



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

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

Case File No: 004/2/07-09-2009-ECCC-OCIJ

Before: The Co-Investigating Judges
Date: 8 May 2017
Language(s): English [Original]
Classification: CONFIDENTIAL

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
08 / 05 / 2017	
ម៉ោង (Time/Heure):	
14:20	
អង្គទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
SANN RADA	

**DECISION ON AO AN'S APPLICATION
TO ANNUL THE ENTIRE INVESTIGATION**

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, 21 October 2015, and 16 January 2017.
2. On 3 May 2017, the Defence for Ao An (“Defence”) filed an application under Internal Rule 76(2) to seize the Pre-Trial Chamber (“PTC”) with a request to annul the entire investigation, or, in the alternative, to stay the investigation until the Defence has been able to carry out its own investigations and to re-file its investigative requests (“Application”).¹
3. On 4 May 2017, my office asked the Co-Prosecutors if they intended to respond to the application; the International Co-Prosecutor indicated he did not.² The National Co-Prosecutor did not respond.

II. SUBMISSIONS

4. The Defence submit in essence³ that the entire investigation suffers from a procedural defect, namely that:
 - (i) the interpretation of the standard for investigative requests applied by the CIJs and sanctioned in several appeal decisions by the Pre-Trial Chamber (“PTC”) robbed the Defence of meaningful participation in the investigation, when combined with the ban against parties conducting their own investigation under the ECCC legal framework; and
 - (ii) this situation has created an inequality of arms, because the Prosecution, the Defence allege, may conduct preliminary investigations and still conduct their own investigations even after the case has been forwarded to the CIJs for investigation.
5. The Defence accept that neither the standard adopted by the CIJs and the PTC for investigative requests, nor the prohibition of investigations by the parties are *ultra vires* if viewed separately, but allege that the combined effect of both deprives the Defence of meaningful participation.⁴
6. The Defence state that the Application could be filed only now because they had to wait for the last appeal regarding the Tenth Request for Investigative Action to be decided by the PTC, which occurred only on 26 April 2017.⁵

III. DISCUSSION

7. The Application is manifestly unfounded.
8. The Defence have neither identified a procedural defect regarding a particular investigative act, nor regarding a part of the proceedings within the meaning of Rule 76. The Defence’s real grievance is of a more general nature and relates to the interplay of two facets of the ECCC’s legal framework, namely the standard for investigative requests

¹ Case File No. 004/2-D350, *Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigation*, 3 May 2017.

² Case File No. 004/2-D350/1.1, *Annex: Email from Ruth Mary Hackler to Filippo De Minicis RE: Re: Fw: [Filed by Ao An Def.] NEW DOCUMENT(S): CASE FILE No. 004/2 – Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigation*, 4 May 2017.

³ Application, para. 2.

⁴ *Ibid.*, para. 3.

⁵ *Ibid.*, para. 4.

for investigative requests on the one hand, and the ban against parties carrying out their own investigations. The Defence are thus in effect attacking the legal views of the CIJs and the PTC through which both previously interpreted said framework. Simply put, they ask the PTC to reconsider its view on the law by re-arguing the points raised unsuccessfully in the prior appeals. The Application is thus really a motion for reconsideration on points of law.

9. The reference made in the Application to a previous decision by the PTC in Case 002 regarding the “*annulment of all investigative action or judicial action*”⁶ is thus misplaced. The citation from that decision in the Application omits one important sentence; the full wording of paragraph 24 of the PTC decision reads:

The Pre Trial Chamber found that the annulment procedure as applied in the Nuon Chea Decision, is ‘not designed to nullify investigations in general [...] but is designed to nullify those portions of the proceedings that harm the Charged Person’s interests which have to be specified.’ An annulment application therefore needs to be reasoned, specific as to which investigative or judicial actions are procedurally defective and, when applicable, prove the harmed interest. In the latter situation, if the annulment of all investigative or judicial actions is requested, the applicant must prove the existence of a procedural defect that has harmed their interests in the entire case. When a violation of the Charged Person’s rights under the ICCPR or Internal Rules is proven, the procedural defect creates a harmed interest and will lead to annulment of that specific investigative or judicial action, although the Pre Trial Chamber has the discretion to appreciate the consequences of this annulment on the entirety of the case.⁷ (emphasis added)

10. The argument that this could be raised only once the last appeal had been decided is unconvincing since the Defence state themselves that they repeatedly drew the PTC’s attention to the matter in the appeals process.⁸ Hence, they already raised then the very issue they now claim it was impossible to raise before. The PTC was not persuaded by the argument then despite repeatedly having the occasion to change its opinion. Moreover, nothing would have prevented the Defence from filing a motion for reconsideration at the first instance the PTC sanctioned the standards employed by the CIJs and the ban on party investigations. The prospective effect of the combination of the two was already recognisable then as a matter of principle.
11. The Defence’s argument around an alleged inequality of arms due to the Prosecution’s ability to conduct its own investigations in the preliminary stage and allegedly even after the case has been forwarded to the CIJs under Internal Rule 53(1) was dealt with in the necessary depth in Case 003 on 19 April 2016;⁹ the decision was put on Case File 004 at the time, however, it is not cited by the Defence in the Application. There is no need to add anything in that respect.
12. The Application was filed outside the period under Internal Rule 66(1) after the first notice of closure,¹⁰ and even after the second closure notice in this case, which explicitly excluded any further filings by the Parties under Internal Rule 66(1).¹¹ Given that I will deny the Application on its merits and absent prior guidance from the PTC on the matter,

⁶ *Ibid.*, para. 17.

⁷ Case File No. 002-D263/2/6, *Decision on Ieng Thirith’s appeal against the Co-Investigating Judges’ Order rejecting the request to seise the Pre-Trial Chamber with a view to annulment of all investigations (D263/1)*, 25 June 2010, para. 24. The appeal was ultimately unsuccessful.

⁸ Application, paras 30 ff.

⁹ Case File No. 004-D308, *Decision on Meas Muth’s Request for the Co-Investigating Judges to Conduct Site Visits*, 19 April 2016, para. 14.

¹⁰ Case File No. 004/2-D334, *Notice of Conclusion of Judicial Investigation Against Ao An*, 16 December 2016, paras 3, 6.

¹¹ Case File No. 004/2-D334/2, *Second Notice of Conclusion of Judicial Investigation Against Ao An*, 29 March 2017, paras 12-16, 18.



I do not consider it helpful in the circumstances to make a finding on whether the Application is as such already out of time.

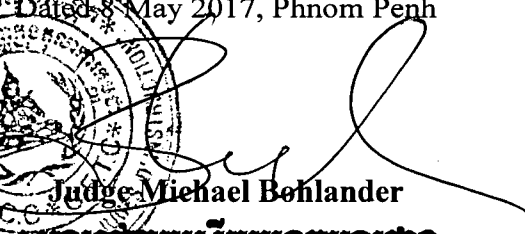
13. Since the legal basis for an annulment of the entire investigation is already manifestly lacking, there is equally neither a basis nor a need for considering the alternative relief sought, i.e. of ordering a stay.
14. For the purposes of transparency, I wish to inform the Parties of the following: I am of the view that any appeal which may be lodged against this decision does not prevent the CIJs from forwarding the Case File to the Co-Prosecutors for final submissions. Such an appeal is not covered by the ban related to outstanding appeals under Internal Rule 76(4), nor is it necessary to wait for pragmatic reasons of procedural fairness and expediency. Should the PTC decide to annul the investigation in its entirety, the impact on the proceedings would be fundamental and the Parties would be immediately put on notice that no further final submissions would be required. Based on the above-mentioned history of this issue in the several appellate proceedings, I see no real prospect of that occurring and therefore no need to halt the proceedings on the off-chance that an appeal might be successful. The same applies *mutatis mutandis* to the alternative risk of a stay order being imposed by the PTC.
15. Finally, I consider that this decision is of interest to the Parties in Cases 003 and 004 and will therefore order the Greffier to place it on those Case Files.

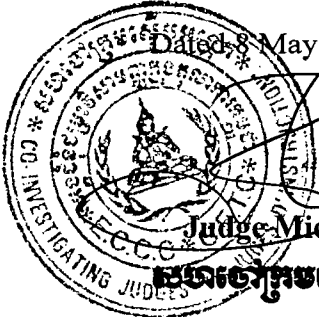
FOR THE FOREGOING REASONS, I

16. **DENY** the Application;
17. **INFORM** the Parties that any appeal filed against this decision will not delay the Case File being forwarded to the Co-Prosecutors, all other criteria under Internal Rule 66(4) being fulfilled; and
18. **INSTRUCT** the Greffier to place this decision on Case Files 003 and 004.

This decision is filed in English, with a Khmer translation to follow.

Dated 8 May 2017, Phnom Penh





Judge Michael Bohlander
សមាជិកអង្គជំនុំអង្គការកម្ពុជា
International Co-Investigating Judge
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