



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: 004/07-09-2009-ECCC-OCIJ

<b>ឯកសារដើម</b>
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): ..... 26 ..... 04 ..... 2016 .....
ម៉ោង (Time/heure): ..... 15:35 .....
មន្ត្រីទទួលបន្ទុកដំណុំរឿង/Case File Officer/L'agent chargé du dossier: ..... JANN PADO .....

Before: The Co-Investigating Judges

Date: 26 April 2016

Language(s): English [Original]

Classification: CONFIDENTIAL

**FURTHER DECISION ON AO AN'S REQUEST TO ORDER DSS  
TO PROVIDE ADDITIONAL RESOURCES**

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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 27 March 2015, my predecessor charged Ao An for violations of the 1956 Cambodian Penal Code and crimes against humanity allegedly committed in three different locations of the Central Zone of Democratic Kampuchea.<sup>1</sup> He also informed Ao An that he was charged for some of these crimes, *inter alia*, by virtue of his participation in a joint criminal enterprise (“Initial Appearance”).<sup>2</sup>
3. On 14 March 2016, I notified Ao An that there was clear and consistent evidence that he may be responsible for crimes committed in ten additional locations of the Central Zone. The new charges included genocide, which had not been previously charged, and a joint criminal enterprise broader in scope than the one previously charged (“Additional Charges”).<sup>3</sup> The most recent ECCC Completion Plan published on 31 December 2015 estimates that the investigation against Ao An is due to close by June 2016.<sup>4</sup>
4. On 15 March 2016, the Ao An Defence (“Defence”) filed an Urgent Request for Additional Resources (“Urgent Request”), requesting the CIJs to order the Defence Support Section (“DSS”) to increase the Defence’s funding to allow the recruitment of one level four senior international legal consultant and one level two junior international legal consultant, and to order the Office of the Administration to provide all the necessary support to facilitate their recruitment.<sup>5</sup>
5. On 18 March 2016, I issued a decision on the Urgent Request (“First Decision”),<sup>6</sup> stating that unilateral judicial action in respect of budgetary administrative decisions should be a measure of last resort, and that while I was broadly sympathetic to, and supportive of the Urgent Request, I required further and better particulars from the Defence of the resources required before deciding on the request.<sup>7</sup>
6. On 24 March 2016, the Defence provided further particulars as instructed in the Initial Decision (“Further Submissions”).<sup>8</sup>
7. On 31 March 2016, DSS filed its response to the Urgent Request and the Further Submissions (“DSS Response”).<sup>9</sup>

<sup>1</sup> Case File No. 004-D242, *Written Record of Initial Appearance*, 27 March 2015, p. 6.

<sup>2</sup> *Ibid.*, p. 7.

<sup>3</sup> Case File No. 004-D303, *Written Record of Further Appearance*, 14 March 2016, pp. 8-9.

<sup>4</sup> See Extraordinary Chambers in the Courts of Cambodia (ECCC) Completion Plan, Rev. 7, 31 December 2015, para 26.

<sup>5</sup> Case File No. 004-D304, *Urgent Request for Additional Resources*, 16 March 2016, para. 18.

<sup>6</sup> Case File No. 004-D304/1, *Decision on Ao An’s Request to Order DSS to provide Additional Resources*, 18 March 2016.

<sup>7</sup> Case File No. 004-D304/1, *Decision on Ao An’s Request to Order DSS to provide Additional Resources*, 18 March 2016, paras 7, 10.

<sup>8</sup> Case File No. 004-D304/2, *Urgent Provision of Further Particulars Following the Decision on Ao An’s Request to Order DSS to Provide Additional Resources*, 24 March 2016.

<sup>9</sup> Case File No. 004-D304/3, *DSS Response to the Ao An Defence Request for Additional Resources*, 31 March 2016.

## II. SUBMISSIONS

### A. Further Submissions

8. In the Further Submissions, the Defence submit that the case against Ao An has increased significantly in size and complexity following the Further Appearance, and particularise 23 new matters which they submit now require factual and legal analysis.<sup>10</sup> The Defence submit these new matters require them to take instructions from Ao An, conduct a further review of all relevant material on the Case File, and carry out substantial legal research.<sup>11</sup> The Defence provide details of the ongoing and potential tasks required to prepare Ao An's defence to further demonstrate the need for additional resources.<sup>12</sup> The Defence submit that a level four senior international legal consultant is required to analyse a significant portion of the Case File in light of the new matters, and to identify issues capable of forming the basis of investigative requests or requests for annulment.<sup>13</sup> The Defence note that Mr Alexandre Prezanti has already been identified as a suitable candidate for the role given his familiarity with the Case File, his availability to take up a temporary position with the Defence, and his ability to work remotely.<sup>14</sup> The Defence submit a level two junior international legal consultant is required to conduct in-depth research into the additional crimes charged, to research and draft legal arguments, and to update the Defence's CaseMap database.<sup>15</sup>
9. With regard to the circumstance that the Ao An is represented by three Co-Lawyers instead of two, the Defence submit that the two International Co-Lawyers are "sharing" one post and may not bill more than 150 hours per month, which is the same number of hours allowed to other defence teams. The Defence therefore conclude that the fact that they have two International Co-Lawyers is not relevant to the amount of resources to which the Defence are entitled.<sup>16</sup>

### B. DSS Response

10. In the DSS Response, DSS submit that the most appropriate remedy is for the CIJs to extend the deadline for the conclusion of the judicial investigation so as to allow the Defence adequate time for the preparation of Ao An's defence.<sup>17</sup> DSS note that the provision of further resources will itself take time to effect, because under the "Legal Assistance Scheme" all Defence Legal Consultants are required to perform their work at the ECCC premises. Thus, DSS argue that any new consultant will add little or no value to the Ao An Defence by the time they have settled into the roles.<sup>18</sup> DSS also note that the provision of additional resources to the Ao An Defence will set a precedent for other Defence teams to make similar requests, putting DSS in a difficult position given it does not have reserve funds to supplement the budget of a Defence team.<sup>19</sup> Finally, DSS submit that there is no

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<sup>10</sup> Further Submissions, paras 7-8.

<sup>11</sup> Further Submissions, paras 6-7.

<sup>12</sup> Further Submissions, para. 9.

<sup>13</sup> Further Submissions, para. 10.

<sup>14</sup> Further Submissions, para. 11.

<sup>15</sup> Further Submissions, para. 12.

<sup>16</sup> Further Submissions, para. 4.

<sup>17</sup> DSS Response, para. 4.

<sup>18</sup> DSS Response, para. 5.

<sup>19</sup> DSS Response, para. 6.

provision in the ECCC Law which gives the CIJs the power to award specific resources to a Defence team.<sup>20</sup>

### III. DISCUSSION

11. Having considered the reasons underlying the Defence's request for additional resources as set out in the Further Submissions, I am satisfied that it is founded. I note for the record that the quarterly completion plan is merely an administrative budget planning tool and does not have any influence on the actual conduct and course of the investigations, which have to follow the exigencies of the applicable law.
12. Before identifying an appropriate solution to the Defence's request, I will briefly address the position taken by DSS in its Response.
13. Firstly, it is the CIJs and the CIJs alone who are responsible for choosing the most appropriate remedy to alleviate fair trial concerns during the investigations. While granting more time may, in the abstract, be an alternative solution to the provision of additional resources, prolonging the investigation may prejudice the charged person, who has a right to a speedy trial, and other parties' rights. The fact that the charged person in this case is at liberty is neither here nor there, but if he were in detention, the argument advanced by DSS would become even more difficult to sustain. Prolonging the investigation also bears an additional overall financial cost to the Court, both on the national and international sides, that may well be greater than the funds requested by the Defence and in that case would make the DSS position self-defeating.
14. Secondly, with regard to the time needed to provide the requested resources, I am satisfied that the Defence have identified a reasonable and efficient solution by proposing the recruitment of Mr Prezanti as the senior legal consultant, who will be able to work from his country of residence. In this regard, I am not convinced by DSS's statement that defence consultants are required to work from the ECCC premises. Upon review of the Legal Assistance Scheme, I have not found any rule mandating the physical presence of consultants at the ECCC. I also note that, more importantly, no such obligation is prescribed in the official document regulating consultants' employment at the United Nations ("Administrative Direction"). In fact, from the wording of Section 5.10 of the Administrative Direction it can be inferred that consultants may perform their work in their country of residence, unless the nature of their work requires otherwise.<sup>21</sup> The Office of the Co-Investigating Judges has itself in the past employed a consultant who performed his duties from a foreign country.
15. Considering that both evidence databases and electronic filings can be accessed remotely, in keeping with Section 5.10 of the Administrative Direction I find it unnecessary to require that Mr Prezanti be physically present at the ECCC to perform his duties.

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<sup>20</sup> DSS Response, para. 8.

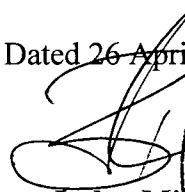
<sup>21</sup> Section 5.10 of the Administrative Instruction on Consultants and Individual Contractors, (ST.AI.2013/4) states that "For internationally recruited consultants or individual contractors, **who are required by the nature of their assignment to work in a country other than their own country of permanent residence**, the Organization, at its own expense, will assist the consultant or individual contractor in obtaining the necessary visas and/or work permits. (Emphasis added)

16. Internal Rule 21 states that administrative regulations shall be interpreted as to always safeguard the interests of charged persons. The Defence are best placed to determine how to allocate their resources to ensure a robust representation of their client, and have determined that Mr Prezanti can adequately perform his duties from abroad. I see no reason not to consider it in the client's best interests that such a reasonable solution, which will save time and resources and protect Ao An's rights, be adopted and DSS should cooperate with the Defence to facilitate that.
17. Thirdly, the concern that granting the Defence's request will set a precedent for other Defence teams is unfounded, especially in circumstances where the request involves, and may impact on, a charged person's fundamental rights. The CIJs must determine each request, present and future, based on its merits only, hence there is no merit in the DSS's floodgate argument.
18. Finally, I should add that while the Internal Rules do not regulate the CIJs' review of DSS's decisions or their powers to issue orders to DSS to ensure the effective safeguarding of a charged person's rights, Article 23 new of the ECCC Law allows the CIJs, in some instances, to seek guidance in procedural rules established at the international level. As stated in the First Decision, it is well established at the international level that, through their inherent powers, judicial bodies have the authority to review administrative decisions which may prejudice the fair trial rights of persons charged with a criminal offence.<sup>22</sup>
19. At this stage I do not consider a direct order to DSS to be necessary and express my expectation that a mutually acceptable solution will be found.
20. This decision is filed in English, with a Khmer translation to follow.

**FOR THE FOREGOING REASONS, I:**

21. **REQUEST** DSS to organise, at their earliest convenience, a meeting with the Defence to devise a solution for the granting of the resources requested by the Defence in the Urgent Request; and
22. **REQUEST** DSS and the Defence to report to the CIJs, within 7 days from the notification of this decision, about the solutions that have been identified in this regard.
23. **REMAIN SEISED** of the matter.

Dated 26 April 2016, Phnom Penh

  
 Judge Michael Böhlander  
 មេធាវីក្រុមស៊ើបអង្កេតអន្តរជាតិ  
 International Co-Investigating Judge  
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<sup>22</sup> See First Decision, para. 7.