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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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D56/19/8

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC11)

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

Date: 31 January 2014

CONFIDENTIAL

DECISION ON REQUESTS FOR INTERIM MEASURES

Co-Prosecutors

CHEA Leang
Nicholas KOUMJAM

**Co-Lawyers
for MEAS Muth**

ANG Udom
Michael KARNAVAS

Defence Support Section

Isaac ENDELEY

Lawyers for the Civil Parties

HONG Kimsuon
KIM Mengkhy
SAM Sokong
Annie DELAHAIE
Laure DESFORGES
Ferdinand DJAMMEN-NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI
Mahdev MOHAN



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “MEAS Muth’s Co-Lawyers’ Urgent and Expedited Request to Lift the Order Suspending Communications with Mr. MEAS Muth, to Access the Case File, and for an Extension of Time to Appeal the *Decision on the International Co-Prosecutor’s Request to Reject Appointment of the Co-Lawyers for MEAS Muth on the Basis of Irreconcilable Conflicts of Interest*”, filed on 15 January 2014 (the “Request”).¹

1. On 13 June 2012, MEAS Muth chose Mr. ANG Udom and Mr. Michael KARNAVAS (the “Co-Lawyers”) to represent him in the proceedings against him before the ECCC and vested them with a power of attorney.²
2. On 14 December 2012, the Head of the Defence Support Section (the “DSS”) assigned the Co-Lawyers to represent MEAS Muth and, on 18 December, he invited the Co-Investigating Judges to “note the assignment”.³
3. On 24 December 2012, the International Co-Prosecutor requested the Co-Investigating Judges to reject the appointment of the Co-Lawyers on the basis of “irreconcilable conflicts of interest” due to the then-concurrent representation by the Co-Lawyers of both IENG Sary in Case 002 before the ECCC and MEAS Muth in the present case.⁴
4. On 11 February 2013, the International Co-Investigating Judge i) invited the Co-Lawyers to make submissions on the potential conflict of interest between their role as counsel for IENG Sary and MEAS Muth; ii) provided the Co-Lawyers access to a redacted copy of the Co-Prosecutor’s Second Introductory Submission and all other evidentiary material referred to in the *Decision*, on a confidential basis and solely for the purposes of the *Decision*; and iii) ordered the Co-Lawyers not to communicate with MEAS Muth “until a decision on their confirmation of their assignment has been issued by the Co-Investigating Judges” (the “Decision of 11 February 2013” and, insofar as the third conclusion is concerned, the “Order Suspending Communications”).⁵

¹ D56/19/1.

² Form 7: Request for Engagement/Assignment of Co-Lawyers, signed by MEAS Muth on 12 June 2012, D56.

³ Letter from the Head of the DSS to the Co-Investigating Judges entitled “Assignment of Co-Lawyers to Represent Mr. MEAS Muth, a Suspect in Case 003”, 18 December 2012, D56, paras 11 and 12.

⁴ International Co-Prosecutor’s Request that Appointment of Co-Lawyers-Designate be Rejected on the Basis of Irreconcilable Conflicts of Interest, 24 December 2012, D56/1, para. 1.

⁵ Decision and Scheduling Order Concerning Request for Appointment of Co-Lawyers Designate, 11 February 2013, D56/3 (the “Order Suspending Communications”), paras 25, 28-30.



5. On 10 January 2014, the International Co-Investigating Judge issued his Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for MEAS Muth on the Basis of Irreconcilable Conflicts of Interest, wherein he granted the prosecution's request, rejected the appointment of the Co-Lawyers by the DSS as Co-Lawyers for MEAS Muth given their past representation of IENG Sary and instructed the DSS to take the necessary steps to assign new Co-Lawyers as soon as practicable (the "Impugned Decision").⁶
6. On 13 January 2014, the Co-Lawyers filed, on behalf of MEAS Muth, a notice of appeal indicating their intention to appeal the Impugned Decision (the "Appeal").⁷
7. On 15 January 2014, the Co-Lawyers filed the Request, asking the Pre-Trial Chamber to a) lift the Order Suspending Communications; b) grant the Defence access to the Case 003 Case File; and c) grant an extension of time to appeal the Impugned Decision until 45 days from the date the Co-Lawyers are permitted to communicate with MEAS Muth. The Co-Lawyers allege that "[the] Request is made necessary because without communicating with Mr. MEAS Muth and reviewing the material on the Case File, the Defence cannot act with the requisite due diligence and cannot meaningfully appeal the Impugned Decision."⁸ They further submit that "the normal filing period is inadequate when considering the time necessary to review and discuss the Impugned Decision."⁹ The Co-Lawyers submit that the Pre-Trial Chamber has "inherent jurisdiction" to decide on the Request "as it is intrinsically related to the forthcoming Appeal of the Impugned Decision."¹⁰
8. On 22 January 2014, the International Co-Prosecutor responded to the Request, submitting that "before any of the issues raised in the [Request] is addressed, MEAS Muth, as the person directly affected by the Impugned Decision, should receive independent advice as to his procedural rights" and decide whether he wants to pursue the appellate proceedings initiated by the Co-Lawyers.¹¹ The International Co-Prosecutor argues that "[g]iven the

⁶ Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for MEAS Muth on the Basis of Irreconcilable Conflicts of Interest, 10 January 2014, D56/18. The decision was notified in English on 10 January 2014, and in Khmer on 14 January 2014.

⁷ MEAS Muth's Notice of Appeal against the Decision on the International Co-Prosecutor's Request to Reject the Appointment of the Co-Lawyers for MEAS Muth on the Basis of Irreconcilable Conflicts of Interest, 13 January 2014, D56/19.

⁸ Request, introduction, p. 1.

⁹ Request, introduction, p. 1.

¹⁰ Request, para. 1.

¹¹ International Co-Prosecutor's Response to the Co-Lawyers' Request for the Lifting of the Suspension of Contact with MEAS Muth and for Access to the Case File, 22 January 2014, D56/19/1/2 (the "Response"), para. 5.



finding in the Impugned Decision that several conflicts may arise between the Co-Lawyers' duties to their former client IENG Sary and their duties to their prospective client MEAS Muth, it is in the interests of justice for Mr. Muth to now be independently informed of his legal position and rights."¹² The International Co-Prosecutor therefore asks the Pre-Trial Chamber to direct the DSS to: a) contact MEAS Muth in order to explain him the findings of the International Co-Investigating Judge in the Impugned Decision and of his procedural rights;¹³ b) "obtain a written and signed instruction from MEAS Muth, acknowledging that he has been informed of his rights and informing the Chamber as to whether he wishes to pursue the Appeal" and report to the Pre-Trial Chamber within 10 days;¹⁴ and c) consider appointing counsel provisionally under Article 6.4 of the DSS Administrative Regulations (the "International Co-Prosecutor Request for Independent Advice to be Provided to MEAS Muth").¹⁵ The International Co-Prosecutor then goes on to propose various courses of action, depending on whether MEAS Muth wants to pursue the Appeal. In the event that MEAS Muth does not wish to pursue the Appeal, the International Co-Prosecutor submits that the Request should be dismissed, the notice of appeal filed in relation to the Impugned Decision should be considered withdrawn and no further filings shall be accepted on the matter.¹⁶ If MEAS Muth wishes to pursue the Appeal, the International Co-Prosecutor requests the Pre-Trial Chamber to deal first with the issue of admissibility of the Appeal which, he argues, is not admissible.¹⁷

9. On 27 January 2014, the Co-Lawyers replied to the Response, submitting that whilst they "[do] not object to Mr. MEAS Muth being advised by the DSS of his right to appeal the Impugned Decision",¹⁸ they should themselves discuss the findings of the International Co-Investigating Judge and advise MEAS Muth of his rights.¹⁹ They argue that "[t]here is no compelling evidence or reason why [they] would be incapable or unwilling" to do so while also abiding by their ethical obligations.²⁰ In any event, the Co-Lawyers submit that MEAS Muth should be provided with a copy of the Impugned Decision, as well as "all the

¹² Response, para. 9.

¹³ Response, paras 7(a)(i), 12-14 and 31(a)(i).

¹⁴ Response, paras 7(a)(ii) and 31(a)(ii) and (iv).

¹⁵ Response, para. 31(a)(iii).

¹⁶ Response, paras 7(a)(iii) and 31(b).

¹⁷ Response, paras 17-21 and 31(c).

¹⁸ MEAS Muth's Co-Lawyers' Reply to the International Co-Prosecutor's Response to the Co-Lawyers' Request for the Lifting of Suspension of Contact with MEAS Muth and for Access to the Case File, 27 January 2014, D56/19/5 (the "Reply"), para. 5.

¹⁹ Reply, para. 4.

²⁰ Reply, paras 7 and 8.



related submissions filed by the parties”.²¹ Finally, the Co-Lawyers object to the International Co-Prosecutor’s request for the admissibility of the Appeal to be decided first as there is no reason for deviating from the usual procedure in appeal,²² and argue that determination of their Request is not predicated upon admissibility of the Appeal.²³

10. The Pre-Trial Chamber notes that the Impugned Decision has not been notified directly to MEAS Muth; that the Head of the DSS appears to have informed MEAS Muth by phone of the outcome of the Impugned Decision but it is unclear whether further information or advice were provided;²⁴ and that MEAS Muth has not been able to discuss the Impugned Decision nor the approach to be taken with the Co-Lawyers due to an order suspending communications between them. As a result, the notice of appeal was filed by the Co-Lawyers on MEAS Muth’s behalf, but without being able to seek his instructions. The Pre-Trial Chamber considers that before the proceedings go any further in this matter, it must first ascertain whether MEAS Muth wants to pursue the Appeal initiated on his behalf and ensure that he is given the necessary means to make such a decision. In particular, prior to deciding whether he wants to pursue the Appeal, MEAS Muth must receive appropriate information and legal advice in order to make an informed decision as to whether he wishes to continue to be represented by the Co-Lawyers in the light of the International Co-Investigating Judge’s findings in the Impugned Decision.
11. At the outset, it is recalled that, on 13 June 2012, MEAS Muth chose the Co-Lawyers to represent him in the proceedings before the ECCC and vested them with a power of attorney. There is no indication at this point that MEAS Muth has changed his position or that he has expressed any need to receive additional or separate advice in respect of the outstanding issue of his legal representation. MEAS Muth’s fundamental right to be represented by counsel of his own choosing²⁵ entails that his current choice of counsel must be respected and not be interfered with, unless it is demonstrated that limitation of

²¹ Reply, para. 5.

²² Reply, para. 9.

²³ Reply, para. 10.

²⁴ Letter from the Head of the DSS to the Co-Investigating Judges entitled “Implementation of the ‘Decision on the International Co-Prosecutor’s Request to Reject Appointment of the Co-Lawyers for MEAS Muth on the Basis of Irreconcilable Conflicts of Interest’”, 13 January 2014, D56/20.

²⁵ See Art. 14(3)(d) of the International Covenant on Civil and Political Rights; Art. 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 Kampuchea Democratic, 6 June 2003; Arts 24 *new* and 35 *new* (b) and (d) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Kampuchea Democratic and Internal Rule 21(1)(d).



this right is necessary to protect a legitimate interest and proportionate in the circumstances.

12. Against this background, the Pre-Trial Chamber will now, in turn, examine the International Co-Prosecutor's Request for Independent Advice to be Provided to MEAS Muth, the Co-Lawyers' Request to Lift the Order Suspending Communications, the Co-Lawyers' Request for Access to the Case File and the Co-Lawyers' Request for Extension of Time to Appeal.

1) International Co-Prosecutor's Request for Independent Advice to be Provided to MEAS Muth

13. The Pre-Trial Chamber considers that there is no legal basis to direct the DSS to provide independent advice to MEAS Muth in respect of the outstanding issue of his legal representation as it has not been demonstrated that the Co-Lawyers cannot act on behalf of MEAS Muth for the purpose of the current appellate proceedings. In particular, the Pre-Trial Chamber notes that the Impugned Decision concludes that because of the Co-Lawyers' duty of loyalty to IENG Sary, "it is reasonably foreseeable that conflict of interest *could* arise and that the Co-Lawyers-Designate *may not be* in a position to advise the Suspect on, and to pursue, *lines of defence*" should they continue to represent MEAS Muth in respect of his defence against the criminal allegations against him in Case 003.²⁶ This finding does not, in and of itself, entail that the Co-Lawyers would have any conflict of *interest in the context of the current appellate proceedings when*, for instance, informing MEAS Muth of the International Co-Investigating Judge's findings, discussing the impact they may have on his defence and the possibility to challenge them, informing MEAS Muth of his rights, exploring the various options available to him in respect of his legal representation and providing him legal advice thereto. Insofar as the International Co-Prosecutor asserts that the Co-Lawyers would not act independently because their "personal interests are directly affected by the [Impugned] Decision",²⁷ the Pre-Trial Chamber recalls that absent any evidence to the contrary, it is presumed that the Co-Lawyers will abide by their professional and ethical obligations²⁸ when providing such

²⁶ Impugned Decision, para. 142 (emphasis added).

²⁷ Response, para. 11.

²⁸ The Pre-Trial Chamber notes that Foreign Lawyers appearing before the ECCC, before being able to act, take an oath in front of the Cambodian Court of Appeal and in the presence of the President of the Bar Association of the Kingdom of Cambodia. The oath is undertaken in accordance with Article 34 of the Law on the Statutes of the



information or advice, including to act in the best interest of their client. In the event of MEAS Muth considering that the Co-Lawyers are not in the best position to fully address all his concerns with respect to his legal representation and his possible defence strategies, it would be incumbent upon him to inform the DSS and seek additional or separate legal advice.

14. The International Co-Prosecutor's Request for Independent Advice to be Provided to MEAS Muth is therefore denied.

2) Co-Lawyers' Request to Lift the Order Suspending Communications

15. The Pre-Trial Chamber considers that it is of fundamental importance for MEAS Muth to be able to communicate with the lawyers of his choice in order to get the information and advice necessary to decide whether he wants to pursue the Appeal. Assuming that it still applies,²⁹ the Order Suspending Communications currently prohibits such communications and, as a result, impairs MEAS Muth's fundamental right to communicate with the counsel of his own choosing for the purpose of the current appellate proceedings. Article 14(3)(b) of the International Covenant on Civil and Political Rights clearly states that the right to be represented by counsel of own choosing includes the right to communicate with the said counsel. The Pre-Trial Chamber notes that no reasons were given by the International Co-Investigating Judge when he ordered the suspension of communications in the first place so the continuing limitation on MEAS Muth's fundamental right is not justified by any legitimate interest. In addition, the Chamber does not have any reason to believe that communications between MEAS Muth and his Co-Lawyers, for the purpose of these appellate proceedings, would cause any prejudice to the investigation or any other prejudice, especially in the light of the International Co-Investigating Judge's finding that there is no evidence that the Co-Lawyers "are in possession of information, provided confidentially by IENG Sary, which could be material to [MEAS Muth]'s Defence".³⁰

BACK and reads: "I swear that I shall implement my profession with dignity, conscientiousness, honesty, humanity, and with an independent mind, and in observance of the Constitution and Laws of the Kingdom of Cambodia".

²⁹ The Pre-Trial Chamber notes that the Co-Lawyers and the International Co-Prosecutor have expressed the view that the Co-Lawyers may no longer be prohibited from contacting MEAS Muth given that a decision on assignment has now been issued. However, out of caution, the Co-Lawyers seek permission from the Pre-Trial Chamber to communicate with MEAS Muth and the International Co-Prosecutor agrees that this issue should be clarified. Given that, pursuant to Art. 606(1) of the Cambodian Code of Criminal Proceedings, the International Co-Investigating Judge would have sole jurisdiction to clarify the Order Suspending Communications, the Pre-Trial Chamber shall address the Co-Lawyers' Request as if the said order was still in force.

³⁰ Impugned Decision, para. 128.



Absent any provision in the ECCC legal compendium or in Cambodian law dealing with its power to order the interim measure sought by the Co-Lawyers, the Pre-Trial Chamber finds it necessary, in order to ensure fairness of the proceedings and respect of MEAS Muth's fundamental right to communicate with counsel of his own choosing, to use its inherent jurisdiction³¹ to lift, in part, the Order Suspending Communications and to allow communications between the Co-Lawyers and MEAS Muth for the purpose of the appellate proceedings against the Impugned Decision.

16. The Co-Lawyers' Request to Lift the Order Suspending Communication is therefore granted in part.

3) Request For Access to the Case File

17. The Pre-Trial Chamber notes that the Co-Lawyers request access to the investigation case file in Case 003 in order to prepare the Appeal, more specifically to challenge the factual conclusions reached by the International Co-Investigating Judge. There is no indication that such access would be necessary to inform MEAS Muth of the findings reached in the Impugned Decision and to provide him advice at this stage, *i.e.* to assist MEAS Muth in deciding whether he wishes to continue to be represented by the Co-Lawyers and pursue the Appeal. Moreover, given the fact that the case file is confidential, the Chamber considers that it is appropriate to first confirm whether MEAS Muth wishes to continue to be represented by the Co-Lawyers and to pursue the Appeal before deciding on the Request.
18. The Pre-Trial Chamber therefore defers its decision on the Request for Access to the Case File until it receives confirmation that MEAS Muth wants to pursue the Appeal.

³¹ The Pre-Trial Chamber recalls that "it has been recognized that in instances where their statutory provisions did not expressly or by necessary implication contemplate their power to pronounce on a matter, international and internationalized tribunals possess an inherent jurisdiction which give them the power 'to determine incidental issues which arise as a direct consequence of the procedures of which [they are] seized by reason of the matter falling under [their] primary jurisdiction'." "The inherent jurisdiction is described as being 'ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice.'" The Pre-Trial Chamber has itself previously used its inherent jurisdiction to suspend the effect of an order of the Co-Investigating Judges pending resolution of the appellate proceedings before it, in order to ensure that the right to appeal the said order remains meaningful. *See* Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement regarding Case File 003", 13 June 2011, D14/1/2, para. 4 referring to Special Tribunal for Lebanon, Decision on Appeal of Pre-Trial Judge's Order on Jurisdiction and Standing, Case No. *CHiAC/2010/02*, Appeals Chamber, 10 November 2010, para. 45. *See also* Case 002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutor's Request for Clarification, 26 June 2013, E286/2/1/2, para. 12.



4) Request for Extension of Time to Appeal

19. The Pre-Trial Chamber considers that the prohibition for the Co-Lawyers to communicate with MEAS Muth, coupled with the absence of notification of the Impugned Decision directly to him, has, until now, prevented MEAS Muth from exercising any right of appeal. In these circumstances, no time period to appeal has started to run yet; it will only start to run once this decision is notified and, as a result, the Co-Lawyers are enabled to communicate with MEAS Muth and to provide him all the necessary information, including a copy of the Impugned Decision.
20. The Pre-Trial Chamber therefore finds that the Request for Extension of Time to Appeal is moot.

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DECLARES that any time limit to appeal the Impugned Decision is suspended until the issuance and receipt of the present decision and, as a consequence, FINDS that the Request for Extension of Time is moot;

LIFTS, in part, the Order Suspending Communications to permit the Co-Lawyers to communicate with MEAS Muth only for the purpose of allowing communications in relation to the appellate proceedings against the Impugned Decision;

DEFERS its decision on the Request for Access to the Case File until it receives confirmation that MEAS Muth wishes to pursue the Appeal;

DISMISSES the International Co-Prosecutor's Request for Independent Advice to Be Provided to MEAS Muth.

Phnom Penh, 31 January 2014 ^៥

President of the Pre-Trial Chamber



PRAK KIMSAN