

BEFORE THE OFFICE OF CO-INVESTIGATING JUDGES**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ**Party Filing:** The Defence for MEAS Muth**Filed to:** Co-Investigating Judges**Original language:** ENGLISH**Date of document:** 7 April 2015**CLASSIFICATION****Classification of the document
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**MEAS MUTH'S REPLY TO THE INTERNATIONAL CO-PROSECUTOR'S
RESPONSE TO MEAS MUTH'S REQUEST TO RESCIND THE ARREST
WARRANT ISSUED ON 10 DECEMBER 2014**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), hereby replies to the International Co-Prosecutor’s Response to the MEAS Muth Request to Rescind the 10 December 2014 Arrest Warrant (“Response”).¹ The Reply is made necessary because the International Co-Prosecutor **a.** does not have standing to respond to Mr. MEAS Muth’s Request to Rescind the Arrest Warrant Issued on 10 December 2014 (“Request”);² and **b.** has made incorrect and misleading statements that require a reply. The arguments made in the Response will be addressed in the order in which they appear. The introduction and procedural history will not be addressed. The Defence files this Reply in English only with the Khmer translation to follow, considering that it will be impossible for the Interpretation and Translation Unit to complete the translation by the filing deadline.³

I. REPLY

A. The International Co-Prosecutor has no standing to respond

1. The International Co-Prosecutor does not have standing to respond to the Request. The Response must be stricken from the Case File.
2. The International Co-Prosecutor has no specific interest in the Arrest Warrant. Co-Investigating Judge Harmon issued the Arrest Warrant for Mr. MEAS Muth. The International Co-Prosecutor was not present at the hearing that preceded issuance of the Arrest Warrant,⁴ was not involved in the issuance of the Arrest Warrant, and was not named in the Arrest Warrant. The Arrest Warrant does not give the International Co-Prosecutor any right of response or participation in execution of the Arrest Warrant itself or in any proceedings that occur in relation to the Arrest Warrant.
3. As the United States Supreme Court has held in relation to plaintiffs’ standing to sue, standing comprises three elements: **a.** there must have been a concrete, particularized “injury in fact” that is actual or imminent; **b.** there must be a causal connection between the injury and the conduct that is the subject of complaint, i.e., the injury must be fairly traceable to the defendant’s conduct and not the result of independent action of a third

¹ International Co-Prosecutor’s Response to the MEAS Muth Request to Rescind the 10 December 2014 Arrest Warrant, 2 April 2015, D130/1.

² MEAS Muth’s Request to Rescind the Arrest Warrant Issued on 10 December 2014, 10 March 2015, D130.

³ See Email from Chanmony Korm to Defence, titled “RE: Translation request”, 6 April 2015.

⁴ See Written Record of Initial Appearance, 8 December 2014, D122, noting the presence at the hearing of International Co-Investigating Judge Harmon, National Co-Lawyer Ang Udom, Senior Legal Consultant Tanya Pettay, Case Manager Monika Mang, ECCC Interpreter Ourk Vora, and ECCC Technical Assistant Khlok Soussolalin.

party not before the court; and c. it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁵ When the challenged action was done by a government entity, and the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is “ordinarily ‘substantially more difficult’” to establish.⁶ Although the International Co-Prosecutor is not a plaintiff in relation to the Arrest Warrant, these principles of standing can be equally applied to his Response. He has suffered no injury in fact (nor has he received any benefit) from the Arrest Warrant; there is thus no causal connection between any injury to himself and the Arrest Warrant, nor is there any possibility of redress. Indeed, the position of the International Co-Prosecutor is not affected whether the Arrest Warrant remains active or is rescinded.⁷

4. The Agreement,⁸ Establishment Law,⁹ and the ECCC Internal Rules (“Rules”) contain no provisions granting the International Co-Prosecutor standing to respond to the Request. The Agreement, Establishment Law, and the Rules do not provide for any role or specific interest of the International Co-Prosecutor whatsoever in the issuance or execution of an Arrest Warrant.
5. An Arrest Warrant is issued pursuant to Rule 42 and is “an order to the Judicial Police to arrest any person and bring him or her before the Co-Investigating Judges or the Chambers.”¹⁰ While the Rules do not preclude issuance of Arrest Warrants by the Pre-Trial Chamber or Supreme Court Chamber, the Rules expressly indicate that the Co-Investigating Judges¹¹ and the Trial Chamber¹² can issue Arrest Warrants. The Rules do not require that the Judges seek input or approval from the International Co-Prosecutor

⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

⁶ *Id.*, at 562.

⁷ See, e.g., *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 12 March 2010, para. 31, in which the Trial Chamber held the Prosecutor had standing to respond to a Defence request for a restraining order against Croatia in relation to investigative proceedings Croatia was conducting, *at the request of the Prosecutor* and by order of the Trial Chamber, because the request “could possibly affect the position of both parties, and ... concerns an issue related to the fairness of the proceedings.” See also *Prosecutor v. Gotovina et al.*, IT-06-90-T, Transcript, 26 June 2009, p. 19398-19399, 19393-19395.

⁸ 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 (“Agreement”).

⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”).

¹⁰ Rules, Glossary, definition of *Arrest Warrant*, p. 82.

¹¹ Pursuant to Rule 55(5)(d).

¹² Pursuant to Rule 81(2).

before issuing an Arrest Warrant. The International Co-Prosecutor plays no role in the issuance, dissemination, or execution of an Arrest Warrant.

6. The Co-Prosecutors' lack of role in the issuance, dissemination, or execution of Arrest Warrants contrasts with their role regarding Arrest and Detention Orders. An Arrest and Detention Order is "an order to the Judicial Police to search for, arrest and bring any person to the ECCC detention facility; and to the head of the ECCC detention facility to receive and detain that person pending an appearance before the Co-Investigating Judges or a Chamber."¹³ Co-Investigating Judges and Judges of the Chambers must seek the opinion of the Co-Prosecutors prior to issuing an Arrest and Detention Order,¹⁴ and the Co-Prosecutors are responsible for disseminating the Arrest and Detention Order.¹⁵ The Co-Prosecutors have no such role in relation to Arrest Warrants.

7. An ECCC Arrest Warrant is equivalent to an order to bring under Cambodian law.¹⁶ As at the ECCC, Cambodian law provides *no* role for the Royal Prosecutor in the issuance of an order to bring. In contrast, Cambodian domestic courts do provide a role for the Royal Prosecutor in the issuance of arrest warrants. An arrest warrant under Cambodian law is the equivalent of an ECCC Arrest and Detention Order.¹⁷ When applicable, arrest warrants are issued by investigating judges.¹⁸ Before issuing an arrest warrant, the investigating judge *must* seek the opinion of the Royal Prosecutor and can only issue an arrest warrant after having obtained the Royal Prosecutor's opinion.¹⁹ The Royal Prosecutor then is responsible for disseminating the arrest warrant.²⁰ In such cases, where a defendant seeks to rescind an arrest warrant, the Royal Prosecutor – whose opinion was a pre-condition to issuance of the arrest warrant – arguably would have standing to respond to the request.

¹³ Rules, Glossary, definition of "Arrest and Detention Order", p. 82.

¹⁴ Rule 44(2).

¹⁵ Rule 44(1).

¹⁶ Cambodian Code of Criminal Procedure (2007), Art. 190, defining an order to bring as an "order to public forces to arrest and bring any person before the investigating judge."

¹⁷ *See id.*, Art. 196, defining an arrest warrant as "an order: for public forces to search for, arrest and bring the charged person to a prison or detention center; for the chief of a prison or a detention center to admit and detain that person."

¹⁸ Cambodian Code of Criminal Procedure (2007), Arts. 195-96.

¹⁹ *Id.*, Art. 196.

²⁰ *Id.*, Arts. 27, 197.

8. At the ECCC, when the Co-Investigating Judges or Judges of the Chambers issue an Arrest Warrant, it is given immediately to the Judicial Police to execute.²¹ The International Co-Prosecutor plays no role in the dissemination of the Arrest Warrant to the Judicial Police. The Judicial Police is required to notify the Office of the Co-Investigating Judges or the Chambers of any difficulty in carrying out its mission.²² The Rules do not require the Judicial Police to notify the Co-Prosecutors of any such difficulties.
9. The Rules do not give the International Co-Prosecutor any power or authority over Arrest Warrants. The Rules do allow the Co-Prosecutors to order that a suspect be taken into police custody for up to 48 hours and brought before the Office of the Co-Prosecutors for the purposes of the preliminary inquiry.²³ Such an order is not an Arrest Warrant, which can only be issued under Rule 42 and is expressly defined as an order to arrest and bring a person before the Office of the Co-Investigating Judges or the Chambers.
10. As the Pre-Trial Chamber has stated in Case 002 and Case 003, the role of the Co-Prosecutors is “strictly related to the ongoing cases and investigations of crimes within the jurisdiction of the ECCC.”²⁴ Accordingly, the Co-Prosecutors did not have standing to: **a.** respond to a Rule 34 disqualification motion filed by the Defence for Mr. IENG Sary and Mrs. IENG Thirith;²⁵ **b.** respond to a Defence request in which the respondent was a person represented by counsel, and was not the Office of the Co-Prosecutors;²⁶ **c.** submit “Observations” on an appeal against an order related to interference with the administration of justice and/or misconduct of a lawyer;²⁷ or **d.** appeal under Rule 74(2)

²¹ Rule 45(2).

²² Rule 45(3).

²³ Rules 51(1), 51(3), 51(4).

²⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 18), Decision on Admissibility on “Appeal Against the Co-Investigating Judges’ Order on Breach of Confidentiality of the Judicial Investigation”, 13 July 2009, D138/1/8, para. 14, citing Rules 49-50, 53.

²⁵ Case No. 002/11-12-2009-ECCC/PTC (07), Decision on IENG Sary’s and on IENG Thirith Applications under Rule 34 to Disqualify Judge Marcel Lemonde, 15 June 2010, document no. 6, para. 20.

²⁶ Case No. 002/14-12-2009-ECCC/PTC (08), Decision on the Co-Prosecutors’ Request for an Extension of Time to File Their Response to IENG Sary’s Request to Reclassify all PTC08 Documents as Public, 8 April 2011, document no. 26, para. 4.

²⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 18), Decision on Admissibility on “Appeal Against the Co-Investigating Judges’ Order on Breach of Confidentiality of the Judicial Investigation”, 13 July 2009, D138/1/8, paras. 14, 25-26.

an Order from the Office of the Co-Investigating Judges related to “an action from one of the officers of the court,” not the criminal investigation.²⁸

11. The Arrest Warrant was an action by Co-Investigating Judge Harmon taken wholly independently of the Co-Prosecutors. It was issued only to Mr. MEAS Muth and only impacts Mr. MEAS Muth. The International Co-Prosecutor neither suffers any injury nor receives any benefit from the issuance or rescission of the Arrest Warrant. He has no standing to respond to the Request. The Response must be stricken from the Case File.

B. Mr. MEAS Muth’s Reply to the International Co-Prosecutor’s Response

12. In paragraph 11, the International Co-Prosecutor inconsequentially asserts that ECCC jurisprudence, laws, and Rules envisage that, unless specifically excluded, “investigatory actions” may be carried out by one Co-Investigating Judge if done in compliance with relevant procedures. The International Co-Prosecutor erroneously equates the issuance of an Arrest Warrant to an “investigatory action.” The Pre-Trial Chamber has defined an investigatory action as an “action to be performed by the Co-Investigating Judges or, upon delegation, by the ECCC investigators or the judicial police, *with the purpose of collecting information conducive to ascertaining the truth.*”²⁹ An Arrest Warrant itself is not an “investigatory action.” The purpose of an Arrest Warrant is not to collect information conducive to ascertaining the truth. The purpose of an Arrest Warrant is to arrest a person and bring him before the Co-Investigating Judges or the Chambers.³⁰ Events that transpire *after* execution of an Arrest Warrant may indeed involve collecting information conducive to ascertaining the truth, e.g., if the arrestee makes a statement before the Judge. The issuance of the Arrest Warrant itself is not a means of collecting information. Indeed, in this case, Co-Investigating Judge Harmon issued the Arrest Warrant knowing that Mr. MEAS Muth had invoked his right to remain silent and that no

²⁸ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 003, 24 October 2011, D14/1/3, para. 16.

²⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (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. 28. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 29), Decision on IENG Sary’s Appeal Against the Co-Investigating Judges’ Constructive Denial of IENG Sary’s Third Request for Investigative Action, 22 December 2009, D171/4/5, para. 8.

³⁰ Rules, Glossary, definition of *Arrest Warrant*, p. 82.

information would be collected from him.³¹ The Rules distinguish an Arrest Warrant from an “investigatory action.” Both Investigators and the Judicial Police may carry out investigatory actions,³² but only the Judicial Police can carry out an Arrest Warrant³³ because it is a “coercive action.”³⁴ An Arrest Warrant is not an investigative mechanism.

13. In paragraphs 12, 13, and 14, the International Co-Prosecutor erroneously asserts that the Rules, the Agreement, and the Establishment Law clearly support the issuance of the Arrest Warrant by Co-Investigating Judge Harmon alone, citing Rule 72 and Pre-Trial Chamber jurisprudence. The Agreement, Establishment Law, and the Rules do not clearly support the issuance of an Arrest Warrant by one Co-Investigating Judge alone. Article 5(4) of the Agreement and Article 23 new of the Establishment Law refer to disagreements in relation to an *investigation*, which would encompass investigatory actions not coercive actions. Similarly, the portion of the Pre-Trial Chamber Decision cited by the International Co-Prosecutor relates to an *investigation* proceeding in the event of a disagreement.³⁵ As noted *supra*, an Arrest Warrant is not itself an investigatory action. The disagreement procedures of Article 5(4) of the Agreement and Article 23 new of the Establishment Law cannot be automatically extended to include Arrest Warrants. Further, Rule 72 is overly broad in its general reference to disagreements. It must be interpreted within the parameters of Article 5(4) of the Agreement and Article 23 new of the Establishment Law and limited to disagreements relating to the *investigation* and investigatory actions.

14. In paragraphs 15 and 16, the International Co-Prosecutor improperly asserts that Pre-Trial Chamber jurisprudence from Case 004 supports the ability of a single Co-Investigating Judge to issue an Arrest Warrant, consistent with Rule 72. As Mr. MEAS Muth noted in

³¹ International Co-Investigating Judge’s Response to the Notice Concerning Mr. MEAS Muth’s Decision not to Recognize Summons, Dated 3 December 2014, 4 December 2014, A67/1/1, para. 6 (emphasis added): “[C]onsidering that no interview will be conducted during the hearing and having taken note of the Suspect’s decision to exercise his right to remain silent, I consider that for the purpose of the initial appearance the presence of only one of the Co-Lawyers will suffice.”

³² Rule 62(1).

³³ Rule 45 (2).

³⁴ Rule 62(1): “[O]nly the Judicial Police shall have the power to undertake any coercive action.”

³⁵ Response, para. 12, quoting *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 274.

the Request,³⁶ the Pre-Trial Chamber Decision in Case 004 related specifically to a Summons, which materially differs from an Arrest Warrant.

15. In contrast to a Summons, an Arrest Warrant carries with it the likelihood of incarceration. Moreover, the Pre-Trial Chamber Decision was based on facts specific to Case 004. The Pre-Trial Chamber found that, under the circumstances of the case, where the Co-Investigating Judges had confirmed registration of a disagreement in respect of the Summons and the lapse of the 30-day referral period, Co-Investigating Judge Harmon could issue the Summons alone.³⁷
16. Here, Co-Investigating Judge Harmon has stated only that a disagreement was registered in Case 003 in July 2014.³⁸ He has not confirmed whether that disagreement relates to the issuance of an Arrest Warrant for Mr. MEAS Muth, and has provided no general information as to the disagreement. The Defence acknowledges that disagreements between the Co-Investigating Judges are only placed on the case file if they are brought before the Pre-Trial Chamber and relate to decisions against which a party would have the right to appeal.³⁹ However, there is a dearth of information as to the nature of the disagreement in Case 003, rendering it impossible to know whether a disagreement exists or has been registered *specifically regarding the Arrest Warrant* and the status of any such disagreement. The Pre-Trial Chamber Decision reflects the circumstances in Case 004. It is unknown whether the Decision would reflect the circumstances in Case 003.
17. In paragraph 17, the International Co-Prosecutor oversteps when he asserts that Mr. MEAS Muth's claim that both Co-Investigating Judges must agree to any measure that restricts a fundamental right, where the right is at risk, should be dismissed because Mr. MEAS Muth does not support his claim, and the Agreement, Establishment Law, and Rules permit such a unilateral measure. The Arrest Warrant puts Mr. MEAS Muth at grave risk of detention, which entails a deprivation of his right to life, liberty, and security.⁴⁰ Cambodian law⁴¹ and the Rules⁴² contain a presumption of freedom. Where a

³⁶ Request, para. 26 and n. 44.

³⁷ 004/07-09-2009-ECCC/OCIJ (PTC09), Decision on [REDACTED] Urgent Request [REDACTED], 15 August 2014, A122/6.1/3, para. 14. This Decision has a Case 003 Case File number of D117/1.2.

³⁸ Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128, para. 8.

³⁹ Rule 72(2).

⁴⁰ As the Defence stated in its Request, this right is expressly protected under Article 32 of the Cambodian Constitution, Article 3 of the Universal Declaration of Human Rights, and Article 9(1) of the International Covenant on Civil and Political Rights.

measure is considered that could result in the deprivation of a right so fundamental as one's liberty and freedom, such a measure should not be undertaken without the approval of both Co-Investigating Judges. The seriousness of issuing of an Arrest Warrant merits signatures from *both* Co-Investigating Judges.

18. In paragraph 18, the International Co-Prosecutor incorrectly asserts that Mr. MEAS Muth's argument that Co-Investigating Judge Harmon cannot rely on Rule 72 to issue an Arrest Warrant without Co-Investigating Judge You Bunleng's signature is unpersuasive because the argument relies on a separate opinion from some of the Pre-Trial Chamber Judges, and Rule 72 permits such an action. The separate opinion of the National Pre-Trial Chamber Judges was an opinion of the majority of the Pre-Trial Chamber Judges and should not be discounted. In that opinion, they stated: "if none of the Co-Prosecutors delegates his or her power to another co-prosecutor, that co-prosecutor cannot act alone."⁴³ As Mr. MEAS Muth noted in the Request, this reasoning equally applies to the Co-Investigating Judges.⁴⁴ Rule 72 should not be interpreted as overriding the narrower parameters of the disagreement procedures of Article 5(4) of the Agreement and Article 23 new of the Establishment Law, which relate to *investigations*.
19. In paragraph 19, the International Co-Prosecutor asserts that the separate opinion of the National Pre-Trial Chamber Judges conflicts with Pre-Trial Chamber Case 004 Decisions recognizing that one Co-Investigating Judge can act alone when a disagreement has been registered and the 30-day referral period has elapsed,⁴⁵ and where, as with the Arrest Warrant, it is not necessary to await passage of the 30-day period.⁴⁶
20. The Pre-Trial Chamber Case 004 Decisions are based upon facts and circumstances relevant to Case 004. In Case 004, Co-Investigating Judge Harmon had noted that a

⁴¹ See Cambodian Criminal Procedure Code (2007), Art. 203: "In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section."

⁴² See Rules 63(3), 72(4)(d).

⁴³ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, Opinion of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, 2 November 2011, D20/4/4, para. 4.

⁴⁴ Request, para. 29.

⁴⁵ The International Co-Prosecutor cites 004/07-09-2009-ECCC/OCIJ (PTC09), Decision on [REDACTED] Urgent Request [REDACTED], 15 August 2014, A122/6.1/3, para. 14 and n. 23.

⁴⁶ 004/07-09-2009-ECCC/OCIJ (PTC16), 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, D208/1/1/2, para. 11.

disagreement had been registered and had explained that there was no lack of cooperation because “[d]isagreement on a specific issue may apply to future decisions dealing with the same or related issue.”⁴⁷ The National Co-Investigating Judge had “not opposed this process or expressed any diverging view.”⁴⁸

21. In Case 003, in contrast, Mr. MEAS Muth has no information as to whether a disagreement has been registered *in relation to the Arrest Warrant*, only that a disagreement was registered in July 2014. Mr. MEAS Muth cannot know whether the Co-Investigating Judges have complied with Rule 72. Further, in Case 004 the Pre-Trial Chamber held there was no need to ensure that the 30-day period had elapsed because none of Co-Investigating Judge Harmon’s decisions fell within the ambit of Rule 72(3)(a)-(c).⁴⁹
22. Here, the purpose of the Arrest Warrant is to “bring Mr. MEAS Muth before the International Co-Investigating Judge for an Initial Appearance.”⁵⁰ An Initial Appearance involves notification of charges,⁵¹ which *is* an act for which Rule 72(3)(b) requires a determination as to whether a disagreement has been registered and whether the 30-day period has elapsed. There is no indication in Case 003 that this 30-day period has elapsed.
23. In paragraph 20, the International Co-Prosecutor asserts that Mr. MEAS Muth does not explicate how Co-Investigating Judge Harmon is self-servingly subsuming Article 5(4) of the Agreement and Article 23 new of the Establishment Law into Rule 74 or how that helps his argument. The reference to Rule 74 in the Request⁵² was clearly intended to be a reference to Rule 72. The Defence refers to its replies to the International Co-Prosecutor’s responses *supra* in paragraphs 12 and 17 and incorporates the replies here.
24. In paragraph 21, the International Co-Prosecutor summarizes Mr. MEAS Muth’s submissions as to why the Arrest Warrant should be rescinded. The summary is accurate.
25. In paragraph 22, the International Co-Prosecutor misleadingly asserts that the Arrest Warrant continues to serve a purpose, as Mr. MEAS Muth’s appearance before Co-

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Arrest Warrant, 10 December 2014, C1, p. 3.

⁵¹ Rule 57(1).

⁵² Request, para. 30.

Investigating Judge Harmon for an initial appearance would serve a myriad of purposes, including allowing Co-Investigating Judge Harmon to charge Mr. MEAS Muth *in persona* and to satisfy himself directly that Mr. MEAS Muth understands the charges against him and his rights.

26. If Co-Investigating Judge Harmon still intended to conduct an initial appearance upon execution of the Arrest Warrant, he would not have charged Mr. MEAS Muth *in absentia*. He would not have issued a document that sets out Mr. MEAS Muth's identifying information, the charges, and a description of Mr. MEAS Muth's rights in relation to the judicial investigation.⁵³
27. Co-Investigating Judge Harmon's statements in his press release⁵⁴ and to the Defence⁵⁵ after charging Mr. MEAS Muth *in absentia* unequivocally indicate that he considers the purpose of an initial appearance has been fulfilled. The International Co-Prosecutor indicates that charging *in absentia* may not be sufficient for the purposes of an initial appearance under Rule 57 because Mr. MEAS Muth's rights would not be safeguarded. Co-Investigating Judge Harmon takes a different view, as indicated by the issuance of his Decision charging Mr. MEAS Muth *in absentia*.
28. The Defence agrees with the International Co-Prosecutor that an initial appearance should be held in person to protect Mr. MEAS Muth's rights, and has appealed Co-Investigating Judge Harmon's Decision.⁵⁶ Nevertheless, for the purpose of determining the rationale for retaining an active Arrest Warrant, given Co-Investigating Judge Harmon's position on charging *in absentia* and the existence of the Notification of Charges, the Defence considers the initial appearance has, in effect, been held. There is no rationale for retaining the Arrest Warrant. It is moot.

⁵³ See Notification of Charges against MEAS Muth, 3 March 2015, D128.1.

⁵⁴ Press Release, *Statement of the International Co-Investigating Judge Regarding Case 003*, 3 March 2015: "With the filing of these charges, the Internal Rules of the ECCC permit [Mr. MEAS] Muth, through his lawyers, to have access to the case file and to participate in the investigation, thus accelerating its progress. This will allow the investigation to proceed with full respect of the rights of all parties and to conclude it within a reasonable time with the issuance of a closing order."

⁵⁵ Response of ICIJ's to MEAS Muth Defence Team, 4 March 2015, A82/1: "As you know, your client was charged with various offenses on 03 March 2015 and as a result will be given reasonable time to review the case file and participate in the investigation."

⁵⁶ MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *In Absentia*, submitted 31 March 2015. The Appeal is pending with the Pre-Trial Chamber Greffier until the Pre-Trial Chamber is fully constituted. See Email from Entela Josifi to Defence, titled "MEAS Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *In Absentia*," 2 April 2015.

29. In paragraph 23, the International Co-Prosecutor incorrectly asserts that because the initial appearance has not been held “in the crucial aspect of being *in persona*,” the argument that the Arrest Warrant is superfluous or is being maintained only to temporarily detain Mr. MEAS Muth, is meritless. Given the Notification of Charges, and Co-Investigating Judge Harmon’s position on the status of the case after issuance of the Decision to Charge *In Absentia*, there is no reason to maintain an active Arrest Warrant for any purpose related to the initial appearance. The only potential purpose that remains is that of detaining Mr. MEAS Muth. Detention with no other purpose is not a valid reason to keep the Arrest Warrant active. Any such detention would be arbitrary and would violate Rule 21(2).
30. In paragraph 24, the International Co-Prosecutor incorrectly asserts that detention necessary to effect a validly-issued judicial summons would not be arbitrary and that since Mr. MEAS Muth has not been detained, and may not be detained, it is premature to challenge detention on the grounds of arbitrariness or otherwise.
31. Detention can be carried out pursuant to a lawful order yet still be arbitrary, if it is unreasonable, unnecessary or disproportionate.⁵⁷ The European Court of Human Rights (“ECtHR”) jurisprudence cited by the International Co-Prosecutor⁵⁸ does not contradict this principle.
32. In *Göthlin v. Sweden*,⁵⁹ the ECtHR examined whether the appellant’s detention violated Article 5 § 1 (b) of the European Convention of Human Rights,⁶⁰ essentially conducting a test of arbitrariness. The ECtHR stated that detention under Article 5 § 1 (b) is permissible only: **a.** to secure the fulfilment of an obligation prescribed by law (and must cease when the obligation has been fulfilled);⁶¹ **b.** when the proper balance has been struck between “the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty”;⁶² and

⁵⁷ Request, para. 34.

⁵⁸ Response, para. 24, n. 40.

⁵⁹ Eur. Ct. H.R. No. 8307/11, 16 October 2014.

⁶⁰ Article 5 § 1 (b) provides: “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: ... b. 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.”

⁶¹ *Göthlin v. Sweden*, Eur. Ct. H.R. No. 8307/11, 16 October 2014, para. 57.

⁶² *Id.*, para. 58.

c. when the measure of depriving a person of his liberty is proportionate to the aim pursued by the authorities.⁶³

33. In *Benham v. United Kingdom*,⁶⁴ the ECtHR stated: “[a] period of detention will in principle be lawful if it is carried out pursuant to a court order.”⁶⁵ The ECtHR found that the magistrates’ detention order was lawfully issued and held that the resulting detention of the appellant was not unlawful under national law.⁶⁶ The ECtHR nevertheless went on to separately address the issue of arbitrariness of the detention, finding that it was not arbitrary because the magistrates had not acted in bad faith or neglected to correctly apply the law.⁶⁷

34. ECtHR jurisprudence recognizes that, even where detention is carried out pursuant to a lawful order, it still may be arbitrary. Here, any detention of Mr. MEAS Muth pursuant to the Arrest Warrant would be arbitrary, regardless of the legality of the Arrest Warrant or the length of detention. Detention would be unreasonable, unnecessary, and disproportionate to the needs of this stage of the proceedings. Mr. MEAS Muth has been notified of the charges and his rights in relation to the judicial investigation. He has not absconded. His location is known.⁶⁸ There is no valid reason to detain him for the purpose of bringing him before Co-Investigating Judge Harmon for an initial appearance.

II. CONCLUSION

35. The Request should be granted posthaste and the Arrest Warrant vacated. There is no legitimate reason to retain an active Arrest Warrant when Mr. MEAS Muth has been notified of the charges and of his rights in relation to the judicial investigation.

⁶³ *Id.*, para. 61. The ECtHR ultimately found that the appellant’s detention was “in accordance with Article 5 § 1 (b) as it was proportionate to the legitimate aim to induce him to fulfil his legal obligation to cooperate with the authorities and give them the necessary information about his property so that they could secure the payment of his tax debt.” *Id.*, para. 67.

⁶⁴ Eur. Ct. H.R. No. 19380/92, 10 June 1996.

⁶⁵ *Id.*, para. 42.

⁶⁶ *Id.*, para. 46.

⁶⁷ *Id.*, para. 47.

⁶⁸ Decision to Charge MEAS Muth *In Absentia*, 3 March 2015, D128, para. 66.

Respectfully submitted,



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Signed in Phnom Penh, Kingdom of Cambodia on this 7th day of **April, 2015**