



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge  
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត  
Office of the Co-Investigating Judges  
Bureau des co-juges d'instruction

Case File No: 004/07-09-2009-ECCC-OCIJ

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Before: **The Co-Investigating Judges**

Date: **17 July 2014**

Language(s): **English [Original]**

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**DECISION ON THE YIM TITH DEFENCE URGENT MOTION  
TO ACCESS THE CASE FILE AND TAKE PART IN THE  
JUDICIAL INVESTIGATION**

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**Noting** the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”);

**Noting** the Third Introductory Submission, filed on 7 September 2009 (“Introductory Submission”);<sup>1</sup>

**Noting** the Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, filed on 18 July 2011;<sup>2</sup>

**Noting** the Co-Prosecutor’s Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, filed on 24 April 2014;<sup>3</sup>

**Noting** the judicial investigation opened in relation to alleged violations of the **1956 Penal Code**, the **Convention on the Prevention and Punishment of the Crime of Genocide**, the **Geneva Conventions of 1949**, and **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 6, 29 and 39 of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;

**Noting** Rules 21, 48, 55, 57, 72 and 76 of the ECCC Internal Rules (“Internal Rules”);

**Considering** *Yim Tith’s Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation*, (“Urgent Motion”) filed by Yim Tith’s Defence (“Suspect, Suspect’s Lawyers”) on 6 March 2014;<sup>4</sup>

**Considering** *Yim Tith’s Submission on the Reconsideration of the Decision to Grant Yim Tith Access to the Case File*, dated 7 May 2014 (“Reconsideration Submissions”);<sup>5</sup>

**Noting** the Disagreements registered on 22 February and 5 April 2013.

## PROCEDURAL HISTORY

1. On 24 February 2012, the Reserve International Co-Investigating Judge Kasper-Ansermet (“RICIJ”) issued the Notification of Suspect’s Rights whereby he informed the Suspect “[t]hat he [was] named as a suspect in the ongoing judicial investigation initiated by the Co-Prosecutor’s Introductory Submission dated 20 November 2008 and the Supplementary Submission dated 18 July 2011”.<sup>6</sup> The Suspect was also informed of the “charges” brought against him. In this regard, the RICIJ stated “*these charges [were] based on both the facts alleged by the co-*

<sup>1</sup> Case File No. 004-D1, *Co-Prosecutor’s Third Introductory Submission*, 20 November 2008; Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009.

<sup>2</sup> Case File No. 004-D65, *Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011.

<sup>3</sup> Case File No. 004-D191, *Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014.

<sup>4</sup> Case File No. 004-D186, *Yim Tith’s Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation*, 6 March 2014.

<sup>5</sup> Case File No. 004-D186/2 *Yim Tith’s Submission on the Reconsideration of the Decision to Grant Yim Tith Access to the Case File*, 7 May 2014.

<sup>6</sup> Case File No. 004-D109, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012, para. 1.



*prosecutors and those uncovered thus far during the course of the investigation*".<sup>7</sup> In addition, the RICIJ granted the Suspect "access to the case file".<sup>8</sup> On 29 February 2012, in the Suspect's absence,<sup>9</sup> the RICIJ delivered a written notification to the Suspect's home address.<sup>10</sup>

2. On 31 July 2013, Judge Harmon ("International CIJ") issued the *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*", relating to another suspect in Case 004.<sup>11</sup> This decision, *inter alia*, reconsidered and vacated the RICIJ's decision to grant the suspect in that case access to Case File 004.
3. On 12 February 2014, Mr. So Mosseny, the Suspect's National Co-Lawyer, requested access to Zylab and documents on the case file,<sup>12</sup> followed by a further email on 5 March 2014.<sup>13</sup> The Greffier for the Office of the Co-Investigating Judges ("OCIJ") responded that he would inform Mr. So Mosseny as soon as he received a response from the Co-Investigating Judges ("CIJs").<sup>14</sup> On 6 March 2014, the Suspect's Lawyers filed the Urgent Motion, requesting the CIJs to order the Office of Administration to provide the Suspect with access to Case File 004.<sup>15</sup>
4. On 22 April 2014, in the *Notification in Relation to Yim Tith's Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation* ("Preliminary Decision"),<sup>16</sup> the International CIJ notified the Suspect of his intention to reconsider Judge Kasper-Ansermet's prior notifications of Suspect's rights dated 24 February 2012 and 29 February 2012 respectively ("Notifications"),<sup>17</sup> and invited the Suspect and the Parties to make any submissions they may have on the matter.<sup>18</sup>
5. On 24 April 2014, the Suspect's Lawyers filed *Yim Tith's Urgent Request for Relief Based on New Information*,<sup>19</sup> requesting provisional access to the case file

<sup>7</sup> Case File No. 004-D109, *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, para. 2.

<sup>8</sup> *Ibid.*, para. 4.

<sup>9</sup> Case File No. 004-D111, *Letter to the Defence Support Section on Notification of Suspect's Rights [Rule 21(1)(D)]*, 6 March 2012, para. 3.

<sup>10</sup> In the letter sent to the Defence Support Section by the RICIJ on 6 March 2012, the date of the oral notification is given as 29 March 2012. Considering, however, that the letter is dated 6 March 2012 and that the same notification to other Suspects was carried out on 28 February 2012, the International CIJ considers the reference to 29 March 2012 to be a clerical error and will consider the notification as carried out on 29 February 2012.

<sup>11</sup> Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013.

<sup>12</sup> Email from SO Mosseny to LY Chantola, "Filing forms access to zylab," 12 February 2014.

<sup>13</sup> Email from SO Mosseny to LY Chantola, "Follow up request for access to zylab," 5 March 2014.

<sup>14</sup> Email from LY Chantola to SO Mosseny, "RE: Follow up request for access to zylab," 5 March 2014.

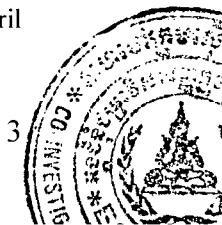
<sup>15</sup> Urgent Motion.

<sup>16</sup> Case File No. 004-D186/1, *Notification in Relation to Yim Tith's Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation*, 22 April 2014.

<sup>17</sup> Preliminary Decision, para. 7; Case File No. 004-D109, *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, para 1; Case File No. 004-D111, *Letter to the Defence Support Section on Notification of Suspect's Rights [Rule 21(1)(D)] in Case File 004*, 6 March 2012.

<sup>18</sup> Preliminary Decision, p. 4.

<sup>19</sup> Case File No. 004-D192, *Yim Tith's Urgent Request for Relief Based on New Information*, 24 April 2014.



pending the International CIJ's reconsideration of the Notifications, on the basis that the Suspect had already been granted *de jure* access to the case file by the RICIJ.<sup>20</sup>

6. On 25 April 2014, the International CIJ issued the *Decision on Yim Tith's Urgent Request for Relief Based on New Information*,<sup>21</sup> denying the request without prejudice to the Urgent Motion and indicating that any further submissions in relation to the Preliminary Decision would still be considered.<sup>22</sup> The International CIJ notes that on 9 May 2014 the Suspect appealed this decision to the Pre-Trial Chamber ("PTC"), but that no decision has been handed down to date.<sup>23</sup>
7. On 7 May 2014, the Suspect's Lawyers filed Reconsideration Submissions arguing that no legitimate basis exists for reconsideration of the Notifications,<sup>24</sup> associated with a request to seize the PTC of an application to partially annul investigation against the Suspect.<sup>25</sup>

## SUBMISSIONS

### Access to the Case File and Participation in the Judicial Investigation

8. In the Urgent Motion and Reconsideration Submissions, the Suspect's Lawyers request the CIJs to order the Office of Administration to provide the Suspect with immediate access to the case file.<sup>26</sup> The Suspect's Lawyers submit that while the Suspect has been granted *de jure* access to the case file by the RICIJ, so far said access has not actually been granted,<sup>27</sup> despite the fact that, to date, the RICIJ's decision "*has not been reconsidered, rescinded or vacated.*"<sup>28</sup> They conclude that the International CIJ has *de facto* arbitrarily denied the Suspect access to the case file in violation of natural justice and procedural fairness, thereby causing prejudice to the Suspect.<sup>29</sup>
9. The Suspect's Lawyers also base the Urgent Request on a number of additional grounds.

*The Suspect is "subject to prosecution"*

10. The Suspect's Lawyers submit that the Suspect is currently "*subject to prosecution*" and therefore entitled to the rights of a "Charged Person"<sup>30</sup> pursuant to the Glossary to the Internal Rules, which states that "*any person who is subject*

<sup>20</sup> Case File No. 004-D192, *Yim Tith's Urgent Request for Relief Based on New Information*, 24 April 2014, paras 3-4, and pp. 1, 3.

<sup>21</sup> Case File No. 004-D192/1, *Decision on Yim Tith's Urgent Request for Relief Based on New Information*, 25 April 2014.

<sup>22</sup> *Ibid.*, paras 12, 14.

<sup>23</sup> Case File No. 004-D192/1/1/1, *Yim Tith's Appeal Against the International Co-Investigating Judge's Denial of his Urgent Request for Relief Based on New Information*, 9 May 2014.

<sup>24</sup> Reconsideration Submissions, p. 1 and paras 9-17.

<sup>25</sup> *Ibid.*, p. 1 and paras 43-48.

<sup>26</sup> Urgent Motion, pp. 1, 15; Reconsideration Submissions, p. 15.

<sup>27</sup> Reconsideration Submissions, paras 20-21.

<sup>28</sup> *Ibid.*, para. 21.

<sup>29</sup> *Ibid.*

<sup>30</sup> Urgent Motion, paras 18-24; Reconsideration Submissions, paras 22-27.



to prosecution in a particular case, during the period between the Introductory Submissions and Indictment or dismissal of the case.” In this respect, they submit that the Glossary does not define “Suspect” and “Charged Person” in mutually exclusive terms.<sup>31</sup>

11. Noting that the Internal Rules should be interpreted in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, which prescribes interpretation of treaties in good faith and “*in accordance to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”, the Suspect’s Lawyers cite Black’s Law Dictionary and submit that due to the Introductory Submissions triggering a judicial investigation, an individual named therein is “*subject to prosecution*” immediately upon its filing.<sup>32</sup>
12. They argue that this definition of a Charged Person is consistent with “*the interpretation followed by the CIJs in Case 002, the position that prevailed in French Law prior to a judicial reform adopted in 1993*”<sup>33</sup> and the definition applied by the RICIJ<sup>34</sup> when he informed the Suspect that he is named in the Introductory Submission and should “*have the same rights as a ‘Charged Person’...*”<sup>35</sup> The Suspect’s Lawyers conclude that, since no decision by the CIJs has been made in over four years on whether to hold an initial appearance or to dismiss the case, the Suspect should be granted the rights of a Charged Person.<sup>36</sup> They further submit that, in accordance with the Constitution of the Kingdom of Cambodia, any doubt should be resolved in favour of the accused.<sup>37</sup>

#### *Protection of the Suspect’s fair trial rights*

13. The Suspect’s Lawyers submit that access to the case file is necessary to protect the Suspect’s fair trial rights and, in particular, to “*ensure legal certainty and transparency of proceedings, ensure equality of arms, and ensure adequate time and facilities to prepare his defence.*”<sup>38</sup> Relying on jurisprudence of the European Court of Human Rights (“ECtHR”) favouring a substantive rather than a formal approach to the notion of criminal charge, the Suspect’s Lawyers submit that a person is subject to a criminal charge once he or she “*has officially learned of the investigation or has begun to be affected by it.*”<sup>39</sup>
14. The Suspect’s Lawyers further submit that access to the case file is necessary in order for the Suspect to meaningfully take part in the judicial investigation, since all parties should be taking part in the investigation at “*the earliest possible opportunity*”.<sup>40</sup> They also express concern in relation to a media report that the

<sup>31</sup> Urgent Motion, paras 18-19; Reconsideration Submissions, paras 22-23.

<sup>32</sup> Urgent Motion, para. 20; Reconsideration Submissions, para. 24.

<sup>33</sup> Urgent Motion, para. 21; Reconsideration Submissions, para. 25.

<sup>34</sup> Urgent Motion, para. 22; Reconsideration Submissions, para. 26.

<sup>35</sup> Urgent Motion, para. 24.

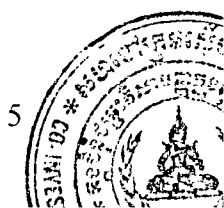
<sup>36</sup> Urgent Motion, paras 23-24; Reconsideration Submissions, para. 27.

<sup>37</sup> Reconsideration Submissions, para. 27.

<sup>38</sup> Urgent Motion, p. 1 and para. 25.

<sup>39</sup> Urgent Motion, paras 26-27; Reconsideration Submissions, paras 29-30.

<sup>40</sup> Urgent Motion, para. 28; Reconsideration Submissions, para. 31.



International Co-Investigating Judge intends to close the investigation by the end of 2014.<sup>41</sup>

15. In addition, the Suspect's Lawyers submit that the Suspect is "*substantively in the same situation as the Charged Persons in Case 002*" and accordingly that, to ensure legal certainty and the transparency of the proceedings pursuant to Internal Rule 21(1)(b), the Suspect should enjoy the same rights afforded to charged persons in Case 002, who were charged, granted access to the case file, and given the opportunity to take part in the judicial investigation approximately four months after the filing of the Introductory Submission.<sup>42</sup>
16. Moreover, recalling that the Co-Prosecutors have had access to the Case File since 7 September 2009 and the Civil Parties applicants since 8 August 2011, the Suspect's Lawyers argue that the "*difference in timing*" for participation between the parties "*has created an imbalance, real or perceived, between the ability of the parties to state their case*", which "*over time[...] would be increasingly difficult, if not impossible, to remedy or compensate by any procedural safeguards.*"<sup>43</sup>
17. Finally, relying on the jurisprudence of the ECtHR, the Suspect's Lawyers point out the importance of the investigation phase of criminal proceedings in ensuring respect for the right to have adequate time and facilities to prepare one's defence. They conclude that, should the Suspect be indicted without being allowed sufficient time to inspect the Case File and partake in the judicial investigation, "*[t]his will result in the entire investigation being defective and annulled.*"<sup>44</sup>

#### Reconsideration of the Notifications

18. The Suspect's Lawyers submit that the International CIJ has no legitimate basis to reconsider the Notifications.<sup>45</sup> They submit that there is no provision in the Agreement, ECCC Law or Internal Rules for the International CIJ to reconsider previous decisions.<sup>46</sup> The Suspect's Lawyers further submit that, should the International CIJ have the discretion to reconsider, the requisite standard for reconsideration has not been met.<sup>47</sup> They submit that there has been no change in circumstances since the RICIJ granted access to the case file,<sup>48</sup> that no injustice was caused as a result of the RICIJ's decision,<sup>49</sup> and that, since the granting of access by the RICIJ protected the Suspect's fair trial rights without any detriment to any other party to the proceedings, there can be no clear error in reasoning by the RICIJ.<sup>50</sup>

#### Annulment of the Investigation pursuant to Internal Rule 76

<sup>41</sup> Reconsideration Submissions, paras 32-33.

<sup>42</sup> Urgent Motion, paras 29-30; Reconsideration Submissions, paras 34-35.

<sup>43</sup> Urgent Motion, paras 31-33; Reconsideration Submissions, paras 36-38.

<sup>44</sup> Urgent Motion, paras 34-36; Reconsideration Submissions, paras 39-42.

<sup>45</sup> Reconsideration Submissions, p. 1.

<sup>46</sup> *Ibid.*, paras 9-10.

<sup>47</sup> *Ibid.*, paras 11-17.

<sup>48</sup> *Ibid.*, para. 13.

<sup>49</sup> *Ibid.*, para. 14.

<sup>50</sup> *Ibid.*, para. 16.

19. The Suspect's Lawyers also request the CIJs to seize the PTC of an application to annul the investigation relating to the Suspect from 9 January 2014, when access to the case file was first requested, until the requested access is granted,<sup>51</sup> since the RICIJ had *de jure* granted the Suspect access to the case file, but that access has been *de facto* denied by the International CIJ since it was first requested by the Suspect's Lawyers on 9 January 2014.<sup>52</sup> This amounted to a procedural defect that violated the Suspect's fair trial rights.<sup>53</sup>

## APPLICABLE LAW

ECCC Internal Rule 21(1), in its relevant parts, prescribes that:

“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.

[...]

ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.

[...]

Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

ECCC Internal Rule 48, in its relevant part, prescribes that:

“Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”

ECCC Internal Rule 55, in its relevant parts, prescribes that:

[...]

The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submissions. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons.

[...]

The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC.

[...]

<sup>51</sup> Reconsideration Submissions, paras 43, 47-48.

<sup>52</sup> *Ibid.*, paras 44-45.

<sup>53</sup> *Ibid.*, paras 46-48.



At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.”

ECCC Internal Rule 57, in its relevant part, prescribes that:

“At the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the statement immediately. A written record of the statement shall be placed on the case file.”

ECCC Internal Rule 76(2), in its relevant part, prescribes that:

“Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.”

## DISCUSSION

### Validity of the Notifications

20. It is well established at the international level that Judges have an inherent discretionary power to reconsider past decisions. The PTC, relying on the jurisprudence of the international *ad hoc* tribunals, has stated that a decision may be reconsidered when there is a change of circumstances,<sup>54</sup> a clear error of reasoning, or when the decision has caused injustice.<sup>55</sup>

<sup>54</sup> A change of circumstances may include new facts or arguments; See Case File No. 002-C22/1/68, *Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person*, 28 August 2008, para. 25.

<sup>55</sup> Case File No. 002-C22/1/68, *Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person*, 28 August 2008, para. 25; Case No. 002-D164/4/9, *Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25*, 20 October 2009, para. 12; Case No. 001-D99/3/41, *Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File*, 3 December 2008, para. 6; Case No. 002-D364/1/6, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, 1 July 2011, para. 6. See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, *Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 November 2009, para. 6.





21. Co-Investigating Judges at the ECCC have used this power in past decisions.<sup>56</sup> In particular, the International CIJ has previously reconsidered a decision of the RICIJ granting access to the Case File to another suspect in Case 004 (“Reconsideration Decision”).<sup>57</sup> In the Reconsideration Decision, the International CIJ found that “[a]ccess to the case file was granted, in violation of the Internal Rules, without first proceeding to formally charge the Suspect pursuant to Internal Rule 57. Nor did the RICIJ make a determination that clear and consistent evidence existed against the Suspect.”<sup>58</sup> These considerations also apply to the present instance.
22. By giving the Suspect access to the case file, the RICIJ granted him a right to which the Suspect was not entitled to pursuant to the Internal Rules. The RICIJ did so by recourse to analogy, without providing any reasoning in support of his decision.<sup>59</sup> Further, and without any explanation, he provided the Suspect with only some of the rights of a charged person, leaving out the right to participate in the judicial investigation.<sup>60</sup>
23. Further, the International CIJ is not satisfied that, at the time the RICIJ issued the Notifications, there was “clear and consistent evidence” that the Suspect may have been responsible for the crimes alleged against him. At the present time, the International CIJ has not yet determined that this threshold has been met.
24. Finally, the International CIJ notes that pursuant to Internal Rule 56, the investigation is confidential. The Internal Rules give the parties, and the parties only, the right to access the record of the investigation. A suspect is not a party to the proceedings.<sup>61</sup> At this stage, granting access to the case file to a suspect who may or may not be charged is not in the interests of justice and may endanger the confidentiality of the investigation.
25. On the basis of these considerations, the International CIJ finds that by granting the Suspect access to the Case File, the RICIJ abused his discretion and committed an error of reasoning.<sup>62</sup>

### **The Suspect is not a “charged person”**

26. The Internal Rules clearly distinguish between a suspect and a charged person and grant the latter a broader set of rights.<sup>63</sup> The status of “charged person” and the

<sup>56</sup> Case Files No. 003&004-D4/2/1, *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to the Case Files 003 and 004 Dated 5 April 2011*, 19 May 2011, para. 3; Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, para. 11, sub-heading C.

<sup>57</sup> Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013.

<sup>58</sup> *Ibid.*, para. 47.

<sup>59</sup> Case File No. 004-D109, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012, para. 4.

<sup>60</sup> *Ibid.*, paras 3-5.

<sup>61</sup> See Internal Rules 55 and 86; see also Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, paras 36-39.

<sup>62</sup> Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, para. 49.



rights attaching thereto are only acquired by a suspect following a discretionary determination of the Co-Investigating Judges to formally lay charges against him or her.<sup>64</sup> This applies both to named and unnamed suspects.<sup>65</sup> The passage of time since the filing of the Introductory Submission does not, on its own, justify a departure from the procedure prescribed by the Internal Rules. Similarly, the rules governing access to the Case File cannot be circumvented by importing common law definitions of legal concepts into the French-inspired Cambodian procedural system.

27. In assessing when a person is subject to criminal charges, previous decisions in Case 004 have also considered, relying on the jurisprudence of the ECtHR, the question whether that person was “*substantially affected*” by the existence of criminal allegations against him or her.<sup>66</sup> In the present instance, the International CIJ does not consider that the notification of the allegations to the Suspect substantially affected him, thus warranting a departure from the Internal Rules and the granting of rights reserved to charged persons.<sup>67</sup>
28. In light of the above reconsideration, the Suspect is not, at present, a charged person in Case 004.

#### **Participation in the Judicial Investigation**

29. The submission by the Suspect’s Lawyers that access to the Case File is necessary for meaningful participation in the investigation fails to take into account that, pursuant to Internal Rule 55(10), only charged persons, and not suspects, can partake in the judicial investigation. Should the Suspect be charged, he will be able to fully exercise all the rights of charged persons under the Internal Rules. Regardless of what the press may report, the International CIJ will ensure that all parties have sufficient time to familiarise themselves with the evidence and to effectively exercise their rights before closing the investigation.<sup>68</sup>

<sup>63</sup> Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, para. 36.

<sup>64</sup> *Ibid.*, paras 33-49, 62. The Co-Investigating Judges in Case 002 stated that charging “*is not a mere procedural formality, but rather a judicial decision made by the Co-Investigating Judges once they have found clear and consistent evidence of criminal responsibility against any person*”, see Case File No. 002-D298/2, *Order Refusing Request for Further Charging*, 16 February 2010, para. 13.

<sup>65</sup> Case File No. 002-D298/2, *Order Refusing Request for Further Charging*, 16 February 2010, para. 13; Case File No. 002-D198/1, *Order Concerning the Co-Prosecutors’ Report for Clarification of Charges*, 20 November 2009, para. 10, “[C]harges may only be laid if there is clear and consistent evidence indicating that a person may be criminally responsible for the commission of a crime alleged in the OCP submission, whether or not such a person is named in that submission.” The French Court of Cassation, the rulings of which are not binding at the ECCC but can offer helpful guidance on the issue of charging, stated that a charging decision shall be declared void when done in the absence of serious and corroborated evidence that a suspect may have participated in the crimes alleged against him or her, see 1er oct. 2003, N. 03-82-909: JurisData n 2003 020541; Bull. Crim. 2003, n. 177.

<sup>66</sup> Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, para. 50; Case File No: 004-D4/1, *Decision on Request for Access to Case File 003 and 004*, 5 April 2011, paras 3-8, 12-13.

<sup>67</sup> See Case File No. 004-D121/4, *Decision on the [redacted] Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013, paras 55, 58.

<sup>68</sup> The International CIJ will not comment on speculations on the duration of the investigation published by the press and referred to by the Suspect’s Lawyers.



### **Equal Treatment with Charged Persons in Case 002**

30. Whether or not the Suspect will be charged, and the timing of any charging, will depend on whether there exists clear and consistent evidence that he may be responsible for the allegations against him. The fact that the CIJs in Case 002 decided to charge two of the suspects approximately four months after the filing of the introductory submission does not – and cannot – imply that the same timing must be followed in Case 004. The difference in the timing of charging in Case 002 and Case 004 is justified by the assessment of the evidence gathered so far in Case 004 and it does not constitute a violation of the Suspect's fundamental right to equal treatment enshrined in Internal Rule 21(1).
31. The International CIJ reiterates that, if charged, the Suspect will be granted adequate time for the preparation of his defence. The right to adequate time does not require that a suspect, charged person or accused be given the same amount of time as the Co-Prosecutors or other parties.<sup>69</sup>

### **Request to Annul Investigative Action**

32. The International CIJ has in the past ruled on the standing of a suspect to make requests for annulment.<sup>70</sup> The relevant Internal Rules 48 and 76 are fully consistent with Cambodian law on this issue. Only the Royal Prosecutor, the charged person or the civil parties can submit requests for annulment of investigative action pursuant to Article 253 of the Cambodian Code of Criminal Procedure. The Suspect, not being a party to the proceedings, does not have standing to submit an application for annulment pursuant to Internal Rule 76.

### **CONCLUSION**

33. On the basis of the foregoing, the International CIJ finds it necessary to reconsider the Notifications and to vacate the part granting the Suspect access to the Case File. The Suspect has not been formally charged, nor has he been substantially affected by the investigation such as to warrant a departure from the Internal Rules. Therefore, his request to access the Case File must, at this stage, be denied. Finally, the request to seise the PTC of an application to annul the investigation relating to the Suspect from 9 January 2014 is inadmissible for lack of standing.
34. This Decision is filed in English, with a Khmer translation to follow.

### **FOR THE FOREGOING REASONS, I, MARK B. HARMON, HEREBY:**

35. **RECONSIDER** the Notifications and vacate the grant of case file access to the Suspect;

<sup>69</sup> ICTR: *Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-A, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date*, 12 May 2009, para. 28; ECtHR: *Ferrari-Bravo v. Italy*, ECtHR (1984) 37 DR 15, p. 40; Special Tribunal for Lebanon: *Prosecutor v. Salim Jamil Ayyash et al.*, Case No. STL-11-01/T/TC, *Decision on Trial Management and Reasons for Decision on Joinder*, 25 February 2014, paras 107-116.


<sup>70</sup> Case File No. 004-D185/1, *Decision on [redacted] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76*, 22 April 2014, paras 19-22.



36. **DENY** the relief requested in the Urgent Motion;

37. **DENY** the relief requested in the Reconsideration Submissions.

Dated 17 July 2014, Phnom Penh



*[Signature]*

**Judge Mark B. Harmon**  
**អង្គការក្រសួងយុត្តិធម៌កម្ពុជា**  
**International Co-Investigating Judge**  
**Co-juge d'instruction internationale**