



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

N°: 5

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° 003/29-07-2011-ECCC/PTC (01)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-Ho CHUNG
Judge HUOT Vuthy

Date: 04 October 2012

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PUBLIC

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

Co-Investigating Judges:

YOU Bunleng
Laurent KASPER-ANSERMET

Requestor:

Ms. Nisha VALABHJI
Officer in Charge, Defence Support Section

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

Civil Party Co-Lawyers:

SAM Sokong
Lyra Thuy NGYEN
CHOUNG Chou-Ngy
HONG Kimsuon
Silke STUDZINSKY



1. The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of a “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” (“Motion for Reconsideration”) filed by the Officer in Charge (“Requestor”) in the Defence Support Section (DSS) of the ECCC on 24 February 2012.¹ The Motion for Reconsideration was notified on 9 March 2012. No Responses were filed to the Motion for Reconsideration.

Submissions for Reconsideration

2. The Requestor asks the Pre-Trial Chamber to “reconsider its decision on admissibility of the DSS Request, to examine the merits of the DSS Request, and to grant the relief requested.”² The Requestor submits that the Motion for Reconsideration is filed “on the basis that two of the recognized criteria for granting a motion for reconsideration are satisfied: (a) the [Pre-Trial Chamber] Decision was erroneous in several respects; and (b) the [Pre-Trial Chamber] Decision caused an injustice.”³ The Requestor argues that the Pre-Trial Chamber erred in applying as an admissibility requirement that motions must be “properly raised” which requirement the Requestor finds to be “undefined,”⁴ and submits that “at the ECCC, which is governed by its own but similar provisions to the ICTY Directive, the power to assign counsel is vested in the DSS Officer-in-Charge by virtue of [Internal] Rule 11(6) and in accordance with the DSS Administrative Regulations.”⁵ The Requestor further argues that the Pre-Trial Chamber erred in its analysis and conclusion

¹ 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, 24 February 2012, Doc. 4. (“Motion for Reconsideration”).

² Motion for Reconsideration, para. 51.

³ Motion for Reconsideration, para. 3.

⁴ Motion for Reconsideration, paras. 12-18.

⁵ Motion for Reconsideration, para. 44.



that the matters of legal representation rest directly with the Co-Investigating Judges and are out of its jurisdiction.⁶ The Motion concludes that “in failing to exercise its inherent jurisdiction, the [Pre-Trial Chamber] has violated the Suspects’ rights to a fair trial.”⁷

Legal Test for Reconsideration

3. In its previous jurisprudence, the Pre-Trial Chamber has applied the following test for reconsideration:

“25. The Application for Reconsideration may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decisions.⁸ The Appeals Chamber of the ICTY has held that a Chamber may “always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realized that the previous decision was erroneous or that it has caused an injustice.”⁹ This has been described as an inherent power¹⁰ and is particularly important for a judicial body of last resort like the Pre-Trial Chamber. A change of circumstances may include new facts or arguments.¹¹ The standard for reconsideration has also been described as follows: “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”^{12,13}

⁶ Motion for Reconsideration, paras. 19 – 45.

⁷ Motion for Reconsideration, para. 50 & paras. 46-50.

⁸ *Prosecutor v. Milosevic*, IT-02-54-T, “Decision on Prosecution Motion for Reconsideration regarding Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski”, 17 May 2005, para. 6.

⁹ *Prosecutor v. Galic*, IT-98-29-AR73, “Decision on Application by Prosecution for Leave to Appeal,” 14 December 2001, para. 13, and *Prosecutor v Mucic et al*, TT-96-21-Abis, “Judgment on Sentence Appeal”, 8 April 2003, para. 49.

¹⁰ *Prosecutor v. Galic*, IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2006, p. 2.

¹¹ *Prosecutor v. Galic*, IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2006, p. 2.

¹² *Prosecutor v. Milutinovic et al.*, IT-05-87-T, “Decision on Prosecution Motion Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56”, 9 November 2006, para. 2.

¹³ Decision on Application for Reconsideration of Civil Party’s Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25 (footnotes not omitted for ease of reference).

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Pre-Trial Chamber's Observations

4. In its Decision on the DSS Request for a Stay in Case 003 (the Decision),¹⁴ the Pre-Trial Chamber decided that the Request is inadmissible. It noted that motions or requests filed before the Pre-Trial Chamber have to be “properly raised,” that the Request for Stay referred mainly to the “Defence,”¹⁵ which term is introduced as “the DSS” and not “Counsel representing anyone before the ECCC;” and that the DSS is part of the Office of Administration which is “there to enable the Chambers to ‘accomplish their mission’.”¹⁶ These observations of the Pre-Trial Chamber are equally sufficient for the ordinary reader, as they would be for a lawyer, to understand that the issue of whether a representative of a particular unit of the Administration of the Court has standing as of right¹⁷ to appear or to bring motions before the Chamber in order to seek relief in proceedings to which they are not parties is one of the issues to be assessed for admissibility purposes before entering into the merits of a motion. The issue of standing, or whether a motion is properly raised, has been previously considered by the Pre-Trial

¹⁴ Decision on Defence Support Section Request for 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, Doc. no. 3 (the “Decision”).

¹⁵ Decision, para. 9.

¹⁶ Decision, para. 11 and fnt.24.

¹⁷ The DSS is not a “party” to any case or proceeding before the ECCC within the meaning of the term as defined in the Glossary of the Internal Rules. The DSS does not represent any parties to the proceedings before the ECCC either. See STL, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, CH/AC/2010/02, Appeals Chamber, 10 November 2010, para. 60 which reads: “Standing, as a general principle, “is the right of a person allegedly aggrieved by the violation of a legal rule to seek relief for any damage he may have suffered;” Note that persons do not have standing as of right to seek relief for any damage in proceedings to which they are not parties, see Ntabakuze v. Prosecutor, ICTR-98-41-AR73, Decision on Motion for Reconsideration, Appeals Chamber, 4 October 2006, paras. 14-15; Prosecutor v. Delić, IT-04-83-A, Decision on Motion for Continuation of the Appellate Proceedings, Appeals Chamber, 29 June 2010, p. 2; Prosecutor v. Brima et al., SCSL-04-16-AR77, Decision on Joint Defence Appeal Against the Decision of the Report of the Independent Counsel pursuant to Rule 77(C)(iii) and 77(D), Appeals Chamber, 17 August 2005, para. 16; Prosecutor v. Brima et al., SCSL-04-16-AR77, Decision on Defence Appeal Motion pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), Appeals Chamber, 23 June 2005, paras. 33-35.



Chamber¹⁸ and it is also part of the jurisprudence of other international tribunals¹⁹ in their examination of admissibility for motions before entering into the merits. The number of decisions from authorities that follow the same approach, other than those of this Chamber, is overwhelming.

5. On 19 January 2005 the Trial Chamber I of the International Criminal Court for Rwanda (ICTR) addressed standing as part of the admissibility issues “before considering the merits of the motion”²⁰.

18 Case File No. 002/07-12-2009-ECCC/PTC (05), Decision on Ieng Sary and Ieng Thirith Applications Under Rule 34 to Disqualify Judge Marcel Lemonde, Doc. No. 8., 15 June 2010, para. 20; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), Decision on Appeals Against Co-Investigating Judges’ Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, D250/3/2/1/5, 27 April 2010, para. 17; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 43), Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File dated 31 December 2009, D3/3/2/2, 20 May 2010, paras. 13 – 14; Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 57), Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties’ Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, D193/5/5, 4 August 2010, paras. 15 – 16; Application No. 002/08-07-2009-ECCC-PTC, Decision on the Charged Person’s Application for Disqualification of Stephen Heder and David Boyle, Doc. No. 3, 22 September 2009, paras. 20, 22.

19 Special Tribunal for Lebanon (STL), Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, CH/AC/2010/02, Appeals Chamber, 10 November 2010, para. 55; *Prosecutor v. Tadić*, IT-94-1, In the Case of Dragan Opačić Decision on Application for Leave to Appeal, Appeals Chamber, p. 2 (noting that to the extent resolution of the matter based on standing appears “overly legalistic, any other ruling would open up the Tribunal’s appeals to non-parties ... who might nurse a grievance... This could not be”); *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, Decision on Joint Defence Appeal Against the Decision of the Report of the Independent Counsel pursuant to Rule 77(C)(iii) and 77(D), Appeals Chamber, 17 August 2005; 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; *Prosecutor v. Kordic et al.*, IT-95-14/2, “Decision Stating Reasons for Trial Chamber’s Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence”, Trial Chamber, 25 June 1999; *Prosecutor v. Bobetko*, IT-02-62-AR54bis & IT-02-62-AR108bis, “Decision on Challenge by Croatia to Decision and Orders of Confirming Judge”, Appeals Chamber, 29 November 2002, paras 10 – 12; Situation in the Democratic Republic of the Congo, ICC-01/04, “Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV”, Pre-Trial Chamber I, 18 January 2008, last paragraph; *The Prosecutor v Ndayambaje et al.*, ICTR-98-42-AR73, “Decision on Joseph Kanyabashi’s Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List”, Appeals Chamber, 21 August 2007, para 14 reapplied in *The Prosecutor v Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, and *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Joint Case No. ICTR-98-42-T, “Decision On Nyiramasuhuko’s Motion For Certification To Appeal The Decision Of 5 November 2007 And Ntahobali’s Motion For Certification To Appeal The Decisions Of 5 And 12 November 2007”, Trial Chamber II, 7 Decemebr 2007, para 44.

20 *The Prosecutor v Bagosora et al.*, ICTR-98-41-T, “Decision On The Defence Motions for the Reinstatement of Jean Yaovi Degli As Lead Counsel For Gratien Kabiligi”, Trial Chamber 1, 19 January 2005, para 23.

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6. Further on 23 June 2005 the Appeals Chamber of the Special Court for Siera Leone (SCSL), having examined and found that the appellants had no standing went on to observe that the appeal was “incompetent.” It noted:

“This appeal is brought without leave by the three defendants in the AFRC trial. *None are subject to the contempt investigation* ordered by the Trial Chamber. *Their counsel have not been assigned* to represent any of the five alleged contemnors nor do they purport to have been instructed to represent them. It follows that they have *no standing*, in any event, to prosecute an appeal against the two decisions taken by the Trial Chamber in relation 1) to its reason to believe that a contempt had been committed by others or 2) to its direction for an independent investigation of that alleged contempt.”²¹

7. It further noted:

“It is unnecessary to consider whether the appellants have *standing* to appeal from such decision which *does not directly affect them*. This is one of the considerations that the Trial Chamber would have had to advert to were leave sought from it. It is of interest that the persons directly affected by the interim orders have not appealed from the orders. Be that as it may, for the purpose of this appeal it suffices to find that the appeal having been brought without the leave of the Trial Chamber, is *incompetent*.”²²

8. On 18 February 2011 the Pre-Trial Chamber II of the International Criminal Court (ICC) stated:

“once the Chamber has detected that the person concerned *lacks a procedural standing* before the Court, it should primarily *refrain from delving into the merits* of his/her application, save for exceptional situations where it deems necessary to ensure, for instance, future clarity, judicial economy and expeditiousness of the proceedings.”²³

21 The *Prosecutor v Birma et al*, Case No. SCSL-04-16-AR77, “Decision on Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii)”, Appeals Chamber, 23 June 2005, para 33.

22 The *Prosecutor v Birma et al*, Case No. SCSL-04-16-AR77, “Decision on Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii)”, Appeals Chamber, 23 June 2005, para. 36.

23 Situation in the Republic Of Kenya, ICC-01-09, “Decision on Application for Leave to Participate under Articles 58,42(5), (7)-(8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence”, Pre-Trial Chamber II, 18 February 2011, para 7.



9. On 4 April 2011 the Pre-Trial Chamber II of the ICC examined a motion from Counsel for the Defence *only* after finding that the latter had standing. It stated:

“With the 8 March 2011 Decision proceedings have past the article 58 stage, and the persons *summoned to appear before the Court have attained procedural standing* before the Chamber. Accordingly, *as of this moment, the suspects are subjected to the rights and obligations envisaged by law.* The Single Judge is also mindful of the wording of rule 121(1) of the Rules providing that a *suspect subject to a summons to appear shall enjoy the rights set forth in article 67 of the Statute*, which could be read literally to be applicable only as of the moment of his or her *initial appearance* before the Pre-Trial Chamber. The Single Judge, however, convinced of the principled consideration as stated above, recalls article 21(3) of the Statute which instructs that the interpretation and application of the law must be consistent with internationally recognized human rights. In light of this, the Single Judge has regard to the existing jurisprudence of, in particular, the European Court of Human Rights to article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms, and thus she concludes that *the rights guaranteed under article 67 of the Statute, including access to court, apply as soon as the Chamber has issued the summonses to appear* in accordance with article 58(7) of the Statute.”²⁴

10. On 1 September 2011 the Pre-Trial Chamber II of the ICC rejected a Request as soon as it found that the Requestor lacked standing.²⁵

11. Notwithstanding observations of the Pre-Trial Chamber related to the issue of standing, as correctly pointed out by the Requestor, following an understanding that “the crux of the argument of the Request [for Stay] lies on the right to legal representation,”²⁶ the Pre-Trial Chamber undertook a full examination²⁷ of the issues raised in the Request for Stay in order to determine whether such warranted its consideration as an appellate court. The Pre-Trial Chamber found that, as the matters stood at that time, such issues rested with

24 Situation in the Republic of Kenya in the case of the Prosecutor v. Muthaura et al, ICC-01/09-02-11, “Decision on Variation of Summons Conditions”, Pre-Trial Chamber II, 4 April 2011, para 11

25 Situation in the Republic of Kenya in the case of the Prosecutor v. Ruto et al, ICC-01/09-01/11, “Decision on the Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings”, Pre-Trial Chamber II, 1 September 2011, para 8.

26 Decision, para. 9.

27 Decision, paras. 10 – 13.




the Co-Investigating Judges. The Pre-Trial Chamber finds that there were no errors of law in its original decision, that there is no injustice and there are no changed circumstances which would cause it to reconsider the Decision. The Pre Trial Chamber further observes that the arguments in the Motion for Reconsideration are argumentative of the Decision and are without merit. It would be inappropriate for it to reconsider the Decision, especially under the circumstances when it has already observed that the Requestor, as part of the Administration of the ECCC and a non party, has no standing to bring motions or appear before this Chamber.²⁸

THEREFORE THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

The Motion for Reconsideration is dismissed.

Phnom-Penh, 04 October 2012

Pre-Trial Chamber



 Rowan DOWNING NEY Thol Chang-Ho CHUNG HUOT Vuthy PRAK Kimsan

²⁸ Prosecutor v. Delić, IT-04-83-A, Decision on Motion for Continuation of the Appellate Proceedings, Appeals Chamber, 29 June 2010.