



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងកម្ពុជា

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

Before: The Co-Investigating Judges

Date: 7 June 2016

Language(s): English [Original]

Classification: CONFIDENTIAL

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 07 / 06 / 2016
ម៉ោង (Time/Heure) : 13:55
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN RADA

**DECISION ON YIM TITH'S URGENT REQUEST CONCERNING
DEFENCE'S RESOURCES**

Distribution:

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Ao An Defence
MOM Luch
Richard ROGERS
Göran SLUITER

Yim Tith Defence
SO Mosseny
Suzana TOMANOVIĆ

Defence Support Section
Isaac ENDELEY

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

Human Resources
Hamayoon MUBTAKIR

Ferdinand DJAMMEN-
NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Emmanuel JACOMY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Beini YE



I. PROCEDURAL HISTORY.

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 21 October 2015.
2. On 1 June 2016, the Yim Tith Defence (“Defence”) requested the CIJs to direct the Defence Support Section (“DSS”) to:
 - a. Confirm that the Defence can, at the very least, prepare their case with the originally notified budget, which was of \$210,000;
 - b. Immediately provide a *pro bono* Expert Consultant contract to Mr Neville Sorab for the duration until he is assigned as an international Co-Lawyer for the Defence; and
 - c. Consider Mr Sorab’s application, dated 18 April 2016, to be placed on the DSS list of foreign Co-Lawyers pursuant to Rule 11(2)(d)(ii) (“April 2016 Application”).¹

II. DISCUSSION

A. Request to confirm that the Defence budget is of \$210,000

3. In order to properly consider this part of the request, the following information is necessary:
 - a. the date on which the Defence learnt from DSS that their budget amounted to \$210,000; and
 - b. the date on which DSS learnt that the available budget was in fact only \$180,000.
4. Once I have been provided with this information, I will consider this issue further, including whether I have jurisdiction to rule on its merits.

B. Request to provide a *pro bono* Expert Consultant contract to Mr Neville Sorab

5. At the outset, I recall that charged persons at the ECCC have a fundamental right to adequate time to prepare their defence. At the same time, they have a fundamental right to be tried within a reasonable time. The resources available to the Defence bear directly on these rights and, consequently, on the duration of the investigation. The longer the investigation, the greater the expense for the ECCC and the donor states. Measures capable of shortening the time required by the Defence to participate in the judicial investigations, therefore, are not only in the interests of Yim Tith, but also of the ECCC and the international community as a whole.
6. The rights to adequate time and reasonable duration of the proceedings are enshrined in Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), of which Cambodia is a signatory and which is directly applicable at all stages of the proceedings before the ECCC.² The Pre-Trial Chamber stated that

¹ Case File No. 004-D312, *Yim Tith’s Urgent Request for the Co-Investigating Judges to Direct the Defence Support Section to Provide the Yim Tith Defence Team with the Resources it Was Originally Allocated*, 1 June 2016 (“Request”), p. 15.

² ECCC Law, Article 33^{new} expressly incorporates Article 14 of the ICCPR; *see also* Internal Rule 21 containing comparable provisions.



Article 14 of the ICCPR “provides for overriding rights which will transcend local procedures declared and followed.”³ The ICCPR is thus hierarchically superior to the Internal Rules and administrative regulations.

7. Requests for resources by a defence team that come at no expense to the ECCC, therefore, should only be denied if they are in violation of a specific rule which is of equal importance with the fundamental rights that would be fostered and protected by the provision of cost-free resources. In the present instance, I am not satisfied that this is the case, for the reasons elaborated below.
 - i. The LAS does not prevent further extensions of Mr Sorab’s contract as an Expert Consultant
8. Firstly, I am not satisfied that the applicable regulations prohibit the extension of Mr Sorab’s contract.
9. The ECCC Legal Assistance Scheme (“LAS”) states that the budget for support staff such as Legal Consultants may also be used “to hire experts on a short term basis for discrete tasks.”⁴ The LAS does not specifically quantify “short term”. In keeping with Internal Rule 21, the LAS must be interpreted in a way that safeguards the interests of Yim Tith.
10. Any attempt to quantify “short term” in the context of the LAS cannot detract from the need to consider the duration of the entire investigation and the date of appointment of the Co-Lawyers for Yim Tith. The investigation of Case 004 began on 7 September 2009 with the filing of the Third Introductory Submission by the Acting International Co-Prosecutor,⁵ and my predecessor first recognised the Co-Lawyers for Yim Tith on 18 March 2014.⁶ Mr Sorab worked as an Expert Consultant for three and a half months, from 15 December 2015 to 31 March 2016. Taking these numbers into account, and further considering the magnitude of the investigation against Yim Tith as well as Internal Rule 21, I am not convinced that further extensions of Mr Sorab’s contract would violate the “short term” condition set forth in the LAS in relation to Expert Consultants.
11. Furthermore, Section 2.2 of the United Nations Administrative Instruction on Temporary Appointments, similarly to the LAS, restricts the appointment of temporary staff within the United Nations system to a “short term”.⁷ According to this Administrative Instruction, “short term” appointments may be for a maximum of 364 days, extendable in exceptional circumstances to 729 days.⁸ Mr Sorab has therefore worked as an Expert Consultant for a period shorter than what is considered “short term” in relation to United Nations’ temporary staff.
12. In application of the principle of equality of arms, I see no reason whatsoever why the Defence should be placed at a disadvantage *vis-à-vis* other parties in the proceedings, for instance the Co-Prosecutors, who could choose to avail

³ Case File No. 002-D264/2/6, *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, para. 13.

⁴ ECCC Legal Assistance Scheme, December 2014, Section H(1).

⁵ Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009.

⁶ Case File No. 004-D122/9/6, *Decision on the Recognition of Co-Lawyers for Suspect Yim Tith*, 18 March 2014.

⁷ ST/AI/2010/4/Rev.1, 26 October 2011.

⁸ *Ibid.*, Sections 2.5, 2.7, and 14.



themselves of the services of temporary staff for up to 364 or even 729 days. I am therefore satisfied that the LSA must be interpreted as to allow Mr Sorab to continue to work as an Expert Consultant for at least 364 days, with the possibility of a further extensions should exceptional circumstances so require.

13. In addition, as I have already stated in another decision in this case, there is no bar under the applicable regulations for Legal Consultants to work remotely. The Co-Lawyers are best placed to determine how to allocate and manage their resources to ensure a robust representation of their client.⁹ Both the Office of the Co-Investigating Judges and, as I understand from the Defence's request, other Defence teams have in the past employed consultants who performed their work remotely. If the Co-Lawyers are satisfied that Mr Sorab can contribute to the Defence's work by performing his duties remotely, their request must be accommodated.
14. I consider the issue of legal consultants working remotely to be settled. In the interest of fairness, expediency, and judicial economy, I expect this issue not to be raised again in relation to future recruitments requested by the Co-Lawyers for charged persons in Cases 003 and 004.

ii. The LAS may not frustrate a charged person's exercise of his or her fundamental rights under the ICCPR

15. Even if the applicable administrative regulations barred the extension of Mr Sorab's contract, considering the hierarchical supremacy of the ICCPR over administrative regulations, I would be under an obligation to consider the use of my inherent powers to prevent any undue violation of a charged person's rights.
16. However, having concluded that there is no bar to further extensions of Mr Sorab's contract, such measures are not necessary in the case at hand at this time.

iii. Conclusion with regard to the extension of Mr Sorab's contract as an Expert Consultant

17. Based on the foregoing, I am satisfied that the denial of Mr Sorab's extension as a *pro bono* Expert Consultant was unjustified and runs contrary to the expeditious completion of the investigation of Case 004. I am therefore inclined to instruct DSS to extend Mr Sorab's appointment until completion of the tasks that the Defence require him to perform. However, before proceeding to issue such instruction, I intend to give the Chief of Human Resources a chance to provide any compelling reason for not allowing the Defence, and ultimately Yim Tith, to further benefit from the assistance of a qualified and experienced expert consultant at no cost to the ECCC.

C. Request to consider Mr Sorab's April 2016 application to be placed on the DSS list of foreign Co-Lawyers pursuant to Rule 11(2)(d)(ii)

18. As I have stated in another decision in this case, the CIJs' powers to review administrative decisions are limited to those instances where such decisions may prejudice the fair trial rights of a charged person.¹⁰

⁹ Case File No. 004-D304/4, *Further Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 26 April 2016, paras 14-16.

¹⁰ *Ibid.*, para. 18.



19. Pursuant to Article 14 ICCPR and Internal Rule 21, persons charged with criminal offences at the ECCC have a fundamental right to be assisted by counsel. Internal Rule 22 states that any person entitled to a lawyer under the Internal Rules shall have the right to the assistance of a national lawyer or a foreign lawyer in collaboration with a national lawyer. Currently, Yim Tith is represented by two lawyers: one national and one international. DSS' refusal to appoint Mr Sorab, therefore, does not prejudice Yim Tith's right to legal representation.
20. Under these circumstances, and irrespective of the merits of the Defence's grievances, I do not consider it within the CIJs' powers to direct DSS to consider Mr Sorab's appointment as a Co-Lawyer as requested by the Defence and to override its primary competence regarding the admission of counsel. In any event, the proper recourse against a denial by DSS would be an appeal to the PTC.
21. The request to order DSS to consider the April 2016 Application is therefore inadmissible.
22. This decision is filed in English, with a Khmer translation to follow.

FOR THE FOREGOING REASONS, I:

23. **REQUEST** the Defence and DSS to inform the CIJs, with appropriate evidence, by close of business on Friday 10 June 2016 of:
 - a. the date on and the manner in which the Defence learnt from DSS that their budget amounted to \$210,000; and
 - b. the date on which DSS learnt that the available budget was in fact only \$180,000.
24. **INVITE** the Chief of Human Resources, if he so wishes, to inform the CIJs by close of business on Friday 10 June 2016, of any compelling reason against the extension of Mr Neville Sorab as a *pro bono* Expert Consultant for the Defence;
25. **DENY** the Defence's request to instruct DSS to consider the April 2016 Application; and
26. **REMAIN SEISED** of the Request.

Dated 7 June 2016, Phnom Penh



Judge Michael Bohlander

សមាជិកសម្របសម្រួលអន្តរជាតិ

International Co-Investigating Judge
Co-juge d'instruction international