

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 004/07-09-2009-ECCC/OCIJ (PTC) **Party Filing:** The Defence for IM Chaem
Filed to: The Pre-Trial Chamber **Original language:** English
Date of document: 7 August 2014

CLASSIFICATION

Classification of the document suggested by the filing party: **CONFIDENTIAL**



Classification by OCIJ or Chamber: សម្ងាត់បំផុត/Strictly Confidential

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IM CHAEM’S URGENT REQUEST TO STAY THE EXECUTION OF HER SUMMONS TO AN INITIAL APPEARANCE

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Judge Rowan DOWNING
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Reserve Judge Steven J. BWANA

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CHEA Leang
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Ms. IM Chaem, through her Co-Lawyers (“the Defence”), hereby requests the Pre-Trial Chamber to stay the execution of her Summons to an initial appearance (“Summons”) until the final determination of the Defence’s Appeal in relation to the validity of the Summons. The Defence is challenging the validity of the Summons on the basis that it has been signed by the International Co-Investigating Judge *alone*, evidently without the agreement of the National Co-Investigating Judge. The question is whether the International Co-Investigating Judge has the power to issue a *binding* summons to an initial appearance, and to charge a Suspect, acting entirely alone. This Request is made necessary because the validity of the Summons must be decided on before Ms. IM Chaem appears at her initial appearance and is charged on 8 August 2014. Although the Defence has not yet received a written decision on its Urgent Application to Seise the Pre-Trial Chamber with a request for Annulment of Ms. IM Chaem’s and her Co-Lawyers’ Summonses (“Application for Annulment”), the International Co-Investigating Judge made it clear to the Defence at a meeting on 6 August 2014 that he would reject it. The Defence is currently preparing an Appeal of the International Co-Investigating Judge’s written decision on its Application for Annulment. However, given that International Co-Investigating Judge Harmon’s written decision will not allow sufficient time to the Defence to appeal before Ms. IM Chaem’s initial appearance takes place on 8 August 2014, *i.e.* tomorrow, such Appeal would become academic once the Summons be executed. The granting of the stay would thus ensure that Ms. IM Chaem’s fundamental right to a fair trial is protected. Due to the urgency of the issue, this Request is filed in English, with the Khmer version to follow, because the Interpretation and Translation Unit cannot complete the translation before 8 August 2014, C.O.B.¹

I. JURISDICTION

1. The Pre-Trial Chamber has jurisdiction to hear this Request for a Stay. According to the Pre-Trial Chamber, requests for stay of proceedings can fall “within the general ambit of an application within Article 33 New of the Law on the Establishment of the Extraordinary

¹ Email from Mr. KORM Chanmony entitled “Re: Urgent request for translation”, 7 August 2014.
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Chambers in the Courts of Cambodia which relevantly provides that ‘trials are fair’.² Article 33 new of the Establishment Law provides that the ECCC shall exercise their jurisdiction in accordance with Articles 14 and 15 of the International Covenant on Civil and Political Rights (“ICCPR”). Articles 14 and 15 of the ICCPR are, in turn, reflected into Rule 21.³

2. The Pre-Trial Chamber has an inherent jurisdiction to order that Ms. IM Chaem’s Summons be stayed pending final determination on the Defence’s Appeal against the International Co-Investigating Judge’s rejection of the Defence’s Application for Annulment. As such, the Pre-Trial Chamber previously ordered that enforcement of an Order be suspended until final determination of the Appeal.⁴ When “the right to appeal before [the Pre-Trial Chamber] would be entirely academic”⁵ should the Order be executed before a decision is made on the Appeal. The Pre-Trial Chamber added that “it is in the interest of fair justice to exercise its inherent jurisdiction in order to suspend *proprio motu* enforcement of the Order pending final determination of the Appeal.”⁶

II. BACKGROUND

3. On 26 May 2014, the Defence requested access to the case file.⁷
4. On 13 June 2014, the Defence filed a letter requesting that all communications relating to Ms. IM Chaem include both of the Co-Investigating Judges and requesting that disagreements regarding her summoning and charging be referred to the Pre-Trial Chamber.⁸

² 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.

³ 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.

⁴ D14/1/2, *Order Suspending the Enforcement of the “Order on International Co-Prosecutor’s Public Statement regarding Case File 003”*, 13 June 2011.

⁵ D14/1/2, *Order Suspending the Enforcement of the “Order on International Co-Prosecutor’s Public Statement regarding Case File 003”*, 13 June 2011, para. 5.

⁶ D14/1/2, *Order Suspending the Enforcement of the “Order on International Co-Prosecutor’s Public Statement regarding Case File 003”*, 13 June 2011, para. 5.

⁷ D201, *IM Chaem’s Motion Requesting Order for Access to the Case File*, 21 May 2014.

5. On 26 June 2014, the Co-Investigating Judges responded that “[i]n respect of the disagreement referred to in [the Defence’s] Letter, the 30 day period prescribed in sub-rule 72(3) [of the Rules] has expired without any referral having been made to the [Pre-Trial Chamber].”⁹
6. From 26 June 2014, all communications to the Defence were made by the International Co-Investigating Judge alone.
7. On 25 July 2014, the Defence requested that the Co-Investigating Judges clarify their disagreements relating to Ms. IM Chaem’s case,¹⁰ in order to ascertain whether the earlier disagreement relied upon by the Co-Investigating Judges was the same or different from the current disagreement concerning the decision to summon Ms. IM Chaem, such that that disagreement could be relied upon in relation to the 30-day period having elapsed.
8. On 31 July 2014, International Co-Investigating Judge Harmon issued Ms. IM Chaem’s Summons to Initial Appearance scheduled for 8 August 2014.¹¹ On the same day he issued a summons requesting that the Defence attend Ms. IM Chaem’s scheduled initial appearance.¹²
9. On 1 August 2014, the Defence filed a letter stating that it did not consider Ms. IM Chaem’s Summons to be valid.¹³ On the same day, the Defence filed a letter requesting access to the case file prior to Ms. IM Chaem’s scheduled initial appearance.¹⁴

⁸ A122, *Request that all formal communications relating to Ms. IM Chaem include the two Co-Investigating Judges and request that disagreements regarding the summoning and charging of Ms. IM Chaem be referred to the Pre-Trial Chamber*, 13 June 2014.

⁹ A122/1, *Your letter requesting that all formal communications re the Suspect include the two Co-Investigating Judges and requesting disagreements regarding summoning and charging her be referred to the Pre-Trial Chamber*, 26 June 2014.

¹⁰ D204, *IM Chaem’s Motion requesting Clarification regarding Disagreements between the Co-Investigating Judges*, 25 July 2014, in which the Defence requested the Co-Investigating Judges to clarify their position with regard to: a) their understanding of Rule 72; b) the nature of the disagreements between the Co-Investigating Judges; c) the date at which the disagreements arose; and d) the Co-Investigating Judges’ reasons for such disagreements.

¹¹ A150, *Summons to Initial Appearance*, 31 July 2014.

¹² A151, *Summons of lawyer*, 31 July 2014. The Co-lawyers understand this summons to be merely in the nature of a request, in accordance with its wording. Moreover, the International Co-Lawyer is on a long-standing family holiday in Europe on 8 August 2014 and unable to attend any initial appearance on that date in any event.

¹³ A151/2, *Response to our summons to attend Ms. IM Chaem’s proposed initial appearance on 8 August 2014*, 1 August 2014, where the Defence reiterates that until and unless the Co-Investigating Judges respond to the IM CHAEM’S URGENT REQUEST TO STAY THE EXECUTION OF HER SUMMONS TO INITIAL APPEARANCE

10. On 1 August 2014, the International Co-Investigating Judge filed a letter arguing that a single investigating judge may issue a summons alone.¹⁵ On the same day, International Co-Investigating Judge Harmon filed a letter denying the Defence's request for access to the case file prior to Ms. IM Chaem's proposed initial appearance.¹⁶
11. On 6 August, the Defence filed an Application for Annulment of Ms. IM Chaem and the Defence's Summonses.¹⁷
12. On 6 August 2014, during a meeting convened by the International Co-Investigating Judge, the latter made it clear to the Defence that he would deny the Defence's Application for Annulment. The Defence will be appealing this Decision.¹⁸

III. ARGUMENT

13. The Defence requests the Pre-trial Chamber to stay the execution of Ms. IM Chaem's Summons issued by International Co-Investigating Judge's Harmon, acting alone, before her initial appearance takes place on 8 August 2014.
14. While the Defence has not received the International Co-Investigating Judge's written decision rejecting the Defence's Application for Annulment, he made it clear to the Defence that he would deny it. However, it does not appear, to the Defence, that the International Co-Investigating Judge will render a written decision in time for the Defence to appeal before Ms. IM Chaem's initial appearance takes place.

Defence's Motion requesting Clarification as to the Co-Investigating Judges' Disagreement (D204), it does not consider a summons signed by only one of the Co-Investigating Judges as being valid. The Defence therefore declines the invitation to attend Ms. IM Chaem's proposed initial appearance.

¹⁴ A151/1, *Letter requesting access to the Case File prior to Ms. IM Chaem's proposed initial appearance and requesting that her initial appearance be rescheduled at a later date*, 1 August 2014.

¹⁵ A122/6, International Co-Investigating Judge Harmon's *Response Concerning Modalities of Service of IM Chaem's Summonses*, 1 August 2014.

¹⁶ A151/1/1, International Co-Investigating Judge Harmon's Letter to the Defence (no subject), 1 August 2014.

¹⁷ *IM Chaem's Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of her and her Co-Lawyers Summonses dated 31 July 2014*, 6 August 2014. The Defence notes that the Application has not been attributed any document number yet.

¹⁸ The Defence notes that a Notice of Appeal will be filed as soon as the Defence receives the International Co-Investigating Judge's rejection of the Defence's Application for Annulment.

15. Ms. IM Chaem must not be compelled to comply with a Summons with a view to charging her that may later be found by the Pre-Trial Chamber to be *ultra vires* or otherwise invalid and, therefore, annulled. For Ms. IM Chaem to comply with her Summons, prior to the final determination by the Pre-Trial Chamber of her Appeal, prejudices her irreparably and renders her challenge to the validity of the summons academic and moot. Indeed, the issuance of the Summons by the International Co-Investigating Judge alone, moreover in circumstances where the nature of his disagreement with his National Co-Investigating Judge has not been clarified at the Defence's request, amounts to a procedural defect which clearly impairs the fairness of the entire proceedings in the Case relating to Ms. IM Chaem, as well as impairing the latter's rights to legal certainty and to transparency of the proceedings, as provided for pursuant to Rule 21. As such, Rule 21 provides that the ECCC legal framework "shall be interpreted so as to always safeguard the interests of Suspects".¹⁹ It would not be in the interests of justice, nor in her own interests, for Ms. IM Chaem to attend an initial appearance, during which she will be charged, before the Pre-Trial Chamber has had time to rule on the validity of her Summons to initial appearance. The execution of Ms. IM Chaem's Summons prior to the Pre-Trial Chamber's ruling would, therefore, render her appeal meaningless.
16. Conversely, there is no, or little, prejudice to the International Co-Investigating to delay Ms. IM Chaem's Summons until the Pre-Trial Chamber Judges have ruled on the issue of its validity. Certainly none has been identified. The delay would amount to days or weeks at most, in the context of an investigation that has already gone on for many *years*. It is, therefore, entirely unclear why there should be any rush to her initial appearance and charging before these issues of fundamental importance and the basic human right to a fair process are litigated upon by the Pre-Trial Chamber. In addition, the Co-Investigating Judges have not yet ruled on the two motions relating to Ms. IM Chaem's fundamental right to a fair trial that the Defence filed.²⁰ The only responses the Defence received were that the

¹⁹ Rule 21(1).

²⁰ See, D201, *IM Chaem's Motion Requesting Order for Access to the Case File*, 21 May 2014; D204, *IM Chaem's Motion requesting Clarification regarding Disagreements between the Co-Investigating Judges*, 25 July 2014.

Motions will be answered “in due course.”²¹ It follows that, pending decisions of the Co-Investigating Judges’ on these two motions, no urgency exists that would compel the International Co-Investigating Judge to proceed with the execution of Ms. IM Chaem’s Summons on 8 August 2014. Finally, the Defence would note that the Summons was only served on Ms. IM Chaem on 31 July 2014. It was open to the Co-Investigating Judge to serve the Summons much earlier, so that the issue of its validity, when it was signed by the International Co-Investigating Judge alone, could have been properly raised, litigated upon and appealed in a leisurely fashion, or at any rate within a reasonable time-frame, without the need for urgent applications which now exist.

17. Granting the Defence’s Request to stay the execution of Ms. IM Chaem’s Summons is therefore necessary, so as to ensure that her fair trial rights are protected and that she is not the victim of the secret administration of justice.

IV. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to STAY the execution of Ms. IM Chaem’s Summons until the final determination by the Pre-Trial Chamber of Ms. IM Chaem’s Appeal against the International Co-Investigating Judge’s rejection of her Application for Annulment.

Respectfully submitted,



BIT Seanglim



John R.W.D. Jones QC

Co-Lawyers for Ms. IM Chaem

Signed on this 7th day of August, 2014

²¹ See, D201/1, International Co-Investigating Judge’s Response to *IM Chaem’s Motion Requesting Order for Access to the Case File*, 26 June 2014; D204/1, International Co-Investigating Judge’s Greffier’s Response to *IM Chaem’s Motion Requesting Clarification Regarding Disagreements Between the Co-Investigating Judges*, 28 July 2014.