

**BEFORE THE OFFICE OF THE 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:** 30 July 2014

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC

**Classification by OCIJ  
or Chamber:** សម្ងាត់/Confidential

**Classification Status:** Declassified to Public

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**




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**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**

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Filed by:  
**The Co-Lawyers:**  
ANG Udom  
Michael G. KARNAVAS

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”), pursuant to Co-Investigating Judge Harmon’s invitation to file submissions concerning his intention to reconsider a decision and a notification made by Reserve International Co-Investigating Judge (“RICIJ”) Kasper-Ansermet,<sup>1</sup> hereby files this submission. Co-Investigating Judge Harmon *did not* invite the Defence to address the issue of Mr. MEAS Muth’s status as a Suspect or Charged Person, *despite* his 28 July 2014 Decision on MEAS Muth’s Request to Place all Submissions on the Case File, wherein he informed the Defence that “the International CIJ is currently considering the issue of the Suspect’s status in the context of the Suspect’s requests relating to access to the case file.”<sup>2</sup> The Defence will address this issue in due course; Mr. MEAS Muth is not waiving any of his rights. The Defence files this submission in English only with the Khmer to follow, because the Interpretation and Translation Unit has indicated that it cannot complete the translation by the filing deadline.<sup>3</sup>

## I. BACKGROUND

1. On 7 September 2009, the OCP initiated the judicial investigation of Mr. MEAS Muth based on the OCP’s 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.<sup>4</sup>
2. On 29 April 2011, Co-Investigating Judges You Bunleng and Blunk filed a Notice of Conclusion of the Judicial Investigation into Case 003.<sup>5</sup>
3. On 9 October 2011, Co-Investigating Judge Blunk resigned, citing the potential public perception that he may lack impartiality as a result of various public statements made by Cambodian government officials concerning Case 003.<sup>6</sup>
4. On 2 December 2011, the RICIJ, acting alone, ordered the resumption of the judicial investigation of Case 003.<sup>7</sup>

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<sup>1</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 (“Notification of Potential Reconsiderations”). This Notification was notified to the parties on 16 July 2014.

<sup>2</sup> Decision on MEAS Muth’s Request to Place all Submissions on the Case File, 28 July 2014, D108/1, para. 3.

<sup>3</sup> Email from Chanmony Korm to Defence, *Re: Translation Request*, 25 July 2014.

<sup>4</sup> Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D56/3.1. According to Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No. 003, 26 February 2013, D58, para. 3, this 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.

<sup>5</sup> Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

<sup>6</sup> OCIJ Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011.

5. On 24 February 2012, the RICIJ 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>8</sup>
6. On 2 May 2012, two days before stepping down from his position, the RICIJ issued the Personal Jurisdiction Decision,<sup>9</sup> finding that Mr. MEAS Muth was one of “those most responsible” for crimes within the jurisdiction of the ECCC.
7. On 29 August 2013, the Defence requested access to the Case File and to be entitled to participate in the judicial investigation.<sup>10</sup>
8. On 26 September 2013, the Defence requested to be provided with the full Introductory Submission and supporting material.<sup>11</sup>
9. On 17 October 2013, the Defence requested the OCIJ to provide its criteria for determining whether someone was a “senior leader” or “most responsible.”<sup>12</sup> On the same date, the Defence also requested the OCIJ to compel the OCP to provide its criteria for determining whether suspects fit within the meaning of these terms.<sup>13</sup> Neither of these Requests were placed on the Case File and no criteria were provided by either the OCIJ or OCP based on these Requests.
10. On 25 October 2013, Co-Investigating Judge Harmon sent a letter to the Defence stating that he would defer a decision on all Defence requests he had received up to that point until he had decided on an alleged conflict of interest on the part of Mr. MEAS Muth’s Co-Lawyers.<sup>14</sup>

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<sup>7</sup> Order on Resuming the Judicial Investigation, 2 December 2011, D28.

<sup>8</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D30.

<sup>9</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48 (“Personal Jurisdiction Decision”).

<sup>10</sup> MEAS Muth’s Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82.

<sup>11</sup> Letter from Defence to OCIJ, *Request to be Provided with Full Introductory Submission and Supporting Material*, 26 September 2013, D82/2.

<sup>12</sup> MEAS Muth’s Request for the OCIJ’s Criteria Concerning “Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible”, 17 October 2013.

<sup>13</sup> 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”, 17 October 2013.

<sup>14</sup> Letter from OCIJ to Defence, *Submissions Filed by the Co-Lawyers-Designate in CF003*, 25 October 2013, D87.

11. On 10 July 2014, following the Pre-Trial Chamber's decision that no conflict of interest exists, Co-Investigating Judge Harmon notified the Defence 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 Submission and supporting material.<sup>15</sup>
12. On 17 July 2014, the Defence filed a letter to the OCIJ requesting information on the two Disagreements between the Co-Investigating Judges that were referred to in Co-Investigating Judge Harmon's 10 July Notification of Potential Reconsiderations.<sup>16</sup> Because the Notification of Potential Reconsiderations stated that it was made "noting" two Disagreements, the Defence requested information as to the basic nature of the Disagreements and whether they were currently before the Pre-Trial Chamber.
13. On 22 July 2014, Co-Investigating Judge Harmon informed the Defence that he was "not in a position to inform [the Defence] of [the Disagreements'] content or general nature. Reference to such Disagreements in OCIJ decisions is purely formal references underpinning signature by a single judge and in order to display respect for relevant time periods. For your information, the Disagreements have not been brought before the Pre-Trial Chamber and the time for such referral prescribed by Internal Rule 72(2) has expired."<sup>17</sup>

## II. ARGUMENT

### A. The Personal Jurisdiction Decision must be vacated

14. Without access to the Case File, the Defence is unable to address the findings of fact made in the Personal Jurisdiction Decision. Should the Co-Investigating Judges not vacate the Personal Jurisdiction Decision for the reasons set out below, the Defence *must* be provided with access to the Case File in order to address the factual errors made in the Personal Jurisdiction Decision that require it to be reconsidered and vacated.

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<sup>15</sup> Notification of Potential Reconsiderations.

<sup>16</sup> Request for information concerning disagreements recorded on 7 February 2013 and 22 February 2013, 17 July 2014, D82/3/1.

<sup>17</sup> Re: Request for information concerning disagreements recorded on 7 February 2013 and 22 February 2013, 22 July 2014, D82/3/2.

15. The Personal Jurisdiction Decision must be vacated because the RICIJ committed a clear error of reasoning.<sup>18</sup> The RICIJ issued the Personal Jurisdiction Decision “to ensure due process and transparency” after the International Co-Prosecutor requested that criteria on personal jurisdiction be placed on the Case File.<sup>19</sup> However, rather than merely listing criteria, the RICIJ made findings that Mr. MEAS Muth was “most responsible” for crimes under the jurisdiction of the ECCC.<sup>20</sup> The RICIJ prejudged the evidence prior to the conclusion of the investigation he unilaterally reopened.<sup>21</sup>
16. The RICIJ’s error is similar to the error made by Co-Investigating Judges You Bunleng and Marcel Lemonde when they held that: “The logic underpinning a criminal investigation is that the principle of sufficiency of evidence outweighs that of exhaustiveness: an investigating judge may close a judicial investigation once he has determined that there is sufficient evidence to indict a Charged Person.”<sup>22</sup> The Pre-Trial Chamber found that the Co-Investigating Judges had committed an error of law in relying on this “principle of sufficiency.”<sup>23</sup> The Pre-Trial Chamber explained that:

the Co-Investigating Judges have a duty, pursuant to Internal Rule 55(5), to investigate exculpatory evidence. To fulfil this obligation, the Co-Investigating Judges have to review documents or other materials when there is a prima facie reason to believe that they may contain exculpatory [sic] evidence. This review shall be undertaken before the Co-Investigating Judges decide to close their investigation, regardless of whether the Co-Investigating Judges might have, or not have, sufficient evidence to send the case to trial. In this respect, the Internal Rules indicate that *the Co-Investigating Judges first have to conclude their investigation*, which means that they have accomplished all the acts they deem necessary to ascertaining the truth in relation to the facts set out in the Introductory and Supplementary Submissions, *before assessing whether the*

<sup>18</sup> The Pre-Trial Chamber has adopted the ICTY standard for reconsiderations, where a Chamber may always reconsider a decision it has previously made, but reconsideration will only succeed where there is a legitimate basis, such as a change of circumstances (including new facts or arguments) or where it is realized that the previous decision was erroneous or has caused an injustice. *See* Decision on Motion for Reconsideration of the Decision on the Defence Support Section Request for a Stay in Case 003 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 003, 4 October 2012, 5, para. 3, *citing Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on Application of Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25.

<sup>19</sup> Personal Jurisdiction Decision, para. 1.

<sup>20</sup> *Id.*, para. 27: “The judicial investigation conducted by the Office of the Co-Investigating Judges has thus established that Suspect [REDACTED] may be considered as one of the persons most responsible for the crimes enumerated in the Co-Prosecutors’ Second Introductory Submission.”

<sup>21</sup> *See* Order on Resuming the Judicial Investigation, 2 December 2011, D28.

<sup>22</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2, para. 6.

<sup>23</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, para. 38.

*charges are sufficient to send the Charged Person to trial or whether they shall dismiss the case.* This latter step is done only after the Co-Investigating Judges have notified the parties that their judicial investigation is closed, the parties had the opportunity to present additional requests for investigative actions and the Co-Prosecutors have filed their final submissions requesting the Co-Investigating Judges either to indict the Charged Person or to dismiss the case. Inculpatory and exculpatory evidence shall equally be considered when the Co-Investigating Judges make their decision to either send the case for trial or dismiss it.<sup>24</sup>

17. Just as the Co-Investigating Judges must conduct a full investigation before assessing the evidence and deciding whether to send the case to trial, so must the Co-Investigating Judges conduct a full investigation *before* assessing the evidence to determine whether a Suspect or Charged Person is “most responsible.” This determination can only be done after the close of the investigation. The RICIJ made his decision prematurely. This error of reasoning warrants that the Personal Jurisdiction Decision be vacated.

**B. The Notification of Suspect’s Rights should stand**

18. There is no reason to reconsider the Notification of Suspect’s Rights: there has not been a change of circumstances, there was no error of reasoning (especially considering that this is a notification and not a decision), and the Notification of Suspect’s Rights has caused no injustice. The Notification of Suspect’s Rights informed Mr. MEAS Muth that he is a suspect named in the Introductory Submission and that he is being investigated for certain crimes. It advised him of his rights as a suspect. There was no *decision* made in the Notification of Suspect’s Rights; it merely provided *notice* to Mr. MEAS Muth. Mr. MEAS Muth’s right to access the Case File, among other rights, flows from his right to adequate time and facilities to prepare his defence.<sup>25</sup> It is not a right that was *granted* through the Notification of Suspect’s Rights; therefore it is not a right that may be rescinded through reconsidering the Notification of Suspect’s Rights. It is a charade to reconsider and revoke the Notification of Suspect’s Rights now that Mr. MEAS Muth has already been notified of his rights.

<sup>24</sup> *Id.*, para. 36 (emphasis added).

<sup>25</sup> This right is guaranteed by the Cambodian Constitution, the Establishment Law, the Agreement, the International Covenant on Civil and Political Rights, and the ECCC Internal Rules. Cambodian Constitution, Art. 31; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Arts. 33 new, 35 new; 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, Arts. 12(2), 13(1); International Covenant on Civil and Political Rights, Art. 14(3)(b); ECCC Internal Rules, Rule 21.

**C. Reconsideration of the Personal Jurisdiction Decision and the Notification of Suspect's Rights does not affect Mr. MEAS Muth's right to access the Case File**

19. Concerning the reasons why the Defence must be provided with access to the Case File immediately, the Defence incorporates by reference all arguments made in MEAS Muth's Request to Access the Case File and Participate in the Judicial Investigation.<sup>26</sup> The Defence further adopts the reasoning of International Pre-Trial Chamber Judges Chung and Downing as to why Suspects named in an Introductory Submission must be afforded the same rights as Charged Persons.<sup>27</sup>
20. The Defence submits that Co-Investigating Judge Harmon erred by finding that a Suspect in Case 004 could not be provided with access to the Case File because this would violate the ECCC Internal Rules.<sup>28</sup> The Rules do not prohibit Suspects from accessing the Case File,<sup>29</sup> nor may the Rules be relied upon to violate fair trial rights. However, notwithstanding the reasons for rejecting Case File access in Case 004, Case 003 is distinguishable from Case 004. In Case 003, the RICIJ issued the Personal Jurisdiction Decision finding that Mr. MEAS Muth was "most responsible." No such decision was issued in Case 004.
21. The Personal Jurisdiction Decision demonstrates that Mr. MEAS Muth has been placed under judicial investigation and is a subject of prosecution. The RICIJ made findings in the Personal Jurisdiction Decision based upon evidence he gathered during the judicial investigation concerning Mr. MEAS Muth's role and level of responsibility.<sup>30</sup> This is unlike the situation in Case 004, in which the National Pre-Trial Chamber Judges found that the Suspect had not been placed under judicial investigation and therefore did not

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<sup>26</sup> MEAS Muth's Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82.

<sup>27</sup> 004/07-09-2009-ECCC/OCIJ (PTC05), Considerations of the Pre-Trial Chamber on [REDACTED] Appeal against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, Opinion of Judges Chang-Ho Chung and Rowan Downing, D121/4/1/4, paras. 14-28.

<sup>28</sup> 004/07-09-2009-ECCC-OCIJ, Decision on the [REDACTED] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4.

<sup>29</sup> MEAS Muth was entitled to access the Case File for purposes of preparing an appeal against a decision by Co-Investigating Judge Harmon on conflict of interest. It was not suggested by the Co-Prosecutors or the Pre-Trial Chamber that this would occasion a violation of the Internal Rules. On the contrary, the Co-Prosecutors did not object to the request for access to the Case File. *See* 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; Second Decision on Requests for Interim Measures, 19 February 2014, D56/19/16.



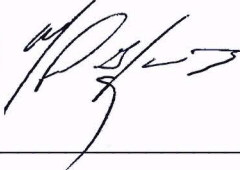
<sup>30</sup> Personal Jurisdiction Decision, notes 18, 29, 30, 31, 32, 33, 56, 57, 58.

enjoy the status of party to the proceedings.<sup>31</sup> Even if the Personal Jurisdiction Decision is vacated, this does not change the fact that Mr. MEAS Muth has been and continues to be under judicial investigation and subject to prosecution. If the Personal Jurisdiction Decision is *not* vacated, the Defence *must* be provided with access to the Case File in order to rebut the RICIJ's findings.

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

- a. VACATE the Personal Jurisdiction Decision;
- b. DECIDE that the Notification of Suspect's Rights stands; and
- c. PROVIDE immediate access to the Case File.

Respectfully submitted,

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ANG Udom		Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **30<sup>th</sup>** day of **July, 2014**

<sup>31</sup> 004/07-09-2009-ECCC/OCIJ (PTC05), Considerations of the Pre-Trial Chamber on [REDACTED] Appeal against the Decision Denying His Requests to Access the Case File and Take Part in the Judicial Investigation, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, 15 January 2014, D121/4/1/4, paras. 8-9.