



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des Tribunaux cambodgiens

Royaume du Cambodge  
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត  
Office of the Co-Investigating Judges  
Bureau des co-juges d'instruction

Case File No: 003/07-09-2009-ECCC-OCIJ

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	
..... 04 ..... / 12 ..... / 2015 .....	
ម៉ោង (Time/Heure) : .....	
..... 14 : 50 .....	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé	
du dossier: .....	
..... SAMAN RADA .....	

Before: The Co-Investigating Judges

Date: 04 December 2015

Language(s): English [Original]

Classification: CONFIDENTIAL

**DECISION ON MEAS MUTH'S REQUEST FOR THE CO-  
INVESTIGATING JUDGES TO CLARIFY WHETHER THE  
DEFENCE MAY CONTACT INDIVIDUALS INCLUDING  
WITNESS EM SON**

**Distribution:**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Meas Muth Defence**

ANG Udom  
Michael G. KARNAVAS

**Civil Party Lawyers**

HONG Kimsuon  
KIM Mengkhy  
MOCH Sovannary  
SAM Sokong  
TY Srinna  
VEN Pov  
Philippe CANONNE  
Laure DESFORGES  
Ferdinand DJAMMEN-  
NZEPA

Nicole DUMAS  
Isabelle DURAND  
Françoise GAUTRY  
Martine JACQUIN  
Christine MARTINEAU  
Barnabe NEKUI  
Lyma NGUYEN  
Nushin SARKARATI  
Fabienne TRUSSES



## I. PROCEDURAL HISTORY

1. On 7 February 2013, 22 February 2013 and 17 July 2014, the Co-Investigating Judges (“CIJs”) registered disagreements in this case.
2. On 26, 27, 28 and 29 November 2013, Investigator Thomas Kuehnel interviewed witness Em Sun<sup>1</sup> pursuant to the International CIJ’s delegation of power to conduct investigative action.<sup>2</sup>
3. On 23 November 2015, the Meas Muth Defence (“Defence”) filed *Meas Muth’s Request for the Co-Investigating Judges to Clarify Whether the Defence May Contact Individuals Including Witness Em Son* (“Request”).<sup>3</sup>

## II. SUBMISSIONS

4. In the Request, the Defence seek clarification as to whether they are permitted to contact individuals, including witnesses or potential witnesses, “for the purpose of gathering general descriptive information”.<sup>4</sup>
5. The Defence note that the CIJs and the Pre-Trial Chamber (“PTC”) have established that parties are permitted to conduct preliminary inquiries, and they submit that it is reasonable to assume that such preliminary inquiries could extend to contacting individuals to gather such general descriptive information.<sup>5</sup>
6. The Defence note that neither 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 (“ECCC Agreement”), the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”), nor the Internal Rules define what constitutes investigative action or expressly prohibit parties from contacting individuals.<sup>6</sup>
7. The Defence seek to ask witness Em Sun to guide them on a visit to Koh Tang<sup>7</sup> and to question him regarding “general descriptive information” and public statements he has made relating to Koh Tang.<sup>8</sup> The Defence submit that they must make such inquiries in order to diligently prepare their case, to shed light on possible exculpatory evidence, and to be able to request that the CIJs undertake investigative action pursuant to Internal Rule 55(10).<sup>9</sup>

<sup>1</sup> Case File No. 003-D54/46, *Written Record of Interview of EM Sun Dated 26-11-2013*, 26 November 2013; Case File No. 003-D54/47, *Written Record of Interview of EM Sun Dated 27-11-2013*, 27 November 2013; Case File No. 003-D54/48, *Written Record of Interview of EM Sun Dated 28-11-2013*, 28 November 2013; Case File No. 003-D54/49, *Written Record of Interview of EM Sun Dated 29-11-2013*, 29 November 2013.

<sup>2</sup> Case File No. 003-D54, *Rogatory Letter dated 07-02-2013*, 7 February 2013, extended by Case File No. 003-D54.1, *ICIJ Memorandum Concerning Extension of Rogatory Letter 54*, 16 July 2013.

<sup>3</sup> Case File No. 003-D173, *Meas Muth’s request for the co-investigating judges to clarify whether the defence may contact individuals including witness Em Son*, 23 November 2015.

<sup>4</sup> Request, para. 7.

<sup>5</sup> Request, para. 3.

<sup>6</sup> Request, para. 2.

<sup>7</sup> The CIJs are seized of the allegation that fishermen captured off Koh Tang were executed on Division 164 orders. See Case 003-D120, *International Co-prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003*, 31 October 2014, fn. 53.

<sup>8</sup> Request, para. 5. The Defence note that Em Sun is quoted in two recent articles and that he stated in an OCIJ interview that he was interviewed in connection with a book and a documentary film. See Request, fn. 14.

<sup>9</sup> Request, para. 6.



### III. DISCUSSION

8. As the Defence note,<sup>10</sup> the ECCC Agreement, the ECCC Law, and the Internal Rules grant the power to conduct investigations solely to the CIJs.<sup>11</sup> In particular, Internal Rule 55(5)(a) assigns to the CIJs the authority to interview witnesses and to conduct on-site investigations. The CIJs have previously noted that Internal Rule 55(5)(a) clearly indicates that the authority to conduct these functions is the “sole domain” of the CIJs.<sup>12</sup>
9. Internal Rule 55(10) sets forth the Charged Person’s permissible role in the conduct of the investigation, which is limited to requesting the CIJs to undertake investigative action they consider useful for the conduct of the investigation. Internal Rule 58(6) further specifies what requests a Charged Person may make, including that the CIJs question a witness or conduct a site visit.<sup>13</sup>
10. Noting these Internal Rules, the CIJs have previously stated that the parties’ capacity to intervene in the investigation is limited to “such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action”.<sup>14</sup> The PTC has confirmed this interpretation of the Internal Rules.<sup>15</sup>
11. The Defence ask the CIJs to clarify the distinction between prohibited investigative action and permissible preliminary inquiries. Both the CIJs and the PTC have provided guidance as to this distinction, stating that the parties are free to review public sources,<sup>16</sup> with the PTC noting that inquires of non-public sources may amount to prohibited investigative action.<sup>17</sup> In separate decisions, the PTC has further noted that parties may contact states to inquire as to the existence of relevant materials and to seek copies of such materials<sup>18</sup> and suggested that contacting an individual to inquire whether he/she is in possession of documents would be a permissible preliminary enquiry.<sup>19</sup>

<sup>10</sup> Request, para. 2.

<sup>11</sup> Article 5(1) of the ECCC Agreement; Article 23 new of the ECCC Law; Internal Rule 55(2).

<sup>12</sup> Case 002-A110/I, *CIJ Response to NUON Chea’s lawyers letter dated 20 December 2007*, 10 January 2008 (“CIJ Response to Nuon Chea”), p. 1.

<sup>13</sup> This is consistent with the Cambodian Code of Criminal Procedure, Article 133 of which states that “the charged person may ask the investigating judge to interrogate him, question a civil party or witness, conduct a confrontation or visit a site”.

<sup>14</sup> CIJ Response to Nuon Chea, p. 2.

<sup>15</sup> Case 002-D315/1/5, *Decision on the Appeal Against Order on NUON CHEA’s Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Action relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU SAMPHAN*, 7 June 2010 (“Foreign States Decision”), para. 15.

<sup>16</sup> Case 002-D164/2, *Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD*, 19 June 2009, para. 14; Case 002-D365/2/10, *Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes*, 15 June 2010 (“Additional Evidentiary Material Appeal Decision”), para. 12.

<sup>17</sup> Additional Evidentiary Material Appeal Decision, para. 12.

<sup>18</sup> Foreign States Decision, para. 15.

<sup>19</sup> Case 002-D273/3/5, *Decision on Appeal Against OCIJ Order of NUON Chea’s Eighteenth Request for Investigative Action*, 10 June 2010, para. 29 (rejecting Nuon Chea Defence’s appeal that the CIJs abused their discretion in not seeking documents from an individual and nothing that the Nuon Chea Defence “do not appear to have undertaken any preliminary enquiry” as to whether said individual was in possession of said documents).



12. The Defence posit that asking an individual to “*provide general descriptive information*” constitutes a permissible preliminary inquiry, as opposed to asking witnesses “*substantive*” or “*substantial*” questions, which would constitute prohibited investigative action.<sup>20</sup> However, the permissible preliminary inquiries envisioned by the CIJs and the PTC are limited to inquiries aimed at seeking and reviewing documents: reviewing publicly-available documents, inquiring as to whether states and/or individuals possess relevant documents, and (at least in the case of states) seeking copies of such documents. In essence, they relate to actions by the Defence which are meant to provide an initial trigger for the CIJs own and detailed investigative action. Questioning witnesses and conducting site visits as described by the Defence, on the other hand, are already investigative actions, the more so the longer an investigation has been going on overall.<sup>21</sup> The Defence admit that the purpose of the on-site visit with witness Em Sun, for example, is to gather information about a site which may be used for further representations in the investigation. Such information-gathering, even if described as aimed at purely descriptive statements, is in substance an investigative act, no less than any ordinary on-site visit by investigators when witnesses describe a location and what it looked like during the Khmer Rouge period. The Defence proposal – conducting a site visit with a witness as a guide, questioning a witness about a site, and questioning a witness about his previous statements – is thus prohibited. The same applies to approaching persons who have not been previously contacted by the CIJs.
13. If the Defence consider a site visit to Koh Tang, further questioning of witness Em Sun, or any other investigative action useful for the conduct of the investigation, the proper course of action is to submit an investigative action request pursuant to Internal Rule 55(10) with specific issues that are to be investigated.
14. This decision is filed in English, with a Khmer translation to follow.

**FOR THE FOREGOING REASONS, I:**

15. **INFORM** the Defence that they may not conduct any investigative action, including questioning witness Em Sun for the purpose of gathering general descriptive information, nor approach any other persons beyond the limits set by the previous case law as described above.

Dated 04 December 2015, Phnom Penh



Judge Michael Bohlander

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

**International Co-Investigating Judge**  
**Co-juge d’instruction international**

<sup>20</sup> Request, para. 5.

<sup>21</sup> See Internal Rule 55(5)(a).