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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D381/42 & D382/41

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 (PTC61)

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

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 18-Mar-2021, 16:00
CMS/CFO: Sann Rada

Date: 18 March 2021

PUBLIC

DECISION ON YIM TITH'S URGENT REQUEST FOR DISMISSAL OF THE DEFENCE SUPPORT SECTION'S ACTION PLAN DECISION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “YIM Tith’s Urgent Request for Dismissal of the Defence Support Section’s Action Plan Decision” filed by the Co-Lawyers for YIM Tith (“Co-Lawyers”) on 3 February 2021 (“Urgent Request”).¹

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 20 January 2021, the Co-Lawyers submitted their Action Plan for February 2021 in accordance with Section E(4) of the ECCC’s Legal Assistance Scheme (“LAS”).

2. On 28 January 2021, the Defence Support Section (“DSS”) issued its Action Plan Decision, limiting the number of hours approved as necessary and reasonable for YIM Tith’s defence from 150 to 75 hours for each Co-Lawyer. In this Decision, the DSS considered that “there will be no oral hearing in Case 004 before the Pre-Trial Chamber” on the basis that the Office of Administration had not received a hearing notification from the Pre-Trial Chamber and in view of the Completion Plan, Revision 27.²

3. On 3 February 2021, the Co-Lawyers filed the Urgent Request in English,³ requesting the Pre-Trial Chamber to dismiss the Action Plan Decision issued by the DSS on 28 January 2021 and to order the DSS to immediately approve the Co-Lawyers’ Action Plan for February 2021.⁴ The Khmer translation of the Urgent Request was filed on 9 February 2021.

4. The Co-Lawyers submit that their Urgent Request is admissible pursuant to Internal Rule 21⁵ as there are no ECCC Rules providing a procedure to appeal the

¹ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC61), YIM Tith’s Urgent Request for Dismissal of the Defence Support Section’s Action Plan Decision, 3 February 2021, D381/33 & D382/32 (“Urgent Request (D381/33 & D382/32)”).

² Case 004, Attachment 3: Email from the DSS to Mr So Mosseny and Ms Suzana Tomanović, ‘Action Plan Decision: February 2021’, Attachment to YIM Tith’s Urgent Request for Dismissal of the Defence Support Section’s Action Plan Decision, 28 January 2021, D381/33.1.3 & D382/32.1.3 (“Action Plan Decision (D381/33.1.3 & D382/32.1.3)”).

³ Case 004, Request to File YIM Tith’s Urgent Request for Dismissal of the Defence Support Section’s Action Plan Decision in One Language, 3 February 2021, D381/32 & D382/31.

⁴ Urgent Request (D381/33 & D382/32).

⁵ Urgent Request (D381/33 & D382/32), paras 4-6.



Action Plan Decision⁶ and because intervention is required to avoid irreparable damage to the fairness of the proceedings and YIM Tith's fair trial rights, including his rights to an effective legal representation and to legal certainty.⁷

5. Pursuant to the Pre-Trial Chamber's Instructions of 5 February 2021,⁸ the International Co-Prosecutor and the DSS filed their Responses to the Urgent Request on 4 February 2021⁹ and 12 February 2021,¹⁰ respectively. The National Co-Prosecutor, the Co-Lawyers for the Civil Parties and the Office of Administration did not respond to the Urgent Request.

6. In her Response, the International Co-Prosecutor suggests that the issue could be best resolved by the Pre-Trial Chamber giving prompt notice to the Parties as to whether there will be an oral hearing.¹¹

7. The DSS, in its Response, requests the Pre-Trial Chamber to dismiss the Urgent Request and to classify as public all substantive filings related to the matter.¹² The DSS further submits that intervention by the Pre-Trial Chamber is not warranted nor appropriate at this time as: (i) the Co-Lawyers have not availed themselves of the procedures in their legal services contracts;¹³ (ii) the remedies sought by the Co-Lawyers cannot be granted by the ECCC;¹⁴ and (iii) the Action Plan Decision preserves YIM Tith's rights to a fair trial and to an effective legal representation.¹⁵

⁶ Urgent Request (D381/33 & D382/32), paras 7-13.

⁷ Urgent Request (D381/33 & D382/32), paras 14-17.

⁸ Case 004, Pre-Trial Chamber Instructions to the Parties, the Defence Support Section and the Office of Administration, Email dated 5 February 2021.

⁹ Case 004, International Co-Prosecutor's Response to YIM Tith's Urgent Request for Dismissal of the Defence Support Section's Action Plan Decision, 4 February 2021, D381/34 & D382/33 ("International Co-Prosecutor's Response (D381/34 & D382/33)").

¹⁰ Case 004, Defence Support Section's Response to YIM Tith's Request for Dismissal of the Defence Support Section's Action Plan Decision, 12 February 2021, D381/35 & D382/34 ("DSS Response (D381/35 & D382/34)").

¹¹ International Co-Prosecutor's Response (D381/34 & D382/33).

¹² DSS Response (D381/35 & D382/34).

¹³ DSS Response (D381/35 & D382/34), paras 4-13.

¹⁴ DSS Response (D381/35 & D382/34), paras 14-18.

¹⁵ DSS Response (D381/35 & D382/34), paras 19-25.



II. ADMISSIBILITY

8. The Pre-Trial Chamber recalls that the fundamental principles expressed in Internal Rule 21 reflect the fair trial requirements that the ECCC is 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 In relation to appeals lodged under Internal Rule 21, the Pre-Trial Chamber has held that the principles expressed in this Rule may warrant the adoption of a liberal interpretation of the right to appeal to ensure that the proceedings are fair and adversarial.¹⁹ In rare instances, where the particular facts and circumstances of the case so require, the Chamber may admit appeals under Internal Rule 21 directly or through a broad interpretation of the specific provisions of the Internal Rules which grant it jurisdiction.²⁰

9. However, the Pre-Trial Chamber has equally emphasised that Internal Rule 21 does not open an automatic avenue for appeal, even where the appeal raises fair trial issues.²¹ Nor does Internal Rule 21 grant the Pre-Trial Chamber jurisdiction to deal with hypothetical matters or to provide advisory opinions.²² For the Chamber to entertain an appeal under Internal Rule 21, the burden is on the appellant to demonstrate that the situation at hand does not fall within the applicable rules and that the particular circumstances of the case require the Chamber's intervention to avoid

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*, 6 June 2003, entered into force 29 April 2005.

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, NS/RKM/1004/006, as amended 27 October 2004.

¹⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.

¹⁹ Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2") (PTC60), Decision on AO An's Urgent Request for Continuation of AO An's Defence Team Budget, 2 September 2019, D359/17 & D360/26 ("Decision on AO An's Urgent Request (D359/17 & D360/26)"), para. 5; Case 004 (PTC19), Considerations on IM Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her *in Absentia*, 01 March 2016 (D239/1/8) ("Considerations on Charging IM Chaem *in Absentia* (D239/1/8)"), para. 17.

²⁰ Decision on AO An's Urgent Request (D359/17 & D360/26), para. 5; Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17.

²¹ Decision on AO An's Urgent Request (D359/17 & D360/26), para. 6; Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17.



irremediable damage to the fairness of the proceedings or the appellant's fair trial rights.²³

10. In the present case, the Pre-Trial Chamber is not persuaded that the Co-Lawyers have met either of the requirements for admissibility under Internal Rule 21. First, with respect to allegation that there are no ECCC rules proving a procedure to appeal the Action Plan Decision,²⁴ the Pre-Trial Chamber finds, on the contrary, that the issue at hand falls squarely within the scope of the dispute resolution mechanism provided under the terms of the LAS²⁵ and/ or the Co-Lawyers' respective legal services contracts,²⁶ to which they have agreed to be bound.²⁷

11. The Chamber observes that the dispute resolution mechanism under Sections F(9) and F(10) of the LAS and Sections 11.2 and 11.3 of the Co-Lawyers' legal services contracts does not apply in circumstances where a Fee Claim Decision has yet to be made.²⁸ Moreover, the Chamber recalls that it does not provide advisory opinions and that any dispute related to a final decision on remuneration may be raised under the relevant procedure at a later stage.²⁹

12. Nevertheless, the Pre-Trial Chamber considers that the Co-Lawyers did not resort to nor fully exhaust the dispute resolution mechanisms available to them at the relevant time. Under Section 11.1 of their legal services contracts, the Co-Lawyers are obliged to amicably resolve "any dispute, controversy or claim" relating to the terms

²² Decision on AO An's Urgent Request (D359/17 & D360/26), para. 6; Case 004 (PTC11), Decision on YIM Tith's Appeal against the Decision Denying His Request for Clarification, 13 November 2014 (D205/1/1/2), paras 7-8.

²³ Decision on AO An's Urgent Request (D359/17 & D360/26), para. 6; Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17.

²⁴ Urgent Request (D381/33 & D382/32), paras 7-13.

²⁵ ECCC Legal Assistance Scheme, December 2014 (amended), D381/33.1.1 & D382/32.1.1.

²⁶ Case 004, Attachment 4: Legal Services Contract between Ms Suzana Tomanović and the DSS, Attachment to YIM Tith's Urgent Request for Dismissal of the Defence Support Section's Action Plan Decision, 4 October 2019, D381/33.1.4 & D382/32.1.4 ("Legal Services Contract (D381/33.1.4 & D382/32.1.4)"), section 11. *See also* DSS Response (D381/35 & D382/34), footnote 12 (noting that the terms, in relevant part, of Mr. SO Mosseny's Legal Services Contract are identical to those of Ms. Tomanović.).

²⁷ Legal Services Contract (D381/33.1.4 & D382/32.1.4).

²⁸ Legal Services Contract (D381/33.1.4 & D382/32.1.4). The Pre-Trial Chamber deems it unnecessary to characterize the dispute involving the Action Plan Decision as a "non-fee" or "fee" dispute considering that clear avenues for dispute resolution are available under each category.

²⁹ Decision on AO An's Urgent Request (D359/17 & D360/26), paras 6, 10.



and conditions of their contract.³⁰ In the event that the parties are unable to amicably settle their dispute within 60 days, the dispute may be referred to the UN Administrative Judge (“UNAJ”).³¹

13. More specifically, the Chamber is not convinced of the Co-Lawyers’ claim that this contractual dispute resolution procedure cannot be used after a decision has been made on the Action Plan³² and notes the DSS’ submission that “it is still open to the co-lawyers to approach DSS” with a view to amicably resolve the issue.³³ Moreover, the Chamber finds that the Co-Lawyers fail to sufficiently demonstrate that recourse to the UNAJ would not provide an effective remedy³⁴ and considers that the guarantees in the present legal framework are sufficient to ensure respect of YIM Tith’s fair trial rights.³⁵

14. Second, with regard to the submission that the Action Plan Decision causes irreparable damage to the fairness of the proceedings,³⁶ the Chamber observes that this allegation is premised on the Co-Lawyers’ need for resources to adequately prepare for an oral hearing in Case 004.³⁷ Having considered the views of the Parties,³⁸ the Pre-Trial Chamber decided, pursuant to Internal Rule 77(3)(b), to proceed and determine the appeals against the Closing Orders in Case 004 on the basis of the written submission only.³⁹

³⁰ Legal Services Contract (D381/33.1.4 & D382/32.1.4), section 11.1.

³¹ Legal Services Contract (D381/33.1.4 & D382/32.1.4), section 11.1.

³² Urgent Request (D381/33 & D382/32), para. 12.

³³ DSS Response (D381/35 & D382/34), para. 6.

³⁴ Urgent Request (D381/33 & D382/32), paras 12-13.

³⁵ Decision on AO An’s Urgent Request (D359/17 & D360/26), para. 8 (“The Chamber notes that, pursuant to Internal Rules 11(2)(a)(iii) and 11(2)(h), the DSS monitors and assesses the fulfilment of the Co-Lawyers’ contracts with the Accused, and authorises corresponding re[n]umerations in accordance with the LAS, which is an administrative regulation that was adopted in accordance with Internal Rule 4”).

³⁶ Urgent Request (D381/33 & D382/32), paras 14-17 (including YIM Tith’s right to effective legal representation and to legal certainty).

³⁷ Urgent Request (D381/33 & D382/32), paras 14-16.

³⁸ International Co-Prosecutor’s Submissions regarding an Oral Hearing on the Appeals against the Closing Orders in Case 004 (YIM Tith), 3 March 2021, D381/36 & D382/35; National Co-Prosecutor’s Submissions regarding an Oral Hearing on the Appeals against the Closing Orders, Email dated 4 March 2021, D381/40 & D382/39; YIM Tith’s Submissions to the Pre-Trial Chamber on the Necessity for an Oral Hearing in Case 004, 4 March 2021, D381/38 & D382/37; Civil Party Co-Lawyers’ Views on Oral Hearings on Appeals to the Closing Order in Case 004, 5 March 2020, D381/39 & D382/38.

³⁹ Case 004, Decision on Oral Hearing in Case 004, 18 March 2021, D381/41 & D382/40.



15. In light of the above, the Pre-Trial Chamber holds that the Co-Lawyers have failed to demonstrate that the situation at hand does not fall within the applicable rules or that the Chamber's intervention is required to avoid irreparable damage to YIM Tith's fair trial rights. Accordingly, the Pre-Trial Chamber finds the Urgent Request inadmissible.

16. Nevertheless, the Pre-Trial Chamber considers it pertinent to address certain errors in the DSS's justification for the reduction of the billable ceiling from 150 to 75 hours. In particular, the Chamber notes the DSS' misplaced reliance on the current Completion Plan and information obtained from the Office of Administration, informing its speculative view that there will be no hearing in Case 004.⁴⁰ The Chamber reiterates that it is within the sole competence of the Pre-Trial Chamber to decide whether an oral hearing on the Case 004 Closing Order Appeals will be held. Neither the Completion Plan nor the views of the Office of Administration on this matter, should be determinative in guiding the DSS' justification for the reduction of the number of approved hours in the Action Plan Decision.

17. Moreover, the Chamber considers inappropriate the DSS' reference to a need to strike a "balance" between the rights of the defendant and the transparent administration of public funds,⁴¹ insofar as this implies that budgetary considerations may be balanced against a defendant's rights to an effective legal representation. The Chamber recalls the DSS' obligation pursuant to Internal Rule 21(1) to interpret the applicable Administrative Regulations so as to always safeguard the interests of the Accused and, accordingly, urges the DSS to allocate resources on the basis of what is necessary and reasonable for YIM Tith's effective defence.

⁴⁰ Action Plan Decision (D381/33.1.3 & D382/32.1.3), at ERN 01663089, para. 2; DSS Response (D381/35 & D382/34), para. 22(11-14); Case 004, Attachment 7: Email from the Office of Administration, 26 January 2021, Attachment to Defence Support Section's Response to YIM Tith's Request for Dismissal of the Defence Support Section's Action Plan Decision, 12 February 2021, D381/35.1.7 & D382/34.1.7.

⁴¹ Action Plan Decision (D381/33.1.3 & D382/32.1.3), at ERN 01663089; DSS Response (D381/35 & D382/34), para. 20.



III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Urgent Request as inadmissible;

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

Phnom Penh, 18 March 2021

President

Pre-Trial Chamber



PRAK Kimsan

Four blue ink signatures of the Pre-Trial Chamber members, written in a cursive style.

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy

