



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

D212/1/2/2

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° 004/07-09-2009-ECCC/OCIJ (PTC14)

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

Date: 4 December 2014

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de réception):	
04 / 12 / 2014	
ម៉ោង (Time/Heure) : 13:35	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé	
du dossier: SANN RADA	

PUBLIC (REDACTED VERSION)

DECISION ON [REDACTED] APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S CLARIFICATION ON THE VALIDITY OF A SUMMONS ISSUED BY ONE CO-INVESTIGATING JUDGE

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████ Appeal against the International Co-Investigating Judge’s Clarification on the Validity of a Summons Issued by One Co-Investigating Judge”, filed in English on 15 September 2014 and in Khmer on 27 October 2014 (the “Appeal”).¹

I. PROCEDURAL BACKGROUND

1. On 21 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, alleging that there is “a real possibility” that he be summoned for charging by the International Co-Investigating Judge (the “ICIJ”) and that the law is unclear as to the validity of such a summons (the “Request for Clarification”).²
2. On 1 September 2014, the ICIJ clarified that “pursuant to the applicable law, a summons to a suspect issued by one Co-Investigating Judge is valid and binding” (the “Impugned Decision”).³ The ICIJ emphasised that the Request for Clarification raised a hypothetical scenario but elected to entertain it as he considered that the Appellant’s Co-Lawyers were misunderstanding an important aspect of the judicial investigation.⁴ The ICIJ rejected the Co-Lawyers’ argument that the “clear and consistent evidence” requirement for charging implies the invalidity of a summons issued by a single Co-Investigating Judge as “ill-founded” and without merits.⁵ The ICIJ held that “[i]n circumstances where the provisions of Internal Rule 72 have been fully complied with, the validity of a summons to a Suspect signed by one Co-Investigating Judge is clearly expressed in the applicable law, and specifically in Articles 5 and 7 of the ECCC Agreement, Article 23 new of the ECCC Law and Internal Rule 72”,⁶ and referred to the Pre-Trial Chamber’s recent holding to this effect, expressed in a decision issued on 15 August 2014 in respect of another suspect in the same

¹ D212/1/2/1.

² ██████████ Request for Clarification regarding the validity of a Summons issued by one Co-Investigating Judge for the purpose of charging him, 21 August 2014, D212.

³ International Co-Investigating Judge’s Clarification on Validity of Summons Signed by One of the Co-Investigating Judges, D212/1, para. 13.

⁴ Impugned Decision, paras 6 and 7.

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*, para. 11.



case.⁷ The Appellant was provided with a redacted version of the said decision, which was classified as “strictly confidential”, on 8 September 2014.⁸

3. On 9 September 2014, the Appellant filed a notice of appeal against the Impugned Decision and, on 15 September 2014 and 27 October 2014, he filed the Appeal in English and Khmer, respectively. The Appellant argues that the Appeal is admissible under Internal Rule 21, as the contradicting holdings from the ICIJ jeopardise his right to legal certainty.⁹ In particular, the Appellant argues that it is contradictory for the ICIJ to hold, on the one hand, that “clear and consistent evidence” must exist against the Appellant before he is charged” and, on the other hand, that a summons can validly be issued by one Co-Investigating Judge alone for the purposes of charging.¹⁰ In the Appellant’s view, “[b]y definition, there is doubt and ambiguity over the evidence if one Co-Investigating Judge does not agree to charge.”¹¹ Accordingly, the Appellant requests the Pre-Trial Chamber “to clarify that a valid and binding summons cannot be issued by one Co-Investigating Judge for the purpose of charging a Suspect as clear and consistent evidence must exist against the Suspect before he is charged.”¹²
4. No response was filed by the Co-Prosecutors or the lawyers for the Civil Parties or Civil Party Applicants within the legal deadline.

II. ADMISSIBILITY

5. The Appellant does not allege that the Appeal is admissible under Internal Rules 73 or 74, which set out the explicit jurisdiction of the Pre-Trial Chamber, but rather argues that the Pre-Trial Chamber should declare it admissible under Internal Rule 21. This Rule provides, in its relevant parts:

Rule 21. Fundamental Principles

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects,

⁷ *Ibid.*, para. 12, referring to Decision on [Redacted] Urgent Request [Redacted], A122/6.1/3, 15 August 2014 (“Pre-Trial Chamber Decision on Urgent Request”), para. 14.

⁸ Decision on [Redacted] Request for Document A122/6.1/3, 8 September 2014, D212/1/1/1.

⁹ Appeal, para. 9.

¹⁰ *Ibid.*, para. 13.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, p. 8.



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.

6. 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,¹³ Article 35^{new} of the ECCC Law¹⁴ and Article 14(3) of the International Covenant on Civil and Political Rights,¹⁵ 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.¹⁶ 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 21.¹⁷ 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, 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.¹⁸ The Pre-Trial Chamber held that “[t]he rights to legal certainty and transparency of proceedings do not require that judicial bodies settle legal issues before

¹³ 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.

¹⁴ 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”).

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

¹⁸ Decision on [REDACTED] Appeal against the Decision Denying His Request for Clarification, 13 November 2014, D205/1/1/2.



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”.¹⁹

7. The Pre-Trial Chamber notes that although the Request for Clarification sought an advisory opinion on a hypothetical question, the ICIJ has elected to entertain it as he considered that the Appellant’s Co-Lawyers were misunderstanding an “important aspect of judicial investigations at the ECCC”.²⁰ The Appellant now seeks to challenge the substance of clarification provided by the ICIJ before the Pre-Trial Chamber and 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 previously held that a summons issued by one investigating judge for the purpose of charging under Internal Rule 57 is valid if the disagreement procedure set forth in Internal Rule 72 has been complied with.²¹ 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 merits.
8. The Pre-Trial Chamber therefore finds that the Appeal is inadmissible.

III. 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. ^{ca}



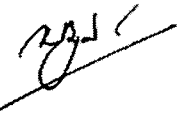
Phnom Penh, 14 November 2014

President




PRAK Kimsan Rowan DOWNING

Pre-Trial Chamber

NEY Thol Chang-ho CHUNG HUOT Vuthy

¹⁹ *Ibid.*, para. 9.

²⁰ Impugned Decision, paras 6 and 7.

²¹ Pre-Trial Chamber Decision on Urgent Request, para. 14.