

**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: 12 May 2016

CLASSIFICATION

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

**Classification by OCIJ
or Chamber:** សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



MEAS MUTH'S REQUEST TO RECLASSIFY AS PUBLIC HIS REQUEST TO OBTAIN THE UNITED NATIONS' AND ROYAL GOVERNMENT OF CAMBODIA'S ARCHIVE MATERIAL, THE INTERNATIONAL CO-INVESTIGATING JUDGE'S NOTICE OF UNSUCCESSFUL ATTEMPT TO OBTAIN STRICTLY CONFIDENTIAL UNITED NATIONS' ARCHIVE MATERIALS, THE UNITED NATIONS' LETTER TO THE INTERNATIONAL CO-INVESTIGATING JUDGE, AND ALL ACCOMPANYING ANNEXES

&

REQUEST TO PLACE ON THE CASE FILE AND MAKE PUBLIC THE INTERNATIONAL CO-INVESTIGATING JUDGE'S LETTER TO THE UNITED NATIONS REQUESTING STRICTLY CONFIDENTIAL ARCHIVE MATERIAL

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 Rule 21 of the ECCC Internal Rules (“Rules”), hereby requests that: **a.** *MEAS Muth’s Request to Obtain and Place on the Case File the United Nations and Royal Government of Cambodia Archive Material Concerning the Negotiations to Establish the ECCC (D170)* and its accompanying Annex (**D170.2**) be re-classified as public; **b.** the International Co-Investigating Judge’s letter to the United Nations (“UN”) requesting strictly confidential archive material be placed on the Case File and classified as public; **c.** the United Nations’ (“UN”) response to the International Co-Investigating Judge’s request (**D181/1.1**) and its accompanying documents (**D181/1.2**, **D181/1.3**, and **D181/1.4**) be re-classified as public; and **d.** the International Co-Investigating Judge’s *Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations’ Archive Materials (D181/1)* be re-classified as public. These documents are collectively referred to herein as the Documents. This Request is made necessary in the interests of transparency and justice. The public has an interest in being kept informed of the proceedings, the International Co-Investigating Judge’s investigative efforts in Case 003, and the UN’s unwillingness to comply with said investigative efforts. None of the Documents contain any confidential or sensitive information that cannot be redacted. Information that does not strictly pertain to the facts under judicial investigation need not and must not be kept confidential. The Defence requests to file this Request in English only with the Khmer translation to follow, as the Khmer translation cannot be completed in a timely manner.¹

I. APPLICABLE LAW

1. Article 3.12 of the Practice Direction on the Filing of Documents Before the ECCC (“Practice Direction on Filing”) states:

During a judicial investigation, a filing party may propose that a document be classified as ‘Public’, ‘Confidential’, or ‘Strictly Confidential’, in accordance with the provisions of the Practice Direction on the Classification and Management of Case-related Information. Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what is the appropriate classification. Such determinations shall remain in force throughout subsequent proceedings, subject to Article 3.14.

2. Article 3.14 of the Practice Direction on Filing states:

Where required in the interests of justice, Co-Investigating Judges or a Chamber

¹ The Interpretation and Translation Unit (“ITU”) has indicated that the Request cannot be translated into Khmer until 23 May 2016. Email from ITU to the Defence, “Re: ERNs 01239929-01239939,” 11 May 2016.

seised of a case may re-classify any document on the case file. Affected parties will be given an opportunity to be heard either prior to such a decision being made, or during any period of a temporary re-classification that is necessary to protect information that may be confidential or strictly confidential. In any event, parties to the case will be notified of any temporary re-classifications and of any decisions on re-classification.

3. Article 1.2 of the Practice Direction on the Classification and Management of Case-Related Information (“Practice Direction on Classification”) states:

The principle underlying this Practice Direction is the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy.

4. Article 9.2 of the Practice Direction on Classification states:

A public version of a confidential or strictly confidential document may be created for the purposes of placement in the public section of the case file, on instruction of the Co-Investigating Judges or a Chamber, as appropriate. The public version will be produced by:

- a. creating a copy of the original document
- b. redacting from the copy all confidential and strictly confidential information, as applicable, and
- c. submitting the redacted version to the Co-Investigating Judges or the Chamber for review and approval, prior to its placement in the public section of the case file.

A confidential version of a strictly confidential document may be created in a similar manner.

5. Article 9.3 of the Practice Direction on Classification states:

If a public version of a confidential or strictly confidential document is to be prepared at the request of a party, any redactions shall be undertaken by the requesting party and submitted for approval in accordance with Article 9.2.(c).

II. BACKGROUND

6. On 7 September 2009, the Office of the Co-Prosecutors initiated the Case 003 judicial investigation based on its 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.²
7. On 10 November 2015, the Defence filed **D170** requesting that the Co-Investigating Judges obtain the UN’s and Royal Government of Cambodia’s (“RGC”) archive material concerning the negotiations to establish the ECCC and the drafting of the Establishment Law and place this material on the Case File. The Defence submitted that the Supreme

² Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

Court Chamber had erred in determining that the terms *senior leaders* and *most responsible* were not jurisdictional limitations on the ECCC, but rather were discretionary factors relevant to prosecutorial and investigative policy decisions. The Defence submitted that obtaining the UN's and RGC's archive material was necessary to challenge the Supreme Court Chamber's decision and to assist the Co-Investigating Judges, Chambers, and all parties in determining the intent of the drafters of the Establishment Law and the meaning of the terms *senior leaders* and *most responsible*. The Defence attached an Annex, **D170.2**, listing potentially relevant UN archive material, some of which was classified as strictly confidential and some of which was not classified.

8. On 1 February 2016, the International Co-Investigating Judge issued a Consolidated Decision on MEAS Muth's Requests on Personal Jurisdiction.³ In his Decision, *inter alia*, the International Co-Investigating Judge granted **D170**, finding that examining the *travaux préparatoires* as a subsidiary means of interpreting the drafters' intent when negotiating the ECCC's establishment "may undoubtedly assist the CIJs in their interpretation of the Terms [*senior leaders* and *most responsible*]."⁴ The International Co-Investigating Judge agreed that to ascertain the drafters' intent it was necessary to consider the full history of the negotiations, rather than selected documents.⁵ He stated that he would endeavor to obtain, in particular, the strictly confidential archive materials included in **D170.2** and would make them available to all parties in Case 003.⁶
9. On 3 May 2016, the International Co-Investigating Judge issued **D181/1**. He indicated that he had written to the UN to request the strictly confidential material listed in **D170.2**.⁷ The UN Under-Secretary-General for Legal Affairs replied that the strictly confidential UN archive materials could not be disclosed because they were considered sensitive documents pursuant to a UN bulletin on the classification and handling of information.⁸ The UN Under-Secretary-General provided the International Co-Investigating Judge with certain documents that were disclosable: a UN General Assembly resolution, a report on Cambodia by the UN Secretary-General, and transcripts

³ Consolidated Decision on MEAS Muth's Requests on Personal Jurisdiction, 1 February 2016, D181.

⁴ *Id.*, para. 32.

⁵ *Id.*, para. 33.

⁶ *Id.*

⁷ Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials, 3 May 2016, D181/1, para. 4.

⁸ *Id.*, para. 5.

and newspaper articles relevant to the negotiation period.⁹ The International Co-Investigating Judge stated that, without UN authorization, he is unable to request the strictly confidential documents from the UN's archives, but will take the necessary steps to obtain the non-classified documents listed in **D170.2**.¹⁰

III. ARGUMENT

10. ECCC proceedings must be transparent.¹¹ While there is a need for confidentiality in the judicial investigation,¹² this need must be balanced against a Charged Person's right to transparency,¹³ the interests of justice,¹⁴ and the need to keep the public informed and educated as to the proceedings.¹⁵ The Defence has repeatedly argued that Case File documents that do not discuss the substance of the Case 003 investigation should be classified as public to promote transparency and keep the public informed as to the proceedings.¹⁶ The Defence does so again with this Request. There is no balancing test to perform here. Mr. MEAS Muth's right to transparency of the proceedings against him, the interest of justice, and the needs of the public require that the Documents be made public.

11. There is no compelling reason to keep the Documents from the public. The question of the ECCC's personal jurisdiction over Mr. MEAS Muth is a dispositive legal issue. It

⁹ *Id.*

¹⁰ *Id.*, para. 6.

¹¹ 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 which was adopted by the National Assembly on the 4th of March 1999, Art. 31; 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, Art. 13(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 33 new; Rule 21(1); International Covenant on Civil and Political Rights, 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(1).

¹² See Rule 56(1).

¹³ Decision on MEAS Muth's Request to Reclassify as Public with Public Annexes A and B and Confidential Annex C, 16 June 2015, D129/1, para. 11.

¹⁴ See Practice Direction on Filing, Art. 3.14.

¹⁵ See Practice Direction on Classification, Art. 1.2.

¹⁶ See, e.g., MEAS Muth's Request to Reclassify as Public his Request to Place Full Transcripts of All Witness Interviews on the Case File and the International Co-Investigating Judge's Decision on this Request, 8 February 2016, D87/2/1.8/2; MEAS Muth's Request to Reclassify Documents as Public, 10 March 2015, D129; MEAS Muth's Request to Co-Investigating Judge Harmon to Reconsider his Decision on MEAS Muth's Request to Reclassify Documents as Public, with Confidential Annexes, 1 July 2015, D129/2; MEAS Muth's Request to Reclassify as Public the International Co-Investigating Judge's Decision on MEAS Muth's Request for the Co-Investigating Judges to Clarify whether the Defence May Contact Individuals Including Witness ██████████ and MEAS Muth's Request for the Co-Investigating Judges to Clarify whether the Defence May Contact Individuals Including Witness ██████████, 18 December 2015, D173/2; MEAS Muth's Request to Reclassify D87/2/1.6 and D87/2/1.6/1 as Public, 25 January 2016, D180.

goes to the heart of the case against him. No factual discussions are necessary to determine the intent of the ECCC's founders regarding the jurisdictional or discretionary nature of personal jurisdiction. The Documents relate generally to this legal issue, which is a topic that has been publicly litigated and widely discussed.¹⁷ While there may be a need to keep confidential certain aspects of the judicial investigation, such as those related to specific witnesses or facts, such aspects are not at issue here. The Documents have no direct bearing upon the facts under investigation in Case 003. The automatic confidential classification of the Documents fosters a culture in which transparency is the rare exception. In such a culture, regrettably, few rays of sunshine are permitted to pierce the veil of the Office of the Co-Investigating Judges.¹⁸

12. As the Open Society Justice Initiative ("OSJI") has observed in regard to the ECCC: "Absent demonstration of a compelling need for confidentiality in a concrete matter, rules favoring transparency should govern, in order to allow the public to observe the work of the court."¹⁹ One example the OSJI cites as demonstrating the effective use of transparency is former International Co-Investigating Judge Lemonde's decision in Case 002 to make public his summonses of six government officials from the Cambodian People's Party.²⁰ These summonses related to facts under investigation in Case 002; nevertheless, the International Co-Investigating Judge made the documents public. Here, *none* of the Documents relate to facts under investigation in Case 003, yet they remain confidential.

¹⁷ See, e.g., *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 62-79; Notice of Conclusion of Judicial Investigation, 29 April 2011, D13; [REDACTED] Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48; Thomas Miller, *KRT Judge Talks Court Controversies*, PHNOM PENH POST, 18 August 2011; Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 599 (2009); Steve Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 1 August 2011.

¹⁸ As United States Supreme Court Justice Louis D. Brandeis has aptly observed: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, 20 December 1913.

¹⁹ Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, July 2010, p. 27.

²⁰ *Id.* See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness HENG Samrin, 25 September 2009, D136/3; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness SIM Ka, 25 September 2009, A297; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness HOR Nam Hong, 25 September 2009, A299; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness KEAT Chhon, 25 September 2009, A296; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness CHEA Sim, 25 September 2009, D136/2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, CIJ's Letter to Witness OUK Bunchhoeun, 25 September 2009, A298. See also Sopheng Cheang, *Khmer Rouge Tribunal Summons Gov't Party Officials*, ASSOCIATED PRESS, 7 October 2009, available at G:\Public Affairs\Daily Clippings International\Archives\2009.

13. Where, as in Case 003, there is significant public concern about government interference and UN inaction,²¹ the public should be informed of the Defence's and International Co-Investigating Judge's efforts to clarify a legal issue that is material to this case. In particular, and especially when one considers the UN's frequent publicly stated support and advocacy for the ECCC's continuing investigations and prosecutions,²² the public must be made aware of the UN's non-compliance with an investigative request by the International Co-Investigating Judge. Encouraging transparency by making the Documents public furthers the rule of law and enhances the ECCC's legacy as a model court for Cambodia. The International Co-Investigating Judge should choose transparency over opacity. Specific submissions as to the Documents are set out below.

MEAS Muth's Request to Obtain and Place on the Case File the United Nations and Royal Government of Cambodia Archive Material Concerning the Negotiations to Establish the ECCC (D170 and D170.2)

14. **D170** is Mr. MEAS Muth's request for the UN's and the RGC's archive material from the negotiations to establish the ECCC. The Defence submitted that archive material from the UN's and RGC's negotiations was necessary to assist the Co-Investigating Judges, Chambers, and all parties in determining the intent of the drafters of the Establishment Law with regard to the ECCC's personal jurisdiction. The request refers to prior litigation that is publicly known and available, and to two confidential documents from Cases 002 and 003. In accordance with Article 9.3 of the Practice Direction on Classification, the Defence has attached a proposed redacted version of **D170** as an Annex to this Request. **D170.2**, the Annex accompanying **D170**, refers to documents that the Defence located online, the identifying information of which is, therefore, publicly available. These documents should be made public.

15. No party or ECCC entity will be prejudiced if **D170** and **D170.2** are re-classified as public. Neither document refers to any confidential facts under investigation in Case 003, nor is the question of the ECCC's personal jurisdiction unknown to the public. The public

²¹ See, e.g., *KRT judge talks court controversies*, PHNOM PENH POST, 18 August 2011; George Wright and Kuon Narim, *Police Ignored Another Arrest Warrant for Meas Muth*, CAMBODIA DAILY, 7 July 2015; Luke Hunt, *Resignation Casts Further Doubt Over Khmer Rouge Tribunal in Cambodia*, THE DIPLOMAT, 9 July 2015.

²² See, e.g., Joint Statement by Deputy Prime Minister Sok and UN Special Expert David Scheffer, 27 April 2016; Joint Statement by Deputy Prime Minister Sok and UN Special Expert David Scheffer, 19 February 2016; Joint Statement on the Extraordinary Chambers in the Courts of Cambodia, 17 November 2015; Speech by UN Special Expert David Scheffer, *What Has Been 'Extraordinary' About International Justice in Cambodia?*, 25 February 2015. These materials are available at <http://www.unakrt-online.org/statements-articles>.

should be informed of the Defence's request, especially considering public criticism of the ECCC as being subject to political interference regarding Cases 003 and 004.²³ As the Open Society Justice Initiative has observed:

The apparent ongoing government interference into the progress of Cases 003 and 004, particularly in the face of delayed and tepid responses from the UN and the international officials of the court, has an ongoing impact on the legacy and legitimacy of the entire court—well beyond Cases 003 and 004. It generates cynicism and basic distrust of the institution.²⁴

Embracing transparency with regard to non-factual aspects of the Case 003 investigation enhances the ECCC's image as a court that protects and promotes the rule of law in Cambodia.

The International Co-Investigating Judge's Letter to the UN Requesting Strictly Confidential Archive Material

16. After receiving Mr. MEAS Muth's request, the International Co-Investigating Judge wrote to the UN's Office of Legal Affairs to request strictly confidential documents related to the ECCC's negotiating history.²⁵ This letter relates to documents – such as Mr. MEAS Muth's request for archive material and the UN's response to the letter – that are on the Case File,²⁶ yet the letter itself has not been placed on the Case File and made available to the parties. This letter is a communication between the International Co-Investigating Judge and the UN, sent as a result of Mr. MEAS Muth's request for archive material. It is contextually relevant to the matters at issue in this Request. The Defence requests that the International Co-Investigating Judge immediately place the letter on the Case File. The letter also should be made public.

17. No party or ECCC entity will be prejudiced if this letter is classified as public.

Presumably, the International Co-Investigating Judge did not include in the letter any

²³ Heather Ryan and Laura McGrew, Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia* 28-29 (Open Society Foundations, 2016) (“OSJI 2016 Report”). See also Alex Batesmith, *Transitional Justice Challenges Facing Lawyers in Cambodia*, Lawyers, Confliction & Transition Project, Economic & Social Research Council, June 2015, p. 7: “There is a real danger that the criticisms of the ECCC for failing to meet expectations of justice may do serious damage to public trust not only in the tribunal itself but also in the capacity of internationally conceived ‘justice’ as a whole to provide satisfaction to a population. This is of particular concern when the rule of law is as much under threat as it is in Cambodia.”

²⁴ OSJI 2016 Report, p. 28-29.

²⁵ Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials, 3 May 2016, D181/1, para. 4.

²⁶ See, e.g., D170, D170.2, D181/1, D181/1.1, D181/1.2, D181/1.3, and D181/1.4.

confidential information about facts under investigation in Case 003. If the letter does contain any such information, the Defence proposes that the International Co-Investigating Judge place a public, redacted version of the letter on the Case File, in accordance with Article 9.2 of the Practice Direction on Classification. Placing this letter on the Case File and making it available to the public ensures transparency in the proceedings. The public also is kept informed of the International Co-Investigating Judge's efforts to comprehensively investigate a dispositive issue: the ECCC's personal jurisdiction to investigate and prosecute Suspects, Charged Persons, and Accused.

The UN's Response to the International Co-Investigating Judge's Letter (D181/1.1, D181/1.2, D181/1.3, and D181/1.4)

18. In **D181/1.1**, the UN Under-Secretary-General conveyed the UN's refusal to disclose to the International Co-Investigating Judge the requested strictly confidential material. According to the UN Under-Secretary-General, the UN Secretary-General has the sole discretion to release UN documents and examines requests on a case-by-case basis to assess the documents' sensitivity.²⁷ The UN Under-Secretary-General indicated that the majority of the strictly confidential documents are "[i]nternal inter-office or intra-office documents, including draft documents, [whose] disclosure would undermine the Organization's free and independent decision-making process."²⁸ With his letter, the UN Under-Secretary-General included documents that the UN determined could be disclosed without any restrictions.²⁹ **D181/1.2**, a UN General Assembly resolution regarding Cambodia, is publicly available on the UN Assistance to the Khmer Rouge Trials' website.³⁰ **D181/1.3**, a report on Cambodia by the UN Secretary-General, is publicly available in the UN's online digital library.³¹ **D181/1.4** contains transcripts of public press conferences held in Cambodia by then-U.S. Senator John Kerry and newspaper articles regarding the UN-RGC negotiations. These documents should be made public.

19. No party or ECCC entity will be prejudiced if **D181/1.1**, **D181/1.2**, **D181/1.3**, and **D181/1.4** are re-classified as public. The UN's reasons for refusing access to the strictly confidential documents are unsatisfactory and vacuous. UN-RGC negotiations ended in

²⁷ **D181/1.1**, p. 1.

²⁸ **D181/1.1**, p. 2, referring to section (d) of the UN Secretary-General's Bulletin of 12 February 2007 on information sensitivity, classification and handling (ST/SGB/2007/6).

²⁹ See **D181/1.1**, p. 2.

³⁰ See <http://www.unakrt-online.org/sites/default/files/documents/A-RES-52-135%281%29.pdf>.

³¹ See <http://repository.un.org/handle/11176/221321>.

2003, more than 10 years ago. It is unlikely that documents that are more than 10 years old could undermine or jeopardize the UN's present-day ability to freely and independently make decisions. Regardless, neither the UN's letter nor the accompanying documents refer to the contents of any strictly confidential documents, or to any confidential facts under investigation in Case 003. These documents should be made public so that the Cambodian public and the international community know of the UN's self-imposed limits to its cooperation with the ECCC. Keeping these documents confidential only furthers the public perception that the UN fully cooperates with and supports the ECCC when, in fact, the opposite is true.

Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials (D181/1)

20. In **D181/1**, the International Co-Investigating Judge notified the parties that the UN refused access to the strictly confidential material listed in **D170.2**. He indicated that, without UN authorization, he cannot obtain this material, but that he will attempt to obtain unclassified material from the UN's archives.³² This notice should be made public.
21. No party or ECCC entity will be prejudiced if **D181/1** is re-classified as public. The notice does not refer to any confidential information provided by the UN or to any confidential facts under investigation in Case 003. It was issued to inform the parties of the status of the International Co-Investigating Judge's efforts to obtain the material requested by Mr. MEAS Muth in **D170**. It is in the interests of transparency and justice that the public be made aware of the UN's refusal to grant full access to the UN-RGC negotiating history. As the International Co-Investigating Judge found, considering the full history of the negotiations for the establishment of the ECCC "may undoubtedly assist" the Co-Investigating Judges in determining the drafters' intent regarding the ECCC's personal jurisdiction.³³ The UN publicly supports and advocates for the ECCC's continuing investigations and prosecutions,³⁴ yet does not hesitate to refuse the International Co-Investigating Judge's efforts to fully investigate the negotiations when it considers the UN's interests to be at stake. Keeping this notice confidential benefits no one. It only fosters the worst practices observed by the international community:

³² Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials, 3 May 2016, D181/1, para. 6.

³³ Consolidated Decision on MEAS Muth's Requests on Personal Jurisdiction, 1 February 2016, D181, para. 32.

³⁴ See *supra*, n. 22.

politically motivated decision-making and interference with regard to Case 003.³⁵ The International Co-Investigating Judge should adopt a practice of transparency, as urged by the Defence. Transparency would shed light both on the proceedings in Case 003 and on the impediments to those proceedings created by the UN – the entity that, in public, urges continued investigations while, in private, refuses access to the means by which those investigations can continue.

IV. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

- A. RECLASSIFY as public D170, D170.2, D181/1, D181/1.1, D181/1.2, D181/1.3, and D181/1.4; and
- B. PLACE on the Case File and CLASSIFY as public the International Co-Investigating Judge’s letter to the UN requesting access to the UN’s strictly confidential archive material.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 12th day of May, 2016

³⁵ OSJI 2016 Report, n. 79, noting its repeated statements about politically motivated decision-making in Cases 003 and 004; *id.*, p. 28, noting the apparent ongoing government interference in Cases 003 and 004 and the “delayed and tepid responses” from the UN and international ECCC officials.