

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

FILING DETAILS

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: 23 November 2015

CLASSIFICATION

**Classification of the document
suggested by the filing party:** CONFIDENTIAL

**Classification by OCIJ
or Chamber:** សម្ងាត់/Confidential

Classification Status:

Review of Interim Classification: **Public**

Records Officer Name:

Signature:

**MEAS MUTH'S REQUEST FOR THE CO-INVESTIGATING JUDGES TO
CLARIFY WHETHER THE DEFENCE MAY CONTACT INDIVIDUALS
INCLUDING [REDACTED]**

Filed by:
The Co-Lawyers:
ANG Udom
Michael G. KARNAVAS

Distribution to:
Co-Investigating Judges:
Judge YOU Bunleng
Judge Michael BOHLANDER

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

All Civil Parties

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Rules 21 and 55(10) of the ECCC Internal Rules (“Rules”) hereby requests clarification from the Co-Investigating Judges as to whether it is permissible to contact individuals such as witnesses or potential witnesses for the purpose of gathering general descriptive information. This Request is made necessary because the Defence wishes to contact individuals, including [REDACTED]. The Defence considers that these individuals could provide general descriptive information relating to areas potentially relevant to Case 003. The Defence requests to file this Request in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot complete the translation in a timely manner.¹

I. REQUEST

1. The Defence wishes to contact individuals such as witnesses or potential witnesses to ask if they would be willing to serve as guides for visits to areas potentially relevant to Case 003 and provide general descriptive information relating to these areas. The Defence also seeks to contact [REDACTED] to visit [REDACTED] and gather general descriptive information relating to this [REDACTED] as it was during the [REDACTED]. The Agreement,² Establishment Law,³ and Rules do not provide sufficient guidance as to whether it is permissible to contact individuals to gather general descriptive information. The Defence seeks clarification from the Co-Investigating Judges as to whether such contacts are permitted.
2. The Agreement, Establishment Law, and Rules indicate that the Co-Investigating Judges are responsible for conducting the investigation.⁴ However, these texts do not define what constitutes an “investigation” nor do they provide guidance as to whether parties may contact individuals for purposes that do not amount to an investigation. No provisions in the Agreement, Establishment Law, or Rules explicitly prohibit parties from contacting individuals such as witnesses or potential witnesses. The Office of the Co-Investigating

¹ See Email from Chanmony Korm to Defence, “Re: translation request”, 20 November 2015, indicating that the translation cannot be completed until 18 December 2015.

² 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”).

³ 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”).

⁴ See Agreement, Art. 5(1): “There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations”; Establishment Law, Art. 23 new: “All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges”; Rule 55: “1. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC. 2. The *Co-Investigating Judges* shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission” (emphasis added).

Judges (“OCIJ”) and Pre-Trial Chamber have ruled that parties may not conduct their own investigation and may not contact witnesses for that purpose.⁵ They have provided little guidance as to whether the parties may contact individuals for other purposes.

3. The Co-Investigating Judges and Pre-Trial Chamber have confirmed that parties are permitted to conduct preliminary inquiries,⁶ without expressly defining the limits of a preliminary inquiry. The OCIJ and Pre-Trial Chamber have held that a preliminary inquiry could consist of reviewing publicly available documents,⁷ contacting “State(s) to ... inquire as to the existence of material useful to, if not exculpatory for, the defence, [and] seek[ing] copies of the material in question,”⁸ or contacting an individual to confirm whether he or she possesses certain documents.⁹ It is reasonable to assume that a preliminary inquiry could also include contacting individuals to gather general descriptive information about particular areas. The Co-Investigating Judges should clarify this issue so that the parties know the parameters of preliminary inquiries.
4. The Defence considers that contacting individuals to gather general descriptive information regarding potentially relevant areas in Case 003 does not amount to an investigation. Such a contact is merely a preliminary inquiry necessary for the Defence to submit investigative requests to the Co-Investigating Judges pursuant to Rule 55(10). The

⁵ See *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/I, p. 2: “[t]here is no provision which authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges....” See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC49), 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 Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/1/5, para. 15: “...the CIJs are responsible for conducting the investigation....”

⁶ See *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/I, p. 2. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), Decision on Reconsideration of 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, 27 September 2010, D365/2/17, para. 52, n. 141.

⁷ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2, para. 14. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC67), 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, para. 12.

⁸ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC49), 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 Actions Relating to Foreign States, In Respect of the Denial of the Request for Witness Interviews by KHIEU Samphan, 7 June 2010, D315/1/5, para. 15.

⁹ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC58), Decision on Appeal Against OCIJ Order on NUON Chea’s Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 29: “[T]he Co-Lawyers for the Charged Person do not appear to have undertaken any preliminary enquiry as to whether [the unnamed person] may or not be in possession of such documents.”

Defence would not be investigating facts set out in the Introductory Submission¹⁰ or Supplementary Submission,¹¹ as this role rests solely with the Co-Investigating Judges.¹² Contacting individuals to gather general descriptive information regarding potentially relevant areas in Case 003 is similar to contacting individuals to verify if they are in possession of relevant documents, which constitutes a permissible preliminary inquiry.¹³ The Defence would verify whether individuals possess relevant general descriptive information about certain areas and would request this information from these individuals.

5. The Defence seeks to contact [REDACTED] to ask [REDACTED] to guide the Defence during a potential visit to [REDACTED] and to provide general descriptive information relating to this [REDACTED]. The Defence would not put substantial questions to [REDACTED] but would merely ask [REDACTED] to illustrate [REDACTED] public statements¹⁴ regarding the [REDACTED]. This action does not constitute an investigation. The Co-Lawyers are bound by ethical rules¹⁵ and understand that putting substantive questions to witnesses may result in the imposition of sanctions pursuant to Rules 35(d) and 38.

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

¹¹ International Co-Prosecutor's Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120.

¹² Rule 55(2) provides: "The Co-Investigating Judges shall ... investigate the facts set out in an Introductory Submission or a Supplementary Submission."

¹³ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC58), Decision on Appeal Against OCIJ Order on NUON Chea's Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 29.

¹⁴ [REDACTED]

¹⁵ Rule 22(4) provides: "In the performance of their duties, lawyers shall be subject to the relevant provisions of the ... Cambodian Law on the Statutes of the Bar and recognised standards and ethics of the legal profession." Article 6 of the Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia provides: "In all circumstances, the lawyer must respect the obligations of his or her oath and the principles of conscience, humanity, and tact. Any participation in an act contrary to the law and regulations, professional rules of conduct, and the imperatives of conscience are prohibited." As Michael G. Karnavas is a member of the Alaska Bar Association, the Alaska Rules of Professional Conduct apply. See ALASKA RULES OF PROF'L CONDUCT (2015-2016 ed.), Preamble: "A lawyer's conduct should conform to the requirements of the law."

6. The Defence must make further preliminary inquiries beyond merely reviewing █████ statements to the OCIJ¹⁶ and █████ public statements. Physically going to █████ with █████ would allow █████ to illustrate █████ previous statements and would provide contextual information to the Defence. It would assist the Defence in better understanding the events that took place at this location. Being able to contact █████ for this purpose will benefit the Defence in its efforts to diligently prepare Mr. MEAS Muth's case.¹⁷ The Defence also considers that conducting preliminary inquiries such as gathering explanations directly from █████ regarding the setting of █████ during the █████ may shed light on possible exculpatory evidence. The Defence will then be able to put a request to the Co-Investigative Judges for investigative action pursuant to Rule 55(10).

II. CONCLUSION & RELIEF REQUESTED

7. The Defence seeks to contact individuals such as witnesses or potential witnesses, including █████, for the purpose of gathering general descriptive information relating to areas potentially relevant to Case 003. The OCIJ and Pre-Trial Chamber have not provided any guidance as to whether conducting such action would amount to a preliminary inquiry. Contacting individuals for this purpose appears to amount to a permissible preliminary inquiry; however, the Co-Investigating Judges must clarify this issue.

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to CLARIFY whether the Defence may contact individuals including █████ for the purpose of gathering general descriptive information.

¹⁶ Written Record of Witness Interview, 26 November 2013, D54/46; Written Record of Witness Interview, 27 November 2013, D54/47; Written Record of Witness Interview, 28 November 2013, D54/48; Written Record of Witness Interview, 29 November 2013, D54/49.

¹⁷ *Black's Law Dictionary* defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 523 (9th ed. 2009). ALASKA RULES OF PROF'L CONDUCT (2015-2016 ed.), Rule 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client." See also *Prosecutor v. Tadić*, IT-94-1, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 47: "Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal.... As stated above, the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber."

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 23rd day of **November, 2015**