

Decision on Case 004 Suspect's Right to Counsel
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June 4, 2013

The international Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (ECCC), acting without the support of his national counterpart, has affirmed a Case 004 suspect's right to defense counsel and resolved a year-long controversy surrounding the suspect's selection of international lawyer.

The investigations of Cases 003 and 004 have followed a markedly different procedural path than Cases 001 and 002. In July 2007, five suspects in Cases 001 and 002 were charged by the Co-Prosecutors. Within a few months of receiving the Co-Prosecutors' request for a judicial investigation, the Co-Investigating Judges (CIJs) arrested and detained all five, who then participated in two more years of investigation through their Court-provided lawyers.

In 2008, former international Co-Prosecutor Robert Petit decided to initiate two new investigations—Cases 003 and 004—despite the opposition of his national counterpart, Chea Leang. Unable to reach an agreement to forward the Cases for judicial investigation, Petit filed a notice of disagreement and asked the Pre-Trial Chamber (PTC) to resolve the dispute.¹ Nearly a year later, the Cases were sent to the CIJs by default after the PTC national and international judges were also unable to reach consensus. Since September 2009, through the tenure of four subsequent international CIJs, Cases 003 and 004 have languished in the Office of the Co-Investigating Judges, and no suspects have been formally named or arrested. Because the national Co-Prosecutor, the national CIJ, and all national PTC judges have consistently ruled against—and in some instances allegedly hindered—their international colleagues' efforts to move the proceedings forward in accordance with standard procedures, there has long been a widespread perception that their resistance is the result of political influence by the Cambodian Government, which has vocally opposed charging new suspects.²

In spring 2011, when the second international CIJ appeared to be colluding with his national counterpart to close Cases 003 and 004 without an investigation, a civil society activist publicly named the five suspects, and the international Co-Prosecutor's initial submissions setting forth the charges were leaked by unknown persons. The suspects were then approached for interviews by numerous media outlets, both local and international.³

The ECCC's Defense Support Section (DSS) has made several attempts to provide the still formally unnamed and uncharged suspects the right to counsel, arguing in part that “[c]ontinuation 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[.]”⁴ The CIJs' rejection of

¹ Press Release, *ECCC International Co-Prosecutor Robert Petit* (Apr. 24, 2009).

² See, e.g., Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Jan. 31, 2009; Ek Madra, *Cambodian PM Rejects Wider Khmer Rouge Trials*, REUTERS, Mar. 31, 2009.

³ See, e.g., Sok Khemara, *Suspect Questions “Most Responsible” Tribunal Mandate*, VOA KHMER (Aug. 16, 2011).

⁴ Cited in 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, ¶ 4 (PTC, Feb. 20,

these requests was affirmed by the PTC, which agreed that “representation rights are available ... [only] once a person is brought before a Judge or ‘*is charged*.’”⁵ The CIJs’ decision was rooted in part in the legal fiction that, despite the allegations against the suspects being public and the subject of a media frenzy, the suspects are not “substantially affected” as “none ... have so far been informed that an investigation has been opened by either the Prosecution or the Co-Investigating Judges[.] ... Therefore, the Unnamed Suspects have not officially learned of the criminal procedure against them.”⁶

When reserve Judge Kasper-Ansermet became the third international CIJ, he decided to inform all Case 003 and 004 suspects that they were being investigated and had a right to counsel.⁷ From what is known publicly, only one suspect in Case 003 and one suspect in Case 004 have sought to exercise this right. In Case 004, the suspect selected former DSS Chief Richard Rogers as his international lawyer and Mom Luch as his national lawyer. However, the current DSS Chief, Isaac Endeley, decided that Mr. Rogers does not qualify for the position⁸ on the basis of:

- i) an apparent conflict of interest resulting from Mr Rogers’ previous position as Chief of the DSS; ii) perceived procedural irregularities in the assignment process; and iii) the fact that Mr Rogers had not yet been admitted to the [Bar Association of the Kingdom of Cambodia] and, therefore, was not eligible or qualified to represent indigent persons appearing before the ECCC.⁹

The reasoning behind the conflict of interest objection is not entirely clear; however, the ethical concern was later clarified to be the circumstances surrounding Mr. Roger’s involvement in the selection of his DSS successor, who placed him on the list of qualified lawyers.¹⁰ With regard to his lack of Cambodian Bar membership, despite this explicit precondition, it was the practice of DSS in both Cases 001 and 002 to require eligible lawyers to join the Bar only after their appointments to avoid unnecessary payment of the high admission fee.

2012) (emphasis in original).

⁵ *Id.* ¶ 11 (emphasis in original).

⁶ Decision on Request for Access to Case Files 003 and 004, ¶ 7 (April 5, 2011), *quoted in* Memorandum from CIJ Judge You Bunleng to DDOA Knut Rosandhaug, *Response to the Clarification on the Decision Recognizing the Lawyers for the Suspects in Case 004*, at 2 (May 18, 2012) [hereinafter You Bunleng Memo].

⁷ Notification of Suspect Right (Feb. 24, 2012). *See also* Sok Khemara, *War Crimes Tribunal Notified a Key Suspect*, VOA Khmer (Mar. 4, 2012).

⁸ ECCC Internal Rule 11(4)(c) provides:

A foreign applicant shall only be required to:

- i) be a current member in good standing of a recognised association of lawyers in a United Nations Member State;
- ii) have a degree in law or an equivalent legal or professional qualification;
- iii) have at least 10 (ten) years working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity;
- iv) have established competence in criminal law and procedure at the international or national level; and
- v) be fluent in Khmer, French or English.

⁹ Memorandum of the Office of Administration to the CIJs, Clarification Regarding the “Lawyer’s Recognition Decision,” ¶ 17 & Annex XII (May, 18 2012), *quoted in* Decision on Motion and Supplemental Brief on Suspect’s Right to Counsel, ¶ 29 (May 17, 2013) [Decision on Suspect’s Right to Counsel].

¹⁰ *See id.*, ¶ 84 (*citing Letter from Isaac Enderly, Head of DSS to Richard Rogers* (May 30, 2012)).

Judge Kasper-Ansermet recognized the appointment of both Mom Luch and Richard Rogers¹¹ before he resigned in frustration due to the refusal of the national side of the ECCC to recognize the legitimacy of his appointment and authority to act.¹² Shortly after Judge Kasper-Ansermet's departure, the ECCC Deputy Director of the Office of Administration (DDOA) asked national CIJ You Bunleng to clarify the order recognizing the suspect's right to counsel, and Bunleng refused to recognize its legal force.¹³

Due to the DSS's rejection of Mr. Rogers, the unnamed suspect selected Goran Sluiter as his alternate international lawyer, and in October 2012, Mr. Sluiter was assigned as counsel. It appears that Mr. Sluiter and Mr. Rogers are currently seeking to be recognized as international co-counsels and to receive access to the Case 004 Case File.

The fourth international CIJ, Mark Harmon, has now issued a unilateral decision¹⁴ addressing "at what point in the judicial investigation, if any, the rights of suspects as defined in Internal Rule 21(d) attach to a specific person." Rule 21(1)(d) states:

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.

Judge Harmon notes that Article 24^{new} of the law establishing the ECCC provides in part:

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it[.]

A "suspect," as defined by the Glossary to the Court's Internal Rules, "refers to a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged." Comparatively, "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."

Although the plain wording of Article 24^{new} appears to grant the right to counsel to persons the Co-Prosecutors have identified as suspects, Judge Harmon found that ECCC rules, Cambodian law, and international standards comport with previous CIJ and PTC decisions, and only

¹¹ Lawyers Recognition Decision (May 3, 2012).

¹² See, e.g., *Press Statement of the National Co-Investigating Judge* (Jan. 9, 2012); *Press Statement by the National Co-Investigating Judge* (Feb. 10, 2012).

¹³ You Bunleng Memo, *supra* note 6. See Julia Wallace, *Chaos Now Bites KR Defence*, 153 INT'L JUST. TRIB. (June 6, 2012) ("Rather than complying with Kasper-Ansermet's order, which has legal force, [Deputy Director Rosandhaug] asked Bunleng, his former Cambodian counterpart, to "clarify" the co-investigating judges' stance on whether [the suspect] is entitled to a defender. Bunleng responded, as could have been expected, in the negative. Rosandhaug, a UN career bureaucrat, is widely perceived to be uninterested in pursuing new cases.").

¹⁴ Judge Harmon has issued a disagreement with Judge You Bunleng on this matter, as Judge You continues to reject the authority of all actions taken by Judge Kasper-Ansermet while in office, and apparently also the right of Case 004 suspects to counsel. See *Decision on Suspect's Right to Counsel*, ¶ 10, *supra* note 9.

“charged persons” are parties to the proceedings with a right to counsel.¹⁵ Nevertheless, he decided that because Judge Kasper-Ansermet informed the suspect of his status and procedural right to a lawyer, he is now entitled to the defense rights embodied in Internal Rule 21(1)(d).¹⁶

With regard to the suspect’s choice of counsel, Judge Harmon found that he has no jurisdiction under the Court’s rules “to review the action of the Chief of DSS and the DDOA, or to order the [Office of Administration] to issue a contract to Rogers.” Nevertheless, he does have the authority to review Judge Kasper-Ansermet’s decision to recognize Roger’s appointment. Although Judge Kasper-Ansermet stated in his decision that Mr. Rogers meets the necessary criteria for appointment, Judge Harmon found:

[W]hen the *Recognition Decision* was issued on 3 May 2012, [Judge Kasper-Ansermet] was unaware that Rogers may have had insufficient relevant legal experience to qualify to represent indigent persons before the ECCC and may have had conflicts of interest in respect of representing the Suspect. Moreover, Rogers had not yet been sworn in at the time of the *Recognition Decision*. These defects vitiate the *Recognition Decision*.¹⁷

It appears from Judge Harmon’s own timeline, however, that Mr. Endeley voiced his concerns and withdrew Rogers’ appointment on April 25, 2012, *before* Judge Kasper-Ansermet issued his May 3rd recognition decision.¹⁸ Moreover, as the May 3 decision anticipates potential challenges to the lawyers’ appointment,¹⁹ it seems likely that Kasper-Ansermet was aware of Mr. Endeley’s concerns.

As a consequence of Judge Harmon’s decision, because the suspect was informed by Judge Kasper-Ansermet that he is being investigated he has a right to Court-provided counsel, Mom Luch and Goran Sluiter are recognized as the suspect’s lawyers, and Mr. Rogers is granted an opportunity to present evidence to DSS that he meets the objective qualifications to serve as international co-counsel.²⁰ Although Judge Harmon does not specifically state that the assigned lawyers will now be granted access to the Case 004 Case File, it would appear to be the logical outcome of his ruling.²¹

¹⁵ *Id.*, ¶¶ 45-54, *supra* note 10.

¹⁶ *Id.* ¶ 57.

¹⁷ *Id.* ¶¶ 81-84, 86 (emphasis in original).

¹⁸ *Id.*, ¶ 29.

¹⁹ Lawyers Recognition Decision, *supra* note 11 (ordering the Office of Administration, including the DSS, “to respect [the suspect’s] free choice of Counsel and recognize the assignment of Mr Mom Luch and Mr Richard Rogers” and to provide them “the necessary resources to ensure effective representation” of the suspect; as well as declaring “that any challenge to [their] status ... must be addressed to the appropriate Chamber/judicial authority for consideration”).

²⁰ Decision on Suspect’s Right to Counsel, ¶¶ 96-106, *supra* note 9.

²¹ Judge Harmon recently granted Case File access to recognized civil party lawyers in Cases 003 and 004. *See* Expert Commentary on Legal Filings, *Civil Party Lawyers Granted Access to Case Files 003 & 004* (Apr. 23, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.