



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

អង្គជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

D359/17

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° 004/2/07-09-2009-ECCC/OCIJ (PTC60)

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

Date: 2 September 2019

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PUBLIC

DECISION ON AO AN'S URGENT REQUEST FOR CONTINUATION OF AO AN'S DEFENCE TEAM BUDGET

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Urgent Request for Continuation of AO An’s Defence Team Budget” filed by the Co-Lawyers for AO An (“Co-Lawyers”) on 31 July 2019 (“Urgent Request”).¹

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 31 July 2019, the Co-Lawyers filed their “Urgent Request for Continuation of AO An’s Defence Team Budget”, in English only,² requesting that the Pre-Trial Chamber order the Office of Administration and the Defence Support Section (“DSS”) to continue the Defence’s full budget until the Chamber issues its decision on the pending appeals against the Closing Orders in Case 004/2 and immediately stay the planned budget reductions until the Chamber decides on this Urgent Request.³ The Co-Lawyers submit that their Urgent Request is admissible pursuant to Internal Rule 21⁴ because the Office of Administration’s cut of the Defence’s resources violates AO An’s rights to an effective defence,⁵ expeditious trial,⁶ equality of arms⁷ and the fairness and integrity of the proceedings.⁸ The Co-Lawyers argue that the Pre-Trial Chamber is the only Chamber of the ECCC that is currently seised of AO An’s case and, thus, is the only available forum, in which AO An may seek a remedy.⁹
2. Pursuant to the Pre-Trial Chamber’s Instructions, dated 8 August 2019,¹⁰ the International Co-Prosecutor (Reserve) and the DSS filed their Responses to the Urgent Request on 15 August 2019¹¹ and 19 August 2019,¹² respectively. The Office of Administration, *via* email, notified the Pre-Trial Chamber that they did not intend to file a response to the Urgent Request on 16 August 2019.¹³

¹ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC60), Urgent Request for Continuation of AO An’s Defence Team Budget, 31 July 2019, D359/14 and D360/23 (“Urgent Request (D359/14 and D360/23)”).

² Urgent Request (D359/14 and D360/23).

³ Urgent Request (D359/14 and D360/23), para. 49.

⁴ Urgent Request (D359/14 and D360/23), paras 19, 21.

⁵ Urgent Request (D359/14 and D360/23), paras 23-31.

⁶ Urgent Request (D359/14 and D360/23), paras 35-38.

⁷ Urgent Request (D359/14 and D360/23), para. 39.

⁸ Urgent Request (D359/14 and D360/23), para. 19.

⁹ Urgent Request (D359/14 and D360/23), para. 20.

¹⁰ Case 004/2, Pre-Trial Chamber’s Instructions to the Parties, the Defence Support Section and the Office of Administration, Email dated 8 August 2019.

¹¹ Case 004/2, International Co-Prosecutor’s Response to AO An’s Urgent Request for Continuation of AO An’s Defence Team Budget, 15 August 2019, D359/15 and D360/24.

¹² Case 004/2, Defence Support Section’s Response to AO An’s Urgent Request for Continuation of the Defence Team Budget, 19 August 2019, D359/16 and D360/25 (“DSS Response (D359/16 and D360/25)”).

¹³ Case 004/2, Email from the Deputy Director of the Office of Administration to the Pre-Trial Chamber’s Greffier.



3. The DSS, in its response to the Urgent Request, submits that, at this stage, there are no grounds for the Co-Lawyers to bring the Urgent Request before the Pre-Trial Chamber as there is not yet a DSS decision that can be reviewed, noting that the Co-Lawyers have not submitted their monthly Action Plans for September 2019 to DSS for its approval, pursuant to the Legal Assistance Scheme (“LAS”).¹⁴ Accordingly, the DSS avers that, *arguendo* there was a formal DSS decision not to pay the full fees of the Co-Lawyers, the appropriate body to review such decision is a United Nations Administrative Judge (“UNAJ”) pursuant to Sections F(9) and (10) of the LAS and paragraph 11 of the Legal Services Contracts between the Co-Lawyers and the United Nations.¹⁵

II. ADMISSIBILITY

4. The Co-Lawyers rely on Internal Rule 21 to invoke the inherent jurisdiction of the Pre-Trial Chamber.¹⁶ The DSS submits that the Urgent Request is inadmissible as there is not yet a DSS decision that can be reviewed by the Pre-Trial Chamber.¹⁷

5. The Pre-Trial Chamber notes that Internal Rule 21 protects fundamental principles of fairness in the proceedings before the ECCC, and reflects the fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) of the ECCC Agreement,¹⁸ Article 35 *new* of the ECCC Law¹⁹ and Article 14(3) of the International Covenant on Civil and Political Rights.²⁰ The Chamber has held that these principles “may warrant adopting a liberal interpretation of the right to appeal to ensure that the proceedings are fair and adversarial” by admitting appeals under Internal Rule 21 or broadly construing the specific provisions of the Internal Rules which grant it jurisdiction.²¹ Such admissibility may apply in the rare instances

16 August 2019.

¹⁴ DSS Response (D359/16 and D360/25), paras 6-7.

¹⁵ DSS Response (D359/16 and D360/25), para. 9.

¹⁶ Urgent Request (D359/14 and D360/23), para. 19.

¹⁷ DSS Response (D359/16 and D360/25), para. 6.

¹⁸ *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.

¹⁹ *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.

²⁰ Case 004/07-09-ECCC/OCIJ (“Case 004”) (PTC19), Considerations on IM Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her *in Absentia*, 1 March 2016, D239/1/8 (“Considerations on Charging IM Chaem *in Absentia* (D239/1/8)”), para. 17.

²¹ Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17.



where the particular facts of a case raise issues of fundamental rights or serious issues of procedural fairness.

6. However, the Pre-Trial Chamber has consistently emphasised that Internal Rule 21 does not open an automatic avenue for appeal, even where an appeal raises fair trial issues.²² Internal Rule 21, moreover, does not provide an avenue for the Chamber to resolve hypothetical questions or provide advisory opinions.²³ For the Pre-Trial Chamber to entertain an appeal under Internal Rule 21, the applicant must demonstrate that the situation at issue does not fall within the applicable rules and that the particular circumstances of the case require the Chamber's intervention to avoid *irremediable* damage to the fairness of the investigation or proceedings, or to the appellant's fundamental rights.²⁴

7. In this case, the Co-Lawyers argue that the Urgent Request is admissible pursuant to Internal Rule 21 because it concerns AO An's fair trial rights,²⁵ and the recourse under Sections F(9) and (10) of the LAS do not provide a holistic and timely remedy.²⁶

8. The Pre-Trial Chamber finds that neither the first nor second prong of the admissibility test under Internal Rule 21 has been sufficiently established by the Co-Lawyers. The Chamber firstly observes that the dispute at hand falls squarely within the scope of the dispute resolution procedure pursuant to the LAS, to which the Co-Lawyers have agreed to be bound.²⁷ 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 remunerations in accordance with the LAS, which is an administrative regulation that was adopted in accordance with Internal Rule 4. The Chamber, thus, considers that the guarantees in the present legal framework are sufficient to ensure respect of AO An's fair trial rights.

9. More significantly, the Pre-Trial Chamber considers that the Co-Lawyers' mere declaration in a footnote of their Urgent Request that the existing recourse to the UNAJ

²² Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17.

²³ Case 004 (PTC16), Decision on Ta An's Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para. 8.

²⁴ Considerations on Charging IM Chaem *in Absentia* (D239/1/8), para. 17. *See also* Case 003/07-09-2009-ECCC/OCIJ ("Case 003") (PTC23), Considerations on MEAS Muth's Request for a Stay of Execution of Arrest Warrant, 23 September 2015, C2/4, Opinion of Judges BEAUVALLET and BWANA, para. 9.

²⁵ Urgent Request (D359/14 and D360/23), paras 19-21.

²⁶ Urgent Request (D359/14 and D360/23), para. 19, footnote 22.

²⁷ Legal Services Contracts between the Co-Lawyers and the United Nations, 19 August 2019, D359/16.1.2 and D360/25.1.2, para. 11.



pursuant to the LAS is not a holistic or timely remedy fails to sufficiently demonstrate that the particular circumstances of the current situation require the Chamber's intervention under Internal Rule 21 to avoid irremediable damage to AO An's fair trial rights or the fairness of the proceedings.

10. The Pre-Trial Chamber reiterates that the Chamber does not provide advisory opinions. In this regard, the Chamber observes that the Co-Lawyers have not yet submitted their monthly Action Plans, Time Sheets or Fees Claim for the period of September 2019 to the DSS for its approval pursuant to Sections A and F of the LAS,²⁸ and notes that the DSS has not yet issued a relevant Fee Claim decision.

11. Accordingly, the Pre-Trial Chamber is not convinced that the rights to an effective defence, expeditious trial, equality of arms and the fairness and integrity of the proceedings will be irremediably damaged if the Chamber does not intervene at this stage. Therefore, the Co-Lawyers have not met the threshold for admissibility under Internal Rule 21.

12. The Pre-Trial Chamber, thus, finds the Co-Lawyer's Urgent Request inadmissible and consequently, denies the Co-Lawyers' request that the Chamber invoke its inherent jurisdiction to immediately stay the planned budget reductions until it decides on their Urgent Request.

13. The Pre-Trial Chamber considers it equally pertinent to note errors in the DSS' justifications for the budget reduction at issue. In particular, the Chamber observes the DSS' incorrect reading of and misplaced reliance on the current Completion Plan. The Chamber notes that it is not the Completion Plan, but the final decision of the Pre-Trial Chamber on the appeals against the Closing Orders that will determine if Case 004/2 will proceed to trial. Furthermore, the Chamber observes that, contrary to the DSS' reading,²⁹ the current Completion Plan recognises the possibility of Case 004/2 proceeding to trial as it stipulates, "it is premature to make a projection on the required time to complete [the trial]" until the Pre-Trial Chamber makes the final decision on whether Case 004/2 is sent for trial.³⁰

²⁸ See ECCC Legal Assistance Scheme, amended December 2014, D359/16.1.1 and D360/25.1.1, Sections A, F.

²⁹ Email from the Chief of DSS to the Co-Lawyers for AO An regarding Possible Budget Cuts dated 2 July 2019, D359/14.1.3 and D360/23.1.3, para. 4 ("the Completion Plan does not foresee trial proceedings after the fourth quarter of 2019").

³⁰ Extraordinary Chambers in the Courts of Cambodia (ECCC) Completion Plan, Revision 20, 31 March 2019, para. 34.



14. The Pre-Trial Chamber recalls the DSS' obligations pursuant to Internal Rule 21(1) and the Section's own acknowledgement that "[t]o date, all formal action plans and fee claims for Co-Lawyers have been approved by DSS"³¹, and accordingly cautions the Section to be diligently and continuously conscious of the fair trial rights of the Accused in their budget planning and the assessment of Fee Claims by the Defence.

III. DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

FINDS the Urgent Request inadmissible;

DENIES the request to stay the planned budget reductions.

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

Phnom Penh, 2 September 2019

Pre-Trial Chamber



PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy

³¹ DSS Response (D359/16 and D360/25), para. 8.

