

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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***MEAS MUTH’S MOTION TO STRIKE INTERNATIONAL CO-PROSECUTOR’S RESPONSE TO NOTIFICATION CONCERNING THE SUSPECT’S REQUESTS TO ACCESS THE CASE FILE, PARTICIPATE IN THE JUDICIAL INVESTIGATION AND RECEIVE THE FULL INTRODUCTORY SUBMISSION***

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Distribution to:  
**Co-Investigating Judges:**  
Judge YOU Bunleng  
Judge Mark B. HARMON

**Co-Prosecutors:**  
CHEA Leang  
Nicholas KOUMJIAN

**All Civil Parties**

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), hereby moves to strike the “International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission.”<sup>1</sup> This Motion is made necessary because the International Co-Prosecutor’s “Response” goes well beyond the submissions invited by the International Co-Investigating Judge. Striking the “Response” is the only way to guarantee the fairness of the proceedings.

## I. BACKGROUND

1. On 24 February 2012, Reserve International Co-Investigating Judge (“RICIJ”) Kasper-Ansermet notified Mr. MEAS Muth that he was being investigated for certain crimes within the jurisdiction of the ECCC and that he therefore has certain rights, including the right to access the Case File.<sup>2</sup>
2. On 2 May 2012, two days before stepping down from his position, the RICIJ issued the Personal Jurisdiction Decision,<sup>3</sup> finding that Mr. MEAS Muth was one of “those most responsible” for crimes within the jurisdiction of the ECCC.
3. On 29 August 2013, the Defence requested access to the Case File and to be entitled to participate in the judicial investigation.<sup>4</sup>
4. On 26 September 2013, the Defence requested to be provided with the full Introductory Submission and supporting material.<sup>5</sup>
5. On 10 July 2014, Co-Investigating Judge Harmon notified the parties that he intends to reconsider the RICIJ’s Personal Jurisdiction Decision and his Notification of Suspect’s Rights, insofar as the Notification referred to the right to access the Case File, with a view to adjudicating on the requests for access to the Case File and the Introductory

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<sup>1</sup> International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission, 30 July 2014 [redacted version filed 6 August 2014], D82/3/3/1.1.

<sup>2</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D30.

<sup>3</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48 (“Personal Jurisdiction Decision”).

<sup>4</sup> MEAS Muth’s Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82.

<sup>5</sup> Letter from Defence to OCIJ, *Request to be Provided with Full Introductory Submission and Supporting Material*, 26 September 2013, D82/2.

Submission and supporting material. He “invite[d] [the parties] to submit any further observations they may have on this matter.”<sup>6</sup>

6. On 30 July 2014, the Defence filed submissions asserting that: **a.** the Personal Jurisdiction Decision must be vacated because it was issued prematurely before the investigation had been closed and all the evidence evaluated; **b.** the Notification of Suspect Rights should not be reconsidered; and **c.** reconsideration of either the Personal Jurisdiction Decision or the Notification of Suspect Rights should not affect Mr. MEAS Muth’s right to access the Case File.<sup>7</sup>
7. On 31 July 2014, Co-Investigating Judge Harmon ordered the International Co-Prosecutor to file a redacted version of the “International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission” within five working days.<sup>8</sup>
8. On 12 August 2014, the Defence sent a letter to the Co-Investigating Judges requesting clarification of the International Co-Prosecutor’s deadline to redact his “Response” (since the Defence had not yet been provided with a redacted version) and notifying the Co-Investigating Judges that the Defence may need to respond to the Co-Prosecutor’s submission.<sup>9</sup>
9. On 15 August 2014, Co-Investigating Judge Harmon instructed his greffier to provide the Defence with the redacted version of the International Co-Prosecutor’s “Response” (which had been filed on 6 August 2014) and invited the Defence to inform the Co-

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<sup>6</sup> Notification Concerning Suspect’s Requests to Access the Case File and Participate in the Judicial Investigation (D82) and the Full Introductory Submission and Supporting Material (D82/2), 10 July 2014, D82/3. This Notification was notified to the parties on 16 July 2014.

<sup>7</sup> MEAS Muth’s Submission on Reconsideration of RICIJ’s Personal Jurisdiction Decision and Decision to Grant Access to the Case File in the Notification of Suspect’s Rights, 30 July 2014, D82/3/5.

<sup>8</sup> Order on the International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission, 31 July 2014, D82/3/3.

<sup>9</sup> Letter from Defence to Co-Investigating Judges, *Request for clarification and notice concerning Co-Investigating Judge Harmon’s 31 July 2014 Order to the International Co-Prosecutor*, 12 August 2014, D82/3/3/2.

Investigating Judges within five working days whether it intended to file submissions in reply to the “Response.”<sup>10</sup>

10. On 18 August 2014, the Defence was provided with a redacted version of the International Co-Prosecutor’s “Response.”

## II. ARGUMENT

11. The International Co-Prosecutor’s “Response” goes well beyond the scope of submissions invited by Co-Investigating Judge Harmon. Rather than addressing whether reconsideration of the Notification of Suspect Rights or the Personal Jurisdiction Decision would affect Mr. MEAS Muth’s right to access the Case File, the International Co-Prosecutor used the invitation to make submissions as a means of filing a mini-Final Submission before the Co-Investigating Judges. He used the entire allotted 15 pages to argue that not only was Mr. MEAS Muth “most responsible” but he was also a “senior leader” and must now be charged. The International Co-Prosecutor attempted to file his submission on an *ex-parte* and strictly confidential basis, presumably to ensure that it could be used to influence the Co-Investigating Judge while Mr. MEAS Muth would have no opportunity to learn the contents of the submission or to respond to it. Had it succeeded, the International Co-Prosecutor’s abhorrent *ex-parte* tactic would have directly frustrated the Defence from even knowing that the International Co-Prosecutor filed submissions in response to Co-Investigating Judge Harmon’s invitation, let alone from being able to respond to them.
12. Co-Investigating Judge Harmon did not request submissions on whether Mr. MEAS Muth was a senior leader or one of those most responsible for crimes within the jurisdiction of the ECCC. This is a determination the Co-Investigating Judges must make after evaluating all the evidence and independently of the Co-Prosecutors.<sup>11</sup> Co-Investigating Judge Harmon was already aware of the International Co-Prosecutor’s position on this issue, considering that the International Co-Prosecutor filed an Introductory Submission alleging that Mr. MEAS Muth was a “senior leader” and/or “most responsible” for certain crimes.

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<sup>10</sup> Second Notification Concerning the Possible Reconsideration of Two Decisions, 15 August 2014, D82/3/3/3.

<sup>11</sup> See Agreement, Art. 5(3)-(4); Establishment Law, Art. 23 new.

13. Striking the International Co-Prosecutor's "Response" is the only way to guarantee the fairness of the proceedings.<sup>12</sup> Mr. MEAS Muth cannot meaningfully respond to the "Response" without being provided with access to the Case File, sufficient time to review all material on the Case File, and the right to make investigative requests and to have them acted upon. Even then, any response would be premature before the investigation has closed. It is not until the Co-Investigating Judges have gathered and examined all of the evidence that a determination on Mr. MEAS Muth's level of responsibility can be made.<sup>13</sup> Granting the Defence access to the Case File and the ability to participate in the judicial investigation would obviate the reason Co-Investigating Judge Harmon stated that he is reconsidering the Notification of Charges and the Personal Jurisdiction Decision (which are being reconsidered in the context of whether to grant Mr. MEAS Muth access to the Case File).
14. The ICTY Appeals Chamber has explained that "[t]he benefit of striking out parts of a submission is not only to guarantee the fairness of the proceedings but also to clarify for the parties, and for the public, which arguments have been considered by the Chamber in reaching a particular decision. *The fact that the Appeals Chamber would easily 'be able to disregard the offending paragraph' is devoid of legal merit.*"<sup>14</sup> Merely disregarding the International Co-Prosecutor's "Response" is insufficient. It must be struck from the record to avoid tainting the Co-Investigating Judges' impartial judicial investigation.

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to STRIKE the "International Co-Prosecutor's Response to Notification Concerning the Suspect's Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission."

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<sup>12</sup> See *Nikolić v. Prosecutor*, IT-02-60/1-A, Decision on Prosecution's Motion to Strike, 20 January 2005, para. 25, available at [http://www.icty.org/x/cases/nikolic\\_momir/acdec/en/050120-2.htm](http://www.icty.org/x/cases/nikolic_momir/acdec/en/050120-2.htm), which explains that one reason to strike out portions of a submission is to guarantee the fairness of the proceedings.

<sup>13</sup> See MEAS Muth's Submission on Reconsideration of RICIJ's Personal Jurisdiction Decision and Decision to Grant Access to the Case File in the Notification of Suspect's Rights, 30 July 2014, D82/3/5, paras. 15-17.

<sup>14</sup> *Nikolić v. Prosecutor*, IT-02-60/1-A, Decision on Prosecution's Motion to Strike, 20 January 2005, para. 25, available at [http://www.icty.org/x/cases/nikolic\\_momir/acdec/en/050120-2.htm](http://www.icty.org/x/cases/nikolic_momir/acdec/en/050120-2.htm). See also *Prosecutor v. Gotovina & Markač*, IT-06-90-A, Decision on Motion to Strike Gotovina's Abandoned Grounds of Appeal, 4 November 2011, p. 3, available at <http://www.icty.org/x/cases/gotovina/acdec/en/111104.pdf>.

Respectfully submitted,

  
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ANG Udom

  
The stamp is circular with a red border. Inside the border, the text reads: 'ROYAUME DU CAMBODGE' at the top, 'AVOCAT' in the center, 'ATTORNEY AT LAW' below it, and 'ROYAUME DU CAMBODGE' at the bottom.

  
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Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **22<sup>nd</sup>** day of **August, 2014**