



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
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Case File No: 004/07-09-2009-ECCC-OCIJ

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DECISION ON THE URGENT REQUEST ON REMOTE WORKING

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 22 January 2015.
2. On 19 July 2016, the Ao An Defence (“Defence”) informed the Defence Support Section (“DSS”) that, in the interests of the Defence, they had authorised Mr Benjamin Joyes, one of their legal consultants, to work with the Co-Lawyers in Europe from 2 August 2016 until a non-specified date in September 2016.¹
3. On 20 July 2016, the Chief of the DSS informed the Defence that he had sought advice on the matter from Human Resources in New York and would notify the Co-Lawyers when he received a response.² On the same date, the Defence replied to the Chief of the DSS reminding him of my previous rulings on remote work (“Remote Work Decisions”)³ and informing him that they were operating on the basis of such rulings.⁴
4. On 1 August 2016, the Chief of the DSS informed Mr Joyes that he might not be able to certify the payment of his consultancy fee for August and part of September if he were not present at the ECCC during that period. He also informed Mr Joyes that he had sought advice from New York but that it could be “*a while*” before New York responded.⁵
5. The Defence, on the same day, proposed that Mr Joyes file time sheets with the same level of detail as the Co-Lawyers in order to enable the DSS to verify the work performed by Mr Joyes.⁶
6. On 4 August 2016, the Defence noted the lack of response by the DSS to the Defence’s communication of 1 August 2016 and informed the DSS that they were in the process of preparing a motion regarding the issue of remote working, because the possibility of Mr Joyes not being paid for his work “*seriously affects the functioning of [their] team and also the rights of Ao An.*” The Defence requested the DSS, *inter alia*, to forward to the competent authorities in New York both the correspondence between the Defence and the DSS and the Remote Working Decisions, and to provide confirmation that that had been done.⁷
7. On 5 August 2016, the Chief of the DSS reiterated to the Defence that he was waiting for a response from New York. The DSS did not specify whether the Remote Work Decisions had been provided to the competent authorities in New York.⁸
8. On 19 August 2016, the Defence filed the *Urgent Request for Remote Working*, in which they move the CIJs to take such measures as they deem necessary to ensure that the DSS complies with the Remote Work Decisions and does not invoke

¹ Case File No. 004-D321, *Urgent Request on Remote Working*, 19 August 2016, para. 9(a).

² *Ibid.*, para. 9(b).

³ In Case 004, I found that there are no rules requiring legal consultants working for Co-Lawyers representing persons charged in Case 004 to work from the premises of the ECCC, see Case File No. 004-D304/4, *Further Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 26 April 2016, paras 14-15; Case File No. 004-D312/1, *Decision on Yim Tith’s Urgent Request Concerning Defence’s Resources*, 7 June 2016, paras 13-14.

⁴ Case File No. 004-D321, *Urgent Request on Remote Working*, 19 August 2016, para. 9(c).

⁵ *Ibid.*, para. 9(d).

⁶ *Ibid.*, para. 9(e).

⁷ *Ibid.*, para. 9(f).

⁸ *Ibid.*, para. 9(g).



remote work as a reason to withhold payment for work properly carried out by legal consultants (“Urgent Request”).⁹

II. DISCUSSION

A. Admissibility of the Urgent Request

9. As already stated in other decisions in this case, pursuant to Article 23 of the ECCC Law and well established international practice on this matter, the CIJs may review administrative *decisions* which may prejudice the fair trial rights of persons charged with a criminal offence. I have also noted, however, that the CIJs’ review of administrative decisions should only be undertaken as a last resort.¹⁰
10. In this instance, the Defence is not requesting the CIJs to review a specific *decision*; nor has a decision on the payment of Mr Joyce’s fees been issued yet. That said, there is a prospect that the current situation amounts, in essence, to a constructive denial by the DSS of a request by the Defence to resolve the fee payment dispute. Lack of pronouncement on a request within a reasonable time, especially in circumstances where a delay in making a decision deprives a charged person of the possibility of obtaining the benefit he or she seeks, may amount to a constructive denial.¹¹
11. On 1 August 2016, the Defence requested the DSS to confirm that the proposal of having Mr Joyes file time sheets would resolve the fee payment dispute.¹² Based on the information in the Urgent Request, I understand that to date this request remains unanswered.
12. In order to assess reasonable time in the context of the Defence’s request to the DSS, the specific circumstances of the unanswered request need to be taken into account.
13. The Chief of the DSS sought guidance from New York on 20 July 2016. Mr Joyes has been working remotely for more than 20 days to date with no guarantee that his work will be duly compensated. It is an unfortunate state of affairs, and Mr Joyes, who acted upon the request of his own direct supervisors, cannot be expected to perform work for the Co-Lawyers *pro bono*. Non-payment of Mr Joyes’s fees is tantamount to depriving the Defence of one of their consultants. Without Mr Joyes’ services, the Defence’s ability to effectively defend Ao An will be diminished.

⁹ *Ibid.*, para. 12.

¹⁰ Case File No. 004-D304/1, *Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 18 March 2016, paras 6-7. See also Case File No. 003-No. 3, *Decision on Defence Support Section Request for a Stay in Case 003 Proceedings before the Pre-Trial Chamber and for Measures pertaining to the Effective Representation of Suspects in Case 003*, 15 December 2011, para. 8, where the Pre-Trial Chamber acknowledged that the doctrine of inherent jurisdiction is established in the jurisprudence of the International Court of Justice, the International Criminal Tribunals, and other international courts.

¹¹ Case File No. 003-D87/2/2, *Decision on [REDACTED]Appeal against the Co-Investigating Judges’ Constructive Denial of Fourteen of [REDACTED] Submissions to the [Office of the Co-Investigating Judges]*, 23 April 2014, paras 10-11.

¹² See Case File No. 004-D321.3, p. 2.



14. Effective legal representation is a fundamental fair trial right.¹³ In large cases such as the present one, the support of legal staff is indispensable for the Defence's ability to ensure an effective representation of their client. I have recently granted requests for provision of further resources to the Defence until the end of the investigation.¹⁴ I did so as I deemed such resources necessary for the Defence to prepare for their case. The uncertainty surrounding Mr Joyes' fee payment and the knock-on effect this creates on the Defence's ability to participate meaningfully in the investigation has all the potential to frustrate my efforts to complete a fair judicial investigation within a reasonable time. In turn, this may not least cause additional and unnecessary costs to the Donor Countries supporting the work of the ECCC, a factor that I need to bear in mind as well. I am particularly concerned by the Chief of the DSS's statement that "*it could be a while*" before New York provides the DSS' with the advice sought on 20 July 2016, and I consider this a relevant factor in answering the question of my jurisdiction.¹⁵
15. Under these circumstances, and in order to safeguard the effectiveness of measures that I have taken to ensure that the Defence is appropriately staffed, I find the Urgent Request to be admissible.

B. Merits

i. Previous pronouncements on the issue of remote work of defence legal consultants

16. The issue of legal consultants working remotely is not a novel one. After the Defence filed a request for additional resources on 16 March 2016, I invited the DSS to make submissions thus rendering it a party to that issue.¹⁶ The DSS made specific submissions on remote work on 31 March 2016, stating that "*under the Legal Assistance Scheme all Defence Legal Consultants are required to perform their functions at the ECCC premises.*" The DSS did not indicate which provision of the Legal Assistance Scheme ("LAS") contained this rule, nor did it rely on any other regulation or contractual clause.¹⁷ Upon review of the LAS I found no such prescription. For the reasons set forth in my ensuing decision, I concluded that there was no rule requiring legal consultants to work at the ECCC premises.¹⁸ I restated this principle in a subsequent decision in relation to an application filed by another charged person in Case 004. I added that I considered the matter to be settled, and that in the interest of fairness, expediency, and judicial economy, I expected the issue of consultants working remotely not to be raised again.¹⁹

¹³ HRC, *Daniel Pinto v. Trinidad and Tobago*, Communication No. 232/1987, 21 August 1990, para. 12.5; ECtHR, *Sejdović v. Italy*, 1 March 2006, para. 95; ECtHR, *Hermi v. Italy*, 18 October 2006, para. 96.

¹⁴ Case File No. 004-D304/4, *Further Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 26 April 2016, para. 11; Case File No. 004-D304/11, *Decision on Ao An's Urgent Request for Continued Provision of Necessary Resources*, 16 August 2016, para. 4.

¹⁵ See Case File No. 004-D321.3, p. 2.

¹⁶ Case File No. 004-D304/1, *Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 18 March 2016, para. 14.

¹⁷ Case File No. 003-D304/3, *DSS Response to the Ao An Defence Request for Additional Resources*, 31 March 2016, para. 5.

¹⁸ Case File No. 004-D304/4, *Further Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 26 April 2016, paras 14-15.

¹⁹ Case File No. 004-D312/1, *Decision on Yim Tith's Urgent Request concerning Defence's Resources*, 7 June 2016, paras 13-14.



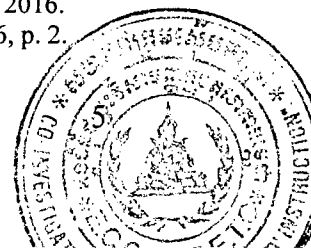
17. While the DSS did characterise the authorisation to a defence consultant to work remotely as “exceptional”,²⁰ it complied with the Remote Work Decisions and did not take issue with the principles stated therein. I may have considered the DSS to have standing to request reconsideration, given I had made the DSS a party to the litigation of the remote work issue. The DSS did not avail itself of this procedural avenue. Nor did the DSS inform the CIJs in any other way of its disagreement on the issue of remote work, or of any difficulty to comply with the principles expressed in the Remote Work Decisions. Had the DSS done that, it might have been possible to discuss and devise a satisfactory solution for the Defence, the DSS, and ultimately for the CIJs.
18. The DSS’ mandate – as pertinently stated by the PTC – is to enable the Chambers to accomplish their mission.²¹ In the absence of any objection by the DSS on the issue of remote work, it was thus legitimate for Mr Joyes, the Defence, and for the CIJs to expect the DSS’ compliance with the Remote Work Decisions. The DSS’ unexpected stance on the payment of Mr Joyes’ fee frustrates specific decisions I issued to safeguard Ao An’s fundamental rights. It also undermines the CIJs’ ability to safeguard the fairness of the investigation and bring it to a conclusion within a reasonable time.
- ii. Non-interference with the Co-Lawyers’ choices with regard to the management of their staff
19. The litigation which eventuated in the issuance of the Remote Work Decisions shows, as I have repeatedly found, that there is no rule requiring the physical presence of consultants at the ECCC. If such rule exists, it has not been brought to my attention. The DSS first stated that physical presence was prescribed by the LAS. After I found that the LAS contained no such rule – a finding that went uncontested - the Chief of the DSS, in a May 2016 correspondence with the Defence, essentially argued that the fact that the United Nations purchased tickets and made other arrangements for legal consultants to travel to Cambodia demonstrates that they are required to work in Cambodia.²² This argument is circular and has no merits: for the reasons more fully explained below, what is required by the nature of defence consultants’ work is best determined – and indeed is to be determined – by the Co-Lawyers responsible for Ao An’s defence.
20. On 2 August 2016, the Chief of the DSS took issue with remote work by relying on yet a different argument, stating that consultants’ physical presence at the ECCC is the only way by which he can certify their work.²³ The Co-Lawyers’ reasonable proposal to submit detailed time sheets for Mr Joyes’ works does not appear to have been given serious consideration.
21. While these are matters that I would normally not concern myself with, they become my concern, by virtue of Article 23 of the ECCC Law, when they interfere with my responsibilities in the investigation of Case 004. In this regard, I recall that the right to an effective defence and to a reasonable duration of the

²⁰ Case File No. 004-D304/6, *DSS Report to the International Co-Investigating Judge regarding the Ao An Defence Request for Additional Resources*, 5 May 2016, para. 2.

²¹ Case File No. 003-No. 5, *Decision on Motion for Reconsideration of the Decision on the Defence Support Section Request for a Stay in Case 003 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 003*, 4 October 2012, para. 4.

²² Case File No. 004-D321.2, *Email from the Chief of the DSS to Mr Richard Rogers*, 17 May 2016.

²³ See Case File No. 004-D321.3, *Email from the Chief of the DSS to Mr Joyes*, 2 August 2016, p. 2.



investigation, enshrined in Article 14 of the ICCPR, are overriding rights which are hierarchically superior to the Internal Rules and administrative regulations.²⁴ It is thus my precise obligation to review administrative decisions that may unreasonably frustrate these rights, and to intervene where appropriate. Should I not do so, I would abdicate my responsibilities under Article 23 of the ECCC Law and Article 13 of the ECCC Agreement.

22. The Co-Lawyers were expressly chosen by Ao An to represent him in Case 004.²⁵ It is a widely recognised principle of the legal profession that a lawyer shall treat the client's interests as paramount.²⁶ Articles 1 and 5 of the 2012 Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia ("BAKC") state that lawyers shall have freedom and independence in the practice of their profession. Independence of counsel is also widely recognised as demonstrated by its inclusion under Article 1 of the International Principles on Conduct for the Legal Profession, adopted on 28 May 2011 by the International Bar Association ("IBA Code"). The relevant commentary to the IBA Code states that it is "*indispensable that a lawyer acts for the client in a professional capacity free from direction, control or interference. There must be no interference with the client's best interest or the lawyer's professional judgement.*"²⁷
23. Counsel's independence and freedom in pursuing their clients' best interests is also recognised under human rights law. The United Nations' Human Rights Committee, for instance, held that "[l]awyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or **undue interference from any quarter**" (emphasis added).²⁸ The European Court of Human Rights stated that the conduct of the defence "*is essentially a matter between the defendant and his counsel, whether appointed under a legal aid scheme or privately financed*" (emphasis added).²⁹
24. A lawyer's ability to organise the defence of his or her client according to his professional judgement is therefore a fundamental and recognised principle in criminal proceedings, and a corollary of the very essence of the lawyer-client relationship. Defence lawyers are responsible for the effective defence of their client. They are trained professionals bound by precise rules of conduct. They must therefore be able to organise the defence of their client in the way they see fit. This includes, logically, the management of the resources at their disposal, because resources are instrumental to an effective defence. If the Co-Lawyers need their staff to join them in their primary offices in Europe, they must certainly

²⁴ See Case File No. 004-D312/1, *Decision on Yim Tith's Urgent Request concerning Defence's Resources*, 7 June 2016, para. 6, citing Case File No. 002-D264/2/6, *Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1)*, 10 August 2010, para. 13.

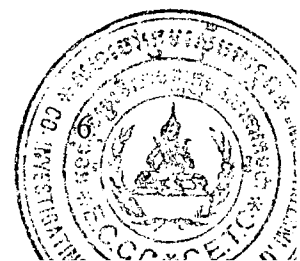
²⁵ See Case File No. 004-D111/2.1, *Form 7: Request for Engagement/Assignment of Co-Lawyers*, 26 March 2012 and Case File No. 004-D111/8, *Letter from the Chief of the DSS to the CIJs*, 5 October 2012.

²⁶ See e.g. Article 5 of the International Principles on Conduct for the Legal Profession, adopted on 28 May 2011 by the International Bar Association.

²⁷ Commentary to the the International Principles on Conduct for the Legal Profession, adopted on 28 May 2011 by the International Bar Association, p. 12.

²⁸ Office of the High Commissioner for Human Rights, *CCPR General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 9.

²⁹ ECtHR, *Sejdovic v. Italy*, 1 March 2006, para. 95.



be able to do so. I note, in this regard, that the Co-Lawyers' choice did not cause additional costs to the ECCC, since it is my understanding that Mr Joyes travelled to Europe at his own expense.

25. Should the Co-Lawyers manage their staff in a way that manifestly violates rules of professional diligence, and should that have repercussions on the defence of their client, they may be found liable for malpractice or other contractual violations, with all the consequences prescribed by the applicable laws and codes of ethics. Significantly, Internal Rule 11(2)(h) and (g), empowers the DSS to monitor the fulfilment of contractual obligations of counsel, but not of their staff. If the DSS interferes with the Co-Lawyers choices as to how to best utilise their resources, there is the risk of running into scenarios, such as the present one, where the Co-Lawyers are not free to choose the best course of action for the defence of their client. The DSS is meant to support but not to run the defence.
26. Therefore, without the support of any peremptory norms of equivalent importance as those enshrined in Article 14 of the ICCPR, any interference by the DSS with the Co-Lawyers' choice on how to best manage the resources at their disposal amounts to an undue interference with the exercise of their professional judgement and independence. Such interference is not in Ao An's interest, does not foster the interests of justice, seriously jeopardises Ao An's right to an effective defence, and ultimately interferes with the CIJs' ability to control the proceedings and ensure a fair investigation.

C. Conclusion

27. On the basis of the rights and interests involved in the Urgent Request, I am obliged to exercise my inherent jurisdiction to ensure the reasonable duration and fairness of the proceedings. I also intend to avoid undue additional costs to the ECCC's Donor Countries.
28. Considering that the investigation against Ao An is at a very advanced stage, I must ensure that the Defence is fully staffed in order to properly prepare before the issuance of the notice of conclusion of the investigation and to avoid unnecessary delays to the progress of the case as a whole. For the reasons explained above and in the Remote Work Decisions, I find that the current uncertainty on the payment of fees for work legitimately performed by members of the Defence has no justification and may be highly prejudicial to Ao An's right to an effective defence.
29. Finally, with regard to the Chief of the DSS' reference to possible disciplinary and financial repercussions should he allow consultants to work remotely,³⁰ such concerns seem unwarranted in a situation where the DSS is requested to take action pursuant to a binding judicial order issued by the judicial authority with overall responsibility over the conduct of Case 004. In my view, such an order replaces the certification discretion of the Chief of the DSS and renders him immune from any regress that might otherwise lie under general UN regulations.
30. Considering that the matter discussed in this decision is of little concern for the OCP and the Civil Parties, I will file it for the time being as strictly confidential and distribute it solely to the DSS and the defence teams in Case 004. I put the parties on notice that I am considering a public version of this and any ensuing

³⁰ See Case File No. 004-D321.3, *Email from the Chief of DSS to Mr Joyes*, 1 August 2016, p. 2.



