

**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 CLARIFICATION CONCERNING WHETHER
THE DEFENCE MAY CONDUCT INVESTIGATIONS AT THE CURRENT STAGE
OF THE PROCEEDINGS**

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All Civil Parties

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules, hereby requests clarification concerning whether the Defence may conduct its own investigations at the current stage of proceedings. This Request is made necessary in order to respect Mr. MEAS Muth’s right to adequate time and facilities to prepare his defence and his right to equality of arms. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall* be interpreted so as to always safeguard the interests of Suspects...” Although the OCIJ has yet to rule on the Defence’s Request to access the Case File,¹ the Defence is aware of the OCIJ’s position that Suspects are not considered parties to the proceedings and that their rights, therefore, remain limited.² Because the OCIJ *does not* recognize Mr. MEAS Muth as a party to the proceedings and is thus denying him access to the Case File and the ability to participate in the judicial investigation, it logically follows that Mr. MEAS Muth and his Co-Lawyers *should* be free to conduct their own investigations concerning all relevant matters reflected in the Case 003 Introductory Submission. If the OCIJ holds a different opinion, the Defence respectfully requests a reasoned decision articulating the basis for denying Mr. MEAS Muth any possibility to investigate at this stage of the proceedings.³ The Defence requests to file this Request in English with the Khmer translation to follow once it has been completed. This is necessary because the Interpretation and Translation Unit has indicated that it cannot complete translation in a timely manner due to the upcoming holiday and other translation priorities.⁴

¹ MEAS Muth’s Request to Access the Case File and Participate in the Judicial Investigation, 29 August 2013, D82.

² See *infra* para. 4.

³ Mr. MEAS Muth has the right to receive reasoned decisions. This right has been consistently recognized in ECCC jurisprudence, by the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber. It is axiomatic that this right applies to decisions issued by the OCIJ. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC (SC 15), Decision on NUON Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 25; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 06), Decision on NUON Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 21; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 62), Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order on Request for Investigative Action by the Defence for Ieng Thirith of 15 March 2010, 14 June 2010, D353/2/3, paras. 22-28; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), 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, D365/2/10, paras. 22-27; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E50, paras. 23-27.

⁴ See Email from Interpretation and Translation Unit to Defence, “Re: Translation Request,” 2 October 2013.

I. BACKGROUND

1. On 7 September 2009, the OCP initiated the judicial investigation of Mr. MEAS Muth based on the OCP's 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.⁵
2. On 29 July 2010, the Defence Support Section ("DSS") sent a letter to the OCIJ requesting access to Case Files 003 and 004.⁶
3. On 20 September 2010, DSS sent a follow-up letter to the OCIJ stating that it had received no response from the OCIJ and would be issuing a press release to inform the public about this matter.⁷
4. On 23 September 2010, the OCIJ sent a letter to DSS stating that access to the Case Files in Cases 003 and 004 could not be granted because "Defence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems."⁸
5. On 5 April 2011, the OCIJ issued a decision rejecting a motion filed by the provisionally assigned Counsel in Cases 003 and 004, Mr. Kong Sam Onn, requesting access to the Case File.⁹
6. On 19 May 2011, the OCIJ rejected a motion for reconsideration filed by Mr. Kong Sam Onn of the denial of access to the Case File.¹⁰

⁵ 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.

⁶ Letter from DSS to OCIJ, "Defence Rights in Case Files 003 and 004," 29 July 2010.

⁷ Letter from DSS to OCIJ, "Follow-up to DSS Letter on Defence Rights in Case File 003 and 004," 20 September 2010.

⁸ According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel. 17 May 2013, D122/6, para. 20. The Defence does not have access to this letter to DSS.

⁹ According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel. 17 May 2013, D122/6, para. 21. The Defence does not have access to this letter to DSS.

¹⁰ According to Case File No. 004/07-09-2009-ECCC-OCIJ, Decision on Motion and Supplemental Brief on Suspect's Right to Counsel. 17 May 2013, D122/6, para. 21. The Defence does not have access to this letter to DSS.

7. On 1 March 2012, International Reserve Co-Investigating Judge Laurent Kasper-Ansermet delivered a *Notification of Suspect Rights* to Mr. MEAS Muth, informing Mr. MEAS Muth that he is named as a Suspect in the ongoing judicial investigation and that he has certain rights, including access to the Case File.¹¹
8. On 2 May 2012, the International Reserve Co-Investigating Judge issued a *Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect*, in which he stated that personal jurisdiction over Mr. MEAS Muth “has been established in a sufficient and reliable manner”¹² and “[t]he judicial investigation conducted by the [OCIJ] has thus established that [Mr. MEAS Muth] may be considered as one of the persons most responsible for the crimes enumerated in the Co-Prosecutors’ Second Introductory Submission.”¹³
9. On 13 June 2012, Mr. MEAS Muth requested DSS to assign Mr. Ang Udom and Mr. Michael G. Karnavas as his Co-Lawyers.¹⁴
10. On 14 December 2012, DSS appointed Mr. Ang Udom and Mr. Michael G. Karnavas as Mr. MEAS Muth’s Co-Lawyers.¹⁵
11. On 29 August 2013, the Defence requested access to the Case File and to be permitted to participate in the judicial investigation.¹⁶ To date, no Decision on this Request has been notified to the Defence.

II. REQUEST

12. The OCP and the Civil Parties are recognized as parties and thus have access to the Case File in Case 003.¹⁷ As such, they can influence the judicial investigation by **a.** filing investigative requests and **b.** requesting to place material on the Case File. Conversely,

¹¹ Notification of Suspect Rights [Internal Rule 21(1)(D) in Case File 003, 6 March 2012, D33, para. 3.

¹² Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 10.

¹³ *Id.*, para. 27.

¹⁴ Letter from Mr. Endeley to Mr. MEAS Muth, titled “Determination of Your Claim of Indigence and Decision on Your Request for Remuneration of Counsel under the ECCC’s Legal Assistance Scheme,” 30 April 2013, D56/11, para. 1.

¹⁵ *Id.*, para. 4. This was done on a *pro bono* basis with the understanding the Co-Lawyers would be retroactively remunerated under the ECCC’s Legal Assistance Scheme should Mr. MEAS Muth be determined to be indigent.

¹⁶ MEAS Muth’s Request to Access the Case File and to Participate in the Judicial Investigation, 29 August 2013, D82.

¹⁷ See Lawyer’s Recognition Decision Concerning All Civil Party Applications on Case File No.003, 26 February 2013, D58, para. 13; Lawyer’s Recognition Decision Regarding KONG Phallack and Mahdev MOHAN on Case File 003, 1 July 2013, D66, p. 3.

Mr. MEAS Muth is not considered a party to the proceedings¹⁸ and thus *does not* have access to the Case File and *cannot* influence the judicial investigation. The judicial investigation is skewed and one-sided. Mr. MEAS Muth is prejudiced.¹⁹

13. The Defence is required to diligently ensure that Mr. MEAS Muth's constitutionally guaranteed²⁰ fundamental fair trial rights are not infringed. These rights encompass the right to adequate time and facilities to prepare a defence²¹ and the right to equality of arms.²² Because the OCIJ does not consider Mr. MEAS Muth to be a party to the

¹⁸ See *supra* para. 4.

¹⁹ See MEAS Muth's Request to Access the Case File and to Participate in the Judicial Investigation, 29 August 2013, D82, especially paras. 20-23 concerning the importance of Defence participation at the investigative stage.

²⁰ Article 31 of the Cambodian Constitution states, "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." Article 38 states, "Every citizen shall enjoy the right to defense through judicial recourse."

²¹ Article 14(3)(b) of the International Covenant on Civil and Political Rights states: "In the determination of any criminal charge against him, *everyone* shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing..." 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. 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." 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..." 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..."

²² *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 KAING 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. The Trial Chamber in Case 001 has confirmed that "the fundamental nature of this principle is acknowledged in the Internal Rules..." *Id.* 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

proceedings and, as a consequence, is precluding the Defence access to the Case File, nothing should preclude the Defence from conducting its own investigation. Specifically, the Defence should be entitled to gather information by: searching for witnesses; interviewing witnesses and if necessary taking their statements; searching for and collecting documentary evidence; visiting and documenting alleged crime sites; consulting with expert witnesses; canvassing for documents at archival institutions; and conducting any other general investigative tasks necessary and reasonable for the defence of Mr. MEAS Muth.

14. Non-parties are not restricted from investigating. The Documentation Center of Cambodia (“DC-Cam”), for example, regularly conducts investigations for its archives, interviewing Cambodians about what they witnessed during the Democratic Kampuchea period and documenting alleged crime sites.²³ No efforts were made by the OCIJ, to the best knowledge of the Defence, to restrict DC-Cam from collecting and documenting evidence after the OCIJ began its judicial investigations. DC-Cam employs an investigative process such as the process the Defence intends to implement. Mr. MEAS Muth, as a non-party, should enjoy equal treatment as other non-parties, such as DC-Cam.
15. The OCIJ in Case 002 addressed the issue of whether parties could conduct investigations while the judicial investigation was ongoing. It did not specifically address the issue relevant to Mr. MEAS Muth, i.e. whether a non-party who is the target of a judicial investigation is prohibited from investigating any factual allegations which may be the subject of an official OCIJ investigation. In Case 002, the OCIJ cautioned the Defence teams that:

Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. ... The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.²⁴

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...”

²³ For example, DC-Cam staff interviewed Phy Phuon, a witness in Case 002, in December 2010. See ERN: 00660621-00660651. DC-Cam also carries out a mapping project of mass graves. See <http://www.dccam.org/Projects/Maps/Mapping.htm>.

²⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/1, p. 2.

16. In Case 002, the circumstances under which the OCIJ issued this warning to the parties are drastically different from the circumstances in the present case. In Case 002, “Charged Persons” were considered parties and were granted full access to the Case File. This enabled Charged Persons to make investigative requests. Conversely, Mr. MEAS Muth, though informed he is a target of a judicial investigation, is not considered a party to the proceedings. As such, he does not have access the Case File. Also, it is unclear whether he will ever have sufficient opportunity to review the entire Case File and make meaningful investigative requests.²⁵
17. There are at least two significant differences between Cases 002 and 003 such that the treatment of the Defence with respect to investigation in the two cases cannot be equated.

First, in Case 002, charging occurred shortly after the OCIJ became seized with the case.²⁶ The OCIJ then conducted its judicial investigation for over two years, during which time the parties were permitted to participate in the judicial investigation by filing investigative requests and requests to place material on the Case File.²⁷ In contrast, Mr. MEAS Muth has been investigated by the OCIJ for over four years²⁸ *without* being charged and *without* being permitted to access the Case File or to participate in the judicial investigation. Indeed, it merits recalling the observations of International Pre-Trial Chamber Judges Katinka Lahuis and Rowan Downing, who have commented on this disparate treatment and noted that it may be perceived as “questionable”:

From the opening to the announcement of the closing of the judicial investigation and until now, the Co-Investigating Judges have not formally notified the charges to, nor informed of the existence of the judicial investigation, the persons named as Suspects in the Second Introductory Submission. This approach departs from that taken for Case 001 and Case 002 whereby the persons named in the First Introductory Submission were brought before the Co-Investigating Judges within the months that followed

²⁵ See MEAS Muth’s Request for Information Concerning the OCIJ’s Investigative Approach and Methodology, forthcoming.

²⁶ For example, Mr. IENG Sary and Mrs. IENG Thirith were charged on 12 November 2007, less than four months after the Introductory Submission was filed and the judicial investigation began. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Police Custody Decision, 12 November 2007, C14, p. 2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Police Custody Decision, 12 November 2007, C15, p. 2.

²⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Notice of Conclusion of Judicial Investigation, 14 January 2010, D317.

²⁸ 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 filing of the Introductory Submission in order to be formally informed of the charges against them through an initial appearance held in pursuance to Internal Rule 57. Although the Co-Investigating Judges enjoy certain discretion in their decision to formally notify of charges a person named in an introductory submission, no explanation has ever been provided by the Co-Investigating Judges in the case file or otherwise as to why their practice in Case 003 differs from the preceding cases and why the Suspects have not been notified of such status in the investigation. This may be perceived as questionable given the requests made by the International Co-Prosecutor, which have not been determined and no explanation for such course of action has been given.²⁹

Second, the National and International Co-Investigating Judges have filed Disagreements concerning the status of the judicial investigation.³⁰ Due to these Disagreements, the status of the current judicial investigation is unclear. It is unclear whether the judicial investigation is validly open and ongoing. It is unclear whether the investigative action currently being performed by Co-Investigating Judge Harmon and his staff is valid and will be considered by Co-Investigating Judge You Bunleng. It appears possible that the investigation could close without Mr. MEAS Muth ever being charged. If this occurs, the OCP and Civil Parties will undoubtedly appeal. Should they be successful in an appeal, it would appear that Mr. MEAS Muth could potentially be charged and an Indictment issued without ever being afforded the opportunity to participate in the judicial investigation. Alternately, it appears possible that Mr. MEAS Muth could be charged at the very end of the judicial investigation, shortly before the issuance of a Closing Order. In such a case, he will have very little time³¹ – much less than the OCP and Civil Parties – to participate in the judicial

²⁹ Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, D11/2/4/4, para. 3.

³⁰ The most recent Disagreement would appear to be that filed on 7 February 2013 by Co-Investigating Judge You Bunleng announced in the Co-Investigating Judges' 28 February 2013 press release. OCIJ Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013.

³¹ In Case 002, due to the sheer number of documents on the Case File and the modest resources of the IENG Sary Defence, it was impossible to review thoroughly *every* piece of evidence prior to trial – and the Defence teams in Case 002 had much more time to perform this task than it appears the Defence could have in Case 003. As of September 2010, there were roughly 31,627 English-language documents on the Case 002 Case File (including submissions by the parties and supporting material but not including Khmer and French documents), consisting of roughly 150,939 pages of material. If the IENG Sary Defence were to review *only* the English language documents, it would have taken approximately 755 days, reading 200 pages per day, to review all of this material. In addition to documentary evidence, there were approximately 846 audio recordings of witness interviews prepared by the OCIJ on the Case File (not including audio and video recordings prepared by outside researchers which the OCIJ placed on the Case File), consisting of approximately 1,767 hours of tape. If the IENG Sary Defence were free to do *nothing* but listen to these recordings for eight hours per day, it would take the IENG Sary Defence 221 days to review all the recordings. See Press Release by the IENG Sary Defence, *“What Have the Defence Lawyers Been Doing Over the Course of the Many Years of the Judicial Investigation?”*, 12 September 2012, available at <http://www.iengsarydefence.org/wp->

investigation or to make applications for annulment or raise other issues of concern, such as the irregularities that were revealed in Case 002/01.³² In either situation, Mr. MEAS Muth's rights will not adequately be protected.

18. Short of allowing the Defence to access the Case File and participate in the judicial investigation, the only available recourse to respect Mr. MEAS Muth's rights to adequate time and facilities and equality of arms at this stage would be for the Defence to conduct its own investigations.³³ If Mr. MEAS Muth is later recognized as a party and permitted to participate in the judicial investigation, the Defence will be in a position to make investigative requests and to request that evidence be placed on the Case File.
19. The Defence therefore requests clarification from the OCIJ as to whether it may proceed. If the OCIJ considers that the Defence may not investigate, the Defence respectfully requests the OCIJ to clarify how it intends to respect and uphold Mr. MEAS Muth's fundamental fair trial rights.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Office of the Co-Investigating Judges to CLARIFY whether the Defence may investigate during the current stage of the proceedings.

Respectfully submitted,





ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 2nd day of **October, 2013**

content/uploads/2013/03/Press-Release-What-the-IENG-Sary-Defence-Has-Been-Doing-During-the-Judicial-Investigation-12-September-2012.pdf.

³² See related forthcoming Requests: MEAS Muth's Request for the Work Product of OCIJ Investigators Involved in Improper Investigative Practices in Case 002; MEAS Muth's Request for Information Concerning the OCIJ's Investigative Approach and Methodology.

³³ Conducting the Defence's own investigations may not be an adequate substitute for participating in the judicial investigation, due to the Defence's lack of resources compared to the OCIJ and OCP.