



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: **29 March 2017**  
Language(s): **Khmer and English**  
Classification: **CONFIDENTIAL**

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**SECOND NOTICE OF CONCLUSION OF JUDICIAL INVESTIGATION AGAINST AO AN**

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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, 22 January 2015, and 16 January 2017.
2. On 16 December 2016, the CIJs notified the parties of the conclusion of the judicial investigation against Ao An, reminded them that they had 15 days from the notification to request further investigations (“Notification”), and ordered the severance of the proceedings against Ao An from Case 004.<sup>1</sup> On 26 December 2016, the International CIJ extended the deadline to request further investigative action to 16 January 2017.<sup>2</sup>
3. On 21 December 2016, the Ao An Defence (“Defence”) filed the *Request to Place Certain Documents Pertaining to Henri Locard on the Case File* (“First Request”).<sup>3</sup> The Co-Prosecutors did not file any response to the First Request.
4. On 21 December 2016, the International Co-Prosecutor (“ICP”) filed the *International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2* (“Second Request”).<sup>4</sup> The Defence did not file any response to the Second Request.
5. On 16 January 2017, the Defence filed the *Thirteenth Request for Investigative Action* (“Third Request”), in which they requested the CIJs to provide an analysis of a number of alleged errors in Written Records of Interviews.<sup>5</sup> The Co-Prosecutors did not file any response to the Third Request.
6. On 8 February 2017, the International CIJ filed the *Decision on Request to Place Certain Documents Pertaining to Henri Locard on the Case File* (“First Decision”) and the *Decision on International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2* (“Second Decision”) in response to the First Request and Second Request, respectively.<sup>6</sup>
7. On 16 March 2017, the International CIJ filed the *Decision on Ao An’s Thirteenth Request for Investigative Action* (“Third Decision”) in response to the Third Request.<sup>7</sup>

<sup>1</sup> Case File No. 004-D334, *Notice of Conclusion of Judicial Investigation Against Ao An*, 16 December 2016; Case File No. 004-D334/1, *Order for Severance of Ao An from Case 004*, 16 December 2016.

<sup>2</sup> Case File No. 004/2-D340/1, *Decision on Ao An’s Request for Extension of Time Limit for Requesting Further Investigative Action Following Rule 66 Notice*, 26 December 2016.

<sup>3</sup> Case File No. 004/2-D339, *Request to Place Certain Documents Pertaining to Henri Locard on the Case File*, 20 December 2016.

<sup>4</sup> Case File No. 004/2-D342, *International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2*, 21 December 2016.

<sup>5</sup> Case File No. 004/2-D345, *Thirteenth Request for Investigative Action*, 16 January 2017.

<sup>6</sup> Case File No. 004/2-D339/1, *Decision on Request to Place Certain Documents Pertaining to Henri Locard on the Case File*, 8 February 2017; Case File No. 004/2-D342/1, *Decision on International Co-Prosecutor’s Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2*, 8 February 2017.

<sup>7</sup> Case File No. 004/2-D345/1, *Decision on Ao An’s Thirteenth Request for Investigative Action*, 16 March 2017.



## II. DISCUSSION

### A. Further Investigative Action Undertaken

8. Pursuant to the First Decision, a newspaper article that appears relevant to the assessment of the reliability and credibility of Henri Locard's evidence already on the Case File was placed on the Case File.<sup>8</sup>
9. Pursuant to the Second Decision, (i) materials providing information regarding the geographic and administrative system of the Democratic Kampuchea Regime or that otherwise appear relevant to alleged policies of forced marriage, the use of worksites and cooperatives, and the targeting of certain groups; and (ii) trial testimonies from Case File 002/2 that supplement evidence of witnesses already on the Case File were placed on the Case File.<sup>9</sup>
10. The Third Request did not fall within the category of "*further investigative action*" that may be requested pursuant to Internal Rule 66(1) and therefore the action undertaken in relation to the Third Request is not characterised as such.<sup>10</sup>
11. Following the expiry of the extended deadline to file further investigative requests and the completion of the further investigative action pursuant to the First Decision and the Second Decision we consider that the judicial investigation against Ao An has been concluded.

### B. Subsequent Rule 66(1) Notification and Time for Further Investigative Requests

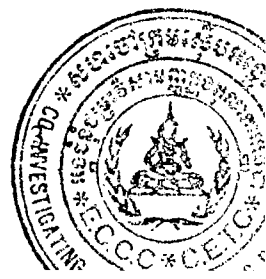
12. Internal Rule 66(1) mandates that upon issuance of a notice of closure, the parties shall have 15 days to request further investigative action. The Internal Rules do not explicitly foresee a subsequent Rule 66(1) notification following the performance of any requested further investigative action and do not explicitly consider, either, whether a further period to request further investigative action ("Additional Period") must be granted. For the reasons set out below, we are satisfied that while Internal Rule 66(1) requires a second notice of closure, it only requires one period to request further investigative action after the initial notification.
13. We are convinced that issuing a second notification is required in order to provide certainty to the parties that the judicial investigation against the charged person has concluded (again), if and after any investigative requests have been acted upon, and to clearly mark the point in time from which the parties can under law now expect a Forwarding Order under Internal Rule 66(4), absent circumstances which may delay such an order for other reasons.
14. The general Cambodian law, on which we must rely if the Internal Rules do not contain more specific regulations, supports us in our interpretation that no Additional Period is required. We note that Article 246 of the Cambodian Code of Criminal Procedure ("CCCPC") expressly provides for investigative requests only by the Prosecution under Article 132, but not by the Defence under Article 133, once the closure notice has been sent to the parties.<sup>11</sup> While it might be argued upon a literal interpretation that the investigation only closes with the closing

<sup>8</sup> First Decision, paras 15, 17.

<sup>9</sup> Second Decision, paras 13-14.

<sup>10</sup> Third Decision, para. 9.

<sup>11</sup> See also, *Annotated Cambodian Code of Criminal Procedure*, 2<sup>nd</sup> Ed., 2015, p. 98.



order (Article 247 of the CCCP) and hence the wording of Article 133 could appear to apply directly until that point in the proceedings and allow the Defence to file requests right up to the point of the closing order, with Article 132 of the CCCP stating the same for the Prosecution, we consider that Article 246 is *lex specialis* for the situation after a closure notice to the point that it excludes any investigative requests by the Defence under the general rule of Article 133 after the closure notice. Otherwise the explicit reference to the Prosecution’s right under Article 132 with the simultaneous omission of an equal reference to the Defence’s right under Article 133 would make little sense; given the potentially serious impact on the position of the Defence of this omission, a mere error in the redaction of the CCCP is highly unlikely. In this sense, the law under the Internal Rules already contains an improvement vis-à-vis the CCCP in that it allows the Defence and the other parties to file requests within the 15-day period.

- 15. Unless the new material put on the case file exceptionally represented a massive amount and required major efforts by the affected parties in analyzing it, leading to serious hardship if they were not given additional time to request new investigative action arising from their analysis, we are thus convinced that no further opportunity needs to be afforded.
- 16. In a previous case we had given the parties additional time for investigative requests after we had discovered after the closure notice that a number of documents needed to be reclassified from strictly confidential to confidential<sup>12</sup>, when the sole cause for the late reclassification had been an oversight within the Office of the Co-Investigating Judges. This is not the case here. We therefore leave open the question of how to treat a scenario when there is a mixture of requested and *proprio motu* investigative acts after the closure notice.

**FOR THE FOREGOING REASONS, WE:**

- 17. **NOTIFY** the parties that we consider the investigation against Ao An to have been concluded.
- 18. **INFORM** the parties that no period for further investigative action is required under the Internal Rules and hence none is granted.

Dated 29 March 2017, Phnom Penh

**សហចៅក្រមស៊ើបអង្កេត**

Co-Investigating Judges  
Co-juge d’instruction



**YOU Bunleng**

**Michael BOHLANDER**

<sup>12</sup> Case File No. 004-D286/7, *Order for Severance of Im Chaem from Case 004*, 5 February 2016, para. 6.