



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

D120/1/1/2

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC18)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Steven J. BWANA
Judge HUOT Vuthy

Date: 17 June 2015

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PUBLIC

DECISION ON MEAS MUTH'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONSTRUCTIVE DENIAL OF MEAS MUTH'S MOTION TO STRIKE THE INTERNATIONAL CO-PROSECUTOR'S SUPPLEMENTARY SUBMISSION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “MEAS Muth’s Appeal against the Co-Investigating Judges’ Constructive Denial of MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission” filed on 3 March 2015 (the “Appeal”)¹.

A. BACKGROUND

2. On 7 September 2009, the then acting International Co-Prosecutor filed the Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea (the “Introductory Submission”) with the Co-Investigating Judges, requesting the opening of a judicial investigation into a number of crimes allegedly committed by MEAS Muth along with another suspect.²
3. On 4 November 2014, the International Co-Prosecutor issued a press release stating that on 31 October 2014, he filed a Supplementary Submission principally intended to remove any ambiguities as to the scope of the Introductory Submission but also to request the Co-Investigating Judges to include additional possible crimes to the judicial investigation (the “Supplementary Submission”)³.
4. On 19 November 2014, MEAS Muth filed a motion to strike the Supplementary Submission from the Case File on the grounds that “a. the dispute settlement procedure does not allow Supplementary Submissions to remove ambiguities to be filed by one Co-Prosecutor; b. the International Co-Prosecutor is interfering with the judicial investigation by attempting to control its scope under the guise of ‘remov[ing] any ambiguities’; and c. accepting the Supplementary Submission would violate Mr. MEAS Muths’s fundamental fair trial right to be tried within a reasonable time” (the “Motion to Strike”)⁴.

¹ D120/1/1/1.

² Second Introductory Submission Regarding the Revolutionary Army of Democratic Kampuchea, 20 November 2008, D1; Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

³ Press Release, Statement by the International Co-Prosecutor Nicholas Koumjian Regarding Case File 003, 4 November 2014. It is noted that at the time of filing the Appeal, MEAS Muth had no access to the Case File, including to the Supplementary Submission.

⁴ MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 19 November 2014, D120/1, introductory paragraph.



B. THE APPEAL

5. On 6 January 2015, MEAS Muth filed a notice of appeal against the “constructive denial” of his Motion to Strike. On 3 March 2015, he filed the Appeal. MEAS Muth argues that the Co-Investigating Judges’ failure to decide on his Motion to Strike four months after its filing amounts to a constructive denial of the said motion given that the investigation into new crimes delays the investigation and, as a result, impairs MEAS Muth’s right to be tried within a reasonable time.⁵ MEAS Muth argues that the Appeal is admissible under Internal Rule 21 as the only avenue to protect his fair trial right to be tried within a reasonable time.⁶ Alternatively, MEAS Muth argues that the Pre-Trial Chamber could assume jurisdiction over the Appeal on the basis of Internal Rule 73(b), which gives the Chamber jurisdiction over applications to annul investigative actions, as the Motion to Strike seeks to annul a “procedurally defective Supplementary Submission”.⁷ Consequently, MEAS Muth asks the Pre-Trial Chamber to: 1) admit the Appeal and 2) order the Co-Investigating Judges to strike the Supplementary Submission from the Case File.⁸
6. No response has been filed to the Appeal within the applicable time limit.

C. ADMISSIBILITY

7. MEAS Muth does not challenge a decision of the Co-Investigating Judges but rather argues that their delay in deciding on his Motion to Strike amounts to a constructive denial of the said motion and opens a possibility to appeal. The Pre-Trial Chamber recalls that pursuant to Internal Rules 73 and 74, it has jurisdiction to hear appeals against “decisions” or “orders” issued by the Co-Investigating Judges. However, the Pre-Trial Chamber previously considered that a request filed by a party that has remained unanswered by the Co-Investigating Judges may be deemed to have been rejected when the Co-Investigating Judges have (i) failed to rule on it within the set legal deadline, if applicable; or (ii) delayed making their decision so as to deprive the party of the possibility of obtaining the benefit sought.⁹ When a request or application is deemed to have been denied by the Co-

⁵ Appeal, paras 12-17.

⁶ Appeal, paras 18-19.

⁷ Appeal, para 20.

⁸ Appeal, para 22.

⁹ Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC10), Decision on IENG Sary’s Appeal regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8 (“Decision on Appointment of Expert”), paras



Investigating Judges, the requesting party may seize the Pre-Trial Chamber provided that the matter falls within the ambit of its jurisdiction *rationae materiae*.¹⁰

8. Where the rules set not time limit for the Co-Investigating Judges to issue a decision, such as in the present case, a mere delay in considering a request does not amount to a constructive refusal. For the inaction of the Co-Investigating Judges to be interpreted as a refusal, it must be demonstrated that the request, by its nature, required “timely attention” lest it would become meaningless.¹¹ As the Chamber recently recalled, “the constructive refusal doctrine [...] has been applied by the Pre-Trial Chamber to cover *exceptional situations* where the inaction of the Office of the Co-Investigating Judges or the delay in acting may cause prejudice”.¹² Indeed, the only case where the Pre-Trial Chamber admitted an appeal against a constructive refusal concerns a request to appoint a psychiatric expert to evaluate IENG Sary’s fitness to participate in his defence, which the Co-Investigating Judges had explicitly deferred to a later stage of the proceedings. The Pre-Trial Chamber found that the Co-Investigating Judges’ decision to defer their consideration of the request amounted to a constructive refusal given that fundamental issues such as provisional detention and jurisdictional challenges were being decided and IENG Sary’s Co-Lawyers argued that he may not have been fit to participate in these proceedings.¹³ All further attempts to seize the Pre-Trial Chamber without a decision being first issued by the Co-Investigating Judges have been unsuccessful. In particular, the Pre-Trial Chamber found that there was no constructive refusal where i) the applicable procedural rules do not envisage a decision on the matter at that stage of the proceedings and the issue can be brought before the Chamber later without violating the appellant’s fair trial rights (*e.g.* issues that are to be addressed in a Closing Order but that parties sought to resolve in

22-24. *See also, e.g.* Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC12), Decision on Appeal against Constructive Dismissal of TA An’s Fourth Request for Investigative Action, 22 October 2014 (“Decision on TA An Fourth Request”), para. 8; PTC10, Decision on MEAS Muth’s Appeal against the Co-Investigating Judges’ Denial of Fourteen of MEAS Muth’s Submissions to the Office of the Co-Investigating Judges, 23 April 2014, D87/2/2 (“Decision on MEAS Muth’s Fourteen Submissions”), paras 10-11; Case 002 (PTC46), Decision on Appeal against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (NUON Chea’s Twelfth Request for Investigative Action), 14 July 2010, D300/1/5, para. 20.

¹⁰ *See, e.g.*, Case 002 (PTC29), Decision on IENG Sary’s Appeal Against the Co-Investigating Judges’ Constructive Denial of IENG Sary’s Third Request for Investigative Action, 22 December 2009, D171/4/5, para 9.

¹¹ *See* Decision on Appointment of Expert, paras 18-25.

¹² Decision on TA An Fourth Request, para. 11.

¹³ Decision on Appointment of Expert, paras 18-25. *See also* paras 14-17 where the Pre-Trial Chamber discussed its subject matter jurisdiction over the appeal.



advance through declaratory relief);¹⁴ ii) the appellant had “not demonstrated that his asserted rights are at risk of being *irremediably impaired*”;¹⁵ iii) the rules provide for an adequate remedy, which remains available at a later stage, to address the alleged violation of rights or irregularities in the investigation, hence the appellant’s fair trial rights are sufficiently protected by the existing legal framework (*e.g.* the possibility to file an application for annulment pursuant to Internal Rule 76);¹⁶ iv) the Co-Investigating Judges indicated that they were in the process of considering the request or application;¹⁷ and v) the Co-Investigating Judges gave a valid reason for deferring their decision on the matter.¹⁸

9. In the present case, MEAS Muth argues that the delay in deciding on his Motion to Strike deprives him of the benefit he seeks, which is to strike the Supplementary Submission from the case file immediately, on the ground that the addition of new crimes will further delay the judicial investigation and violate his right to be tried within a reasonable time.¹⁹ The Pre-Trial Chamber finds that although MEAS Muth seeks to obtain an immediate relief, the Co-Investigating Judges’ delay in considering the Motion to Strike does not amount to a constructive refusal, for two reasons.
10. Firstly, it is clear from the record that the Co-Investigating Judges have not denied the Motion to Strike; rather, the International Co-Investigating Judge has deferred his decision until MEAS Muth becomes a party to the proceedings and, as such, is allowed to file submissions before the Co-Investigating Judges. The Motion was filed on 19 November 2014. At the time, the International Co-Investigating Judge was in the process of determining MEAS Muth’s legal status under the Internal Rules and his standing to file submissions before the Co-Investigating Judges, given that he had not been formally

¹⁴ Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order on IENG Sary’s Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11 (“Decision on Order on Application of Command Responsibility”), para 11. *See also* Decision on MEAS Muth Fourteen Submissions, para. 34.

¹⁵ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC17), Decision on [REDACTED] Appeal against the Co-Investigating Judges’ Constructive Denial of his Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 27 February 2015, D229/1/2 (“Decision on Disclosure”), para. 8.

¹⁶ Decision on MEAS Muth Fourteen Submissions, paras 20, 32. *See also* Case 002 (PTC31), Decision on Admissibility of IENG Sary’s Appeal Against the OCIJ’s Constructive Denial of IENG Sary’s Request Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2009, D130/7/3/5, paras 26-39.

¹⁷ Case 003 (PTC10), Decision on MEAS Muth’s Appeal against the Co-Investigating Judges’ Constructive Denial of MEAS Muth’s Request to Access the Case File and to Participate in the Judicial Investigation, 9 September 2014, D87/2/3, paras 10-11.

¹⁸ Decision on MEAS Muth Fourteen Submissions, paras 12-13.

¹⁹ Appeal, paras 13-15.



charged following the procedure set forth in Internal Rule 57.²⁰ In the International Co-Investigating Judge's view, suspects named in an Introductory Submission who have not been charged pursuant to Internal Rule 57 are not parties to the proceedings, hence not allowed to file submissions to the Co-Investigating Judges unless they can justify a particular interest as a "suspect".²¹ This position was challenged before the Pre-Trial Chamber but remained binding as the Pre-Trial Chamber could not reach a majority of four votes to dispose of the matter.²² The situation changed on 3 March 2015, when MEAS Muth was formally charged for a number of crimes alleged in the Introductory Submission and informed that he is now a party to the proceedings and allowed to participate in the judicial investigation.²³ On 17 March 2015, MEAS Muth requested the Co-Investigating Judges to address a number of his pending submissions but his request did not include the Motion to Strike.²⁴ The Co-Investigating Judge advised on 26 March 2015 that given the change in MEAS Muth's legal status, he was now in the process of considering MEAS Muth's pending submissions.²⁵ Although the Motion to Strike is not specifically mentioned, it is expected that it will similarly be considered in the near future.

11. Secondly, MEAS Muth has not demonstrated that the deferral of a decision on his Motion to Strike would ultimately deprive him of the benefit which he seeks. Proceedings that are found to be null and void may be annulled and removed from the case file up until the issuance of a Closing Order.²⁶ Hence, an appropriate remedy remains available at a later stage to remove the Supplementary Submission from the case file should it be found to be invalid. MEAS Muth's argument that the Pre-Trial Chamber's intervention is necessary at

²⁰ Notification Concerning Suspect's Requests to Access the Case File and Participate in the Judicial Investigation (D82) and the Full Introductory Submission and Supporting Material (D82/2), 10 July 2014, D82/3, para. 16; Decision on MEAS Muth's Request to Place all Submissions on the Case File, 28 July 2014, D108/1, para. 3. *See also* Notification on Suspect's Requests to Access the Case File, Take Part in the Judicial Investigation, and to Strike ICP's Submissions, 28 November 2014, D82/5, paras 16-17.

²¹ *See, e.g.*, Case 004, Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4.

²² *See* Case 004 (PTC05), Considerations of the Pre-Trial Chamber on TA An's Appeal against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014, D121/4/1/4. *See also*, on MEAS Muth's legal status, PTC15, Considerations of the Pre-Trial Chamber on MEAS Muths' Appeal against the Co-Investigating Judges' Constructive Refusal to Seize the Pre-Trial Chamber with Two Annulment Applications, 23 January 2015, D103/5/2.

²³ Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128; Annex, Notification of Charges against MEAS Muth, 3 March 2015, D128.1.

²⁴ MEAS Muth's Request for the Co-Investigating Judges to Act on His Past Submissions, 17 March 2015, D132.

²⁵ Response to MEAS Muth's Request for the Co-Investigating Judges to Act on His Past Submissions, 26 March 2015, D132/1.

²⁶ Internal Rule 76(2).



this stage to prevent a violation of his right to be tried within reasonable time and, therefore, justifies the admissibility of the Appeal is unconvincing. It is emphasised that when no decision has been issued in first instance, the Pre-Trial Chamber can only be seised of the matter if it can be inferred from the circumstances of the case that the Co-Investigating Judges have, in effect, denied a request filed to them. The fact that a delay in considering a request may prolong the investigation does not indicate that the Co-Investigating Judges have dismissed it. In any event, the investigation is ongoing on a number of factual allegations set out in the Introductory Submission and there is no indication at this stage that it is delayed by the investigation into the additional crimes set out in the Supplementary Submission.

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Appeal as inadmissible.

Phnom Penh, 17 June 2015

President

Pre-Trial Chamber



[Signature]
Prak Kimsan

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