



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងកម្ពុជា

Royaume du Cambodge
Nation Religion Roi

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 003/07-09-2009-ECCC-OCIJ

Before: The Co-Investigating Judges
Date: 1 February 2018
Language(s): English and Khmer [Original in English]
Classification: CONFIDENTIAL

ឯកសារដើម	
ORIGINAL DOCUMENT / DOCUMENT ORIGINAL	
ថ្ងៃ ទទួល (Date of receipt/Date de reception):	01 / 02 / 2018
ពេលវេលា (Time/Heure):	14:15
អង្គប្រឹក្សាសាលាដំបូង/Case File Officer/L'agent chargé du dossier:	SANN RADA

DECISION ON MEAS MUTH'S REQUEST TO COMPEL THE NATIONAL CO-PROSECUTOR TO PROVIDE MATERIAL CITED IN HER FINAL SUBMISSION

Distribution:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Meas Muth Defence

ANG Udom
Michael G. KARNAVAS

Civil Party Lawyers

CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov

Laure DESFORGES
Isabelle DURAND
Yiqiang LIU
Martine JACQUIN
Daniel MCLAUGHLIN
Lyma NGUYEN
Nushin SARKARATI



I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 7 February 2013, 22 February 2013, 17 July 2014, and 16 January 2017.
2. On 14 November 2017, the National Co-Prosecutor (“NCP”) filed her final submission pursuant to Internal Rule 66 in which she requested the CIJs to dismiss the allegations against Meas Muth on the basis that the ECCC does not have personal jurisdiction over him (“NCP’s Final Submission”).¹
3. On 19 January 2018, the Meas Muth Defence (“Defence”) filed a request to compel the NCP to provide certain material cited in the NCP’s Final Submission (“Request”).²
4. On 25 January 2018, the Co-Prosecutors informed my office that they did not intend to file a response to the Request.³

II. SUBMISSIONS

5. The Defence request the CIJs to compel the NCP to provide the following documents, prepared and submitted to the Pre-Trial Chamber (“PTC”) by the NCP in relation to a disagreement with the International Co-Prosecutor (“ICP”), which are cited in the NCP’s Final Submission, and purportedly contain the NCP’s reasoning in support of her view that the ECCC has no personal jurisdiction over Meas Muth:
 - a. *National Co-Prosecutor’s Response to the International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement Pursuant to Rule 71.2*, 29 December 2008; and
 - b. *National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars*, 24 April 2009, and *National Co-Prosecutor’s Additional Observations*, 22 May 2009, (“Documents”).⁴
6. The Defence submit that they need the Documents to be able to submit a meaningful response to the NCP’s Final Submission and the ICP’s arguments advanced against the NCP. The Defence argue that while the ICP is fully aware of the NCP’s views on personal jurisdiction, the Defence’s lack of access infringes the right to an effective defence and the equality of arms.⁵
7. Because the NCP did not respond to the Defence’s request for the Documents⁶ the Defence argue that, while the Documents may be confidential under Internal Rule 71, the fact that they have been cited in the NCP’s Final Submission warrants their disclosure.⁷

III. DISCUSSION

8. As stated in a Case 004/2 decision (added to Case File 003⁸ but to which the Defence make no reference in the Request), any disagreement procedure between the Co-

¹ Case File No. 003-D256/6, *Final Submission Concerning Meas Muth Pursuant to Internal Rule 66*, 14 November 2017.

² Case File No. 003-D256/10, *Meas Muth’s Request to Compel the National Co-Prosecutor to Provide Material Cited in Her Final Submission*, 19 January 2018.

³ Case File No. 003-D256/10/1.1, *Annex: Email from Nicholas Koumjian to Nivedha Thiru*, 25 January 2018.

⁴ Request, p.1, paras. 1-2, *citing* NCP’s Final Submission, paras 4, 6, 8, notes 42-43, 47-53, 57-63.

⁵ Request, paras 7-10.

⁶ Request, pp.1, 5, paras 11-14.

⁷ Request, para. 16.

⁸ Case File No. 003-D262, *Order to Place Decisions Regarding Disagreements onto Case File 003*, 18 September 2017, para. 6.



Prosecutors is confidential and the CIJs have no access to it nor the power to compel the Co-Prosecutors to disclose their disagreements.⁹ Documents generated in disagreement proceedings before the PTC are solely within the PTC's purview and it is for the PTC to decide whether they should be released.¹⁰

9. To the extent that the Request relates to debates of the Cambodian National Assembly regarding the Agreement between the United Nations and the Royal Government of Cambodia and the ECCC Law,¹¹ it should be recalled that the Supreme Court Chamber concluded that the terms "*senior leader*" and "*those most responsible*" have no fixed interpretation – and certainly not in the sense of relating to a finite number of particular individuals¹² – but were intended only to guide investigative and prosecutorial policy.¹³ The CIJs adopted that approach already in the Case 004/1 Closing Order (Reasons).¹⁴
10. Therefore, while it might be useful for the purposes of acquiring a better understanding of the discussions of the drafters during the negotiations to have access to their full history, it is not *necessary*.¹⁵
11. Finally, the Request in essence is in part a request for investigative action and as such made out of time. The investigation was closed twice. The time allowed for investigative requests after the closure of the investigation is set out in Internal Rule 66(1), and even if one applied the PTC's recent *obiter dictum* that the period runs again after every closure of the investigation,¹⁶ the Request would still be manifestly out of time. The Defence have made no case why an exception from that rule should be made, especially at this late stage of the proceedings. Quite the contrary: reference to the Documents and to the existence of a disagreement between the Co-Prosecutors concerning personal jurisdiction has been on the Case File since November 2010¹⁷ and the NCP's reasoning has been referred to numerous times by the PTC's national judges in all cases, including case 003.¹⁸

⁹ Case File No. 003-D262.2, *Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements*, 18 September 2017 ("Case 004/2 Decision"), para. 7.

¹⁰ Case 004/2 Decision, para. 8.

¹¹ Request, para. 1, *citing* NCP's Final Submission, para. 6.

¹² Case File No. 003-D261, *Closing Order (Reasons) in Case 004/1*, 10 July 2017, para. 37.

¹³ Case File No. 001-F28, *Appeal Judgement*, 3 February 2012, paras 63-68, 74-77.

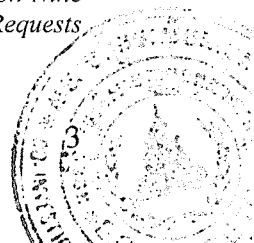
¹⁴ Case 004/2 Decision, para. 12; Case File No. 003-D261, *Closing Order (Reasons) in Case 004/1*, 10 July 2017, Section 2.1: Personal Jurisdiction at the ECCC.

¹⁵ Case File No. 003-D181, *Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction*, 1 February 2016, para. 33.

¹⁶ Case File No. 004-D361/4/1/10, [Redacted] *Decision on Appeal Against the Decision on Request for Adequate Preparation Time*, 13 November 2017, paras 23-27.

¹⁷ Case File No. 003-D1/1.3, *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, paras 2, 5, 9, 31-32, 39.

¹⁸ Case File No. 003-D120/3/1/8, *Considerations on Meas Muth's Appeal Against the International Co-Investigating Judge's Re-Issued Decision on Meas Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission*, 26 April 2016, Opinions of Judges Prak Kimsan, Ney Thol and Huot Vuthy, paras 27-28; Case File No. 003-D165/2/26, *Decision Related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) the two Annulment Requests Referred by the International Co-Investigating Judge*, 13 September 2016, para. 139.



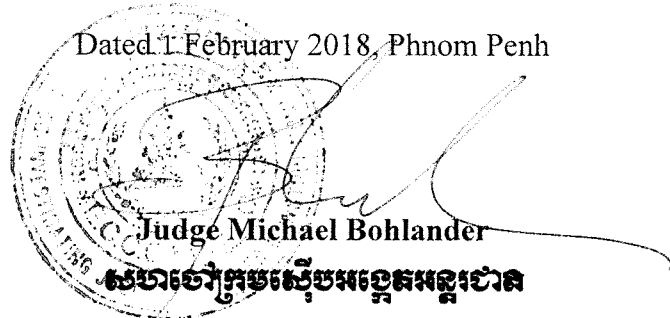
12. This decision may be of interest to the Parties in Cases 004 and 004/2, and I will order a copy to be placed on those Case Files.

FOR THE FOREGOING REASONS, I:

13. **DENY** the Request; and

14. **ORDER** that a copy of this decision be placed on Case Files 004 and 004/2.

Dated 1 February 2018, Phnom Penh



Judge Michael Bohlander
សមាជិកក្រុមស៊ើបអង្កេតអន្តរជាតិ
International Co-Investigating Judge
Co-juge d'instruction internationale