

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

**FILING DETAILS**

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| <b>ORIGINAL/ORIGINAL</b> |                    |
| ថ្ងៃ ខែ ឆ្នាំ (Date):    | 17-Nov-2014, 15:59 |
| CMS/CFO:                 | Sann Rada          |

**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:** 3 November 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 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**

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Judge YOU Bunleng

Judge Mark B. HARMON

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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 clarify the manner in which they intend to protect his fair trial rights during the remainder of the pre-trial stage. This Request is made necessary to ensure Mr. MEAS Muth’s rights are protected and to ensure transparency and legal certainty in the upcoming pre-trial procedure. Specifically, the Defence requests clarification concerning:

- a. The amount of time the Co-Investigating Judges consider to be sufficient to review the Case File and participate in the judicial investigation, should Mr. MEAS Muth be afforded this right;
- b. Whether the Co-Investigating Judges consider that it would be permissible to charge Mr. MEAS Muth *after* the investigation has concluded;
- c. If the Co-Investigating Judges *do* consider that Mr. MEAS Muth could be charged *after* the investigation has concluded, whether this would result in the investigation being reopened;
- d. Whether Mr. MEAS Muth will be permitted to access the Case File and to respond to the Final Submission if he is *not* charged;
- e. Whether Mr. MEAS Muth will be permitted to access the Case File and to respond to any appeals against a Dismissal Order if he is *not* charged; and
- f. What the consequences would be if a Dismissal Order is overturned on appeal.

## **I. BACKGROUND**

1. On 7 September 2009, the OCP initiated the judicial investigation of Mr. MEAS Muth based on its 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.<sup>1</sup>
2. On 29 April 2011, nearly 20 months after the judicial investigation commenced, Co-Investigating Judges You Bunleng and Siegfried Blunk filed a Notice of Conclusion of

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<sup>1</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 not placed on the Case File until 7 September 2009 through Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009.

the Judicial Investigation into Case 003.<sup>2</sup> The Case File had over 2,000 pieces of evidence, comprising more than 48,000 pages.<sup>3</sup>

3. On 9 October 2011, International 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>4</sup>
4. On 2 December 2011, Reserve International Co-Investigating Judge (“RICIJ”) Kasper-Ansermet, acting alone, ordered the resumption of the judicial investigation of Case 003.<sup>5</sup>
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>6</sup>
6. On 2 May 2012, two days before stepping down from his position, the RICIJ issued a decision finding that Mr. MEAS Muth was one of “those most responsible” for crimes within the jurisdiction of the ECCC.<sup>7</sup>
7. On 20 June 2012, Mark Harmon was appointed as International Co-Investigating Judge.<sup>8</sup>
8. On 28 February 2013, the Co-Investigating Judges issued a press release. Each Co-Investigating Judge provided a separate statement in this press release. National Co-Investigating Judge You Bunleng noted that he sent the Forwarding Order to the OCP for the Final Submission, following a Disagreement recorded on 7 February 2013, thus completing his investigative duties. He did, however, express that “he will continue to take procedural measures as provided in the Internal Rules at the appropriate time” and will also consider other submissions by the Co-Prosecutors that might be made within three months starting from 7 February 2013, the date when the Disagreement was recorded. Conversely, International Co-Investigating Judge Harmon effectively noted

<sup>2</sup> Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

<sup>3</sup> OCIJ Press Release, *Statement from the Co-Investigating Judges*, 29 April 2011.

<sup>4</sup> OCIJ Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011.

<sup>5</sup> Order on Resuming the Judicial Investigation, 2 December 2011, D28.

<sup>6</sup> Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D30.

<sup>7</sup> Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48.

<sup>8</sup> Press Release, *Deployment of New International Co-Investigating Judge*, 30 July 2012.

that his investigative duties in Case 003 continued: “Case 003 remains open and the investigation of the alleged crimes are [sic] proceeding.”<sup>9</sup>

9. On 14 October 2014, a revised completion strategy for the ECCC was published.<sup>10</sup> It was prepared based on consultations between the Office of Administration and the Office of the Co-Investigating Judges.<sup>11</sup> It states that the Case 003 investigation is expected to be completed by the first quarter of 2015.<sup>12</sup>

## II. REQUEST

### A. The information requested is necessary in the interests of transparency and legal certainty

10. The information requested herein is necessary in the interests of transparency and legal certainty. Legal certainty is “a central tenet of the rule of law as understood around the world.”<sup>13</sup> According to German philosopher Gustav Radbruch, legal certainty was one of the three fundamental pillars of the very idea of law (along with justice and policy).<sup>14</sup> The European Court of Human Rights has similarly referred to legal certainty as “one of the fundamental aspects of the rule of law.”<sup>15</sup> “Legal indeterminacy threatens the rule of law. Professor Michael Dorf observes: ‘If the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require....’”<sup>16</sup>
11. The origin of the notion of legal certainty goes back to the first period of the Roman Empire during which equity, logic, and predictability of norms constituted the basis of Roman law. Roman law divided the concept of legal certainty into two sub-principles: *certitudo* and *securitas*. *Certitudo* requires that a law be predictable and clear so that a

<sup>9</sup> OCIJ Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013.

<sup>10</sup> ECCC Completion Plan – Revision 2, 30 September 2014, available at <http://www.eccc.gov.kh/en/eccc-completion-plan-revision-2>.

<sup>11</sup> *Id.*, p. 2.

<sup>12</sup> *Id.*, para. 9.

<sup>13</sup> James R. Maxeiner, *Some Realism about Legal Certainty in the Globalization of the Rule of Law*, 31 HOUS. J. INT’L L. 27, 28 (2008-2009).

<sup>14</sup> *Id.*, at 30-31.

<sup>15</sup> *Şahin & Şahin v. Turkey*, Eur. Ct. H.R., App. No. 13279/05, Judgement (Gr. Ch.), 20 October 2011, para. 56.

<sup>16</sup> James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 517 (2006-2007), quoting Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003).

person knows what behavior he/she should adopt; *securitas* means that a law must be effectively implemented in such way that it prevents arbitrary decisions.<sup>17</sup>

12. In France, the Conseil d'Etat, the highest jurisdiction in the French administrative order, stressed two cumulative criteria to guarantee legal certainty (known as *sécurité juridique*): (1) quality of the law, meaning that the law must not create doubts regarding its legal effects but must be accessible and intelligible (i.e. clear, legible, and precise); and (2) predictability of the law, meaning that the law shall be relatively stable, while taking into account the necessity to adapt to social changes.<sup>18</sup> The French Conseil Constitutionnel has held that legal certainty requires that a law be clear and precise<sup>19</sup> as well as accessible and intelligible.<sup>20</sup> It also ruled that the “equality before the law” principle would not be effective if a citizen did not have sufficient knowledge of the provisions applicable to him or her.<sup>21</sup>
13. Similarly, legal certainty has been found by the ECtHR to require that the law be (1) adequately accessible: “the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case” and (2) formulated with sufficient precision “to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>22</sup>
14. Legal certainty applies to procedural rules as well as substantive law. In *Cañete de Goñi v. Spain*, the ECtHR held that “the rules governing the formal steps to be taken and the

<sup>17</sup> Dominique Soulas de Russel & Philippe Rimbault, *Nature et racines du principe de sécurité juridique: une mise au point*, 55 REVUE INTERNATIONALE DE DROIT COMPARE 85, 96-97 (2003).

<sup>18</sup> *Conseil d'Etat*, ‘Rapport public : Sécurité juridique et complexité du droit’ (2006), p. 282-83.

<sup>19</sup> See *Conseil Constitutionnel*, Decision no. 81-132 DC, 16 January 1982, ‘Loi de nationalisation’, para. 69, in which the *Conseil Constitutionnel* ruled that Article 34 of the Constitution, defining the notion of “law” and delimiting its scope, requires that a legal provision be clear and precise. This decision was reaffirmed numerous times. See also *Conseil Constitutionnel*, Decision no. 98-401 DC, 10 June 1998, ‘Loi d’orientation et d’incitation relative à la réduction du temps de travail’, para. 10; *Conseil Constitutionnel*, Decision no. 2001-455 DC, 12 January 2002, ‘Loi de modernisation sociale’, para. 82.

<sup>20</sup> *Conseil Constitutionnel*, Decision no. 99-421 DC, 16 December 1999, ‘Loi portant habilitation du Gouvernement à procéder, par ordonnances, à l’adoption de la partie législative de certains codes’, para. 13. In this decision, the *Conseil Constitutionnel* held that the requirement that a law be accessible and intelligible is an objective of constitutional value.

<sup>21</sup> *Conseil Constitutionnel*, Decision no. 2005-530 DC, 29 December 2005, ‘Loi de finances pour 2006’, para. 89. In this decision, the French *Conseil Constitutionnel* found a provision to be contrary to the Constitution because it was excessively complex. Only sufficient public interest reasons could possibly justify the complexity of the law.

<sup>22</sup> *Sunday Times v. United Kingdom*, Eur. Ct. H.R., App. No. 6538/74, Judgement, 26 April 1979, para. 49. See also *Korchuganova v. Russia*, Eur. Ct. H.R., App. No. 75039/01, Judgement, 8 June 2006, para. 47.

time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants must be entitled to expect those rules to be applied.”<sup>23</sup>

15. Although the principle of legal certainty is not enshrined expressly in the Cambodian Constitution, it is a principle of law recognized in Cambodia. Legal certainty is protected by Article 141 new, which provides that citizens have the right to appeal the constitutionality of laws to the Constitutional Council.<sup>24</sup> Another example of the respect for legal certainty can be found in Article 158 new, which states that laws continue to be effective until altered or abrogated by new laws. This provision enhances legal certainty by clarifying the status of older laws. The Cambodian Constitution also provides that every citizen shall enjoy the right to defense through judicial recourse<sup>25</sup> and that fundamental fair trial rights must be respected.<sup>26</sup> Judicial recourse is inadequate and fair trial rights cannot be respected where procedural rules are vague and uncertain.
16. Providing the requested information will ensure transparency and legal certainty. It will assist all parties in understanding the upcoming pre-trial procedure. It will in no way compromise the judicial investigation or harm the interests of any party. Instead, it may expedite proceedings by ensuring that any disagreements as to the upcoming procedure and any potential violations of Mr. MEAS Muth’s fair trial rights are resolved at this stage.

### **B. Charging Mr. MEAS Muth at this late stage in the investigation**

17. Reportedly, the judicial investigation in Case 003, which has been ongoing since September 2009, will soon be closed. According to Zylab, there are approximately 13,000 documents on the Case File (including roughly 5,400 documents in Khmer, 4,900 in

<sup>23</sup> *Cañete de Goñi v. Spain*, Eur. Ct. H.R., App. No. 55782/00, Judgement, 15 October 2002, para. 36.

<sup>24</sup> Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia, adopted by the National Assembly on 4 March 1999.

<sup>25</sup> *Id.*, Art. 38.

<sup>26</sup> Article 31 of the Cambodian Constitution requires the fair trial rights set out in the Universal Declaration of Human Rights and in the covenants and conventions related to human rights to which Cambodia is a party, such as the International Covenant on Civil and Political Rights, to be respected.

English, and 2,700 in French). These documents comprise a total of approximately 200,000 pages.

18. Mr. MEAS Muth has the fundamental fair trial right to adequate time and facilities to prepare his defence. This right is guaranteed to Mr. MEAS Muth through the Cambodian Constitution,<sup>27</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>28</sup> the Agreement,<sup>29</sup> the Establishment Law,<sup>30</sup> and the Rules.<sup>31</sup> The right to adequate time and facilities includes access to the Case File. The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),<sup>32</sup> defines the right to “adequate facilities” as encompassing the right to access documents and other evidence.<sup>33</sup>

19. The Defence is concerned that if Mr. MEAS Muth is charged at this late stage of the investigation, he will have insufficient time to review the material on the Case File and to

<sup>27</sup> *Id.*

<sup>28</sup> Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Art. 14(3)(b).

<sup>29</sup> Article 12(2) of the 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”) states: “The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party”; Article 13(1) states: “The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.”

<sup>30</sup> Article 33 new of the 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”) states: “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights”; Article 35 new states: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing...”

<sup>31</sup> Rule 21(1) provides in part 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, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement....”

<sup>32</sup> See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3).

<sup>33</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 33.

participate in the judicial investigation<sup>34</sup> before it is closed. This may result in the investigation being incomplete and one-sided, since the Co-Prosecutors and Civil Parties have had the opportunity to participate in the investigation for the past five years, and the Co-Prosecutors conducted their own investigations into Case 003 prior to this. Charging Mr. MEAS Muth shortly before closing the judicial investigation will violate his rights to adequate time and facilities to prepare his defence, to participate in the judicial investigation, and to equality of arms.

20. The Trial Chamber in Case 001 has confirmed that the fundamental nature of the equality of arms principle is acknowledged in the Internal Rules.<sup>35</sup> This principle is fundamental to various international human rights instruments, including the ICCPR, which, in accordance with Article 31 of the Cambodian Constitution, the ECCC must respect. According to Article 14(1) of the ICCPR: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...”
21. The Defence requests clarification from the Co-Investigating Judges as to how they intend to ensure that Mr. MEAS Muth’s rights will be protected in the event that he is charged. It will also assist the Defence to be informed of the amount of time the Co-Investigating Judges consider sufficient to review the Case File and participate in the judicial investigation.

**C. Whether Mr. MEAS Muth may be charged after the investigation has closed and whether this would require the investigation to be reopened**

22. In Cambodian criminal procedure, any person named in an Introductory Submission has the status of Charged Person,<sup>36</sup> so the issue does not arise as to whether someone named in an Introductory Submission may be charged *after* the judicial investigation has

<sup>34</sup> Rule 55(10) provides that a Charged Person has the right to participate in the investigation through the filing of investigative requests.

<sup>35</sup> *Equality of arms* is “the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.” *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, D288/6.90, para. 4.

<sup>36</sup> Article 27 of the Cambodian Code of Criminal Procedure provides: “The Prosecution brings charges of criminal offenses against charged persons and asks for the application of laws by the Court.”



concluded but before a Closing Order has been issued. According to H. E. Keut Rith, Under-Secretary of State at the Ministry of Justice:

to become a party to the case file under investigation, [an offender] must be named in the Prosecution's Introductory Submission as a 'charged person' or if he is not named in the Prosecution's Introductory Submission, he is charged by the Investigating Judge, pursuant to articles 126 and 143 of the Code of Criminal Procedure. So, to know that he is the Offender Party, we must check in the case file if he is named in the Prosecution's Introductory Submission ... and he is charged by the Investigating Judge. These two types of persons are named 'charged persons.'<sup>37</sup>

ECCC procedure does not specify whether a person named in an Introductory Submission has the status of a Charged Person or the time period in which a Suspect may be charged.<sup>38</sup>

23. Cambodian procedure has not been followed in Case 003; had it been followed, Mr. MEAS Muth would already be considered a Charged Person since he is named in the Introductory Submission. As a Charged Person, he would have been granted access to the Case File upon the opening of the judicial investigation in 2009. Because Cambodian procedure has not been followed, the Defence is concerned that the Co-Investigating Judges may consider it possible to charge Mr. MEAS Muth *after* they have closed the judicial investigation. Were this to happen, Mr. MEAS Muth's right to participate in the judicial investigation would be violated; the Co-Investigating Judges would effectively be denying him adequate time and facilities for the preparation of his defence, and equality of arms.

24. The Defence requests clarification from the Co-Investigating Judges as to whether they consider that Mr. MEAS Muth could be charged after they have closed the judicial

<sup>37</sup> Television Kampuchea Program on the Code of Criminal Procedure of the Kingdom of Cambodia, June 2009, available on the SMD at ERN V01003160-V01003160. This is in line with past OCIJ jurisprudence holding that any person the Co-Prosecutor names in an Introductory Submission has the status of Charged Person. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order on Request for Further Charging, 16 February 2010, D298/2, para. 13. However, the current International Co-Investigating Judge and the majority of the Pre-Trial Chamber now consider that a Suspect named in the Introductory Submission does *not* have the status of Charged Person until he has been notified of the charges by the Co-Investigating Judges at an initial appearance. *See* 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, 15 January 2014, Opinion of Judge[s] Prak Kimsan, Ney Thol and Huot Vuthy, paras. 6-16. The International Judges of the Pre-Trial Chamber disagreed with this interpretation. *See* Opinion of Judges Chang-Ho Chung and Rowan Downing, paras. 16-29.

<sup>38</sup> Rule 57, on Notification of Charges, simply states that "[a]t the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent."

investigation. If the Co-Investigating Judges consider that it *is* permissible to charge a Suspect after the investigation has been closed, the Defence requests clarification as to whether the Co-Investigating Judges would reopen the investigation were this to happen, as would be done in France.

25. In French criminal procedure, if an investigating judge wishes to charge a Suspect after he has closed a judicial investigation but before he has issued a Closing Order, the investigating judge may do so; however this will result in the investigation being reopened.
26. As an example, in the Cour de Cassation case 94-84975, an investigating judge had informed Gaston X, a person under judicial investigation, on 15 June 1994 that the investigation was complete. On 5 July 1994, the investigating judge informed another person under investigation for the same matter that the investigation was complete. The Cour de Cassation held that the act of informing the person on 5 July 1994 of the close of the investigation annulled the earlier notification to Gaston X. *See* Cour de cassation, Chambre criminelle, 94-84.975, 9 January 1995.
27. Similarly, in the Cour de Cassation case 96-86614, the investigating judge informed the parties that an investigation was complete. Necessary acts to complete a rogatory letter were carried out after this announcement, thus the Cour de Cassation found that the announcement of the close of the investigation was voided. Cour de cassation, Chambre criminelle, 96-86614, 28 May 1997.
28. In contrast, after a Closing Order has been issued, a person under judicial examination can only be investigated on new charges, according to Article 188 of the French Code of Criminal Procedure. According to Article 190, the Investigating Judge would need authorization of the Prosecutor to reopen the investigation on these new charges. If Suspects are ever charged in France after an investigation has closed but before a Closing Order has been issued, logically this must be a rare occurrence. An investigating judge would not close an investigation until he had evaluated all of the evidence to determine whether the investigation is complete and should be closed. If he had evaluated all the evidence, he would know, prior to closing the case, whether any Suspects should be charged.

29. Here, Rule 70 permits the reopening of the investigation where new evidence becomes available after a Dismissal Order has been issued; it is silent as to other situations in which an investigation may be reopened. The Defence nonetheless submits that where good cause is shown and where it would be in the interest of justice and in keeping with the principle of equality of arms, pursuant to the overarching fair trial rights enshrined in Article 31 of the Cambodian Constitution and Article 35 new of the Establishment Law and guaranteed to Mr. MEAS Muth, the investigation would have to be reopened to allow Mr. MEAS Muth to meaningfully participate in the investigation.

**D. If Mr. MEAS Muth is not charged and a Final Submission is issued**

30. Rule 66(5) provides that where the Co-Prosecutors consider that the investigation has been concluded, “they *shall* issue a written, reasoned final submission.... The Co-Prosecutors may request the Co-Investigating Judges *to either* indict the Charged Person and send him or her for trial, *or* to dismiss the case.”<sup>39</sup> While this Rule is clear that the Co-Prosecutors have an obligation to prepare a Final Submission, it is unclear what purpose such a submission could serve if there is no Charged Person. Since there would be no Charged Person for the Co-Prosecutors to request to be sent to trial, the only option available under Rule 66(5) would be to request that the case be dismissed.

31. Since the Co-Investigating Judges do not consider Suspects to be “parties,”<sup>40</sup> if the Co-Prosecutors (or one of them) submit a Final Submission urging that Mr. MEAS Muth be charged, indicted, and sent to trial, the Defence is concerned that the Co-Investigating Judges may not notify Mr. MEAS Muth of this submission or allow him to respond to it. This is not a hypothetical scenario. The International Co-Prosecutor in his recent submission asserts that “there is clear and consistent evidence that Meas Muth is responsible for the crimes alleged in the Introductory Submission.... Meas Muth should

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<sup>39</sup> Emphasis added.

<sup>40</sup> See, e.g., 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, para. 37: “Suspects are not parties to the proceedings”; Decision on MEAS Muth’s Request to Place All Submissions on the Case File, 28 July 2014, D108/1, para. 3: “the International CIJ also notes that the extent of the Applicant’s standing to file submissions depends, *inter alia*, on his status as a suspect or charged person in the judicial investigation.”

therefore now be charged....”<sup>41</sup> Irrespective of Mr. MEAS Muth’s status as a “party,” he *must* be permitted to respond to the Final Submission.

32. In Case 002, the Pre-Trial Chamber reversed an OCIJ decision to refuse to accept Mr. IENG Sary’s response to the Final Submission. The Pre-Trial Chamber, referring to the Final Submission as a “key step in the ECCC proceedings,” noted that “it is certainly understandable that a charged person may wish to have his or her submissions in response to those offered by the Co-Prosecutors in the Final Submission taken into consideration by the Co-Investigating Judges before they issue a Closing Order, which determines whether or not the charged person faces trial and on what charges.”<sup>42</sup> The Pre-Trial Chamber found that the Co-Investigating Judges violated Mr. IENG Sary’s right to equal treatment, since in Case 001, the Co-Investigating Judges had permitted Duch to respond to the Final Submission.
33. Although the Pre-Trial Chamber was referring to the interest a *Charged Person* has in responding to a Final Submission, Mr. MEAS Muth’s interests are equal in this regard. The Final Submission is intended to influence the Co-Investigating Judges as to whether to issue an indictment. Mr. MEAS Muth has an interest in and a right to respond to such a submission. He has a right to rebut submissions made by the Co-Prosecutors. To respond meaningfully, he must be granted access to the Case File and have sufficient time to review it.
34. The Defence requests clarification from the Co-Investigating Judges as to whether a Final Submission requesting an indictment would be accepted by the Co-Investigating Judges if Mr. MEAS Muth has not been charged. The Defence further requests clarification as to whether Mr. MEAS Muth will be permitted to access the Case File, to have sufficient time to review it, and to respond to the Final Submission if he has not been charged.

#### **E. If Mr. MEAS Muth is not charged and a Closing Order is issued**

<sup>41</sup> International Co-Prosecutor’s Response to Notification Concerning the Suspect’s Requests to Access the Case File, Participate in the Judicial Investigation and Receive the Full Introductory Submission, 30 July 2014 [redacted version filed 6 August 2014], D82/3/3/1.1, para. 28b.

<sup>42</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC 71), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Decision Refusing to Accept the Filings of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 18.

35. Rule 67(1) provides that “[t]he Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.” If there is no Charged Person at this stage, it would appear that the Co-Investigating Judges *must* issue a Dismissal Order. A Dismissal Order would undoubtedly be appealed by the Co-Prosecutors (or one of them) and the Civil Parties.<sup>43</sup> If this occurs, since the Co-Investigating Judges do not consider Suspects to be “parties” they may not notify Mr. MEAS Muth of these appeals or allow him to respond to them, despite the obvious impact a decision by the Pre-Trial Chamber would have to the future of the case. Mr. MEAS Muth *must* be permitted to respond to any appeals against a Dismissal Order, and *must* be granted access to the Case File and a sufficient time to review it in order for any response to be meaningful.

36. The Defence requests clarification as to whether Mr. MEAS Muth will be permitted to access the Case File and to respond to any appeals against a Dismissal Order if he is *not* charged. The Defence further requests to be informed what the consequence would be if a Dismissal Order were overturned on appeal. The Rules do not explain whether the Case File would be returned to the Co-Investigating Judges to issue an Indictment, or whether that act could be performed by the Pre-Trial Chamber. If the Pre-Trial Chamber were to overturn a Dismissal Order and to issue an Indictment, Mr. MEAS Muth would have no opportunity to appeal the jurisdictional issues raised in the Indictment<sup>44</sup> or to request the annulment of procedural defects<sup>45</sup> before they are cured by the Closing Order.<sup>46</sup> This would violate his right to be heard and his right to fair and adversarial proceedings.

### III. CONCLUSION

37. There are many areas for concern with respect to the protection of Mr. MEAS Muth’s fair trial rights as the investigation comes to a close and during the remainder of the pre-trial stage. Clear answers to the questions raised herein, made with full respect for Mr. MEAS

<sup>43</sup> The Civil Parties are entitled, under Rule 74(4)(f), to appeal a Dismissal Order where the Co-Prosecutors have appealed.

<sup>44</sup> A right recognized by Rule 74(3)(a) and past Pre-Trial Chamber jurisprudence. *See, e.g., Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30.

<sup>45</sup> Rule 76(2) provides that “[w]here, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment.”

<sup>46</sup> Rule 76(7) provides that “[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.”

Muth's fair trial rights, will provide transparency and legal certainty and will assist the Defence and all the parties.

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to CLARIFY the manner in which they intend to protect Mr. MEAS Muth's fair trial rights during the remainder of the pre-trial stage.

Respectfully submitted,

  
ANG Udom

  
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Signed in Phnom Penh, Kingdom of Cambodia on this 3<sup>rd</sup> day of November, 2014