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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D117/1/12

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° 003/07-09-2009-ECCC/OCIJ (PTC13)

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

Date: 3 December 2014

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DECISION ON MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S ORDER ON SUSPECT'S REQUEST CONCERNING SUMMONS SIGNED BY ONE CO-INVESTIGATING JUDGE

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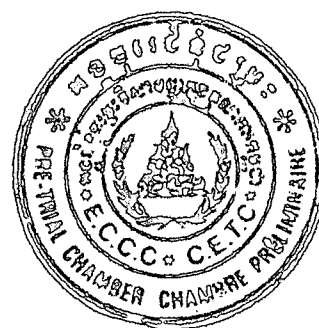
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Decision on Appeal against Clarification on Validity of Summons



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of an Appeal filed on 27 October 2014 by the Co-Lawyers for MEAS Muth (the “Appellant”) against an Order issued by the International Co-Investigating Judge (the “ICIJ”) on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge” (the “Appeal”).¹

I. PROCEDURAL BACKGROUND

1. On 18 July 2014, the Co-Lawyers sent a letter to the Office of the Co-Investigating Judges requiring information on the nature of the disagreements dated 7 and 22 February 2013 between the National and International Co-Investigating Judges (the “Disagreements”), which the Co-Lawyers did not have access to.² On 22 July 2014, the ICIJ replied by informing as follows:

“2. All Disagreements are strictly confidential *ex parte* matters except as provided in Internal Rule 72(4)(b). Accordingly, the International CIJ is not in a position to inform you of their content or general nature. Reference to such Disagreements in OCIJ decisions is purely formal references underpinning signature by a single judge and in order to display respect for relevant time periods.

3. For your information, *the Disagreements have not been brought before the Pre-Trial Chamber and the time for such referral prescribed by Internal Rule 72(2) has expired*.”³

2. On 11 August 2014, the Voice of America published an article stating that IM Cheam was summoned to appear before the ECCC.⁴

3. On 13 August 2014, the Appellant requested the Co-Investigating Judges to provide clarification on the validity of a summons issued by one Co-Investigating Judge alone *for the purpose of charging*, arguing, *inter alia*, that the law is unclear as to the validity of such summons (the “Request”).⁵ The Co-Lawyers argued in the Request that in case the the “ICIJ” decided to *unilaterally* summon MEAS Muth, the Co-Lawyers would require from both Co-Investigating Judges a legal reasoning of the validity of such summon in

¹MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Order to on Suspect’s Concerning Summons Signed by One Co-Investigating Judge, 27 October 2014, D117/1/1/1.

² Letter from Co-Investigating Judge Harmon to Defence, *Request for Information Concerning Disagreements recorded on 7 February 2013 and 22 February 2013*, 22 July 2014, D82/3/2, para.1.

³ *Ibid.*, para. 2 and 3.

⁴ Sock Khemara, *Additional Khmer Rouge Suspect To Appear at Tribunal Monday*, VOa Khmer, 11 August 2014, available at <http://www.voacambodia.com/content/additional-khmer-rouge-suspect-to-appear-at-tribunal-monday/2409141.html>.

⁵ Request for information concerning the validity of a summons issued by one Co-Investigating Judge, D117, 18 August 2014.



order to be able to “meaningfully advise” the Appellant. Lastly, the Co-Lawyers submitted that the summons to a suspect, unlike that directed to a witness, does not constitute investigative action.⁶

4. On 15 August 2014, the Pre – Trial Chamber issued a Decision addressing the validity of summons to another Suspect issued by one Co-Investigating Judge alone (the “PTC Case 004 Decision”).⁷ In that case, where the Co-Investigating Judges had registered the disagreement and had not brought it before the Pre-Trial Chamber by the 30 day time limit, the Pre-Trial Chamber held that the summon is valid and in compliance with the ECCC legal compendium.
5. On 1 September 2014, the ICIJ issued a clarification in reply to another request, similar to the Request in question, submitted by another Suspect in Case 004 (the “Case 004 Clarification”).⁸
6. Subsequently, on 26 September 2014, the ICIJ issued the Order regarding the Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge (the “Impugned Order”).⁹ The ICIJ clarified that the validity of summons to a Suspect signed by only one Co-Investigating Judge is regulated in Articles 5 and 7 of the ECCC Agreement, Article 23 new of the ECCC Law and Internal Rule 72(5).¹⁰ The ICIJ further informed the Co-Lawyers, in respect of their argument that the Summon to a Suspect for initial appearance is not an investigative action falling under Internal Rule 72, that the ICIJ has already addressed such issue in Case 004¹¹ and that the Pre-Trial Chamber has also unequivocally confirmed the power of one Co-Investigating Judge to alone issue a valid summons to a Suspect in such circumstances.¹²
7. On 27 October 2014, the Appellant filed the Appeal. There was no Response to the Appeal filed within the legal deadline. The Appellant does not make a request for hearing on

⁶ Letter from Case 003 to OCIJ *Request for information concerning the validity of a summons issued by one Co-Investigating Judge*, 13 August 2013, D117.

⁷ 004/07-09-2009- ECCC/OCIJ (PTC 09), Decision on IM Chaem’s Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014, A 122/6.1/3, para 14.

⁸ Case 004 International Co-Investigating Judge’s Clarification on Validity of Summons Signed by one of the Co-Investigating Judges, D117/1.1, 1 September 2014.

⁹ Order on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge, 26 September 2014, D117/1.

¹⁰ *Ibid.*, para. 3.

¹¹ *Ibid.*, referring to the Case 004 Clarification, para. 11:

¹² *Ibid.*, para. 4 referring to the PTC Case 004 Decision.



appeal although, he argues in the Appeal, that “the Defence must have an opportunity to be heard by the Pre-Trial Chamber before [its] reasoning in Case 004 can have precedential effect in Case 003”.¹³ The Pre-Trial Chamber decided to proceed on the basis of the written submissions on Appeal which are sufficient for it to fully understand the issues raised by the Appellant before it.

II. SUBMISSIONS ON APPEAL

8. In the Appeal, the Co-Lawyers ask the Pre-Trial Chamber to: 1) Admit the Appeal and 2) Find that a summons issued by one Co-Investigating Judge acting alone is invalid.
9. The Co-Lawyers submit that the appeal is admissible under Internal Rule 21, in order to safeguard the Appellant’s *right to legal certainty*. To this end, the Co-Lawyers refer to national¹⁴ and international jurisprudence¹⁵ to set out the criteria a law must comply with in order to be considered legally certain, requiring it to be “[c]lear and precise, as well as accessible and intelligible”.¹⁶ The Co-Lawyers further submit that the principle of legal certainty, although not expressly established in the Cambodian Constitution, is a principle of Law recognized in Cambodia which is protected through the right of citizens to appeal the constitutionality of laws,¹⁷ through the right of defence safeguarded by the availability of judicial recourse and by the respect for the fair trial rights.¹⁸ The Co-Lawyers argue that judicial recourse is inadequate and fair trial rights cannot be respected where procedural rules are vague and uncertain. In this respect, to the Co-Lawyers’ understanding, the law on summoning at the ECCC is uncertain as to whether a Co-Investigating Judge can act alone. In addition, the Co-Lawyers contend that in Case 003 this issue has not been dealt with and therefore Decisions issued in Case 004 cannot act as a precedent because the Appellant is not a party to Case 004.¹⁹ In any event, the Co-Lawyers argue, “the reasoning in the PTC Case 004 Decision seems to be incorrect.”²⁰ Finally, the Co-Lawyers argue the

¹³ The Appeal, para. 17.

¹⁴ The Appeal, para. 11

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 11.

¹⁷ *Ibid.*, para. 12 referring to Article 141 new Constitution of Cambodia dated 24 September 1994 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11,12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and Other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia, adopted by National Assembly on 4 March 1999.

¹⁸ Appeal, para. 12.

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*, para. 17.



Appeal should be admitted through a broad interpretation of the right to appeal under Internal Rule 21.²¹

10. Firstly, the Co-Lawyers argue in the Appeal that Article 5(4) of the Agreement and Article 23 new of the Establishment Law as well as Rule 1(2) must be interpreted as to require the Co-Investigating Judges to act jointly.²² In this line, they add that the exception to this interpretation could be found in the *delegation of powers* of one Co-Investigative Judge in favour of the other, recalling that there is no indication that the National Co-Investigating Judge has delegated his power to sign summonses to the ICIJ.²³ Further *assuming* that a summon for *initial appearance* is a “summon for the purpose of charging”, the Co-Lawyers argue that in order to charge a Suspect the Rules seek the existence of “clear and consistent evidence”,²⁴ hence if the Co-Investigative Judges disagree in this respect, the evidence cannot be considered clear and consistent, rendering “[i]mproper for one Co-Investigative Judge to issue a summons *and to charge* a Suspect on his own”.²⁵ When such *doubts* exist, the Co-Lawyers suggest, the Cambodian Constitution provides for resolution in favour of the defence.²⁶
11. Secondly, the Co-Lawyers submit that the Agreement and the Establishment Law do not provide for summons to be issued by one Co-Investigating Judge alone in the case of a disagreement.²⁷ As Meas Muth has repeatedly informed the Co-Investigating Judges that he has no intention of answering any questions and will *exercise his right to remain silent*, the Co-Lawyers assume that “summoning Mr. Meas Muth *could only be for the purpose of charging him.*”²⁸ Such type of summoning, the Co-Lawyers argue, does not relate to whether the investigation will proceed but rather to *whether an eventual trial may proceed*. The Agreement and Establishment Law, the Co-Lawyers continue, do not address such a situation, and previous jurisprudence, where the Pre-Trial Chamber rejected arguments that the action performed by ICIJ Lemonde acting alone to summon *witnesses* was invalid, is

²¹ *Ibid.*, para. 19. Referring to Decision on YENG Sary’s Appeal against the Co-Investigative Judges’ 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, 20 September 2010, D390/1/2/4.

²² The Appeal, para. 23 and 24.

²³ *Ibid.*, para. 25.

²⁴ *Ibid.*, para 26 referring to Rule 5(4).

²⁵ *Ibid.*, para 26.

²⁶ *Ibid.*

²⁷ *Ibid.*, paras. 27-30.

²⁸ *Ibid.*, para. 29.



not relevant to the instant case because ICIJ Lemonde's action related only to whether *the investigation* may proceed, according to the Co-Lawyers.²⁹

12. Thirdly, the Co-Lawyers argue that Internal Rule 72(3) cannot be relied upon by one Co-Investigating Judge to issue a summons alone because, in providing that “[a]ll actions or decisions which are the subject of a disagreement will be executed”, the rule goes beyond what is provided in the Agreement and in the Establishment Law which require the Co-Investigating Judges to work together.³⁰
13. Lastly, the Co-Lawyers argue that, even if the applicable law may be interpreted to allow a Co-Investigating Judge to act alone to summon a Suspect, the ICIJ erred by placing no limit on *when* a Co-Investigating Judge may issue a summons alone.³¹ The Co-Lawyers contend that the expression used by the ICIJ in the Impugned Order that “[a] summons to a suspect issued by one Co-Investigating Judge is valid and binding”³² *broadens the applicability* of such premise to mean that such is *always* permissible. Claiming to be unaware “whether the Co-Investigating Judges have disagreed about whether to summon Mr. Meas Muth” and referring to the reasoning of the PTC Decision in Case 004, the Co-Lawyers ask the Pre-Trial Chamber to instruct the ICIJ that before summoning a Suspect *for the purpose of charging* the ICIJ should “first record *the* disagreement with Co-Investigative Judge YOU Bunleng and to wait until the 30-day period has elapsed or until YOU Bunleng refers to the Pre-Trial Chamber”.³³

III. ADMISSIBILITY

14. The Appellant does not argue that the Appeal is admissible under Internal Rules 73 or 74, which set out the explicit jurisdiction of the Pre-Trial Chamber, but rather suggests that the Pre-Trial Chamber should declare it admissible under Internal Rule 21 in order to safeguard the Suspect's right to *legal certainty*. Internal Rule 21 provides, in its relevant parts:

Rule 21. Fundamental Principles

²⁹ *Ibid.*, paras. 28 and 30.

³⁰ The Appeal, paras. 31 – 33.

³¹ The Appeal, paras. 34 – 35.

³² *Ibid.*, para 34. *citing* Impugned Order para. 5.

³³ *Ibid.*, para 34 and 36.



1. “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as *to ensure legal certainty* and transparency of proceedings, in light of the inherent specificity of the ECCC, *as set out in the ECCC Law and the Agreement.*”
15. The Pre-Trial Chamber previously held that the fundamental principles expressed in Internal Rule 21, which reflect the fair trial requirements that the ECCC is bound to apply pursuant to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia,³⁴ Article 35^{new} of the ECCC Law³⁵ and Article 14(3) of the International Covenant on Civil and Political Rights,³⁶ may warrant that it adopts a liberal interpretation of the right to appeal in order to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of the parties.³⁷ Where the particular facts and circumstances of a case required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or “serious issue[s] of fairness” under Internal Rule 21.³⁸ This being said, Internal Rule 21 does not provide an automatic avenue for appeals raising arguments based on fair trial rights; for the Pre-Trial Chamber to exercise appellate jurisdiction under the said rule, the appellant must demonstrate that in the particular circumstances of the case at stake, the Pre-Trial Chamber’s intervention is necessary to prevent an *irremediable damage* to the fairness of the proceedings or the appellant’s fair trial rights. The Pre-Trial Chamber recently found inadmissible under Internal Rule 21 another appeal lodged by the Appellant seeking clarification of the law in respect of a hypothetical scenario.³⁹ The Pre-Trial Chamber held that “[t]he rights to legal

³⁴ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea Democratic, 6 June 2003.

³⁵ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Kampuchea Democratic, with inclusion of amendments as promulgated on 27 October 2004 (“ECCC Law”).

³⁶ See, e.g., Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC64), Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, paras. 13-18; 27.

³⁷ See, e.g., Case 002 (PTC11), Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/1/20, para. 36; Case 002 (PTC71), Decision on IENG Sary’s Appeal against Co-Investigating Judges’ 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 Proceedings, 20 September 2010, D390/1/2/4 (“Decision on IENG Sary’s Response”), para. 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No. 2 (“Decision on Errors in Translation”), para. 3; Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

³⁸ See, e.g., Case 002 (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, 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary’s Response, para. 13 and Decision on Errors in Translations, paras 2-6.

³⁹ Decision on YIM Tith’s Appeal against the Decision Denying His Request for Clarification, 13 November 2014, D205/1/1/2.



*certainty and transparency of proceedings do not require that judicial bodies settle legal issues before they actually arise, out of their factual and contextual background” and found that it “has no jurisdiction to deal with hypothetical matters or provide advisory opinions”.*⁴⁰

16. The Pre-Trial Chamber notes, however, that although the Request envisages a scenario that is hypothetical and seeks clarification of the law, the ICIJ has elected to entertain it through the Impugned Decision. The Appellant now seeks to challenge the substance of the clarification provided by the ICIJ before the Pre-Trial Chamber and to get the Pre-Trial Chamber to express its own understanding of the law, arguing that it is part of his right to legal certainty. As recalled by the ICIJ in the Impugned Decision, the Pre-Trial Chamber has previously held that a summons issued by one Co-Investigating Judge for the purpose of charging is valid where the disagreement procedure set forth in Internal Rule 72 has been complied with and the 30 day time period to bring it before the Pre-Trial Chamber has elapsed.⁴¹ As to the threshold for charging, it is explicitly set out in Internal Rule 55(4). Whether this threshold is met or not in a particular case is a question of fact that cannot be examined in the abstract. In these circumstances, the Pre-Trial Chamber finds that the Appellant’s argument that the ICIJ’s interpretation of the law set forth in the Impugned Decision impairs his right to legal certainty is without merit.
17. The Pre-Trial Chamber therefore finds that the Appeal is inadmissible.



⁴⁰ *Ibid.*, para. 9.

⁴¹ Impugned Decision, para. 4 making reference to the PTC Case 004 Decision, para. 14 which was made available to the Appellant.

IV. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

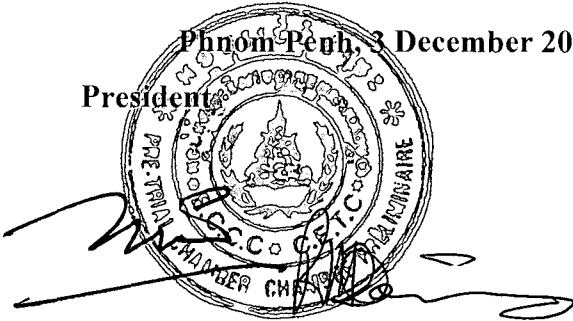
DISMISSES the Appeal as inadmissible.

In accordance with Internal Rule 77(13), this decision is not subject to appeal.²²

Phnom Penh, 3 December 2014

President

Pre-Trial Chamber



PRAK Kimsan Rowan DOWNING

NEY Thol

정창호

Chang-ho CHUNG

HUOT Vuthy