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**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 TO RESCIND THE ARREST WARRANT ISSUED ON
10 DECEMBER 2014**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Rule 21 of the ECCC Internal Rules (“Rules”), hereby requests that Co-Investigating Judge Harmon rescind the Arrest Warrant¹ issued on 10 December 2014 to bring Mr. MEAS Muth before Co-Investigating Judge Harmon for an initial appearance. This Request is made necessary because on 3 March 2015 Co-Investigating Judge Harmon issued a Decision² charging Mr. MEAS Muth *in absentia*, rendering the Arrest Warrant moot.³ Mr. MEAS Muth is appealing the Decision.⁴ Co-Investigating Judge Harmon has effectively conducted the initial appearance, considering the exquisite timing of Co-Investigating Judge Harmon’s press release,⁵ the resulting widespread media reports,⁶ and Co-Investigating Judge Harmon’s statement to the Defence that Mr. MEAS Muth has been charged.⁷ Nevertheless, the now superfluous Arrest Warrant remains in force.⁸ The Defence requests to file this Request in English only with the Khmer translation to follow, due to the urgency of the Request and the backlog currently experienced by the Interpretation and Translation Unit.⁹

I. BACKGROUND

1. On 7 September 2009, the judicial investigation of Mr. MEAS Muth was initiated based on the OCP’s 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.¹⁰
2. On 24 February 2012, Reserve International Co-Investigating Judge (“RICIJ”) Kasper-Ansermet 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.¹¹

¹ Arrest Warrant, 10 December 2014 (“Arrest Warrant”), C1, p. 2-3.

² Decision to Charge MEAS Muth *In Absentia*, 3 March 2015 (“Decision”), D128, and Annex: Notification of Charges against MEAS Muth, 3 March 2015 (“Notification of Charges”), D128.1.

³ By submitting this Request, the Defence does not waive any future arguments or submissions it may make as to the legality or validity of the Decision. The Defence reserves its right to make separate submissions on the legality and validity of the Decision.

⁴ MEAS Muth’s Notice of Appeal Against Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *In Absentia*, 9 March 2015, D128.1/1. The Defence will argue, *inter alia*, that Co-Investigating Judge Harmon erred in interpreting the scope of his authority to unilaterally issue the Decision; erred in his application of the ECCC Law and Rules, and the statutes and jurisprudence of the *ad hoc* tribunals and International Criminal Court; and failed to take all reasonable measures before issuing the Decision.

⁵ Press Release, *Statement of the International Co-Investigating Judge regarding Case 003*, 3 March 2015 (“Press Release”).

⁶ *See, infra*, n. 40.

⁷ Response of ICIJ’s to MEAS Muth Defence Team, 5 March 2015 (“Co-Investigating Judge Harmon’s Response”), A82/1.

⁸ Decision, para. 65.

⁹ Email from Interpretation and Translation Unit to Defence, “RE: Translation request,” 10 March 2015.

¹⁰ Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

3. On 2 May 2012, the RICIJ issued a decision finding that Mr. MEAS Muth was one of “those most responsible” for crimes within the jurisdiction of the ECCC.¹²
4. On 7 and 22 February 2013, and again on 17 July 2014, the Co-Investigating Judges filed disagreements. The Defence does not know the nature of these disagreements, but Co-Investigating Judge Harmon informed the Defence that at least the first two disagreements were not brought before the Pre-Trial Chamber in accordance with the Rule 72 dispute settlement procedure.¹³
5. On 11 August 2014, Voice of America Khmer reported that a Suspect in Case 004 was summoned to the ECCC.¹⁴
6. On 13 August 2014, the Defence sent a letter to the Co-Investigating Judges requesting the legal reasoning of each Co-Investigating Judge concerning whether a summons issued by one of them alone would be valid.¹⁵
7. On 26 September 2014, Co-Investigating Judge Harmon issued an Order finding that “[t]he validity of a summons to a Suspect signed by one Co-Investigating Judge is clearly expressed in the applicable law, and specifically in Articles 5 and 7 of the ECCC Agreement, Article 23 new of the ECCC Law and Internal Rule 72.”¹⁶ Co-Investigating Judge You Bunleng did not issue this Order jointly with Co-Investigating Judge Harmon or provide his own legal reasoning concerning the validity of a summons signed by one Co-Investigating Judge.
8. On 27 October 2014, the Defence appealed this Order. The Defence asserted, *inter alia*, that the Co-Investigating Judges must work together and issue summonses jointly; that the Agreement and Establishment Law do not provide for a summons to be issued by

¹¹ Notification of Suspect’s Rights [Rule 21(1)(D)], 24 February 2012, D30.

¹² Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48.

¹³ See Letter from Co-Investigating Judge Harmon to Defence, *Request for Information Concerning Disagreements Recorded on 7 February 2013 and 22 February 2013*, 22 July 2014 (“Letter Regarding Disagreements”), D82/3/2.

¹⁴ See Sok Khemara, *Additional Khmer Rouge Suspect to Appear at Tribunal Monday*, VOA KHMER, 11 August 2014, available at <http://www.voacambodia.com/content/additional-khmer-rouge-suspect-to-appear-at-tribunal-monday/2409141.html>.

¹⁵ Letter from Case 003 Defence to OCIJ, *Request for Information Concerning the Validity of a Summons Issued by One Co-Investigating Judge*, 13 August 2014 [notified 26 September 2014], D117.

¹⁶ Order on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge, 26 September 2014, D117/1, para. 3.

one Co-Investigating Judge alone in the case of a disagreement; and that Rule 72 cannot be relied upon to allow one Co-Investigating Judge to issue a summons alone.¹⁷

9. On 28 November 2014, Co-Investigating Judge Harmon summoned Mr. MEAS Muth and his Co-Lawyers to an Initial Appearance scheduled for 8 December 2014.¹⁸ The Summons to Mr. MEAS Muth stated: "Should Meas Mut[h] fail to appear on the specified date, further measures taken in accordance with the ECCC Internal Rules shall be considered."¹⁹ On this same date, Co-Investigating Judge Harmon issued a notification 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."²⁰
10. On 2 December 2014, the Defence met with Mr. MEAS Muth to discuss the Summons. Mr. MEAS Muth indicated that he did not consider the Summons to be valid since it was issued by Co-Investigating Judge Harmon alone. The Defence prepared a Notice of Non-Recognition of Summons to this effect, which Mr. MEAS Muth signed.²¹ It was filed the following day, 3 December 2014. Mr. MEAS Muth noted:

This summons was issued by Co-Investigating Judge Harmon. Co-Investigating Judge You Bunleng's signature is not on the summons. I therefore do not consider it to be a valid summons from both Co-Investigating Judges.... My Co-Lawyers have informed me that you, Co-Investigating Judge Harmon, have recently decided on your own and without Co-Investigating Judge You Bunleng, to defer, yet again, a decision on whether you will grant my Defence team access to the Case File.... It appears that it is your position that in order for me to be afforded accesses to the Case File so I can fully enjoy my right to a defence and my right to assist in my own defence, I must comply with your summons. This *quid pro quo* is offensive. Complying with an invalid summons cannot be made a precondition to exercising my fair trial rights.²²

11. On 3 December 2014, the Pre-Trial Chamber found inadmissible the Defence's Appeal concerning whether a Co-Investigating Judge could issue a summons alone, on the basis that there was no danger of irreparable harm to Mr. MEAS Muth's right to legal

¹⁷ MEAS Muth's Appeal Against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge, 27 October 2014, D117/1/1/1.

¹⁸ Summons to Initial Appearance, 28 November 2014, A66; Written Record of Service of Summons, 5 December 2014, A66/1; Summons of Lawyer, 28 November 2014, A67.

¹⁹ Summons to Initial Appearance, 28 November 2014, A66.

²⁰ 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.

²¹ See Notice Concerning Mr. MEAS Muth's Decision not to Recognize Summons, 3 December 2014, A67/1; Notice of Non-Recognition of Summons, 2 December 2014, A67/1.1.

²² Notice of Non-Recognition of Summons, 2 December 2014, A67/1.1 (internal citations omitted).

certainty and because the Pre-Trial Chamber has no jurisdiction to deal with hypothetical matters or provide advisory opinions.²³

12. On 4 December 2014, Co-Investigating Judge Harmon issued a letter stating that he took note of Mr. MEAS Muth's Notice of Non-Recognition of Summons. Co-Investigating Judge Harmon stated that he considered the Summons to be valid and: "I therefore expect the Suspect to attend his initial appearance scheduled for 8 December 2014. Failure to do so will constitute a direct violation of a legally binding order. In that case, I will consider further measures available under the law applicable at the ECCC to ensure his attendance."²⁴ Co-Investigating Judge Harmon also indicated that the Co-Lawyers were expected to appear at the Initial Appearance.²⁵
13. On 8 December 2014, National Co-Lawyer Ang Udom, Senior Legal Consultant Tanya Pettay, and Case Manager Mang Monika appeared before Co-Investigating Judge Harmon.²⁶ Mr. MEAS Muth was not present. Co-Investigating Judge Harmon questioned whether the Defence had received his letter explaining that he, Co-Investigating Judge Harmon, considered the Summons to be valid. Mr. Ang Udom stated that the Defence had received the letter. Co-Investigating Judge Harmon asked whether, notwithstanding the letter, it was Mr. MEAS Muth's choice not to appear. After confirming that it was, Mr. Ang Udom requested access to the Case File, while also enquiring why the National Co-Investigating Judge was not present. Co-Investigating Judge Harmon denied the request for access to the Case File, noting further that the reason the National Co-Investigating Judge was not present was confidential.²⁷

²³ Decision on MEAS Muth's Appeal Against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2, paras. 15-16.

²⁴ Response to the Notice Concerning Mr. MEAS Muth's Decision Not to Recognize Summons, Dated 3 December 2014, 4 December 2014, A67/1/1 (quote, para. 5).

²⁵ *Id.*, para. 6.

²⁶ See Notice Concerning Attendance at Scheduled Initial Appearance 8 December 2014, 5 December 2014, A67/2, in which International Co-Lawyer Michael G. Karnavas requested that Senior Legal Consultant Tanya Pettay appear in his stead due to other prior commitments, and Response to the Notice Concerning Attendance at Scheduled Initial Appearance 8 December 2014, Dated 5 December 2014, 5 December 2014, A67/2/1, in which Co-Investigating Judge Harmon granted this request.

²⁷ See Written Record of Initial Appearance, 11 December 2014, D122.

14. On 10 December 2014, Co-Investigating Judge Harmon issued an Arrest Warrant pursuant to Rule 42 and ordered the Judicial Police to bring Mr. MEAS Muth before him for an Initial Appearance.²⁸ The Arrest Warrant further ordered:

If Meas Mut[h], due to the circumstances, cannot be brought before the International Co-Investigating Judge immediately, he shall be placed in temporary detention, wherever possible in the detention facility of the ECCC, and presented to the International Co-Investigating Judge as soon as possible.²⁹

15. On 12 December 2014, the Arrest Warrant was delivered to the Judicial Police.³⁰ To date, the Arrest Warrant has not been executed.

16. On 15 December 2014, unaware of the existence of the Arrest Warrant, the Defence filed an application to the Co-Investigating Judges requesting that they seize the Pre-Trial Chamber with a request to annul the Summons. The Defence argued that the Summons was procedurally defective, having been issued by Co-Investigating Judge Harmon alone. The Defence explained that this procedural defect harmed Mr. MEAS Muth because Co-Investigating Judge Harmon considered that Mr. MEAS Muth had violated a legally binding order. Co-Investigating Judge Harmon further stated that he intended to consider measures to force Mr. MEAS Muth to comply with the Summons.³¹ In this application, the Defence referred to a C1 document that had been placed on the Case File, which the Defence surmised was an Order from Co-Investigating Judge Harmon related to detention or bail. Shortly thereafter, the designation "C1" was removed from zylab and the OCIJ Order and accompanying photograph, both dated 11 December 2014, appeared on the Case 003 Case File with the document number listed as "blocked."

17. On 19 December 2014, Co-Investigating Judge Harmon issued a decision refusing to seize the Pre-Trial Chamber with a request to annul the summons, finding that Rule 76(2) only allows *parties* to submit annulment applications and that Suspects are not parties.³² Co-Investigating Judge Harmon found that Mr. MEAS Muth:

²⁸ Arrest Warrant, p. 3; Decision, para. 21.

²⁹ Arrest Warrant, p. 3.

³⁰ Decision, para. 21.

³¹ MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance, 15 December 2014, A77.

³² Decision on MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance, 19 December 2014, A77/1, para. 13.

is not currently a party to Case 003 due to his voluntary obstruction of the procedure that could have eventuated in the granting of full rights under the Internal Rules. Therefore, currently [Mr. MEAS Muth] does not have standing to file the Application. As to the Suspect's Lawyers' speculation about the issuance of an '*Order related to detention and bail*' against the Suspect, the International CIJ considers it sufficient to note that there is no provision in the Internal Rules or under Cambodian law allowing a suspect against whom an arrest warrant has been issued to seek its annulment before the warrant is executed.³³

Co-Investigating Judge Harmon indicated that he would continue his efforts to secure Mr. MEAS Muth's appearance at an Initial Appearance "with the view of enabling his exercise of the rights under the Internal Rules..."³⁴

18. On 19 December 2014, two members of the OCIJ staff met with a representative of the Judicial Police to discuss the progress of execution of the Arrest Warrant.³⁵ The representative of the Judicial Police could not state when the Arrest Warrant would be executed and stated that the final decision on its execution rested with the Security Commission for the ECCC.³⁶
19. On 30 January 2015, with the Arrest Warrant not yet executed by the Judicial Police, Co-Investigating Judge Harmon wrote to the Chairman of the Security Commission for the ECCC, stating that should Mr. MEAS Muth fail to appear at the ECCC or not be arrested before 18 February 2015, he would charge Mr. MEAS Muth *in absentia*.³⁷
20. On 3 March 2015, the Defence wrote to the Office of the Co-Investigating Judges to request the status of the judicial investigation, noting that the ECCC Completion Plan indicated that the investigation was scheduled to conclude by the end of March 2015.³⁸
21. On 3 March 2015 at 4:30 pm, with the 18 February 2015 date having passed without Mr. MEAS Muth's appearance before the ECCC or the Judicial Police's execution of the Arrest Warrant, Co-Investigating Judge Harmon issued the Decision and accompanying Notification of Charges. The Notification of Charges sets out: Mr. MEAS Muth's identifying information; his alleged roles during the temporal jurisdiction of the ECCC; the alleged crimes and applicable statutory provisions; the modes of liability under

³³ *Id.*, paras. 16-17.

³⁴ *Id.*, para. 18.

³⁵ See Decision, para. 24.

³⁶ *Id.*

³⁷ *Id.*, para. 25.

³⁸ Request for Information Concerning Status of the Judicial Investigation, 3 March 2015, A82.

which Mr. MEAS Muth is charged; and Mr. MEAS Muth's rights under Rules 11, 21-22, 55(10), and 58(6), including his right to be represented by counsel of his choosing and his right to remain silent.

22. On 3 March 2015, within minutes of notifying the Parties of the Decision and Notification of Charges, Co-Investigating Judge Harmon issued a press release setting out the charges and alleged crime sites under investigation, noting:

With the filing of these charges, the Internal Rules of the ECCC permit [Mr. MEAS] Muth, through his lawyers, to have access to the case file and to participate in the investigation, thus accelerating its progress. This will allow the investigation to proceed with full respect of the rights of all parties and to conclude it within a reasonable time with the issuance of a closing order.³⁹

The contents of the press release were reported widely in both local and international newspapers.⁴⁰

23. On 4 March 2015, Co-Investigating Judge Harmon responded to the Defence's letter of 3 March 2015 concerning the status of the investigation. Co-Investigating Judge Harmon stated: "As you know, your client was charged with various offenses on 03 March 2015 and as a result will be given reasonable time to review the case file and participate in the investigation."⁴¹
24. To the best of the Defence's knowledge, despite issuance of the Notification of Charges and the subsequent press release, the Arrest Warrant remains in force and has not been withdrawn by Co-Investigating Judge Harmon.⁴²

³⁹ Press Release.

⁴⁰ See, e.g., Holly Robertson, *KR Tribunal Charges Navy Commander, District Chief*, THE CAMBODIA DAILY, 4 March 2015; Stuart White et al., *KRT charges two more*, THE PHNOM PENH POST, 4 March 2015; Stuart White et al., *Khmer Rouge duo charged*, THE PHNOM PENH POST, 3 March 2015; Kong Sothanarith, *Two Former Khmer Rouge Cadre Charged by Tribunal*, VOA KHMER, 3 March 2015; Prak Chan Thul, *U.N.-Cambodia tribunal charges two more ex-Khmer Rouge cadres*, REUTERS, 3 March 2015; Lindsay Murdoch, *Tribunal charges ex-Khmer Rouge commander with crimes against humanity*, THE SYDNEY MORNING HERALD, 4 March 2015; Elizabeth LaForgia, *Cambodia Khmer Rouge tribunal charges 2 new suspects*, JURIST, 3 March 2015; Tu Thanh Ha, *Khmer Rouge official charged in 1978 killing of Canadian Stuart Glass*, THE GLOBE AND MAIL, 3 March 2015; Lauren Crothers, *Two more Khmer Rouge cadre charged in Cambodia*, ANADOLU AGENCY, 3 March 2015; *Cambodia's Khmer Rouge tribunal charges 2 new suspects*, THE ASSOCIATED PRESS, 3 March 2015; *Two more Khmer Rouge suspects charged with crimes against humanity*, THE AGENCE FRANCE-PRESS, 3 March 2015.

⁴¹ Co-Investigating Judge Harmon's Response.

⁴² See, e.g., Decision, para. 65.

II. LAW AND ARGUMENT

A. The Arrest Warrant is invalid because it is not signed by both Co-Investigating Judges

25. Article 5(4) of the Agreement provides, in relevant part: “The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation.” Article 23 new of the Establishment Law reiterates this requirement in providing, in relevant part: “All investigations shall be the joint responsibility of two investigating judges...” Here, the Arrest Warrant was issued to bring Mr. MEAS Muth before Co-Investigating Judge Harmon for an initial appearance to facilitate the continuation of the investigation.⁴³ The Arrest Warrant was issued in the course of the investigation, and therefore should have been issued by the Co-Investigating Judges acting jointly.
26. The Pre-Trial Chamber has held, in Case 004 in relation to the issuance of a Summons, that a Co-Investigating Judge may issue a Summons alone if he has complied with the dispute resolution provisions of Rule 72.⁴⁴ The Pre-Trial Chamber has never held that one Co-Investigating Judge may issue an Arrest Warrant alone, regardless of whether he has complied with Rule 72. Co-Investigating Judge Harmon unilaterally, without reasoned analysis, extended the Pre-Trial Chamber’s limited decision in Case 004 to Arrest Warrants. An Arrest Warrant is not equivalent to a Summons.
27. A Summons is simply an order to appear before the ECCC.⁴⁵ It carries with it no possibility of detention or incarceration. An Arrest Warrant, in contrast, is “an order to the Judicial Police to arrest any person and bring him or her before the Co-Investigating Judges or the Chambers.”⁴⁶ There is every likelihood that the arrestee will be detained⁴⁷

⁴³ See *id.*, para. 69.

⁴⁴ See, e.g., 004/07-09-2009-ECCC/OCIJ (PTC09), Decision on [REDACTED] Urgent Request [REDACTED], 15 August 2014, A122/6.1/3, para. 14 (the Case 003 Case File number is D117/1.2). The Defence does not concede the applicability of the Pre-Trial Chamber’s Decision to Case 003, as this Decision may have been limited to the facts in Case 004. The Defence is unable to make this determination because the Decision has been redacted. As Co-Investigating Judge Harmon has, however, relied on this Decision, it is addressed in this Request.

⁴⁵ Rule 41(1).

⁴⁶ Glossary to the Rule, definition of “Arrest Warrant”, p. 82.

⁴⁷ See Rule 45(4), which provides:

Where, due to the circumstances, the person cannot be brought before the issuing authority immediately after arrest, that person shall be placed in detention and presented to the Co-Investigating Judges or the Chambers as soon as possible. In such cases, the provisions of Rule 51 shall apply as if the reference therein to the Co-Prosecutors was a reference to the Co-Investigating Judges or the Chambers. The Co-Investigating Judges shall decide on Provisional Detention of the person in question as provided in Rule 63.

and, indeed, temporary detention is a possibility under the Arrest Warrant issued for Mr. MEAS Muth.⁴⁸ Cambodian law⁴⁹ and the Rules⁵⁰ contain a presumption of freedom where detention is concerned.⁵¹ It is axiomatic that any deprivation of Mr. MEAS Muth's fundamental right to liberty directly impacts his right to life, liberty, and security.⁵² Where such a fundamental right is at risk, any measure imposed by the Office of the Co-Investigating Judges that could restrict this right – such as issuance of the Arrest Warrant – must be agreed to by both Co-Investigating Judges.

28. The Defence is not aware of a disagreement between the Co-Investigating Judges as to the issuance of the Arrest Warrant for Mr. MEAS Muth.⁵³ A disagreement can be safely presumed since Co-Investigating Judge Harmon incontrovertibly took unilateral action by issuing the Arrest Warrant only seven days after notification that Mr. MEAS Muth did not recognize the Summons.⁵⁴ The Defence has previously requested clarification as to the basic nature of the disagreements between the Co-Investigating Judges,⁵⁵ to which Co-Investigating Judge Harmon responded:

All Disagreements are strictly confidential *ex parte* matters except as provided in Internal Rule 72(4)(b). Accordingly, the International CIJ is not in a position to inform you of their content or general nature.⁵⁶

⁴⁸ See Arrest Warrant, p. 3.

⁴⁹ Article 203 of the Cambodian Code of Criminal Procedure provides: "In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section."

⁵⁰ Rule 63(3) provides that provisional detention is to be ordered only where specific conditions are met; Rule 72(4)(d) states, in relevant part: "[W]here the disagreement concerns provisional detention, there shall be a presumption of freedom."

⁵¹ The French Code of Criminal Procedure similarly contains a presumption of freedom for persons who are under judicial examination. See Article 137, French Code of Criminal Procedure (official translation; italics added): "*The person under judicial examination, presumed innocent, remains at liberty.* However, if the investigation so requires, or as a precautionary measure, he may be subjected to one or more obligations of judicial supervision. If this does not serve its purpose, he may, in exceptional circumstances, be remanded in custody."

⁵² This right is expressly protected under Article 32 of the Cambodian Constitution ("Constitution"), Article 3 of the Universal Declaration of Human Rights ("UDHR"), and Article 9(1) of the International Covenant on Civil and Political Rights ("ICCPR").

⁵³ See Letter Regarding Disagreements.

⁵⁴ Mr. MEAS Muth's Notice of Non-Recognition of Summons was filed on 3 December 2014. The Arrest Warrant was issued on 10 December 2014. Notwithstanding the Defence's argument that Rule 72 does not permit Co-Investigating Judge Harmon to issue an Arrest Warrant on his own, the timing of the Arrest Warrant indicates that Co-Investigating Judge Harmon has not registered a disagreement relating to the Arrest Warrant and did not wait 30 days before issuing it. See Rules 72(1)-(2).

⁵⁵ Request for information concerning disagreements recorded on 7 February 2013 and 22 February 2013, 17 July 2014, D82/3/1.

⁵⁶ Letter Regarding Disagreements.

The Arrest Warrant impacts Mr. MEAS Muth's fundamental rights to liberty and to be free from arbitrary arrest or detention.⁵⁷ It is vital that the Defence has basic information as to the disagreements and the understanding of each of the Co-Investigating Judges regarding the ECCC laws and procedures pertaining to disagreements. Without such information, the Defence cannot know whether it has made all necessary legal challenges to protect Mr. MEAS Muth's fundamental human rights.

29. Co-Investigating Judge Harmon cannot rely on the dispute resolution procedures contained in Rule 72 to issue an Arrest Warrant without Co-Investigating Judge You Bunleng's signature. As the National Pre-Trial Chamber Judges have explained (with respect to the Co-Prosecutors working together): "if none of the Co-Prosecutors delegates his or her power to another co-prosecutor, that co-prosecutor cannot act alone."⁵⁸ This reasoning equally applies to the Co-Investigating Judges.⁵⁹ There is no indication that Co-Investigating Judge You Bunleng has delegated his power to sign and issue Arrest Warrants to Co-Investigating Judge Harmon.⁶⁰

30. As noted *supra* in paragraph 25, Article 5(4) of the Agreement and Article 23 new of the Establishment Law require the Co-Investigating Judges to cooperate and work together in carrying out the judicial investigation. These Articles cannot be wholly subsumed by Rule 74 for the self-serving purpose of interpreting the Rule as permitting execution of *all* actions or decisions that are the subject of a disagreement between the Co-Investigating Judges. Such a result violates the spirit and intent of the Agreement and Establishment Law. Such a result means that, despite the dual nature of the ECCC, one Co-Investigating Judge can single-handedly drive the proceedings. The Rules have no basis in applicable law when they exceed the Agreement and Establishment Law. As both Co-Investigating Judges did not sign the Arrest Warrant, and there is no indication

⁵⁷ Protections against arbitrary arrest or detention are enshrined in Article 38 of the Constitution, Article 9(1) of the ICCPR, and Article 3 of the UDHR.

⁵⁸ Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal against the Decision on time Extension Request and Investigative Requests Regarding Case 003, Opinion of Judge Prak Kimsan, Judge Ney Thol, and Judge Huot Vuthy, 2 November 2011, D20/4/4, para. 4.

⁵⁹ The relevant Articles of the Agreement applicable to Co-Prosecutors and the relevant Articles applicable to Co-Investigating Judges have nearly identical language. *See* Agreement, Arts. 5(4) and 6(4).

⁶⁰ Rule 14(4) provides that such a decision to delegate power must be made jointly by the Co-Investigating Judges: "Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually."

that Co-Investigating Judge You Bunleng delegated to Co-Investigating Judge Harmon his signing authority, the Arrest Warrant is invalid and must be rescinded.

B. Assuming, *arguendo*, that the Arrest Warrant was validly issued, the Arrest Warrant should be rescinded as it is now moot

31. Rule 57 provides: “[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.”⁶¹ The Notification of Charges satisfies the Rule 57 requirements of an initial appearance: it identifies Mr. MEAS Muth, sets out the allegations against him and the alleged modes of liability under which he is charged, and notifies Mr. MEAS Muth of his rights in relation to the judicial investigation. There is no dispute as to whether Mr. MEAS Muth is aware of the charges.
32. The Arrest Warrant was issued to “bring [Mr. MEAS Muth] before the International Co-Investigating Judge for an Initial Appearance.”⁶² It would be illogical to suggest that, despite issuance of the Notification of Charges – which, as Co-Investigating Judge Harmon stated, “charged [Mr. MEAS Muth] with various offenses on 03 March 2015”⁶³ – an initial appearance must still be held.⁶⁴ There is no valid reason to have Mr. MEAS Muth arrested, handcuffed, transported to the ECCC, and held at the Detention Unit solely to be brought before Co-Investigating Judge Harmon to be notified of charges of which he already is aware. Effectively, an initial appearance has been held. Mr. MEAS Muth is aware of the charges. The Arrest Warrant is moot and any attempt to now execute it is a charade.

C. There is no justification for retaining the Arrest Warrant in order to temporarily detain Mr. MEAS Muth

33. Rule 21(2) expressly states that any coercive measures to which a person may be subjected shall be “strictly limited to the needs of the proceedings.” Rule 21(2) reflects the prohibition against arbitrary arrest or detention that is enshrined in the Cambodian

⁶¹ See also Glossary to the Rules, definition of “Initial appearance”, p. 84.

⁶² Arrest Warrant, p. 3. As per Rule 42, “[a]n Arrest Warrant may be issued against a Suspect, Charged Person or Accused, whether he or she is within or outside the territory of the Kingdom of Cambodia.”

⁶³ Co-Investigating Judge Harmon’s Response.

⁶⁴ As noted *supra* in n. 4, the Defence does not concede the legality or validity of the Decision or the Notification of Charges and will be filing an appeal.

Constitution (“Constitution”),⁶⁵ the Universal Declaration of Human Rights (“UDHR”),⁶⁶ and the International Covenant on Civil and Political Rights (“ICCPR”).⁶⁷

Rule 45(4) provides:

Where, due to the circumstances, the person [who is the subject of an Arrest Warrant] cannot be brought before the issuing authority immediately after arrest, that person shall be placed in detention and presented to the Co-Investigating Judges or the Chambers as soon as possible. In such cases, the provisions of Rule 51 shall apply as if the reference therein to the Co-Prosecutors was a reference to the Co-Investigating Judges or the Chambers. The Co-Investigating Judges shall decide on Provisional Detention of the person in question as provided in Rule 63.

34. As the United Nations’ Human Rights Committee has noted: “[a]n arrest or detention may be authorized by domestic law and nonetheless be arbitrary.”⁶⁸ A lawful arrest or detention also must be necessary, reasonable and proportionate⁶⁹ and, as required by Rule 21(2), strictly limited to the needs of the proceedings. Detention at this stage, no matter how temporary, would be an arbitrary loss of freedom for Mr. MEAS Muth not strictly limited to the needs of the proceedings. The Arrest Warrant ordered the temporary detention of Mr. MEAS Muth if, due to the circumstances, he could not immediately be brought before Co-Investigating Judge Harmon for the purpose of the initial appearance.⁷⁰ The initial appearance has, in effect, been held.

35. Retaining an active Arrest Warrant for no other reason than to temporarily detain Mr. MEAS Muth would be a coercive measure not justified by the needs of the proceedings. Such an arbitrary measure would violate the Constitution, the ICCPR, the UDHR, and Rule 21(2): it would be unnecessary, unreasonable, and disproportionate at this stage of the proceedings. As recognized by Co-Investigating Judge Harmon, Mr. MEAS Muth

⁶⁵ Article 32 of the Constitution provides: “Every Khmer citizen shall have the right to life, personal freedom, and security”, with Article 38 of the Constitution providing: “The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.”

⁶⁶ Article 9 of the UDHR provides: “No one shall be subjected to arbitrary arrest, detention or exile[.]” while Article 3 recognizes: “Everyone has the right to life, liberty and security of person.”

⁶⁷ Article 9(1) of the ICCPR provides: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure[s] as are established by law.”

⁶⁸ The notion of “arbitrariness” is not to be solely equated with “against the law.” Human Rights Committee, General Comment No. 35, *Article 9 (Liberty and security of person)*, U.N. Doc. CCPR/C/GC/35 (16 December 2014), para. 12, citing *Gorji-Dinka v. Cameroon*, Communications No. 1134/2002, para. 5.1; *Van Alphen v. Netherlands*, Communications No. 305/1988, para. 5.8; *Kulov v. Kyrgyzstan*, Communications No. 1369/2005, para. 8.3.

⁶⁹ Human Rights Committee, General Comment No. 35, *Article 9 (Liberty and security of person)*, U.N. Doc. CCPR/C/GC/35 (16 December 2014), para. 12.

⁷⁰ Arrest Warrant, p. 3.

has been notified of the charges. Co-Investigating Judge Harmon “is satisfied that Meas Muth is not in hiding.”⁷¹ With the issuance of the Notification of Charges, Co-Investigating Judge Harmon can continue to “[fulfill his] responsibility to complete the investigation of Case 003.”⁷² There is no conceivable reason to maintain an active Arrest Warrant solely for the purpose of temporarily detaining Mr. MEAS Muth.

III. CONCLUSION

36. The Arrest Warrant is invalid. It was only signed by Co-Investigating Judge Harmon, an act not envisaged by ECCC jurisprudence, laws, or the Rules. Even if the Arrest Warrant is valid, its purpose has been fulfilled. Mr. MEAS Muth has been notified of the charges against him and his rights to counsel of his own choosing and to remain silent, as required by Rule 57. There is no justification for retaining a gratuitous Arrest Warrant. The Arrest Warrant is moot and must be rescinded.

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests Co-Investigating Judge Harmon to **RESCIND** the Arrest Warrant that was issued on 10 December 2014.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 10th day of **March, 2015**

⁷¹ Decision, para. 66.

⁷² *Id.*, para. 69.

