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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

D236/1/1/8

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 (PTC20)

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

Date: 09 December 2015

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SAMR RANA	

CONFIDENTIAL

DECISION ON IM CHAEM'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISION ON HER MOTION TO RECONSIDER AND VACATE HER SUMMONS DATED 29 JULY 2014

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “Im Chaem’s (the “Appellant”) Appeal against the International Co-Investigating Judge’s Decision on her Motion to Reconsider and Vacate her Summons Dated 29 July 2014” filed by her Co-Lawyers on 23 March 2015 (the “Appeal”).¹

I. PROCEDURAL BACKGROUND

1. On 20 May 2014, the Co-Investigating Judges recorded a disagreement (the “Disagreement”).² The Defence submits that the subject of the Disagreement is not known to them.³ On 13 June 2014, the Appellant filed before the Office of the Co-Investigating Judges a Request that all formal communications regarding the Appellant include the two Co-Investigating Judges and that disagreements regarding the summoning and charging of the Appellant be referred to the Pre-Trial Chamber.⁴ On 20 June 2014, the Co-Investigating Judge’s responded in a joint letter (the “Joint Clarification”) stating that: i) “the internal workings of the Office of the Co-Investigating Judges are confidential; ii) pursuant to Internal Rule 72, the decision of a judge to refer a disagreement to the Pre-Trial Chamber is discretionary and until such a referral is made the content of the disagreement remains a confidential internal [Office of the Co-Investigating Judges] matter; iii) the 30 day period prescribed in sub-rule 72(3) has expired without any referral having been made to the PTC.”⁵
2. On 27 June 2014, the International Co-Investigating Judge informed the Co-Lawyers that a summons would be personally served on the Suspect in due course, unless the Co-Lawyers informed the Office of the Co-Investigating Judges by 11 July 2014 that the Suspect had authorised them to accept service on her behalf.⁶ On 18 July 2014, the Co-Lawyers: i)

¹ Im Chaem’s Appeal Against the International Co-Investigating Judge’s Decision on Her Motion to Reconsider and Vacate Her Summons Dated 29 July 2014, 23 March 2015, D236/1/1/2.

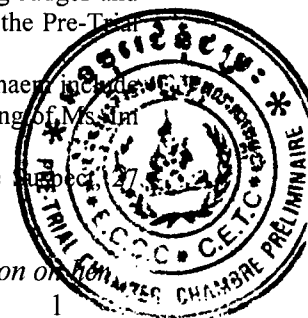
² Decision on Im Chaem’s Motion to Reconsider and Vacate Her Summons Dated 29 July 2014 (the “Impugned Decision”), 19 February 2015, D236/1, para. 1. See Summons of Im Chaem for Initial Appearance, 29 July 2014, A150.

³ Impugned Decision, para. 1; Appeal, para. 7.

⁴ Request that all formal communication 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.

⁵ Co-Investigating Judges’ Response to 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, 26 June 2014, A122/1.

⁶ International Co-Investigating Judge’s Letter Concerning Preparation of Initial Appearance of the Suspect, 27 June 2014, A122/2.



informed the Co-Investigating Judges that the summons should be served on the Suspect personally; ii) requested that a courtesy copy be provided to them as soon as practicable following service; and iii) stated that they would not regard summons signed by only one Co-Investigating Judge as valid.⁷

3. On 25 July 2014, the Co-Lawyers filed before the Office of the Co-Investigating Judges a motion requesting clarification regarding the Co-Investigating Judges' understanding of Internal Rule 72 and any disagreement they may have in Case 004 (the "Request for Clarification").⁸
4. On 29 July 2014, the International Co-Investigating Judge issued the Summons to an initial appearance for 8 August 2014, which was served on the Suspect personally on 31 July 2014 (the "Summons").⁹ In the Summons, the International Co-Investigating Judge noted the Disagreement. On 31 July 2014, the International Co-Investigating Judge summoned the Co-Lawyers to attend their client's initial appearance.¹⁰
5. On 1 August 2014, the Co-Lawyers wrote to the International Co-Investigating Judge stating that until the Co-Investigating Judges responded to their Request for Clarification, they would not consider any summons issued by one Co-Investigating Judge alone as being valid and "respectfully decline the invitation to attend our client's proposed initial appearance."¹¹
6. On 6 August 2014, the Co-Lawyers filed before the Office of the Co-Investigating Judges an Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons (the "Annulment Application").¹² The Co-Lawyers based the Annulment Application on Internal Rules 48 and 76(2) and requested a stay of the Appellant's and her Co-Lawyers' Summons until such time as the Co-Investigating Judges a) seize the Pre-

⁷ Defence's Letter Regarding Modalities of Service of Summons, 18 July 2014, A122/5.

⁸ Im Chaem's Motion requesting for Clarification regarding Disagreements between the Co-Investigating Judges, 25 July 2014, D204.

⁹ Summons of Im Chaem for Initial Appearance, 29 July 2014, A150. *See also* Written report of service of summons (the "Report of Service of Summons"), 8 August 2014, A150/1.

¹⁰ Summons of Im Chaem's Co-Lawyers for the Initial Appearance of Im Chaem, 31 July 2014, A151.

¹¹ Letter in response to the International Co-Investigating Judge's Summons of Lawyers, 1 August 2014, A152.

¹² 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, 6 August 2014, D207.



Trial Chamber in view to annul the Summons; and b) clarify the nature of their disagreements.¹³

7. On 8 August 2014, the Co-Lawyers filed another urgent request for stay of the execution of the Summons before the Pre-Trial Chamber arguing that the Summons is invalid since “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, amounts to a procedural defect which clearly impairs the fairness of the entire proceedings in the Case relating to the Appellant, as well as impairing the latter's rights to legal certainty and to transparency of the proceedings (the “Request for Stay”).¹⁴ On the same day the Pre-Trial Chamber dismissed the Request for Stay¹⁵ and on 15 August 2014 issued the reasons for rejection, finding that the request did not fall under its jurisdiction.¹⁶ Given the interests at stake, the Pre-Trial Chamber found that, even if the matter fell under its jurisdiction: i) firstly, the Co-Lawyers have not established that the Appellant would suffer any “irremediable” prejudice, and ii) secondly, the ground raised by the Co-Lawyers for challenging the validity of the Summons, was, *prima facie*, without merit.¹⁷
8. On 8 August 2014, the International Co-Investigating Judge denied the Request for Clarification (the “Clarification”).¹⁸
9. Approximately one hour before the scheduled 8 August 2014 initial appearance hearing, the Suspect's International Co-Lawyer informed the International Co-Investigating Judge by email that, in light of the Pre-Trial Chamber's rejection of their Request for Stay of the Summons, the Suspect would voluntarily appear at the ECCC for a re-scheduled initial appearance at a future date. The International Co-Investigating Judge agreed to this arrangement. However, on 12 August 2014, the Co-Lawyers informed the International Co-Investigating Judge that the Suspect was no longer willing to appear voluntarily at the

¹³ *Ibid.*

¹⁴ Im Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 8 August 2014, A122/6.1/1.

¹⁵ Decision on Im Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2015, A122/6.1/2.

¹⁶ Decision on Im Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance (the “Decision on Request for Stay”), 15 August 2015, A122/6.1/3

¹⁷ Decision on Request for Stay, paras 13-14.

¹⁸ Decision on Suspect's Motion Requesting Clarification Regarding Disagreements between the Co-Investigating Judges, 8 August 2014, D204/2.



ECCC in response to a summons signed only by the International Co-Investigating Judge.¹⁹ On 14 August 2014, the International Co-Investigating Judge issued an Arrest Warrant to secure the Appellant's attendance at an initial appearance at the court.²⁰

10. On 18 August 2014, the International Co-Investigating Judge issued a decision denying the Application for Annulment of Summons as inadmissible, having found that suspects did not have standing to file applications for annulment (the "Decision on Annulment Application").²¹ Notwithstanding the finding that the Annulment Application is inadmissible, the International Co-Investigating Judge noted that, "in light of the clarity of the law and jurisprudence on the validity of the summons issued by only one of the Co-Investigating Judges, made even clearer by the [Decision on Request for Stay], the International Co-Investigating Judge is also not "satisfied that the Application meets the test for referral [to the Pre-Trial Chamber] pursuant to Internal Rule 76."²² No appeal was lodged against the Decision on Annulment Application.
11. On 5 January 2015, the Co-Lawyers filed before the Office of the Co-Investigating Judges a Motion to Reconsider and Vacate the Summons dated 29 July 2014 (the "Reconsideration Motion")²³ arguing admissibility of the Motion on two basis: i) the "judges' inherent powers to reconsider their previous decisions"²⁴ where a previous decision is alleged to be erroneous or to have caused injustice;²⁵ and ii) Internal Rule 21 which safeguards the fundamental right to a competent tribunal.²⁶
12. On 19 February 2015, the International Co-Investigating Judge issued the Impugned Decision rejecting the Reconsideration Motion and concluding that "the Summons contained no error, did not prejudice the Suspect, and did not impair the exercise of the

¹⁹ International Co-Investigating Judge's Note Concerning Im Chaem's Initial Appearance, 14 August 2014, A150/2.

²⁰ Arrest Warrant, dated 14 August 2014, filed 12 February 2015, C1.

²¹ Order on Im Chaem's Application To Seise The Pre-Trial Chamber With A Request For Annulment of Her and Her Co-Lawyers' Summonses, 25 August 2014, D207/1, paras 32, 33, 39.

²² *Ibid*, para. 34.

²³ Im Chaem's Motion to Reconsider and Vacate her Summons dated 29 July 2014, 5 January 2015, D236/1/1/8, paragraph.

²⁴ Reconsideration Motion, para. 13 referring to Pre-Trial Chamber's jurisprudence.

²⁵ Reconsideration Motion, paras 14-15.

²⁶ Reconsideration Motion, paras 13, 16.



Suspect's fair trial rights."²⁷ On 27 February 2015, the Co-Lawyers filed the Appellant's Notice of Appeal against the Impugned Decision.²⁸

13. On 3 March 2015, the International Co-Investigating Judge rendered the Decision to Charge Im Chaem *in Absentia* deciding to charge her as specified in the Notification of Charges and to grant to her Co-Lawyers access to the case file (the "Decision to Charge in Absentia").²⁹
14. On 23 March 2015, the Co-Lawyers filed the Appeal in English only, with a preliminary Request for Authorisation to file in English first with the Khmer translation to follow. On 27 May 2015, the Pre-Trial Chamber granted the Co-Lawyers' preliminary Request and the Appeal was notified in English and Khmer on the same day. On 16 June 2015, as instructed by the Pre-Trial Chamber,³⁰ the International Co-Prosecutor filed their Response to the Appeal (the "OCP Response").³¹ The Co-Lawyers filed their Reply on 29 June 2015 in English only and on 9 July 2015 in Khmer (the "Reply").³²

II. SUBMISSIONS

15. The Co-Lawyers request the Pre-Trial Chamber to: (a) admit the Defence's submission as an appeal under Internal Rules 21 and 74(3)(a); (b) to overturn the Impugned Decision, which errs in law; and (c) to vacate the Appellant's Summons dated 29 July 2014. The Co-Lawyers argue admissibility of the Appeal under Internal Rule 21,³³ to safeguard the Appellant's right to a competent tribunal, and under Internal Rule 74(3)(a),³⁴ since the right to a competent tribunal means that a tribunal must have jurisdiction over the particular matter.

²⁷ Impugned Decision, para. 24.

²⁸ Appeal Register of Appeal Against International Co-Investigating Judge HARMON's Decision on Im Chaem's Motion to Reconsider and Vacate Her Summons Dated 29 July 2014, 27 February 2015, D236/1/1.

²⁹ Decision to Charge Im Chaem in Absentia, 3 March 2015, D239.

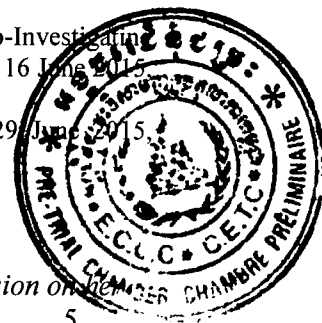
³⁰ Decision on International Co-Prosecutor's Request for Extension of Time to Respond to Im Chaem's Appeal and on Defence related Requests, 9 June 2015, D236/1/1/5.

³¹ International Co-Prosecutor's Response to Im Chaem's Appeal against the International Co-Investigating Judge's Decision Denying her Motion to Reconsider and Vacate Her Summons Dated 29 July 2014, 16 June 2015, D236/1/1/6.

³² Im Chaem's Reply to the International Co-Prosecutor's Response to her Summons Appeal, 29 June 2015, D236/1/1/7.

³³ Appeal, paras 16-19.

³⁴ Appeal, paras 20-21.



16. The Co-Lawyers argue that “irremediable damage [is caused to] the appellant’s rights” due to the International Co-Investigating Judge’s error in law in failing to recognise that the lack of information about the Disagreement impairs her right to a competent tribunal by disabling her from challenging the Judge’s competence to act alone.³⁵ The court has an obligation to provide such information as there is evidence that the matter against the defendant falls within its jurisdiction³⁶ and to demonstrate compliance with Internal Rule 72(3) which limits a Co-Investigating Judge’s competence to “the action which is subject of the disagreement.”³⁷ According to the Co-Lawyers, the disagreement provisions allowing International Co-Investigating Judge Harmon to act alone must also implicitly give the Appellant a right to know the exact nature of the Disagreement in function of her right to a competent tribunal which is absolute and ‘not subject to any exception.’³⁸ The Co-Lawyers clarify that they have no doubts about or seek to impugn the Judge’s independence or impartiality³⁹ and claim that the damage caused to the Appellant’s rights by the alleged errors is irreparable because her non-attendance⁴⁰ has already been used to justify an arrest warrant.⁴¹

17. In Response, the International Co-Prosecutor requests the Pre-Trial Chamber to dismiss the Appeal⁴² and argues that, despite lack of access to the Disagreement, the Appellant is able to assess with certainty Judge Harmon’s competence, since it is clear that in issuing the Summons, the International Co-Investigating Judge acted in compliance with the requirements of the legal framework on disagreements.⁴³

18. In Reply, the Co-Lawyers reiterate their request that the Pre-Trial Chamber grant the Appeal and Vacate the Summons.⁴⁴ They submit that: i) it is the Judge’s duty to grant access to the Disagreement to allow assessment of his competence;⁴⁵ ii) that by failing to observe such duty, the Judge erred in law and violated the Appellant’s right to challenge his

³⁵ Appeal, paras 17, 18. *See also* paras 26, 31.

³⁶ *Ibid.*

³⁷ Appeal, para. 26 *referring to* Reconsideration Motion, paras 23-24.

³⁸ Reconsideration Motion, paras 29-30.

³⁹ Appeal, para. 33.

⁴⁰ Appeal, para. 10.

⁴¹ Appeal, para. 19.

⁴² Response, para. 15.

⁴³ Response, paras 8-9, 13.

⁴⁴ Reply, p.5, final paragraph.

⁴⁵ Reply, paras 10, 13.



competence;⁴⁶ and iii) that such violation invalidates the Summons which must, therefore, be vacated.⁴⁷

III. ADMISSIBILITY

19. The Defence requests that the Pre-Trial Chamber admit this Appeal under Rules 21 and 74(3)(a) of the Internal Rules.⁴⁸ The Pre-Trial Chamber will first examine whether the Appeal falls within its jurisdiction under Internal Rule 74(3)(a) before examining whether the circumstances of the case warrant its intervention under Internal Rule 21 to protect the Appellant's fair trial rights.

a) Admissibility under Internal Rule 74(3)(a)

20. Pursuant to Internal Rule 74(3)(a), "[t]he Charged Person or the Accused may appeal against [...] orders or decisions of the Co-investigating Judges [...] confirming the jurisdiction of the ECCC."⁴⁹ In interpreting Internal Rule 74(3)(a), the Pre-Trial Chamber has previously held that only jurisdictional challenges may be raised under this rule.⁵⁰ The first question to be resolved is whether the Impugned Decision is a decision confirming the jurisdiction of the ECCC.

21. The Co-Lawyers argue before the Pre-Trial Chamber that the Appellant's right to a competent tribunal also means that "her tribunal must have jurisdiction over a particular matter and that Co-Investigating Judge Harmon's unilateral jurisdiction in issuing the Summons is limited to the nature of the Disagreement."⁵¹ The Defence argues that the Appeal falls within the ambit of Internal Rule 74(3)(a) on the ground that "Judge Harmon implicitly affirmed that he had jurisdiction to summon [the Appellant] without having proved that he had jurisdiction by disclosing information about the 20 May 2014 disagreement."⁵²

⁴⁶ Reply, para. 13.

⁴⁷ *Ibid.*

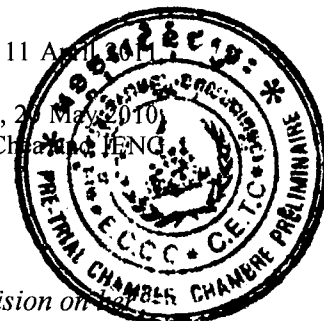
⁴⁸ Appeal, para. 5.

⁴⁹ Decision on Ieng Sary's Appeal against the Closing Order (the "Ieng Sary Appeal Decision"), 11 April 2010, D427/1/30, para. 44.

⁵⁰ Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15, para. 21; Ieng Sary Appeal Decision, paras 45, 47; Decision on Appeal by NUON CHEA and IENG THIRITH against the Closing Order, 15 February 2011, D427/2/15, para. 60.

⁵¹ Appeal, para. 20.

⁵² Appeal, para. 21.



22. At the outset, it is recalled that these proceedings originate from a request by the Co-Lawyers for the International Co-Investigating Judge to reconsider the Summons, on the basis that the Defence's lack of access to the Disagreement impairs its ability to examine the International Co-Investigating Judge's competence to issue the said Summons.⁵³ Applying previous holdings of the Pre-Trial Chamber regarding the possibility for parties to access disagreements between the Co-Investigating Judges, the International Co-Investigating Judge has examined if the lack of access to the Disagreement in this case has caused prejudice to the Appellant's fair trial rights guaranteed by Internal Rule 21. He concluded that this was not the case, as the disagreement procedure had been duly followed and the legal framework contains sufficient guarantees to ensure respect of the requirements for unilateral actions.⁵⁴
23. The Pre-Trial Chamber notes that the gist of the matter in this case is not the competence of the ECCC to issue the Summons, or even that of the International Co-Investigating Judge, but rather the claimed right of access to the Disagreement. Indeed, the Defence acknowledges that a Co-Investigating Judge can act alone when the disagreement procedure has been followed but claims that the lack of access to the Disagreement prevents it from examining if the International Co-Investigating Judge has acted within the scope of the Disagreement in the present case.⁵⁵ In the Impugned Decision, the International Co-Investigating Judge merely dismissed the Defence's argument,⁵⁶ he did not confirm his competence to issue the Summons, as asserted by the Defence, nor did he have to do so.
24. As recalled by the International Co-Investigating Judge and more amply discussed below, the applicable rules do not provide for the parties to access disagreements and, therefore, challenge the power of a Co-Investigating Judge to act alone. Rather, Internal Rule 72 clearly grants the power to a Co-Investigating Judge to act alone when the time period for bringing a disagreement for resolution before the Pre-Trial Chamber has elapsed.⁵⁷ In this

⁵³ Impugned Decision, para. 12.

⁵⁴ Impugned Decision, paras 20-22.

⁵⁵ Appeal, para. 26.

⁵⁶ Impugned Decision, para.17-24.

⁵⁷ Article 5(4) of the Agreement; Article 23new (2) of the ECCC Law; Internal Rule 72(2) and (3); 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 (the "Decision on TA An Appeal"), 22 January 2015, D208/1/1, para. 1; Decision on Request for Stay, para.14; Ieng Sary Appeal, paras 274-276; Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutor's Pursuant to Internal Rule 71, 18 August 2009, paras 16, 27.



respect, the Pre-Trial Chamber emphasises that any disagreement does not withdraw the case from the disagreeing Co-Investigating Judge, who may raise objections if necessary.⁵⁸ Indeed, the Pre-Trial Chamber has previously held, in the present case, that a summons issued by one Co-Investigating Judge for the purpose of charging is valid where the disagreement procedure set forth in Internal Rule 72 has been complied with and the 30 day time period to bring it before the Pre-Trial Chamber has elapsed.⁵⁹ As a matter of consequence, as long as a disagreement is not raised before the Pre-Trial Chamber, the fact that some orders or decisions are apparently operated under the guidance of one Co-Investigating Judge only is not a matter of jurisdictional challenge.

25. In the light of the foregoing, the Pre-Trial Chamber is not convinced that the Impugned Decision, which rejected the Defence's request to reconsider the Summons and vacate it, amounts to a decision confirming the jurisdiction of the ECCC.
26. As far as Internal Rule 74(3)(a) is concerned, the Appeal is therefore inadmissible.

b) Admissibility under Internal Rule 21(1)

27. The Defence submits the Pre-Trial Chamber has jurisdiction to hear appeals based on Internal Rule 21(1) when its "intervention is necessary to prevent irremediable damage to the fairness of the proceedings or to the appellant's fair trial rights."⁶⁰ The Defence further submits that the Appellant's right to a competent tribunal has been violated by the failure to provide information on the Disagreement, "which was [the International Co-Investigating Judge's] purported basis for unilateral authority in issuing the Summons."⁶¹ The Defence argues that, as a result, the Appeal should be admitted to safeguard her right to a competent tribunal and to establish that the Summons was invalid.⁶²

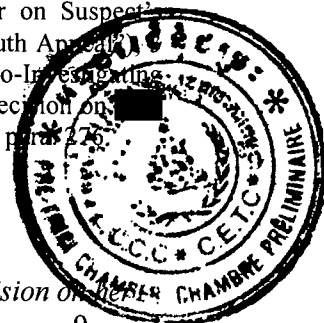
⁵⁸ Decision on TA An Appeal, para.11.

⁵⁹ Decision on Meas Muth's Appeal against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge (the "Decision on Meas Muth Appeal", 12 December 2014, D117/1/1/2, para.16; Decision on [REDACTED] Appeal against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge (the "Decision on [REDACTED] Appeal on Validity of Summons"), 4 December 2014, D212/1/2/2, para.7; Ieng Sary Appeal, para. 17.

⁶⁰ Appeal, para. 17; *See also* Decision on TA An Appeal, para. 10.

⁶¹ Appeal, para. 18; *See also* Summons, p. 2.

⁶² Appeal, para. 19.



28. The Pre-Trial Chamber notes that Internal Rule 21 does not provide an automatic avenue for appeals based on fair trial rights.⁶³ For the Pre-Trial Chamber to exercise appellate jurisdiction under Internal Rule 21, the Appellant must demonstrate that in the particular circumstances of the case at hand, 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.⁶⁴ Similarly, Internal Rule 21 cannot be used to allow as admissible an application for which there is a defined framework but the application does not meet the concerned requirements for admissibility.⁶⁵
29. In any event, the Pre-Trial Chamber finds that the Appellant has not demonstrated in the present case that the Impugned Decision, by refusing to reconsider and vacate a summons, jeopardises her fair trial rights. The provision of information concerning disagreements of Co-Investigating Judges is strictly within the purview of their discretion.⁶⁶ Further, the Pre-Trial Chamber "shall not interfere with this discretion unless it is demonstrated, in the exceptional circumstances of the case, the lack of information about the disagreement impairs the Appellant's fair trial rights."⁶⁷ The Pre-Trial Chamber notes that legal requirements for unilateral action by one Co-Investigating Judge have been complied with and the Disagreement was not brought before the Pre-Trial Chamber.⁶⁸ Further, absence of any contrary indication, it is presumed that the Co-Investigating Judges, in light of their judicial and ethical duties, ensure they act in compliance with the requirements in Article 5(4) of the Agreement, Article 23new of the ECCC Law and Internal Rule 72.⁶⁹

⁶³ Decision on TA An Appeal, para. 8; Decision on Meas Muth Appeal, para. 15.

⁶⁴ Decision on [REDACTED] Appeal against the Decision Denying his Request for Clarification (the "Decision on [REDACTED] Appeal on Request for Clarification"), 13 November 2014, D205/1/1/2, para. 7; Decision on Meas Muth Appeal, para. 15.

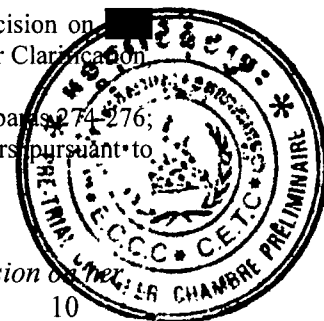
⁶⁵ See Decision on TA An's Appeal against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judge's Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para.8. See also Case 002 (PTC16), Decision on the Appeal Against the 'Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', 7 July 2010, D370/2/11, para. 12.

⁶⁶ Decision on TA An Appeal, para. 10, referring to *Prosecutor v. Šešelj*, IT-03-67-T, Decision to Unseal the Report of the Presiding Judge to the President of the Tribunal or Alternatively the Judge Designated by Him Regarding the Motion for Disqualification of Judge Harhoff, Presiding Judge of Trial Chamber III, 4 September 2013, p.3; *Prosecutor v. Prlić*, IT-04-74-T, Order by the Chamber's Presiding Judge Concerning the Prlić Defence Request Seeking Disclosure of Correspondence, Trial Chamber III, 5 October 2010, p.2.

⁶⁷ Decision on TA An Appeal, para. 10. See also Decision on Meas Muth Appeal, para. 15; Decision on [REDACTED] Appeal on the Validity of a Summons, para. 6; Decision on [REDACTED] Appeal on Request for Clarification on para. 7.

⁶⁸ Impugned Decision, para. 19; Decision on Request for Stay, para 14. See also Ieng Sary Appeal, paras 274-276; Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, paras 16, 27.

⁶⁹ Decision on TA An Appeal, para. 11.



30. As recalled by the International Co-Investigating Judge, the applicable rules are clear that a Co-Investigating Judge can act alone if the disagreement procedure is followed.⁷⁰ They are also clear that disagreements are internal to the Office of the Co-Investigating Judges and not accessible to the parties, unless they are brought for resolution before the Pre-Trial Chamber.⁷¹ The applicable rules therefore do not envisage that the power of one Co-Investigating Judge to act alone would be subject to the parties' scrutiny, unless there is evidence that the legal requirements for unilateral action have not been complied with. Instead, the Rules provide that both Co-Investigating Judges have the power and duty to ensure that actions taken by one of them are within the scope of disagreements or subject to a delegation of authority. They are presumed to fulfil these obligations and act in accordance with their ethical duties.⁷²

31. Therefore, the Pre-Trial Chamber agrees with the International Co-Investigating Judge that the present legal framework contains sufficient checks and balances to ensure that unilateral actions are taken in accordance with the law.⁷³ To generally allow the parties to get access to disagreements upon allegation that they want to examine the competence of one Co-Investigating Judge to act alone would compromise the principle of confidentiality of the disagreement procedure and, ultimately, change its very nature. The guarantees in place are sufficient to ensure respect of the right to a competent tribunal.

32. In the present case, the Summons specifically refers to the Disagreement⁷⁴ and it has been confirmed that the said disagreement has not been brought to the Pre-Trial Chamber.⁷⁵ The Summons was issued on 29 July 2014, more than 30 days after the registration of the Disagreement. Pursuant to Internal Rule 72, the International Co-Investigating Judge could therefore proceed with the issuance of the Summons. In this respect, it is noted that both Co-Investigating Judges shared this interpretation of Internal Rule 72 through a Joint Clarification⁷⁶ and foresaw the development of the present proceedings. The last paragraph of the Joint Clarification reads that “[t]he International [Co-Investigating Judge] will precise, in a separate letter, the date to conduct the above judicial investigation act and the

⁷⁰ Impugned Decision, para. 17 referring to Decision on Request for Stay, para. 14.

⁷¹ Decision on TA An Appeal, para. 10.

⁷² Decision on TA An Appeal, para. 11.

⁷³ Impugned Decision, paras 20-21.

⁷⁴ Summons. See also Report of Service of Summons.

⁷⁵ Impugned decision, para.19. See also Joint Clarification.

⁷⁶ Joint Clarification.



method of notification and summons delivery relating to the suspect Im Chaem.”⁷⁷ Access to the Disagreement is therefore not necessary to conclude that the International Co-Investigating Judge had the authority to issue the Summons.

33. In light of the foregoing, the Pre-Trial Chamber considers that there are no exceptional circumstances in the present case that would justify the Pre-Trial Chamber’s intervention under Internal Rule 21. As far as Internal Rule 21(1) is concerned, the present Appeal is therefore inadmissible.

34. The present appeal shall consequently be dismissed as inadmissible.

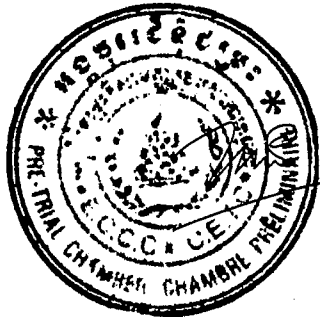
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

DECIDES UNANIMOUSLY TO DISMISS the appeal as inadmissible.

Phnom Penh, 09 December 2015

President

Pre-Trial Chamber



PRAK Kimsan BEAUVALLET Olivier NEY Thol BWANA Steven James HUOT Vuthy

⁷⁷ *Ibid.*