



**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

D120/3/1/8

*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° 003/07-09-2009-ECCC/OCIJ (PTC26)

**Before:** Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

**Date:** 26 April 2016

<b>ឯកសារដើម</b>
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**CONFIDENTIAL**

**CONSIDERATIONS ON MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S RE-ISSUED DECISION ON 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 International Co-Investigating Judge’s Re-issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission (the “Appeal”) filed on 22 September 2015.<sup>1</sup>

## I. PROCEDURAL BACKGROUND

1. On 7 September 2009, the Co-Prosecutors filed the Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, initiating the Case 003 judicial investigation (“Introductory Submission”).<sup>2</sup>
2. On 24 February 2012, MEAS Muth was notified of his status as a Suspect.<sup>3</sup>
3. On 31 October 2014, the International Co-Prosecutor filed a Supplementary Submission, after having filed a disagreement with his National Counterpart.<sup>4</sup>
4. On 19 November 2014, MEAS Muth, through his Co-Lawyers (the “Co-Lawyers”) filed the Motion to Strike the International Co-Prosecutor’s Supplementary Submission (“Motion to Strike”).<sup>5</sup>
5. On 26 November 2014, the International Co-Investigating Judge summoned MEAS Muth for an initial appearance on 8 December 2014.<sup>6</sup> Upon his refusal to attend the initial appearance<sup>7</sup> and the Judicial Police’s failure to secure his attendance, the International Co-Investigating Judge charged MEAS Muth *in absentia* for crimes against humanity, violations of the 1956 Cambodian Penal

<sup>1</sup> Case File No. 003/07-09-2009-ECCC/OCIJ (PTC26), MEAS Muth’s Appeal against International Co-Investigating Judge’s Re-issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 22 September 2015, D120/3/1/1 (“Appeal”).

<sup>2</sup> Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1 (“Introductory Submission”).

<sup>3</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D30.

<sup>4</sup> International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120 (“Supplementary Submission”).

<sup>5</sup> MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 19 November 2014, D120/1 (“Motion to Strike”).

<sup>6</sup> Summons of MEAS Muth for Initial Appearance, 26 November 2014, A66.

<sup>7</sup> Notice concerning Mr. MEAS Muth’s Decision not to Recognize Summons, 2 December 2014, A67/1; Notice of Non-Recognition of Summons, 2 December 2014, A67/1.



Code and grave breaches of the Geneva Conventions of 1949 and granted him access to the Case 003 case file.<sup>8</sup>

6. On 3 March 2015, the Co-Lawyers filed before the Pre-Trial Chamber the Appeal against the Co-Investigating Judges' Constructive Denial of his Motion to Strike.<sup>9</sup> Upon recognition of the MEAS Muth's change of status to a Charged Person, the International Co-Investigating Judge informed him, on 26 March 2015, that his earlier submissions were now under consideration.<sup>10</sup>
7. On 17 June 2015, the Pre-Trial Chamber issued its Decision on the Appeal against the Co-Investigating Judges' Constructive Denial of MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, stating, *inter alia*, that the time taken by the Co-Investigating Judges did not amount to a constructive denial of the Motion to Strike and dismissing the appeal as inadmissible.<sup>11</sup>
8. On 31 July 2015, His Majesty King Norodom Sihamoni of Cambodia signed the Appointment Letter appointing Judge Bohlander to the Office of International Co-Investigating Judge with immediate effect. On 20 August 2015, Judge Bohlander and Judge Harmon were officially notified of this appointment.
9. On 5 August 2015, Judge Harmon issued the Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission.<sup>12</sup>
10. On 20 August 2015, the Co-Lawyers filed a Notice of Appeal.<sup>13</sup> After having filed a request to the Pre-Trial Chamber to allow the filing of its Appeal in English

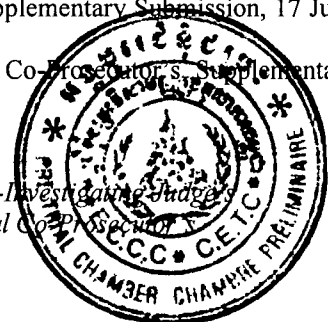
<sup>8</sup> Decision to Charge MEAS Muth *in absentia*, 3 March 2015, D128; Notification of Charges against MEAS Muth, 3 March 2015, D128.1.

<sup>9</sup> MEAS Muth's Appeal against the Co-Investigating Judges Constructive Denial of MEAS Muth's Motion to Strike the Supplementary Submission, 3 March 2015, D120/1/1/1.

<sup>10</sup> Response to MEAS Muth's Request for the Co-Investigating Judges to Act on his Past Submissions, 26 March 2015, D132/1.

<sup>11</sup> 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, 17 June 2015, D120/1/1/2 (PTC18).

<sup>12</sup> Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 5 August 2015, D120/2.



with the Khmer translation to follow,<sup>14</sup> the Appeal was filed in English and Khmer on 31 August 2015.<sup>15</sup>

11. On 4 September 2015, the Co-Lawyers received an email from a Legal Officer in the Office of the Co-Investigating Judges, sent on behalf of Co-Investigating Judge Bohlander, stating that while acting in good faith, Judge Harmon issued the Decision on Meas Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, without the necessary authority to do so on account of his own appointment as International Co-Investigating Judge by His Majesty King Norodom Sihamoni of Cambodia.<sup>16</sup>
12. On 11 September 2015, the International Co-Investigating Judge issued the Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission ("Impugned Decision").<sup>17</sup>
13. On 17 September 2015, MEAS Muth, through his Co-Lawyers, filed a renewed Notice of Appeal,<sup>18</sup> and filed the Appeal on 22 September 2015.<sup>19</sup>
14. The International Co-Prosecutor filed a Request for extension of time,<sup>20</sup> which the Defence asked the Pre-Trial Chamber to reject.<sup>21</sup> On 14 October 2015, the International Co-Prosecutor filed its Response to the Appeal (the "Response").<sup>22</sup>

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<sup>13</sup> MEAS Muth's Notice of Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 20 August 2015, D120/2/1.

<sup>14</sup> MEAS Muth's Request to File Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission in English with Khmer Translation to Follow, 25 August 2015, D120/2/1/1.

<sup>15</sup> MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 31 August 2015, D120/2/1/2 (PTC25).

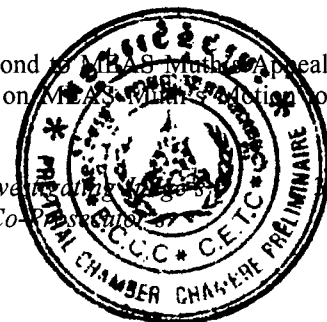
<sup>16</sup> Email from OCIJ to Defence, "Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission", 4 September 2015, D120/2/1/3.1.1.

<sup>17</sup> Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 11 September 2015, D120/3 ("Impugned Decision").

<sup>18</sup> MEAS Muth's Notice of Appeal against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 17 September 2015, D120/3/1.

<sup>19</sup> Appeal.

<sup>20</sup> International Co-Prosecutor's Request for Extension of Time to Respond to MEAS Muth's Appeal against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to



15. On 20 October 2015, MEAS Muth filed an Urgent Request to summarily reject the International Co-Prosecutor's Response to Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, or, in the Alternative, Urgent Request for Extension of Time to Reply and for Permission to File Reply in English with Khmer Translation to Follow.<sup>23</sup>
16. On 27 October 2015, pursuant to Internal Rule ("Rule") 39(4)(b), the Pre-Trial Chamber formally recognized, the validity of the International Co-Prosecutor's Response filed after the time limit prescribed in the Rules. The Pre-Trial Chamber also granted the extension of time and permitted MEAS Muth to file his Reply in English with the Khmer translation to follow at the first opportunity.<sup>24</sup>
17. On 27 October 2015, MEAS Muth filed the Reply to the International Co-Prosecutor's Response to Appeal against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission in English. The Khmer version was filed on 13 November 2015.<sup>25</sup>

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Strike the International Co-Prosecutor's Supplementary Submission, 25 September 2015, D120/3/1/2 (PTC26).

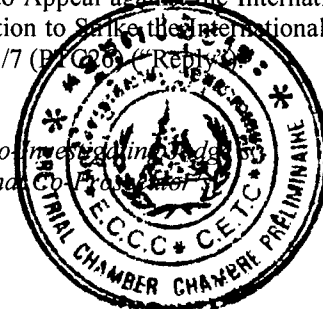
<sup>21</sup> MEAS Muth's Response to International Co-Prosecutor's Request for Extension of Time to Respond to MEAS Muth's Appeal against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 2 October 2015, D120/3/1/3 (PTC26).

<sup>22</sup> International Co-Prosecutor's Response to MEAS Muth's Appeal against Co-Investigating Judge Bohlander's Re-issued Decision on Motion to Strike the International Co-Prosecutor's Supplementary Submission, 14 October 2015, D120/3/1/4 (PTC26) ("Response").

<sup>23</sup> MEAS Muth's Urgent Request to Summarily Reject International Co-Prosecutor's Response to Appeal against Co-Investigating Judge's Re-issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, or, in the Alternative, Urgent Request for Extension of Time to Reply and for Permission to File Reply in English with the Khmer translation to follow, 20 October 2015, D120/3/1/5 (PTC26).

<sup>24</sup> Decision on MEAS Muth's Urgent Request to Summarily Reject International Co-Prosecutor's Response to Appeal against Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, or, in the Alternative, Urgent Request for Extension of Time to Reply and for Permission to File Reply in English with the Khmer Translation to Follow, 27 October 2015, D120/3/1/6 (PTC26).

<sup>25</sup> MEAS Muth's Reply to International Co-Prosecutor's Response to Appeal against the International Co-Investigating Judges' Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 27 October 2015, D120/3/1/7 (PTC26) ("Reply").



## II. ADMISSIBILITY OF THE APPEAL

18. MEAS Muth argues that the Appeal is admissible under Rule 74(3)(a) as an appeal against a decision confirming the jurisdiction of the ECCC. The Co-Lawyers argue that “[t]hrough the Impugned Decision, the International Co-Investigating Judge confirmed that Co-Investigating Judges have jurisdiction to investigate the facts that were alleged in the Supplementary Submission to have been within the scope of the Introductory Submission”.<sup>26</sup> According to the Co-Lawyers, the Appeal is also admissible under Rule 74(3)(g) because “although the Motion to Strike was not styled as an annulment application, it essentially sought the annulment of the Supplementary Submission”, and the International Co-Investigating Judge refusal to do so is appealable under Rule 74(3)(g).<sup>27</sup> If there is any doubt as to the interpretation of Rules 74(3)(a) and 74(3)(g), the Co-Lawyers argue that they should be interpreted in a way that safeguards MEAS Muth’s rights to be informed of the case against him, to prepare his defence, and to be tried within a reasonable time, as well as to safeguard his overall right to a fair trial pursuant to Rule 21.<sup>28</sup>
19. The International Co-Prosecutor argues that the Appeal is not admissible under Rule 74(3)(a) since only true jurisdictional challenges may be raised pursuant to it. The Co-Prosecutor argues that the Pre-Trial Chamber previously held that the scope of this avenue of appeal is narrow, prohibiting appeals based upon procedural irregularities in the investigation.<sup>29</sup> The International Co-Prosecutor does not, however, object to the admissibility of the Appeal under Rules 74(3)(g) and 21, “in the interests of achieving a resolution of this matter without incurring additional time and resources unnecessarily”.<sup>30</sup> Nonetheless, according to the International Co-Prosecutor, consistently with previous Pre-Trial Chamber

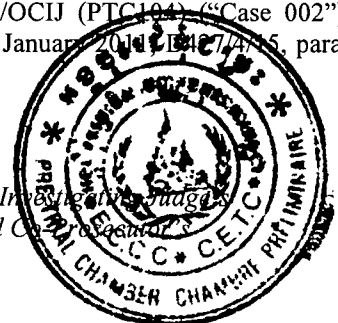
<sup>26</sup> Appeal, para 24.

<sup>27</sup> Appeal, para 25.

<sup>28</sup> Appeal, para 26.

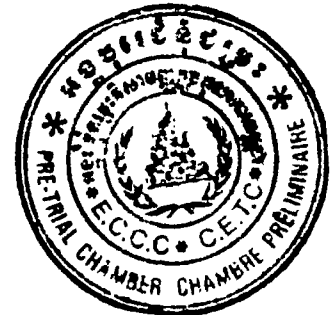
<sup>29</sup> Response, para. 19, citing, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC104) (“Case 002”), Decision on KHIEU Sampan’s Appeal against the Closing Order, 21 January 2010, ECCC-2010-01-01, paras 14-16.

<sup>30</sup> Response, para. 20.



jurisprudence, only those arguments raised in the Motion to Strike should be considered and not the full extent of the arguments raised by the Appeal.<sup>31</sup>

20. The Co-Lawyers reply that the International Co-Prosecutor's interpretation of Rule 74(3)(a) is overly restrictive and that although the Pre-Trial Chamber has previously taken a narrow view of the scope of appeals permitted under Rule 74(3)(a), the Co-Lawyers have recently requested that the Pre-Trial Chamber re-evaluate its position.<sup>32</sup> Moreover, the Co-Lawyers assert that the International Co-Prosecutor's request that only the arguments raised in the Motion to Strike be considered is meritless. They argue that "it is only when appeals have been admitted under Rule 74(3)(g) that the Pre-Trial Chamber has previously considered it appropriate to base its decision on the underlying submissions only". However, the Co-Lawyers note that in this case, the Pre-Trial Chamber is seised also through Rule 74(3)(a). According to the Co-Lawyers, the Pre-Trial Chamber will benefit from considering the arguments raised in the Appeal, especially since the Motion to Strike was filed before the Defence was granted access to the Case File and became aware of highly relevant facts.<sup>33</sup> Should the Pre-Trial Chamber decide to consider only the arguments raised in the Motion to Strike, the Co-Lawyers request the Pre-Trial Chamber to ignore the Arguments raised by the International Co-Prosecutor in the Response that exceed the Motion to Strike, on the basis of equality of arms.<sup>34</sup>
21. The Pre-Trial Chamber will first examine whether the three grounds of Appeal are admissible pursuant to Rules 74(3)(a) and 74(3)(g), which explicitly set the grounds for appeals before the Pre-Trial Chamber, before considering the admissibility pursuant to Rule 21, if necessary.




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<sup>31</sup> Response, para. 21.

<sup>32</sup> Reply, para. 3.

<sup>33</sup> Reply, para. 5.

<sup>34</sup> Reply, para. 6.

### 1. Rule 74(3)(a) of the Internal Rules

22. Pursuant to Rule 74(3), a “Charged Person” may appeal against a number of enumerated orders or decisions of the Co-Investigating Judges, including decisions “confirming the jurisdiction of the ECCC”.<sup>35</sup>

23. In interpreting Rule 74(3)(a), the Pre-Trial Chamber has previously held that “only jurisdictional challenges may be raised under that Rule”. In assessing what constitutes a proper jurisdictional challenge, since it is not defined in the legal framework of the ECCC, the Pre-Trial Chamber considered that the Court:

“[...] is in a situation comparable to that of the *ad hoc* tribunals, as opposed to domestic civil law systems, where the terms of the statutes with respect to the crimes and modes of liability that may be charged are very broad, where the applicable law is open-ended, and where the principle of legality demands that the Tribunal apply law which was binding at the time of the acts for which an accused is charged”.<sup>36</sup>

Consequently, the Pre-Trial Chamber stated that appeals which “challenge the very existence of a form of responsibility or its recognition under [...] law at the time relevant to the indictment”,<sup>37</sup> as well as those challenging “the existence in law of a crime and its elements at the time relevant to the indictment” are jurisdictional challenges.<sup>38</sup>

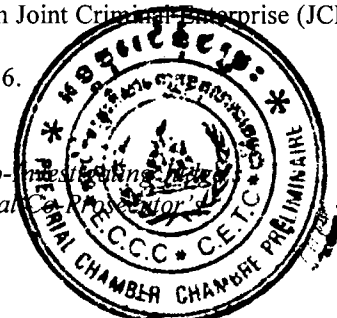
24. The Pre-Trial Chamber has also held that it was appropriate to adopt a broad interpretation of the right to appeal under Rule 74(3)(a) when the Co-Investigating Judges addressed a situation not contemplated by the Rules. The Pre-Trial Chamber found this appropriate in light of Rule 21, which provides

<sup>35</sup> Internal Rule 74(3)(a).

<sup>36</sup> Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011 D427/1/30, (“Decision on IENG Sary’s Appeal against the Closing Order”), para. 45, citing, Case 002(PTC35), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, paras 21-24.

<sup>37</sup> Decision on IENG Sary’s Appeal against the Closing Order, para. 45, citing, Case 002 (PTC35), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 23.

<sup>38</sup> Decision on IENG Sary’s Appeal against the Closing Order, para. 46.





that the Rules shall be interpreted so as to safeguard the interests of a Charged Person, and ensure both legal certainty, and “fair and adversarial” proceedings.<sup>39</sup>

25. Nonetheless, the Pre-Trial Chamber notes that alleged defects in the form of the indictment<sup>40</sup> and appeals against procedural irregularities in the investigation<sup>41</sup> are “non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Rule 74(3)(a) and Chapter II of the ECCC Law,<sup>42</sup> which outlines the personal, temporal and subject matter jurisdiction of the ECCC.”<sup>43</sup>
26. The Pre-Trial Chamber notes that the Impugned Decision constitutes a refusal to strike the International Co-Prosecutor’s Supplementary Submission. Grounds A and B of the Motion to Strike challenged the validity of the Supplementary Submission on two bases: (1) it was improperly filed to “remove ambiguities”, not to seise the Co-Investigating Judges with new facts;<sup>44</sup> and (2) it was ineffectively signed by only one Co-Prosecutor.<sup>45</sup> The Impugned Decision considered the Motion to Strike to be unfounded and confirmed the validity of the Supplementary Submission. By assessing the validity of the Submission and refusing to strike it, the Co-Investigating Judge did not confirm that he had jurisdiction to investigate the alleged facts.<sup>46</sup> The evaluation undertaken by the Co-Investigating Judge can neither be considered as a decision to ascertain his power to investigate the alleged facts, nor as a decision confirming the jurisdiction of the ECCC.

<sup>39</sup> Considerations on MEAS Muth’s Appeal Against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth In Absentia, 30 March 2016, D128/1/9 (PTC21), para. 28.

<sup>40</sup> Decision on IENG Sary’s Appeal against the Closing Order, para. 47.

<sup>41</sup> Case 002 (PTC104), Decision on KHIEU Samphan’s Appeal against the Closing Order, 21 January 2011, D427/4/15, para. 14.

<sup>42</sup> 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, with amendments as of 27 October 2004, NS/RKM/1004/006 (“ECCC Law”).

<sup>43</sup> Decision on IENG Sary’s Appeal against the Closing Order, para. 47.

<sup>44</sup> Motion to Strike, para 19.

<sup>45</sup> Motion to Strike, para. 13.

<sup>46</sup> Impugned Decision, para. 24.



27. Moreover, Ground C of the Motion to Strike claims a violation of MEAS Muth's right to be tried within a reasonable time.<sup>47</sup> When rejecting this ground of appeal, the Impugned Decision only considered the infringement, if any, of his fair trials rights;<sup>48</sup> it did not confirm the jurisdiction of the ECCC. Thus, the Impugned Decision does not "confirm" the ECCC's jurisdiction *rationae personae, materiae, temporis* or *loci*. Therefore, the Pre-Trial Chamber finds the Appeal inadmissible pursuant to Rule 74(3)(a).

## 2. Rules 74(3)(g) and 21 of the Internal Rules

28. Pursuant to Rule 74(3), a "Charged Person" may appeal against decisions of the Co-Investigating Judges, including decisions "refusing an application to seise the Chamber for annulment of investigative action".<sup>49</sup>

### (i) Meaning of "investigative action" in Rule 74(3)(g)

29. The Pre-Trial Chamber stresses that pursuant to Rule 73(b) it has sole jurisdiction over applications to annul investigative action.<sup>50</sup>

30. Rule 74(3)(g) provides that the Charged Person may appeal against decisions of the Co-Investigating Judges regarding refusal to seise the Chamber with annulment of "investigative action". It follows, therefore, that a Charged Person may only appeal that which he was permitted to seek annulment of before the Co-Investigating Judge. Rule 48, which governs annulments for procedural defect provides: "Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application".

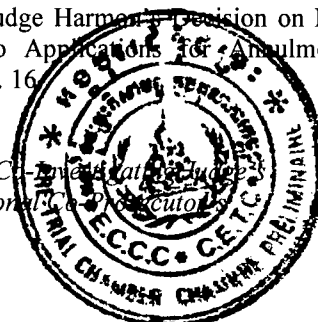
31. The Pre-Trial Chamber is of the view that the notion of "investigative action" in the meaning of Rule 74(3)(g) should be interpreted as to encompass the Supplementary Submission. This finding is also supported by Chapter 6 of the

<sup>47</sup> Motion to Strike, para. 25.

<sup>48</sup> Impugned Decision, para. 41.

<sup>49</sup> Rule, 74(3)(g).

<sup>50</sup> Decision on MEAS Muth's Appeal Against Co-Investigating Judge Harman, Decision on MEAS Muth's Application to Seise the Pre-Trial Chamber with two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (PTC20), para. 16.



Cambodian Code of Criminal Procedure (the “CCP”) and specifically articles 253 and 280 which provide respectively for “complaints to the Investigation Chamber” and the “effect of annulment”. These articles consider the annulment of particular *parts of the proceedings* and do not restrict it specifically to investigative actions.<sup>51</sup> A supplementary submission is therefore included in the notion of investigative action of which annulment can be sought. The Co-Lawyers should have submitted a reasoned application to the Co-Investigating Judges requesting that they seize the Pre-Trial Chamber with a view to annulment pursuant to Rule 76(2).

(ii) Broad interpretation of Rule 74(3)(g) in light of Rule 21

32. The Pre-Trial Chamber has previously held that, the fundamental principles stated in Rule 21 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 Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea (the “ECCC Agreement”),<sup>52</sup> Article 35 (new) of the ECCC Law<sup>53</sup> and Article 14(3) of the International Covenant on Civil and Political Rights (the “ICCPR”).<sup>54</sup> It has further held on multiple occasions that these principles may warrant adopting a liberal interpretation of a right to appeal to ensure that the proceedings are fair and adversarial.<sup>55</sup>

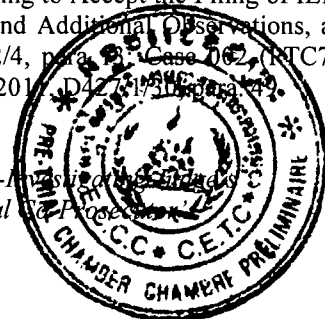
<sup>51</sup> Article 280 Cambodian Criminal Procedural Code provides that; ““When the Investigation Chamber is seized with a request *for annulment of a particular part of the proceedings*, a decision to annul shall include *whether the annulment also affects other documents or proceedings*. *Parts of the proceedings* which have been nullified shall be removed from the case file and filed separately by the court clerk of the Investigation Chamber” [emphasis added].

<sup>52</sup> 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 2003 (“ECCC Agreement”), Article 13(1).

<sup>53</sup> ECCC Law. Article 35 new.

<sup>54</sup> International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS 171 and 1057 UNTS 407 (“the ICCPR”), Article 14(3).

<sup>55</sup> Case 002 (PTC11), Decision on KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/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. 8; Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2010, D427/1/2/3/4.

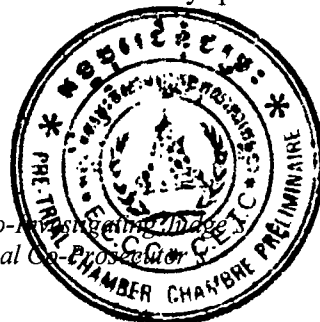


33. While the Motion to Strike was not filed as an annulment application to seize the Chamber, the Pre-Trial Chamber finds that it is in the interests of justice to interpret the annulment procedure broadly in this case, pursuant to Rule 21.
34. The Pre-Trial Chamber finds that the Impugned Decision amounts to a decision “refusing an application to seize the Chamber for annulment”, in the meaning of Rule 74(3)(g), when interpreted broadly considering first of all the importance of such a submission and its impact on the investigation. This interpretation is supported by the fact that introductory and supplementary submissions are part of the documents where no action shall be taken when subject to disagreement between Co-Prosecutors, pursuant to Rule 71(3), until a consensus is achieved, the thirty day period has ended or a dispute settlement procedure has been completed. Furthermore, the Pre-Trial Chamber notes that the result sought by the Co-Lawyers when requesting that the Co-Investigating Judge strike the Supplementary Submission is the same as the one sought from a request for annulment pursuant to Rule 76(2). The annulment of the Supplementary Submission is the result sought in both cases even though the legal basis for the request is different. The Impugned Decisions stated that “[s]hould the Co-Investigating Judges find the filing of a supplementary submission would violate either of these rights, even in the absence of specific provisions in the Internal Rules, they may take the necessary measures by exercising the inherent powers attached to their function”.<sup>56</sup> Resorting to inherent powers would have been unnecessary in the present case since there is no *lacuna* regarding this matter in the Rules. The Motion to Strike is an application seeking annulment of part of the proceedings. Rule 76(2) should have been applied and consequently the seisin of the Pre-Trial Chamber with a view to annulment should have been considered. As mentioned by the International Co-Investigating Judge, “[t]here is no provision in the Internal Rules allowing the Co-Investigating Judges to strike an introductory or supplementary submission from the Case File”.<sup>57</sup> Rule 73(b) has vested the right to annul part of the proceedings only in the Pre-Trial Chamber. Should the Co-Investigating Judges consider that any part of the

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<sup>56</sup> Impugned Decision, para. 41.

<sup>57</sup> *Ibid.*



proceedings is null and void, they can, pursuant to Rule 76(1) submit a reasoned application to the Pre-Trial Chamber.

35. Thus this broad interpretation of Rule 74(3)(g) is necessary given that the Impugned Decision examines the validity and potential annulment of the Supplementary Submission. Therefore, exceptional and particular facts and circumstances of the case at stake mandate that the Pre-Trial Chamber admit the Appeal pursuant to a broad interpretation of Rule 74(3)(g), read in light of Rule 21.

(iii) The Co-Investigating Judges' test regarding requests to seize the Chamber for annulment

36. Such applications for annulment may be brought before the Pre-Trial Chamber by the Co-Investigating Judges acting on their own motion pursuant to Rule 76(1) or by the parties, in accordance with Rule 76(2). In the latter case, the Co-Investigating Judges determine whether the Pre-Trial Chamber should be seised of the request.<sup>58</sup> The Pre-Trial Chamber has consistently held that an order of the Co-Investigating Judges ruling on a request to seize the Pre-Trial Chamber with a view to annulment must state the reasons for seizing the Pre-Trial Chamber or for declining to do so.<sup>59</sup>
37. The Pre-Trial Chamber has held that the Co-Investigating Judges must consider such an application in two respects: first, as to whether the application identifies a procedural defect, and second, as to whether the application identifies the prejudice caused by such defect to the applicant.<sup>60</sup> The Pre-Trial Chamber delineated the parameters of the assessment to be undertaken by the Co-Investigating Judges when it identified the test which must be applied in considering such an application.<sup>61</sup> The Pre-Trial Chamber held that “the Co-Investigating Judges were to determine only whether there was an arguable case

<sup>58</sup> Internal Rule 76(2).

<sup>59</sup> Case 002 (PTC06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, D55/1/8, 26 August 2008 (“NUON Chea Decision”) para. 21.

<sup>60</sup> NUON Chea Decision, para. 23.



and not examine the merits of the application”.<sup>62</sup> Specifically, the Pre-Trial Chamber determined that in considering an application for annulment founded on Rule 76(2), the Co-Investigating Judges need only be satisfied that the application advances a reasoned argument alleging procedural defect and prejudice.<sup>63</sup>

38. Had the Motion to Strike been put forward on the correct legal basis regarding annulment procedures, the Pre-Trial Chamber considers that the Co-Investigating Judges should have decided that the annulment application was reasoned and that an arguable case for a procedural defect and infringement of rights had been put forward. The Co-Investigating Judges dismissal of the Motion to Strike in the Impugned Decision amounts to a refusal to seise the Chamber, which the Co-Lawyers should have appealed pursuant to Rules 76(2) and 74(3)(g).

(iv) The Pre-Trial Chamber test regarding admissibility of annulment applications

39. Rule 76(4) then provides that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: (a) does not set out sufficient reasons; (b) relates to an order that is open to appeal; or (c) is manifestly unfounded.<sup>64</sup>

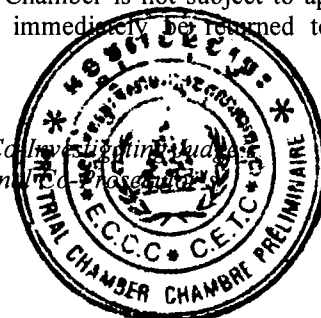
40. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the

<sup>61</sup> Decision on MEAS Muth’s Appeal Against Co-Investigating Judge Harmon’s Decision on MEAS Muth’s Application to Seise the Pre-Trial Chamber with two Applications for Annulment of Anvestigative Action, 23 December 2015, D134/1/10 (PTC20), paras 16-19.

<sup>62</sup> Case 002 (PTC41), Decision on IENG Thirith’s Appeal against the Co-Investigating judges’ Order Rejecting the Request to Seise the Pre-trial Chamber with a view to Annulment of all Investigations, 25 June 2010, D263/2/6, (“IENG Thirith Decision”), para. 18.

<sup>63</sup> *Ibid*, para. 18.

<sup>64</sup> See also Article 279 of the Cambodian Code of Criminal Procedure (“CCCP”), 9 September 2008, which provides, “The Investigation Chamber may declare any request for annulment inadmissible if: - the request does not contain reasons; - the request is related to an order that is subject to appeal; - the request is obviously unfounded. The decision of the Investigation Chamber is not subject to appeal. When the request is declared inadmissible, the case file shall immediately be returned to the investigating judge.”



rights and interests of MEAS Muth;<sup>65</sup> (ii) has clearly articulated the prejudice;<sup>66</sup> and when necessary, (iii) adduced evidence to sustain the allegations.<sup>67</sup>

41. In the present case, the Pre-Trial Chamber is of the view that the annulment application provided sufficient arguments to render it admissible.
42. In light of its previous jurisprudence,<sup>68</sup> the Pre-Trial Chamber finds that equality of arms dictates that it is appropriate to consider this matter on the basis of the Motion to Strike, as well as the Appeal, the Reponse and the Reply to the extent that the arguments raised in these submissions are developing, supporting or replying to the *matters* raised in the initial annulment application, the Motion to Strike.

### III. MERITS

43. Upon deliberation, the Judges of the Pre-Trial Chamber could not reach a majority of votes for a decision on the merits of this Appeal.
44. Therefore, while the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeal is expressed in the preceding paragraphs, the separate opinions of the various Judges of the Pre-Trial Chamber in respect of the merits of the Appeal are appended, as required by Internal Rule 77(14).

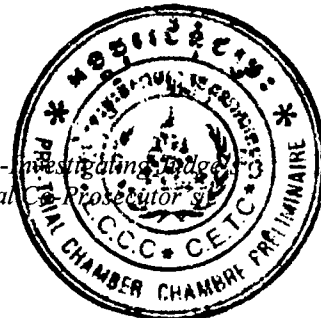
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<sup>65</sup> IENG Thirith Decision, para. 24 provides: “[a]n annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective.”

<sup>66</sup> NUON Chea Decision, para. 40 provides: “a *proven* violation of a right [...], would qualify as a procedural defect [...]. In such cases, the investigative or judicial action *may* be annulled”; para. 42 provides: “the party making the application will have to *demonstrate* that its interests were harmed by the procedural defect” [emphasis added].

<sup>67</sup> IENG Thirith Decision, para. 32.

<sup>68</sup> NUON Chea Decision, para. 34; IENG Thirith Decision, para. 20.

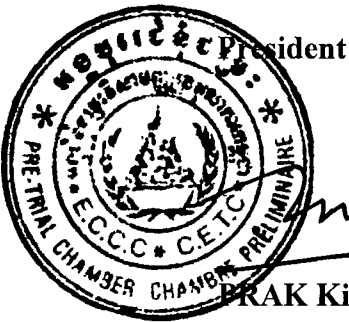


**DISPOSITION**

**FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY  
HEREBY:**

1. **FINDS** the Appeal admissible;
2. **DECLARES** that it has not assembled an affirmative vote of at least four Judges to issue a decision on the merits of the Appeal.

**Phnom Penh, 26 April 2016**



**Pre-Trial Chamber**

**PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy**

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion with regard to the Merits of the Appeal.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion with regard to the Merits of the Appeal.



**OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT  
VUTHY**

1. The national judges will develop below opinion on the merit issue at stake. However, we want for a start to clarify the sense we give to the publicity of the Pre-Trial Chamber decisions.
2. Pursuant to Article 3.12 of the ECCC Practice Direction, Mr. Meas Muth may propose that the PTC reclassify as “Public” a “Confidential” or “Strictly Confidential” document, in accordance with the provisions of the Practice Direction on the Classification and Management of Case-Related Information.
3. Sentence 2 of Article 3.12 of the ECCC Practice Direction prescribes: “Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what is the appropriate classification.”
4. For the forgoing reasons, the National Judges find that at the present time the reclassification from “Confidential” to “Public” is not yet necessary, and Mr. Meas Muth’s rights and interest are not in jeopardy even if the documents remained confidential because he can still access them. The PTC should therefore consider reclassifying the documents upon the issuance of a Closing Order and the determination of any appeal against the Closing Order, pursuant to Sentence 2 of Article 3.12 of the ECCC Practice Direction.

**A. The Facts of the Appeals**

**A.1. Is the International Co-Prosecutor’s Supplementary Submission dated 31 October 2014 a Submission to Further Clarify the Facts Contained in the Second Introductory Submission?**

5. MEAS Muth’s Co-Lawyers argue that the Impugned Decision must be overturned and the Supplementary Submission removed from the Case File: **a.** the Supplementary Submission does not provide “clarifications” or “remove ambiguities” as claimed, but instead attempts to cure investigative action that must be annulled; **b.** to the extent that it does not purport to



Judges of new facts, the Supplementary Submission may not be filed by one Co-Prosecutor alone; and c. new facts may not be added to the judicial investigation at this late stage without violating Mr. MEAS Muth's right to be tried in a reasonable time.<sup>69</sup>

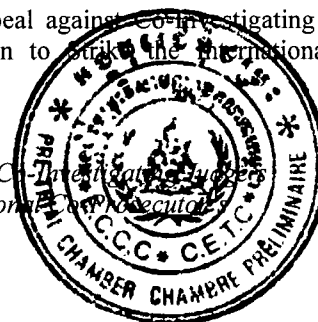
6. MEAS Muth's Co-Lawyers indicate that the International Co-Prosecutor's claim that he filed the Supplementary Submission to provide "clarifications" is a subterfuge: an attempt to cure Co-Investigating Judge Harmon's defective investigation into new facts that fell outside the scope of the Introductory Submission. Masquerading new facts as existing facts within the scope of the Introductory Submission is a charade. Co-Investigating Judge Harmon's investigation into new facts was defective and cannot be cured in this manner.<sup>70</sup>
7. The International Co-Prosecutor indicates that he maintains his position that these facts were not "new", and that the "clarifications" contained in the Supplementary Submission were properly so called. The Co-Prosecutor incorporates by reference all his arguments in that regard contained in his Response to MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action. In summary, it is the Co-Prosecutor's position that MEAS Muth espouses an overly restrictive interpretation of what constitute "new facts" for the purposes of Internal Rule 55(3), and that, contrary to MEAS Muth's contention, the scope of the judicial investigation was not limited to the facts expressly set out in the Introductory Submission. Specifically therefore, the Durian Plantation and Bet Trang worksite fell firmly within the scope of the Co-Prosecutors' Introductory Submission.<sup>71</sup>

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<sup>69</sup> MEAS Muth's Appeal against Co-Investigating Judge Harmon's Re-issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, para. 1, D120/3/1/1.

<sup>70</sup> MEAS Muth's Appeal against Co-Investigating Judge Harmon's Re-issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, para. 2, D120/3/1/1.

<sup>71</sup> International Co-Prosecutor's Response to MEAS Muth's Appeal against Co-Investigating Judge BOHLANDER's Re-issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, para.26, D120/3/1/4.



8. In the Supplementary Submission, the International Co-Prosecutor (“ICP”) submits, pursuant to Internal Rules 53 and 55, the Supplementary Submission, which is intended to clarify and supplement the factual matters to be investigated by the Co-Investigating Judges (“CIJs”) in Case 003.<sup>72</sup>
9. In the Supplementary Submission, the Second Introductory Submission (Second IS) sets out the importance of Kang Keng in paragraph 86(a), stating that MEAS Muth, as Secretary of Division 164, was responsible for defending Cambodia’s coast, including the town of Kang Keng. Furthermore, in his 21 June 2012 Response to an OCIJ Forwarding Order, the ICP clarified that one of the alternative grounds justifying that the Bet Trang site had to be deemed part of the investigative scope was the geographical proximity or even identity of sites between Bet Trang and Kang Keng, which implied that the latter was considered by the ICP as being already included in the scope of the Second IS. Referring to paragraph 86(a) of the Second IS, the ICP stated that the reference to the “town” of Kang Keng may properly be read as referring to the airport of the same name<sup>73</sup>.
10. The Supplementary Submission further clarifies that the purge of Division 117 military cadres and Sector 505 civilian cadres in Kratie Province in late 1978, which has been a subject of interviews conducted by OCIJ investigators to date, is included within the scope of crimes to be investigated in Case 003, as part of the allegation in paragraph 43 of the Second IS regarding cadres who were purged and taken to the S-21 Security Centre and in relation to the allegation in paragraph 62 that “MEAS Muth accompanied Division 164 troops.....”<sup>74</sup>
11. The Supplementary Submission also clarifies that the Second IS sets out the importance of Ream in paragraph 82 and 86(a), stating that RAK Division 164 was based in Kampong Som and Ream and that MEAS Muth, as Secretary of Division 164, was responsible for defending Cambodia’s coast, including the town of Ream. Paragraphs 58 to 61 of the Second IS also explain the key role played by the DK Navy in the capture at sea of Vietnamese and Thai fishermen or other

<sup>72</sup> The Supplementary Submission dated 31 October 2014, para. 1, D120.

<sup>73</sup> The Supplementary Submission dated 31 October 2014, para. 7, D120.

<sup>74</sup> The Supplementary Submission dated 31 October 2014, para. 12, D120.



foreign nationals and their subsequent fate (forced labour, execution or transfer to S-21).<sup>75</sup>

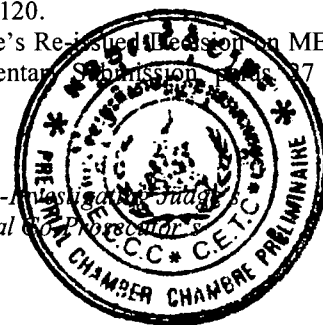
12. For all the arguments stated herein, the national judges of the Pre-Trial Chamber find that the ICP's Supplementary Submission dated 31 October 2014 contains certain parts for further clarification of certain facts contained in the Second IS.

**A.2. Is the International Co-Prosecutor's Supplementary Submission dated 31 October 2014 a Submission to Open Judicial Investigation on New Facts?**

13. MEAS Muth's Co-Lawyers claimed that even if a Supplementary Submission could properly be filed for the purpose of providing "clarifications" or "remov[ing] any ambiguities", the Supplementary Submission does not do this. Instead, under the guise of providing clarifications, the Supplementary Submission attempts to cure Co-Investigating Judge Harmon's defective judicial investigation by making it appear that the facts being investigated were not new, but were always within the scope of the judicial investigation established by the Introductory Submission. Once the Defence received access to the Case File, the Defence learned that the International Co-Prosecutor had filed the Supplementary Submission to include the Durian Plantation and Bet Trang, the investigation of which the Defence had sought to annul because they fell outside the scope of the Introductory Submission.<sup>76</sup>
14. MEAS Muth's Co-Lawyers indicate that annulling a Supplementary Submission in this situation is a remedy that occurs in France. For example, in a 6 February 1996 decision the *Cour de cassation* upheld the annulment of two Supplementary Submissions. The prosecutor had filed an Introductory Submission seizing the investigating judge of an allegation of false attestation in relation to an ongoing trial before the *conseil de prud'hommes*. During the investigation, the investigating judge discovered new facts amounting to abuse of a corporate asset and investigated these new facts for just over one month, including seizing bank

<sup>75</sup> The Supplementary Submission dated 31 October 2014, para. 15, D120.

<sup>76</sup> MEAS Muth's Appeal against International Co-Investigating Judge's Re-issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, paras. 17 and 28, D120/3/1/1



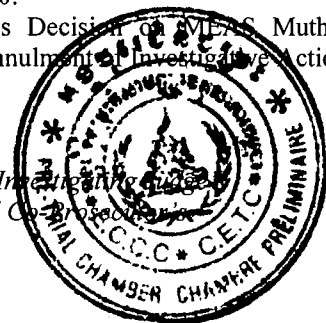
accounts, tapping telephones, and issuing an arrest warrant. The prosecutor then issued two Supplementary Submissions seizing the investigating judge with the crime of abuse of a corporate asset. The *chambre d'accusation* annulled all acts performed by the investigating judge in relation to the offense of abuse of a corporate asset, which led to the annulment of the two Supplementary Submissions. It considered that before receiving the Supplementary Submissions, the investigating judge investigated the facts without being properly seized by the prosecutor. The *Chambre criminelle* of the *Cour de cassation* agreed. Similarly, here, the Supplementary Submission must be annulled.<sup>77</sup>

15. The Supplementary Submission states that on 24 April 2012, the IRCIJ, acting under internal Rule 55(3), indicated that new facts had arisen in the judicial investigation which included a Division 164 execution site referred to as the “Durian Plantation” (located in Ream Village, Ream Commune, Prey Nob District) and Bet Trang forced labour and re-education site (and peripheral sites). On 21 June 2012, the ICP submitted that he considered the OCIJ to be seized of the facts in relation to both sites but that no supplementary submission was necessary, the facts being only partially new and relating to existing facts described in the Second IS.<sup>78</sup>
16. The Pre-Trial Chamber of the Extraordinary Chamber in the Courts of Cambodia (ECCC) was seized of MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision on MEAS Muth’s Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action<sup>79</sup> entered by MEAS Muth’s Co-Lawyers on 18 May 2015, including the one of the facts in relation to “Durian Plantation” and “Bet Trang worksite” contained in the Supplementary Submission dated 31 October 2014.

<sup>77</sup> MEAS Muth’s Appeal against International Co-Investigating Judge’s Re-issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, paras. 31, D120/3/1/1.

<sup>78</sup> The Supplementary Submission dated 31 October 2014, para. 6, D120.

<sup>79</sup> MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision on MEAS Muth’s Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action dated 18 May 2015, D134/1/1.



17. On 23 December 2015, the Pre-Trial Chamber issued a Decision on MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action (the facts in relation to "Durian Plantation" and "Bet Trang worksite"), in which the Pre-Trial Chamber could not reach an affirmative vote of at least four judges in order to issue a decision on the request as the three National Judges of the Pre-Trial Chamber find that the discovery of the "Durian Plantation" and "Bet Trang worksite" uncovered new facts which were not set out in the Second IS, while the two International Judges take the view that the facts pertaining to the "Durian Plantation" and "Bet Trang worksite" are not new, i.e. the existing facts contained in the Second IS.<sup>80</sup>
18. Based on the reasoning given by MEAS Muth's Co-Lawyers, the Supplementary Submission and Decision on MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, the National Judges of the Pre-Trial Chamber still find that certain parts of the Supplementary Submission dated 31 October 2014 are new facts.

### B. Laws

19. Internal Rule 53, paragraph 1 provides that if the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information:
- a) a summary of the facts;
  - b) the type of offence(s) alleged;
  - c) the relevant provisions of the law that defines and punishes the crimes;

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<sup>80</sup> Decision on MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision on MEAS Muth's Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, D134/1/10.



- d) the name of any person to be investigated, if applicable; and
- e) the date and signature of both Co-Prosecutors.<sup>81</sup>

20. Internal Rule 55, paragraphs 2 and 3 provides that the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission. During an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.<sup>82</sup>

21. Internal Rule 53, paragraph 1 aforementioned clearly provides that the Introductory Submission is a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the Co-Investigating Judges, investigating any facts which the Co-Prosecutors believe that crimes within the jurisdiction of the ECCC have been committed.

22. Pursuant to Internal Rule 55, paragraphs 2 and 3, the Supplementary Submission is also a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the Co-Investigating Judges, investigating any *new facts* which the Co-Prosecutors believe that crimes within the jurisdiction of the ECCC have been committed in addition to the existing facts set out in the Introductory Submission.

23. Pursuant to Internal Rule 53, paragraph 1 and Internal Rule 55, paragraphs 2 and 3, the National Judges of the Pre-Trial Chamber find that the Supplementary Submission is a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the Co-Investigating Judges, investigating "*new facts which do not contain in the Introductory Submission*",

<sup>81</sup> Article 44 "Opening of Judicial Investigation" of Code of Criminal Procedure of the Kingdom of Cambodia also stipulates as Internal Rule 53.

<sup>82</sup> Article 125 "Scope of Complaint" of Code of Criminal Procedure of the Kingdom of Cambodia also stipulates as Internal Rule 53.

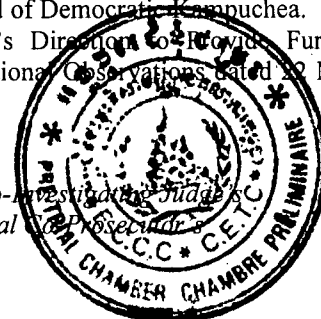


but not a submission for “clarification” on the existing facts set out in the Introductory Submission, for example, the International Co-Prosecutor’s Supplementary Submission dated 31 October 2014.

24. As elaborated in **A.2.**, is the Supplementary Submission a submission for opening judicial investigation on new facts? As aforementioned, the National Judges of the Pre-Trial Chamber are of the view that certain parts of the Supplementary Submission dated 31 October 2014 are new facts. Therefore, the National Judges of the Pre-Trial Chamber will consider whether or not the International Co-Prosecutor’s Supplementary Submission dated 31 October 2014 was properly done.
25. In principle, the Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges a Supplementary Submission for opening further investigation on new facts pursuant to Internal Rules 53 and 55.
26. Although the Internal Rules allow the Co-Prosecutors to issue a Supplementary Submission, the Co-Prosecutors must not open further investigation at will, i.e. further investigation shall be conducted on senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.<sup>83</sup>
27. The National and International Co-Prosecutors expressed their dissenting opinions on the issuance of the Introductory Submission in Case 003, in which the International Co-Prosecutor requested to submit the Second Introductory Submission, while the National Co-Prosecutor requested not to, on the grounds that “these suspects are not senior leaders and/or those most responsible”<sup>84</sup>. The dissent was then appealed before the Pre-Trial Chamber. The National and

<sup>83</sup> Amended Articles 1 and 2, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

<sup>84</sup> National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars dated 24 April 2009, and National Co-Prosecutor’s Additional Observations dated 22 May 2009, para. 86(A).



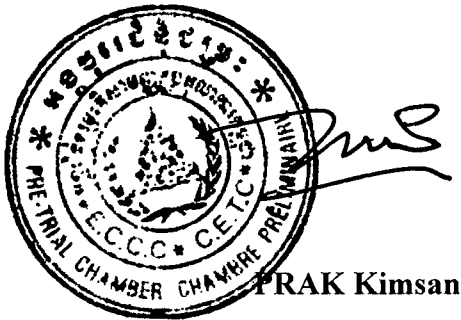


International Judges of the Pre-Trial Chamber also expressed their dissenting opinions, in which the National Judges are in favour of the National Co-Prosecutor's arguments, while the International Judges are in favour of the International Co-Prosecutor's arguments.<sup>85</sup>

28. The National Judges of the Pre-Trial Chamber are in favour of the National Co-Prosecutor's arguments. Therefore, although certain parts of the International Co-Prosecutor's Supplementary Submission dated 31 October 2014 included new facts, the National Judges of the Pre-Trial Chamber still take the view that the International Co-Prosecutor must not issue the Supplementary Submission dated 31 October 2014, on the grounds of the arguments provided in the National Judges' dissenting opinions dated 17 August 2009.

29. In light of the foregoing, the National Judges of the Pre-Trial Chamber take the view that the International Co-Prosecutor's Supplementary Submission dated 31 October 2014 must be found to be null and void.

Phnom Penh, 26 April 2016



PRAK Kimsan

A handwritten signature in black ink, consisting of stylized, cursive letters.

NEY Thol

A handwritten signature in black ink, featuring a large, bold initial 'H' followed by cursive letters.

HUOT Vuthy

<sup>85</sup> Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy dated 17 August 2009.

**OPINION OF JUDGES BEAUVALLET AND BAIK (THE “UNDERSIGNED  
JUDGES”) REGARDING THE MERIT OF THE APPEAL**

1. We, the Undersigned Judges, have already explained our understanding of the publicity principle enshrined in Internal Rule 78.<sup>86</sup> This Rule provides that all decisions and default decisions of the Pre-Trial Chamber, including any opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.
2. We therefore consider that any decision of the Chamber related to classification, diverging from the publicity principle set in Internal Rule 78, must be taken with sufficient authority to reverse the above mentioned principle. We reserve the right to release, when appropriate, public (redacted) versions of our opinions accordingly even if not systematically announced.

**A. SUBMISSIONS OF THE PARTIES**

3. With regard to the merits of the Motion to Strike, the Co-Lawyers argue that using the Supplementary Submission for removing ambiguities is not permissible insofar as the Supplementary Submission’s sole purpose is to seize the International Co-Investigating Judge with new facts (A).<sup>87</sup> In addition, the International Co-Prosecutor cannot file a Supplementary Submission on his own (B).<sup>88</sup> Finally, the Co-Lawyers submit that new facts could not be added to the judicial investigation at this late stage without violating MEAS Muth’s right to

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<sup>86</sup> Decision on MEAS Muth’s Request to Reclassify as Public Certain Defence Submissions to the Pre-Trial Chamber, 19 February 2016, D174/1 (PTC24), paras 18-22; Case File No. 004/07-09-2009-ECCC/OCIJ (PTC19) (“Case 004”), Considerations on IM Chaem’s Appeal Against the International Co-Investigating Judge’s Decision to Charge her *In Absentia*, 1 March 2016, D239/1/8, paras 1-5; Considerations on MEAS Muth’s Appeal Against Co-Investigating Judge Harmon’s Decision to Charge MEAS Muth *In Absentia*, Opinion of Judges Beauvallet and Bwana Regarding the Merit of Ground B of the Appeal, 30 March 2016, D128/1/9 (PTC21), paras 1-5.

<sup>87</sup> Motion to Strike, paras 19-24.

<sup>88</sup> Motion to Strike, paras 11-18.



be tried within a reasonable time (C).<sup>89</sup> All these arguments will be addressed in turn.

4. The International Co-Prosecutor argues the International Co-Investigating Judge was validly seized of the facts and therefore there has been no defective investigation. The International Co-Prosecutor notes that the question whether the facts contained in the Supplementary Submission were “new” is the subject matter of numerous pending Annulment Requests.<sup>90</sup> The Co-Lawyers suggestion that the International Co-Investigating Judge knew that the International Co-Prosecutor would step in to cure the defect by filing a Supplementary Submission is baseless and according to the International Co-Prosecutor, it overlooks the independence of both the Co-Investigating Judges and the Co-Prosecutors.<sup>91</sup>
5. Finally, the International Co-Prosecutor argues that even if these crimes and crimes sites constituted new facts and the investigation was found to be defective, the Co-Lawyers cite no ECCC law or jurisprudence to support their assertion that the Supplementary Submission should be stricken from the case file on this basis. He points out that the Co-Lawyers do not dispute the fact that the criteria outlined in Rules 53(1)(a)-(d) have been complied with and accept that one Co-Prosecutor alone could sign a supplementary submission, seising the Co-Investigating Judges of new facts.<sup>92</sup>
6. In their Reply, the Co-Lawyers restate their arguments and further reiterate that an Investigating Judge may only investigate the facts of which he is seized.<sup>93</sup> They also claim that the International Co-Investigating Judge was not permitted to undertake the coercive measures which he did in relation to the investigation of the facts of which he was not seized.<sup>94</sup> Further, with regard to the signing of the Supplementary Submission by only one Co-Prosecutor, to the extent that it provides clarifications, the Co-Lawyers submit that there is no unanimous and

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<sup>89</sup> Motion to Strike, paras 25-32.

<sup>90</sup> Response, para. 26.

<sup>91</sup> Response, para. 30.

<sup>92</sup> Response, para. 31.

<sup>93</sup> Reply, paras 10, 12.

<sup>94</sup> Reply, para. 14.



consistent jurisprudence on the matter.<sup>95</sup> The Co-Lawyers argue that the defective submission affects MEAS Muth's right to know the case against him, especially since the scope of the investigation is not defined. Finally, they insist that annulment of the Supplementary Submission is the proper remedy, since these defects violate MEAS Muth's fair trial rights.<sup>96</sup>

## B. EXAMINATION OF THE GROUNDS FOR ANNULMENT

7. Pursuant to Rule 48, a judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application. In light of its consistent jurisprudence, if a defect is identified when considering the three grounds for annulment of the Supplementary Submission, the Undersigned Judges will then assess whether the defect in the Supplementary Submission harms MEAS Muth's interests.<sup>97</sup>

### 1. Validity of a supplementary submission removing ambiguities

8. The Co-Lawyers argue that the Supplementary Submission is invalid and should therefore be stricken pursuant to Rule 21 to safeguard MEAS Muth's fundamental rights because it was improperly used to remove ambiguities, not to seise the Co-Investigating Judges of new facts.
9. By way of a preliminary remark, the Undersigned Judges observe that the striking of a supplementary submission from the case file has not previously been addressed by the Pre-Trial Chamber. The analysis of the Undersigned Judges will therefore stem from the law to which it ordinarily refers,<sup>98</sup> the ECCC law,<sup>99</sup> national legal rules, the Cambodian CCP, international jurisprudence and, vis-à-vis the particularities of the annulment procedure for a supplementary submission, the French CCP.

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<sup>95</sup> Reply, para. 26.

<sup>96</sup> Reply, paras 37-39.

<sup>97</sup> NUON Chea Decision, paras 36, 42.

<sup>98</sup> See Agreement, Article 12(1); Case 002 (PTC12), Decision on IENG Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 February 2009, A198/09, para 20.

<sup>99</sup> ECCC Law.



10. The Undersigned Judges have to assess whether the Supplementary Submission is valid even though it reiterates clarifications already made in relation to the five forwarding orders filed by the International Co-Investigating Judge pursuant to Rule 55(3).<sup>100</sup> Consequently, the Undersigned Judges have to ascertain whether the fact that a supplementary submission is filed to “remove ambiguities” is a ground for annulment of such a submission.
11. At the outset, a distinction has to be made between the portion of the Supplementary Submission which clarifies the scope of the investigation, explaining which facts are considered to fall within the scope of the Introductory Submission,<sup>101</sup> and the second portion which relates to the inclusion of new facts and legal characterisation of forced marriage.<sup>102</sup> This second portion clearly requires the Co-Investigating Judges to re-evaluate the evidence already gathered in light of the new legal characterisation, as well as to extend the investigation. The validity of this portion of the Supplementary Submission is not challenged by the Co-Lawyers on the basis of this ground for annulment. However, whether the Co-Investigating Judges can be seized of new crimes at this stage of the investigation without violating MEAS Muth’s right to be tried within a reasonable time, is an issue raised by the Co-Lawyers,<sup>103</sup> and will be dealt with below.<sup>104</sup>
12. Furthermore, the Undersigned Judges note that the questions regarding whether the alleged facts are *new*, that is whether they were already part of the Introductory Submission and whether they fall within the scope of the Co-Investigating Judges’ seisin, were the subject matter of another appeal before the Pre-Trial Chamber.<sup>105</sup> To a certain extent, whilst the validity of the acts of judicial

<sup>100</sup> Response of International Co-Prosecutor to Request for Clarification, 16 February 2011, D1/2/1; International Co-Prosecutor’s Response to Forwarding Order of 24 April 2012, 21 June 2012, D47/1; Co-Prosecutors’ Response to Forwarding Order of 4 May 2012, 24 May 2012, D50/1; International Co-Prosecutor’s Response to Forwarding Order Regarding Toek Sab Prison, 20 June 2014, D102/1; International Co-Prosecutor’s Response to Forwarding Order D105 Regarding Security Centres 808, 809 & 810, 1 July 2014, D105/1.

<sup>101</sup> Supplementary Submission, paras 4-19.

<sup>102</sup> Supplementary Submission, paras 20-24.

<sup>103</sup> Motion to Strike, paras 25-32.

<sup>104</sup> See below, Section B(3).

<sup>105</sup> MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision on MEAS Muth’s Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 18 May 2015, D134/1/1; Response, para. 9.



investigation based upon the Introductory Submission depends on whether the facts under investigation are new, the validity of the Supplementary Submission does not depend upon such a determination. The Undersigned Judges will thus focus on the validity of the Supplementary Submission to the extent that it reaffirms clarifications previously submitted and not only seises the Co-Investigating Judges of new facts.

13. According to the Glossary for the Rules, a supplementary submission refers to a “written submission by the Co-Prosecutors requesting the Co-Investigating Judges to issue an order or undertake further action in an ongoing investigation”.<sup>106</sup> *Prima facie*, the exact wording of the definition tends to suggest that only requests requiring the Co-Investigating Judges to undertake a positive action, whether by issuing an order or by furthering ongoing investigations, can be defined as supplementary submissions.

14. Rule 53 sets out the formalities that need to be satisfied for an introductory submission to be valid:

1. If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information:

- a) a summary of the facts;
- b) the type of offence(s) alleged;
- c) the relevant provisions of the law that defines and punishes the crimes;
- d) the name of any person to be investigated, if applicable; and
- e) the date and signature of both Co-Prosecutors.

[...]

3. The absence of any of the formalities provided in sub rule 1 shall render the submission void.

15. Sub rules 2 and 3 of Rule 55 General Provisions Concerning Investigations, provide that:

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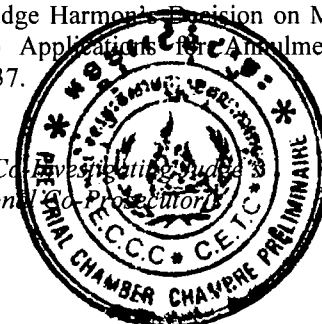
<sup>106</sup> Internal Rules, Glossary.



2. [...] The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.
3. If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.
16. The Undersigned Judges are of the view that the formalities of Rule 53(1) also apply to supplementary submissions, as previously stated by the International Co-Investigating Judge.<sup>107</sup> Except for Rule 53 which refers exclusively to introductory submissions, Rules 54, 55(2), 55(3), 55(4), 63(3)(a), 66bis(1) and Rule 71(3) all refer to both the Introductory and Supplementary Submissions. Given that these submissions altogether define the scope of the investigation and have to be considered as a whole, the Undersigned Judges consider that these formal conditions apply to both.
17. Rule 53(3) provides that the formalities in sub rule (1)(a)-(e) shall be strictly complied with or the Introductory Submission shall be null and void. As previously stated the by the Pre-Trial Chamber,<sup>108</sup> Rule 53(1) also lays down an additional condition for validity which may be inferred from the following excerpt: “[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons”.<sup>109</sup> This condition is substantive.
18. Considering the above-mentioned, a supplementary submission is valid if the formalities of Rule 53(1)(a)-(e) are complied with and if the Co-Prosecutors have

<sup>107</sup> Case 002 (PTC47&48), Combined Order on Co-Prosecutors’ Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, 13 January 2010, D250/3/3, para. 6.

<sup>108</sup> Decision on MEAS Muth’s Appeal against Co-Investigating Judge Harmon’s Decision on MEAS Muth’s Application to seise the Pre-Trial Chamber with two Applications for Annulment of Investigative action, 23 December 2015, D134/1/10 (PTC20), para 37.



reason to believe that further crimes within the jurisdiction of the ECCC have been committed.

19. The Undersigned Judges further note that these requirements reflect Cambodian law<sup>110</sup> and French law,<sup>111</sup> upon which the Cambodian CCP was based. Similarly, consistent French case law from the *Cour de Cassation* has held that, regardless of the grounds alleged for the irregularity of a submission, be it introductory or supplementary, a submission can only be annulled if the facts are not ascertained or if it does not meet the necessary formal conditions.<sup>112</sup> The superfluous nature of a submission has no consequence for its validity and the regularity of the procedure as long as the conditions are met.
20. In the present case, the Supplementary Submission satisfied the conditions set forth in Rule 53(1)(a)-(e). A summary of the facts<sup>113</sup> and the name of the person to be investigated<sup>114</sup> are provided, as well as the type of offence and relevant provisions of the law.<sup>115</sup> The submission was signed on 31 October 2014 by the International Co-Prosecutor and thus complies with all formal requirements set out in Rules 53(1)(a)-(e). One part of the Supplementary Submission expressly relates to the new facts that the Co-Prosecutor have reason to believe constitute crimes within the jurisdiction of the ECCC.<sup>116</sup> The other part, the clarifications part of the Supplementary Submission, relates the facts which the International Co-Prosecutor believed constituted crimes falling within the jurisdiction of the ECCC and for which he had already sent an Introductory Submission to the Co-

<sup>109</sup> Internal Rule 53 (1).

<sup>110</sup> Similar to the Internal Rules, Articles. 44 and 125 of the Cambodian Criminal Procedural Code provide for the same formal conditions in order for an initial or a supplementary Submission to be valid.

<sup>111</sup> Articles 80 and 82 of the French Criminal Procedural Code.

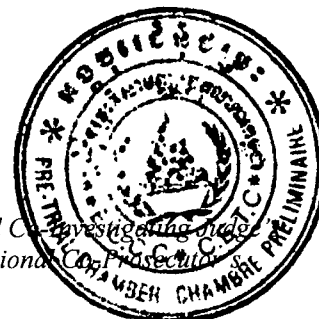
<sup>112</sup> Cass. Crim., 27 juin 1991, Bull.crim. 1991, n° 587; Cass. Crim., 2 juin 1992, Bull. crim. 1992, n° 216; Cass. Crim., 30 mai 1996, Bull. crim. 1996, n° 226, Cass. Crim., 4 août 1998, Bull. crim. 1998, n° 222; Cass. Crim., 8 nov 2000, Bull. crim 2000, n. 335; Cass. crim.,16 oct. 2001, Bull. crim. 2001, n° 207; Cass. crim., 30 oct. 2001, Bull. crim. 2001, n° 223.

<sup>113</sup> Supplementary Submission, paras 4-24.

<sup>114</sup> Supplementary Submission, paras 2, 7, 9, 11, 13-16, 20, 22, 26.

<sup>115</sup> Supplementary Submission, paras 3, 25-26.

<sup>116</sup> Supplementary Submission, paras 20-24.





Investigating Judge.<sup>117</sup> The Supplementary Submission ascertains these facts and satisfies all the formal conditions of Rule 53(1). Consequently, the superfluous and redundant feature of the clarifications part of the submission has no effect on its validity.

21. The Co-Lawyers submit that the Co-Prosecutor influences and manipulates the scope of the investigation through this improper use of the Supplementary Submission.<sup>118</sup> The Undersigned Judges find that the separation of the tasks assigned to the Co-Prosecutors and to the Co-Investigating Judges is a fundamental feature, inherent to the inquisitorial system. Furthermore, as stated in Rule 55(2): “[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission [by the Co-Prosecutor]”. The tasks assigned to each of them are clearly defined. The fact that the International Co-Prosecutor clarified the scope of the Introductory Submission assists the Co-Investigating Judges in respecting this Rule, when investigating the facts falling within the scope of the Introductory and Supplementary Submission. This ground for annulment of the Supplementary Submission is therefore found to be without merit.

## **2. Validity of a supplementary submission signed by one Co-Prosecutor**

22. The Co-Lawyers submit that insofar as the Supplementary Submission intends to remove ambiguities, it does not relate to whether “the prosecution will proceed” pursuant to Rule 6(4) of the Agreement and Article 20 new of the ECCC Law. The Co-Lawyers argue that Rule 71(3) exceeds what is provided for in the Agreement and the Establishment Law by providing that “all” actions which are the subject of a disagreement will be executed. According to the Co-Lawyers, the Rules therefore have no basis in applicable law and the Supplementary Submission could not have been filed by one Co-Prosecutor alone.<sup>119</sup>

<sup>117</sup> Supplementary Submission, paras 4-19.

<sup>118</sup> Motion to Strike, paras 20- 22; Reply, para. 7.

<sup>119</sup> Motion to Strike, paras 11- 18.



23. The question raised by the Co-Lawyers is therefore whether one Co-Prosecutor can file a Supplementary Submission that adds new facts and clarifies the scope of the investigation or whether this exceeds the disagreement procedure as it was contemplated by the drafters of the Agreement and the ECCC Law.
24. The Undersigned Judges note that pursuant to Rule 71(1), the International Co-Prosecutor placed a record of his disagreement with the National Co-Prosecutor concerning the Supplementary Submission in the register kept by the Office of the Co-Prosecutors' Greffier.<sup>120</sup>
25. As previously stated by the Pre-Trial Chamber,<sup>121</sup> the Rules establish a procedure concerning the settlement of disagreements between the two Co-Prosecutors, as provided by the Agreement (Articles 6(4) and 7)<sup>122</sup> and the ECCC Law (Article 20(new)).<sup>123</sup>

<sup>120</sup> Supplementary Submission, para. 28.

<sup>121</sup> Disagreement No. 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, D1/1.3 ("Considerations of the Pre-Trial Chamber Regarding Disagreement"), paras 11-16.

<sup>122</sup> Agreement, Article 6(4): "The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7."

<sup>123</sup> ECCC Law, Article 20(new) provides, in its relevant parts:

"[...] In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.[...]"



26. Articles 6(1) and (4) of the Agreement, Articles 20(new) of the ECCC Law and Rule 71(3) clearly indicate that one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit.<sup>124</sup> With regard specifically to supplementary submissions, Rule 71(3)(b) provides explicitly that no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the thirty day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed.
27. In the present case, the National Co-Prosecutor did not seise the Pre-Trial Chamber with the disagreement pursuant to Rule 71(2) within the prescribed timeline. As provided by the Rules, the National Co-Prosecutor could have brought the disagreement to the Pre-Trial Chamber but refused to do so. In accordance with precedent,<sup>125</sup> the Undersigned Judges find that the International Co-Prosecutor could file the Supplementary Submission alone after the thirty day period had ended or the disagreement procedure set forth in Rule 71 had been complied with. The Undersigned Judges are of the view that it does not exceed the disagreement procedure as it was contemplated by the drafters of the Agreement and the Law. The Undersigned Judges find that this ground raised to challenge the validity of the Supplementary Submission is without merit.

### **3. Assessment of the violation of MEAS Muth's right to be tried within a reasonable time**

28. The Co-Lawyers argue that seising the Co-Investigating Judges through the Supplementary Submission with new crimes at this late stage of the investigation violates MEAS Muth's right to be tried within a reasonable time.<sup>126</sup> The International Co-Prosecutor was aware of evidence relating to these alleged crimes since 30 July 2014 and should have seised the International Co-

<sup>124</sup> Considerations of the Pre-Trial Chamber Regarding Disagreement, para. 16.

<sup>125</sup> 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, 3 December 2014, D117/1/1/2 (PTC13), para. 16, citing Case 004 (PTC09), Decision on IM Chaen's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2009, D122/6-1/3 para. 14.

<sup>126</sup> Motion to Strike, paras 25-32.



Investigating Judge earlier.<sup>127</sup> The Co-Lawyers argue that extending the investigation at this late stage amounts to a violation of their client's right to be tried without undue delay, and the Supplementary Submission should therefore be stricken.

29. The Co-Prosecutors argue that when taking into account all the factors relevant to assessing the reasonableness of the duration of the proceedings, the Supplementary Submission does not constitute an unreasonable extension of judicial investigation.<sup>128</sup>
30. In the Reply, the Co-Lawyers restate their arguments as set forth in the Appeal.<sup>129</sup>

#### a. Preliminary Remarks

31. The Undersigned Judges note that Article 12(2) of the Agreement provides that the ECCC shall exercise its jurisdiction in accordance with Article 14 of the ICCPR.<sup>130</sup>

32. Article 14(3) of the ICCPR provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(c) To be tried without undue delay”.<sup>131</sup>

33. Similarly, Article 33 (new) of the ECCC Law provides, in relevant part:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, [...] or if there is uncertainty regarding their consistency with international

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<sup>127</sup> Motion to Strike, paras 26-27.

<sup>128</sup> Response, paras 55-65.

<sup>129</sup> Reply, paras 40-52.

<sup>130</sup> Agreement, Article 12(2).

<sup>131</sup> ICCPR, Article 14(3)(c).



standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [...].<sup>132</sup>

34. Rule 21(4) further provides:

“Proceedings before the ECCC shall be brought to a conclusion within a reasonable time”.

35. According to consistent case-law, the Undersigned Judges consider that Article 14 of the ICCPR applies at all stages of the proceedings before the ECCC, including the pre-trial stage.<sup>133</sup> The starting point for assessing the reasonable duration of criminal proceedings is when the suspect was officially notified that he would be prosecuted even if he was not formally charged until later.<sup>134</sup>

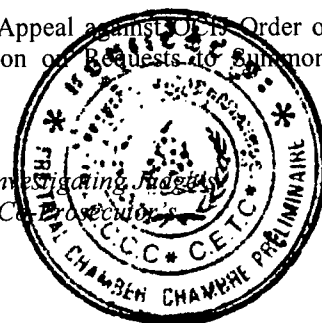
36. The Pre-Trial Chamber has previously addressed a Charged Person’s right to a fair trial without undue delay in the context of requests for investigative action. Under those circumstances, the Pre-Trial Chamber has explained that the relevant factors to consider include the “age and state of health of the Charged Persons [...] the effect of delay on evidence and witness testimony, and the overall length of the investigation [...]”.<sup>135</sup> Further, the Pre-Trial Chamber explained that it has the duty “to balance the right to be tried without *undue delay* with the general necessity for the investigation and judicial processes to

<sup>132</sup> ECCC Law, Article 33new.

<sup>133</sup> Case 002 (PTC42), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Requests for stay of proceedings on the basis of abuse of process, 10 August, D264/2/6, para. 13.

<sup>134</sup> European Court of Human rights (“ECtHR”), *Eckle v. Germany*, Application no. 8130/78, Judgment, 15 July 1982, para. 73 provides: “The term “charge” for the purpose of the article 6 of the European Convention on Human Rights may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, a definition that also corresponds to the test whether the situation of the suspect has been substantially affected.” cited in, ECtHR, *Hozee v. The Netherlands*, Application no. 21961/93, Judgment, 22 May 1998, para. 43; *Coëme v. Belgium*, Application no. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 June 2000, para. 133.

<sup>135</sup> Case 002 (PTC50), Decision on NUON Chea’s and IENG Sary’s Appeal against the Co-Investigating Judges’ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8, (“Decision on Requests to Summons Witnesses”) para. 70.



advance” [emphasis added].<sup>136</sup> The protection of that right must be interpreted and balanced with the fundamental purpose of the Tribunal which is to “to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”.<sup>137</sup> This entails balancing the rights of the accused with the ends of justice. Thus, the duty to ensure fairness and the expeditiousness of trial proceedings should be balanced with the need to ascertain the truth about the crimes with which the accused has been charged, as well as with the general principle of proper administration of justice.<sup>138</sup>

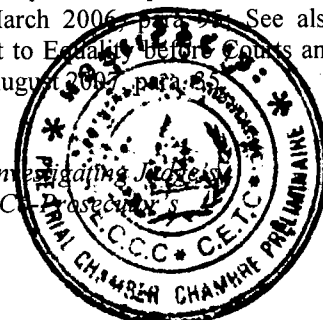
37. The Undersigned Judges acknowledge and concur with the European Court of Human Rights (ECtHR) that the assessment must be conducted “in the light of the circumstances of the case, regard being had to [...], in particular the complexity of the case, the applicant’s conduct and the conduct of the competent authorities”.<sup>139</sup> The reasonableness of the length of the proceedings must be assessed in each instance according to the particular circumstances. Thus, in evaluating whether MEAS Muth’s right to be tried within a reasonable time is violated by the addition of new crimes through the Supplementary Submission, the Undersigned Judges will therefore consider the following factors: (1) the complexity of the case, (2) the conduct of the applicant, and (3) the conduct of the relevant authorities.

<sup>136</sup> Decision on Requests to Summons Witnesses, para. 70.

<sup>137</sup> ECCC Law, Article 1; See also, Agreement, Article 1.

<sup>138</sup> ECtHR, *Neumeister v. Austria*, Application no. 1936/63, Judgment, 27 June 1968 (“*Neumeister v. Austria*”), para. 21; ECtHR, *Boddaert v. Belgium*, Application no. 12919/87, Judgment, 12 October 1992 (“*Boddaert v. Belgium*”), para. 39.

<sup>139</sup> ECtHR, *Rokhlina v. Russia*, Application no. 54071/00, Judgment, 7 April 2005, para. 86; ECtHR, *Nakhmanovich v. Russia*, Application no. 55669/00, Judgment, 2 March 2006, para. 57. See also Human Rights Committee, General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 90<sup>th</sup> sess, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 20.



**b. Analysis of the relevant criteria**

i. Complexity of the case

38. The Co-Lawyers concede that “Case 003 is somewhat complex, dealing, as it does, with allegations of serious crimes that allegedly took place approximately forty years ago”; however, they argue “this complexity does not justify further extension of the already exceedingly long judicial investigation, especially when comparing Case 003 to Case 002”.<sup>140</sup>
39. The International Co-Prosecutor argues that “any comparison between Case 002 and 003 is unwarranted and misleading. The question to be addressed is whether Case 003 is complex, not whether it is complex in comparison to other cases before the ECCC”.<sup>141</sup>
40. The Undersigned Judges find the Co-Lawyers’ argument unpersuasive. The Pre-Trial Chamber has held that, when evaluating the reasonableness of the length of pre-trial detention, a case by case analysis must be conducted.<sup>142</sup> The particular features of each case have to be taken into consideration.<sup>143</sup> Thus, the particulars of the case must be looked at in isolation, rather than in comparison.
41. In light of the European Court of Human Rights case law (“ECtHR”), the particulars to be considered include, *inter alia*, the number of charges, the number of people involved in the proceedings, such as defendants and witnesses, the volume of evidence, the international dimension of the case and the complexity of facts and law.<sup>144</sup>
42. The Undersigned Judges note that the Introductory Submission seized the Co-Investigating Judges of an investigation into the entire Revolutionary Army of Kampuchea (“RAK”), for crimes committed throughout Cambodia during the

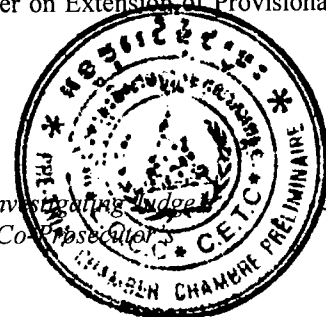
<sup>140</sup> Appeal, para. 49.

<sup>141</sup> Response, para. 57.

<sup>142</sup> Case 002 (PTC16), Decision on IENG Thirith’s Appeal against Order on Extension of Provisional Detention, 11 May 2009, C20/5/18, para. 57.

<sup>143</sup> *Boddaert v. Belgium*, paras 36, 39.

<sup>144</sup> *Neumeister v. Austria*, paras 20, 21.



entire temporal jurisdiction of the ECCC. Further the Introductory Submission seised the Co-Investigating Judges with an investigation into all internal purges within the RAK, as well as all security centres and related purge sites. There are numerous potential legal characterisations, extending from domestic crimes to Grave Breaches of the Geneva Conventions, to crimes against humanity and an important number of civil parties.

43. Based upon these factors, the Undersigned Judges find that the scope of the facts submitted in the Introductory Submission, the nature of the domestic and international crimes, and the number of Civil Parties support the finding that the case is complex.

ii. Conduct of the Accused

44. The ECtHR has considered the conduct of the accused extensively in its jurisprudence.<sup>145</sup> Factors relevant to the analysis include whether the Accused's conduct contributed substantially to the length of the proceedings, and whether he showed dilatory conduct or otherwise upset the proper conduct of the trial.<sup>146</sup>
45. To begin with, the Undersigned Judges note the discord between the complaint that the length of an investigation is unreasonable and the fact that MEAS Muth has for a long time failed to appear before the ECCC. The Accused refused to appear when summoned for the initial appearance, requiring the International Co-Investigating Judge to take further procedural steps, ultimately prolonging the proceedings. While MEAS Muth may contest decisions, once the issues have been determined by this Chamber, a failure to comply with validly issued decisions<sup>147</sup> results in conduct that contributes to the length of the proceedings.

<sup>145</sup> ECtHR, *Pedersenv. Denmark*, Application no. 49017/99, Judgment, 17 December 2004, para. 49; ECtHR, *Sürmeli v. Germany*, Application no. 75529/01 Judgment, 8 June 2006, para. 131; ECtHR, *Kudla v. Poland*, Application no. 30210/96, Judgment, 26 October 2000 ("*Kudla v. Poland*"), paras 128,130.

<sup>146</sup> *Kudla v. Poland*, para. 130; ECtHR, *Pélissier v. France*, Application no. 25444/94, Judgment, 25 March 1999, para. 72.

<sup>147</sup> 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, 3 December 2014, D117/1/1/2 (PTC13), para. 4.





The Undersigned Judges therefore take into consideration MEAS Muth's conduct in this regard.

iii. Conduct of the relevant authorities

46. The ECtHR has explained that “the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case taken as a whole”.<sup>148</sup> Therefore, the Undersigned Judges will consider the conduct of the relevant authorities throughout the entire proceedings.
47. The Undersigned Judges note the Co-Lawyers' arguments regarding the Office of the Co-Investigating Judges, including “the departure of key staff from the Office”, “the lack of timely translation, and the lack of interpretation resources”,<sup>149</sup> but finds that MEAS Muth has failed to substantiate these arguments. MEAS Muth failed to specify any details relating to these complaints and how they may have delayed the proceedings, and therefore, the Undersigned Judges are unable to address this argument.
48. Finally, in assessing the proceedings as a whole, the Undersigned Judges also note the relevance of the conduct of the Judicial Police. Pursuant to Rules 15 and 45,<sup>150</sup> Judicial Police are auxiliary officers of the ECCC and shall execute Arrest Warrants. Their refusal to execute the Arrest Warrant issued by the International Co-Investigating Judge in Case 003 is a factor to consider in the present assessment.<sup>151</sup> The Judicial Police's failure to execute the warrant to bring MEAS Muth before the International Co-Investigating Judge for an initial appearance has also contributed to the length of the investigation.
49. Based upon the foregoing and what is at stake for MEAS Muth, the Undersigned Judges find that MEAS Muth's right to be tried within a reasonable time has not been violated on account of the inclusion of forced marriage through the filing of

<sup>148</sup> ECtHR, *Majewski v. Poland*, Application no. 52690/99, Judgment, 11 October 2005, para. 35.

<sup>149</sup> Appeal, para. 58.


<sup>150</sup> Rules 15(1), 45(2).


<sup>151</sup> Arrest Warrant, 10 December 2014, C1; Decision to Charge MEAS Muth *in Absentia*, 9 March 2015, D128, para. 66.



the Supplementary Submission. It is not unreasonable to accept the limited extension to the length of the judicial investigation that will be required to deal with these serious factual allegations. The new legal characterisation of the alleged facts and the further investigation it will require is limited and will not cause undue delay in concluding the investigation. The Undersigned Judges find that this Ground for annulment of the Supplementary Submission should also be rejected.

Phnom Penh, 26 April 2016

  
**Olivier BEAUVALLET**

  
**Kang Jin BAIK**

