



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

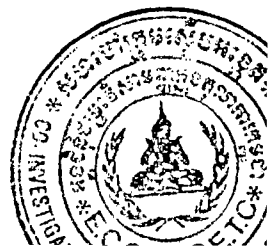
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**CONSOLIDATED DECISION ON THE INTERNATIONAL CO-PROSECUTOR'S REQUESTS TO DISCLOSE CASE 003 DOCUMENTS INTO CASE 002 (D100/25 AND D100/29)**

**Distribution:**

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## I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 7 and 22 February 2013, and 17 July 2014.
2. On 8 May 2014, my predecessor issued his *Decision on the International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to Case 002/02* (“8 May Decision”), wherein he declined the International Co-Prosecutor’s (“ICP”) request for disclosure of 231 records of witness interviews,<sup>1</sup> noting, *inter alia*, that “no fixed date for the commencement of trial in Case 002/02 has been set”.<sup>2</sup> Judge Harmon remained seised of the request until such time that the disclosure of the records of interviews would not jeopardise ongoing investigations, at which time he would authorise the ICP to seek their admission in Case 002/02.<sup>3</sup>
3. On 14 October 2014, Judge Harmon issued the *Decision on Co-Prosecutors’ Urgent Request to Disclose Case 004 Interviews Relevant to 1<sup>st</sup> Segment of Case 002/02 Trial* (“14 October Decision”).<sup>4</sup> I recall and incorporate by reference the procedural history summarised in paragraphs 1 to 7 in the 14 October Decision.
4. On 6 November 2015, I issued the *Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber concerning “Disclosure of material from Cases 003 and 004 to Case 002”*, in which I amended the restrictions and modalities of disclosure.<sup>5</sup>
5. On 16 May 2016, the ICP filed the *International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002* (“First Request”)<sup>6</sup>, requesting the CIJs to authorise the disclosure in Case 002 of 11 Written Records of Interview (“WRI”) and three Investigative Action Reports (“IAR”) from Case 003.<sup>7</sup>
6. On 17 May 2016, Meas Muth, through his Co-Lawyers (“Defence”), filed *Meas Muth’s Notice of Intent to Respond to the International Co-Prosecutor’s Request to Disclose Case 003 Documents into Case 002 (D100/25) and Request that the Co-Investigating Judges Stay the Issuance of Any Decision on D100/15 Pending Mr. Meas Muth’s Response* (“Notice”), notifying his intent to respond to the First Request and requesting that the CIJs not issue a decision on the First Request until the response had been filed.<sup>8</sup>

<sup>1</sup> Case File No. 004-D193, *International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to Case 002/02 Trial*, 2 May 2014.

<sup>2</sup> Case File No. 004-D193/1, *Decision on the International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to Case 002/02*, 8 May 2014, paras 11 and 17.

<sup>3</sup> 8 May Decision, paras 12 and 17.

<sup>4</sup> Case File No. 004-D193/4, *Decision on Co-Prosecutors’ Urgent Request to Disclose Case 004 Interviews Relevant to 1<sup>st</sup> Segment of Case 002/02 Trial*, 14 October 2014.

<sup>5</sup> Case File No. 004-D273, *Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber concerning “Disclosure of material from Cases 003 and 004 to Case 002”*, 6 November 2015.

<sup>6</sup> Case File No. 003-D100/25, *International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002*, 16 May 2016.

<sup>7</sup> First Request, para. 1.

<sup>8</sup> Case File No. 003-D100/26, *Meas Muth’s Notice of Intent to Respond to the International Co-Prosecutor’s Request to Disclose Case 003 Documents into Case 002 (D100/25) and Request that the*



7. On 25 May 2016, the Meas Muth Defence (“Defence”) filed a response objecting to the First Request (“First Response”).<sup>9</sup>
8. On 9 June 2016, the ICP filed a reply (“Reply”).<sup>10</sup>
9. On 6 July 2016, the ICP filed the *International Co-Prosecutor’s Request to Disclose Case 003 Documents into Case 002* (“Second Request”).<sup>11</sup>
10. On 18 July 2016, the Defence filed a response objecting to the Second Request (“Second Response”).<sup>12</sup>

## II. SUBMISSIONS

### A. First Request

11. In the First Request, the ICP seeks the disclosure into Case 002 of 11 WRIs from Case 003, as identified in Annex A to the First Request, and three IARs from Case 003, as listed in Annex B to the First Request (“First Requested Documents”).<sup>13</sup> Two of the documents sought for disclosure relate to Meas Muth personally (“Meas Muth Statements”).<sup>14</sup>
12. The ICP submits that the First Requested Documents are relevant to the Case 002/02 proceedings and are required to be disclosed because they are statements of individuals proposed as witnesses in Case 002/02, statements of a relative of a proposed Case 002/02 witness, statements of individuals who testified in Case 002/01, they contain potentially exculpatory information, and/or are sought to be admitted into evidence by the ICP.<sup>15</sup> The ICP requests that the First Requested Documents be allowed for use in open court, without the use of pseudonyms.<sup>16</sup>
13. The Defence oppose the First Request in its entirety on the basis that the ICP has failed to demonstrate “exceptional circumstances” under Rule 56(2)(b) that would justify the disclosure.<sup>17</sup>
14. Specifically in relation to the Meas Muth Statements, the Defence argue the ICP has provided “no information, other than general references to the Case 002

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*Co-Investigating Judges Stay the Issuance of any Decision on D100/25 Pending Mr. Meas Muth’s Response*, 17 May 2016.

<sup>9</sup> Case File No. 003-D100/27, *Meas Muth’s Response to the International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002*, 25 May 2016.

<sup>10</sup> Case File No. 003-D100/28, *International Co-Prosecutor’s Reply To Meas Muth’s Response to Requested Disclosure of Documents*, 9 June 2016.

<sup>11</sup> Case File No. 003-D100/29, *International Co-Prosecutor’s Request to Disclose Case 003 Documents into Case 002*, 6 July 2016.

<sup>12</sup> Case File No. 003-D100/30, *Meas Muth’s Response to the International Co-Prosecutor’s Request to Disclose Case 003 Documents into Case 002*, 18 July 2016.

<sup>13</sup> First Request, para. 1.

<sup>14</sup> See Items 2 and 3 of Annex B to the Request.

<sup>15</sup> First Request, paras 1 and 2, and Annexes A and B, columns titled “Reasons for disclosure”.

<sup>16</sup> First Request, para. 4.

<sup>17</sup> First Response, paras 12, 15, 17, 19, and 22.



Closing order” as to why this information is relevant.<sup>18</sup> Moreover, the Defence explain that the CIJs would violate their obligation to protect Meas Muth’s fair trial rights were they to permit Case 002/02 parties or the Trial Chamber to have access to the Meas Muth Statements, for probable use against Meas Muth, when he has expressly invoked his right to remain silent in Case 003.<sup>19</sup>

15. The Defence also assert that the ICP provides no specific information as to why the Case 003 statements of witness Ung Ren, who testified in Case 002/01, must be disclosed in Case 002/02, and has not indicated whether Ung Ren is a proposed Case 002/02 witness.<sup>20</sup> The Defence also allege the ICP has not sufficiently described or identified the potentially exculpatory nature of the information contained in the First Requested Documents.<sup>21</sup>
16. The Defence finally argue that the First Request does not demonstrate how an alleged familial relationship between a witness in Case 003 and a witness in Case 002/02 constitutes an ‘exceptional circumstance’ justifying disclosure.<sup>22</sup>
17. In the alternative, should the CIJs be inclined to disclose the First Requested Documents, the Defence request that their disclosure be authorised with the most stringent restrictions and that they be assigned Category C. The Defence explain that permitting the use of the First Requested Documents in open court and without pseudonyms, as the ICP proposes, would jeopardise the ongoing investigation into these allegations and may put witnesses at risk.<sup>23</sup>
18. In the Reply, the ICP submits that Meas Muth lacks standing to make submissions regarding disclosure into Case 002/02, citing the Pre-Trial Chamber (“PTC”) finding that non-parties to Case 002 do not have standing to challenge the CIJs’ decisions regarding disclosure from Cases 003 and 004 into Case 002. The ICP submits that this ruling from the PTC is dispositive here, and that the Defence do not make sufficient arguments in relation to Meas Muth’s “fair trial rights” to challenge the disclosure of the First Requested Documents.<sup>24</sup> In addition, the ICP submits that the Defence misunderstand the relevant law by applying Internal Rule 56(2). The ICP argues that he only needs to demonstrate the “*prima facie* relevance” to Case 002 of the First Requested Documents, which he has done.<sup>25</sup>
19. The ICP states that the Meas Muth Statements are sought for disclosure in part because Meas Muth has been proposed to testify as a witness in Case 002/02 by the Nuon Chea Defence. If Meas Muth is summonsed, he may choose to invoke his right to remain silent. However, regardless of whether he ultimately testifies, he does not have a right to prohibit statements that he has already made from being disclosed onto Case File 002.<sup>26</sup>

<sup>18</sup> First Response, paras 8 and 9.

<sup>19</sup> First Response, para. 12.

<sup>20</sup> First Response, paras 16 and 17.

<sup>21</sup> First Response, paras 18 and 19.

<sup>22</sup> First Response, paras 20 to 22.

<sup>23</sup> First Response, paras 23 to 26.

<sup>24</sup> Reply, paras 2, and 4 to 7.

<sup>25</sup> Reply, paras 8 to 13.

<sup>26</sup> Reply, paras 15 and 16.



20. Finally, the ICP submits that the Defence fail to justify heightened restrictions on the disclosure of the First Requested Documents. The Defence give no reason to believe that the investigation would be jeopardised or that witnesses, who have not requested protective measures, would be put at risk by the disclosure. Moreover, there is a strong presumption that trials are to be public at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).<sup>27</sup>

### B. Second Request

21. In the Second Request, the ICP seeks leave from the CIJs to disclose into Case 002 three Case 003 WRIs and one civil party document, as identified in Annex A to the Second Request (“Second Requested Documents”).<sup>28</sup>
22. The ICP submits that the Second Requested Documents are relevant to the Case 002/02 proceedings and are required to be disclosed because they are statement of a civil party who has testified in Case 002 and has been selected to testify in upcoming regulation of marriages segment in Case 002, contain potentially exculpatory information, and/or are sought to be admitted into evidence by the ICP.<sup>29</sup>
23. The Defence oppose the disclosure of the Second Requested Documents into Case 002.<sup>30</sup> The Defence argue that only CIJs, and not the Trial Chamber, can order the disclosure of evidence from Case 003 into Case 002, as the CIJs are obligated to guarantee the confidentiality of the Case 003 judicial investigation and preserve Meas Muth’s rights and interests.<sup>31</sup>
24. Moreover, the Defence submits that assessing a disclosure request using a *prima facie* standard and considering the interests and obligations of the ICP and the Case 002 parties is the wrong approach under Internal Rule 56. The Defence argue that permitting the use of the Second Requested Documents in open court and without pseudonyms, as the ICP proposes, would jeopardise the confidentiality of the ongoing investigation and Meas Muth’s right to be presumed innocent until proven guilty.<sup>32</sup>
25. The Defence finally argue that the Second Request does not demonstrate ‘exceptional circumstances’ justifying disclosure, with regard to each of the Second Requested Documents.<sup>33</sup>
26. In the alternative, should the CIJs be inclined to disclose the Second Requested Documents, the Defence request that their disclosure be authorised with the most stringent restrictions and that they be assigned Category C.<sup>34</sup>

<sup>27</sup> Reply, paras 25 to 29.

<sup>28</sup> Second Request, para. 1.

<sup>29</sup> Second Request, para 1, and Annex A, column titled “Reasons for disclosure”.

<sup>30</sup> Second Response, para. 5.

<sup>31</sup> Second Response, paras 8 to 10.

<sup>32</sup> Second Response, paras 11 to 14.

<sup>33</sup> Second Response, paras 15 to 23.

<sup>34</sup> Second Response, paras 24 to 26.



### III. DISCUSSION

#### A. Meas Muth's standing to make submissions on disclosure requests

27. First of all, before embarking upon the question of standing, and given the fact that sometimes reference is made by the Defence across cases to a perceived rule that only exculpatory evidence<sup>35</sup> may be disclosed into other cases, it is important to clarify that the use of the term “disclosure” in the context of one section of the ECCC providing case-related information to another judicial section is confusing and actually a misnomer in the context of the ECCC. It has nothing to do with the common law concept of disclosure *between parties* in adversarial proceedings, where such restrictions may make systemic sense. Cambodia is a civil law inquisitorial system and the ECCC as a Cambodian court partakes of this nature of the Cambodian law. It is in essence a question of providing access to a case file to which the parties and the other judicial sections would otherwise not be privy. In this sense, the authorisation given by the CIJ – after considering the impact on the ongoing investigations – that certain documents may be supplied to other parties in other cases, be it in the trial or appeal stage, or indeed in other investigations through transposals as evidence to another investigation case file, is guided solely by the twin aims of material truth-finding, regardless of whether the evidence is incriminatory or exculpatory, and of ensuring that the demands of judicial economy are met. That said, the term “disclosure” has acquired a settled status in this context in the practice of the ECCC and it would seem churlish to attempt to amend the terminology at this late stage.
28. Meas Muth has no standing to make submissions on the admissibility of evidence in Case 002. He does not, however, purport to make submissions on the admissibility of evidence in Case 002 in his First and Second Responses, but rather, on the impact on the Case 003 investigation, to which he is now a party, as a result of disclosing the First and Second Requested Documents into Case 002.<sup>36</sup> A charged person's standing to make submissions on the disclosure of documents from the investigation to which they are a party was recently confirmed by the Pre-Trial Chamber.<sup>37</sup> These disclosure requests are requests in Case 003 and Meas Muth as a charged person in Case 003 has standing to be heard on them.

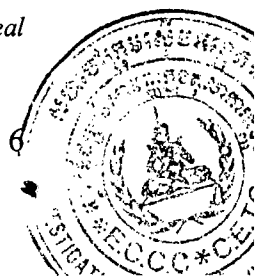
#### B. Merits of Meas Muth's Responses

29. In assessing the merits of Meas Muth's submissions, I note at the outset that a party cannot comment on the CIJs' conduct of the investigation in the purely institutional or organisational sense without alleging a specific violation of rights, for which the reasoning threshold will be very high: the internal oversight of the OCIJ's activities is under the sole control of the CIJs and, as a matter of principle, is not subject to external review by the parties within the context of the judicial proceedings related to the investigation as such. Remedies for any perceived misconduct of the CIJs follow a different path.

<sup>35</sup> The Internal Rules in Rule 53(2) and (4), for example, put a duty on the OCP to inform the *CIJs* of potentially exculpatory material in the context of the filing of an introductory submission. The investigations are conducted with the aim of ascertaining the truth, with equal weight given to incriminating and exculpatory facts (Rule 55(5)). The same aim applies to the trial stage.

<sup>36</sup> First Request, para. 25; Second Request, paras 17-18, 25-26.

<sup>37</sup> Case File No. 004-D309/6, [REDACTED] *Decision on International Co-Prosecutor's appeal Concerning Testimony at Trial in Closed Session*, 20 July 2016 (“Closed Session Ruling”), para. 17.



30. The Defence assert that Meas Muth has the right to make submissions on disclosure by virtue of Internal Rule 21, in particular his right to the presumption of innocence, and Internal Rule 56.<sup>38</sup> The assertion regarding the presumption of innocence is a mischaracterisation. In reality, Meas Muth complains about an impact on his reputation and his right to privacy. This complaint is without merit. The PTC recently held in Case 004 that Internal Rule 21 does not confer an inherent *right* to integrity in the conduct of the investigation, a confidential investigation, or the protection of his reputation.<sup>39</sup> I consider this matter settled and will not entertain any further argument along those lines.
31. Meas Muth's presumed innocence is not affected any more by the disclosure into Case 002 than by the investigation in Case 003 itself. He is not on trial in Case 002 but the information about him may be relevant evidence for the truth-finding of the Trial Chamber with regard to the two accused, and may in fact prove to be of an exculpatory nature in the view of the Case 002 Defence. Suffice it to say that it stands to reason that Meas Muth would welcome the same provision of evidence from another case if he was on trial and the evidence might be useful to him. That such evidence may not be helpful in the individual case is neither here nor there. That evidential overlap is a common occurrence in separate trials of persons who might equally be joint defendants in a more complex trial. The fact that the Co-Prosecutors chose not to, or were unable to file a joint introductory submission for all accused and charged persons in Cases 001 to 003 at the same time is a mere organisational factor and does not change the picture. That the right to the presumption of innocence does not prohibit the disclosure of information about, including evidence from, a case, or even statements confirming the existence of reasonable suspicion of guilt, or predicting the probable outcome of a trial, has been established in international human rights jurisprudence.<sup>40</sup> The investigation as such does not pronounce on guilt or innocence and even if it were to end in an indictment, that would mean no more than an expression of the CIJ's view that the charged person has to answer a *prima facie* case, because the indictment standard is precisely *not* that of "beyond reasonable doubt" or "*intime conviction*". Meas Muth's innocence would be presumed during the entire proceedings until the final judgment.
32. The disclosure of Case 003 materials is also not regulated by Internal Rule 56(2), which requires that the CIJs may grant limited access to the judicial investigation to the media or other non-parties, *inter alia*, after seeking observations from the parties to the proceedings. That rule is relevant only to access by the press or the public to the investigation.<sup>41</sup> In dismissing an appeal of my decisions granting disclosure in Case 004, the PTC noted that the ECCC framework, particularly Internal Rule 56, gives the CIJs broad discretion to handle confidentiality issues

<sup>38</sup> First Response, paras 4-5; Second Response, paras 6-7, 14.

<sup>39</sup> Case File No. 004-D284/1/4, [REDACTED] *Decision on Appeal Against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23.

<sup>40</sup> See for example, European Court of Human Rights ("ECtHR"), *Nölkenbockhoff v. Germany*, 25 August 1987, para. 39; ECtHR, *Englert v. Germany*, 25 August 1987, para. 39; ECtHR, *Lutz v. Germany*, 25 August 1987, para. 62; ECtHR, *Marziano v. Italy*, 28 November 2002, para. 31).

<sup>41</sup> Case File No. 004-D284, *Order on Ao An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 18 December 2015, para. 20; Case File No. 004-D193/89, *Consolidated Decision on Yim Tith's Requests for Reconsideration of Disclosure (D193/76 & D193/77) and the International Co-Prosecutor's Request for Disclosure (D193/72)*, 5 July 2016, para. 61.



and disclose material from the judicial investigations.<sup>42</sup> I do not consider Internal Rule 56(2)(b) to govern disclosure between cases and the point is thus irrelevant for this decision.

33. Disclosure is a concept distinct from granting publicity; in other words public access to case-related information. The former applies to the provision of material between parties in litigation for the purposes of ascertaining the truth. The latter is directed at keeping the public informed about aspects of the investigation through the media. That the public may become aware of material from Case 003 disclosed into Case 002 through the public hearings in the trial is an inevitable collateral consequence of such disclosure depending on whether any confidentiality restrictions attach to the disclosure, but publicity is not the purpose for which the disclosure was granted. In fact, the restrictions and modalities I regularly impose on disclosure explicitly prohibit the *direct* dissemination of the disclosed material to the public.
34. Internal Rule 56 gives the CIJs a wide discretion regarding the confidentiality in general, which includes the disclosure regime, as the PTC has repeatedly held.<sup>43</sup> Internal Rule 56(2) is, however, irrelevant for the disclosure regime; it regulates the provision of information to “keep the public informed”. The second exception grants “access to the media or other non-parties” to part of the investigation. Read in the context of the remainder of Internal Rule 56, the “non-parties” referred to in that exception envisage persons or organisations for whom access to the investigation is granted for reasons that are not case-related, such as academic researchers, civil society organisations, etc. This should not be conflated with disclosure. Indeed, the rule does not even exhaustively regulate publicity, either: Internal Rule 66(1), for example, which requires the CIJs to make public the notification of the conclusion of the judicial investigation, is another instance in which information about the investigation *must* actually be publicised.

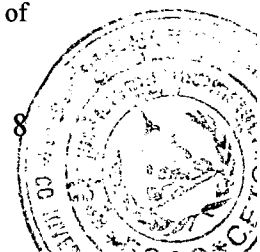
### C. Standard for disclosure of material from investigations into other proceedings

35. The Internal Rules do not specifically regulate the disclosure of material from the investigation to the Trial Chamber. Nor is the practice regulated in Cambodian criminal procedure. The practice and procedure of the international criminal tribunals is not helpful in this instance, either, given the significant differences in the mainly common law-influenced procedure applied in those tribunals, and the ECCC which is part of the civil law Cambodian system and employs the institution of the investigating judge, a figure not found in any other international tribunal, including the Special Tribunal for Lebanon. Notwithstanding, it is fair to say that disclosure between separate criminal proceedings concerning different accused in, for example, the International Criminal Tribunal for the Former Yugoslavia has been authorised in the past subject to protective measures being put in place for the relevant witness.<sup>44</sup>

<sup>42</sup> Case File No. 004-D284/1/4, [REDACTED] *Decision on Appeal Against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23; Closed Session Ruling, para. 38.

<sup>43</sup> *Ibid.*

<sup>44</sup> *See for example, Prosecutor v. Blaškić*, Trial Chamber (IT-95-14), Order for the Disclosure of Evidence, 19 February 1999, p. 2.





36. The Trial Chamber of the ECCC has acknowledged that statements taken by the OCIJ in the Case 003 and 004 investigations may be relevant to Case 002, and has directed the ICP to seek leave from the CIJs to disclose these statements to the Trial Chamber. The Trial Chamber will then decide whether the evidence is to be admitted in the trial.<sup>45</sup> Given that the parties and the Trial Chamber in Case 002 do not have access to Case Files 003 and 004, the Co-Prosecutors may need to disclose material from Cases 003 and 004, both inculpatory and exculpatory, that is relevant to the Case 002/02 trial.<sup>46</sup>
37. Once authorised for disclosure by the CIJs, the Trial Chamber controls the admission of the documents into the trial,<sup>47</sup> taking into consideration the restrictions and modalities of disclosure requested by the CIJs. These restrictions and modalities can, in practical terms, acquire a binding effect on the disclosure and presentation of evidence before the Trial Chamber, given that – as recently confirmed by the PTC – it is the CIJs' sole prerogative to revoke a disclosure order if they consider that a failure to follow the restrictions and modalities will have a detrimental impact on the confidentiality and integrity of the judicial investigation.<sup>48</sup>
38. The disclosure practice in the ECCC to date has followed this procedure, and has done so consonant with the principles outlined below.
39. It is nonetheless useful in this context to examine how disclosure is regulated in the French<sup>49</sup> system on which the Cambodian Code of Criminal Procedure is modelled.
40. The Cour de Cassation has previously found that the confidentiality of the investigation does not prevent the disclosure of materials from a judicial investigation into public criminal proceedings in another case provided the information enlightens the judge and contributes to the ascertainment of the truth.<sup>50</sup> Further, the investigating judge must accommodate the adversarial participation of the parties and subject the matter to debate before determining a request to disclose the materials from the investigation.<sup>51</sup> The Cour de Cassation has also confirmed that neither Article 11 of the French Code of Criminal Procedure (which states that except where the law provides otherwise and subject to the defence rights, the preliminary and judicial investigation are secret<sup>52</sup>), nor other articles of the same Code prohibit the disclosure in criminal proceedings of

<sup>45</sup> Case File No. 002-E127/7/1, *Information concerning Case 003 and Case 004 Witness Statements that may be relevant to Case 002*, 16 August 2013, para. 2.

<sup>46</sup> Case 002/01-F2/4/2, *Decision on Part of Nuon Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01*, 16 March 2015, para. 17.

<sup>47</sup> Case File No. 002-E363/3, *Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutor's Disclosure Obligations*, 22 October 2015, para. 32.

<sup>48</sup> Closed Session Ruling, paras 28, 30.

<sup>49</sup> While German law is, due to systemic differences, not strictly relevant for the Cambodian context, it is nonetheless of supportive value to point out that German constitutional law does sanction the disclosure of case-related information as well; see the judgments of the German Federal Constitutional Court in *Neue Juristische Wochenschrift (NJW)* 2014, pp. 1581 – 1583, and *NJW* 2016, pp. 626 – 629. The German Code of Criminal Procedure explicitly regulates the issue in its § 474 (for an English translation see [www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p2761](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2761)).

<sup>50</sup> Cass. Crim., 16 March 1981, no. 80-95.343, para. 6.

<sup>51</sup> *Ibid.*, para. 8

<sup>52</sup> French Code of Criminal Procedure Article 11 para. 1.



evidence obtained in another proceeding which may enlighten the judge and contribute to the ascertainment of the truth.<sup>53</sup>

41. The Cour de Cassation has consistently applied these findings in subsequent decisions, thus establishing the following key principles regarding the disclosure of the investigation file from one case into another judicial proceeding: (i) there is no legal provision that prohibits the use of evidence obtained in an investigation into another criminal proceeding that may contribute to the ascertainment of the truth, on the condition that the disclosure is of an adversarial nature and the documents are subjected to discussion by the parties; and (ii) the confidentiality of the investigation does not obstruct the disclosure or use of evidence obtained in the investigation in another criminal proceeding that may contribute to the ascertainment of the truth in that proceeding.<sup>54</sup>
42. The jurisprudence does not require that disclosure be permitted only in exceptional cases. Indeed the bar for disclosure is set low – the evidence need only contribute to the “ascertainment of the truth”, a principle also subscribed to by the law before the ECCC in Internal Rules 85(1), 87(4) and 91(3).

- i. The test for disclosure

43. When seised of requests for disclosure of material in Case 002, the CIJs’ primary responsibility is to ensure that disclosure does not jeopardise the confidentiality and integrity of the judicial investigations. The CIJs may also assess the *prima facie* relevance of the requested material to the trial proceedings in Case 002. To that extent, the CIJs may reject disclosure requests that present such risk or appear to be *prima facie* manifestly irrelevant.
44. The CIJs cannot test for relevance above this standard for two reasons. Firstly, to require a higher standard of relevance would result in an incongruous situation whereby the Case 003 parties are able to make submissions on relevance, while Case 002 parties cannot due to their lack of standing in the Case 003 investigation. Secondly, it would require the CIJs to understand the Trial Chamber’s thinking or the parties’ evidentiary strategy, which the CIJs are not in a position to do. The relevance threshold is very low, and unless the request is blatantly irrelevant (in which case I would give the ICP notice informally to give the ICP a chance to rectify the request), the *prima facie* relevance test will be met. A notification that a witness is proposed to testify in Case 002 is sufficient for the purposes of determining *prima facie* relevance, notwithstanding the fact that the Trial Chamber may, for its own reasons, decide not to hear the witness after all.
45. Further, the disclosure must not compromise the integrity of the judicial investigation. Restrictions and modalities, as set out in my memorandum to the Trial Chamber of 6 November 2015, are applied to the disclosure in order to preserve the confidentiality and integrity of the investigation.<sup>55</sup> I repeat that in the event those restrictions and modalities are not followed, it is the CIJs’ sole

<sup>53</sup> Cass. Crim., 16 March 1981, no. 80-95.343, para. 6.

<sup>54</sup> Cass. Crim., 9 December 1992, no. 92-80.429, para. 7. *See also*: Cass. Crim., 29 September 1992, no. 92-83.881, para. 20; Cass. Crim., 2 October 1981, no. 80-90.893, para. 26; Cass. Crim., 11 March 1964, no. 63-91.109, paras 9-10.

<sup>55</sup> Case File No. 003-D186, *Memorandum from ICIJ to Trial Chamber and Supreme Court Chamber Concerning “Disclosure of Material from Cases 003 and 004 to Case 002”*, 6 November 2015.



prerogative to revoke the disclosure authorisation and thus prevent the actual use of the material as evidence at trial.<sup>56</sup>

46. The confidentiality criteria are not concerned with protecting the reputations of charged persons. As the PTC confirmed, charged persons have no such right.<sup>57</sup> The confidentiality element of the test and the decision by the CIJ based on it is not reviewable by the Trial Chamber; the Trial Chamber will have to rely upon the CIJs' decision on the classification of witnesses.<sup>58</sup>

ii. Rights of the Case 002 parties

47. The CIJs' responsibilities are confined to the investigative phase of the proceedings and safeguarding the confidentiality and integrity of the investigation is their primary concern.<sup>59</sup> Therefore, in deciding disclosure requests the CIJs bear in mind mainly the rights of the charged persons in Cases 003 and 004. However, it is inevitable that those decisions will impact upon the trial of Case 002 and this impact cannot simply be overlooked. While the CIJ's are certainly not as such involved in the actual exercise of the Trial Chamber's discretion related to holding *in camera* trial hearings,<sup>60</sup> they are entitled to recognise the overall importance of the *general principle* of a public trial when determining the nature of restrictions based on the exigencies of the confidentiality of the investigations<sup>61</sup>. Accordingly, mindful of the general importance of a public trial, I consider it appropriate to be as accommodating in my disclosure decisions as I can, provided that the disclosure does neither infringe the rights of the persons charged in Cases 003 or 004, nor the integrity of the investigation. Conversely, if and when I order the assignment of material to the protective measures under Categories A to C, then the default conclusion by the Parties should be that I see these measures as strictly necessary at the time of their imposition.

<sup>56</sup> Closed Session Ruling, paras 28, 30. In this context it should be pointed out as a matter of principle that the Pre-Trial Chamber's extensive reference in paragraphs 30 and 31 of its decision to the use of the term "request" and similar polite language between judicial colleagues, and the Trial Chamber's prerogative to "properly balance[...] the right to a public hearing with the need to maintain confidentiality of ongoing investigations" should not detract from the fact that the CIJs retain the sole control over the use of the evidence from Cases 003 and 004 even at trial if the conditions imposed during disclosure are not honored and a rescission of the disclosure becomes necessary in order to protect the investigations in Cases 003 and 004 in their respective state at the time of the breach. Firstly, the terminology is a mere recognition of the fact that the CIJs cannot "instruct" or "order" the Trial Chamber, but, secondly, it is in no sense meant to acknowledge any form of supervisory role of the Trial Chamber vis-à-vis the CIJs' decision-making powers regarding disclosure conditions and I do not understand the Pre-Trial Chamber's ruling to suggest otherwise, despite the potential for construing in particular paragraph 31 as saying that the balancing test is only for the Trial Chamber to make *and* that this would in and of itself provide a procedural vehicle to override the CIJs' disclosure classification once disclosure has been made.

<sup>57</sup> Case File No. 004-D284/1/4, *Decision on Appeal Against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23.

<sup>58</sup> Case File No. 002-E319/35/5, *Trial Chamber Memorandum entitled "Ruling on Closed Session for Witnesses 2-TCW-894 and 2-TCW-938"*, 23 February 2016, paras 5-6.

<sup>59</sup> Article 23 new of the ECCC Law; Case File No. 004-D309/6, [REDACTED] *Decision on International Co-Prosecutor's Appeal Concerning Testimony at Trial in Closed Session*, 20 July 2016, para. 35.

<sup>60</sup> Closed Session Ruling, para. 35.

<sup>61</sup> I do not understand paragraph 48 of the Closed Session Ruling as indicating that such general considerations should not be entertained by the CIJs at all as long as it is understood that the balancing exercise of the CIJs when determining disclosure conditions does not replace the one to be performed by the Trial Chamber regarding the modalities of testimony at trial.



48. Disclosure into Case 002 serves two key purposes: to assist in ascertaining the truth in Case 002, and to ensure that all proceedings before the ECCC are brought to a conclusion within a reasonable time. If disclosure from Cases 003 and 004 were not provided at trial stage, this could well result in requests to admit new evidence on appeal pursuant to Internal Rule 108(7), thus affecting the length of the proceedings, judicial economy and the preservation of resources at the ECCC in the long run.
49. Mindful of that approach, I have developed and applied the categories of disclosure and have only sparingly to date assigned Case 003 witnesses to Category C when testifying in Case 002; of the approximately 285 WRIs and attachments disclosed to date from Case 003 into Case 002, I have assigned only one witness to Category C. If the witnesses relevant to the First Requested Documents and the Second Requested Documents were all required to testify in closed session as Category C witnesses as the Defence opine, a consistent treatment of other similar witnesses would result in a very large number of witnesses being required to testify in closed session.

#### **D. Disclosure of the First Requested Documents and the Second Requested Documents**

50. As to the First Requested Documents and the Second Requested Documents, I am satisfied of their *prima facie* relevance to the Case 002 proceedings based on the information provided by the ICP in the First and Second Requests, and their disclosure will not jeopardise the confidentiality and integrity of the ongoing judicial investigation.
51. The Meas Muth Statements are *prima facie* relevant to the Case 002 proceedings given Meas Muth is proposed to testify as a witness in Case 002.<sup>62</sup>
52. Meas Muth is not precluded from exercising his right to remain silent when called to testify in Case 002/02. That is not a matter in which I can or need intervene. In any event, the Meas Muth Statements do not reveal any information beyond what is already publicly available on the ECCC website, i.e. that Meas Muth was charged in person when he appeared before me in December 2015 pursuant to a summons in Case 003. Meas Muth is not on trial in Case 002 and any pronouncements the Trial Chamber may eventually make on the evidence related to him with regard to Nuon Chea and Khieu Samphan are irrelevant to any potential future trial of Meas Muth himself, in which the Defence would be able, under general principles of evidence, to raise challenges they were unable to mount due to their absence in Case 002. I am thus not persuaded that the disclosure of this information without identity-protection measures will affect Meas Muth's rights.
53. Both the First Requested Documents and the Second Requested Documents may be disclosed and are assigned the witness Category A.
54. Regarding the ICP's request that all evidence be permitted for use in open court, without pseudonyms,<sup>63</sup> only the following witnesses do not require measures to protect their identity or the contents of their evidence given that they have

<sup>62</sup> Reply, paras 15 and 16.

<sup>63</sup> First Request, para. 4.



previously provided statements in Case 002 that are on that Case File, and/or have previously testified in Case 002 without a pseudonym:

- a. [REDACTED];<sup>64</sup>
- b. [REDACTED];<sup>65</sup>
- c. [REDACTED];<sup>66</sup>
- d. [REDACTED];<sup>67</sup>
- e. [REDACTED];<sup>68</sup>
- f. [REDACTED].<sup>69</sup>

55. The ICP has not made any arguments nor provided supporting information as to why pseudonyms are not required in respect of the remaining witnesses from the First and Second Requested Documents.
56. This decision is filed in English, with a Khmer version to follow, due to the urgency of the matter and the logistical constraints of the translation section, which even after three weeks from when the final draft of the English version was sent for translation estimates the Khmer translation will only be available sometime early next week.

**FOR THE FOREGOING REASONS, I:**

57. **AUTHORISE** disclosure of all the First Requested Documents and the Second Requested Documents to the Trial Chamber and the Parties in Case 002/02. Owing to the confidential and sensitive nature of the ongoing investigations in Case 003, this disclosure is authorised with the following modalities and restrictions:
- (a) that all material provided from Case 003 be treated as confidential;
  - (b) in the event that the material provided pursuant to this decision is admitted as evidence in Case 002/02, it shall be treated as confidential;
  - (c) no materials provided pursuant to this decision shall be disseminated beyond those persons explicitly identified herein;
  - (d) in the event that the witnesses or civil party applicants whose documents are authorised for disclosure are called to testify, they can do so in open sessions of the court provided their names and other identifying information are kept confidential, apart from the witnesses [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] for whom no measures are required to protect their identity or the contents of their evidence;
  - (e) no material provided shall be disseminated to the public, in any format or via any form of media whatsoever, beyond the evidence presented in open sessions of the court;

<sup>64</sup> Annex A to the First Request, item 4.

<sup>65</sup> Annex A to the First Request, item 8.

<sup>66</sup> Annexes A (item 11) and B (item 1) to the First Request.

<sup>67</sup> Annex B to the First Request, item 1.

<sup>68</sup> Annex B to the First Request, items 2 and 3.

<sup>69</sup> Annex A to the Second Request, item 2.



- (f) any party, counsel, or other individual who reads from, cites, or otherwise uses any of the documents disclosed shall identify the witnesses or civil party applicants only by their assigned pseudonym for Case 002/02 and use descriptions reasonably calculated to avoid identifying the witnesses by other information;
- (g) the records of the authorised interviews shall be provided to the Defence Counsel of both the Accused, Standby Counsel of Khieu Samphan ("Standby Counsel") and Civil Party Lead Co-Lawyers through electronic copies;
- (h) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall disclose the material provided pursuant to this decision only to those members of their teams that are officially retained under Internal Rules 22(5) and 12 *ter* (4), respectively, along with their officially assigned interns;
- (i) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers are not authorised to print, reproduce, photo-copy, scan, or otherwise make duplicate copies of the originals provided to them other than for the internal use of the material by those members of their respective teams who are instructed or authorised to have access to confidential material;
- (j) the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall maintain a written record, in a manner that can be reviewed, of the copies that they print, reproduce, photo-copy, scan, or otherwise duplicate for their internal use; and
- (k) should any member of the Parties or the Trial Chamber in Case 002/02 learn of an unauthorised copy of the documents authorised for disclosure, he/ she shall immediately take all measures to secure and return the copy to the CIJs; and
- (l) should any member of the Parties or the Trial Chamber in Case 002/02 learn of a breach of these conditions and restrictions, he/ she shall report such breach to the CIJs.


58. **CLARIFY** that for the purposes of this decision, "public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Trial Chamber, the staff of the Court Management Section, the Co-Prosecutors and his representatives, the Accused, any employees who have been officially retained under Internal Rules 22(5) and 12 *ter* (4) authorised by the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers, respectively, to have access to the confidential material. "The public" also includes, without limitation, members of the Accused's family, friends, and associates; suspects, defence counsel, and members of their respective staff in other cases or proceedings before the ECCC; the media; and journalists.

59. **STATE** that the foregoing conditions and restrictions remain in place until such time as they are varied by an explicit order to that effect by the CIJs or the investigations in Case 003 are closed.



60. **REQUEST** the Trial Chamber to ensure the compliance by all Parties with this Decision.

Dated 16 August 2016, Phnom Penh



**Judge Michael Bohlander**  
**សម្រាប់ក្រុមហ៊ុនអន្តរជាតិ**

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