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

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INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO THE MEAS MUTH REQUEST TO RESCIND THE 10 DECEMBER 2014 ARREST WARRANT

Filed by:

International Co-Prosecutor
Nicholas KOUMJIAN

Copied to:
National Co-Prosecutor
CHEA Leang

Distribution to:

Co-Investigating Judges
Judge YOU Bunleng
Judge Mark B. HARMON

Charged Person

MEAS Muth
ANG Udom
Michael KARNAVAS

Copied to:

All Lawyers for Civil Parties

I. INTRODUCTION

1. Meas Muth has requested[1] ("Request"), that the Co-Investigating Judges rescind the warrant for his arrest issued by the International Co-Investigating Judge (ICIJ) on 10 December 2014 ("Arrest Warrant"). Meas Muth argues that the ICIJ did not have the power to issue the Arrest Warrant individually, and, alternatively, that it is moot now that Meas Muth has been notified of the charges against him. The International Co-Prosecutor ("Co-Prosecutor") responds that Meas Muth's arguments are meritless, and requests that the Co-Investigating Judges dismiss the Request.

II. PROCEDURAL HISTORY

2. On 17 July 2014, the CIJs registered a disagreement regarding Case 003.[2]

3. On 26 November 2014, the ICIJ issued a summons to Meas Muth to appear at the ECCC for an initial appearance on 8 December 2014.[3] On 28 November 2014, an OCIJ investigator served the summons on Meas Muth.[4]

4. On information and belief, on 28 November 2014 Meas Muth's Co-Lawyers were summonsed to attend his initial appearance.[5]

5. On information and belief, Meas Muth informed the ICIJ by letter dated 2 December 2014 that he did not recognize the validity of the summons not signed by the National Co-Investigating Judge, and on 3 December 2014 the Co-Lawyers for Meas Muth informed the Co-Investigating Judges that their client did not intend to comply with the summons.[6]

6. On information and belief, the ICIJ responded to Meas Muth on 4 December 2014 recalling "that the Pre-Trial Chamber had already affirmed the validity of a summons for Initial Appearance issued by one Co-Investigating Judge, provided that the disagreement

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1 **D130** Meas Muth's Request to Rescind the Arrest Warrant Issued on 10 December 2014, 10 March 2015 (hereinafter "Request") (notified in Khmer on 23 March 2015).
2 **D128** Decision to Charge Meas Muth *In Absentia,* 3 March 2015, at para. 8.
3 **A66** Summons to Initial Appearance, 8 December 2014.
4 **A66** Summons to Initial Appearance, 8 December 2014.
5 **D128** Decision to Charge Meas Muth *In Absentia,* 3 March 2015, at para. 15 (citing A67 Summons of Lawyer, 28 November 2014). The Co-Prosecutors do not have access to the cited document.
6 **C1** Arrest Warrant, 11 December 2014, p. 2 (citing A67/1.1 Notice of Non-Recognition of Summons, 2 December 2014; A67/1 Notice Concerning Meas Muth's Decision not to Recognize Summons, 3 December 2014). The Co-Prosecutors do not have access to the cited documents.

procedure set forth in Internal Rule 72 has been complied with and that the 30 day time period to bring it before the Pre-Trial Chamber has elapsed."[7]

7. On 8 December 2014, the ICIJ held the Initial Appearance for Meas Muth.[8] Counsel for Meas Muth attended, but Meas Muth did not.[9]

8. On 10 December 2014, the ICIJ issued an Arrest Warrant for Meas Muth, noting his failure to appear for the Initial Appearance.[10] The ICIJ ordered the Judicial Police to effect the Arrest Warrant in order to have Meas Muth appear for his Initial Appearance.

9. On 30 January 2015, the ICIJ sent a letter to H.E. Mr. Em Sam An, Secretary of State at the Ministry of Interior and Chairman of the Security Commission for the ECCC, noting that the arrest warrant had not been served on Meas Muth.[11] The ICIJ informed H.E. Mr. Em Sam An that, due to the failure to serve the Arrest Warrant, he intended to charge Meas Muth *in absentia* should Meas Muth not appear at the ECCC or the Arrest Warrant not be served by 18 February 2015.

10. On 3 March 2015, the ICIJ charged Meas Muth *in absentia* with crimes under the 1956 Cambodian Penal Code, crimes against humanity, and Grave Breaches of the Geneva Conventions.[12] To the Co-Prosecutor's knowledge, the Arrest Warrant has not yet been served.

III. RESPONSE

A. The Arrest Warrant is Valid

11. Meas Muth argues that the Arrest Warrant is invalid because it is not signed by both Co-Investigating Judges.[13] He maintains that the issuance of an arrest warrant by a single Co-Investigating Judge is "an act not envisaged by ECCC jurisprudence, laws, or the Rules."[14] To the contrary, the ECCC jurisprudence, laws, and Rules envisage, and support, that unless specifically excluded, investigatory actions may be carried out by a single Co-Investigating Judge as long as they are done in compliance with relevant procedures.

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7 **C1** Arrest Warrant, 11 December 2014, at p. 2 (citing A67/1/1 Response to the Notice concerning Mr Meas Muth's decision not recognized [sic] summons Dated 3 December 2014, 4 December 2014.) The Co-Prosecutors do not have access to the cited document.
8 **D122** Written Record of Initial Appearance, 11 December 2014.
9 **D122** Written Record of Initial Appearance, 11 December 2014, at p.2.
10 **C1** Arrest Warrant, 11 December 2014.
11 **D127** Letter from ICIJ to H.E. Em Sam An, 30 January 2015.
12 **D128** Decision to Charge Meas Muth *in Absentia,* 3 March 2015.
13 **D130** Request, at paras. 25-30.
14 **D130** Request, at para. 36.

12. Rule 72 of the Internal Rules explicitly addresses the settlement of disagreements between the Co-Investigating Judges[15], and allows that even where there is a disagreement between the Judges "the action or decision which is the subject of the disagreement shall be executed" except in certain circumstances not applicable to the issuance of arrest warrants.[16] Furthermore, if the Co-Investigating Judges do not choose to seize the Pre-Trial Chamber (PTC) with the disagreement, the action or decision is implemented. As the PTC has stated "[t]he Co-Investigating Judges are under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them, the default position being that the 'investigation shall proceed'… ."[17] The Rules therefore clearly support the issuance of the Arrest Warrant by the ICIJ alone.

13. In support of his argument, Meas Muth quotes to this Chamber the first sentence of Article 5(4) of the Agreement[18], which he deems to be the "relevant part."[19] He implies that in his view, that sentence, "[t]he co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation", indicates that all actions must be taken jointly by the Co-Investigating Judges.[20] As a textual matter, such an implication is clearly incorrect. Cooperation between the Judges does not prescribe agreement. Moreover, Article 5(4) continues after the passage quoted by Meas Muth by explicitly acknowledging that disagreements may occur and that in such cases the default is that the investigative actions will proceed, stating: "In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7." Article 5(4) of the Agreement, therefore, when viewed holistically rather than selectively, is explicitly supportive of a single Co-Investigating Judge carrying out the actions of an investigation, including issuing arrest warrants.

14. Meas Muth is likewise misleadingly selective when quoting from the Establishment Law.[21] He claims that the "relevant part" of Article 23-new states "[a]ll investigations shall be the joint responsibility of the two investigating judges…", again arguing that this

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[15] Rule 72.
[16] Rule 72(3).
[17] **D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, at para. 274.
[18] 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.
[19] **D130** Request, at para. 25.
[20] **D130** Request, at paras. 25, 30.
[21] 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 inclusion of amendments as promulgated on 27 October 2004.

requires that the Co-Investigating Judges must act jointly in all actions.[22] Once again, as a textual matter that interpretation is incorrect. The fact that both Judges have "responsibility" for the investigation does not equate with both Judges agreeing on every action in the investigation. Portions of the Article omitted by Meas Muth make clear that disagreements between the Co-Investigating Judges, and actions by just one of them, were explicitly contemplated in the Establishment Law. Article 23-new continues on after the passage quoted by Meas Muth to address the applicable procedures "[i]n the event of a disagreement between the Co-Investigating Judges" and states that the default is that "[t]he investigation shall proceed…". Article 23-new is therefore also explicitly supportive of a single Co-Investigating Judge carrying out the actions of an investigation, including issuing arrest warrants.

15. Just as the Rules, the Agreement, and the Establishment Law permit the actions of a single Co-Investigating Judge in the course of the investigation, including the issuance of an arrest warrant, so does the ECCC's jurisprudence. Meas Muth acknowledges that in Case 004 the PTC has held that a summons may be issued by a single judge. He claims that "Co-investigating Judge Harmon unilaterally, without reasoned analysis, extended the Pre-Trial Chamber's limited decision in Case 004 to Arrest Warrants."[23] On the contrary, a single investigating judge has the power to issue an Arrest Warrant, and the referenced PTC decision clearly recognises that principle.

16. In that decision, the PTC found that a claim that a single Co-Investigating Judge "does not have the power to issue a summons alone, is, *prima facie*, without merits."[24] As long as any applicable disagreement procedures have been complied with, the PTC held, "it is clear from the Agreement between the United Nations and the Royal Government of Cambodia for the establishment of the ECCC, the ECCC Law and the Internal Rules that the International Co-Investigating Judge could validly issue the Summons alone."[25] For this holding the PTC cites to Article 5(4) of the Agreement and Article 23-new on the Establishment Law—the very provisions Meas Muth claims support his contention that a single Co-Investigating Judge could not act alone—as well as to Rule 72. The jurisprudence of the PTC therefore supports the ability of a single Co-Investigating Judge to carry out the functions of the office, including issuing arrest warrants, consistent with Rule 72.

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[22] **D130** Request, at para. 25.
[23] **D130** Request, at para. 26.
[24] **D117/1.2** Decision on [Redacted] Urgent Request [Redacted], 15 August 2014, at para. 14.
[25] **D117/1.2** Decision on [Redacted] Urgent Request [Redacted], 15 August 2014, at para. 25.

17. Meas Muth provides no support for his contention that where "a fundamental right is at risk, any measure imposed by the Office of the Co-Investigating Judges that could restrict this right – such as issuance of the Arrest Warrant – must be agreed to by both Co-Investigating Judges."[26] Given this total lack of support, and that, as explained above, such an action by a single Judge is contemplated by the Agreement, Establishment Law, and Rules, this claim should be dismissed.

18. Meas Muth also argues that "Co-Investigating Judge Harmon cannot rely on the dispute resolution procedures contained in Rule 72 to issue an Arrest Warrant without Co-Investigating Judge You Bunleng's signature."[27] To the contrary, as already mentioned Rule 72 allows just that. Moreover, Meas Muth's argument for his position is unpersuasive. He relies exclusively on the seperate opinion of some of the judges of the Pre-Trial Chamber (which failed to reach the required majority[28]), which stated "if none of the Co-Prosecutors delegates his or her power to another co-prosecutor, that co-prosecutor cannot act alone."[29]

19. This separate opinion that Meas Muth relies on, however, conflicts with decisions of the PTC that did attain the necessary majority and that recognized "that one Co-Prosecutor or Investigating Judge can act alone when a disagreement has been registered within the Office of the Co-Prosecutors or the Co-Investigating Judges, as appropriate, and the period for bringing a disagreement before the Pre-Trial Chamber has elapsed."[30] The PTC has further specified the power of a single Co-Investigating Judge where, as with the issuance of an arrest warrant, it is not necessary to await the passage of the settlement period before the action is performed: "The Agreement, ECCC Law and Internal Rules provide that one Co-Investigating Judge can validly act alone if the requirements of the disagreement procedure have been complied with. In the present case, there was no need to ensure that the 30-day settlement period had elapsed before the International Co-Investigating Judge could issue [his decisions], given that none of them fall within the ambit of paragraphs (a) to (c) of Internal Rule 72(3)."[31]

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[26] **D130** Request, at para. 27.
[27] **D130** Request, at para. 29.
[28] Agreement Article 7(4).
[29] **D130** Request, at para. 29, quoting D20/4/4 (Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy) para. 4.
[30] **D117/1.2** Decision on [Redacted] Urgent Request [Redacted], 15 August 2014, at para. 14 and fn. 23.
[31] **D208/1/1/2** Decision on [Redacted] Appeal Against the Decision Rejecting his Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, at para. 11 (internal citations omitted). Rule 72(3)(c) does apply to Arrest and Detention Orders, but such an order is distinct from an Arrest Warrant. *Compare* Rule 42 *with* Rule 44.

20. Meas Muth's final argument in relation to his claim that the Arrest Warrant was not validly issued is that Article 5(4) of the Agreement and Article 23-new of the Establishment Law "cannot be wholly subsumed by Rule 74 for the self-serving purpose of interpreting the Rule as permitting execution of *all* actions or decisions that are the subject of a disagreement between the Co-Investigating Judges" because "[s]uch a result violates the spirit and intent of the Agreement and Establishment Law." [32] Rule 74 concerns grounds for pre-trial appeals, and Meas Muth does not explicate how he believes the ICIJ is self-servingly subsuming the referenced Articles into Rule 74 or how that helps his argument. Regardless, however, as previously demonstrated those Articles expressly allow the actions of a single Co-Investigating Judge, and thus any such interpretation would not violate the spirit and intent of the Agreement and Establishment Law.

B. The Arrest Warrant Should Not Be Rescinded

21. Meas Muth argues that even if the Arrest Warrant was validly issued, it should now be rescinded because it has purportedly been rendered moot due to the objectives of the Arrest Warrant having been achieved.[33] He argues that the Arrest Warrant was issued in order to bring Meas Muth before the OCIJ for the purposes of the Initial Appearance, and that because a Notification of Charges has already been issued, an Initial Appearance is no longer necessary.

22. Meas Muth's argument operates under the fallacious assumption that the sole reason for requiring any accused to appear before the OCIJ for the Initial Appearance is to transfer the information contained in the Notification of Charges.[34] Meas Muth's appearance before the OCIJ for an Initial Appearance would serve a myriad of purposes, including allowing his charging *in persona*, and for the ICIJ to satisfy himself directly that Meas Muth understands the charges against him and his rights.[35] Thus, the Arrest Warrant continues to serve a purpose, and would only perhaps be mooted should Meas Muth voluntarily present himself before the OCIJ to be charged *in persona*.

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[32] **D130** Request, at para. 30 (emphasis in original).
[33] **D130** Request, at paras. 31-32.
[34] **D128** Decision to Charge Meas Muth *in Absentia,* 3 March 2015.
[35] Such a purpose is reflected in the rules of procedure and evidence of other international and internationalized tribunals. *See, e.g.*, Special Tribunal for Lebanon, Rules of Procedure and Evidence, 3 April 2014, Rule 98(A)(i)-(ii); International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, 22 May 2013, Rule 62(A)(i)-(ii); Special Court for Sierra Leone, Rules of Procedure and Evidence, 28 May 2010, Rule 61(i)-(ii); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, 10 April 2013, Rule 62(A)(i)-(ii).

23. Meas Muth also argues that the Arrest Warrant should not be left open "for no other reason than to temporarily detain Mr. Meas Muth".[36] He argues that "[d]etention at this stage, no matter how temporary, would be an arbitrary loss of freedom for Mr. Meas Muth not strictly limited to the needs of the proceedings"[37], again based on his claim that the Arrest Warrant is for the purpose of the Initial Appearance and the Initial Appearance "has, in effect, been held".[38] The Co-Prosecutor reiterates his position that the Initial Appearance has not been held in the crucial aspect of being *in persona,* and therefore the argument that the Arrest Warrant is superfluous, or is being maintained "for no other reason than to temporarily detain Mr. Meas Muth"[39], is meritless.

24. Moreover, detention necessary to effect a validly-issued judicial summons would not be arbitrary.[40] Regardless, the Co-Prosecutor notes that the ICIJ allowed for temporary detention under the Arrest Warrant only in the situation that "Meas Muth, due to the circumstances, cannot be brought before the International Co-Investigating Judge immediately"[41] for purposes of the Initial Appearance. Given that Meas Muth has not been detained, and may not be detained, it is premature for him to challenge detention on the grounds that it is arbitrary or otherwise.

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[36] **D130** Request, at para. 35.
[37] **D130** Request, at para. 34.
[38] **D130** Request, at para. 34.
[39] **D130** Request, at para. 35.
[40] *See, e.g.,* European Convention on Human Rights, Article 5 § 1(b) ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law."); *Benham v. United Kingdom*, Judgment, no. 19380/92, 10 June 1996, para. 42 ("A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention."); *Göthlin v. Sweden*, Judgment, no. 8307/11, 16 October 2014, paras. 55-68 (finding no violation of Article 5 of the ECHR because detention was effected due to applicant failing to comply with court order).
[41] **C1** Arrest Warrant, 10 December 2014, at p. 3.

IV. RELIEF REQUESTED

25. For the foregoing reasons, the Co-Prosecutor requests that the Co-Investigating Judges **DISMISS** the Request.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
2 April 2015	Nicholas KOUMJIAN Co-Prosecutor	Phnom Penh	