ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):
20 / 02 / 2012
ម៉ោង (Time/Heure) : 13:50
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier: Ratanak

លេខ/N°: 3

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° 004/29-07-2011-ECCC/(PTC 01)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: **20 February 2012**

PUBLIC REDACTED

DECISION ON DEFENCE SUPPORT SECTION REQUEST FOR A STAY IN CASE 004 PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER AND FOR MEASURES PERTAINING TO THE EFFECTIVE REPRESENTATION OF SUSPECTS IN CASE 004

Co-Investigating Judges:

YOU Bunleng
Siegfried BLUNK

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

Requestor:

Ms. Nisha VALABHJI
Officer in Charge, Defence Support Section

Civil Party Co-Lawyers:

SAM Sokong
Lyma Thuy NGYEN
CHOUNG Chou-Ngy

1. The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of a "Request for a Stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 004" ("Request") filed by the Officer in Charge ("Requestor") in the Defence Support Section (DSS) of the ECCC on 10 October 2011.[1]

2. On 28 October 2011 the Requestor filed a Notice of Termination[2] which supplied more information in relation to developments concerning [redacted]. There has been no response to the Request.

RELIEF SOUGHT:

3. The Request seeks the following relief:

> "a. The DSS OiC respectfully requests the [Pre-Trial Chamber] to order a stay of proceedings before it in Case 004 to allow the DSS, with assistance from the OA, to undertake all necessary steps to provide effective legal representation to the suspects in Case 004;
>
> b. The DSS OiC respectfully requests the [Pre-Trial Chamber] to order the [Office of Administration] (OA) to provide the DSS with logistical and administrative assistance required for contacting the suspects and providing them with lists of counsel pursuant to Rule 11(2)(e) IR for the purpose of proceedings before the [Pre-Trial Chamber] and any other matters deemed appropriate by the Chamber. The DSS OIC respectfully requests the PTC to provide the OA any information in its possession that could expedite this process.
>
> c. In the interim, the DSS OiC respectfully requests the [Pre-Trial Chamber] to issue an order to compel the [Deputy Director of the Office of Administration] (DDOA) to extend the contract of [redacted]; and

[1] Defence Support Section Request for a stay in Case 004 Proceedings before the Pre-Trial Chamber and for Measures pertaining to the Effective Representation of Suspects in Case 004, 10 October 2011, Doc. 1. ("Request").
[2] Notice of Termination of Assignment [redacted] – Cases 003 and 004, 28 October 2011, Doc. 2.

d. Pursuant to the goals of transparency and public understanding of the justice process, the DSS respectfully requests this motion to be classified as 'public redacted' once the necessary redactions have been made."[3]

GROUNDS FOR THE REQUEST:

4. As quoted above, the justification for a request to "stay proceedings before the [Pre-Trial Chamber]" is in order "to allow the DSS to undertake all necessary steps to provide effective legal representation to the suspects in Case 004 for the purpose of proceedings before the [Pre-Trial Chamber]."[4] The Request also reads:

> "Proceedings in Case 004 require the participation of *the Defence*, as the suspects, based on all of the above reasoning, are entitled to the fundamental right to effective legal representation.
>
> Continuation of these proceedings without the participation of *the Defence* would breach various aspects of the right to a fair trial, including the right to equality of arms, effective representation and the adversarial nature of proceedings enshrined in Rule 21(1) IR.
>
> Therefore, proceedings must be stayed to allow the DSS, with the support of the OA and all relevant units, to take all necessary steps to safeguard the suspects' fundamental right to legal representation for the purpose of proceedings before the [Pre-Trial Chamber], and any other matters deemed appropriate by the Chamber."[5]

ADMISSIBILITY OF THE REQUEST:

5. The Request does not address whether it is expressly or impliedly within the jurisdiction of the Pre-Trial Chamber.

[3] Request, para 71.
[4] Request, para 69(a).
[5] Request, paras. 66-68.

6. Pursuant to the Internal Rules, the expressed jurisdiction of the Pre-Trial Chamber includes: settlement of Disagreements between the Co-Prosecutors,[6] settlement of Disagreements between the Co-Investigating Judges,[7] appeals against decisions of the Co-Investigating Judges, as provided in Rule 74,[8] applications to annul investigative action, as provided in Rule 76,[9] and the appeals provided for in Rules 11(5) and (6), 35(6), 38(3) and 77bis of the Internal Rules.[10] The DSS Request does not refer or fall within any of these provisions.

7. The Request, however, argues that continuation of appellate proceedings without the participation of "the Defence"[11] would breach various aspects of the right to a fair trial, including the right to equality of arms, effective representation and the adversarial nature of proceedings.

8. The Pre-Trial Chamber has previously invoked its inherent jurisdiction to admit appeals related to requests for stay of proceedings and, where special circumstances warranted so, it also reviewed such requests afresh, when issues of fairness of the proceedings have been put before it.[12] An incidental exercise of inherent jurisdiction is in conformity with the practice before other international or internationalized Tribunals:

> "in conformity with the established case law from the International Court of Justice, the International Criminal Tribunals and other international courts, an international tribunal may rule on issues which, although not falling, strictly speaking, within its "original jurisdiction," are closely connected to it and should be examined in the interests of fairness of the proceedings and good administration of justice. In other words, in the exercise of its functions, the Tribunal has implicit jurisdiction to rule on

[6] Internal Rule 71.
[7] Internal Rule 71.
[8] Internal Rules 73(a) and 74.
[9] Internal Rules 73(b) and 76,
[10] Internal Rule 73(c).
[11] Emphasis is added to the term inserted in quotation marks. Explanation for the emphasis in the paragraphs that follow.
[12] 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, D264/2/6, paras. 10 and 17-18.

incidental issues that are connected to its mandate or have an impact on it and which must be settled in the interests of justice."[13]

9. The Pre-Trial Chamber could invoke its inherent jurisdiction on a case by case basis provided an appeal or a related request is not only related to fundamental issues but also that it has been properly raised. The Pre-Trial Chamber notes that, in the relief sought, the Request refers mainly to the "Defence," however, given the nature of the rights counted therein, it is understood that the crux of the argument in the Request lies on the right to legal representation for Suspects in case 004. The balance of the relief sought is dependant upon the resolution to this issue.

10. The Pre-Trial Chamber observes that, in respect to the right of legal representation, the Co-Investigating Judges gave, on 23 September 2010, the following clarification to the DSS:

> "Defence 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.
>
> In this instance, the Internal Rules specify the rights of suspects, for example where they are called as witnesses (Rules 24-4 and 28), are in police custody (Rule 51) or subject to search (Rule 61). In such instances, the "unnamed suspects" you refer to are afforded full benefit of the rights in question. However, they cannot claim the same rights as parties to the proceedings, which are set out, inter alia, in Rules 55(8), 55(10), 55(11), 57 and 58, if only because, at this point, no one can predict what the outcome of the ongoing investigations will be.
>
> In this regard, it is worth recalling the wording of our Clarification Order (rendered public), which specifies the consequences of the scope of the Co-Investigating Judges' investigation: [t]he obligation to investigate all the facts referred to the Co-Investigating Judges must not be mistaken for an "obligation to charge" in relation to those facts (...) it results from the very terms of Rule 55(4)5 that the Co-Investigating Judges have the "power", but not the obligation, to charge a person, whether or not that person is named in the Introductory Submission. Where the Co-Investigating Judges decide to charge a person, they are free to

[13] Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and whether Mr El Sayed has standing before the Tribunal, STL, 17 September 2010, CH/PTJ/2010/005, para 31 (footnotes omitted).

> choose when to do so. The "power" to charge is nonetheless governed by the provisions of both Rule 24(4), which proscribes calling as a witness any person against whom there is evidence of criminal responsibility, and 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, whether or not such person is named in that submission."[14]

11. The Pre-Trial Chamber notes, as also correctly observed by the Requestor,[15] that the above-quoted clarification of the Co-Investigating Judges, does not represent a refusal of the related request. It rather explains, according to the applicable law, when the representation rights are available, which is once a person is brought before a Judge or "*is charged.*" The Pre-Trial Chamber agrees that the timing for these rights to be available depends on how the investigation develops. This is a matter within the discretion of the Co-Investigating Judges as they are in charge of the investigations. As also explained by the Co-Investigating Judges, in Cambodia similar to many national procedural systems and to the international courts, it is the authority in charge of an investigation that has the obligation to make sure, once a person *is brought before them*, that he/she is informed, prior to being questioned, in a language that he/she understands,[16] that he/she has, amongst other rights, the right to be assisted by counsel of his/her choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it.[17] This means that the right to legal representation is the Suspect's *own* right for him/her to choose to exercise it or not on his/her *own free will*. It is not for anybody else to decide on behalf of the Suspect in this respect. The Suspect may choose to defend him/herself in person. Where the suspect informs the Judge or Chamber before which

---

[14] Letter from the Co-Investigating Judges to the Defence titled "Defence rights in Case File 003 and 004, D3.1.31 (A1/2), 23 September 2010.

[15] Request, para. 18.

[16] Article 14 (3) (a) and (b) of the International Covenant on Civil and Political Rights (ICCPR) and Articles 6(3)(a) (*right to be informed*), (b) (*right to prepare his/her defence* and (c) (*right to defend himself or to legal assistance*) of the European Conventin of Human Rights (ECHR), *Ofner v. Austria* No 524/59, 3 YB 322 at 344 (1960): "There is an overlap between Article 6(3)(a) and Article 6(3)(b); compliance with the former is a necessary condition of compliance with the latter," *Accord* Harris, M O'Boyle & C Warbrick, Law of the European Convention on Human Rights, OXFORD University Press, First Eddition of 1995, p. 250 ("ECHR First Commentary").

[17] Internal Rule 21(1)(d) See also Article 55(2)(c) of the Statute of the International Criminal Court (ICC), and Rule 42(A)(i) of the Rules of Procedure and Evidence (RPE) of the International Tribunal for the Former Yugoslavia (ICTY) which applies at the same stage of the proceedings before the ICTY as the stage the proceedings in cases 003 and 004 are currently before the ECCC.

he/she appears that he/she has engaged Counsel, then he/she has to file a power of attorney with the Registry and where the Counsel meets the requirements he/she can act on behalf of the suspect.[18] Suspects who are indigent shall be assigned Counsel,[19] provided "the interests of justice so demand."[20] Although the directives for such assignments are set out by the Registrar, they have to be *approved by the judges*.[21] It is the Judges who may, "if [they] decide that it is in the interests of justice," *instruct the Registrar to assiogn a councel* to represent the interests of the accused."[22] The position and functions of the Registrar in ICTY appear to be similar to those of the DOA/DDOA in ECCC in that they are there to enable the Chambers to "accomplish their mission."[23]

12. The Pre-Trial Chamber further observes that the Co-Investigating Judges have not decided on the requests made by the International Co-Prosecutor for the arrest and provisional detention of the persons named in the Third Introductory Submission in case 004.[24] There has been no appeal filed by the International Co-Prosecutor in relation to the Co-Investigating Judges lack of determination on these requests either.

13. When the Request was filed with the Pre-Trial Chamber, and currently, the criminal proceedings in case 004 are at a stage where the investigations are still pending before the Co-Investigating Judges. As it is the Co-Investigating Judges who are those seized with and in charge of the pending criminal investigations in case 004, the matters of legal representation rest directly with them and are, therefore, out of Pre-Trial Chamber's

[18] See also Rule 44 of the ICTY RPEs similar to Internal Rule 22(1)(a).
[19] Internal Rule 22(1)(b).
[20] See also also Article 55(2)(c) of the Statute of the ICC and Rule 45(A) of the ICTY RPEs.
[21] See Internal Rules 11(2(a) in conjunction with Internal Rules 4 and 20. See also Rule 45 of the ICTY RPEs.
[22] Rule 45 *ter* of the ICTY RPEs.
[23] See Section III of the Rules of Procedure and Evidence before the ICC and specifically Rules 13, 14, 15, 20, 21 and 22 read in conjunction with Article 55(2)(c) of the ICC Statute. See also ICTY Rules 33bis(B)(i) in comparison to the ECCC Internal Rules 9(1), 10(2) and 11. Emphasis is added to the fact that Internal Rule 11 is part of Section B of the Internal Rules titled: "The Office of Administration." DSS is part of the DOA/DDOA, acts only with limited autonomy from DOA/DDOA as expressed in Internal Rule 11, and its functions are trigered once the judicial authority in charge of the ongoing proceedings gives instruction to the DSS, through the DOA/DDOA or, where specific circumstances so require, also directly to the DSS.
[24] Co-Prosecutor's Third Introductory Submission, 20 November 2008, D1, para. 120.

jurisdiction. The fact that some of the orders made by the Co-Investigating Judges in case 004 have been appealed before the Pre-Trial Chamber does not change this finding.

THEREFORE THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Request is inadmissible.

Phnom-Penh, 20 February 2012 CR

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**