



Lawyer's Fees Dispute Decision Highlights Administrative Irregularities in Case 004

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A recently published ruling on a funding dispute between a defense team and the international head of the Defense Support Section (DSS) provides a rare snapshot of activity in the confidential investigation of Case 004 at the Extraordinary Chambers in the Courts of Cambodia (ECCC). The judicial investigations in Cases 003 and 004, involving crime sites in discrete regions of Cambodia, have been ongoing for four years through the tenure of four different international investigating judges. Comparatively, the judicial investigation in Case 002, involving a countrywide conspiracy, took less than three years. This recent decision, like many others in Cases 003 and 004, brings to light serious procedural irregularities suggesting that some ECCC officials do not expect them to go to trial.

Until 2012, when reserve international Co-Investigating Judge (CIJ) Laurent Kasper-Ansermet informed the five officially unnamed Case 003 and 004 suspects of their right to counsel, both the CIJs and the Pre-Trial Chamber refused to recognize their right to court-appointed lawyers,¹ despite the fact that their names had been leaked and they were besieged by journalists seeking information about their alleged crimes. However, in May of this year, incumbent international CIJ Mark Harmon decided that—only because the suspects had been formally apprised of their right to counsel by Judge Kasper-Ansermet—they are now entitled to the defense rights embodied in ECCC Internal Rule 21(1)(d), including the right to counsel.²

Two of the four surviving suspects (the fifth died in June) have requested legal representation, and a team representing a Case 004 suspect was recently recognized by Judge Harmon—eight months after his international co-lawyer was assigned by the DSS (an autonomous arm of the Office of Administration) and over a year after his national co-lawyer was assigned.³ DSS assigned a second team of lawyers to represent a Case 003 suspect in December 2012; however, there is no publicly available information indicating that either his national or international co-lawyer has been recognized by the CIJs. Neither team is listed on the ECCC website.

Last Spring Judge Harmon recognized all Civil Party lawyers in Cases 003 and 004 and granted them access to the case file⁴ in order to facilitate their clients' right to participate in the judicial

¹ See, e.g., Decision on Defense 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 (PTC, Feb. 20, 2012).

² Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, ¶ 57 (May 17, 2013). See also Cambodia Tribunal Monitor Expert Commentary on Legal Filings, *Decision on Case 004 Suspect's Right to Counsel* (June 4, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

³ See *id.*, ¶¶ 108-09.

⁴ See, e.g., Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No. 004, ¶ 12 (CIJ, Apr. 1, 2013). See also 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>.

investigation. No defense lawyers in these cases have similar access despite repeated requests.⁵ Under the Court's Internal Rules, defense lawyers appear to be entitled to case file access only when their clients are charged with a crime by the CIJs. In Cases 001 and 002, the CIJs charged the accused within months of receiving the initial (charging) submission from the Co-Prosecutors and then continued their investigation with the participation of the defense teams, who had access to the case file. In contrast, in Cases 003 and 004, four years after the judicial investigation began, the persons named by the Co-Prosecutors in their initial investigation remain merely "suspects." Nevertheless, even a suspect's defense team may "conduct [by itself] *preliminary* investigations which are to be distinguished from requests by the defense for investigations to be carried out by the [CIJs.]"⁶

In June, Judge Downing of the Pre-Trial Chamber, acting as a United Nations Administrative Judge (UNAJ), invalidated the DSS head's refusal to fund a ticket for the Case 004 defense team's legal consultant to fly from Phnom Penh to the international co-lawyer's office in The Netherlands. In his ruling, the UNAJ castigated the DSS head for failing "to comply with the applicable legal requirements and to observe basic rules of natural justice or to act with procedural fairness" or "to properly and thoroughly take into consideration the totality of rights attached to [the suspect] at this stage of proceedings."⁷

According to the UNAJ, instead of evaluating whether the flight was "necessary and reasonable *for the effective advice and representation* of [the suspect]," and then determining if there was money in the budget, the DSS head rejected the request on primarily financial grounds without knowing or inquiring whether funding was available. Furthermore, throughout the decision-making process, the need to facilitate the suspect's proper defense was "not adequately or properly considered[.]" and his rights were "underestimated" with the justification that he is not yet a "charged person." However, "[w]hen dealing with matters related to people who are at the very least suspected of the commission of the most heinous crimes known to mankind, their rights to be properly represented are of the foremost importance[.]"⁸

Significantly, the UNAJ found that the DSS head had arbitrarily applied more restrictive funding guidelines to the Case 004 team than those applied in Cases 001 and 002 and still in force:

The UNAJ observes that the Head of DSS ... appears to have, knowingly, applied in his decision making process the non-final amendments to the Guide in a manner that openly disregarded and placed the Applicant and his client in a disadvantageous situation in comparison with the other Defence teams and their clients in Cases 001 and 002 while they were fulfilling their contractual obligation at the same stage of the proceedings as the Applicant is now. ... A change of the

⁵ Press Statement by Defence Team for a Names Suspect at the ECCC, Decision of UN Judge Highlights Failure of Defence Support Section to Ensure Effective Representation in Case 004 (July 26, 2013) (expressing concern that they did not yet have case file access "whereas this has been granted to the lawyers for the civil parties in Case 004").

⁶ Decision on Application Requesting Funding for Legal Consultant's Flight to the Office of the Co-Lawyer, ¶ 111 (June 25, 2013), *available at* <http://www.eccc.gov.kh/en/dss/defence-support-section/claims-decisions> (quoting the Guide to the Legal Assistance Scheme).

⁷ *Id.*, ¶ 102.

⁸ *Id.* ¶¶ 96 (emphasis in original), 105, 108-11.

policy now would clearly put those subject to investigations in Case 004 at a disadvantage in comparison with those subject to investigations in Cases 001 and 002 and would therefore be in breach of the principle of equality before the law.⁹

According to the suspect's defense team, Judge Downing, whose Pre-Trial Chamber rulings have highlighted prior aberrations in the administration of Cases 003 and 004,¹⁰ ordered the public release of the UNAJ decision last month. The little information publicly available continues to feature impediments to these cases proceeding in accordance with the rules in force and prior practice. The Court has issued no other information explaining why the investigations remain incomplete and no suspects have been charged.

⁹ *Id.* ¶¶ 101, 104, 105.

¹⁰ *See, e.g.*, Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED] (Feb. 13, 2013); Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Case No 003/07-09-ECCC/OCIJ (PTC02) (Oct. 24, 2011). *See also* Cambodia Tribunal Monitor Expert Commentary on Legal Filings, *Pre-Trial Chamber Judges Again Split Down National/International Lines* (Feb. 19, 2013).