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

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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

A122/6.1/3

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC09)

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

Date: 15 August 2014

STRICTLY CONFIDENTIAL

DECISION ON IM CHAEM'S URGENT REQUEST TO STAY THE EXECUTION OF HER SUMMONS TO AN INITIAL APPEARANCE

Co-Lawyers
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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 15 / 08 / 2014
ម៉ោង (Time/Heure) : 13:40
ចម្កីរិចម្មលបន្តកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN RAO



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “IM Chaem’s Urgent Request to Stay the Excecution of her Summons to an Initial Appearance” filed on 8 August 2014 (the “Request for Stay”).¹

I- PROCEDURAL BACKGROUND

1. On 13 June 2014, the Co-Lawyers sent a letter to the Co-Investigating Judges requesting that all communications relating to IM Chaem include both of the Co-Investigating Judges and requesting that disagreements regarding her summoning and charging be referred to the Pre-Trial Chamber.² On 26 June 2014, the Co-Investigating Judges jointly responded that “the internal workings of the Office of the Co-Investigating Judges (“OCIJ”) are confidential”; “pursuant to Internal Rule 72, the decision of a judge to refer a disagreement to the Pre-Trial Chamber (“PTC”) is discretionary” and “unless and until such a referral is made, the content of the disagreement register remains a confidential internal OCIJ matter”. The Co-Investigating Judges added that the 30 day period prescribed in Internal Rule 72(3) to bring the disagreement referred to in the 13 June Letter before the Pre-Trial Chamber has expired “without any referral having been made to the PTC”.³
2. On 25 July 2014, the Co-Lawyers filed a motion to the Office of the Co-Investigating Judges seeking clarification of the Co-Investigating Judges’ understanding of Internal Rule 72 and their position regarding any disagreement they have registered in Case 004.⁴
3. On 31 July 2014, the International Co-Investigating Judge summoned IM Chaem for an initial appearance scheduled for 8 August 2014, at 4:00 pm (“IM Cheam’s Summons”).⁵ He also summoned the Co-Lawyers to attend IM Chaem’s initial appearance (the “Co-Lawyers’ Summons”).⁶

¹ A122/6.1/1. The Request for Stay was filed in Khmer on 13 August 2014.

² Letter from the Co-Lawyers to the Co-Investigating Judges entitled “Request that all formal communciations 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, A122.

³ Letter from the Co-Investigating Judges to the Co-Lawyers entitled “Your Letter requesting 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”, dated 20 June 2014 and notified on 26 June 2014, A122/1.

⁴ IM Chaem’s Motion Requesting Clarification regarding Disagreements between the Co-Investigating Judges, 25 July 2014, D204.

⁵ Summons to Initial Appearance, dated 29 July 2014 and notified to IM Chaem on 31 July 2014, A150.

⁶ Summons of Lawyers, dated 29 July 2014 and notified on 31 July 2014, A151.



4. On 1 August 2014, the Co-Lawyers sent a letter to the Office of the Co-Investigating Judges stating that they did not consider IM Chaem's Summons to be valid given that it had been issued by the International Co-Investigating Judge alone.⁷ On the same day, the International Co-Investigating Judge responded that pursuant to Internal Rule 72, he could validly issue the Summons for IM Chaem's initial appearance alone, as previously stated by the Pre-Trial Chamber in Case 002 and the Co-Investigating Judges in their letter of 26 June 2014.⁸
5. On 6 August 2014, the Co-Lawyers filed an urgent application to seize the Pre-Trial Chamber with a request for annulment of IM Chaem's and the Co-Lawyers' Summonses to the Office of the Co-Investigating Judges (the "Application for Annulment").⁹ The Co-Lawyers requested the Office of the Co-Investigating Judges to stay the Summonses "until the Co-Investigating Judges seize the Pre-Trial Chamber with a Request for Annulment of [the Summons] and clarify their disagreements on the proceedings relating to Ms. IM Chaem".¹⁰ The Co-Lawyers assert that the International Co-Investigating Judge "made it clear to the Defence at a meeting on 6 August 2014 that he would reject [the Application for Annulment]".¹¹
6. On 8 August 2014, at 8:15 the Co-Lawyers filed the Request for Stay, asking the Pre-Trial Chamber to "stay the execution of Ms. IM Chaem's Summons until the final determination by the Pre-Trial Chamber of Ms. IM Chaem's Appeal against the International Co-Investigating Judge's rejection of her Application for Annulment".¹² The Co-Lawyers state that they are "challenging the validity of the Summons on the basis that it has been signed by the International Co-Investigating Judge alone, evidently without the agreement of the National Co-Investigating Judge".¹³ They submit that the Request for Stay is "made necessary because the validity of the Summons must be decided on before Ms. IM Chaem appears at her initial appearance and is charged on 8 August 2014".¹⁴ More specifically, the Co-Lawyers state that they will appeal the International Co-Investigating's written

⁷ Letter from the Co-Lawyers to the Co-Investigating Judges entitled "Response to our summons to attend Ms. IM Chaem's proposed initial appearance on 8 August 2014, 1 August 2014, A151/2.

⁸ Letter from the International Co-Investigating Judge to the Co-Lawyers, 1 August 2014, A122/6.

⁹ IM Chaem's Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of Her and Her Co-Lawyers' Summonses Dated 31 July 2014, filed by the Co-Lawyers on 6 August 2014 and placed on the Case File and notified to the Pre-Trial Chamber on 8 August 2014, D207.

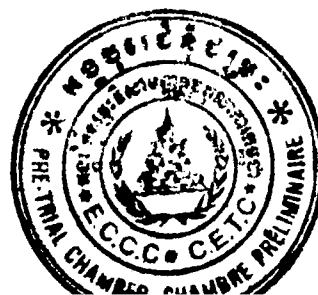
¹⁰ Application for Annulment, Section V.

¹¹ Request for Stay, Introduction.

¹² Request for Stay, Section IV.

¹³ Request for Stay, Introduction.

¹⁴ Request for Stay, Introduction.



decision on the Application for Annulment, once it has been issued, and that such appeal would “become academic” should the Summons be executed by that time.¹⁵ They further argue that IM Chaem will suffer irremediable prejudice should she appear to an initial appearance that may eventually be annulled.¹⁶ In these circumstances, the Co-Lawyers aver that the Pre-Trial Chamber, which will eventually be seised of an appeal against a decision denying the Application for Annulment, has “inherent jurisdiction” to stay the execution of the Summons.¹⁷ The Request for Stay was filed in English only and was *ex parte*, as the Summons was itself classified as “strictly confidential” and not accessible to any of the parties or participants to the proceedings.

7. On 8 August 2014, given the urgency of the situation, the Pre-Trial Chamber issued its disposition of the Request for Stay, which reads as follows:

“THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY

DISMISSES the Request for Stay.

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

8. As announced on 8 August 2014, the Pre-Trial Chamber hereby issues the reasons for its decision.

REASONS FOR THE DECISION ISSUED ON 8 AUGUST 2014

9. At the outset, the Pre-Trial Chamber advises that it has exceptionnally decided to consider the Request for Stay, although only filed in English, in order to avoid a state of uncertainty in respect of the Summons that had to be executed on the day the Request for Stay was filed. To reach a decision, the Pre-Trial Chamber used its internal linguistic resources.
10. The Pre-Trial Chamber previously found that absent any provision in the ECCC legal compendium or Cambodian law, it may, using its “inherent jurisdiction”, stay an order issued by the Co-Investigating Judge(s) so as to avoid that a right to appeal becomes ineffective or to preserve fairness of the appellate process.¹⁸ The Pre-Trial Chamber

¹⁵ Request for Stay, Introduction.

¹⁶ Request for Stay, para. 15.

¹⁷ Request for Stay, para. 2.

¹⁸ Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC03), Order Suspending the Enforcement of the “Order on International Co-Prosecutor’s Public Statement Regarding Case File 003”, 13 June 2011, D14/1/2; Case 003 (PTC11), Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, para. 15. *See also* Case 003 (PTC11), Decision on Co-Lawyers’ Request to Stay the Order for Assignment of Provisional Counsel to [REDACTED], 11 February 2014, D56/19/14 (“Decision on Request to Stay Appointment”), para. 16; Case



insisted that for a request for stay to be granted, it must be established that implementation of the act or order that the applicant seeks to stay “would have a direct impact on the appellate proceedings of which it is seized”.¹⁹ Furthermore, for a request for stay to be granted, it must meet the following three conditions:

- “a. there is a 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.”²⁰

11. The Pre-Trial Chamber notes that it is not currently seized of any application for annulment in respect of the Summons; rather, the Request for Stay is based on a prospective application that the Co-Lawyers intend to bring to the Pre-Trial Chamber once the International Co-Investigating Judge has issued his decision in respect of their application to seise the Pre-Trial Chamber with their Application for Annulment. In this respect, the Pre-Trial Chamber recalls that the Internal Rules require application for annulment to be first filed with the Co-Investigating Judges who shall decide whether to seise the Pre-Trial Chamber.²¹ The Pre-Trial Chamber acknowledges that it may have been impossible for the Co-Lawyers to seise the Pre-Trial Chamber with an application for annulment at the time they filed the Request for Stay, on 8 August 2014, as the Co-Investigating Judges had yet to decide whether to seise the Pre-Trial Chamber of such application or not. This being said, the Chamber notes that the Co-Lawyers, instead of immediately seeking the annulment of the Summons after its notification on 31 July 2014, most unusually elected to send a letter to the International Co-Investigating Judge announcing their intention not to attend the initial appearance and stating that they consider the Summons to be invalid. Their Application for Annulment was therefore submitted only on 6 August 2014 to the Office of the Co-Investigating Judges, which left little time for the Co-Investigating Judges and eventually the Pre-Trial Chamber to deal with it before the date set for the initial appearance. Whereas it cannot be ascertained that the Co-Investigating Judge(s) would

002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutor’s Request for Clarification, 26 June 2013, E284/2/1/2, para. 12.

¹⁹ Decision on Request to Stay Appointment, para. 16.

²⁰ Special Tribunal for Lebanon,, Case No. CH/AC/2011/01, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, Appeals Chamber, 12 September 2011, para. 8. *See also* para. 11, where the Appeals Chamber emphasises that “the appeal itself must have reasonable chances of success” and the request for stay shall not “simply constitute a delaying tactic on the part of the requesting party”.

²¹ Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC06), Decision on NUON Chea’s Appeal Against Order Refusing Request for Annulment, D55/I/8, 26 August 2008, paras 16; 21-23.



have issued a decision on the Application for Annulment prior to 8 August 2014 should have it been filed earlier, it can, at the very least, be concluded that the Co-Lawyers did not, at the first opportunity, used the appropriate procedural vehicle to challenge the validity of the Summons. In particular, the sending of a letter to the International Co Investigating Judge on 31 July 2014 did not formally place any matter before that judge or the court for consideration. In the present circumstances where it is not seised of any appeal or application challenging the validity of the Summons, it is doubtful that the Pre-Trial Chamber would have jurisdiction to stay the execution of the Summons.

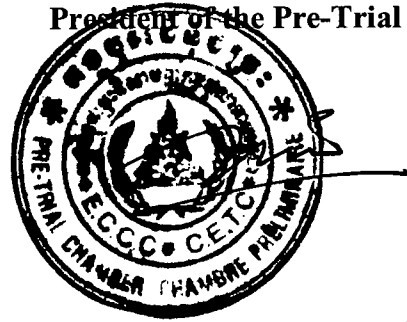
12. However, given the interests at stake and in order to avoid that IM Chaem suffers prejudice as a result of the course of action adopted by her Co-Lawyers, the Pre-Trial Chamber has examined whether the announced intention of the Co-Lawyers to challenge the validity of the Summons before the Pre-Trial Chamber through an application for annulment requires that it stays the execution of the Summons. The Pre-Trial Chamber finds that a stay, should the Pre-Trial Chamber have jurisdiction to order it, would not be warranted in the present circumstances, for two main reasons.
13. Firstly, the Co-Lawyers have not established that IM Chaem would suffer any “irremediable” prejudice if she appears before the International Co-Investigating Judge for the purpose of being notified of the charges against her and the Summons is subsequently annulled. There is no obligation for IM Chaem to make any statement during the initial appearance and should the Summons and/or the decision on charging be subsequently annulled, they will be void and without any effect, as if they never existed. IM Chaem will then be placed in the same situation as she was before.
14. Secondly, the Pre-Trial Chamber finds that the ground raised by the Co-Lawyers for challenging the validity of the Summons, *i.e.* that the International Co-Investigating Judge does not have the power to issue a summons alone, is, *prima facie*, without merits. The Co-Investigating Judges have confirmed that they have registered a disagreement in respect of the Summons and that the 30 day time period to bring it before the Pre-Trial Chamber has elapsed. In these circumstances, it is clear from the Agreement between the United Nations and the Royal Government of Cambodia for the establishment of the ECCC, the ECCC Law and the Internal Rules that the International Co-Investigating Judge could validly issue



the Summons alone.²² Furthermore, the Pre-Trial Chamber previously confirmed that one Co-Prosecutor or Investigating Judge can act alone when a disagreement has been registered within the Office of the Co-Prosecutors or the Co-Investigating Judges, as appropriate, and the period for bringing a disagreement before the Pre-Trial Chamber has elapsed.²³ It would be improper for the Pre-Trial Chamber to consider staying the execution of a Summons on the basis of an eventual application that will purportedly challenge a rule that is expressed in clear terms in the ECCC legal compendium and the Pre-Trial Chamber's jurisprudence.

Phnom Penh, 15 August 2014

President of the Pre-Trial Chamber



PRAK KIMSAN

²² Article 5(4) of the Agreement between 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 2003, Article 23new (2) of 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, as amended on 27 October 2004; Internal Rule 72(2) and (3).

²³ Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, para. 16 and 27; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, paras 274-276.