

**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 CO-INVESTIGATING JUDGES TO  
EXPLAIN THEIR UNDERSTANDING OF WHAT WILL OCCUR IN THE EVENT  
THE CO-INVESTIGATING JUDGES AND PRE-TRIAL CHAMBER JUDGES SPLIT  
AS TO WHETHER TO CLOSE THE INVESTIGATION OR WHETHER TO  
ARREST, CHARGE, OR INDICT MR. MEAS MUTH**

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

**Co-Prosecutors:**  
CHEA Leang  
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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 Co-Investigating Judges to explain their understanding of what will occur in the event the Co-Investigating Judges and Pre-Trial Chamber Judges split as to whether to close the investigation or whether to arrest, charge, or indict Mr. MEAS Muth. This Request is made necessary to protect Mr. MEAS Muth’s rights to legal certainty and transparency. This Request does not address merely hypothetical situations. Past practice indicates that the Co-Investigating Judges and Pre-Trial Chamber Judges are likely to disagree as to each of these situations. The law is unclear as to what will occur. 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 ... and so as to ensure legal certainty and transparency of proceedings.... 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.<sup>1</sup>

## I. BACKGROUND

1. The Pre-Trial Chamber has failed to reach a super-majority on at least nine occasions in Case 003.<sup>2</sup> The Pre-Trial Chamber Judges have split over such issues as to whether to open the investigation into Case 003, whether investigative requests filed by the International Co-Prosecutor should have been accepted by the Co-Investigating Judges, and whether the Reserve International Co-Investigating Judge had authority to reopen the

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<sup>1</sup> See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 2 January 2014.

<sup>2</sup> See Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, no document number listed; Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Application Robert Hamill, 24 October 2011, D11/2/4/4; 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; 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, 2 November 2011, D20/4/4; Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on the Re-Filing of Three Investigative Requests, 15 November 2011, D26/1/3; Opinion of the Pre-Trial Chamber Judges Downing and Chung on the Disagreement between the Co-Investigating Judges Pursuant to Internal Rule, 10 February 2012, no document number listed; Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant, 28 February 2012, D11/1/4/2; Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on Admissibility of Civil Party Applicant, 13 February 2013, D11/3/4/2; Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on Admissibility of Civil Party Applicant, 14 February 2013, D11/4/4/2.

investigation. There currently appears to be<sup>3</sup> a Disagreement between the Co-Investigating Judges and a Disagreement between the Co-Prosecutors pending before the Pre-Trial Chamber.<sup>4</sup> The exact nature of these Disagreements is unknown to the Defence.

## II. APPLICABLE LAW

### 2. Article 5(4) of the Agreement<sup>5</sup> states:

The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. 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.

### 3. Article 7 of the Agreement states:

#### Settlement of differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.

3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

### 4. Article 23 new of the Establishment Law<sup>6</sup> states in pertinent part:

<sup>3</sup> The Defence does not have access to the Case File and has no information as to whether the Disagreements were formally filed with the Pre-Trial Chamber or whether the Pre-Trial Chamber has decided on the Disagreements. See MEAS Muth's Request for Clarification Concerning the Status of the Judicial Investigation, 30 December 2013.

<sup>4</sup> See Press Release, *Statement by the Co-Investigating Judges Regarding Case 002*, 28 February 2013.

<sup>5</sup> 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").

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

5. Rule 72 states:

**Settlement of Disagreements between the Co-Investigating Judges**

1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.

2. Within 30 (thirty) days, either Co-Investigating Judge may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. If the disagreement relates to the Provisional Detention of a Charged Person, this period shall be reduced to 5 (five) days. The other Co-Investigating Judge may submit a response within 10 (ten) days. The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases referred to in sub-rule 4(b) below. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.

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<sup>6</sup> 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”).

3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:

- a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;
- b) notification of charges; or
- c) an Arrest and Detention Order, in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

4. The Chamber shall settle the disagreement forthwith, as follows:

- a) The hearing shall be held and the judgment handed down *in camera*.
- b) Where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs:
  - i) The Greffier of the Chamber shall immediately inform the parties in question and their lawyers of the date of the hearing;
  - ii) The Co-Prosecutors and the lawyers for the other parties involved may consult the case file up until the date of the hearing;
  - iii) The Co-Prosecutors and the lawyers for the other parties involved may file pleadings as provided in the Practice Direction on filing of documents. Such pleadings shall immediately be placed on the case file by the Greffier of the Chamber;
  - iv) The Chamber may, on the motion of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or requests concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court;
  - v) During the hearing, the Co-Prosecutors and the lawyers of the other parties involved may present brief observations.
- c) In all cases, the Chamber may, at its discretion, order the personal appearance of any parties or experts, as well as the production of any exhibits.
- d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC Law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. However, where the disagreement concerns provisional detention, there shall be a presumption of freedom.

e) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Investigating Judges. In addition, decisions concerning matters referred to in sub-rule 4(b) shall be notified to the parties. The Co-Investigating Judges shall place the decision of the Chamber on the case file and immediately proceed in accordance with such decision.

### III. REQUEST

6. The Defence respectfully requests the Co-Investigating Judges to explain their understanding of what will occur in the event the Co-Investigating Judges and Pre-Trial Chamber Judges split as to whether to close the investigation or whether to arrest, charge, or indict Mr. MEAS Muth. This information is necessary to protect Mr. MEAS Muth's rights to legal certainty and transparency, required by Rule 21. The European Court of Human Rights has referred to legal certainty as "one of the fundamental aspects of the rule of law."<sup>7</sup> By providing their understanding at this point in time, the Co-Investigating Judges will avoid any future appearance that the applicable law has been interpreted arbitrarily to reach a certain result.
7. Pursuant to Article 7 of the Agreement, Article 23 new of the Establishment Law, and Rule 72, if the Co-Investigating Judges disagree as to whether to arrest, charge or indict Mr. MEAS Muth, or whether to close the investigation without taking such actions, they may file a Disagreement with the Pre-Trial Chamber. If the Pre-Trial Chamber Judges are then unable to reach an affirmative vote of at least four judges, Rule 72(4)(d) provides that "in accordance with Article 23 new of the ECCC Law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. However, where the disagreement concerns provisional detention, there shall be a presumption of freedom."
8. The applicable law is unclear and potentially conflicting in several respects:
  - First, the Agreement and Establishment Law provide no guidance concerning issues which are not related to whether the investigation will continue. If the Co-Investigating Judges disagree as to which charges to apply or what the contents of an indictment might be, the Pre-Trial Chamber will have no guidance in the applicable

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<sup>7</sup> *Şahin v. Turkey*, App. No. 13279/05 Eur. Ct. H.R., Gr. Ch., (2011), para. 56.

law as to how to resolve the issue. Rule 72(4) is thus unclear in its reference to Article 23 new of the Establishment Law. Rule 72(4) states: “*in accordance with Article 23 new of the ECCC Law*, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed.”<sup>8</sup> It is unclear how issues relating to arrests, charging, or indicting would be resolved “in accordance with Article 23 new” since Article 23 new only specifies that in the event the requisite majority is not reached, “the investigation shall proceed.” Article 23 new provides no guidance in other situations.

- Second, Rule 72(4) does not provide guidance in a situation in which the Co-Investigating Judges propose conflicting orders. Rule 72(4) states that if the Pre-Trial Chamber Judges are unable to reach an affirmative vote of at least four judges, the default decision shall be that the order proposed to be done by one Co-Investigating Judge shall stand. What would occur if the Disagreement between the Co-Investigating Judges actually involves two conflicting orders?
  - Third, Rule 72(4) appears to conflict with Article 7(4) of the Agreement and Article 23 new of the Establishment Law in the event that one Co-Investigating Judge proposes to close the investigation and the other Co-Investigating Judge disagrees but does not propose any alternate order. In such a situation, Rule 72(4) would appear to require the order closing the investigation to be executed. However, Articles 7(4) of the Agreement and 23 new of the Establishment Law instead provide that if the required majority is not reached, the investigation shall proceed.
  - Finally, Rule 72(4) is unclear concerning arrests. Would a proposed arrest order be executed (as the default decision referred to in Rule 72(4)), or would the presumption of freedom (also referred to in Rule 72(4)) override this default decision and prevent its execution?
9. Because the applicable law is unclear, and in order to ensure that Mr. MEAS Muth has notice of the ways in which the law may be applied in the event the Co-Investigating Judges and Pre-Trial Chamber Judges split concerning certain issues fundamental to the

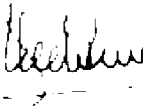
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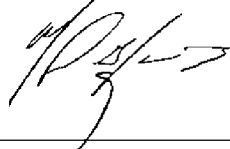
<sup>8</sup> Emphasis added.

future of Case 003, the Defence requests the Co-Investigating Judges to clarify the applicable law. Undoubtedly in the more than four years since the judicial investigation in Case 003 commenced (and even prior to this), the Co-Investigating Judges must have considered, deliberated upon, and formulated answers to the very serious issues raised herein which are likely to arise in Case 003. No prejudice will result to the OCP or Civil Parties by providing Mr. MEAS Muth with the requested explanations. Indeed, all parties will benefit from this clarification.

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to EXPLAIN their understanding of what will occur in the event the Co-Investigating Judges and Pre-Trial Chamber Judges split as to whether to close the investigation or whether to arrest, charge, or indict Mr. MEAS Muth.

Respectfully submitted,

  
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ANG Udom

  
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Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 2<sup>nd</sup> day of **January, 2014**