 9 December 2015, D281, p. 3.

⁴ Case 004, Second Notice of Conclusion of Judicial Investigation Against ██████████, 5 September 2017, D368.

⁵ Case 004, ██████████’s Request for Correction of Translation Errors in Written Records of Interview, 9 February 2018, D377 (“Request”).

⁶ Case 004, Annex A: ██████████’s Request for Correction of Translation Errors in Written Records of Interview, 9 February 2018, D377.2.



5. On 28 February 2018, the International Co-Investigating Judge issued a decision denying the Request in part (“Impugned Decision”).⁷ On 1 March 2018, he issued the Forwarding Order pursuant to Internal Rule 66(4).⁸
6. On 7 May 2018, the Co-Lawyers filed a notice of appeal against the Impugned Decision,⁹ and on 4 June 2018 they filed the Appeal.¹⁰ Annex A to the Appeal¹¹ contains a list of the alleged errors originally identified in the Request which the International Co-Investigating Judge declined to correct in the Impugned Decision (“Alleged Translation Errors”).
7. On 31 May and 4 June 2018, the National Co-Prosecutor¹² and the International Co-Prosecutor,¹³ respectively, filed their final submissions pursuant to Internal Rule 66 (“Final Submissions”). On 20 June 2018, the Co-Investigating Judges granted the Appellant three months to respond to the Final Submissions, counting from the date of the notification of the Khmer translation of the International Co-Prosecutor’s Final Submission¹⁴ on 22 August 2018.
8. On 3 July 2018, the International Co-Prosecutor notified the Pre-Trial Chamber by email that he did not intend to file a response to the Appeal. The National Co-Prosecutor did not file a response, either.

⁷ Case 004, Decision on ██████’s Request for Correction of Translation Errors in Written Records of Interview, filed and notified in English on 28 February 2018 and notified in Khmer on 4 May 2018, D377/1 (“Impugned Decision”); *see also* Case 004, Annex A: Corrections to be made to the English translation of written records of interview “WRI” on Case File 004, 28 February 2018, D377/1.1.

⁸ Case 004, Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378.

⁹ Case 004, ██████’s Notice of Appeal Against the Decision on ██████’s Request for Correction of Translation Errors in Written Records of Interview, filed on 7 May 2018 and notified on 8 May 2018, D377/1/1 (“Notice of Appeal”).

¹⁰ Appeal. *See also* Case 004, Urgent Request to File ██████’s Appeal of the Decision on ██████’s Request for Correction of Translation Errors in Written Records of Interview in One Language, 1 June 2018, D377/1/1/1.

¹¹ Case 004, Annex A: ██████’s Appeal of the Co-Investigating Judge’s Decision on ██████’s Request for Correction of Translation Errors in Written Records of Interview, 4 June 2018, D377/1/1/2.2.

¹² Case 004, Final Submission Concerning ██████ Pursuant to Internal Rule 66, 31 May 2018, D378/1.

¹³ Case 004, International Co-Prosecutor’s Rule 66 Final Submission Against ██████, dated 4 June 2018, notified in English on 5 June 2018 and in Khmer on 22 August 2018, D378/2.

¹⁴ Case 004, Decision on Time Granted to the Defence to Respond to the Final Submissions by the Co-Prosecutors, 20 June 2018, D378/4.



II. ADMISSIBILITY

9. The Impugned Decision was notified in English on 28 February 2018 and in Khmer on 27 June 2018. The Notice of Appeal, filed on 7 May 2018, and the Appeal, filed on 4 June 2018, were therefore timely, within the meaning of Internal Rule 75.

10. Internal Rules 73 and 74 set out the explicit jurisdiction of the Pre-Trial Chamber, with Rule 74(3)(a) providing an exhaustive list of the types of orders and decisions of the Co-Investigating Judges that can be appealed against by a charged person. The Co-Lawyers do not invoke these rules in arguing that the Appeal is admissible, but rather file the Appeal pursuant to Internal Rule 21.¹⁵

11. Internal Rule 21 protects fundamental principles of fairness in the proceedings before the ECCC, and reflects the fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) of the ECCC Agreement,¹⁶ Article 35 *new* of the ECCC Law¹⁷ and Article 14(3) of the International Covenant on Civil and Political Rights.¹⁸ The Pre-Trial Chamber has held that these principles “may warrant adopting a liberal interpretation of the right to appeal to ensure that the proceedings are fair and adversarial” by admitting appeals under Internal Rule 21 or broadly construing the specific provisions of the Internal Rules which grant it jurisdiction.¹⁹ Such admissibility may apply in the rare instances where the particular facts of a case raise issues of fundamental rights or serious issues of procedural fairness, but Internal Rule 21 does not open an automatic avenue for appeal, even where an appeal raises fair trial issues.²⁰ Internal Rule 21 moreover does not provide an avenue for the Chamber to resolve hypothetical questions or provide advisory opinions.²¹ For the Pre-Trial

¹⁵ Appeal, p. 1, paras 19-23.

¹⁶ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005 (“ECCC Agreement”).

¹⁷ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (“ECCC Law”).

¹⁸ Case 004 (PTC19), Considerations on [REDACTED] Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*, 1 March 2016, D239/1/8 (“Considerations on Charging [REDACTED] *In Absentia* (D239/1/8)”), para. 17.

¹⁹ Considerations on Charging [REDACTED] *In Absentia* (D239/1/8), para. 17.

²⁰ Considerations on Charging [REDACTED] *In Absentia* (D239/1/8), para. 17.

²¹ Case 004 (PTC16), Decision on [REDACTED] Appeal Against the Decision Rejecting His Request for Information



Chamber to entertain an appeal under Internal Rule 21, the appellant must demonstrate that the situation at issue does not fall within the applicable rules and 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.²²

12. The Co-Lawyers argue the Appeal is admissible pursuant to Internal Rule 21 because it concerns the issue of whether the Alleged Translation Errors are unduly prejudicial to the Appellant, and the Impugned Decision infringes upon the Appellant's rights to a fair trial, namely his right to test the evidence tendered against him.²³ The Co-Lawyers submit that, if left to stand, the Alleged Translation Errors will have an irremediable impact on the current proceedings.²⁴ They note, in this regard, that the International Co-Investigating Judge has held that "inaccuracies of this nature must logically be corrected before the [*sic*] 'the point when the parties are meant to comment on the outcome of the investigations'",²⁵ and observe that – at the time the Appeal was filed – the Final Submissions and response thereto were already being or would soon be prepared by the parties²⁶ based on the inaccurate English versions of the WRIs.²⁷ The Co-Lawyers contend that adverse findings could now be made against the Appellant on the basis of the Alleged Translation Errors, that there is an immediate risk that an indictment could be drafted on the basis of "unfairly inaccurate

Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para. 8.

²² Considerations on Charging ██████████ *In Absentia* (D239/1/8), para. 17. *See also* Case 003/07-09-2009-ECCC/OCIJ ("Case 003") (PTC23), Considerations on ██████████ Request for a Stay of Execution of Arrest Warrant, 23 September 2015, C2/4 ("Case 003 Considerations on Stay of Arrest Warrant (C2/4)"), Opinion of Judges BEAUVALLET and BWANA, para. 9.

²³ Appeal, paras 19-21 *referring to* International Covenant on Civil and Political Rights, Art. 14; ECCC Agreement, Art. 12(2); ECCC Law, Art. 35 *new*.

²⁴ Appeal, para. 21.

²⁵ Appeal, para. 21 *referring to* Case 004/2/07-09-2009-ECCC/OCIJ, Decision on ██████████ Thirteenth Request for Investigative Action, 16 March 2017, D345/1.

²⁶ The Pre-Trial Chamber notes that the International Co-Prosecutor filed his Final Submission in English on the same day the Appeal was filed, while the National Co-Prosecutor filed her Final Submission in English and Khmer on 31 May 2018; the Appellant was granted three months to respond to the Final Submissions in English only, counting from the date of the notification of the full Khmer translation of the International Co-Prosecutor's Final Submission on 22 August 2018. *See supra* footnotes 12-14.

²⁷ Appeal, para. 22.



evidence”,²⁸ and that the Appellant will not have any further opportunity to raise the errors after the closing order has been issued in light of Internal Rule 76(7).²⁹

13. The Pre-Trial Chamber recalls that an appellant alleging that an appeal is admissible under Internal Rule 21 must demonstrate that the situation at issue does not fall within the applicable rules. In other words, “this rule cannot be invoked to render admissible a request for which an established regime exists, but which does not satisfy the relevant admissibility requirements.”³⁰ The Pre-Trial Chamber notes that the Appeal makes no attempt at making this preliminary demonstration, and the Chamber declines to undertake a *proprio motu* analysis of the potential admissibility, or inadmissibility, of this Appeal pursuant to any other regulation.

14. However, assuming *arguendo* that this first prong of the admissibility test under Internal Rule 21 were established, the Pre-Trial Chamber is nevertheless of the view that the second prong of this test has not been sufficiently demonstrated. Although the Appeal alleges violations of procedural fairness and the Appellant’s fair trial rights, recourse to Internal Rule 21 is not automatic. The Pre-Trial Chamber, having considered the reasoning in the Impugned Decision leading to the rejection of part of the Request,³¹ is not convinced that the Appellant has established any serious violations warranting the Chamber’s intervention under Internal Rule 21.

15. Thus, the Pre-Trial Chamber finds the Appeal inadmissible under Internal Rule 21.

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

- **REJECTS** the Appeal as inadmissible under Internal Rule 21.

²⁸ Appeal, para. 22.

²⁹ Appeal, para. 23.

³⁰ Case 003 Considerations on Stay of Arrest Warrant (C2/4), Opinion of Judges BEAUVALLET and BWANA, para. 15. *See also* Case 002/19-09-2007-ECCC/OCIJ (PTC63), Decision on the Appeal Against the “Order on the Request to Place on the Case [File] the Documents Relating to Mr. KHIEU Samphan’s Real Activity” 7 July 2010, D370/2/11, para. 12.

³¹ Impugned Decision, paras 9-12.



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

Phnom Penh, 19 October 2018

President

Pre-Trial Chamber



    
PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy