



## **Pre-Trial Chamber Judges Again Split Down National/International Lines in Case 003**

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The Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has once again split down international/national lines in controversial Case 003, dismissing the appeal of a rejected civil party applicant 18 months after it was filed due to deadlock.<sup>1</sup> The decision brings to light additional procedural irregularities in the administration of the Case and revives concerns about the Court's ability to proceed independently and impartially with its remaining investigations.

In April 2011, Co-Investigative Judge (CIJ) You BunLeng and former CIJ Siegfried Blunk summarily closed the Case 003 investigation in a one-sentence press release<sup>2</sup> without informing victims of their expiring right to join the proceedings as civil parties and file requests for final investigative actions. Few victims were able to file within the impending 15-day deadline,<sup>3</sup> and all publicly known applications were rejected by the CIJs. Seized with an appeal by rejected applicant Rob Hamill, whose brother was taken prisoner by the naval forces commanded by one of the suspects and later killed, the PTC could not reach a decision due a split between the national and international judges. The separate opinion of the international judges castigated the CIJs for inconsistencies in their handling of the investigation compared to how the investigations in Cases 001 and 002 were managed, including failing to notify the suspects of the charges, failing to provide victims timely information to enable them to exercise their right to participate in the judicial investigation, failing to recognize the applicant's lawyers and notify them of documents in the case or give them access to the case file, and "significant unexplained delays in processing documents and placing these in the case file[.]"<sup>4</sup>

Another civil party applicant was an unnamed woman who had been forced to marry during the Democratic Kampuchea period and whose husband had then been forced to labor at Kampong Chhnang Airport (a crime site in Case 003) before being tortured and executed at S-21 prison. Although she had been previously admitted in Cases 001 and 002, the CIJs reasoned that she had not been directly harmed by the crime committed against her husband, but instead by an intervening cause: his forced labor. They also found it "highly unlikely" that she in fact experienced any psychological harm from her husband's forced labor 34 years ago and surmised

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<sup>1</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant [REDACTED] (Feb. 13, 2013) [hereinafter 2013 Considerations of the PTC].

<sup>2</sup> See *Press Release from the Co-Investigating Judges* (Apr. 29, 2011).

<sup>3</sup> Internal Rules, r. 23bis(2).

<sup>4</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, Case No 003/07-09-ECCC/OCIJ (PTC02), Opinion of Judges Lahuis and Downing ¶¶ 3-16 (Oct. 24, 2011) (considering the appeal moot because the CIJs replaced the impugned Civil Party rejection order while challenges to its defects were on appeal).

that she had claimed this “based on unsound advice by a third person.” Finally, they said that she should not be admitted because she was already a civil party in Cases 001 and 002.<sup>5</sup>

The PTC’s new ruling on her 2011 appeal indicates that there has been no softening of views since the Rob Hamill decision. Because the PTC could not reach a super-majority decision, under the Court’s rules the CIJ order rejecting her application remains in force. Mirroring their reasoning in the Rob Hamill appeal, the separate opinion of the national PTC judges argues that because the CIJs never charged anyone in Case 003, “there is no Charged Person to be responsible for the remedy being sought for the damage he or she had caused to the victim, [and thus] the rejection of Civil Party Application at this stage does not infringe the rights of the victim.”<sup>6</sup>

In contrast, international judges Downing and Chung adopted all of the observations in the Rob Hamill appeal decision on the existence of procedural irregularities and inconsistencies in the CIJs’ work. Moreover, they identified an additional procedural defect that in their view should result in the order’s annulment due to its “adverse effects” for the rights of the parties: neither the civil party application nor its supporting documents were part of the case file at the time they were rejected. “Hence, it appears that the [CIJs] . . . issued the Impugned Order without being formally seized of the Application, nor notifying to the Co-Prosecutors and the Charged Person” in circumvention of “the procedural regime established by the Internal Rules as well as the fundamental guarantees of due process provided by internationally recognized standards.”<sup>7</sup> This new irregularity “reflects a pattern of conduct that has been adopted by the Co-Investigating Judges in Case 003” that “casts doubts about their willingness to conduct the proceedings in a transparent, fair and adversarial manner that would ensure respect of the rights of the parties and the participants to the proceedings.”<sup>8</sup>

As the international and national judges could not agree to send the matter back to the CIJs for reconsideration as a consequence of these procedural defects, the international PTCs for the first time addressed the merits of the CIJs’ reasoning. They noted that both the appellant and other civil parties had been admitted by the CIJs, the PTC, and the Trial Chamber in Cases 001 and 002 based on “alleged harm as a result of crimes committed against their direct family members, including their spouses.” In ruling to the contrary that the appellant’s injury did not meet the necessary requirement for admission to Case 003, the CIJs ignored the Court’s previous rulings and violated the rights of the parties to “legal certainty and equality before the law.” Moreover, they found the CIJs’ implication that only immediate victims, and not next of kin, are entitled to become ECCC civil parties contravenes not only the intention of the Internal Rules but also national and international practice.<sup>9</sup> Finally, they said that the standard of proof as applied lacked reasoning and the assumption that civil parties have no right to be admitted in multiple cases was “not grounded in law or in sustainable reasoning and violate[ed] the fundamental rights of victims.”<sup>10</sup>

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<sup>5</sup> Order on the Admissibility of the Civil Party Application of [REDACTED], Case No. 003/07-09-2009-ECCC-OCIJ, ¶¶ 5, 9, 10 (July 27, 2011).

<sup>6</sup> 2013 Considerations of the PTC, *supra* note 1, separate opinion of Judges Prak, Ney, & Huot ¶ 15.

<sup>7</sup> *Id.*, separate opinion of Downing & Chung ¶¶ 1-8.

<sup>8</sup> *Id.*, separate opinion of Downing & Chung ¶ 9.

<sup>9</sup> *Id.*, separate opinion of Downing & Chung ¶¶ 14-26.

<sup>10</sup> *Id.*, separate opinion of Downing & Chung ¶¶ 27-37.

As the divided PTC cannot provide the appellant a remedy for the CIJs' flawed consideration of her application, the international judges encouraged the incumbent CIJs to exercise their inherent authority to reconsider her application.<sup>11</sup> However, as noted by the judges, this has already happened. When Reserve International CIJ Laurent Kasper-Ansermet took office, replacing Judge Blunk, he reconsidered her application, found it met the necessary admissibility requirements, and granted her lawyers access to the case file,<sup>12</sup> making her appeal theoretically moot.<sup>13</sup> Nevertheless, his order has had no practical impact because the Cambodian Government withheld recognition of his appointment and therefore his authority to act.<sup>14</sup> National staff categorically refused to execute any of his orders, including one to admit on reconsideration civil party applicant Rob Hamill and to grant his lawyers access to the Case 003 case file.<sup>15</sup>

It therefore seems unlikely that any of Judge Kasper-Ansermet's orders, including his resumption of the Case 003 investigation, will be respected unless adopted by his successor, Judge Mark Harmon. The PTC's new decision confirms that impression, as the national judges' opinion takes pains to reiterate the argument that Kasper-Ansermet's (supposed) lack of accreditation deprived him of authority to act.<sup>16</sup> The national PTC judges' continuing unwillingness to acknowledge and remedy the egregious and pervasive procedural defects in the handling of the Case 003 investigation can only invigorate skepticism that—even with a new international CIJ in place—this Case will be allowed to proceed in accordance with the Court's Internal Rules and international standards.

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<sup>11</sup> *Id.*, separate opinion of Downing & Chung ¶ 38.

<sup>12</sup> Order on the Reconsideration of the Admissibility of Civil Party Applicant [REDACTED], ¶ 34 (April 3, 2012).

<sup>13</sup> 2013 Considerations of the PTC, *supra* note 1, separate opinion of Downing & Chung ¶ 39.

<sup>14</sup> The United Nations and the international PTC judges disagreed. *See* Statement Attributable to the Spokesperson for the Secretary-General on Cambodia, *International Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia* (Jan 20, 2012); Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, Case No. 003/16-12-2011-ECCC/PTC, ¶ 33 (Feb. 10, 2012).

<sup>15</sup> *See* Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, ¶¶ 39-40 (Mar. 21, 2012) (noting, however, that the international staff abided by his orders and (at least temporarily) “granted effective access” to the lawyers).

<sup>16</sup> 2013 Considerations of the PTC, *supra* note 1, separate opinion of Judges Prak, Ney & Huot ¶ 16 (referring specifically to his authority to inform the suspects of the charges against them).