ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D284/1/4

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 (PTC25)

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

Date: **31 March 2016**

PUBLIC REDACTED

DECISION ON APPEAL AGAINST ORDER ON [redacted]'S RESPONSES D193/47, D193/49, D193/51, D193/53, D193/56 AND D193/60

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Appellant

MOM Luch
Richard ROGERS
Göran SLUITER

Civil Party Lawyers

CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov
Linda BEHNKE
Laure DESFORGES
Herve DIAKIESE
Ferdinand DJAMMEN-NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Emmanuel JACOMY
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Beini YE

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of the "Appeal against Order on [redacted]'s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60" filed on 15 January 2016 (the "Appeal").[1]

I – INTRODUCTION

1. This Appeal concerns an order of the International Co-Investigating Judge, issued on 18 December 2015, regarding [redacted]'s responses to the International Co-Prosecutor's requests to disclose Case 004 documents into Case 002 (the "Impugned Order").[2]

a. Background

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 [redacted] (the "Appellant") in criminal acts and proposing to press charges against him.[3]

3. Between 28 August 2013 and 25 September 2015, the International Co-Prosecutor filed twenty-six requests for disclosure of Case 004 material into Case 002.[4] The International Co-Investigating Judge issued twenty-five related decisions or orders.[5]

4. On 27 February 2015, the Pre-Trial Chamber dismissed for lack of standing an appeal from the Co-Lawyers for [redacted] alleging constructive denial of a request to reconsider the disclosure of Case 004 witness statements in Case 002/02.[6]

5. On 27 March 2015, the Appellant attended an initial appearance hearing and the International Co-Investigating Judge charged him with crimes against humanity, in addition to other charges under both national and international law.[7]

---

[1] D284/1/2 ("Appeal").
[2] Order on [redacted]'s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 18 December 2015, D284 ("Impugned Order").
[3] Co-Prosecutors' Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.
[4] *See* D167, D167/2, D193, D193/2, D193/3, D193/5, D193/7, D193/9, D193/12, D193/14, D193/17, D193/20, D193/23, D193/25, D193/26, D193/27, D193/29, D193/31, D193/32, D193/35, D193/36, D193/38, D193/39, D193/40, D193/42, and D200.
[5] *See* D167/1, D167/3, D193/1, D193/4, D193/6, D193/8, D193/10, D193/11, D193/13, D193/15, D193/16, D193/19, D193/21, D193/24, D193/28, D193/30, D193/33, D193/34, D193/37, D193/41, D193/43, D193/44, D200/1, D200/2, and D200/4.
[6] Decision on [redacted]'s 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, 27 February 2015, D229/1/2.

6. Between 7 October 2015 and 1 December 2015, the International Co-Prosecutor filed six further requests to disclose Case 004 documents into Case 002 (collectively the "Disclosure Requests"), all pertaining to written records of interviews or investigative actions relevant to ongoing trial and appeal proceedings in Cases 002/01 and 002/02.[8]

7. Between 20 October 2015 and 4 December 2015, the Co-Lawyers for the Appellant filed five responses to the Disclosure Requests (collectively the "Responses").[9]

8. On 4 November 2015, the International Co-Prosecutor submitted a consolidated reply to four of the Responses.[10]

9. On 10 November 2015, 17 November 2015, 3 December 2015, 18 December 2015 and 15 January 2016, the International Co-Investigating Judge issued five decisions on the Disclosure Requests.[11]

---

[7] Written Record of Initial Appearance, 27 March 2015, D242.

[8] International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002, 7 October 2015, D193/45 [redacted]; International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002, 16 October 2015, D193/46 [redacted]; International Co-Prosecutor's Request to Disclose Case 004 Documents into Case 002, 21 October 2015, D193/48 [redacted]; International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002, 26 October 2015, D193/50 [redacted]; International Co-Prosecutor's Urgent Request to Disclose a Case 004 Document into Case 002, 30 October 2015, D193/52 [redacted]; International Co-Prosecutor's Urgent Request to Disclose a Case 004 Document into Case 002, 1 December 2015, D193/58 [redacted].

[9] [redacted]'s Response to the International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002, 20 October 2015, D193/47; AO An's Response to International Co-Prosecutor's Requests D193/46 and D193/48 to Disclose Case 004 Documents into Case 002, 26 October 2015, D193/49; [redacted]'s Response to International Co-Prosecutor's Urgent Request D193/50 to Disclose Case 004 Documents into Case 002, 3 December 2015, D193/51; [redacted]'s Response to International Co-Prosecutor's Urgent Request D193/52 to Disclose a Case 004 Document into Case 002, 3 November 2015, D193/53; [redacted]'s Response to International Co-Prosecutor's Urgent Request D193/58 to Disclose a Case 004 Document into Case 002, 4 December 2015, D193/60.

[10] International Co-Prosecutor's Reply to [redacted]'s Responses (D193/47, D193/49, D193/51, D193/53) to the International Co-Prosecutor's Requests to Disclose Case 004 Documents into Case 002, 4 November 2015, D193/54.

10. On 10 November 2015, the Co-Lawyers for the Appellant filed a request for clarification regarding the International Co-Investigating Judge's 10 November 2015 Decision.[12]

11. On 18 December 2015, the International Co-Investigating Judge issued the Impugned Order, in which he rejected the Appellant's request to cease disclosures and vary the conditions for disclosure made in the Responses.

b. The Appeal

12. On 24 December 2015, the Co-Lawyers filed the Appellant's Notice of Appeal against the Impugned Order.[13]

13. On 13 January 2016, the Co-Lawyers filed a request for authorization to file the Appeal in English first with the Khmer translation to follow.[14]

14. On 15 January 2016, the Co-Lawyers filed the Appeal in English. The Appeal was notified to the parties in English only on 18 January 2016 and in Khmer on 29 January 2016. The Appellant submits that the Appeal is admissible pursuant to Internal Rules 74(3)(b) and/or under Internal Rule 21[15] and raises three grounds of appeal based on alleged errors of law and of fact.[16] The Appellant asks the Pre-Trial Chamber to overturn the Impugned Order and to order the International Co-Investigating Judge "to revoke all previous orders and decisions on the disclosure of Case 004 materials into Case 002, which were based on the errors raised in this appeal."[17]

---

[11] Decision on International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002/01, 10 November 2015, D193/55; Decision on the International Co-Prosecutor's Disclosure Request D193/52, 17 November 2015, D193/57; Decision on the International Co-Prosecutor's Urgent Disclosure Request D193/58, 3 December 2015, D193/59; Decision on the International Co-Prosecutor's Disclosure Requests D193/29, D193/35, D193/38, D193/39, D193/42, D193/45, D193/46 and D193/48, 18 December 2015, D193/61; Decision Providing Trial Chamber with Documents of Case 004 Disclosed in Case 002/01 to the Supreme Court Chamber in D193/55 and D193/57, 15 January 2016, D193/62.

[12] Request for Clarification of Decision on International Co-Prosecutor's Urgent Request to Disclose Case 004 Documents into Case 002/01, 10 November 2015, D193/56.

[13] Notice of Appeal against Order on [redacted]'s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 24 December 2015, D284/1.

[14] Request to File in English First the Appeal against the Order on [redacted]'s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 13 January 2016, D284/1/1.

[15] Appeal, para. 29.

[16] Appeal, paras 4, 48-76.

[17] Appeal, paras 5, 78.

15. The International Co-Prosecutor filed a response on 8 February 2016, which was notified to the parties on 9 February 2016.[18]

II – ADMISSIBILITY

16. The Appellant submits that the Appeal is admissible under a broad interpretation of Internal Rule 74(3)(b) and/or under Internal Rule 21[19] since the International Co-Investigating Judge's decisions on the Disclosure Requests affect his fundamental rights going to the heart of the fairness of proceedings, including equality of arms, the integrity of the investigation and the presumption of innocence.[20] The Appellant specifies that, because disclosed Case 004 material was used in public trial in Case 002 to question witnesses on the Appellant's functions and role in relation to alleged crimes, "the presumption of his innocence and his reputation have been patently violated"[21] and "[t]he cumulative effect of the existing and potential violations of confidentiality and the damage to [redacted]'s fair trial rights and reputation is causing irreversible prejudice to the integrity of the Case 004 investigation."[22]

17. The International Co-Prosecutor responds that the Appeal is inadmissible under Internal Rule 74(3)(b), which relates to investigative action requests and not disclosure decisions.[23] According to the Co-Prosecutor's submissions, the Appellant fails to demonstrate that the Chamber's intervention is necessary under Internal Rule 21 to prevent irremediable damage to the fairness of the proceedings or the Appellant's fair trial rights.[24] The International Co-Prosecutor further submits that there is no fair trial right protecting a charged person's reputational integrity[25] or the confidentiality of the investigation.[26]

18. At the outset, the Pre-Trial Chamber notes that the second prong of the Appeal requesting the revocation of "all previous orders and decisions on the disclosure of Case 004 materials into Case 002, which were based on the errors raised in this [A]ppeal"[27] is impermissibly

[18] International Co-Prosecutor's Response to [redacted]'s Appeal against Order on [redacted]'s Responses D193/47, D193/49, D193/51, D193/53 & D193/60, 8 February 2016, D284/1/3 ("Response").
[19] Appeal, paras 26-30.
[20] Appeal, para. 29.
[21] Appeal, paras 73-75.
[22] Appeal, para. 76.
[23] Response, para. 6.
[24] Response, paras 7-18.
[25] Response, para. 11.
[26] Response, para. 14.
[27] Appeal, paras 5, 78.

vague. The Pre-Trial Chamber recalls the long history of disclosure requests in Case 004 and holds that it cannot be expected to consider a party's contention if it does not provide precise references to the findings it challenges and arguments to its support. This part of the Appeal is therefore summarily dismissed.

19. The Pre-Trial Chamber now turns to the admissibility of the first prong of the Appeal against the Impugned Order rejecting the Appellant's request to cease disclosure into Case 002 and vary the conditions for disclosure.

20. Internal Rule 21 provides in relevant parts:

> **Rule 21. Fundamental Principles**
>
> 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]
>
> d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. [...]

21. The Pre-Trial Chamber has previously held that the fundamental principles expressed in Internal Rule 21, which reflect the fair trial requirements that the ECCC is bound to apply pursuant to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia (the "Agreement"),[28] Article 35 *new* of the ECCC Law[29] and Article 14(3) of the International Covenant on Civil and Political Rights,[30] may warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of

[28] 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, 6 June 2003.
[29] 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, 27 October 2004.
[30] *See, e.g.*, Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC64), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, paras 13-18, 27.

the parties.[31] Where the particular facts and circumstances of a case have required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or "serious issue[s] of fairness" under Internal Rule 21.[32] However, Internal Rule 21 does not provide an automatic avenue for appeals raising arguments based on fair trial rights.[33] For the Pre-Trial Chamber to exercise appellate jurisdiction under the said rule, the appellant must demonstrate that in the particular circumstances of the case at stake, the Pre-Trial Chamber's intervention is necessary to prevent irremediable damage to the fairness of the proceedings or the appellant's fair trial rights.

22. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 74(3)(b), a charged person may appeal against orders refusing requests for investigative actions, which should be interpreted as being "requests for action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, with the purpose of collecting information conducive to ascertaining the truth."[34] The Pre-Trial Chamber observes that the Impugned Order relates to Disclosure Requests which, in essence, do not aim to collect evidence in the case at hand but rather to disclose evidentiary material to other judicial bodies of the ECCC and parties appearing before them. The Appeal therefore

---

[31] *See, e.g.*, Decision on [redacted]'s 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; Case 003/07-09-2009-ECCC/OCIJ (PTC13), Decision on [redacted]'s Appeal against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2 ("Decision on [redacted]'s Appeal Concerning Summons"), para. 15. *See also* Case 002 (PTC11), Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; Case 002 (PTC71), Decision on IENG Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4 ("Decision on IENG Sary's Appeal Concerning Filing of Response"), para. 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, 2 ("Decision on Errors in Translation"), para. 3; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

[32] For example where "the seriousness and egregiousness of the issues of fairness raised under the abuse of process doctrine and their impact on the proceedings warranted admitting the appeal" or where, on balance, the fairness interests outweighed "the interests in the preservation of judicial resources and acceleration of legal and procedural processes". *See* Case 002 (PTC 145 & 146) Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 ("Decision on NUON Chea and IENG Thirith's Appeals against Closing Order"), para. 73 *citing* Case 002 (PTC42), Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 14; Case 002 (PTC38), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 34, 35. *See also* Decision on IENG Sary's Appeal Concerning Filing of Response, para. 13; Decision on Errors in Translations, paras 2-6.

[33] Decision on NUON Chea and IENG Thirith's Appeals against Closing Order, paras 72, 73.

[34] Case 002 (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, para. 18 *citing citing* Case 002 (PTC11), Decision on KHIEU Samphan's Appeals against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 28.

does not fall within the Pre-Trial Chamber's subject-matter jurisdiction under Internal Rule 74(3)(b).

23. The Pre-Trial Chamber further considers that the Appellant has not demonstrated that his asserted rights under Internal Rule 21 would be at risk of being irremediably impaired if the Impugned Order is not reversed. In particular, the Pre-Trial Chamber finds no merit in the Appellant's interpretation of Articles 83 and 121 of the Cambodian Code of Criminal Procedure and of Internal Rules 21 and 56(1) as conferring him an "inherent right" to integrity in the conduct of the investigations, to a confidential investigation or to the protection of his reputation.[35] The Pre-Trial Chamber underlines that the ECCC legal framework, particularly under Internal Rule 56, gives a broad discretion to the Co-Investigating Judges in handling confidentiality issues and granting limited access to the judicial investigations. The Appellant has failed to show any compelling circumstances warranting the Pre-Trial Chamber's intervention in these matters.

24. The Pre-Trial Chamber is also not convinced that the established rights to a fair trial, to the equality of arms and to the presumption of innocence are at risk of being irremediably damaged by the Impugned Order in the Case 004 proceedings concerning the Appellant. The Chamber considers that the mere mention of the Appellant's name, functions or role in Case 002[36] is inevitable, due to overlapping facts and evidence, and that it does not constitute a breach of fairness or reversal of the burden of proof in the distinct case at hand. Finally, the Pre-Trial Chamber recalls that it has no jurisdiction to deal with hypothetical matters[37] and notes that the impact of potential future disclosure in Case 002 on the Appellant's rights under Internal Rule 21 remains, at this stage, purely speculative.

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

[35] *See, e.g.*, Appeal, paras 29, 44, 73.
[36] *See, e.g.*, Appeal, para. 74.
[37] Decision on [redacted]'s Appeal Concerning Summons, para. 15 *citing* Decision on [redacted]'s Appeal against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2.

III – DISPOSITION

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, 31 March 2016

President **Pre-Trial Chamber**

PRAK Kimsan **Olivier BEAUVALLET** **NEY Thol** **Kang Jin BAIK** **HUOT Vuthy**