



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

Before: **The Co-Investigating Judges**  
Date: **8 December 2016**  
Language(s): **English [Original]**  
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**DECISION ON AO AN'S TWELFTH 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 18 August 2016, the Ao An Defence (“Defence”) filed the *Twelfth Request for Investigative Action* (“Request”).<sup>1</sup>

## II. SUBMISSIONS

3. The Defence request the CIJs to investigate the “*structures through which CPK economic policy was implemented in the Central Zone and Sector 41*”.<sup>2</sup> The Defence also request an analysis of the materials concerning economic affairs in other regions of Democratic Kampuchea, as this may help the CIJs in identifying types and sources of available evidence.<sup>3</sup>
4. The Defence request that an investigation of four categories of Democratic Kampuchea (“DK”) era documents is necessary to satisfy the Request, namely: (1) communications between the Centre, zones, sectors, and districts; (2) reports and directives pertaining to economic affairs; (3) documents that record meetings at various levels of the *Communist Party of Kampuchea* (“CPK”) hierarchy, and (4) other DK-era documents.<sup>4</sup>
5. The Defences identify three potential sources of these types evidence, namely:
  - i. other ECCC case files;
  - ii. the Documentation Centre of Cambodia (“DC-Cam”); and
  - iii. national and regional archives.<sup>5</sup>
6. The Defence submit that the requested investigative actions are likely to reveal *prima facie* exculpatory evidence that challenges the International Co-Prosecutor’s (“ICP”) allegation that Ao An had authority over civil and military affairs, was responsible for all security centres in the Central Zone, and had authority to “*smash inside and outside the ranks*”.<sup>6</sup> Contrary to this allegation, the Defence submit that Ao An was responsible for the economic and agricultural affairs in Sector 41, and in this capacity improved the living conditions of people in the Sector through his implementation of economic and agricultural development.<sup>7</sup> The Defence contend that the requested investigative actions are likely to yield exculpatory evidence to support this hypothesis, and would thus place Ao An outside the personal jurisdiction of the ECCC.<sup>8</sup> Finally, the Defence argue that the Request is also relevant to the overall structure in the Communist Party of Kampuchea (“CPK”) for the implementation of economic affairs in the Central Zone and Sector 41.<sup>9</sup>
7. The Defence maintain that witnesses may not be able to give accurate evidence regarding decision-making structures and hierarchies in the CPK, and that

<sup>1</sup> Case File No. 004-D320, *Twelfth Request For Investigative Action*, 18 August 2016, (“Request”).

<sup>2</sup> *Ibid.*, para. 22.

<sup>3</sup> *Ibid.*, para. 22.

<sup>4</sup> *Ibid.*, paras 24-30.

<sup>5</sup> *Ibid.*, paras 3, 31-33.

<sup>6</sup> *Ibid.*, paras 7, 18.

<sup>7</sup> *Ibid.*, paras 7,9, 18.

<sup>8</sup> *Ibid.*, para. 19.

<sup>9</sup> *Ibid.*, para. 14.



documentary evidence has been virtually unexplored in the investigation.<sup>10</sup> The investigation thus far, according to the Defence, has focused on security and military affairs, following the narrative in the Third Introductory Submission.<sup>11</sup> As a result, the Defence argue, Ao An's role in the implementation of economic policy has not been sufficiently investigated, which is contrary to the CIJs' obligation to investigate both parties' accounts.<sup>12</sup> In particular, the Defence claim that OCIJ investigators neglected to ask follow-up questions of several witnesses who had given indications of further evidence.<sup>13</sup>

### III. DISCUSSION

#### A. Standard for the assessment of investigative requests

8. The Pre-Trial Chamber has previously stated that a party requesting investigative action "*must satisfy the two cumulative conditions [...] [n]amely, the request must:*
  - (i) *identify the action to be taken or order to be made, as applicable, with sufficient precision ("the precision requirement"), and*
  - (ii) *demonstrate in detail the reasons why the requested investigative action [...] is prima facie 'relevant to ascertaining the truth' ("the prima facie relevance requirement").*<sup>14</sup>
9. The precision requirement obliges the requesting party to be "*specific enough to give clear indications to the Co-Investigating Judges as to what they should search for*".<sup>15</sup> Consequently, I am not required to grant general or speculative requests to look for exculpatory evidence.<sup>16</sup> Rather, the requesting party must point specifically towards the presence of the evidence that is sought.<sup>17</sup> For example, the PTC found that a request that does not clearly state the number of documents sought or their exact location within collection of documents or archives fails to meet this test.<sup>18</sup>
10. The relevance requirement contains two sub-requirements. Firstly, the request must be "*relevant to the scope of the investigation pursuant to the limitations and parameters set by the Introductory and Supplementary Submissions.*"<sup>19</sup> Secondly, the request "*must detail why the requested information is conducive to*

<sup>10</sup> *Ibid.*, paras 10, 14.

<sup>11</sup> *Ibid.*, para. 15.

<sup>12</sup> *Ibid.*, paras 15-16.

<sup>13</sup> *Ibid.*, para. 14.

<sup>14</sup> Case File No. 002-D365/2/17, *Decision on reconsideration of Co-Prosecutors' appeal against the Co-Investigating Judges order on request to place additional evidentiary material on the casefile which assists in proving the charged persons' knowledge of the crimes*, 27 September 2010, para. 47 ("Reconsideration Decision").

<sup>15</sup> *Ibid.*, para. 48.

<sup>16</sup> *Ibid.*, paras 48 & 51.

<sup>17</sup> Case File No. 002-D100/9/2, *Decision on the Appeal against the Co-Investigative Judges Order on Nuon Chea's Second Request for Investigative Action*, 5 May 2010, para. 31; Case File No. 002-D164/4/13, *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive*, 18 November 2009, paras 38-39; Case File No. 002-D273/3/5, *Decision on Appeal against OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action*, 10 June 2010, paras 19-20, 26, 29; Reconsideration Decision, paras 48 & 73.

<sup>18</sup> Reconsideration Decision, para. 48.

<sup>19</sup> *Ibid.*, para. 49.



*ascertaining the truth.*"<sup>20</sup> This requires the requesting party to establish a *prima facie* nexus between the requested investigative action and a matter within the scope of the investigation.<sup>21</sup> Where the request concerns exculpatory evidence, the requesting party must demonstrate a *prima facie* reason that the investigative action may yield exculpatory evidence.<sup>22</sup>

## B. Analysis of the Request

### i. Prima facie relevance to the investigation

11. The Defence's submission that the OCIJ has neglected investigating Ao An's responsibility for the implementation of economic policy in Sector 41<sup>23</sup> is not borne out by the evidence already on the Case File.<sup>24</sup> Indeed, Ao An's role over the economic affairs in Sector 41, so far as this relates to the facts set out in the Third Introductory Submission ("3IS"), falls squarely within the purview of this investigation. Among the crime sites in the 3IS is an alleged forced labour site at Anlong Chrey Dam, for which Ao An is alleged to bear responsibility through his leadership position within the Communist Party of Kampuchea ("CPK") and the Central Zone, including regular visits and inspections of worksites and cooperatives.<sup>25</sup> Furthermore, having found clear and consistent evidence indicating that Ao An may be criminally responsible for Crimes against Humanity at Anlong Chrey Dam and other alleged crime sites, my predecessor charged Ao An for his participation in a joint criminal enterprise whose common purpose was,

<sup>20</sup> *Ibid.*, para. 50

<sup>21</sup> *Ibid.*, paras 50-51.

<sup>22</sup> Case File No. 002-D353/2/3, *Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010*, 14 June 2010, para. 47.

<sup>23</sup> Request, paras 15-16.

<sup>24</sup> Case File No. 004-D29, *Written Record of Interview of witness SUON Kanil*, 10 June 2011, ERN 00716227.. The following relate to Anlong Chrey dam worksite: Case File No. 004-D219/286, *Written Record of Interview witness MIN Art*, 22 April 2015, ERN 01100837, A24-A25; Case File No. 004-D219/288, *Written Record of Interview witness CHHEUN Lai Sim*, 24 April 2015, ERN 01111774, A17-A21; Case File No. 004-D219/285, *Written Record of Interview witness HO Hoeun*, 21 April 2015, ERN 01116057, A5; Case File No. 004-D219/405, *Written Record of Interview witness CHHIM Bunserey*, 29 June 2015, ERN 01148840-01148841, A28-A30; Case File No. 004-D219/504, *Written Record of Interview witness SAT Pheap*, 17 September 2015, ERN 01167907, A116-A117; Case File No. 004-D78, *Written Record of Interview of witness CHIN Sinal*, 26 August 2011, ERN 00740734, A1-A4, ERN 00740735, A14 [according to the witness, Ao An visited Anlong Chrey dam worksite on a regular basis]; Case File No. 004-D117/50, *Written Record of Interview of IM Pon*, 23 May 2014, ERN 01059867- ERN 01059869, A34- A40. *See also*, Case File No. 004-D219/582, *Written Record of Interview witness TOY Meach*, 2 September 2015, ERN 01179830, A66-A67, ERN 01179842-ERN 01179843, A154-A155, A157-A160 [describing Ao An's authority generally as well as his visits to Pa Khou Dam, now known as Prey Char Dam]; Case File No. 004-D107/7, *Written Record of Interview of NHIM Kol*, Dated '19-02-2012, 19 February 2012, ERN 00787214 [Sauti Prey Char dike site in Prey Chhor district, Sector 41]; Case File No. 004-D119/70/3, *DC-Cam Interview of TO Sem*, 18 August 2013, ERN 01113681ERN 01113682 [Teuk Chha dam in Prey Chhor district, Sector 41]; Case File No. 004-D76, *Written Record of Interview of witness SENG Srun*, 25 August 2011, ERN 00740715, A17-A19 [Pring Chrum worksite in Cheung Prey district, Sector 41]. Case File No. 004-D219/331, *Written Record of Interview witness PHORN Sophal*, 27 May 2015, ERN 01112052, A47-A49 [stating that Ao An visited the Anlong Chrey dam worksite and that he appointed Ta Chhin to be in charge of this worksite];

<sup>25</sup> Case File No. 004-D1, *[Corrected 2] Third Introductory submission dated 20-11-2008*, 20 November 2008, paras 35-36, 90(f).



*inter alia*, to implement “the establishment and operation of cooperatives and worksites” in the Central Zone.<sup>26</sup>

12. However, the Defence do not link their request to investigate CPK structures for implementing economic affairs in the Central Zone and Sector 41 to the alleged crime site at Anlong Chrey Dam, nor to any other specific allegations or charges against Ao An.<sup>27</sup> I am therefore not persuaded that the Defence have established *prima facie* reasons that such a broad enquiry into the economic affairs of the Central Zone and Sector 41 would be conducive to ascertaining the truth regarding the facts set out in the 3IS.
13. Moreover, the Defence’s claim that investigators failed to follow up on indicia of further evidence in WRIs rests on a misunderstanding of the CIJs’ role in the investigation. The CIJs’ obligation pursuant to Internal Rule 55(5) to be impartial and search for exculpatory evidence does not extinguish their wide discretion over the conduct of the investigation.<sup>28</sup> In particular, the CIJs are under no obligation to conduct judicial interviews in accordance with the Defence’s theory of the case. In the same vein, the purpose of the investigation is not to establish an exhaustive catalogue of Ao An’s day-to-day activities during the relevant period, but to only investigate the facts set out in the Introductory and Supplementary Submissions, including Ao An’s criminal responsibility for the alleged crimes.<sup>29</sup>

*ii. Exculpatory evidence*

14. The Defence’s submission that an investigation into Ao An’s role over economic and agricultural affairs in Sector 41 would, at a *prima facie* level, produce exculpatory evidence is unconvincing. Both my predecessor and I charged Ao An, *inter alia*, in his former capacities as Secretary of Sector 41 and Deputy Secretary of the Central Zone, having found clear and consistent evidence that he held responsibility over economic affairs and security.<sup>30</sup> The Defence have not put forth any *prima facie* reasons that evidence of Ao An’s responsibility over the former would support the argument that he did not have responsibilities over the latter.

*iii. ECCC case files*

15. The OCIJ has already conducted several full and thorough searches of Case Files 001, 002, and 003, as a result of which a substantial amount of evidence has been placed on Case File 004,<sup>31</sup> including evidence relevant to the implementation of

<sup>26</sup> Case File No. 004-D303, *Written Record of Further Appearance of AO An*, 14 March 2016, p.9.

<sup>27</sup> Request, para. 14.

<sup>28</sup> Case File No. 002-D164/4/13, *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive*, 18 November 2009, para. 22; Case File No. 002-D300/1/5, *Decision on Appeal against OCIJ order on requests D153, D172, D173, D174, D178 and D284 (Nuon Chea’s Twelfth Request for Investigative Action)*, 14 July 2010, para. 22; Case File No. 002-C20/5/18, [REDACTED] *Decision on Ieng Thirith’s Appeal against Order on Extension of Provisional Detention*, 11 May 2009, para. 63.

<sup>29</sup> Internal Rule 55(2).

<sup>30</sup> Case File No. 004-D303, *Written Record of Further Appearance of AO An*, 14 March 2016, pp. 3-4, 9.

<sup>31</sup> Case File No. 004-D219/702, *Written Record of Investigation Action*, 1 March 2016; Case File No. 004-D219/702.1, *Annex A*, 1 March 2016; Case File No. 004-D219/234, *Written Record of Investigation Action*, 24 March 2015; Case File No. 004-D219/234.1, [Corrected 1] *Annex A: Documents for transfer to case file 004*, 24 March 2015; Case File No. 004-D219/487, *Written Record of Investigation Action*, 2 September 2015; Case File No. 004-D219/487.1, *Annex A*, 2 September



CPK economic policy.<sup>32</sup> Additionally, the ICP has a continuing obligation pursuant to Internal Rule 53(4) to disclose any material from other case files which may be exculpatory regarding the ongoing investigation in Case 004; and my predecessor reminded the ICP of this obligation on 13 November 2013.<sup>33</sup>

16. The following review is instructive: in paragraphs 24 to 30 of the Request the Defence cite numerous paragraphs from the Case 002 Closing Order and Case 002/01 Trial Judgment. Those paragraphs contain 150 citations (excluding duplicates) to evidence on Case File 002. Of those 150 pieces of evidence, only 16 are not already on Case File 004, and many of those 16 pieces of evidence are lengthy trial transcripts from Case 002/01 that are available to the Defence. A list of these 150 pieces of evidence with corresponding Case File 004 citations (if applicable) is annexed to this Decision.<sup>34</sup>
17. Without access to Case File 002, the Defence cannot be expected to identify specific evidence for the CIJs to place on the Case File. However, the Defence's request is not confined to the confidential parts of ECCC case files, but rather extends to a review of "all ECCC case files for potentially relevant evidence [...] on CPK economic affairs".<sup>35</sup> If the Defence seek the placement of publicly available documents from other case files onto Case File 004, then it is incumbent on the Defence to identify, with precision, each particular piece of evidence and explain why it is relevant to the investigation. In this regard, the Request fails to satisfy the precision requirement, and consequently does not meet the threshold for admission. In any future requests for investigative action, the CIJs would be assisted by more thorough groundwork.

*iv. Documentation Centre of Cambodia*

18. The OCIJ has reviewed the archive of DC-Cam for any documents relevant to the investigation in Case 004.<sup>36</sup> Following that review, my predecessor placed numerous documents relevant to the investigation onto the Case File.<sup>37</sup> Additionally, given the overlap between Case 002 and Case 004, almost all of the contemporaneous documentary evidence from the DC-Cam archive relevant to

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2015; Case File No. 004-D219/792, *Written Record of Investigation Action*, 5 July 2016; Case File No. 004-D219/792.1, *Annex A*, 5 July 2016; Case File No. 004-D267, [*Corrected 1*] *Order to place evidence on the case file*, 22 September 2015; Case File No. 004-D267.1, [*Corrected 1*] *Annex A: List of new documents not related to documents previously file in cse file 004*; 22 September 2015; Case File No. 004-D267.2, *Annex B: List of new documents that are related to documents previously filed in case file 004*, 22 September 2015.

<sup>32</sup> Case File No. 004-D6.1.1166, *Minutes of meeting on local affairs on 8/3/76*, 8 March 1976 [discussing pre-1977 and Southwest Zone administration of the Central Zone, including worksites]; Case File No. 004-D1.3.30.2, *CPK Telegram by Pok entitled "Telegram 94 - Radio Band 1100 - With Respect to Beloved Brother Pol"*, 2 April 1976 [discussing re-1977 and Southwest Zone administration of the Central Zone, including worksites and crop production in the Zone]; Case File No. 004-D1.3.30.18, *DK Military Telegram by Comrade Pauk entitled "Telegram 13 - Radio Band 330 -To Missed Committe 870"*, 9 May 1978 [discussing farming in the Zone]; Case File No. 004- D6.1.793, *Telegram 59: to respected Brother Pork about allowing workers of Kampong Cham factory to visite Phnom Penh factory to study about how to organize the factory*, 5 November 1977.

<sup>33</sup> Case File No. 004-D175, [*Corrected b1*] *ICIJ's Letter on Continuing Legal Obligation Pursuant to Internal Rule 53(4)*, 13 November 2013.

<sup>34</sup> Case File No. 004-D320/1.1, *Annex: Table of Citations*, 8 December 2016.

<sup>35</sup> Request, para. 31.

<sup>36</sup> Case File No. 004-D123, [*Corrected 21*] *Rogatory Letter dated 06-03-2013*, 6 March 2015; Case File No. 004-D123/1, *Written Record of Acts of Investigations*, 16 May 2013.

<sup>37</sup> Case File No. 004-D123/1, *Written Record of Acts of Investigation*, 16 May 2013.



Case 004 has already been placed onto Case File 002.<sup>38</sup> On 3 May 2011, following a review of the evidentiary material on Case File 002, the CIJs ordered the transfer of 1270 documents from Case File 002 to Case File 004, including many contemporaneous CPK documents.<sup>39</sup> I am not convinced that an additional search would yield further evidence relevant to the Request.

v. *National and regional archives*

19. The Defence request the CIJs to search “*national and regional archives*” without offering any further detail as to the location of those archives. The OCIJ has already made efforts to obtain access to archives in Vietnam in Cases 003 and 004, but these efforts were unsuccessful.<sup>40</sup> Within Cambodia, as part of the investigation in Case 002 OCIJ investigators searched the National Archive of Cambodia for documents relevant to that investigation.<sup>41</sup> The OCIJ scanned 51 documents relating to matters of commerce and placed them on Case File 002.<sup>42</sup> In the absence of *prima facie* indications that the National Archive contains documents relevant to the investigation in Case 004, I am unconvinced that a further search of this archive would be fruitful.
20. The Defence fails to specify which other archives they request the CIJs to search. In this regard, I note that the Defence is not prevented from conducting preliminary inquiries as to the existence of archives of documents from the Democratic Kampuchea era.<sup>43</sup> This part of the Request is therefore denied because it is insufficiently specific.

<sup>38</sup> Case File No. 004-D6, *Note on placement of documents from Case File 002 to Case File 004*, 3 May 2011; Case File No. 004-D6.1, [Corrected 1] *Annex: List of documents to be transferred from Case File 002 to Case File 004*, 3 May 2011.

<sup>39</sup> Case File No. 004-D6, *Note on placement of documents from Case File 002 to Case File 004*, 3 May 2011; Case File No. 004-D6.1, [Corrected 1] *Annex: List of documents to be transferred from Case File 002 to Case File 004*, 3 May 2011.

<sup>40</sup> Case File No. 004-D181/4, *Rogatory Letter Completion Report*, 22 September 2016.

<sup>41</sup> Case File No. 002-D161, *Rogatory Letter for Documents at National Archive of Cambodia dated 27 January 2009*, 27 January 2009.

<sup>42</sup> Case File No. 004-D277/1.1, *Report of the Execution of Rogatory Letter, dated 04 February 2009*, 4 February 2009; Case File No. 004-D277/1.2, *List of telegrams and documents Scanned from originals held within the National Archive of Cambodia*, 19 March 2009; Case File No. 004-D277/1.3, *Written Record of providing and obtaining of documents*, 3 February 2009.

<sup>43</sup> Case File No. 004-D203/1, *Decision Regarding Yim Tith's Request For Clarification That He Can Conduct His Own Investigations*, 21 July 2014, paras 12-13; Case File No. 003-D173/1, *Decision on MEAS Muth's Request for the Co-Investigating Judges to Clarify Whether the Defence may Contact Individuals Including Witness EM Son*, 4 December 2015, paras 11-12; Case 002-D164/2, *Order on the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Material Drive*, 19 June 2009, para. 14; Case 002-D365/2/10, *Decision on Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place on Case File Additional Evidentiary Material which assists in proving the Charged Persons' Knowledge of the Crimes*, 15 June 2010, para. 12; Case 002-D315/1/5, *Decision on the Appeal against Order on NUON CHEA's Requests for Investigative Action Relating to Foreign States and on the Appeal against the Order on the Requests for Investigative Actions relating to Foreign States, in Respect of the Denial of The Request for Witness Interviews by KHIEU SAMPHAN*, 7 June 2010, para. 15; Case 002-D273/3/5, *Decision on Appeal Against OCIJ Order of NUON Chea's Eighteenth Request for Investigative Action*, 10 June 2010, para. 29.

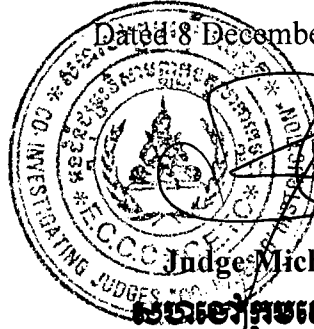


**FOR THE FOREGOING REASONS, I:**

21. **DENY** the Request.

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

Dated 8 December 2016, Phnom Penh



Judge Michael Bohlander

**សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ**

**International Co-Investigating Judge  
Co-juge d'instruction international**

