



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: 004/2/07-09-2009-ECCC-OCIJ

Before: The Co-Investigating Judges
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**DECISION ON REQUEST TO PLACE CERTAIN DOCUMENTS
PERTAINING TO HENRI LOCARD ON THE CASE FILE**

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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. Between 2008 and 2011, several documents authored by Henri Locard in his capacity as an expert historian were placed on Case File 004.¹
3. Between 28 July and 2 August 2016, Henri Locard testified before the Trial Chamber in Case 002/2.²
4. On 16 December 2016, I notified the parties of the conclusion of the judicial investigation against Ao An, informed the parties that they may request further investigative action within 15 days,³ and ordered the severance of the investigation against Ao An from Case 004.⁴ On 26 December 2016, I extended the period of time for the parties to request further investigative action to 16 January 2017.⁵
5. On 21 December 2016, the Ao An Defence (“Defence”) filed a request for investigative action pursuant to Internal Rule 55(10) requesting the CIJs to place certain documents pertaining to Henri Locard on the Case File.⁶
6. The Co-Prosecutors did not file any response to the Request.

II. SUBMISSIONS

7. The Defence submit that during Henri Locard’s testimony before the Trial Chamber he expressed what appeared to be his opinion on the work and role of the ECCC defence, and on the accused’s rights to an effective defence.⁷ On 3 August 2016, the *Cambodia Daily* published an article quoting statements to that effect made by Henri Locard out of court after the hearing:
 - a. *“These people [Case 002 Defence lawyers] are criminal because they are making the tribunal waste hours and weeks, days and months”;*
 - b. *“It [the tribunal] should have been no more than three years, because of these completely perverse people who are what we call deniers, negationists—they deny reality”;*

¹ Case File No. 004/2-D339, *Request to Place Certain Documents Pertaining to HENRI LOCARD on the Case File*, 20 December 2016, (“Request”), paras 2, 8; *See for example* Case File No. 004-D1.3.10.7, *Tramkāk District in the Grip of the Khmer Rouge*, by Henri Locard, 20 November 2008; Case File No. 004-D1.3.11.16, *Annex B 0010: Henri LOCARD, “Report: Kampong Cham: West Bank of the Mekong (Old North Region), 2007*, 31 May 2007; Case File No. 004-D1.3.10.21, *Report by Henri Locard Entitled “Niredey Region”*, 31 May 2007.

² Request, paras 2, 9; Case File No. 002-E1/450.1, *Transcript of Hearing on the Substance in Case 002/2 – 28 July 2016*, 28 July 2016; Case File No. 002-E1/452.1, *Transcript of Hearing on the Substance in Case 002/02 – 01 August 2016*, 1 August 2016; Case File No. 002-E1/453.1, *Transcript of Hearing on the Substance in Case 002/02 – 02 August 2016*, 2 August 2016, pp. 4-5.

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

⁴ Case File No. 004-D334/1, *Order for Severance of Ao An from Case 004*, 16 December 2016.

⁵ 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.

⁶ Request.

⁷ Request, para. 2.



- c. *"I was expecting it and I know how to defend myself. But I think of the poor Khmers who have not got as high education and my ability to debate and who are completely upset and thrown off balance."*⁸
8. The Defence submit that these remarks are potentially exculpatory, are relevant to ascertaining the truth of the allegations against Ao An, and further relate to the evaluation of evidence given by Henri Locard as they are important in assessing his credibility and reliability as an expert witness.⁹
9. The Defence add that the requested relief is sufficiently specific as it identifies the precise extracts to be placed on the Case File.¹⁰
10. As such, the Defence request the following documents to be placed on Case File 004/2:
- a. Case File No. 002/19-09-2007, Transcript of Trial Proceedings, E1/453.1, 2 August 2016, pp. 4-5 ("2 August Transcript Extract"); and
 - b. Wright, George, 'Historian Accuses Tribunal Lawyers of 'Cold Torture', *The Cambodia Daily*, 3 August 2016 ("Wright Article").¹¹

III. DISCUSSION

A. Standard for the Assessment of Investigative Requests

11. The Pre-Trial Chamber ("PTC") has previously stated that a party requesting investigative action *"must satisfy 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").*¹²
12. 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"*,¹³ and the requesting party must point specifically towards the presence of the evidence that is sought.¹⁴ For example, the PTC found that a request that does not clearly state the number of documents sought or their exact

⁸ Request, para. 11, citing George Wright, 'Historian Accuses Tribunal Lawyers of "Cold Torture"', *The Cambodia Daily*, 3 August 2016.

⁹ Request, paras 12-13.

¹⁰ Request, paras 3, 13.

¹¹ Request, para. 14.

¹² 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 Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes*, 27 September 2010 ("Reconsideration Decision"), para. 47.

¹³ Reconsideration Decision, para. 48.

¹⁴ Reconsideration Decision, paras 48, 73; 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-D164/4113, *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.



location within a collection of documents or archives fails to meet this test.¹⁵ The *prima facie* 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.”¹⁶ Secondly, the request “*must detail why the requested information is conducive to ascertaining the truth.*”¹⁷ This requires the requesting party to establish a *prima facie* nexus between the requested investigative action and a matter within the scope of investigation.¹⁸ Where the request concerns exculpatory evidence, the requesting party must demonstrate a *prima facie* reason that the investigative action may yield exculpatory evidence.¹⁹

B. Analysis of the Request

13. I am satisfied that the Request meets the precision requirement.
14. Pursuant to my *Decision on International Co-Prosecutor's Request for Investigative Action to Place Maps and Case 002 Materials onto Case File 004/2*,²⁰ the complete transcript of Henri Locard's testimony on 2 August 2016 before the Trial Chamber was placed on the Case File. As such, the request for the 2 August Transcript Extract is moot.
15. With respect to the Defence's request to place the Wright Article on the Case File, I am satisfied that the article meets the *prima facie* relevance requirement, as the article appears relevant to the assessment of the reliability and credibility of Henri Locard's evidence already on the Case File.²¹

¹⁵ Reconsideration Decision, para. 48.

¹⁶ Reconsideration Decision, para. 49.

¹⁷ Reconsideration Decision, para. 50.

¹⁸ Reconsideration Decision, paras 50-51.

¹⁹ 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.

²⁰ 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.


²¹ Case File No. 002-E363/3, *Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutor's Disclosure Obligations*, 22 October 2015, para.23.



FOR THE FOREGOING REASONS, I:

- 16. **DECLARE** the Request is moot with respect to the 2 August Transcript Extract;
- 17. **GRANT** the remainder of the Request; and
- 18. **INSTRUCT** the OCIJ Greffier to place the Wright Article on Case File 004/2.

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



Dated 8 February 2017, Phnom Penh

Judge Michael Bohlander

នាយកអន្តរជាតិស៊ើបអង្កេតអន្តរជាតិ

International Co-Investigating Judge

Co-juge d'instruction international