



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ  
Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Royaume du Cambodge  
Nation Religion Roi

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

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Office of the Co-Investigating Judges  
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**DECISION ON MEAS MUTH'S URGENT REQUEST FOR THE  
RECRUITMENT OF TWO ADDITIONAL INTERNATIONAL  
LEGAL CONSULTANTS**

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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 3 March 2015, my predecessor issued the *Decision to Charge Meas Muth in Absentia*. Through this, my predecessor granted Meas Muth the right to access the Case File and to participate in the judicial investigation.<sup>1</sup>
3. On 14 December 2015, I held an initial appearance with Meas Muth during which I charged Meas Muth with additional crimes, including genocide, and rescinded certain charges.<sup>2</sup>
4. On 31 May 2016, Meas Muth’s Defence (“Defence”) sent a letter to the Defence Support Section (“DSS”) requesting the recruitment of two additional international legal consultants for the remainder of the pre-trial proceedings.<sup>3</sup>
5. On 1 June 2016, the DSS rejected the Defence’s request.<sup>4</sup>
6. On 8 June 2016, the Defence filed *Meas Muth’s Urgent Ex Parte Request for the Co-Investigating Judges to Direct the Defence Support Section to Permit the Defence to Recruit Two Additional International Legal Consultants for the Pre-Trial Stage of Proceedings* (“Request”).<sup>5</sup>

## II. SUBMISSIONS

7. The Defence submit that the DSS’ refusal to permit the Defence to hire additional staff, based solely on budgetary constraints, prevents Meas Muth from enjoying his fair trial rights to adequate facilities to prepare his defence, to equal treatment, and to equality of arms.<sup>6</sup> The Defence therefore request the CIJs to intervene on the matter by directing the DSS to allow the recruitment of two additional consultants.<sup>7</sup>
8. The Defence team consists of two Co-Lawyers, one case manager, two international senior legal consultants, and one national senior legal consultant. The Defence submit that the national staff are fully engaged with the review of audio recordings and documentary evidence in Khmer, in addition to the review of the translation of Defence submissions before they are filed.<sup>8</sup>
9. The international Co-Lawyer and the international staff, on the other hand, are engaged in the review of evidence in the English language and on the building of the Defence’s Case Map. In addition, they are responsible for the filing of Defence motions and for the review of the jurisprudence of the Trial Chamber in Cases 001 and 002. The Defence submit that the review of the evidence on the Case File must be completed before the end of the investigation to allow

<sup>1</sup> Case File No. 003-D128, *Decision to Charge Meas Muth in Absentia*, 3 March 2015, para. 72.

<sup>2</sup> Case File No. 003-D174, *Written Record of Initial Appearance*, 14 December 2015.

<sup>3</sup> Request, para. 8.

<sup>4</sup> Request, para. 9.

<sup>5</sup> Case File No. 003-D200, *Meas Muth’s Urgent Ex Parte Request for the Co-Investigating Judges to Direct the Defence Support Section to Permit the Defence to Recruit Two Additional International Legal Consultants for the Pre-Trial Stage of Proceedings*, 8 June 2016.

<sup>6</sup> Request, paras 18-26.

<sup>7</sup> Request, p. 1. and para. 10.

<sup>8</sup> Request, paras 12-13.



for the timely filing of any investigative requests and requests for annulment that may be necessary.<sup>9</sup>

10. The Defence submit that, in addition to reviewing the evidence on the Case File, they need to prepare “*vitaly important*” submissions on the applicable law in 1975-1979, because, they aver, I have indicated that I do not consider myself bound by decisions of the Pre-Trial Chamber (“PTC”) on legal matters. Specifically, the Defence submit that they need to prepare submissions on:
  - a. The impact of the statute of limitations on the applicability of the Geneva conventions;
  - b. The impact of the statute of limitations on the applicability of national crimes;
  - c. The applicability of command responsibility;
  - d. Whether crimes against humanity needed to be carried out pursuant to a State or organisational policy; and
  - e. Whether crimes against humanity required that the attack, constituting part of the *chapeau* elements, be committed on discriminatory grounds.<sup>10</sup>
11. According to the Defence, they do not possess the resources to prepare these submissions without setting aside the time-sensitive review of the evidence on the Case File.<sup>11</sup>
12. Finally, the Defence submit that in addition to the tasks described above, they must continue to research and prepare for an eventual appeal against the closing order on relevant jurisdictional issues.<sup>12</sup>

### III. DISCUSSION

#### A. The Defence’s request for additional resources

##### i. Meas Muth’s right to adequate facilities

13. The Defence submit that they are fully engaged with the review of the evidence on the Case File, and that they do not possess the resources to “*to research and prepare vitaly important submissions concerning the applicable law without putting aside its time-sensitive work with the material on the Case File.*”<sup>13</sup> They also submit that, already at this stage, they must research and prepare for “*an eventual appeal against the Closing Order on any relevant jurisdictional issues.*”<sup>14</sup>
14. As a general remark, while the Defence is free to make submissions on the applicable law, submissions on the issues identified in the Request are neither vital nor essential in the present circumstances. In application of the principle *iura novit curia*, which is particularly relevant in civil law systems, the CIJs know the applicable law and do not need, unless specifically requested, the

<sup>9</sup> Request, paras 14-15.

<sup>10</sup> Request, para. 16.

<sup>11</sup> *Id.*

<sup>12</sup> Request, para. 17.

<sup>13</sup> Request, para. 16

<sup>14</sup> Request, para. 17.



parties' assistance in this regard. The Defence will be able to make legal submissions in response to the final submissions that the OCP will file pursuant to Internal Rule 66(5). If they disagree with the CIJs' application of the law, they may appeal the closing order. Challenges to the applicability of crimes and modes of liability have been considered jurisdictional and hence admissible by the Pre-Trial Chamber ("PTC").<sup>15</sup>

15. The issues identified by the Defence are not controversial at the ECCC and I can inform the Defence already at this stage of the position I will take on these matters:

- a. "*Whether grave breaches of the Geneva Convention may be applied without violating the statute of limitations*": In Case 002, the PTC stated that the Geneva Conventions, which are applicable law under Article 6 of the ECCC Law, exclude the applicability of the statute of limitations.<sup>16</sup> The Trial Chamber agreed with the PTC.<sup>17</sup> I agree with the PTC and Trial Chamber's conclusion on this issue, albeit for different reasons. The Geneva Conventions themselves do not state that the statute of limitations does not apply to war crimes. However, this principle exists under customary international law, and is set forth in Rule 160 of the International Committee of the Red Cross's list of rules of customary international law. This principle existed in customary international law during the period relevant to the allegations against Meas Muth.<sup>18</sup> I do not consider the prosecution of grave breaches of the Geneva Conventions to be time-barred at the ECCC.
- b. "*Whether national crimes may be applied without violating the statute of limitations*": The Trial Chamber in Case 001 was divided on this issue, with the national judges finding that the statute of limitations did not apply and the international judges finding otherwise.<sup>19</sup> However, in Case 002, the PTC, found the extension of the statute of limitations adopted by the National Assembly through the ECCC Law in 2001 and 2004 to be lawful, hence no barrier against the prosecution of domestic crimes committed over the period of the ECCC jurisdiction existed.<sup>20</sup> National crimes were not the object of the trial of Case 002/01.<sup>21</sup> In the absence of contrary jurisprudence of the Trial and Supreme Court Chambers on this issue, I will follow the PTC's finding that the prosecution of domestic crimes is not time-barred.

<sup>15</sup> Case File No. 002-D427/1/30, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, paras 69, 76, 84, 100.

<sup>16</sup> *Ibid.*, para. 73.

<sup>17</sup> Case File No. 002-E306/6, *Decision on Defence Preliminary Objection regarding a Statute of Limitations for Grave Breaches of the Geneva Conventions of 12 August 1949*, 31 October 2014, para. 12.

<sup>18</sup> See [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule160](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule160) and [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule160](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule160).

<sup>19</sup> Case File No. 001-E187, *Decision on the Defence Preliminary Objection concerning the Statute of Limitations for Domestic Crimes*, 26 July 2010.

<sup>20</sup> Case File No. 002-D427/1/30, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, paras 278-287.

<sup>21</sup> Case File No. 002-E122, *Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes)*, 22 September 2011, p. 11.



- c. “*Whether command responsibility existed in customary international law in 1975-79*”: As I recently stated in another decision in this case,<sup>22</sup> command responsibility was a mode of liability under customary international law in 1975.
- d. “*Whether crimes against humanity required to be carried out pursuant to a State or organizational policy*”: The Trial Chamber found in Case 001 that state policy, while it may provide evidence relevant in establishing the widespread or systematic nature of the attack, does not constitute an independent legal element of the crime.<sup>23</sup> The Trial Chamber confirmed this finding in Case 002.<sup>24</sup> In the absence of contrary conclusions by other ECCC chambers, and considering that it is the Trial Chamber which will eventually decide on the legal characterisation of crimes if Meas Muth goes to trial, I will follow its jurisprudence.
- e. “*Whether crimes against humanity required that the attack be committed on discriminatory grounds*”: While this is not an element of crimes against humanity under customary international law, it is clearly a jurisdictional requirement under Article 5 of the ECCC Law. This is undisputed in the jurisprudence of the ECCC.<sup>25</sup>
16. My position on the issues listed above under paragraph 15(a)-(e) will only be reconsidered should the Supreme Court Chamber take a different stance on any of these issues in the appeal in Case 002/01, or the Trial Chamber in Case 002/02, assuming the judgment were to be delivered before the closing order in this case.
17. I am equally unconvinced by the Defence’s contention that, at this stage, they “*must*” research and prepare for an “*eventual*” appeal against the closing order on relevant jurisdictional issues. The preparation of an eventual appeal against a closing order which has not yet been filed, and the content of which may only be speculated on by the Parties at this stage, is premature. The investigation has not been concluded and the decision on indictment or dismissal will be taken once the process under Internal Rule 66 is complete. The appropriate time and forum for any questions dealing with an eventual appeal is after the filing of the closing order and before the PTC, if and when an appeal is lodged.
18. Meas Muth’s rights will therefore not be violated if the Defence are not given the requested resources.
- ii. Meas Muth’s rights to equal treatment and to equality of arms
19. With regard to equal treatment, the Defence contend that Meas Muth is not being treated equally to a charged person in Case 004, who was permitted to hire additional legal consultants beyond the number normally permitted by the legal consultant budget. The Defence argue that Case 004 is at the same stage

<sup>22</sup> Case File No. 003-D145/3, *Decision on the Application of Command Responsibility Outside International Armed Conflict*, 1 August 2016.

<sup>23</sup> Case File No. 001/18-07-2007/ECCC/TC, *Trial Chamber Judgement*, 26 July 2010, para. 301.

<sup>24</sup> Case File No. 002/1-E313, *Case 002/01 Judgement*, 7 August 2014, para. 181.

<sup>25</sup> Case File No. 001/18-07-2007/ECCC/TC, *Trial Chamber Judgement*, 26 July 2010, paras 313, 314; Case File No. 002/1-E313, *Case 002/01 Judgement*, 7 August 2014, para. 188.

of the proceedings as Case 003.<sup>26</sup> However, the decision to grant further resources in Case 004 was based on different grounds. In Case 004, Ao An was charged with additional crimes, including genocide, on 14 March 2016 with the investigation scheduled to conclude by the end of June 2016.<sup>27</sup> Ao An had thus been notified of several additional charges against him, at the time when the investigation in Case 004 was still scheduled to be closed approximately fourteen weeks after the notification of the additional charges. The Ao An Defence submitted that they needed further resources in order to review the evidence relevant to the new charges within the time left for the investigation, and in granting their request I considered this to be a key factor.<sup>28</sup> That the timeline for the completion of the investigation had to be substantially revised in the Completion Plan of 30 June 2016 is neither here nor there as far as the reasons for granting additional resources at the time were concerned.<sup>29</sup>

20. Meas Muth, on the other hand, was charged with additional crimes, including genocide, on 14 December 2015, when the investigation was scheduled to conclude by mid-August 2016, approximately eight months afterwards.<sup>30</sup> When Meas Muth was notified of the additional charges, the Defence did not argue that with the time at their disposal they were not in a position to prepare Meas Muth's defence. The Defence do not do so in the Request, either, as they only argue that without the additional staff, they are not in a position to perform tasks, namely the filing of submissions on the applicable law and the preparation of the appeal against a closing order that is yet to be issued, that I have found not to be necessary – let alone of *vital* importance - at this stage of the proceedings, and part of which are now moot since I have given the Defence my view on the questions of law they intended to address. I note that Meas Muth also benefits from the revised timeline for the completion of the investigation, now scheduled to be concluded at the end of 2016.<sup>31</sup>
21. The argument that denying the requested resources would violate Meas Muth's right to equal treatment is therefore without merit.
22. The Defence, invoking the principle of equality of arms, also argue that the Office of the Co-Prosecutors ("OCP") is much larger than the Defence team. The principle of equality of arms requires that each party be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at disadvantage *vis-à-vis* his or her opponent.<sup>32</sup> Equality of

<sup>26</sup> Request, para. 24.

<sup>27</sup> See ECCC Completion Plan – Revision 8, 31 March 2016, para. 27, available at <https://www.eccc.gov.kh/en/eccc-completion-plan-revision-8>

<sup>28</sup> Case File No. 004-D304/1, *Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 18 March 2016, paras 9 and 10; Case File No. 004-D304/4, *Further Decision on Ao An's Request to Order DSS to Provide Additional Resources*, 26 April 2011, para. 11. Redacted copies of these decisions will be provided to the Defence.

<sup>29</sup> Extraordinary Chambers in the Courts of Cambodia, Completion Plan, Revision 9, 30 June 2016, p. 9, available at: <https://www.eccc.gov.kh/en/eccc-completion-plan-revision-9>

<sup>30</sup> See ECCC Completion Plan – Revision 8, 31 March 2016, para. 27, available at <https://www.eccc.gov.kh/en/eccc-completion-plan-revision-8>

<sup>31</sup> Extraordinary Chambers in the Courts of Cambodia, Completion Plan, Revision 9, 30 June 2016, p. 9, available at: <https://www.eccc.gov.kh/en/eccc-completion-plan-revision-9>

<sup>32</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-A, *Judgement*, 15 July 1999, paras 48-50. See also European Court of Human Rights, *Bulut v. Austria*, *Judgment*, 22 February 1996, para. 47.



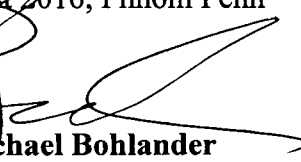
arms requires procedural equality between the parties: in considering alleged violations of equality of arms, the European Court of Human Rights and the United Nations' Human Rights Committee have generally assessed whether the applicant had been denied any of the fundamental procedural rights set forth, respectively, in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.<sup>33</sup> Equality of arms does not, as observed by the Appeals Chamber of the International Criminal Tribunal for Rwanda, necessarily require material equality in the amount of staff at disposal of the defence and the prosecution.<sup>34</sup> In fact, in all jurisdictions the prosecution has generally a larger office because it must be able to deal with broader responsibilities (for instance, it is the prosecution that initiates and performs the necessary preliminary – and in legal systems that do not use an investigating judge, the entire – investigations) and a larger case load.

23. In the Request, the Defence have not made a claim that the resources currently at their disposal are insufficient to defend Meas Muth, with the exception of undertaking those tasks which I have deemed unnecessary at this stage of the proceedings. Nor have the Defence demonstrated that the denial of additional resources by the DSS has violated any other of Meas Muth's fundamental procedural rights. The argument that denying the requested resources would violate Meas Muth's right to equality of arms is unfounded.
24. This decision is filed in English, with a Khmer translation to follow.

**FOR THE FOREGOING REASONS, I:**

25. **DENY** the Request.
26. **INSTRUCT** the Greffier to make redacted versions of Case File 004 decisions D304/1 and D304/4 available to the Defence.

Dated 4 August 2016, Phnom Penh



Judge Michael Bohlander  
**ស៊េន្ទ័រអ៊ីនធឺណេស៊ីយ៉ាឡ**  
 International Co-Investigating Judge  
 Co-juge d'instruction international

<sup>33</sup> See e.g. Human Rights Committee: Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4; Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4; ECHR: *Jasper v. United Kingdom*, Judgment, 16 February 2000, para. 57; *APBP v. France*, Judgment, 21 March 2002, para. 24; *Monnell and Morris v. United Kingdom*, Judgment, 2 March 1987, para. 62. See also Guide on Article 6 Right to a Fair Trial, European Court of Human Rights, pp. 19-20, available at [http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n14278064742986744502025\\_poin](http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n14278064742986744502025_poin)ter and Trechsel, Stefan, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 99.

<sup>34</sup> International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-I-A, *Judgement*, 1 June 2001, para. 69.