

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IM CHAEM'S URGENT APPLICATION TO SEISE THE PRE-TRIAL CHAMBER
WITH A REQUEST FOR ANNULMENT OF HER AND HER CO-LAWYERS'
SUMMONSES DATED 31 JULY 2014**

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Ms. IM Chaem, through her Co-Lawyers (“the Defence”), hereby submits, pursuant to Rules 48 and 76(2) of the Internal Rules (“Rules”), this Urgent Application to seize the Pre-Trial Chamber with a request for annulment of her summons to an initial appearance (“Ms. IM Chaem’s Summons”) and of the Defence’s summons to attend Ms. IM Chaem’s proposed initial appearance (“Co-Lawyers’ Summons”). This Application is made necessary because: a) the Summonses are signed only by one Co-Investigating Judge; b) the International Co-Investigating Judge intends to charge Ms. IM Chaem without giving her the opportunity to be heard; and c) the Co-Investigating Judges have not yet clarified the nature of their disagreements as previously requested by the Defence. As such, Ms. IM Chaem’s fundamental rights to be tried by a tribunal established by law, to legal certainty, and to transparency of proceedings are being violated. The Defence needs to be satisfied that the Summonses have been issued in accordance with the ECCC legal framework, in order to protect Ms. IM Chaem’s fundamental rights. Accordingly, the Defence requests a stay of Ms. IM Chaem’s and her Co-Lawyers’ Summonses until such time as the Co-Investigating Judges a) seize the Pre-Trial Chamber in view to annul the Summonses; and b) clarify the nature of their disagreements. This Application is filed in English with the Khmer version to follow because the Interpretation and Translation Unit cannot complete the translation in a timely manner.

I. BACKGROUND

1. On 21 May 2014, the Defence filed a Motion requesting Access to the Case File,¹ which has not yet been ruled on.²

¹ D201, *IM Chaem’s Motion requesting Order for Access to the Case File*, 21 May 2014.

² The Defence notes that the only response it received was that “the International Co-Investigating Judge has placed the Request on the case file and will answer it in due course.” See, D201/1, International Co-Investigating Letter in Response to *IM Chaem’s Motion requesting Order for Access to the Case File*, 26 June 2014. The Defence also notes that the International Co-Investigating Judge impliedly denied the Request, without legal reasoning, by stating that the Defence “will of course be granted access to the case file after the initial appearance.” See, A151/1/1, Co-Investigating Judge Harmon’s Letter to the Defence (no subject), 1 August 2014.

2. On 13 June 2014, the Defence filed a letter requesting that communications relating to Ms. IM Chaem include the two Co-Investigating Judges and requesting that disagreements regarding her summoning and charging be referred to the Pre-Trial Chamber.³
3. 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].”⁴ From 26 June 2014, all communications to the Defence were made by the International Co-Investigating Judge alone.
4. On 27 June 2014, International Co-Investigating Judge Harmon informed the Defence that Ms. IM Chaem’s initial appearance was scheduled for 8 August 2014, and informing the Defence that Ms. IM Chaem’s Summons would be either served on her personally, or on the Defence on Ms. IM Chaem’s behalf and with her authorization.⁵
5. On 18 July 2014, the Defence informed the two Co-Investigating Judges that Ms. IM Chaem’s Summons should be served on her personally. The Defence also requested that a courtesy copy of Ms. IM Chaem’s Summons be served on them.⁶
6. On 25 July 2014, the Defence requested that the Co-Investigating Judges clarify their disagreements relating to Ms. IM Chaem’s case with them.⁷ No response has been received to date.⁸

³ 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.

⁴ 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.

⁵ A122/2, *Preparation of Initial Appearance of the Suspect*, 27 June 2014. On 15 July 2014, International Co-Investigating Judge Harmon granted the Defence’s Request for an extension of time to reply to his 27 June 2014’s Letter. See, A122/4, *Preparation of Initial Appearance of the Suspect*, 15 July 2014, in response to A122/3, *Request for an extension of time to reply to your Letter concerning the preparation of Initial Appearance of Ms. IM Chaem*, 8 July 2014.

⁶ A122/5, *Modalities of service of Ms. IM Chaem’s Summons*, 18 July 2014.

7. On 31 July 2014, International Co-Investigating Judge Harmon issued Ms. IM Chaem's Summons to appear at her initial appearance scheduled on 8 August 2014.⁹ On the same day he issued a summons requesting that the Co-Lawyers attend their client's initial appearance.¹⁰
8. On 1 August 2014, the Defence filed three letters to the Co-Investigating Judges: a letter stating that they did not consider the summons to the client to be valid;¹¹ a letter requesting access to the case file prior to Ms. IM Chaem's proposed initial appearance;¹² and a letter reiterating their request to receive a courtesy copy of Ms. IM Chaem's Summons.¹³
9. On 1 August 2014, the International Co-Investigating Judge filed two letters: a letter arguing that a single investigating judge may issue a summons alone;¹⁴ and a letter denying the

⁷ 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.

⁸ The only response received by the Defence is that the Motion "has been placed on the case file, and it will be answered in due course." See, D204/1, Office of the Co-Investigating Judges' Greffier's *Response to Im Chaem's Motion requesting Clarification regarding Disagreements between the Co-Investigating Judges*, 28 July 2014.

⁹ A150, *Summons to Initial Appearance*, 31 July 2014.

¹⁰ 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.

¹¹ 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 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.

¹² 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.

¹³ A151/3, *Request for a courtesy copy of Ms. IM Chaem's summons to appear at an initial appearance on 8 August 2014*, 1 August 2014. The Defence notes that courtesy copy of Ms. IM Chaem's Summons was received on 1 August 2014. See, A122/6.1, *Courtesy Copy of Summons to Initial Appearance*, 1 August 2014.

¹⁴ A122/6, International Co-Investigating Judge Harmon's *Response Concerning Modalities of Service of IM Chaem's Summons*, 1 August 2014, *attaching* A122/6.1, *Courtesy Copy of Summons to Initial Appearance*, 1 August 2014.

Defence's request for access to the case file prior to Ms. IM Chaem's proposed initial appearance.¹⁵

II. ADMISSIBILITY

10. This Application is admissible pursuant to Rule 48, which provides that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.” Rule 21(1) provides for the rights of, *inter alia*, Suspects in the proceedings before the ECCC. As such, Rule 21(1) requires that 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, ... and so as to ensure legal certainty and transparency of proceedings.”¹⁶ The issues stated herein relate to the fundamental fairness of the proceedings against Ms. IM Chaem, in light of Rule 21(1).

III. APPLICABLE LAW

11. Article 31 of the Cambodia Constitution provides: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”
12. Article 12(2) of the Agreement also reads “[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.”
13. Article 33 new of the Establishment Law states: “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice,

¹⁵ A151/1/1, International Co-Investigating Judge Harmon's Letter to the Defence (no subject), 1 August 2014.

¹⁶ Emphasis added.

fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”

14. Rule 73 states: “the [Pre-Trial] Chamber shall have sole jurisdiction over: ... b) applications to annul investigative action, as provided in Rule 76.”
15. Rule 76(2) states: “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.”
16. Rule 48 provides: “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”
17. Rule 21(1) reads: “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 ...”
18. Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), to which Cambodia is a party, provides for the right to a fair trial in criminal proceedings. In particular, Article 14(1) of the ICCPR reads: “... [E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

IV. ARGUMENT

19. Ms. IM Chaem’s fundamental right to be tried by a tribunal established by law is guaranteed to her by the Constitution,¹⁷ the Agreement,¹⁸ the Establishment Law,¹⁹ and the ICCPR.²⁰

¹⁷ Article 31 of the Cambodia Constitution provides: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” Article 14 of the ICCPR, to which Cambodia

Ms. IM Chaem also has the rights to legal certainty and to transparency of proceedings, guaranteed to her under the Rules.²¹ She has the fundamental right to a fair trial. The Summons issued by International Co-Investigating Judge Harmon, acting alone, prevents her from enjoying the aforementioned rights, and thus violates them.

20. The Defence submits that annulment of Ms. IM Chaem's Summons, and, therefore, of the Co-Lawyers' Summons, must be granted pursuant to Rule 48 of the Rules. That is because 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, and where the International Co-Investigating Judge intends to charge Ms. IM Chaem without giving her the chance to be heard, amount to procedural defects which clearly impair 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. The Pre-Trial Chamber, in its *Decision on Nuon Chea's Appeal against Order refusing Request for Annulment*,²² held that "a proven violation of a right of a Charged Person, recognized in the ICCPR, would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled."²³ Because Articles 14 and 15 of the ICCPR are reflected into Rule

is a party, provides for the fundamental right to a fair trial, including the right to be tried by a tribunal established by law. *See*, ICCPR, Art. 14(1).

¹⁸ Article 12(2) of the Agreement reads "[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party."

¹⁹ Article 33 new of the Establishment Law states: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights."

²⁰ ICCPR, Art. 14(1).

²¹ Rule 21(1).

²² D55/I/8, *Decision on NUON Chea's Appeal against Order refusing Request for Annulment*, 26 August 2008 ("PTC Decision on Annulment").

²³ PTC Decision on Annulment, para. 40. *See also*, D263/2/6, *Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order rejecting the Request to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1)*, 25 June 2010, para. 18, where the Pre-Trial Chamber held that when "considering an application under Internal Rule 76(2), the Co-Investigating Judges must only be formally satisfied that there is an

21,²⁴ which provides that the ECCC legal framework “shall be interpreted so as to always safeguard the interests of Suspects”,²⁵ it can safely be said that the violation of a Suspect’s right may also qualify as a procedural defect.

21. The Defence submits that the International Co-Investigating Judge’s decision to charge Ms. IM Chaem amounts to a procedural defect because: a) Summonses issued by a single investigating judge are not legally binding; b) the process of charging Ms. IM Chaem includes her right to be interviewed and to access the Case File; and c) no clarification has yet been given as to the nature of the disagreements between the Co-Investigating Judges.
22. **First**, the Defence reiterates its previous submissions that Summonses issued by a single investigating judge are not legally binding.²⁶ In its previous submissions, the Defence recalls that the Co-Investigating Judges have been instituted with the aim of cooperating in all investigations,²⁷ which constitute their joint responsibility.²⁸ International Co-Investigating Judge Harmon himself, in his *Decision on the Defence Requests to Access the Case File and Take Part in the Judicial Investigation*,²⁹ acknowledges the requirement that the charging is a prerogative of the two Co-Investigating Judges. Indeed, when summing up the substantive and formal requirements for charging a suspect during an investigation,³⁰ the International Co-Investigating Judge held that the “decision to charge is a prerogative of the CIJs”,³¹ using the plural rather than the singular. Such ruling is consistent with the ECCC legal provisions

application supported by a reasoned argument making assertions that there has been a procedural defect and that such defect infringes the rights of the party making the application.”

²⁴ See, 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.

²⁵ Rule 21(1).

²⁶ See, A122/5, *Modalities of service of Ms. IM Chaem’s Summons*, 18 July 2014; D204, *IM Chaem’s Motion requesting Clarification regarding Disagreements between the Co-Investigating Judges*, 25 July 2014; A151/2, *Response to our summons to attend Ms. IM Chaem’s proposed initial appearance on 8 August 2014*, 1 August 2014.

²⁷ Art. 5(4) of the Agreement reads: “The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation” (emphasis added).

²⁸ Art. 23 new of the Establishment Law. See also, Art. 5(1) of the Agreement.

²⁹ D121/4, *Decision on the Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 31 July 2013 (“ICIJ Decision on Request to Access the Case File”).

³⁰ ICIJ Decision on Request to Access the Case File, paras 40-44.

³¹ ICIJ Decision on Request to Access the Case File, para. 40.

relating to the cooperation between the two Co-Investigating Judges,³² and constantly recalled by the Defence: Without any cooperation between the Co-Investigating Judges, when they are part of a legal system that consecrates at every level the necessity of cooperation between the international and Cambodian counterparts,³³ it may truly be said that Ms. IM Chaem is not being investigated, nor will she be charged, by a tribunal established by law. For Ms. IM Chaem to undergo the fundamental step in the proceedings of being charged, with all that it entails in terms of the ensuing criminal proceedings and the gravity of the implications for her, when it is the act of an International Co-Investigating Judge acting alone, makes a mockery of the concept that the ECCC is part of the Cambodian legal system. Fundamentally important decisions regarding the ECCC, of which the decision to charge a person is clearly one, can and must be one in which Cambodians play some role, or the ECCC loses any claim to be a Chamber *in the Courts of Cambodia*.

23. The International Co-Investigating Judge argued that action taken by a single investigating judge is legally valid, apparently without any limitation whatsoever, based on the Pre-Trial Chamber's *Public Decision on Ieng Sary's Appeal Against the Closing Order*.³⁴ However it is readily apparent that this Decision does not and cannot support the proposition that a summons issued to a Suspect, with a view to charging him or her, signed only by an International Co-Investigating Judge is, under all and any circumstances, legally valid and binding. The Defence notes that the Decision relied upon by the Co-Investigating Judge

³² See, Art. 1 of the Agreement which reads: "The purpose of the present Agreement is to regulate cooperation between the United Nations and the Royal Government of Cambodia ... The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation"; Art. 5(1) of the Agreement which provides: "There shall be one Cambodian and one international investigating judge serving as co-investigating judges"; Art. 5(4) of the Agreement, which reads: "The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation"; Art. 23 new of the Establishment Law which states: "All investigations shall be the joint responsibility of the two co-investigating judges, one Cambodian and another foreign"; Rule 14(4) which reads: "[e]xcept for actions that must be taken jointly under the ECCC Law and ... [the Internal Rules], the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually"; Rule 72(3), which provides that throughout "the dispute settlement period, the Co-Investigating Judges shall continue to seek consensus".

³³ See, Art. 1 of the Agreement.

³⁴ A122/6, International Co-Investigating Judge Harmon's *Response concerning Modalities of Service of IM Chaem's Summons*, 1 August 2014, referring to D427/1/30, *Public Decision on Ieng Sary's Appeal Against the Closing Order*, 11 April 2011 ("PTC Decision on the Closing Order"), paras 272-77.

relates to investigative actions taken by a single Co-Investigating Judge. As such, and this is not challenged, the Pre-Trial Chamber recalled that “in the case of requests for investigative action made to the Co-Investigating Judges and as appealed to the Pre-Trial Chamber, actions taken or requests granted by only one investigating judge have been upheld.”³⁵ However, the decision to charge a suspect is not an investigative action,³⁶ and therefore, cannot be taken by a single investigating judge acting alone. Accordingly, a summons issued with a view to charging a suspect cannot be considered as an investigative action either.

24. In addition, the Pre-Trial Chamber, in its *Public Decision on Ieng Sary’s Appeal Against the Closing Order*, relied upon by the International Co-Investigating Judge, observed that the Co-Investigating Judges, dealing with the issue of trial for national crimes, had decided by mutual agreement to send the accused in Case 002 to trial.³⁷ In Ms. IM Chaem’s case, not only has no ruling been made as to whether a single Co-Investigating Judge may legally summon her with a view to charging her, despite disagreements with his National counterpart, but the decision to summons Ms. IM Chaem with a view to charging her clearly does not result from a *mutual agreement* between the Co-Investigating Judges.³⁸ On the contrary, Ms. IM Chaem is being investigated by the International side of the Office of the Co-Investigating Judges only, and it may readily be inferred that the National Co-Investigating Judge does *not* agree to charge her. If that inference is incorrect, the Co-Investigating Judges will no doubt immediately correct this perception.

³⁵ PTC Decision on the Closing Order, para. 275.

³⁶ See, Rule 55(5), which provides that “the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth” and gives a list of investigative actions, which does not include the decision to charge a suspect.

³⁷ PTC Decision on the Closing Order, para. 272-274. See also, PTC Decision, para. 274, where the Pre-Trial Chamber notes that not only the Co-Investigating Judges had decided by mutual agreement to grant the Requests but they also agreed on the conclusion to send the accused for trial for the national crimes.

³⁸ The Defence notes that all the submissions relating to the summoning and charging of Ms. IM Chaem have been made by the International Co-Investigating Judge only, which denotes the absence of “mutual agreement” between the Co-Investigating Judges. See, A122/2, *Preparation of Initial Appearance of the Suspect*, 27 June 2014; A122/4, *Preparation of Initial Appearance of the Suspect*, 15 July 2014; A150, *Summons to Initial Appearance*, 31 July 2014; A151, *Summons of lawyer*, 31 July 2014; A122/6, International Co-Investigating Judge Harmon’s *Response Concerning Modalities of Service of IM Chaem’s Summons*, 1 August 2014; A151/1/1, International Co-Investigating Judge Harmon’s Letter to the Defence (no subject), 1 August 2014.

25. **Second**, the Defence submits that the process of charging Ms. IM Chaem includes her right to be interviewed and to access the Case File. The International Co-Investigating Judge has stated that the purpose of Ms. IM Chaem's scheduled initial appearance is not to interview her, but to record her identity, to notify her of the charges, and to inform her of her right to a lawyer and to remain silent.³⁹ While International Co-Investigating Judge Harmon previously recognized that, although French jurisprudence is "not directly applicable or binding [it] may provide useful guidance in the interpretation of the Internal Rules",⁴⁰ that jurisprudence is now being disregarded, without any reasons being given. Under French law, central to the initial appearance is the interview of the Suspect before he or she is formally charged.⁴¹ The Suspect's lawyer must be summoned five days prior to the interview of the person he assists,⁴² and be granted the opportunity to consult the case file four days prior to the interview.⁴³ If this time period is not respected, the investigating judge cannot proceed with the interview.⁴⁴ Accordingly, and as recognized by International Co-Investigating Judge Harmon, guidance as to the interpretation of the Rules relating to the charging of Suspects should be taken from French law. As such, Ms. IM Chaem should be interviewed at her initial appearance, before she is charged, and the Defence should be granted access to the case file prior to her interview. This is also an aspect of Ms. IM Chaem's fundamental right to be heard. Moreover, if the International Co-Investigating Judge has decided to charge Ms. IM Chaem without first hearing her side of the story, that shows that he has already made up his mind about her potential responsibility for certain crimes, and believes that *nothing she could say* would affect his opinion on that matter. That implies that the

³⁹ A151/1/1, Co-Investigating Judge Harmon's Letter to the Defence (no subject), 1 August 2014.

⁴⁰ ICIJ Decision on Request to Access the Case File, para. 44.

⁴¹ See, Article 116 of the French Code of Criminal Procedure, which provides that the investigating judge may proceed with the charging of a suspect only after having recorded the suspect's statements or carrying out his interrogation. See, for a similar wording, Article 80-2 of the same Code. Besides, the French Code of Criminal Procedure makes it clear that the charging may not take place until after the suspect's initial appearance before the investigating judge. See, Article 80-1 of the French Code of Criminal Procedure.

⁴² French Code of Criminal Procedure, Art. 114 al. 2.

⁴³ French Code of Criminal Procedure, Art. 114 al. 3.

⁴⁴ French Code of Criminal Procedure, Art. 172. However, the investigating judge may proceed when the person voluntarily waive his or her right to the respect of the time limit. Such waiver may be done only in the presence of the person's lawyer. See, French Code of Criminal Procedure, Art. 172.

International Co-Investigating Judge has pre-judged her responsibility and is not maintaining an open mind as to her potential responsibility. These considerations make it all the more of concern that he is acting alone, in the face of the disagreement of his National counterpart.

26. Consequently, the International Co-Investigating Judge's act of issuing a Summons to Ms. IM Chaem appears to be all the more *ultra vires* because International Co-Investigating Judge Harmon has decided to charge Ms. IM Chaem without any agreement whatsoever from his National counterpart, and without giving her the opportunity to be heard at her proposed initial appearance.
27. **Third**, the Defence notes that no clarification has yet been given as to the nature of the disagreements between the Co-Investigating Judges. Ms. IM Chaem is now in a situation of total uncertainty and suffers from a lack of transparency of proceedings in Case 004. While International Co-Investigating Judge Harmon held that the charging of a suspect is a prerogative that the two Co-Investigating Judges share, only he signed Ms. IM Chaem's Summons to appear with a view to being charged.⁴⁵ Ms. IM Chaem does not know why the National Co-Investigating Judge did not sign her Summons. In the ICIJ Decision on Request to Access the Case File, the International Co-Investigating Judge recalled that there must be "clear and consistent evidence" that a suspect may be responsible for the commission of crime in order to charge him or her.⁴⁶ The refusal of the National Co-Investigating Judge to sign the Summons issued to Ms. IM Chaem casts substantial doubts as to whether *clear and consistent evidence* exists. According to Co-Investigating Judges Blunk and You, "in Case 004 ... unlike in Case 002, there are serious doubts whether the suspects are 'most responsible' according to the jurisdictional requirement of Article 2 ECCC Law."⁴⁷ While this statement was made in 2011, there is nothing to suggest that it is any the less accurate today, especially in light of the National Co-Investigating Judge's refusal to sign Ms. IM Chaem's Summons. Because the Defence does not have access to the Case File relating to

⁴⁵ See, A122/6.1, *Summons to Initial Appearance*, 31 July 2014.

⁴⁶ ICIJ Decision on Request to Access the Case File, para. 40. See also, ICIJ Decision on Request to Access the Case File, paras. 41, 44.

⁴⁷ Statement by the Co-Investigating Judges regarding Civil Parties in Case 004, 8 August 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004>.

the proceedings in Case 004, it cannot verify and challenge the lack of clear and consistent evidence that Ms. IM Chaem may be responsible for the commission of a crime. For this reason, it is essential that the Co-Investigating Judges clarify the nature of their disagreements, so as to ensure that Ms. IM Chaem is protected from the secret administration of justice, before they – or one of them – take any action.

V. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that the Co-Investigating Judges STAY Ms. IM Chaem's and her Co-Lawyer's Summonses dated 31 July 2014 until the Co-Investigating Judges SEISE the Pre-Trial Chamber with a Request for Annulment of Ms. IM Chaem's and her Co-Lawyers' Summonses and CLARIFY their disagreements on the proceedings relating to Ms. IM Chaem.

Respectfully submitted,



BIT Seanglim



John R.W.D. Jones QC

Co-Lawyers for Ms. IM Chaem

Signed on this 6th day of August, 2014