

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 004/10-10-2011-ECCC/PTC (01)
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**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**

Filed by

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All representatives in these proceedings

Distribution

Pre-Trial Chamber Judges:
 Judge PRAK Kimsan, President
 Judge Rowan DOWNING
 Judge NEY Thol
 Judge Chang-ho CHUNG
 Judge HUOT Vuthy

Co-Prosecutors:

CHEA Leang
 Andrew CAYLEY

I. INTRODUCTION

1. The continuation of proceedings before the Pre-Trial Chamber (“PTC”) in Case 004 without the effective participation of the Defence will substantially undermine the suspects’ rights under Rule 21(1) of the ECCC Internal Rules (“IR”).
2. Suspects in Case 004 have accrued the right to effective legal representation under Rule 21(1) IR, but to the knowledge of the Defence Support Section (“DSS”), and notwithstanding all of its efforts to date, they currently remain without effective legal representation.
3. The DSS Officer-in-Charge (“OIC”) respectfully requests the PTC to stay proceedings before it, to allow the DSS to undertake all necessary steps to provide effective legal representation to the suspects in Case 004 for the purpose of these proceedings and any other matters deemed appropriate by the Chamber.
4. Further, the DSS OIC respectfully requests the PTC to order the Office of Administration (“OA”) to provide the DSS with logistical and administrative assistance required for contacting the suspects to inform them of their rights and providing them with lists of counsel pursuant to Rule 11(2)(e) IR. The DSS OIC respectfully requests the PTC to provide to the OA any information in its possession that could expedite this process.
5. In the interim, the DSS OIC respectfully requests the PTC to issue an order to compel the Deputy Director of Administration (“DDOA”) to comply with the DSS request to extend the contract of [REDACTED] counsel assigned by the DSS to represent the interests of the suspects until they are assigned individual counsel of their own choosing.
6. The DSS OIC respectfully informs the PTC judges that she has submitted an application for a stay in proceedings in Case 004 to the Co-Investigating Judges (“CIJs”),¹ attached as Annex A to this motion, and a request for assistance to the Office of Administration (“OA”),² attached as Annex B.

¹ 004/07-09-2009-ECCC-OCIJ, ‘Defence Support Section Request for Stay in Case 004 Proceedings Before the Co-Investigating Judges and for Measures Pertaining to the Effective Representation of Suspects in Case 004’, 7 October 2011 (Annex A). A technical problem with the electronic filing interface prevented the DSS from filing the present application before the PTC on 7 October 2011 also.

² Memorandum: ‘Defence Support Section to present lists of national and foreign lawyers to suspects in Case 004, pursuant to Rule 11(2)(e) of the ECCC Internal Rules’, Nisha Valabhji (Officer-in-Charge, Defence Support Section), 7 October 2011 (Annex B).

II. SUMMARY OF RELEVANT FACTS

2.1 Proceedings in Case 004 affecting the interests of the Suspects

7. On 8 September 2009, the Acting International Co-Prosecutor issued a press statement confirming the filing of the Third Introductory Submission with the Co-Investigating Judges ("CIJs").³
8. On 16 June 2011, the International Co-Prosecutor announced the filing of a Supplementary Submission and requests for further investigative action in Case 004.⁴
9. On 8 August 2011, the CIJs issued a press statement setting out a long list of 'crime sites and criminal episodes' under investigation in Case 004.⁵
10. On 3 April 2011, ██████████ applied to become a Civil Party in Cases 003 and 004.⁶
11. On 8 April 2011, Robert Hamill applied to become a Civil Party in Cases 003 and 004.⁷
12. On 1 May 2011, Robert Hamill's legal representative requested access to Case Files 003 and 004.⁸
13. On 16 May 2011, Robert Hamill requested the suspension of the deadline for filing an appeal against an order rejecting his application to be constituted as Civil Party in Case 004 pending the decision on his request to be granted access to Case File 004.⁹
14. On 18 May 2011, ██████████¹⁰ and on 23 May 2011, Robert Hamill,¹¹ filed appeals to the PTC against the CIJs' orders rejecting their applications to be constituted as Civil Parties in Case 004.

³ Press Release: 'Statement of the Acting International Co-Prosecutor', ECCC Office of the Co-Prosecutors, 8 September 2009.

⁴ Press Release: 'Statement by the International Co-Prosecutor regarding Case File 004', 16 June 2011.

⁵ Press Release: 'Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OClJ)', Office of the Co-Investigating Judges, 8 August 2011.

⁶ 004/07-09-2009-ECCC-OClJ(PTC01), 'Appeal Against Order on the Admissibility of Civil Party Application of ██████████', Doc. D5/1/4/1 (ERN 00698346), 18 May 2011, para. 1.

⁷ 004/07-09-2009-ECCC-OClJ(PTC01), 'Appeal Against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004)', Doc. D5/2/4/2 (ERN 00693830), 23 May 2011. This filing is classified 'confidential' and was sent to the DSS by the Case File Officer on 27 May 2011.

⁸ *Ibid.*, para. 6.

⁹ *Ibid.*, para. 7.

¹⁰ *Vide supra.*, fn. 6.

¹¹ *Vide supra.*, fn. 7.

15. On 8 August 2011, the CIJs issued a press statement confirming that they have received 200 Civil Party applications.¹²
16. In the August 2011 issue of the ECCC Court Report, the CIJs reported that they have amassed 3004 documents comprising of more than 50,000 pages and have scheduled further field missions in connection with Case 004.¹³

2.2 Suspects remain without effective legal representation

17. On 29 July 2010, the former Head of DSS, Mr. Richard Rogers, requested access to Case Files 003 and 004 for the DSS for the purposes of safeguarding the fair trial rights of, and to prepare an effective defence, for the suspects in those cases.¹⁴
18. On 23 September 2010, the CIJs responded in a letter, rejecting the request.¹⁵ However, this letter did not address the issue of assignment of defence counsel in Cases 003 and 004, and, in any event, did not purport impliedly or expressly to be a 'judicial order.'¹⁶
19. On 7 October 2010, the former head of the DSS submitted a memorandum to the OA requesting a contract for [REDACTED] under the following terms of reference, *inter alia*:

The [REDACTED] Consultant is required to assist the Defence Support Section on Cases 003 and 004 at the Extraordinary Chambers in the Courts of Cambodia by:

- Representing the interests of the unnamed suspects to ensure respect for their fundamental human rights including fair trial rights;
- Providing other advice and assistance as required, before Co-Lawyers are appointed for each suspect in the event of questioning or arrest.¹⁷

¹² *Vide supra.*, fn. 5. The August 2011 ECCC Court Report mentions that more than 300 Civil Party applications have been received in Case 004: 'ECCC Court Report: August 2011', ECCC Public Affairs Section, Issue 39, p. 5.

¹³ 'ECCC Court Report: August 2011', ECCC Public Affairs Section, Issue 39, p. 5.

¹⁴ Letter: 'Re: Defence rights in Case File 003 and 004', R.J. Rogers (Chief, DSS), 29 July 2010.

¹⁵ Letter: 'Defence Rights in Case File 003 and 004', CIJs You Bunleng and Marcel Lemonde, Doc. A1/2 (ERN 00611316), 23 September 2010 – classified 'confidential' and notified to the DSS on 2 December 2010.

¹⁶ According to ECCC jurisprudence, CIJ letters do not constitute binding orders or decisions: see discussion on the legal distinction between 'letters' and 'orders' in: 002/19-09-2007-ECCC-OIJ, 'Decision on the Admissibility on Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation' (Pre-Trial Chamber), Doc. D138/1/8 (ERN 00349456), 13 July 2009, paras 43, 44.

¹⁷ Memorandum: 'Consultancy: Sam Onn KONG', From: Richard Rogers (Chief, Defence Support Section), To: Emmanuelle Dupont (Chief, UNAKRT Personnel Section), 7 October 2010.

20. The DDOA approved [REDACTED]'s contract, and the latter signed his contract and commenced work on 8 November 2010.¹⁸
21. On 8 November 2010, the former Head of DSS assigned [REDACTED] as counsel representing the interests of the Un-named Suspects in Cases 003 and 004, until such time that the suspects are assigned individual counsel of their own choosing. This assignment was officially confirmed in writing by the DSS to [REDACTED] on 10 December 2010,¹⁹ and notified to the CIJs on 11 February 2011.²⁰
22. The CIJs have not contacted the DSS regarding this notification of assignment. In a decision on a motion filed by [REDACTED] the CIJs listed him as 'counsel assigned to represent the interests of Un-named Suspects'; this decision was issued subsequent to the notification of assignment.²¹
23. [REDACTED]'s initial contract expired on 30 April 2011. Two memoranda were submitted by the DSS OiC to the DDOA, on 3 May 2011²² and 10 May 2011,²³ requesting the extension of [REDACTED]'s contract.
24. The DDOA did not approve the extension and requested the DSS to provide further explanations and justifications. A third memorandum to this effect was submitted to the DDOA on 6 July 2011.²⁴ On 9 September 2011, the DDOA rejected the request.²⁵
25. To the knowledge of the DSS, [REDACTED] has not been granted access to Case Files 003 and 004.
26. To the knowledge of the DSS, the suspects in Case 004 remain without effective legal representation.

¹⁸ Contract for Consultant N. 4982, signed by [REDACTED], UNAKRT Personnel Section (5 November 2010) and [REDACTED] (8 November 2010).

¹⁹ Letter: 'Letter of Assignment', Rupert Abbott (DSS Officer-in-Charge), 10 December 2010.

²⁰ Letter: 'Re. Notification of Assignment - Cases 003 and 004', [REDACTED] (DSS Officer-in-Charge), Doc. A2 (ERN 00649132), 11 February 2011 - classified 'confidential' and notified to DSS on 3 March 2011.

²¹ 004/07-09-2009-ECCC-OCLI, REDACTED TITLE, Co-Investigating Judges, Doc. D4/1 (ERN 00658678), 5 April 2011 - [REDACTED]

²² Memorandum: 'Defence Support Section - Request for new consultancy contract for [REDACTED]', Ms. Nisha Valabhji (Officer-in-Charge, Defence Support Section), 3 May 2011.

²³ Memorandum: 'Defence Support Section - Request for new consultancy contract for [REDACTED]', Ms. Nisha Valabhji (Officer-in-Charge, Defence Support Section), 10 May 2011.

²⁴ Memorandum: 'Justification for extending the contract of [REDACTED]', Nisha Valabhji (Officer-in-Charge, Defence Support Section), 6 July 2011.

²⁵ Interoffice Memorandum: 'Assignment of Defence Counsel in Case 3 and 4', from Knut Rosandhaug (DDOA), 9 September 2011.

27. On 7 October 2011, the DSS OiC submitted a memorandum entitled 'Defence Support Section to present lists of national and foreign lawyers to suspects in Case 004, pursuant to Rule 11(2)(e) of the ECCC Internal Rules',²⁶ in which she urgently:
- i. Informed the Co-Prosecutors and CIJs that the DSS will endeavour to present the Lists of Lawyers to suspects in Case 004;
 - ii. Informed the OA that the DSS will require administrative and logistical support to locate suspects in Case 004 and present them with the Lists of Lawyers; and
 - iii. Requested the CIJs to provide to the OA, as soon as possible, any information in their possession that could expedite this process.

III. SUBMISSIONS

3.1 DSS has standing to bring this motion before the PTC

28. All parties whose interests are adversely affected by proceedings have the right to make submissions in response to other parties' filings,²⁷ to request the annulment of proceedings,²⁸ or to make reasonable applications for time²⁹ and page³⁰ extensions necessary to guarantee the adversarial nature of proceedings and the fairness of the trial as enshrined in Rule 21(1) IR.
29. In Case 003, the Pre-Trial Chamber ("PTC") listed the DSS OiC as a party to the proceedings before it.³¹ It is presumed that the DSS OiC was listed as a party to those proceedings in order to safeguard the fundamental rights of the suspects pursuant to Rule 21(1) IR and Articles 33 new and 35 new of the ECCC Law. Case 004 presents a similar situation in terms of the suspects' rights being infringed. The DSS OiC therefore has standing to bring this motion before the PTC.

²⁶Memorandum: 'Defence Support Section to present lists of national and foreign lawyers to suspects in Case 004, pursuant to Rule 11(2)(e) of the ECCC Internal Rules', Nisha Valabhji (Officer-in-Charge, Defence Support Section), 7 October 2011.

²⁷Articles 8.3 and 8.4 of the Practice Direction on Filing of Documents Before the ECCC (ECCC/01/2007/Rev.6).

²⁸Rule 76 IR.

²⁹Rule 39(4)(a) IR.

³⁰Article 5.4 of the Practice Direction on Filing of Documents Before the ECCC (ECCC/01/2007/Rev.6).

³¹003/07-09-2009-ECCC-OIJ(PTC02), 'Notice to the parties concerning the co-lawyers' request for suspension of time to file the appeal pending access to the case file', Doc. D11/2/4/3 (ERN 00714762), 13 July 2011.

30. The PTC has previously held that requests for a stay in proceedings can fall “within the general ambit of an application falling within Article 33 New of the Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia (“ECCC Law”) which relevantly provides that ‘trials are fair’ and conducted ‘with full respect for the rights of the accused...’³²
31. The CIJs have held that they consider that “the principles governing the law applicable to a request for annulment and those governing the law applicable to a request for a stay of proceedings are the same, especially where the requests are essentially based on the same facts”, and that accordingly, a stay of proceedings may be granted where there has been, or will be if a stay is not granted, a procedural defect and “where the defect infringes the rights of the party making the application.”³³
32. Similar reasoning has been used at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) to order a stay in proceedings, notably where a fair trial is impossible without a stay in proceedings,³⁴ or where the continuation of proceedings would violate the fundamental rights of the accused.³⁵
33. Pursuant to Rule 21(1) IR and Articles 33 new and 35 new of the ECCC Law, the DSS OIC has determined that a stay of proceedings in Case 004 before the PTC is necessary in order for the DSS, with support from the OA, to take all necessary measures to allow the suspects in Case 004 to exercise their accrued legal right to effective legal representation.

3.2 Suspects in Case 004 have a fundamental right to legal representation

34. The suspects in Case 004 are entitled to their fundamental right to legal representation pursuant to the ECCC Law,³⁶ the IR³⁷, and the International Covenant on Civil and

³²002/19-09-2007-ECCC/OCIJ (PTC42), ‘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)’, Doc. D264/2/6 (ERN 00543789), 10 August 2010, para. 13.

³³002/19-09-2007-ECCC/OCIJ, ‘Order rejecting the request for annulment and the requests for stay of proceedings on the basis of abuse of process filed by Ieng Thirith’, Doc. D264/1 (ERN 00422607-00422618), para. 30 – filing classified ‘confidential’ but cited in 002/19-09-2007-ECCC/OCIJ(PTC71), ‘Ieng Sary’s expedited appeal against the OCIJ’s Decision refusing to accept the filing of Ieng Sary’s response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and request for stay of the proceedings’, Doc. D390/1/2/1 (ERN 00598685), 6 September 2010, para. 3, fn. 6.

³⁴*The Prosecutor v. Dusko Tadic*, IT-94-1-A, ‘Judgement’, Appeals Chamber, 15 July 1999, para. 55.

³⁵*The Prosecutor v. Janko Bobetko*, IT-02-62-AR54bis, ‘Decision on challenge by Croatia to Decision and Orders of confirming Judge’, 29 November 2002, para. 15.

³⁶Articles 24, 33 new and 35 new of the ECCC Law.

Political Rights³⁸ (“ICCPR”) which is entrenched in the ECCC legal framework³⁹ and the Cambodian Constitution.⁴⁰

35. Article 24 of the ECCC Law states:

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, as well as the right to interpretation, as necessary, into and from a language they speak and understand (emphasis added).

36. Rule 21(1)(d) IR guarantees that “[e]very person suspected or prosecuted shall be [...] defended by a lawyer of his/her choice” (emphasis added).

37. Moreover, Rule 21(1) IR provides that all interpretation of applicable legal provisions shall be made “so as to *always safeguard the interests of Suspects, Charged Persons, Accused and Victims*” (emphasis added).

38. In the IR Glossary, ‘Suspect’ is defined as:

[A] person whom the Co-Prosecutor or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged.

39. In addition, Article 33 new of the ECCC Law applies to all ECCC proceedings the international fair trial standards enshrined in Articles 14 and 15 of the ICCPR, while Article 35 new of the ECCC Law sets out the minimum applicable fair trial guarantees, which include:

To be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;

To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

To be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have

³⁷ Rule 21 IR.

³⁸ Articles 14 and 15 ICCPR.

³⁹ Articles 33 new and 35 new ECCC Law; Articles 12 and 14 of 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 (“Agreement”).

⁴⁰ Articles 31 and 38 of The Constitution of the Kingdom of Cambodia (1993).

legal assistance assigned to them free of charge if they do not have sufficient means to pay for it.⁴¹

40. It is accepted that in civil law systems, the full protection of fair trial rights applies from the moment that a suspect is subject to a 'charge'. The IR Glossary defines 'Charged Person' as: "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."
41. The ClJs have held that "[a]ny person named in the Introductory Submission is referred to as 'the Charged Person'".⁴² This position is also consistent with French jurisprudence cited by the ClJs.⁴³
42. The application of the concept of 'charge' is rooted in the context of fundamental fair trial rights.⁴⁴ The European Court of Human Rights ("ECtHR") has opined:
- The prominent place held in a democratic society by the right to a fair trial favours a 'substantive', rather than a 'formal', conception of the 'charge' referred to by Article 6; it impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a 'charge' within the meaning of Article 6.⁴⁵
43. Pursuant to ECtHR jurisprudence, a suspect's situation satisfies the substantive conception of a 'charge' for the purpose of application of fair trial rights if:
- a. An official notification has been given to an individual by the competent authority of an allegation that he has committed a criminal offence; or

⁴¹ Article 35 new (a), (b) and (d) of the ECCC Law.

⁴² 002/19-09-2007-ECCC-OClJ, 'Order Refusing Request for Further Charging', Co-Investigating Judges, D298/2 (ERN 00476085), 16 February 2010, para.13 (fn. 6).

⁴³ "[A]ny person named in the introductory submission, even when referred to as 'X appearing to be...', is automatically a charged person, regardless of the date on which he or she is notified of the charges by the investigating judge." Crim. 5 Nov. 1985: Bull. Crim. No 244; D. 186. IR. 303, obs. Pradel; JCP 1986 II. 20685, note Jeandidier [Translation]: cited in 002/19-09-2007-ECCC-OClJ, 'Order Refusing Request for Further Charging', Co-Investigating Judges, D298/2 (ERN 00476085), 16 February 2010, para. 13 (fn. 6).

⁴⁴ See also Stephanos Stavros, "The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments", Martinus Nijhoff, Dordrecht, 1993, p.83: "*The Convention intends to protect the individual against having a substantial suspicion pending against him for an unreasonably long time without being determined. Such suspicion, in particular if it is known to the public, may seriously affect his interests, moral as well as material, and those of his family*".

⁴⁵ *Adolf v Austria* (1982) 4 EHRR 313, para. 30.

b. There exist other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.⁴⁶

44. With reference to condition (b), which can be satisfied independently from the existence of an 'official notification', the term 'substantially affects' refers to the consequences of prosecutorial and/or investigatory activities on the personal and legal interests of a suspect.⁴⁷

45. The following factors have amounted to an implication of an allegation of criminal charges against, and which substantially affect the interests of, the suspects in Case 004:

a. The individuals in question have been mentioned on numerous occasions in the media as suspects in Case 004.⁴⁸ Their identities were mentioned in published quotations from leaked official court documents⁴⁹ and confirmed in a public statement by the Acting Head of the ECCC Public Affairs Section.⁵⁰ At least two of the suspects have been interviewed by the press and made public statements relating to their roles during the temporal jurisdiction of the ECCC, made comments on the leaked allegations against them, and expressed their concern at the possibility of indictments.⁵¹ An NGO has conducted a parallel public investigation, publishing interviews with a number of potential witnesses relating to an allegedly key crime

⁴⁶ *Foti et al. v Italy* (7604/76), [1982] ECHR 11, para. 52; *Corigliano v. Italy* (8304/78), [1982] ECHR 10, para. 34; *Kangashuoma v. Finland* (5635/09) [2011] ECHR, para. 26; *Eckle v. Germany* (8130/78) [1982] ECHR 4, para. 74.

⁴⁷ *Eckle v. Germany*, 15 July 1982, para. 74: where fair trial rights under the Convention were held to apply not from the moment of official notification of charges, but from the beginning of preliminary investigations.

⁴⁸ Robbie Correy-Boulet and May Titthara, 'Cadres face prospect of more arrests', *The Phnom Penh Post*, 10 November 2009; Julia Wallace, 'Tribunal retracts announcement of new defence lawyer', *The Cambodia Daily*, 1 December 2010; T. Curvellier, 'Five more suspects in Phnom Penh', *Radio Nederland Wereldomroep*, 16 September 2009 (ERN 00411534).

⁴⁹ J. Ferrie, 'More leaked documents highlight Khmer Rouge tribunal under fire in Cambodia', *The Christian Science Monitor*, 15 June 2011 (available: www.csmonitor.com/layout/set/print/content/view/print/390529); J. Wallace, 'Under Pressure, Tribunal Release List', *Cambodia Daily*, 9 August 2011, p. 27; J. Ferrie, 'Khmer Rouge crimes in legal limbo', *The National*, 24 June 2011; S. Manning, 'Leaked Documents Suggest UN Backing Off Khmer Rouge Trials', *Scoop*, 27 June 2011 (available on <http://www.scoop.co.nz/stories/HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>).

⁵⁰ Kong Sotharith, 'Tribunal Case Applicant Names Three More Suspects', *VOA Khmer*, 20 June 2011: which quotes the ECCC official as stating that Civil Party applicant, Theary Seng, 'abused confidentiality principles of the court by naming suspects'.

⁵¹ Sok Khemara, 'Second Tribunal Suspect Denies Prosecution's Charges', *VOA Khmer*, 11 August 2011; Sok Khemara, 'Atrocities Suspect Says He's "Not Fearful" of Tribunal, Hell', *VOA Khmer*, 11 August 2011; M. Titthara & T. Miller, 'Frail war crimes suspect "not afraid" to face tribunal', *Phnom Penh Post*, 22 August 2011; Sok Khemara, 'Former Khmer Rouge Deny War Crimes Charges', *VOA Khmer*, 31 August 2011; Sok Khemara, 'Suspect Says "No one" From Tribunal Has Contacted Him', *VOA Khmer*, 9 September 2011.

site under investigation in Case 004.⁵² Human Rights Watch published a detailed list of allegations against each suspect and opined that they fall within the jurisdiction of the ECCC.⁵³ These factors have gravely undermined the suspects' presumption of innocence⁵⁴ and a suspect's right to be informed of his right to remain silent.⁵⁵ They have created an imperative need for effective legal representation to safeguard these and other fair trial rights.

- b. The suspects' fundamental right to equality of arms has been, and continues to be, undermined by the exclusion of the Defence from participating in the two year-long judicial investigation, as well as the right to request further investigative action, respond to party submissions,⁵⁶ or appeal against judicial decisions made during the investigation. It should be emphasised that in their submissions currently before the PTC, the other parties raise a number of legal issues and make factual allegations which warrant scrutiny from a defence perspective.
- c. The fact that [REDACTED] individuals have applied to be constituted as Civil Parties in Case 004,⁵⁷ a fact which according to the IR⁵⁸ and civil law criminal procedure may entitle applicants access to the case file,⁵⁹ thereby further undermining the suspects' equality of arms without granting suspects redress in the form of procedural rights as in other civil law systems.⁶⁰

46. Accordingly, suspects in Case 004 have a fundamental right to legal representation for the following reasons:

⁵² Documentation Centre of Cambodia: Promoting Accountability Project, 'Khmer Rouge "Trapeang Thma" Dam Construction Interview Series', Interviews 1-5, July 2011.

⁵³ Press Release: 'Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign', Human Rights Watch, 3 October 2011.

⁵⁴ Stavros: *vide supra*: fn. 44.

⁵⁵ Rule 21(1)(d) IR.

⁵⁶ *Vide supra* paras. 7-16 of this motion.

⁵⁷ 'ECCC Court Report: August 2011', ECCC Public Affairs Section, Issue 39, p. 5. In a subsequent press release, however, the figure is listed as 200: Press Release: 'Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)', Office of the Co-Investigating Judges, 8 August 2011.

⁵⁸ Rule 23bis(2) IR.

⁵⁹ Article 114, paragraphs 5-10 of the French Code of Criminal Procedure cited in Dalloz, 'Code de Procédure Pénale', 50^{ième} édition, 2009, pp.360-361; see also Frédérique Agostini, 'Les droits de la partie civile dans le proces pénal', Rapport Annuel de la Cour de Cassation, 2000.

⁶⁰ French penal procedure specifically redresses this inequality by naming individuals subject to civil party applications as 'charged': « Une personne qui a été personnellement mise en cause dans une plainte avec constitution de partie civile et contre laquelle le ministère public a requis, nommément, l'ouverture d'une information est partie à l'instance et doit être considérée comme inculpée » : Crim. 24 mai 1971 : Bull. crim. n. 171 cited in Dalloz, 'Code de Procédure Pénale', 50^{ième} édition, 2009, p. 314.

- a. Article 24 of the ECCC Law read in conjunction with Rule 21(1) IR and the IR Glossary leaves no ambiguity as to suspects' unconditional right to legal representation.
- b. In addition, suspects have the right to legal representation pursuant to their fundamental fair trial rights applicable by virtue of the existence of measures which carry the implication of an allegation of criminal charges against, and which substantially affect the interests of the suspects.⁶¹

3.3 The ECCC Office of Administration has an obligation to uphold the suspects' right to legal representation

47. Rule 22(1)(b) IR provides:

Any person entitled to a lawyer under these IRs shall have the right to assistance of a national lawyer, or a foreign lawyer in collaboration with a national lawyer, of their own choosing, as follows:

[...]

Indigent persons entitled to representation under these Rules shall have the right freely to choose from amongst national lawyers and foreign lawyers included in the list provided for in Rule 11(2)(d).

48. The initial determination as to whether a person is entitled to a lawyer under the IR and the process of assignment of counsel are substantive defence matters, which fall within the autonomous mandate of the DSS by virtue of Rule 11(1) IR and are not subject to administrative review:

The Office of Administration shall establish a Defence Support Section, which shall only be autonomous with regard to the substantive defence matters set out in this Rule.

49. This provision reflects one of the founding principles concerning the structure of the ECCC envisaged by the Secretary General of the United Nations in his October 2004 Report on the Khmer Rouge Trials:

⁶¹See also Article 56(2)(d) of the Rome Statute of the ICC concerning unique investigative opportunities, which empowers the Pre-Trial Chamber to appoint counsel "to represent the interests of the defence" in situations where there has not yet been an arrest or appearance by suspects. The Rome Statute has been ratified by 116 states. See also Sections 140 and 141 of the German Code of Penal Procedure.
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The Chambers' legal aid system would be managed by a small semi-autonomous Defence Support Unit, loosely linked to the Office of Administration [...].⁶²

50. The authority of the DSS OiC to assign counsel is enshrined in Rule 11(6) IR:

The Head of the Defence Support Section shall make determinations on indigence and the assignment of lawyers to indigent persons [...]

51. This authority was confirmed by the President of the Trial Chamber ("TC") at the ECCC on 6 August 2010.⁶³ The precedent at the ECCC is for the DSS OiC to make the decision to assign Defence counsel, while the relevant judicial Chamber simply 'notes' the assignment "*on the basis of this decision*".⁶⁴

52. For these purposes, Rule 11(2)(e) provides:⁶⁵

The Defence Support Section shall:

[...]

Under the supervision of the Co-Prosecutors, Co-Investigating Judges or the Chambers, as appropriate, present the list of lawyers as provided in sub-rules 2(c) and 2(d) to persons entitled to a defence lawyer under these IRs.

53. Furthermore, according to Rule 11(2)(g) IR:

The Defence Support Section shall:

[...]

Enter into contracts with defence lawyers for any indigent Suspects, Charged Persons, Accused or other persons entitled to a defence lawyer under these IRs[.]

54. The imperative verb 'shall' used in these provisions creates an obligation on the DSS OiC to take steps to guarantee legal representation to those entitled to it under the law.

55. Once, as in the present case, the DSS OiC has determined that, according to provisions of the ECCC legal framework, certain individuals are entitled to the assistance of counsel, she has an obligation to launch the procedure for informing these individuals of their right, assess their indigence to determine whether they are

⁶²Report of the Secretary-General on Khmer Rouge trials, A/59/432, 12 October 2004, para. 35.

⁶³ 001/18-7-2007/ECCC/TC, 'Notification of Assignment of Co-Lawyer', Trial Chamber, Doc. E189 (ERN 00581354), 6 August 2010: Mr. Kang Ritheary was assigned as second Cambodian Co-Lawyer by former Head of DSS, Mr. Richard Rogers. The Judges 'noted' the assignment on the basis of Mr. Rogers' decision.

⁶⁴*Ibid.*

⁶⁵ It is clear that the meaning of 'supervision' in the wording of Rule 11(2)(e) IR was merely intended to ensure that the presentation of lists of lawyers to a suspect is conducted in a correct manner and with the knowledge of the Co-Prosecutors, ClJs or relevant Chamber.

entitled to court-funded counsel,⁶⁶ and assign counsel of their choice where appropriate.

56. The first step in this procedure is the initial contact to determine whether the suspect wishes to retain counsel, and if so, to present the lists of lawyers⁶⁷ and assess indigence.
57. In light of his function as administrator of the resources provided through the United Nations Trust Fund,⁶⁸ and his obligations under Rule 9(3) IR to support the DSS OiC in the fulfilment of her autonomous functions by providing “equipment, facilities management, information technology, supplies, vehicles, transportation, and other physical and administrative requirements”, the DDOA has an obligation to accept and facilitate the DSS OiC’s request for administrative and logistical support necessary for the performance of her mandated autonomous functions.
58. A refusal to accept the DSS OiC’s request for administrative and logistical support for the purpose of guaranteeing the fundamental right to legal representation to suspects in Case 004 is a violation of the Internal Rules and would result in an infringement of their rights enshrined in Rule 21(1) IR and Rule 22(1)(b) IR.

3.4 DSS requires the immediate assistance of the OA to contact the suspects to determine if they wish to retain counsel and to present them with the lists of counsel pursuant to Rule 11(2)(e) IR

59. Despite the wide-spread media coverage of issues relating to Cases 003 and 004, the suspects in Case 004 may be unaware of the fact that they have accrued the right to assistance of court-funded counsel, provided that they do not have the means to pay for their own legal representatives. It is their legal right to be informed of this fundamental fair trial right.
60. The DSS OiC is not in the possession of contact details required to inform the suspects of their rights. Furthermore, due to the sensitivity of this matter and to security concerns based on the political context of these proceedings, as well as the transportation and other logistical requirements involved in fulfilling her mandate

⁶⁶Rule 11(6) IR.

⁶⁷Rule 11(2)(e) IR.

⁶⁸Article 31 new of the ECCC Law.

under Rule 11(2)(e) IR, the DSS OIC requires immediate assistance from the OA to contact suspects, inform them of their rights, and present them with the Lists of Lawyers.

61. In the event that the OA does not have sufficient information to assist the DSS in the fulfilment of its mandate under Rule 11(2)(e) IR, the OA must be provided with such information by all relevant offices.

3.5 In the interim, the DDOA must extend the contract of [REDACTED]

62. The regular procedure for the assignment of counsel provided for in paragraph 6.2 of the DSS Administrative Regulations⁶⁹ ("DSS AR") requires the DSS to make contact with a Suspect, Charged Person, or Accused entitled to representation, for the purpose of assessing his/her means, presenting him/her with a list of national and international lawyers, and providing him/her with a 'Request for Assignment' form to be approved by DSS and forwarded for notification to the CIJs or Chamber, as appropriate.
63. In the event of delay in the process set out in paragraph 6.2 DSS AR, paragraph 6.4 DSS AR provides for provisional assignment for defendants who require representation, until such time as Co-Lawyers can be permanently engaged or assigned.⁷⁰
64. This mechanism was used as a basis for the initial recruitment of [REDACTED] and reflects the law and practice of the International Criminal Court.⁷¹ According to Article 33 new of the ECCC Law, procedure established at the international level may be relied upon in case of a *lacuna* in existing procedures, or where questions arise regarding their interpretation or consistency with international standards.
65. In light of the suspects' right to legal representation, as well as other fair trial rights enshrined in the ECCC Law, IR and the ICCPR, [REDACTED]'s contract must be renewed to enable the DSS to guarantee the suspects' fair trial rights pending the assignment of individual counsel to them pursuant to Rule 22(1)(b) IR.

⁶⁹ Adopted in July 2007 pursuant to Rule 11(2)(a)(ii) IR.

⁷⁰ Para. 6.4 DSS AR: "If there is a delay in the process of engagement or assignment and the suspect, charged person or accused requires representation, the Defence Support Section may provisionally assign one or more lawyers from the list until such time as Co-Lawyers can be engaged or assigned".

⁷¹ See e.g., Article 56(2)(d) of the Rome Statute and Regulation 76 of the ICC Regulations of the Court.

3.6 Proceedings before the PTC must be stayed to allow all necessary measures to be taken to uphold the suspects' right to legal representation

66. 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.
67. 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.
68. 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 PTC, and any other matters deemed appropriate by the Chamber.

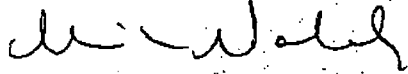
IV. RELIEF SOUGHT

69. For all of the above reasons,
 - a. The DSS OiC respectfully requests the PTC 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 PTC to order the 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 PTC and any other matters deemed appropriate by the Chamber. The DSS OiC respectfully requests the PTC to provide to the OA any information in its possession that could expedite this process.
 - c. In the interim, the DSS OiC respectfully requests the PTC to issue an order to compel the DDOA to extend the contract of [REDACTED] and

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- 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.

Respectfully submitted,



Nisha Valabhji

Officer-in-Charge

Defence Support Section

Phnom Penh, 10 October 2011