

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

FILING DETAILS

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**MEAS MUTH'S REQUEST FOR THE OCIJ TO COMPEL THE OCP TO PROVIDE
THE DEFENCE WITH ITS CRITERIA CONCERNING "SENIOR LEADERS OF
DEMOCRATIC KAMPUCHEA AND THOSE WHO WERE MOST RESPONSIBLE"**

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Co-Prosecutors:
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All Civil Parties

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules (“Rules”), hereby requests the OCIJ to compel the OCP to provide the Defence with each Co-Prosecutor’s criteria for determining whether Suspects may be considered “senior leaders of Democratic Kampuchea and those who were most responsible” and to place these criteria on the Case File. This Request is made necessary because the Defence, in the exercise of its due diligence obligations, may need to make submissions challenging any abuse of discretion by the OCP, as permitted by ECCC jurisprudence. Hence, there is a need for unfettered transparency. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall* be interpreted so as to always safeguard the interests of Suspects.... In this respect: a) ECCC proceedings shall be fair and transparent....” The Defence requests to file this Request in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation due to other priorities.¹

I. BACKGROUND

1. On 3 December 2008, the Pre-Trial Chamber was seized of a Disagreement between the Co-Prosecutors concerning, *inter alia*, whether the 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea (“Introductory Submission”) would be submitted to the Co-Investigating Judges to open a judicial investigation.² According to the Pre-Trial Chamber, the National Co-Prosecutor disagreed with forwarding the Introductory Submission to the OCIJ, *inter alia*, because Mr. MEAS Muth was not a senior leader or one of those most responsible for the alleged crimes due to his comparatively lower rank.³ The National Co-Prosecutor also alleged that the Introductory Submission was investigated and prepared without her knowledge or assistance.⁴ The Pre-Trial Chamber was unable to reach a decision on the Disagreement; therefore, according to Rule 71(4), the Introductory Submission was forwarded to the OCIJ to open a judicial investigation.⁵

¹ See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 17 October 2013.

² See Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, para. 1.

³ *Id.*, para. 32.

⁴ *Id.*, para. 38.

⁵ *Id.*, para. 45.

2. On 7 September 2009, the judicial investigation of Mr. MEAS Muth was initiated.⁶ The Introductory Submission alleges that the Co-Prosecutors are satisfied that Mr. MEAS Muth was a “senior leader[] during the Democratic Kampuchea period and / or [a person] most responsible for the crimes described.”⁷
3. On 29 April 2011, Co-Investigating Judges You Bunleng and Siegfried Blunk filed a Notice of Conclusion of the Judicial Investigation into Case 003.⁸
4. On 9 May 2011, the International Co-Prosecutor issued a press release informing the public that he intended to request the Co-Investigating Judges to take certain further investigative actions in Case 003 “as he is of the view that the crimes alleged in the Introductory Submission have not been fully investigated.” He informed the public about the crimes and crime scenes being investigated, the additional investigation he would request, and how to become involved as Civil Parties or complainants.⁹ The Co-Prosecutor later retracted this press release, as ordered by the OCIJ,¹⁰ however, the press release remains available on the ECCC website.
5. On 10 May 2011, the National Co-Prosecutor issued a press release, stating:

In view of the first preliminary investigation by the International Co-Prosecutor and the latest investigation leading to the closure of investigation by the Co-Investigating Judges, the National Co-Prosecutor thoroughly examined and maintained that the suspects mentioned the Case File 003 were not either senior leaders or those who were most responsible during the period of Democratic Kampuchea. In accordance with the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (the ‘ECCC Law’) and the preamble 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 Democratic Kampuchea (‘UN-RGC Agreement’) dated 18 December 2002 and the recognition by the United Nations General Assembly of the legitimate concern of the Royal Government of Cambodia and the people of Cambodia in the pursuit of justice and national

⁶ According to Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, 26 February 2013, D58, para. 3, the Introductory Submission was placed on the Case File on 7 September 2009 through Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009.

⁷ Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D56/3.1, para. 96.

⁸ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁹ Statement by the International Co-Prosecutor Regarding Case File 003, 9 May 2011.

¹⁰ Statement by the International Co-Prosecutor Regarding the Co-Investigating Judges’ Retraction Order In Case 003, 27 October 2011.

reconciliation, stability, peace and security, the selection of two categories of suspects were made: senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of the 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. Further, the National Co-Prosecutor opines that priorities should be given to the prosecution of the Accused in the custody of the ECCC Detention Facility. In light of the UN-RGC Agreement and the ECCC Law that envisaged the prosecution of a limited number of people. For the reasons given, the National Co-Prosecutor maintains that the named suspects in Case File 003 do not fall within the jurisdiction of the ECCC to be brought to trial and that the Tribunal's mandate can be adequately fulfilled through the prosecution of the Accused persons in the ECCC Detention Facility.¹¹

6. On 3 February 2012, the Supreme Court Chamber issued its Appeal Judgement in Case 001.¹² The Supreme Court Chamber found that whether a person is a Khmer Rouge official is a jurisdictional issue, as the ECCC only has jurisdiction over Khmer Rouge officials.¹³ It found that whether a person falls within the category of “senior leaders of Democratic Kampuchea and those who were most responsible” is a matter of investigatorial and prosecutorial policy for the OCP and OCIJ that is not justiciable before the Trial Chamber.¹⁴ It also found that “the Trial Chamber has the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement in bad faith or according to unsound professional judgement.”¹⁵

II. LAW AND ARGUMENT

7. The issue of whether Mr. MEAS Muth falls within the category of “senior leaders of Democratic Kampuchea and those who were most responsible” is a dispositive issue:¹⁶ it

¹¹ Statement by the National Co-Prosecutor Regarding Case File 003, 10 May 2011.

¹² *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28.

¹³ *Id.*, para. 61.

¹⁴ *Id.*, paras. 62-79.

¹⁵ *Id.*, para. 80.

¹⁶ While the Defence has referred to this issue in the past as a “jurisdictional issue,” this was for the purposes of highlighting its dispositive nature. *See* MEAS Muth's Notification of Objection to Stephen Heder Having Any Further Involvement in Case 003 & Request for the Work Product of Stephen Heder, 9 October 2013 and MEAS Muth's Notification of Objection to David Boyle Having Any Further Involvement in Case 003 & Request for the Work Product of David Boyle, 9 October 2013. The Defence is not alone in considering this effectively a jurisdictional matter. National Co-Prosecutor Chea Leang has stated that in her opinion “the named suspects in Case File 003 do not fall within the jurisdiction of the ECCC to be brought to trial.” Statement by the National Co-Prosecutor Regarding Case File 003, 10 May 2011. Co-Investigating Judges You Bunleng and Blunk focused their investigation on “personal jurisdiction” and former OCIJ Investigator Mr. Heder titled his article, which contained an introduction by current OCIJ Legal Office David Boyle, “*The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge ‘Senior Leaders’ and Others ‘Most Responsible’ for Khmer Rouge Crimes: A History and Recent*

goes to the heart of whether Mr. MEAS Muth will be prosecuted at the ECCC. While the Supreme Court Chamber has held that this is a matter of prosecutorial and investigatorial policy for the OCP and OCIJ, rather than a justiciable jurisdictional issue,¹⁷ it nonetheless also held that this issue is subject to appellate review for abuse of discretion.¹⁸ Because of the dispositive nature of this issue, for all intents and purposes it *effectively* amounts to a jurisdictional issue.¹⁹

8. While the Supreme Court Chamber specifically referred to *the Trial Chamber* having the “the power to review the discretion of the Co-Investigating Judges,”²⁰ the Pre-Trial Chamber is entrusted with the power to do likewise in determining whether the Co-Prosecutors exercised their discretion in bad faith or according to unsound professional judgement. The Pre-Trial Chamber could exercise this power if it is seized with **a.** an annulment application pursuant to Rule 76(2), or **b.** an appeal pursuant to Rule 21. If the Co-Prosecutors abused their prosecutorial discretion, this is not a matter that should be left until the end of a lengthy, expensive, and emotional trial to determine.²¹

Developments.” See Press Release, *Statement of the National Co-Investigating Judge*, 12 October 2011; Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge “Senior Leaders” and Others “Most Responsible” for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, available at <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>.

¹⁷ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 62-79.

¹⁸ *Id.*, para. 80. Appellate review of discretionary decisions is common at the ECCC. See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC(SC), Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12.

¹⁹ Similarly, although the Supreme Court Chamber has relied upon the referral system at the ICTY as evidence that the term “most responsible” operates as prosecutorial and investigatorial policy rather than as a jurisdictional requirement, the referral system at the ICTY is a good example of the issue of “most responsible” having a dispositive effect. Although the Prosecution at the ICTY may request that a case to be referred to a national court and seek the appointment of a referral board to consider the issue, the Accused has the right to appeal this discretionary decision of the referral board. In the case of *Prosecutor v. Lukić & Lukić*, for example, the Accused Lukić argued that the Referral Board abused its discretion in deciding that he could be tried by a court in Bosnia and Herzegovina. The Appeals Chamber agreed, and Lukić was tried at the ICTY. See *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 71; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-AR11bis.1, Decision on Milan Lukić’s Appeal Regarding Referral, 11 July 2007.

²⁰ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 80.

²¹ See *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6: “Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and a proper rule is selected.”

9. Pursuant to Rule 76(2), the Defence is entitled to apply for the annulment of investigative action containing procedural defects. The Pre-Trial Chamber has held that “a proven violation of a right ... recognized in the [International Covenant on Civil and Political Rights (“ICCPR”)], would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled.”²² If the Co-Prosecutors have acted in bad faith or without sound professional judgement in exercising their prosecutorial discretion, this would violate Mr. MEAS Muth’s right, guaranteed by the ICCPR to a fair trial. Mr. MEAS Muth would have the right to have the investigation annulled based on Rule 76(2).
10. Rule 21(1) requires the ECCC’s applicable law and Rules to be interpreted so as to always safeguard Mr. MEAS Muth’s interests.²³ The Pre-Trial Chamber, in recognizing that Rule 21 requires a broad interpretation of the right to appeal,²⁴ has admitted an appeal based on Rule 21 alone, where the issue being appealed did not fall under the grounds for pre-trial appeals set out in Rule 74(3).²⁵ Supreme Court Chamber Judges Klonowiecka-Milart and Jayasinghe have rightly noted that strictly limiting interlocutory appeals “is inconsistent with the jurisprudence of the ECCC, the practice of all international criminal tribunals, the needs of a fair and expeditious trial and the rights of the accused.”²⁶ If the Co-Prosecutors have acted in bad faith or without sound professional judgement in

²² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC06), Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 40. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC41), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order rejecting the Request to Seize the Pre-Trial Chamber with a view to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6, para. 24.

²³ Rule 21(1) provides: “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”

²⁴ *See, e.g., Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 18 (emphasis added): “[c]onsidering the fair trial rights of the Appellant ... the Pre-Trial Chamber finds that Rule 21 *requires* it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21.”

²⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC 71), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Decision Refusing to Accept the Filings 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. 13.

²⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC(SC), Decision on IENG Sary’s Appeal Against Trial Chamber’s Decision on IENG Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe, 20 March 2012, E51/15/1/2.1, para. 1. This opinion has been cited approvingly by the OCP in Case 002. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC(SC), Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1, n. 28.

exercising their prosecutorial discretion, this would violate Mr. MEAS Muth's right, guaranteed by the ICCPR to a fair trial and could be appealed pursuant to Rule 21.

11. The Defence must be provided with the criteria the Co-Prosecutors each used in exercising their prosecutorial discretion so that it can determine, in the exercise of its due diligence,²⁷ whether to request the Pre-Trial Chamber to review the OCP's decision to prosecute Mr. MEAS Muth. Co-Prosecutor Chea Leang has argued that Mr. MEAS Muth should not be prosecuted at the ECCC because he does not fit within the jurisdictional contours of the ECCC. In exercising her prosecutorial discretion, Co-Prosecutor Chea Leang concluded that Mr. MEAS Muth was not a senior leader or one of those most responsible for the alleged crimes due to his comparatively lower rank. In reaching this conclusion, however, Co-Prosecutor Chea Leang failed to articulate all of the criteria she applied. Co-Prosecutor Cayley disagreed with his national counterpart, arguing that Mr. MEAS Muth was, in fact, either a senior leader or one of those most responsible. Co-Prosecutor Cayley, like his national counterpart, failed to articulate the criteria he used when reaching his decision.
12. Without the benefit of the criteria used by the National and International Co-Prosecutors when reaching their opposing conclusions, the Defence cannot meaningfully determine whether submissions should be made and cannot meaningfully articulate arguments for any such submissions. It is a matter of public knowledge that this disagreement exists, and this is a dispositive issue. Therefore, it is in the interest of justice for all information related to the criteria, including all legal memoranda in support of the respective positions taken by the Co-Prosecutors, to be disclosed. This material does not constitute work product. Indeed, the requested material is essential in the determination of whether either of the Co-Prosecutors has acted with bad faith or according to unsound professional judgement concerning the issue of whether Mr. MEAS Muth can be considered a senior leader or one of those most responsible.

²⁷ *Black's Law Dictionary* defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 468 (7th ed. 1999). The ICTY has stated that the purpose of according the accused certain rights under the ICTY Statute "was that the accused should exercise due diligence in utilizing them." JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 306 (Transnational Publishers Inc., 2002), discussing *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998.

13. Furthermore, should this matter be challenged by the Defence, the Pre-Trial Chamber will also be in need of this material in order to make its determination as to whether the Co-Prosecutors used objective, legally sound criteria. It will be unable to determine whether the Co-Prosecutors agreed as to the appropriate criteria, but reached different conclusions based on their analyses of the facts, or whether the Co-Prosecutors each employed different criteria (which could indicate that at least one Co-Prosecutor was not acting with sound professional judgement or was even acting in bad faith).

III. RELIEF SOUGHT

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the OCIJ to:

- A. COMPEL the Co-Prosecutors to provide their criteria for determining whether Suspects may be considered “senior leaders of Democratic Kampuchea and those who were most responsible” including any related legal memoranda; and
- B. PLACE this material on the Case File.

Respectfully submitted,



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Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 17th day of **October, 2013**