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ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge
Nation Religion Roi

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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 No. 003/07-09-2009-ECCC/OCIJ (PTC23)

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

Date: 23 September 2015

PUBLIC

CONSIDERATIONS OF THE PRE-TRIAL CHAMBER ON MEAS MUTH'S URGENT REQUEST FOR A STAY OF EXECUTION OF ARREST WARRANT

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of an urgent request filed by MEAS Muth on 8 June 2015 for a stay of execution of the Arrest Warrant issued against him on 4 June 2015 by the International Co-Investigating Judge (the “Request for a Stay of Execution”).¹

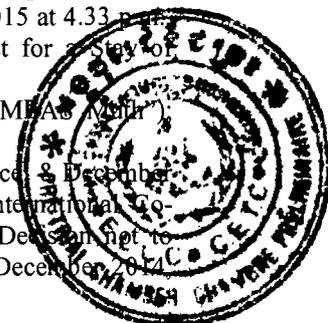
I. BACKGROUND

1. On 3 March 2015, the International Co-Investigating Judge decided to charge MEAS Muth *in absentia* and notified him of the charges against him through a written notice to his Co-Lawyers (the “Decision to Charge MEAS Muth”).² The decision stemmed from proceedings initiated by the International Co-Investigating Judge on 28 November 2014, which sought to secure MEAS Muth’s initial appearance on 8 December 2014, but to no avail.³
2. On 31 March 2015, the Co-Lawyers for MEAS Muth (the “Defence”) seised the Pre-Trial Chamber of an appeal against the Decision to Charge MEAS Muth (the “Appeal”). The Appeal, consisting of sixty-one pages and filed only in English, comprised a request to exceed the page limit laid down by the Practice Direction on Filing of Documents before the ECCC, as well as a request to file initially in English, with a Khmer translation to follow. As the Pre-Trial Chamber was not fully constituted at the time, the Defence’s preliminary motions could not be entertained until 19 May 2015. On 26 May 2015, the Chamber informed the Defence that its request for extension of pages, as it stood, could not be considered because it was included in the Appeal itself, and invited the Defence to file a

¹ MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal Against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *In Absentia*, 8 June 2015 [The Request was notified on 8 June 2015 at 4.33 pm, the time limit for filing a response therefore started to run on 9 June 2015], C2/1 (“Request for a Stay of Execution”).

² Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128 (“Decision to Charge MEAS Muth In Absentia”), Notification of Charges Against MEAS Muth, 3 March 2015, D128.1.

³ Summons to Initial Appearance, 28 November 2014, A66; Written Record of Initial Appearance, 8 December 2014, D122 (on 8 December 2014, the Co-Lawyers for MEAS Muth appeared before the International Co-Investigating Judge, but MEAS Muth did not); Notification Concerning Mr. MEAS Muth’s Decision Not to Recognise Summons, 3 December 2014, A67/1.1; Notice of Non-Recognition of Summons, 2 December 2014, A67/1.1; Arrest Warrant, 10 December 2014, C1.



separate request by 29 May 2015.⁴ The Defence filed its request on 28 May 2015 (the “Request for Extension of Pages”).⁵

3. On 4 June 2014, the International Co-Investigating Judge issued an Arrest Warrant, ordering the Judicial Police to bring MEAS Muth before him for a hearing concerning provisional detention under Internal Rule 63 (the “Arrest Warrant”).⁶
4. On 8 June 2015, the Defence filed the Request for a Stay of Execution, moving the Pre-Trial Chamber to order the International Co-Investigating Judge to stay the execution of the Arrest Warrant pending the Chamber’s ruling on its Request for Extension of Pages and its Appeal.⁷
5. On 10 June 2015, the Pre-Trial Chamber dismissed the Request for Extension of Pages.⁸ In order to ensure that the Defence suffered no prejudice as a result of the dismissal of its Request, the Chamber extended the time limit for appeal to 16 June 2015. The Defence filed its Appeal Brief on 16 June 2015.⁹
6. On 22 June 2015, the International Co-Prosecutor filed a Response to the Request for a Stay of Execution, moving the Pre-Trial Chamber to dismiss it as inadmissible and, in any event, as without merit (the “Response”).¹⁰
7. On 29 June 2015, the Defence filed a reply, requesting the Pre-Trial Chamber to dismiss the Response as inadmissible and strike it from the case file, and to grant its Request for a Stay of Execution *posthaste* (the “Reply”).¹¹

⁴ “Email from Pre-Trial Chamber to Defence, “Meas Muth’s Appeal against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth In Absentia”, 26 May 2015, Item 11 of the C2/1.1.

⁵ MEAS Muth’s Request for Extension of Pages to Appeal Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *In Absentia*, 28 May 2015, D128/1/1.

⁶ Arrest Warrant, 4 June 2015, C2.

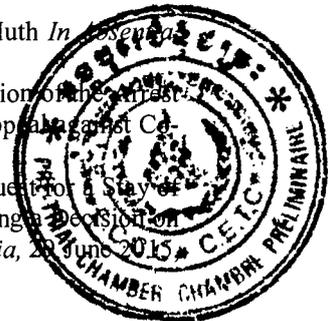
⁷ Request for a Stay of Execution, Conclusion.

⁸ Decision on MEAS Muth’s Request for Extension of Pages to Appeal Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth In Absentia, 10 June 2015, D128/1/2.

⁹ MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *In Absentia*, 16 June 2015, D128/1/3.

¹⁰ International Co-Prosecutor’s Response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth In Absentia, 22 June 2015, C2/2.

¹¹ MEAS Muth’s Reply to International Co-Prosecutor’s Response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal Against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *In Absentia*, 29 June 2015, C2/3 (the “Reply”).



II. SUBMISSIONS OF THE PARTIES

8. The Defence first submits that the Pre-Trial Chamber has the authority to order a stay of execution of the Arrest Warrant under “a broad interpretation of Rule 21”, on the ground that a decision on this matter is necessary to ensure fairness of the proceedings during the investigations.¹² On the merits, the Defence argues that it is impermissible for the International Co-Investigating Judge to continue the investigation of MEAS Muth and contemplate his provisional detention, while the Defence has challenged the lawfulness of the International Co-Investigating Judge’s decision to charge him *in absentia*.¹³ The Defence submits further that to arrest and detain MEAS Muth pursuant to the Arrest Warrant, whereas the decision to charge him has been challenged, would constitute “a charade” and infringe his rights to liberty and to a fair trial.¹⁴
9. In his Response, the International Co-Prosecutor submits that the Request for a Stay of Execution is inadmissible on the ground that it does not fall within the Pre-Trial Chamber’s jurisdiction. As to Internal Rule 21, upon which the Defence bases its Request, the International Co-Prosecutor maintains that it is not a stand-alone route conferring jurisdiction on the Pre-Trial Chamber.¹⁵ He maintains further that the Defence has not demonstrated the existence of exceptional circumstances which would require the Chamber to safeguard fairness of the proceedings, especially since the Defence also had the option of filing its request with the Co-Investigating Judges.¹⁶ Nor does the Request, in the view of the International Co-Prosecutor, fall within the Pre-Trial Chamber’s inherent jurisdiction, insofar as execution of the Arrest Warrant will not impede the appellate proceedings of which the Pre-Trial Chamber is seised, and which do not in any way concern the Arrest Warrant.¹⁷ As to the substance of the matter, the International Co-Prosecutor argues that, first, a stay of execution would be inconsistent with the principle that the investigation continues during appellate proceedings.¹⁸ He submits further that MEAS Muth fails to state how execution of the Arrest Warrant would violate his fair trial rights¹⁹ or his right to

¹² Request for a Stay of Execution, para. 8.

¹³ Request for a Stay of Execution, paras 9-10.

¹⁴ Request for a Stay of Execution, Introduction and paras 10-11.

¹⁵ Response, para. 11.

¹⁶ Response, paras 10 and 12-13.

¹⁷ Response, paras 14-15.

¹⁸ Response, para. 18.

¹⁹ Response, para. 19.



liberty.²⁰ On this point, the International Co-Prosecutor submits that the Arrest Warrant was validly issued, the grounds on which MEAS Muth may be arrested were made clear to him and that an adversarial hearing would precede a decision to place him in provisional detention, if any.²¹

10. In its Reply, the Defence contends that the International Co-Prosecutor is not concerned by the Arrest Warrant, whose issuance is the prerogative of the Co-Investigating Judges, and therefore, he does not have sufficient interest to respond to the Request for a Stay of Execution.²² As to the admissibility of its Request, the Defence submits that MEAS Muth's right to liberty would be infringed if he were detained before the Pre-Trial Chamber determines the legality of the Decision to Charge Meas Muth, thus requiring the Pre-Trial Chamber's intervention under Internal Rule 21 or the exercise of its inherent jurisdiction.²³ The Defence submits that while the Co-Investigating Judges may have jurisdiction to adjudicate the Request for a Stay of Execution, it would have been futile to file it with them, since the International Co-Investigating Judge ignored the pending Appeal by proceeding to issue the Arrest Warrant. Therefore, only the Pre-Trial Chamber can safeguard Mr. MEAS Muth's rights.²⁴ Additionally, the Defence submits that, contrary to the International Co-Prosecutor's claim, the Pre-Trial Chamber's inherent jurisdiction is not limited to incidental issues arising from *its primary jurisdiction*, but extends to any ancillary issues arising from the ECCC's primary jurisdiction over a matter.²⁵ In this regard, the Defence submits that the Pre-Trial Chamber misconstrued the Decision of the Appeals Chamber of the Special Tribunal for Lebanon (the "STL") in the case of *El Sayed* (the "*El Sayed Decision*"), upon which the Pre-Trial Chamber relied in defining its inherent jurisdiction.²⁶ As to substance, the Defence reiterates that the mere possibility of MEAS Muth's detention before a final determination on the lawfulness of the Decision to Charge MEAS Muth would infringe his right to liberty. It submits further that there is no reason to

²⁰ Response, para. 20.

²¹ Response, para. 20.

²² Reply, paras 1-11.

²³ Reply, para. 14.

²⁴ Reply, para. 16.

²⁵ Reply, paras 17-19.

²⁶ Reply, paras 18-19, referring to *El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, para. 45 (the "*El Sayed Decision*").



detain MEAS Muth since he has not fled and his address is known to the International Co-Investigating Judge and the Judicial Police.²⁷

III. EXPRESSION OF OPINION AND CONCLUSION ON THE APPEAL

11. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the Appeal. Given that Internal Rule 77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.

12. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Order shall stand.

IV. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of at least four judges on a decision on the Appeal.

In accordance with Internal Rule 77(13), there is no possibility to appeal

Phnom Penh, 23 September 2015

President

Pre-Trial Chamber



PRAK Kimsan Olivier BEAUVALLET NEY Thol Steven J. BWANA HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion with regards to the remainder of the Request.

Judges Olivier BEAUVALLET and Steven J. BWANA append their opinion with regards to the remainder of the Request.

²⁷ Reply, paras 25-32.

OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY**A. PROCEDURAL HISTORY**

1. On 4 June 2015, International Co-Investigating Judge Harmon issued an arrest order to “bring MEAS Muth before the International Co-Investigating Judge.”²⁸ On the same day, the International Co-Investigating Judge Harmon issued a response to MEAS Muth’s Request to Rescind the Arrest Warrant Issued on 10 December 2014, stating that the request is now moot because he had issued “a new arrest warrant, superseding the 10 December 2014 Warrant, on 4 June 2015.”²⁹
2. On 5 June 2015, MEAS Muth’s Co-Lawyers filed the Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in absentia*.³⁰
3. On 22 June 2015, the International Co-Prosecutor filed a response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in absentia*.³¹
4. On 29 June 2015, MEAS Muth filed a reply to the ICP Response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in absentia*.³²

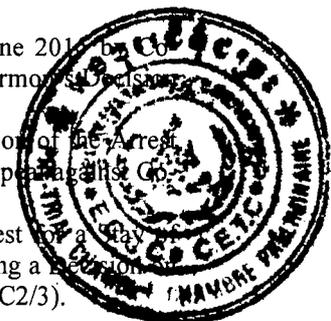
²⁸ Arrest Warrant, dated 4 June 2015 (C2).

²⁹ Meas Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *in absentia*, Paragraph 7 (C2/1).

³⁰ Meas Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *in absentia* (C2/1).

³¹ International Co-Prosecutor’s Response to Meas Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *in absentia* (C2/2).

³² Meas Muth’s Reply to International Co-Prosecutor’s Reponse to Meas Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *in absentia* (C2/3).



B. ADMISSIBILITY

5. On 5 June 2015, MEAS Muth's Co-Lawyers filed the Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *in absentia*, arguing that "the Pre-Trial Chamber has the authority to decide this request under a broad interpretation of Rule 21, as a decision on this matter is necessary to ensure fairness of the proceedings during the investigations."³³
6. While in this request, Mr MEAS Muth is not authorised to file an appeal pursuant to Internal Rule 74(3), the Pre-Trial Chamber previously admitted IENG Thirith's appeal in Case 002 pursuant to Internal Rule 21 on 10 August 2010, considering "the fairness of the proceedings, as provided in Internal Rule 21(1)(a)."³⁴ In this regard, the PTC National Judges will consider if this request is admissible pursuant to Internal Rule 21.
7. The arrest warrant is a coercive measure to be enforced by judicial police to bring MEAS Muth before the International Co-Investigating Judge alone, but not before both Co-Investigating Judges.
8. This measure, in Cambodian society, is regarded as humiliating and affecting MEAS Muth's honour, dignity and rights substantially and irremediably.
9. MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *in absentia*³⁵ has not yet been decided by the PTC.
10. MEAS Muth's Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *in absentia* is only a temporary request.

³³ Meas Muth's Reply to International Co-Prosecutor's Reponse to Meas Muth's Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *in absentia*, paragraph 8 (C2/1).

³⁴ Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Proceedings on the Basis of Abuse of Process, dated 10 August 2010, Paragraph 14, (PTC42) (D264/2010).

³⁵ Meas Muth's Appeal against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *in absentia* (D128/1/3).



- 11. The request is not an obstacle to decide on Meas Muth's appeal.
- 12. Therefore, intervention by the PTC pursuant to Internal Rule 21 is necessary to prevent the above mentioned irreparable damage.

THEREFORE, THE NATIONAL JUDGES WOULD HEREBY:

GRANT The Request.

STAY OF EXECUTION of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *in absentia*.

Phnom Penh, 23 September 2015



PRAK Kimsan

A handwritten signature in black ink, consisting of stylized, cursive letters, positioned above a horizontal line.

Judge NEY Thol

A handwritten signature in black ink, consisting of stylized, cursive letters, positioned above a horizontal line.

Judge HUOT Vuthy

OPINIONS OF JUDGES OLIVIER BEAUVALLET AND STEVEN J. BWANA**A. PROCEDURAL HISTORY**

1. On 4 June 2014, the International Co-Investigating Judge issued an Arrest Warrant against Meas Muth to bring him for a hearing concerning provisional detention under Internal Rule 63.³⁶
2. On 8 June 2015, the Defence filed the Request for a Stay of Execution moving the Pre-Trial Chamber to order the International Co-Investigating Judge to stay the execution of the Arrest Warrant.³⁷ The Defence filed its Appeal Brief on 16 June 2015.³⁸
3. On 22 June 2015, the International Co-Prosecutor filed a Response to the Request for a Stay of Execution, moving the Pre-Trial Chamber to dismiss it as inadmissible and, in any event, as without merit.³⁹
4. On 29 June 2015, the Defence filed its reply, requesting the Pre-Trial Chamber to dismiss the Response as inadmissible and strike it from the case file, and to grant its Request for a Stay of Execution *posthaste*.⁴⁰

B. ADMISSIBILITY**I – Admissibility of the International Co-Prosecutor’s Response**

5. We consider that the Defence’s claim that the International Co-Prosecutor has insufficient interest to respond to the Request for a Stay of Execution should be rejected.⁴¹ As the Office of the Co-Prosecutors is responsible for mounting the prosecution, it goes without saying that it has standing to intervene in any matter relating to the conduct of the investigation, including matters concerning the arrest of charged persons. Moreover, Internal Rule 74(2) provides that the Co-Prosecutors may appeal any order of the Co-

³⁶ Arrest Warrant, 4 June 2015, C2.

³⁷ Request for a Stay of Execution, Conclusion.

³⁸ MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *in absentia* 26 June 2015, D128/1/3.

³⁹ International Co-Prosecutor’s Response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth In Absentia, 22 June 2015, C2/2.

⁴⁰ MEAS Muth’s Reply to International Co-Prosecutor’s Response to MEAS Muth’s Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by Co-Investigating Judge Harmon Pending a Decision on the Appeal Against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth In Absentia, 29 June 2015, C2/3.

⁴¹ Reply, paras 1-11.



Investigating Judges. Likewise, they may respond to requests or appeals of the other parties, which moreover, was undoubtedly why the Defence specifically included the Office of the Co-Prosecutors in the distribution list of its Request for a Stay of Execution.

6. Therefore, we would deny the request of the Defence to dismiss the International Co-Prosecutor's Response as inadmissible and to strike it from the case file.

II – Admissibility of the Request for a Stay of Execution

A. Applicable Law

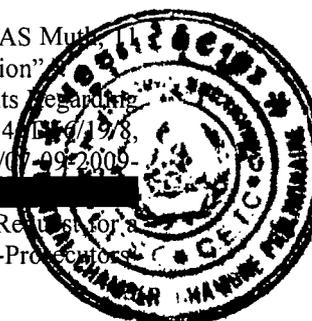
7. Internal Rule 77(11) provides: “Pending the outcome of the proceedings before the Chamber under this Rule, and unless the Chamber orders otherwise, the Co-Investigating Judges may continue their investigation, where applicable.” Article 275 of the Cambodian Code of Criminal Procedure provides to the same effect,⁴² as do the rules of procedure of international criminal tribunals.⁴³ Accordingly, an appeal does not have a suspensive effect on ongoing investigation proceedings, unless the Chamber decides otherwise or a specific provision explicitly so provides.⁴⁴
8. The Pre-Trial Chamber previously held in the absence of a relevant provision in the Internal Rules, the ECCC Law and Cambodian law, that it may exercise its “inherent jurisdiction” to order suspension of the execution of an order issued by the Co-Investigating Judge(s) so as to ensure that a right of appeal does not become meaningless or to preserve the fairness of the appellate process.⁴⁵ Moreover, the Pre-Trial Chamber emphasised that for an appellant's request for a stay of execution of an impugned act or order to succeed, it

⁴²Article 275 of the Cambodian Code of Criminal Procedure provides: “In case there is an appeal against any order other than a closing order, the investigating judge may continue his investigation unless it is otherwise decided by the President of the Investigation Chamber. This decision shall not be subject to an appeal.”

⁴³ At the International Criminal Court (ICC), the STL and the Special Court for Sierra Leone (SCSL), an appeal does not have suspensive effect on ongoing proceedings unless the Appeals Chamber or the Trial Chamber, as the case may be, decides otherwise (see Article 82(3) of the Rome Statute; Rule 126(F) of the STL Rules of Procedure and Evidence, and Rules 72(H) and 73 (A) and (B) of the SCSL Rules of Procedure and Evidence).

⁴⁴ Decision on Co-Lawyers' Request to Stay the Order for Assignment of Provisional Counsel to MEAS Muth, 11 February 2014, D56/19/14, para. 14 (the “11 February 2014 Decision on Request for a Stay of Execution”).

⁴⁵ Order Suspending the Enforcement of the “Order on International Co-Prosecutor's Public Statements regarding Case File 003”, 13 June 2011, D14/1/2; Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, para. 15; 11 February 2014 Decision on Request for a Stay of Execution para. 16; Case No.004/07-09-2009-ECCC/OCIJ (PTC09), Decision on [REDACTED] Urgent Request to Stay the Execution of [REDACTED] Summons to an Initial Appearance, 15 August 2014, A122/6.1/3 (the “15 August 2014 Decision on Request for a Stay of Execution”), para. 6; *See also* Case No. 002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutors' Request for Clarification, Supreme Court Chamber, 26 June 2013, E284/2/1/2, para. 12.



must be established that execution of such an act or order “would have a direct impact on the appellate proceedings of which it is seized”,⁴⁶ adding that the following three conditions must also be met: “a. there is good cause for the requested suspension; b. the duration of the requested suspension is reasonable; and c. the appeal itself has reasonable prospects of success on its merits.”⁴⁷ The Pre-Trial Chamber held that it has no jurisdiction to order suspension of the execution of an order of the Co-Investigating Judges if the first condition is not satisfied.⁴⁸ Accordingly, the Pre-Trial Chamber found that a request for a stay of execution of an order which has no impact on the appellate proceedings of which it was seized does not fall within the purview of its jurisdiction, and is, therefore, inadmissible.⁴⁹

9. Internal Rule 21 also provides, in relevant part:

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, 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. In this respect:

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication.

[...]

2. Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.

The Pre-Trial Chamber previously held that the fundamental principles stated in this Rule, which reflect the fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia,⁵⁰ Article 35 new of the ECCC Law⁵¹ and Article 14(3) of the International

⁴⁶ 11 February 2014 Decision on Request for a Stay of Execution, para. 16.

⁴⁷ 15 August 2014 Decision on Request for a Stay of Execution para. 10, *referring to* TSL CH/AC/2011/01, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, 1 September 2011, paras 8 and 11.

⁴⁸ 11 February 2014 Decision on Request for a Stay of Execution, para. 16.

⁴⁹ 11 February 2014 Decision on Request for a Stay of Execution, paras 18-19.

⁵⁰ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2001.

⁵¹ Article 35 new, ECCC Law.



Covenant on Civil and Political Rights⁵² may warrant that it adopt a liberal interpretation of the right to appeal to ensure that the proceedings are fair and adversarial.⁵³ In the rare instances where the particular facts of a case raised issues of fundamental rights or serious issues of procedural fairness, the Pre-Trial Chamber admitted appeals under Internal Rule 21⁵⁴ or broadly construed the specific provisions of the Internal Rules which vest it with jurisdiction.⁵⁵ That said, the Pre-Trial Chamber frequently recalled that Internal Rule 21 does not open an automatic avenue for appeal, even where an appeal raises fair trial issues. In exceptional cases, for the Pre-Trial Chamber to entertain an appeal under Rule 21, the Appellant must demonstrate that the situation at issue does not fall within the applicable rules and that the particular circumstances of the case require the Chamber's intervention to avoid *irremediable* damage to the fairness of the investigation proceedings or to the Appellant's fundamental rights.⁵⁶

B. Findings on the Admissibility of the Request for a Stay of Execution

10. We note that the Defence does not claim that its Request for a Stay of Execution falls within the Chamber's inherent jurisdiction, but rather, (i) moves the Pre-Trial Chamber to either extend the sphere of its inherent jurisdiction to any matter inherent to the primary jurisdiction of the ECCC⁵⁷ or (ii) to admit the Request for a Stay of Execution in accordance with Internal Rule 21.⁵⁸ These two submissions will be considered in turn.

i) Inherent jurisdiction of the Pre-Trial Chamber

⁵² See, for example: Case No. 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.

⁵³ See, for example: Case 002 (PTC11), Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A/190/1/20, 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 the Proceedings, 20 September 2010, D390/1/2/4, para. 13 (the "Decision on IENG Sary's Response"); Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No.2, para. 3 (the "Decision on Errors in Translation"); Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para.49.

⁵⁴ See, for example: 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 (D264/1), 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary's Response, para. 13; Decision on Errors in Translation, para. 27.

⁵⁵ See, for example: Case 002 (PTC05), Decision on the Admissibility of the Appeal Lodged by IENG Sary on Visitation Rights, 21 March 2008, A104/II/4, para. 10.

⁵⁶ See, for example: Case File 004 (PTC16), Decision on TA An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judge's Disagreement of 5 April 2013, 22 April 2013, D208/1/1/2, para. 8.

⁵⁷ Reply, para. 19.

⁵⁸ Request for a Stay of Execution, para. 8.



11. We note that there is a fundamental distinction between the inherent jurisdiction of the ECCC and its own jurisdiction, as an appellate chamber sitting within the ECCC judicial system. Were the Pre-Trial Chamber to consider, at first instance, any incidental matter arising from the jurisdiction of the ECCC, as the Defence seems to be requesting, it would then be usurping the authority of the Co-Investigating Judges and perhaps that of the other Chambers of the ECCC. Accordingly, for a motion brought at first instance to fall within the ambit of the Pre-Trial Chamber's inherent jurisdiction, it is required that it relates directly to appellate proceedings of which the Pre-Trial Chamber is seised.
12. This interpretation is entirely consistent with the STL Appeals Chamber's *El Sayed* Decision, on which the Pre-Trial Chamber previously relied to define its inherent jurisdiction, and whose interpretation, the Defence argues, must be revisited. When the STL Appeals Chamber defined "inherent jurisdiction" as "the power of the Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction,"⁵⁹ it was examining, on appeal, the Pre-Trial Judge's ruling on the STL's jurisdiction over Mr. El Sayed's request. Therein, the Appeals Chamber was not considering whether it had jurisdiction to adjudicate the appeal – this it did separately and in different terms.⁶⁰
13. Accordingly, we would find a request for a stay of execution admissible only where it may affect the fairness of appellate proceedings brought before it or imperil an acknowledged right to appeal.
14. In the present case, the Defence is not arguing that the execution of the Arrest Warrant could affect the appellate proceedings before the Pre-Trial Chamber. Instead, it contends that if the Arrest Warrant is executed before the Chamber determines the lawfulness of the Charging Decision, MEAS Muth could possibly be detained on the basis of a decision that is invalid.⁶¹ Insofar as the Request for a Stay of Execution does not concern the issue of charging MEAS Muth, but rather that of his provisional detention – a matter of which the Pre-Trial Chamber is not seised – we consider that it does not fall within the purview of the Pre-Trial Chamber's inherent jurisdiction.

⁵⁹ *El Sayed* Decision, para. 45.

⁶⁰ *El Sayed* Decision, paras 54-55.

⁶¹ Request for a Stay of Execution, paras 9-11.



ii) Internal Rule 21

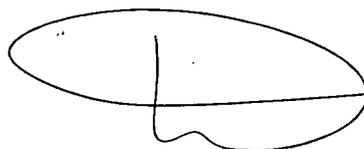
15. As to admissibility of the Appeal under Internal Rule 21, we note that this rule cannot be invoked to render admissible a request for which an established regime exists, but which does not satisfy the relevant admissibility requirements. In this instance, the rules governing admissibility of a request for a stay of execution have been clearly set out by the Pre-Trial Chamber, such that Internal Rule 21 does not provide an alternative remedy.
16. Moreover, we are unpersuaded by the Defence's argument that execution of the Arrest Warrant before adjudication of the Appeal would infringe the fundamental principles stated in Internal Rule 21. As its name [in French: mandat d'amener] indicates, the purpose of the Arrest Warrant is to bring MEAS Muth before the International Co-Investigating Judge for a hearing which will examine the *possibility* of his provisional detention pursuant to Internal Rule 63. Accordingly, at the hearing, which will be adversarial, MEAS Muth will be at liberty to make any submission he sees fit before a decision is taken on his provisional detention. As matters stand, therefore, the principles stated in Internal Rule 21(2) and, more generally, the rights of the Defence, are fully safeguarded. Such being the case, we do not consider that execution of the Arrest Warrant before adjudication of the Appeal against the Decision to Charge MEAS Muth would impair the fairness of the proceedings or infringe MEAS Muth's right to liberty.
17. We consider that the Request for a Stay of Execution does not fall within the Pre-Trial Chamber jurisdiction. It is therefore inadmissible.

THEREFORE, THE INTERNATIONAL JUDGES WOULD FIND:

The International Co-Prosecutor's Response admissible.

The Request for a Stay of Execution inadmissible.

Phnom Penh, 23 September 2015


Olivier BEAUVALLET


Steven J. BWANA