



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

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DECISION ON THE [REDACTED] DEFENCE REQUESTS TO ACCESS THE CASE FILE AND TAKE PART IN THE JUDICIAL INVESTIGATION

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1. **Noting** the 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, dated 6 June 2003 (the “ECCC Agreement”);
2. **Noting** the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);
3. **Noting** the Third Introductory Submission, dated 20 November 2008, relating to Case File 004,¹ which was placed on the Case File on 7 September 2009;²
4. **Noting** the Supplementary Submission regarding Sector 1 crime sites and persecution of Khmer Krom, relating to Case File 004, dated 18 July 2011;³
5. **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 in relation to **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 6, 29 (new) and 39 (new) of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;
6. **Noting** Rules 21, 55, 57, 60, and 86 of the ECCC Internal Rules, Rev.8 (“Internal Rules”);
7. **Noting** that, on 22 February 2013, Judge You Bunleng (the “National CIJ”) and the International CIJ signed a Written Record of Disagreement concerning, *inter alia*, this matter.

A. PROCEDURAL HISTORY

8. On 29 July 2010, Richard Rogers filed a letter to the CIJs requesting, in his capacity as Chief of the Defence Support Section (“DSS”), access to the case files for the suspects in Cases 003 and 004, and the granting of other procedural rights, including the rights set out in Internal Rules 55(8) and 55(10), claimed to be necessary to ensure protection of the rights enshrined in Internal Rule 21. In this letter, the Chief of DSS raised concerns over the situation of the suspects in Cases 003 and 004 (“Suspects”) who were, it was claimed, “*left without any form of legal representation or means of protecting their fair trial rights, despite being substantially affected by the investigation*”.⁴ On 20 September 2010, DSS made further submissions on this point, stating, *inter alia*, that the “*possibility of*

¹ Case File No. 004-D1, *Co-Prosecutor’s Third Introductory Submission*, 20 November 2008.

² Case File No. 004-D1/1, *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009.

³ Case File No. 004-D65, *Co-Prosecutors’ Supplementary Submission regarding Sector 1 crime sites and persecution of Khmer Krom*, 18 July 2011.

⁴ Case File No. 004-D4.1.29, *DSS letter on defence rights in case 003 and 004*, 29 July 2010.



prejudice to the fair trial rights of the unnamed suspects” was increasing due to lack of a timely answer from the CIJs.⁵

9. On 23 September 2010, the CIJs responded to the DSS, explaining their reasons for not granting the Suspects access to Case Files 003 and 004. The CIJs stated, *inter alia*, that “[d]efence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems”.⁶
10. On 8 November 2010, the DSS decided to assign a Cambodian lawyer, Kong Sam Onn, to represent the interests of the Suspects. The decision was taken, according to DSS, on the basis of the Suspects’ unconditional right to counsel and of DSS’s duty and authority to assign counsel to suspects.⁷ On 11 February 2011, the DSS notified this assignment to the CIJs.⁸
11. On 14 February 2011, Kong Sam Onn filed the *Request for Access to Case Files 003 and 004*, demanding access to the case files or, alternatively, requesting the CIJs to dismiss the proceedings against the Suspects.⁹ Kong Sam Onn based his request on the principle of equality of arms and on the right to a fair trial, which, he argued, apply from the moment the interests of the Suspects become “substantially affected”.¹⁰ In Kong Sam Onn’s submission, the defence’s inability to monitor the investigation and to prepare an effective defence substantially affected the Suspects.¹¹
12. On 5 April 2011, the CIJs issued the *Decision on Request for Access to Case Files 003 and 004* (“5 April 2011 Decision”), rejecting the request on the basis that the Suspects had not been charged through the formal procedure set forth in Internal Rule 57, nor had their interests been substantially affected by the investigations.¹² With regard to the conclusion that the investigations had not substantially affected the Suspects, the CIJs stated that none of them had been approached, interviewed, subjected to any search and seizure actions, detained,

⁵ Case File No. 004-A1/1, *Follow-up to DSS letter on defence rights in case 003 and 004*, 20 September 2010.

⁶ Case File No. 004-D4.1.31, *Response of the CIJs on Defence rights in Case File 003 and 004*, 23 September 2010 (“23 September 2010 CIJs Response”), p. 1.

⁷ Case File No. 004-A2, *Notification of Assignment – Case 003 and 004*, 11 February 2011, para. 5.

⁸ *Ibid.*, para. 1.

⁹ Case File No. 004-D4, *Request for Access to Case Files 003 and 004*, 14 February 2011, para. 44.

¹⁰ Case File No. 004-D4, *Request for Access to Case Files 003 and 004*, 14 February 2011, paras 18-22.

¹¹ Case File No. 004-D4, *Request for Access to Case Files 003 and 004*, 14 February 2011, paras 28, 38.

¹² Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011 (“5 April 2011 Decision”), paras 3-8 and 12-13.



or in any other way affected by the investigation of the Co-Investigating Judges.¹³

13. On 29 April 2011, Kong Sam Onn filed the *Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011* (“29 April 2011 Motion”) with the CIJs, requesting that the 5 April 2011 Decision be reconsidered and access to the case files granted. This request was based on an alleged change in circumstances, namely that [REDACTED] and [REDACTED] had filed applications to become Civil Parties in Case 003 and Case 004.¹⁴
14. On 30 April 2011, Kong Sam Onn’s consultancy contract expired.¹⁵
15. On 19 May 2011, the CIJs issued the *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, in which they rejected the 29 April 2011 Motion. In this decision, the CIJs stated that the requests filed by [REDACTED] and [REDACTED] did not constitute an exceptional change in circumstances, and that no injustice had been caused to the Suspects (as both applications had been rejected and neither applicant had gained access to the Case File).¹⁶
16. On 24 February 2012, the Reserve International Co-Investigating Judge (“RICIJ”) issued the *Notification of Suspect’s Rights* (“Written Notification”), whereby he informed [REDACTED] (“Suspect”), one of the suspects in Case 004, “that 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”.¹⁷ The Suspect was also informed of the “charges” brought against him. In this regard, the RICIJ stated that “these charges [were] based on both the facts alleged by the co-prosecutors and those uncovered thus far during the course of the investigation.”¹⁸
17. In addition, the RICIJ informed the Suspect that:

“in accordance with the law, he shall be presumed innocent as long as his guilt has not been established, and that we remain available to hear evidence from him relating to these charges should he so wish.”; and that

¹³ Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011 (“5 April 2011 Decision”), para. 8.

¹⁴ Case File 004-D4/2, *Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, 29 April 2011, para 11.

¹⁵ Case File 004-D 103/1, *Notice of Termination of Assignment of Mr. Kong Sam Onn – Cases 003 and 004*, 24 October 2011.

¹⁶ Case File No: 004-D4/2/1, *Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 dated 5 April 2011*, 19 May 2011.

¹⁷ Case File No. 004-D110, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012.

¹⁸ *Ibid.*, para. 2.



“in accordance with the Internal Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of suspect notably include the right to be defended by a lawyer of his/her choice, to have access to the case file (application, by analogy, of Rules 55(6), 55(1)¹⁹ and 58, except for the provisions of Rule 58(6) of the ECCC) and to remain silent at every stage of the proceedings.”²⁰

18. On 29 February 2012,²¹ the RCIJ conveyed the above information orally to the Suspect (“Oral Notification”).²²
19. On 31 March 2012, the Suspect submitted a letter to the CIJs informing them that he had met his Co-Lawyers, Mom Luch and Richard Rogers, and that he wished to exercise his right to remain silent and not respond to any questions until further notice.²³
20. On 5 October 2012, DSS appointed Göran Sluiter as Foreign Co-Lawyer for the Suspect.²⁴
21. On 22 October 2012, the Suspect’s Defence submitted a letter to the CIJs, whereby it requested, *inter alia*, that the CIJs ensure that suspects before the ECCC enjoy all their fair trial rights, adding that these rights must not be “*theoretical and illusory, but real and effective.*”²⁵
22. On 14 December 2012, the Suspect’s Defence filed the *Urgent Motion Requesting Order for Access to the Case File* (“Urgent Motion”), requesting the CIJs to order the Office of the Administration to provide the Suspect,

¹⁹ It should be noted that the French version of the *Notification of Suspect’s Rights* decision (004-D110) refers to Internal Rule 55(11), whereas the (original) English and Khmer versions refer to Internal Rule 55(1).

²⁰ Case File No. 004-D110, *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012, paras 3 and 4.

²¹ In the letter sent to the Defence Support Section by the RCIJ 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 ICIJ considers the reference to 29 March 2012 to be a clerical error and will consider the notification as carried out on 29 February 2012.

²² 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. 4.

²³ Case File No 004-D111/3.1, *Letter from* [REDACTED] 31 March 2012. For a detailed background on the appointment of Mom Luch and Richard Rogers as counsel for the Suspect, see Case File No. 004-D122/6, *Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel*, 17 May 2013 (“Decision on Right to Counsel”), paras 14-43. Richard Rogers was officially recognized as counsel for the Suspect by the RCIJ on 3 May 2012. However, his appointment was subsequently vacated on 17 May 2013, see *Decision on Right to Counsel*, para. 110.

²⁴ Case File No. 004-D111/8, *DSS Letter, Assignment of Foreign Co-Lawyer to Represent* [REDACTED], 5 October 2012.

²⁵ Case File No. 004-D122/2.1.41, *Letter from the Suspect’s Defence*, 22 October 2012, para. 11.



characterized in the Urgent Motion as the “Charged Person”, with access to all investigation case files relevant to the proceedings against him.²⁶

23. On 20 December 2012, the Suspect’s Defence filed a further letter in which it characterized the Suspect as a “Charged Person before the ECCC”²⁷ and expressed its concern at the “ongoing violation” of his rights. The Suspect’s Defence requested that the letter be appended to the Urgent Motion (“Appended Letter”).²⁸
24. On 15 February 2013, the Suspect’s Defence filed with the Pre-Trial Chamber the *Appeal Against Constructive Dismissal of Urgent Motion Requesting Order to Access the Case File* (“Appeal”), whereby it submitted that the CIJ’s failure “[...] to grant the Charged Person access to the case file despite his repeated requests denied him his right to play an active role during the investigative phase of proceedings before the ECCC...” thus rendering nugatory the rights guaranteed to him as a “Charged Person”.²⁹ On this basis, the Suspect’s Defence requested the Pre-Trial Chamber to grant the Suspect the relief requested in the Urgent Motion.³⁰
25. On 26 February 2013, the International Co-Investigating Judge (“ICIJ”) filed the *Note Forwarding the Appeal to the Pre-Trial Chamber*, setting forth in detail the activities he had undertaken since his arrival at the ECCC and stated that he was conscious of the requirement to respond to requests “as soon as possible and in any event before the end of the investigation” but that he first had to resolve various substantive and preliminary matters that were pre-conditions to any decision on access to the Case File.³¹
26. On 12 March 2013, the Suspect’s Defence sent a letter to the CIJs requesting to be granted the right to “participate in the investigations that are currently ongoing in Case 004” (“12 March 2013 Letter”).³²
27. On 9 April 2013, on the basis of the information provided by the CIJ in the *Note Forwarding the Appeal to the Pre-Trial Chamber*, the Suspect’s Defence withdrew the Appeal.³³

²⁶ Case File No. 004-D121, *Urgent Motion Requesting Order for Access to the Case File*, 14 December 2012.

²⁷ Case File No. 004-D121/1, ██████████ *Right to Information as to the Nature and Cause of the Charge Against Him and His Right to Adequate Facilities to Prepare his Defence*, 20 December 2012, para. 7.

²⁸ Case File No. 004-D121/1, ██████████ *Right to Information as to the Nature and Cause of the Charge Against Him and His Right to Adequate Facilities to Prepare his Defence*, 20 December 2012, para. 9.

²⁹ Case File No. 004-D121/2/1, *Appeal against constructive dismissal of Urgent Motion requesting order to access the case file*, 15 February 2013, para. 3.

³⁰ Case File No. 004-D121/2/1, *Appeal against constructive dismissal of Urgent Motion requesting order to access the case file*, 15 February 2013, para. 9.

³¹ Case File No. 004-D121/2, *Note by International Co-Investigating Judge forwarding an appeal to the Pre-Trial Chamber*, 26 February 2013.

³² Case File No. 004-D121/3, *Letter from the Defence to the CIJs on Participation in judicial investigations in Case 004*, 12 March 2013 (“12 March 2013 Letter”).

³³ Case File No. 004-D121/2/2, *Notification of withdrawal of appeal*, 9 April 2013, paras 5-6.



28. On 17 June 2013, the Suspect's Defence³⁴ sent a letter ("17 June 2013 Letter") to the CIJs whereby, after recalling that on 1 April 2013 the ICIJ granted lawyers for the civil parties access to the case file, they submitted, "*it is clear that recognized lawyers must be granted access to the case file.*"³⁵

B. SUBMISSIONS

29. In the Urgent Motion, the Suspect's Defence requested the Co-Investigating Judges ("CIJs") to order the Office of Administration to provide the Suspect, whom the Suspect's Defence referred to as the "Charged Person", with access to the case file.³⁶ In support of its request, the Suspect's Defence stated that, as a "Charged Person", the Suspect has the "*express right under Internal Rules 55(6) and 86 of the ECCC to access the case file in the investigation into the allegations against him at any time.*" It further submitted that, as a "Charged Person", the Suspect has the right to access the case file based on Article 14(3)(b) of the International Covenant on Civil and Political Rights ("ICCPR"). In the Suspect's Defence's submission, the right to access the case file is part of the broader right to adequate facilities.³⁷
30. The Suspect's Defence argued that the only information that has been provided to the Suspect on the investigation against him is limited to the *Notification of Suspect's Rights*, issued on 24 February 2012, and the oral notification of 29 February 2013,³⁸ which information "amounted to little more than a vague and general overview of the nature and cause of the charges against him."³⁹
31. In addition, the Suspect's Defence submitted that, although the investigation is confidential, his name has been mentioned by national and international media in connection with the proceedings against him, and that he was visited on a number of occasions by members of the media. The Suspect's Defence further argued that, "*while [the Suspect] is suspected of having committed serious offences, the Charged Person has been denied the facilities necessary for the preparation of his defence.*"⁴⁰
32. The Suspect's Defence finally submitted that "*more than four years have passed since the 'Charged Person' was named in the Third Introductory Submission*"

³⁴ The Urgent Motion, the Appended Letter, the Appeal, the 12 March 2013 Letter, and the withdrawal of the Appeal were signed by Richard Rogers, Mom Luch and Göran Sluiter. However, on 17 May 2013, the ICIJ vacated Richard Rogers' recognition as foreign co-lawyer representing the Suspect. The 17 June 2013 Letter is only signed by Mom Luch and Göran Sluiter.

³⁵ Case File No. 004-D122/7, *Letter to the Co-Investigating Judges and the Co-Prosecutors concerning the failure of the Co Investigating Judges to grant access to the case file to the Co-lawyers for* [REDACTED] 17 June 2013, p. 2.

³⁶ Urgent Motion, paras 1, 15.

³⁷ Urgent Motion, paras 1, 5, 9.

³⁸ Urgent Motion, para. 3.

³⁹ Urgent Motion, para. 8.

⁴⁰ Urgent Motion, para. 8.



and the ongoing failure to provide him with access to the case file is in violation of the ECCC Law as well as international human rights standards.⁴¹

33. In the Appended Letter, the Suspect's Defence expressed its concern on the ongoing violation of their client's rights as a "Charged Person before the ECCC",⁴² including his right to be informed of the nature and cause of the charges against him, his right to adequate time and facilities to prepare his defence and his right to access the case file.⁴³ It also expressed concern that the CIJs are moving the investigation forward, including inviting victims to submit civil parties applications, without making sufficient efforts to inform the Suspect of the allegations and developments of proceedings against him.⁴⁴ Finally, the Suspect's Defence reiterated that the Suspect is [REDACTED] years old and in fragile health, that his name has been reported by national and international media and that he has been visited by members of the media several times.⁴⁵ They conclude by requesting the provision of "*full information pertaining to the nature and cause of the allegations against him and the provision of access to the investigation case file in the proceedings against him*".⁴⁶
34. In the 12 March 2013 Letter, the Suspect's Defence requested permission to participate in the investigations that are currently ongoing in Case 004. It specifically requested to be confronted with all witnesses interviewed by the CIJs and to be allowed to submit questions to them, through the CIJs. In the Suspect's Defence's submission, participation in the interrogation of witnesses will be conducive to establishing the truth.⁴⁷
35. In the 17 June 2013 Letter, the Suspect's Defence argued that failure to grant access to the Suspect is "*not only illegal*", but "*sends a disturbing message [...] of a hierarchy of parties in which the suspect's rights are viewed as subordinate to those of the Co-Prosecutors and the civil parties.*"⁴⁸ The Suspect's Defence relies on the *Decision Recognising Civil Party Lawyers*, issued on 1 April 2013,⁴⁹ and states that, on its basis, "*it is clear that recognised lawyers must be granted access to the case file.*"⁵⁰

⁴¹ Urgent Motion, para. 14.

⁴² Appended Letter, para. 7.

⁴³ Appended Letter, para. 1.

⁴⁴ Appended Letter, para. 5.

⁴⁵ Appended Letter, para. 8.

⁴⁶ Appended Letter, para. 9.

⁴⁷ Case File No. 004-D121/3, *Letter from the Defence to the CIJs on Participation in judicial investigations in Case 004*, 12 March 2013 ("12 March 2013 Letter").

⁴⁸ Case File No. 004-D122/7, *Letter to the Co-Investigating Judges and the Co-Prosecutors concerning the failure of the Co Investigating Judges to grant access to the case file to the Co-lawyers for* [REDACTED] 17 June 2013.

⁴⁹ Case File No. 004-D126, *Decision Recognising Civil Party Lawyers*, 1 April 2013.

⁵⁰ 13 June 2013 Letter, p. 2.



C. APPLICABLE LAW

Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia

[...]

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.

[...]

Article 23 of the ECCC Law

“All the investigations [...] shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.”

Article 14 of the 1966 International Covenant on Civil and Political Rights prescribes, in its relevant part, that:

[...]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

[...]

ECCC Internal Rule 21(1)(d) prescribes that:

“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 55, in its relevant parts, prescribes that:

“[...]

The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. 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.

[...]

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.

The Co-Prosecutors and the lawyers for the other parties shall have the right to consult the original case file, subject to reasonable limitations to ensure the continuity of the proceedings.”

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 in the case file.

ECCC Internal Rule 86 prescribes that:

At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the



Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC.

Inherent power to reconsider previous decisions

Judges have an inherent power to reconsider a decision previously rendered in the event of a change of circumstances, but also where the previous decision was erroneous or could cause an injustice.⁵¹ This power can also be exercised *proprio motu*.⁵²

D. ANALYSIS

I. The rights to access the case file and to take part in the judicial investigation

36. The Internal Rules clearly distinguish between a Suspect and a Charged Person⁵³ and grant the latter a broader set of rights.⁵⁴
37. The right to access the case file is regulated by Internal Rules 55(6), 55(11), and 86 and is exclusively reserved to the Co-Prosecutors and the “*lawyers for the other parties*”, namely the Charged Person, the Accused, and Civil Parties. Suspects are not parties to the proceedings.⁵⁵ Similarly, pursuant to Internal

⁵¹ ECCC: Case File No. 002/PTC-D364/1/6, *Decision on the Reconsideration of the Admissibility of Civil Party Applications*, 1 July 2011, para. 6; ICTY: *Prosecutor v. Prlić et al.*, IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration or for Certification to Appeal the Order of 14 October 2008*, 12 November 2008, p. 4; *Prosecutor v. Galić*, IT-98-29-A, *Decision on Defence’s Request for Reconsideration*, 16 July 2004, p. 2; *Prosecutor v. Milosević*, IT-02-54-T, *Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukasin Andrić, and Dobre Aleksovski and Decision proprio motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituch*, 17 May 2005, paras. 7-8; *Prosecutor v. Galić*, IT-98-29-AR73, *Decision on Application by Prosecution for Leave to Appeal*, 14 December 2001, para. 13; ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-Abis, *Judgement on Sentence Appeal*, 8 April 2003, para. 49; *Prosecutor v. Milutinović et al.*, IT-05-87-T, *Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial Related Protective Measures for Witness K56*, 9 November 2006, para. 2.

⁵² Case No. 003-D14/1/2, *Order Suspending the Enforcement of the “Order of the International Co-Prosecutor’s Public Statement Regarding Case 003*, 13 June 2011, para. 4; *Callixte Nzabonimana v. The Prosecutor*, Case Nos. ICTR-98-44D-AR7bis, ICTR-98-44D-AR7bis.2, *Decision on Callixte Nzabonimana’s Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and on the Motion for Leave to Appeal the President’s Decision Dated 5 May 2010*, 20 September 2010, para. 29.

⁵³ See Internal Rule 55(4), which states that “The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission” and Internal Rule 55(5), which states that “[...] the Co-Investigating Judges may: a) Summon and question Suspects and Charges Persons [...].”

⁵⁴ See Internal Rules 55(6), 60, and 86.

⁵⁵ See the Glossary to the Internal Rules under “Party”.



Rules 55(8) and 60, only the "parties" have the right to take part in the judicial investigation and to take part in confrontations with witnesses.

38. The right to access the case file is also guaranteed by Article 14(3)(b) of the ICCPR, which is applicable to proceedings at the ECCC, as part of the broader right to adequate facilities.⁵⁶ Article 14(3)(b) grants this right to persons against whom "charges" exist. An analysis of international jurisprudence, including case law cited in the Urgent Motion, confirms that the fundamental nature of the right to access the case file is recognized with regard to individuals against whom charges exist, as it is ultimately necessary to challenge the evidence gathered or tendered in support of these charges.⁵⁷
39. In order to decide on the relief requested in the Urgent Motion and on the 12 March 2013 Letter the ICIJ will need to determine whether the Suspect has the status of "Charged Person" in these proceedings, as claimed by the Suspect's Defence in the Urgent Motion.

II. Substantive and formal requirements for charging a suspect during an investigation

40. The decision to charge is a prerogative of the CIJs. Pursuant to Internal Rule 55(4), the CIJs have a discretionary power to charge any suspect named in the Introductory Submission, or other persons against whom there is "clear and consistent evidence". This standard has been consistently applied in other cases investigated by the OCIJ and also recalled in previous rulings in Case 004.⁵⁸ The formal procedure for charging a suspect is set forth in Internal Rule 57.
41. The CIJs, in the *Order Concerning the Co-Prosecutor's Request for Clarification of Charges*, issued on 20 November 2009 in Case 002 ("Clarification Order"), provided a clear explanation of the rules governing the charging process. The CIJs recalled that Judges have the "power", but not the obligation, to charge a person. They also recalled that the power to charge is governed by Internal Rule 55(4), under which charges "*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 [...]*".⁵⁹

⁵⁶ Human Rights Committee, General Comment n. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, para. 33.

⁵⁷ ECtHR: *Leas v. Estonia*, 6 June 2012, paras 76-90; *Jespers v. Belgium*, 14 December 1981, paras 56-57; *Öcalan v. Turkey*, 12 March 2003, paras 158-170; Human Rights Committee, Communication No. 676/1996, *Yasseen and Thomas v. Republic of Guyana*, 7 May 1998, para. 7.10.

⁵⁸ See Case File No. 002-D198/1, *Order Concerning the Co-Prosecutor's Request for Clarification of Charges*, 20 November 2009, para. 10; Case File No. 002-D275, *Written Record of Interview of Charged Person*, 15 December 2009, paras 4-5; Case File No. 002-D282, *Written Record of Interview of Charged Person*, 21 December 2009, paras 4-5; Case File No. 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011, para. 22.

⁵⁹ Case No. 002-D198/1, *Order Concerning the Co-Prosecutor's Request for Clarification of Charges*, 20 November 2009, para. 10.



42. In the Clarification Order, the CIJs added that, “*during the charging process, notification of ‘charges’ includes specifying the legal characterization of the facts*”.⁶⁰ In a footnote to this sentence, they stated that “*Charging is the process by which a person is notified of the potentially criminal nature of the acts under investigation. By definition, it consists in notifying the person of the acts and their legal characterisation as envisages at this stage of the judicial investigation.*”⁶¹ The Suspect’s Defence cites this footnote in isolation from its context in order to define the process of charging.⁶² However, the notification of the alleged facts and of their legal characterization is clearly only a part of the charging process, which is broader and subjected to the other rigorous requirements examined above.
43. In the Urgent Motion, the Suspect’s Defence also cites the Glossary to the Internal Rules, according to which “*Charged Person*” refers to “*any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case.*” The definition refers to persons “*subject to prosecution*”, which is not the case for a suspect against whom charges have not been brought, and it merely provides a timeframe during which an individual can acquire the status of Charged Person.
44. To conclude, the Internal Rules set forth rigorous requirements for charging a suspect. First, there needs to be clear and consistent evidence that a suspect may be responsible for the crimes alleged by the Prosecution in the introductory submission; second, a suspect must be charged following the procedure set forth in Internal Rule 57. Notably, according to French jurisprudence, which although not directly applicable or binding may provide useful guidance in the interpretation of the Internal Rules, an act of charging issued in the absence of the required evidentiary standard must be declared void.⁶³

III. The 24 February 2012 Notification of Suspect’s Rights

45. On 24 February 2012, with the Written Notification, then RICIJ Laurent Kasper-Ansermet notified the Suspect of the allegations against him, and added that “*the status of Suspect notably include the right to be defended by a lawyer of his/her choice, to have access to the case file (application, by analogy, of Rules 55(6), 55(1) and 58, except for the provisions of Rule 58(6) of the ECCC), and to*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, fn. 10.

⁶² Urgent Motion, fn. 1.

⁶³ 1er oct. 2003, n° 03-82.909 : JurisData n° 2003-020541 ; Bull. crim. 2003, n° 177 : « *est tenue de prononcer l’annulation d’une mise en examen lorsqu’il a été procédé à celle-ci en l’absence d’indices graves et concordants rendant vraisemblable que la personne mise en cause ait pu participer, comme auteur ou complice, à la commission de l’infraction dont le juge d’instruction est saisi* ». ICIJ’s English translation : “[*The Chambre de l’instruction*] shall declare void a charging decision when it was rendered in the absence of serious or corroborated evidence making it likely that the person may have participated, either directly or as an accomplice, in the commission of the offence the Judge is seized of.”



*remain silent at every stage of the proceedings.*⁶⁴ On 29 February 2012, the RICIJ orally notified the Suspect of his status of “suspect” in the investigation. The Suspect was also informed of his rights to be presumed innocent, to give evidence to the CIJs, to be represented by a lawyer of his choice, to have access to the case file, and to remain silent at all stages of the proceedings.⁶⁵

46. The Written Notification and the Oral Notification made repeated reference to the Suspect as a “suspect” and informed him that he was entitled to the rights set forth in Internal Rule 21(1)(d). They additionally granted him access to the case file, a right reserved by the Internal Rules to Charged Persons and other parties. The RICIJ expressly declined to grant the Suspect the right set forth in Internal Rule 58(6), which enables Charged Persons to take part in judicial investigations.
47. Access 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. At the present time, the ICIJ has not yet determined that this threshold has been met.
48. Rather, the broadening of the Suspect's rights was based, by purported analogy, on the application of Internal Rules 55(6), 55(1) and 58, which apply exclusively to the Charged Person and the other parties. The Pre-Trial Chamber explicitly stated that the CIJs are required to provide reasons for their decisions. In spite of this requirement, the RICIJ provided no reasoning for this recourse to analogy.⁶⁶
49. By granting the Suspect access to the case file, the RICIJ granted the Suspect a right to which the Suspect was not entitled pursuant to the Internal Rules. Further, the RICIJ did so without providing any reasoning in support of the decision. This constitutes an abuse of judicial discretion. On this basis, the ICIJ has reconsidered the portions of the Written Notification and of the Oral Notification granting the Suspect access to the case file and, for the reasons set out above, vacates them.

IV. Whether any other factors currently warrant access to the case file

50. In a past decision on a request to access the case file in the absence of formal charges, the CIJs considered whether a suspect had been “substantially affected” by the investigation.⁶⁷

⁶⁴ Written Notification, para. 4.

⁶⁵ Oral Notification, para. 4.

⁶⁶ On the CIJs' obligation to provide reasoned decisions, *see* Case File No: 002-D427/5/10, *Decision on Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention*, 21 January 2011, para. 27.

⁶⁷ Case File No: 004-D4/1, *Decision on Request for Access to Case Files 003 and 004*, 5 April 2011 (“5 April 2011 Decision”), paras 3-8 and 12-13.



51. In so doing, the CIJs relied on case law of the European Court of Human Rights (“ECtHR”) concerning alleged violations of the right to be tried within reasonable time, set forth in Article 6(1) of the European Convention on Human Rights (“ECHR”).
52. According to the ECtHR jurisprudence, “‘Charge’, for the purposes of Article 6 § 1, may be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether ‘the situation of the [suspect] has been substantially affected’.”⁶⁸ The ICIJ notes that this test has not been discussed by the ECtHR within the context of applications to access the case file. Notably, when seized of applications concerning alleged violations of this right, the ECtHR did not rely on the “substantially affected” test.⁶⁹
53. However, this test was applied by the Pre-Trial Judge of the Special Tribunal for Lebanon (“STL”) to a request for access the case file in the case of an individual who was neither a party to the proceedings nor a victim participating in the proceedings. The unique circumstances of the case involved an individual who was arrested and detained on the basis of an arrest warrant issued by a Lebanese Investigating Judge and transferred to the custody of the STL where he was detained under legal authority of the STL. He was not indicted by the Prosecutor of the STL and was later released by the Pre-Trial Judge. Thereafter, the individual brought a civil action before a Lebanese court to sue the authors of the “libelous denunciations” on which his “arbitrary detention” was based⁷⁰ and sought to access to the case file to obtain evidence in support of his claim. The Lebanese court found they lacked jurisdiction to rule on his request for evidentiary material.
54. The Pre-Trial Judge of the STL concluded that the individual had standing to seize the STL of the issue⁷¹ and found that there existed a basic right to obtain compensation for prejudice suffered by way of an unlawful detention.⁷² It further concluded that, although he was not formally accused before the STL, the individual was “entitled to basic defence rights similar to those conferred on an indictée, such as the right to have access to his criminal file.”⁷³ The ECtHR, too, affirmed the importance of access to the case file in cases where an individual has been imprisoned by the State.⁷⁴ In practice, even in the absence of

⁶⁸ *Foti et al. v. Italy*, 10 December 1982, para. 51; *Kangasluoma v. Finland*, 20 January 2004, para. 26; *See also McFarlane v. Ireland*, 10 September 2010, para. 143; *Eckle v. Germany*, 15 July 1982, para. 73; *Deweere v. Belgium*, 27 February 1980, para. 42.

⁶⁹ *Mooren v. Germany*, 9 July 2009, para. 124; *Lamy v. Belgium*, 30 March 1989, para. 29. *See also Nikolova v. Bulgaria*, 25 March 1999, para. 58.

⁷⁰ *El Sayed Order*, para. 2.

⁷¹ *El Sayed Order*, para. 42.

⁷² *El Sayed Order*, para. 51.

⁷³ *El Sayed Order*, para. 52.

⁷⁴ ECtHR *Mooren v. Germany*, 9 July 2009, para. 124; *Lamy v. Belgium*, 30 March 1989, para. 29. *See also Nikolova v. Bulgaria*, 25 March 1999, para. 58.



formal charges, access to the case file was considered a necessary means to safeguard the suspect's right to challenge the lawfulness of his detention.

55. The ICIJ has already concluded that the Written Notification and Oral Notification cannot be considered to have properly and lawfully charged the Suspect. In addition, the ICIJ does not consider that, by receiving notification of his "suspect" status and of the allegations against him, the Suspect was substantially affected so as to require a departure from the Internal Rules and to warrant the granting of rights which, at this stage of the proceedings, the Suspect does not have.
56. In support of its request to access the case file, the Suspect's Defence submits that their client is in fragile health, has been reported in the domestic and international media in connection with the proceedings against him, and has been visited on numerous occasions by members of the media.
57. The ICIJ has given due consideration to the effect that the media coverage of the case may have had on the Suspect. In the ICIJ's view, media attention is not a determinative factor in deciding on the relief sought by the Suspect's Defence. Access to the case file is clearly recognized as fundamental in the presence of charges (see Section I above), to challenge the lawfulness of detention on remand, or the seizure of a suspect's property. However, the ICIJ does not consider that media attention carries the same weight or requires the same remedy. The same considerations apply with regard to the Suspect's Defence's claim that the Suspect is in fragile health.
58. To conclude, in the absence of charges against the Suspect, there is no other reason making access to the case file necessary to safeguard the Suspect's rights.
59. The Suspect is currently represented by counsel, is sufficiently informed of the allegations against him, and is aware of his right to remain silent. This constitutes a sufficient guarantee of his rights and fully respects international standards of fairness.

V. The Decision Recognising Civil Party Lawyers as a basis to request access to the case file

60. Finally, in the 13 June 2013 Letter, the Suspect's Defence relies on the Decision Recognising Civil Party Lawyers, issued on 1 April 2013 ("Civil Parties Decision"),⁷⁵ and states that, on that basis, "*it is clear that recognised lawyers must be granted access to the case file.*"⁷⁶ The Civil Parties Decision clearly stated that "*recognised lawyers have the right to examine and make copies of the original case file of the judicial investigation to which their client is a party (emphasis added).*" A suspect is not a party to the proceedings and therefore the

⁷⁵ Case No. 004/07-09-2009-ECCC-OCIJ, Doc. No. D126, *Decision Recognising Civil Party Lawyers*, 1 April 2013.

⁷⁶ 13 June 2013 Letter, p. 2.



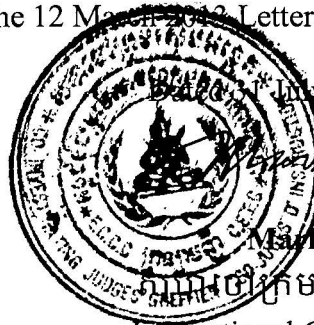
Civil Party Decision does not support the Suspect Defence's request. For the same reason, the ICIJ rejects the argument that refusal to grant a suspect access to the case file sends a “*disturbing message [...] of a hierarchy of parties.*”

VI. Conclusion

61. The ICIJ reconsiders the Written Notification and the Oral Notification and vacates them to the extent that they granted the Suspect access to the case file.
62. The Suspect is not a Charged Person, and therefore not a party, at this stage of the proceedings. There is no other reason currently warranting access to the case file to the Suspect. For these reasons, the Suspect's Defence's request to take part in the judicial investigation must also be denied.

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

63. **RECONSIDER** the Written Notification and the Oral Notification, and vacate the granting of access to the case file to the Suspect;
64. **DENY** the relief requested in the Urgent Motion, the Appended Letter, and the 17 June 2013 Letter; and
65. **DENY** the relief requested in the 12 March 2013 Letter.



July 2013, Phnom Penh,

Mark B. Harmon

សម្តេចក្រុមស៊ើបអង្កេតអន្តរជាតិ
International Co-Investigating Judge
Co-juge d'instruction internationale