



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

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**DECISION ON AO AN'S NINTH REQUEST FOR
INVESTIGATIVE ACTION**

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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, and 22 January 2015.
2. On 29 February 2016, the Ao An Defence (“Defence”) filed the *Ninth Request for Investigative Action* (“Request”).¹
3. On 21 March 2016, the International Co-Prosecutor (“ICP”) filed his *Response to Ao An’s Ninth Request for Investigative Action* (“Response”).²

II. SUBMISSIONS

A. Ao An’s Ninth Request for investigative action

4. The Request calls on the CIJs to place on the Case File transcripts of all *in camera* hearings in Case 002/02, full transcripts of relevant public hearings when the transcripts were redacted, and a list of names and corresponding pseudonyms of all Case File 004 witnesses testifying in Case 002/02.³ The Defence submit that the Request is sufficiently precise, relevant, and conducive to ascertaining the truth, and that it will likely result in *prima facie* exculpatory evidence supporting Ao An’s defence.⁴ The Defence submit that the Co-Prosecutors have access to full and unredacted transcripts of all hearings by virtue of their participation in Case 002/02.⁵ Consequently, the Defence argue that the Request should be granted in order to both safeguard Ao An’s fair trial rights and ensure that the Defence enjoy the same access as the Co-Prosecutors.⁶

i. *In camera* hearing transcripts

5. The Defence submit that at least seven Case 002/02 hearings were held fully or partially *in camera*, yet the Defence have no access to their transcripts.⁷ The Defence note that these hearings were held *in camera* to protect the integrity of the Case 004 investigation, but that some of these hearings occurred during trial segments that related to allegations against Ao An.⁸ As a result, the Defence argue that these *in camera* hearings are likely to be directly relevant to ascertaining the truth in Case 004.⁹
6. Further, the Defence submit that some witnesses may have provided exculpatory evidence in Case 002/02 that supports the defence, or provided testimony that is inconsistent with the witnesses’ prior inculpatory statements or those of other Case 004 witnesses.¹⁰ The Defence submit that they must be granted access to this testimony in order to properly assess the credibility and reliability of these witnesses.¹¹

¹ Case File No. 004-D300, *Ninth request for investigative action*, 29 February 2016.

² Case File No. 004-D300/1, *International co-prosecutor’s response to Ao An’s ninth request for investigative action*, 21 March 2016.

³ Request, para. 1.

⁴ *Ibid.*, paras 2, 11-17.

⁵ *Ibid.*, para. 22.

⁶ *Ibid.*

⁷ *Ibid.*, para. 18.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 19.

¹¹ *Ibid.*



ii. Unredacted public transcripts

7. The Defence submit that at least four public hearing transcripts that have been released by the Trial Chamber in redacted form are relevant to the case against Ao An.¹² The Defence contend that the redacted sections may contain information relevant to ascertaining the truth in the investigation or may reveal inconsistencies or other exculpatory information in support of the defence.¹³

iii. List of pseudonyms

8. The Defence point out that the Trial Chamber has referred to at least five Case 002/02 witnesses by pseudonyms, making it impossible for the Defence to identify the sources of inculpatory or exculpatory evidence adduced at trial.¹⁴ The Defence submit that access to a list of names and corresponding pseudonyms is directly relevant to ascertaining the truth.¹⁵

iv. Requested investigative actions

9. For the abovementioned reasons, the Defence request that the CIJs:
- a. analyse the transcripts of all *in camera* hearings in Case 002/02 to determine whether they are relevant to the investigation into Ao An, and place all relevant transcripts, in full and unredacted form, on Case File 004;
 - b. analyse all unredacted versions of Case 002/02 public redacted transcripts to determine whether they are relevant to the investigation into Ao An, and place all relevant transcripts, in full and unredacted form, on Case File 004; and
 - c. place on Case File 004 a list of names and corresponding Case 002/02 pseudonyms of all Case File 004 witnesses who have been given pseudonyms in Case 002/02.¹⁶

B. International Co-Prosecutor's Response

10. In the Response, the ICP notes that the majority of transcripts identified by the Defence for further analysis and placement are already on Case File 004, or are irrelevant to the Ao An investigation.¹⁷

i. In camera hearing transcripts

11. The ICP submits that in regard to the Defence request to place at least seven Case 002/02 transcripts of *in camera* hearings on the Case File:
- a. two of these transcripts are irrelevant to the Ao An investigation but were nevertheless placed on the Case File on 11 January 2016;
 - b. three of these transcripts were placed on the Case File after the Request was submitted; and
 - c. two of these transcripts are relevant and necessary to the Ao An investigation, and the ICP joins the Defence in requesting that the CIJs place the two transcripts listed in the Response on the Case File.¹⁸

¹² *Ibid.*, para. 20.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 21.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, paras 15, 23.

¹⁷ Response, para. 1.



ii. *Unredacted public transcripts*

12. The ICP submits that in relation to the Defence request to place four redacted Case 002/02 transcripts on the Case File in full and unredacted form:

- a. three of these transcripts have already been placed on the Case File; and
- b. there is no reason to place an unredacted form of the 5 January 2016 transcript on the Case File as it is clear from the redacted version that the content of the testimony is not relevant to the investigation.¹⁹ Furthermore, the redactions in this transcript serve to protect the identity of two witnesses.²⁰

iii. *List of pseudonyms*

13. The ICP does not oppose the Defence's request where protective measures were put in place to safeguard the integrity of the Case 004 investigation. The ICP submits, however, that the identities of the witnesses specified by the Defence have already been provided, or are irrelevant to the Ao An investigation.²¹

iv. *Analysis of all Case 002/02 hearing transcripts*

14. Although the Defence's Request was limited to transcripts of *in camera* hearings or those containing redactions, the ICP submits that ongoing investigative actions should include analysis of all Case 002/02 transcripts.²² Specifically, the ICP submits that seven Case 002/02 transcripts listed in the Response should be placed on the Case File as they are conducive to ascertaining the truth in this investigation.²³

III. DISCUSSION

A. *In camera* hearing and redacted public transcripts of Case 002 testimony

i. *Defence request*

15. The OCIJ analysed seven transcripts of *in camera* hearings as well as three public redacted transcripts from Case 002/02. Nine of these transcripts have been placed on the Case File.²⁴ I am not convinced that the tenth transcript, the testimony of witness Pak Sok (2-TCW-1000) on 5 January 2016, is relevant to the

¹⁸ *Ibid.*, para. 2.

¹⁹ *Ibid.*, para. 3.

²⁰ *Ibid.*, para. 3(b).

²¹ *Ibid.*, para. 4.

²² *Ibid.*, para. 5.

²³ *Ibid.*

²⁴ Case File No. 004-D289.3, *Transcript of hearing on the substance in Case 002/02 – 26 October 2015*, 26 October 2015; Case File No. 004-D289.4, *Transcript of hearing on the substance in Case 002/02 – 27 October 2015*, 27 October 2015; Case File No. 004-D219/702.1.87, *Transcript of hearing on the substance in Case 002/02 – 14 January 2016*, 14 January 2016; Case File No. 004-D219/702.1.94, *Transcript of hearing on the substance in Case 002/02 – 18 January 2016*, 18 January 2016; Case File No. 004-D219/702.1.95, *Transcript of hearing on the substance in Case 002/02 – 19 January 2016*, 19 January 2016; Case File No. 004-D219/792.1.2, *Transcript of hearing on the substance in Case 002/02 – 20 January 2016*, 20 January 2016; Case File No. 004-D219/792.1.3, *Transcript of hearing on the substance in Case 002/02 – 21 January 2016*, 21 January 2016; Case File No. 004-D219/702.1.75, *Transcript of hearing on the substance in Case 002/02 – 05 October 2015*, 5 October 2015; Case File No. 004-D219/702.1.76, *Transcript of hearing on the substance in Case 002/02 – 06 October 2015*, 6 October 2015.



investigation.²⁵ Pak Sok testified on 16 December 2015 and 5 January 2016.²⁶ He was a member of Division 164 naval forces and stationed in Kampot Province.²⁷ There is no indication that this witness is able to give evidence that is relevant to any of the crime sites in Case 004, Ao An's individual responsibility, or other matters relevant to the investigation. In any event, this transcript is publicly available in redacted form, with only two minor redactions.²⁸

ii. ICP response

16. Regarding the seven transcripts mentioned in the ICP's Response, the OCIJ reviewed these transcripts, deemed them relevant to the investigation, and thus added them to the Case File.²⁹

B. List of pseudonyms

17. In another Decision in this case, I provided a list of names of Case 002/02 witnesses with corresponding pseudonyms to the Yim Tith Defence.³⁰ An updated version of this list is annexed to this Decision.

²⁵ Case File No. 002-E1/370.1, [Redacted] Transcript of hearing on the substance in Case 002/02 – 05 January 2016, 5 January 2016.

²⁶ *Ibid.*, Case File No. 002-E1/369.1, Transcript of hearing on the substance in Case 002/02 – 16 December 2015, 16 December 2015.

²⁷ *Ibid.*, pp. 14, 17.

²⁸ ²⁸ Case File No. 002-E1/370.1, [Redacted] Transcript of hearing on the substance in Case 002/02 – 05 January 2016, 5 January 2016, pp. 39, 41.

²⁹ Case File No. 004-D219/792.1.1, Transcript of hearing on the substance in Case 002/02 – 06 January 2016, 6 January 2016; Case File No. 004-D219/792.1.4, Transcript of hearing on the substance in Case 002/02 – 29 February 2016, 29 February 2016; Case File No. 004-D219/792.1.5, Transcript of hearing on the substance in Case 002/02 – 09 March 2016, 9 March 2016; Case File No. 004-D219/792.1.6, Transcript of hearing on the substance in Case 002/02 – 14 March 2016, 14 March 2016; Case File No. 004-D219/792.1.7, Transcript of hearing on the substance in Case 002/02 – 15 March 2016, 15 March 2016; Case File No. 004-D219/792.1.8, Transcript of hearing on the substance in Case 002/02 – 16 March 2016, 16 March 2016; Case File No. 004-D219/792.1.9, Transcript of hearing on the substance in Case 002/02 – 17 March 2016, 17 March 2016.

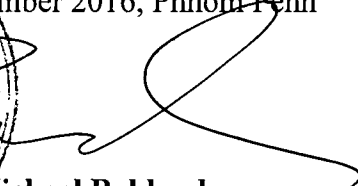

³⁰ Case File No. 004-D319/1, Decision on Request for Names and Pseudonyms of Case 002 Witnesses, 5 August 2016.



FOR THE FOREGOING REASONS, I:

- 18. **INFORM** the Defence that the Request has been performed in part;
- 19. **DENY** the remainder of the Request; and
- 20. **INFORM** the ICP that the investigative actions requested in the Response have been performed.

Dated: 18 November 2016, Phnom Penh

Judge Michael Bohlander
អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
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