

**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 ACT ON
HIS PAST SUBMISSIONS**

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Judge Mark B. HARMON

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All Civil Parties



Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), hereby requests that the Co-Investigating Judges decide or otherwise act on certain submissions he has filed over the past two years which they have, to date, ignored. This Request is made necessary because the Co-Investigating Judges must resolve several issues to protect Mr. MEAS Muth’s rights and interests. Co-Investigating Judge Harmon previously refused to do so on the basis that he did not consider Mr. MEAS Muth a party to the proceedings. Co-Investigating Judge Harmon now, straightforwardly, considers Mr. MEAS Muth a party to the proceedings.¹ The time is thus ripe. These issues *must* be resolved posthaste. The Defence lists below the submissions, with relevant explanations/argument, that, in its view, still warrant expeditious action by the Co-Investigating Judges.²

I. LIST OF SUBMISSIONS REQUIRING RESOLUTION

1. MEAS Muth’s Request for Clarification of the Way in Which the Co-Investigating Judges Intend to Respect His Rights Concerning the Remainder of the Pre-Trial Proceedings, 3 November 2014, D121.
 - This submission was filed to ensure Mr. MEAS Muth’s rights are protected and to ensure transparency and legal certainty in the upcoming pre-trial procedure. Although certain questions posed in this submission may now be moot (e.g. whether the Co-Investigating Judges consider that it would be permissible to charge Mr. MEAS Muth *after* the investigation has concluded), the submission raises several questions that

¹ As of 26 November 2014, when Co-Investigating Judge Harmon summoned Mr. MEAS Muth for an initial appearance, Co-Investigating Judge Harmon had obviously decided to charge Mr. MEAS Muth, and therefore should not have delayed acting on Mr. MEAS Muth’s submissions. See Summons to Initial Appearance, 28 November 2014, A66. The claim Co-Investigating Judge Harmon made that *if* he were to charge Mr. MEAS Muth after the initial appearance Mr. MEAS Muth would be considered a party and would have access to the Case File is a charade, considering that the purpose of summoning Mr. MEAS Muth was to charge him. See Notification on Suspect’s Requests to Access the Case File, Take Part in the Judicial Investigation, and to Strike ICP’s Submissions, 28 November 2014, D82/5, para. 16, stating, *inter alia*, that if Mr. MEAS Muth is charged at the Initial Appearance he will be able to “exercise all the rights to which charged persons are entitled under the Internal Rules.”

² Certain other submissions were never decided or otherwise acted on by the Co-Investigating Judges but have now become moot and are therefore not listed below. These submissions include MEAS Muth’s Request for Clarification Concerning Whether the Defence May Conduct Investigations at the Current Stage of the Proceedings, 2 October 2013, D87/2/1.12; MEAS Muth’s Request for Clarification Concerning the Status of the Judicial Investigation, 30 December 2013, D103/1.4; Request for Information Concerning Whether Experts Or Others Have Been Consulted in the Case 003 Judicial Investigation, 3 June 2014, A41.2. Other submissions appear to have been decided, albeit indirectly, and this decision will now be appealed to the Pre-Trial Chamber. These submissions include MEAS Muth’s Motion Against the Application of Crimes Listed in Article 3 New of the Establishment Law (National Crimes), 24 October 2013, D87/2/1.13; and MEAS Muth’s Motion Against the Application of Grave Breaches of the Geneva Conventions Due to Expiry of the Statute of Limitations, 12 December 2013, D103/1.3.

must still be addressed in order to ensure transparency and to protect legal certainty. The OCIJ remains seized of this Request.

2. MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Religious Persecution, 7 February 2014, D103/1.7.

- This Annulment Application was filed because the Introductory Submission sets out *no* facts relating to religious persecution and yet requests that Mr. MEAS Muth be investigated for religious persecution.
- The Annulment Application is somewhat outdated in that it requests the Pre-Trial Chamber to annul certain investigative action without pointing to specific investigative acts since the Defence did not have access to the Case File at the time the Annulment Application was made. Nonetheless, the OCIJ remains seized of this Annulment Application. Once the Co-Investigating Judges have forwarded the Annulment Application to the Pre-Trial Chamber, the Defence will submit additional arguments to the Pre-Trial Chamber to update this Application.

3. MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Two Alleged Crime Sites, 3 February 2014, D103/1.6.

- This Annulment Application was filed because a "Durian Plantation, Ream Village, Ream Commune, Prey Nub District, Preah Sihanouk Province" and Bet Trang worksite, Bet Trang Commune, Prey Nub District, Preah Sihanouk Province are not identified in the Introductory Submission and yet Co-Investigating Judge Harmon indicated in a February 2013 press release that these alleged crime sites are under investigation in Case 003.
- The Defence made this Annulment Application without the benefit of having access to the Case File. Upon receiving access to the Case File, the Defence learned that it was indeed correct that Co-Investigating Judge Harmon is conducting investigations into these two alleged crime sites. Reserve International Co-Investigating Judge Kasper-Ansermet issued a Forwarding Order concerning these two alleged crime

sites,³ to which the International Co-Prosecutor responded, asserting that the sites could be investigated without the filing of a Supplementary Submission, *inter alia* because they were related to sites currently under investigation.⁴

- These crime sites were later included in the Supplementary Submission filed by the International Co-Prosecutor,⁵ but the status of this Supplementary Submission is unclear: paragraph 28 of the Supplementary Submission states that it is “submitted subject to Internal Rule 71(3).” This language appears to indicate that the 30-day dispute resolution period set out in Rule 71(3) may not have elapsed prior to submission of the Supplementary Submission. The Pre-Trial Chamber may have been seized with the disagreement during this period, in which case the Supplementary Submission cannot be acted upon until the Pre-Trial Chamber resolves the disagreement.
 - The OCIJ remains seized of this Annulment Application. Once the Co-Investigating Judges have forwarded the Annulment Application to the Pre-Trial Chamber, the Defence will submit additional arguments to the Pre-Trial Chamber to update this Application.
4. 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, 2 January 2014, D103/1.5.
- This submission was filed to request 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. The submission protects Mr. MEAS Muth’s rights to legal certainty and transparency.
 - While the Defence is now aware of Co-Investigating Judge Harmon’s position that one Co-Investigating Judge can arrest and charge a Suspect alone, Co-Investigating

³ Forwarding Order, 24 April 2012, D47.

⁴ International Co-Prosecutor’s Response to Forwarding Order, 21 June 2012, D47/1, paras. 6-7.

⁵ International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120.

Judge You Bunleng's understanding of this issue has not been provided. Furthermore, the Co-Investigating Judges' positions as to the consequence of a split concerning whether to send the case to trial remain unclear. The OCIJ remains seized of this Request.

5. MEAS Muth's Motion Against the Application of JCE III, 28 October 2013, D87/2/1.15.

- This submission was filed because the Introductory Submission alleges that Mr. MEAS Muth is alternately responsible for committing crimes through JCE III, a form of liability not recognized at the ECCC.
- Recently, the Co-Prosecutors filed an appeal in Case 002/01, alleging that the Trial Chamber erred by failing to consider the application of JCE III. The Case 003 Defence filed a request to intervene or to submit an *amicus curiae* brief concerning this issue in Case 002/01. The brief is attached as an Annex. The Defence requests that the arguments contained therein supplement the arguments made in MEAS Muth's Motion Against the Application of JCE III. The OCIJ remains seized of this Request.

6. MEAS Muth's Request for the OCIJ to Re-Interview Witnesses, 24 October 2013, D87/2/1.14.

- This submission was filed because Mr. MEAS Muth has a fair trial right to examine the evidence against him, which he cannot exercise if the witness statements on the Case File do not reflect the statements witnesses actually made to OCIJ Investigators. To protect Mr. MEAS Muth's fair trial rights, the OCIJ should examine all witness interviews on the Case File and determine whether, and to what extent, any witnesses may need to be re-interviewed. The OCIJ remains seized of this Request.

7. MEAS Muth's Request for the OCIJ to Place Full Transcripts of All Witness Interviews on the Case File, 17 October 2013, D87/2/1.8.

- This submission was filed because Mr. MEAS Muth has the fair trial right to examine the evidence against him. He cannot exercise this right if the witness statements on the Case File do not reflect the statements witnesses actually made to OCIJ

Investigators. Placing audiotapes of witness interviews on the Case File *in lieu* of transcripts is insufficient to protect Mr. MEAS Muth's right to examine the evidence against him.

- According to a 3 December 2012 memorandum on the Case File,⁶ the OCIJ investigators are not required to record witness interviews, and it appears that there are few audio records of witness interviews available on the Case File. Nonetheless, the audio recordings that *are* available should be transcribed and these transcriptions should be placed on the Case File. The OCIJ remains seized of this Request.
8. MEAS Muth's Request for the OCIJ to Compel the OCP to Provide the Defence With Its Criteria Concerning "Senior Leaders of the Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.11.
- This submission was filed because the Defence, in the exercise of its due diligence obligations, may need to make submissions challenging any abuse of discretion by the OCP in its decision to prosecute Mr. MEAS Muth, as permitted by ECCC jurisprudence. The OCIJ remains seized of this Request.
9. MEAS Muth's Request for the OCIJ to Provide the Defence With Its Criteria Concerning "Senior Leaders of the Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.10.
- This submission was filed because the Defence, in the exercise of its due diligence obligations, may need to make submissions challenging any abuse of discretion by the OCIJ in its decision to investigate Mr. MEAS Muth, as permitted by ECCC jurisprudence. The OCIJ remains seized of this Request.
10. MEAS Muth's Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Require a Nexus With Armed Conflict, 17 October 2013, D87/2/1.7.
- This submission was filed in the interest of legal certainty since this issue of law remains unsettled at the ECCC: in Case 002 the Pre-Trial and Trial Chambers have

⁶ Instructions on Conduct of Witness Interviews, 3 December 2012, D61.

split. The Pre-Trial Chamber found that a nexus with armed conflict was a requirement of crimes against humanity in customary international law in 1975-79, while the Trial Chamber found that no nexus was required.

- Since filing this submission, the Pre-Trial Chamber has unanimously confirmed that:

With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases. This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system and is also in the interest of judicial economy and expediency in the proceedings given that decisions of the Co-Investigating Judges are subject to appeal before the Pre-Trial Chamber which, in principle, follows its previous decisions according to the standard set out above and will therefore overturn decisions of the Co-Investigating Judges departing from its existing jurisprudence.⁷

Therefore, the OCIJ should simply confirm that it intends to abide by the Pre-Trial Chamber's jurisprudence on this issue. The Defence notes that the Notification of Charges against MEAS Muth,⁸ in discussing crimes against humanity, is silent on the issue of a nexus with armed conflict requirement. The OCIJ remains seized of this Request.

11. MEAS Muth's Request to Be Provided with Correspondence from the Head of the OCIJ Legal Unit to the United Nations Secretary General and All Related Material and to Have This Material Placed on the Case File, 9 October 2013, D87/2/1.6.

- This submission was filed because Mr. MEAS Muth's right to a fair, independent, and impartial investigation may have been, and may continue to be, compromised by the fact that the international OCIJ legal team has called on the United Nations to interfere in the Co-Investigating Judges' decisions concerning the judicial investigation. The international OCIJ legal team's actions call into question the integrity, independence, and impartiality of the international OCIJ legal team, the Co-Investigating Judges themselves, and the investigation as a whole. Mr. MEAS Muth

⁷ Decision on MEAS Muth's Appeal Against the Co-Investigating Judges' Constructive Denial of Fourteen of MEAS Muth's Submissions to the [Office of the Co-Investigating Judges], 23 April 2014, D87/2/2, para. 27.

⁸ Notification of Charges against MEAS Muth, 3 March 2014, D128.1.

has the right to be informed if any credible information exists demonstrating a lack of independence or impartiality within the OCIJ. The OCIJ remains seized of this Request.

12. MEAS Muth's Notice of Objection to David Boyle Having Any Further Involvement in Case 003 and Request for the Work Product of David Boyle, 9 October 2013, D87/2/1.5.

- This Notification was filed because Mr. MEAS Muth is entitled to a fair and impartial investigation. Mr. Boyle is biased and any involvement by him in Case 003 in any capacity will taint this investigation. The Defence, in exercising its due diligence obligations, *must* review Mr. Boyle's work product to determine whether applications to annul investigative action pursuant to Rule 76 may be necessary.
- While the Defence now has access to the Case File, it is not clear whether Mr. Boyle's work product is on the Case File and available to the Defence. The OCIJ remains seized of this Notification and Request.

13. MEAS Muth's Notice of Objection to Stephen Heder Having Any Further Involvement in Case 003 and Request for the Work Product of Stephen Heder, 9 October 2013, D87/2/1.4.

- This Notification was filed because Mr. MEAS Muth is entitled to a fair and impartial investigation. Mr. Heder is biased and any involvement by him in Case 003 in any capacity will taint this investigation. The Defence, in exercising its due diligence obligations, *must* review Mr. Heder's work product to determine whether applications to annul investigative action pursuant to Rule 76 may be necessary.
- While the Defence now has access to the Case File, it is not clear whether Mr. Heder's work product is on the Case File and available to the Defence. The OCIJ remains seized of this Notification and Request.

14. MEAS Muth's Request for the Work Product of OCIJ Investigators Involved in Improper Investigative Practices in Case 002, 2 October 2013, D87/2/1.9.

- This submission was filed because certain former or current OCIJ Investigators are believed to have been involved in irregular and improper investigation practices in Case 002. The Defence must review the work product of these OCIJ Investigators in

Case 003 to determine whether it may be necessary to make any applications to annul investigative action pursuant to Rule 76.

- While the Defence now has access to the Case File, it is not clear whether these investigators' entire work product is on the Case File and available to the Defence. The OCIJ remains seized of this Request.


15. MEAS Muth's Request for Information Concerning the OCIJ's Investigative Approach and Methodology, 2 October 2013, D87/2/1.3.

- This submission was filed because it was indiscernible whether a fair, diligent, and thorough judicial investigation is being conducted and whether there is a uniform investigative approach (i.e. modalities that are fair, consistent, and transparent) in place that is being scrupulously followed by OCIJ Investigators.
- While the Defence now has access to the *results* of the judicial investigation, the investigative approach and methodology remains opaque. The OCIJ remains seized of this Request.

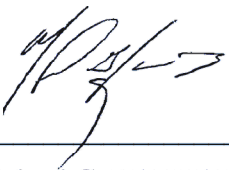

II. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to DECIDE or otherwise take action on the above listed submissions without delay.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **17th** day of **March, 2015**