



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ  
Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសេសវិសេសសាលាដំបូងកម្ពុជា

Royaume du Cambodge  
Nation Religion Roi

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des Tribunaux cambodgiens

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Office of the Co-Investigating Judges  
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**DECISION ON AO AN'S AMENDED SECOND 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 10 April 2014, the Ao An Defence (“Defence”) filed *Ta An’s Second Request for Investigative Action Pursuant to Internal Rule 55(10)*.<sup>1</sup>
3. On 23 April 2014, my predecessor denied the request, noting that Ao An had not been charged, and consequently was not entitled to file requests for investigative action.<sup>2</sup>
4. On 27 March 2015, my predecessor notified Ao An of his decision to charge him for the commission of crimes at Tuol Beng security centre, Kok Pring execution site, and Wat Au Trakuon security centre.<sup>3</sup>
5. On 7 May 2015, the Defence filed the *Amended Second Request for Investigative Action* (“Request”).<sup>4</sup>
6. On 14 March 2016, I charged Ao An with the commission of further crimes at Anlong Chrey Dam Forced Labour Site, Met Sop (Kor) Security Centre, Angkuonh Dei Pagoda, Wat Batheay Security Centre, Wat Phnom Pros Security Centre, Wat Ta Meak, Chamkar Svay Chanty Security Centre, Wat Baray Chan Dek Security Centre, Wat Srange Security Centre. I also charged Ao An with the crimes of forced marriage in Kampong Siem and Prey Chhor Districts, and Genocide of the Cham in Kampong Cham Province. I charged Ao An in his former capacities as Deputy Secretary of the Central (old North) Zone, Member of the Central (old North) Zone Committee, and Secretary of Sector 41 in the Central (old North) Zone.<sup>5</sup>

## II. SUBMISSIONS

7. The first part of the Request relates to the methodologies used to determine eight crime base statistics and factual allegations in the Third Introductory Submission (“3IS”) and Supplementary Submission (“SS”).<sup>6</sup> The Defence request that I investigate the methodologies used by the International Co-Prosecutor (“ICP”) to:
  - a) Define and assert that a ‘clear pattern exist[ed] throughout the Central Zone after Ta An and the Southwest cadre arrived, more work was required, less food was provided, and large numbers of people were arrested’;
  - b) Identify ‘Ethnic minorities’;
  - c) Estimate that 32,690 people were killed at Wat O Trau Kuon;
  - d) Estimate that there were 400,000 deaths in the Central Zone;
  - e) Estimate that 10,000 people were executed at Wat Phnom Pros, Wat Angkuonh Dei or Tuol Beng Village;

<sup>1</sup> Case File No. 004-D188, *Ta An’s Second Request for Investigative Action Pursuant to Internal Rule 55(10)*, 9 April 2014.

<sup>2</sup> Case File No. 004-D190, *Decision on Ta An’s Requests for Investigation*, 23 April 2014.

<sup>3</sup> Case File No. 004-D242, *Written Record of Initial Appearance of Ao An*, 27 March 2015.

<sup>4</sup> Case File No. 004-D188/1, *Amended Second Request for Investigative Action*, 7 May 2015 (“Request”).

<sup>5</sup> Case No. 004-D303, *Written Record of Further Appearance of Ao An*, 14 March 2016.

<sup>6</sup> Request, para. 20.



- f) Estimate that around 1,000 people were killed at Kok Pring;
- g) Estimate that as many as 10,000 Cham were executed at Wat O Trau Kuon Security Centre; and
- h) Determine that in Kampong Cham, a 'substantially higher percentage' of ethnic minorities were killed.<sup>7</sup>
8. Secondly, the Defence request that I assess the reliability of the methodologies.<sup>8</sup> In particular, I am asked to consider any inaccuracies and alternative versions of events that challenge the ICP's figures and determinations.<sup>9</sup>
9. The Defence submit that the above investigative actions would likely lead to the discovery of probative exculpatory evidence, given that the methodologies applied in Case 002 have been criticised and questioned, and it is likely that the same or similar methodologies could lead to errors in Case 004.<sup>10</sup> Further, the Defence claim their own research suggests that the estimations are inaccurate or based on faulty methodology.<sup>11</sup>
10. The Defence submit that an understanding of the methodology is critical to Ao An's defence as it forms the foundation of the allegations against him,<sup>12</sup> and knowledge of any faults is critical in order to challenge the factual allegations at trial.<sup>13</sup> Although some information relevant to the methodologies is already available, the Defence say they have not found sufficient material regarding the specific methodologies relating to Case 004.<sup>14</sup>
11. Thirdly, the Defence request that I investigate and determine the dates and causes of death of the alleged victims,<sup>15</sup> which the Defence submit go to the "heart of culpability in any criminal case".<sup>16</sup>
12. Fourthly, the Defence recommend that I appoint a forensic expert where required.<sup>17</sup> While the Defence concede that the CIJs previously appointed experts to analyse the methodologies applied to calculate the total number of Khmer Rouge victims,<sup>18</sup> they contend that no specific analysis was undertaken in relation to the crime-base statistics in Case 004.<sup>19</sup>

### III. DISCUSSION

13. 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

<sup>7</sup> Request, para. 20.

<sup>8</sup> Request, para. 2.

<sup>9</sup> Request, para. 21.

<sup>10</sup> Request, para. 24.

<sup>11</sup> Request, para. 8.

<sup>12</sup> Request, para. 23.

<sup>13</sup> Request, para. 24.

<sup>14</sup> Request, para. 11.

<sup>15</sup> Request, para. 21.

<sup>16</sup> Request, para. 4.

<sup>17</sup> Request, paras. 3 & 22.

<sup>18</sup> Case File No. 002-D140, *Demographic Expertise Order*, 11 March 2009.

<sup>19</sup> Request, para. 9.



(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>20</sup>

14. 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>21</sup> Consequently, I am not required to grant general or speculative requests to look for exculpatory evidence.<sup>22</sup> Rather, the requesting party must point specifically towards the presence of the evidence that is sought.<sup>23</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>24</sup>
15. 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>25</sup> Secondly, the request “must detail why the requested information is conducive to ascertaining the truth”.<sup>26</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>27</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>28</sup>

#### A. Investigation of methodologies: DC-Cam reports

16. Many of the factual allegations that are the subject of the Request are supported with reference to reports produced by the Documentation Centre of Cambodia (“DC-Cam”) and it is convenient to deal with those at the outset.
17. Since the Defence filed this request for investigative action, OCIJ investigators have interviewed Sin Khin and Hak Sophal who both worked for DC-Cam and participated in the preparation of the reports cited in the 3IS.<sup>29</sup> A further OCIJ interview with Pheng Pong Rasy had been obtained earlier in the year.<sup>30</sup> Each of

<sup>20</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 Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes* (“Reconsideration Decision”), 27 September 2010, para. 47.

<sup>21</sup> Reconsideration Decision, para. 48.

<sup>22</sup> Reconsideration Decision, paras. 48 & 51.

<sup>23</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, para. 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, para. 48 & 73.

<sup>24</sup> Reconsideration Decision, para. 48.

<sup>25</sup> Reconsideration Decision, para. 49.

<sup>26</sup> Reconsideration Decision, para. 50.

<sup>27</sup> Reconsideration Decision, paras. 50-51.

<sup>28</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>29</sup> Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015; Case File No. 004-D219/363, *Written Record of Interview witness HAK Sophal*, 12 June 2015.

<sup>30</sup> Case File No. 004-D219/144, *Written Record of Interview Witness PHENG Pong Rasy*, 15 January 2015.



these witnesses gave evidence regarding the general methodologies behind determining victim numbers in the DC-Cam reports.<sup>31</sup> All three written records of interview (“WRIs”) have been placed on Case File 004.

18. Additionally, a report from demographic expert Ewa Tabeau, which assesses the methodologies employed by DC-Cam, has been placed on Case File 004.<sup>32</sup> Although not focused specifically on the Central Zone, the report examined the processes employed by DC-Cam in their mass grave mapping projects.<sup>33</sup> Tabeau describes their process as “*reliable enough to consider their estimates as very serious, although at the same time still approximate*”.<sup>34</sup> The report considered issues regarding deaths from natural causes, and factors unrelated to the alleged criminal acts of Ao An.<sup>35</sup>
19. A further Case 002 analytical report by Craig Etcheson entitled “*The Number, Qualifying crime against humanity in Cambodia*” (“Craig Etcheson Report”) provides an overview of the methodologies and potential inaccuracies of the DC-Cam grave mapping process and discusses issues of double counting, the deaths of individuals from natural causes, disease or starvation and factors unrelated to alleged criminal acts.<sup>36</sup> The report notes that, while the surveys carried out in the 1980s by the authorities were significantly flawed with a high risk of double counting,<sup>37</sup> this was acknowledged by DC-Cam and taken into account when producing their reports.<sup>38</sup> I will place this report on the Case File.
20. I do not consider it necessary to further investigate the methodology used by DC-Cam in the reports cited by the ICP (“DC-Cam methodology”), which has been canvassed extensively in the above material. As the WRIs with Hak Sophal and Sin Khin demonstrate, the DC-Cam methodology in the Central Zone crime sites was the same as the DC-Cam methodology used in the reports cited in the 3IS.

**B. Investigation of methodologies: allegations a) – h)**

*a) A clear pattern exist[ed] throughout the Central Zone after Ta An and the Southwest cadre arrived, more work was required, less food was provided, and large numbers of people were arrested*

21. This allegation appears in paragraph 22 of the 3IS. In support of the allegation, the ICP cited 13 witness statements taken by investigators from the Office of the Co-Prosecutors (“OCP”),<sup>39</sup> four DC-Cam Mapping Reports;<sup>40</sup> an OCP Report entitled

<sup>31</sup> Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A17.

<sup>32</sup> Case File No. 004-D6.1.197, *Khmer Rouge Victims in Cambodia, April 1975 – January 1979. A Critical Assessment of Major Estimates* (“Demographic Expertise Report”), 30 September 2009.

<sup>33</sup> Demographic Expertise Report, pp. 11-17 (ERN 00385273-00385279).

<sup>34</sup> Demographic Expertise Report, p. 13 (ERN 00385275).

<sup>35</sup> Demographic Expertise Report, p. 12 (ERN 00385255).

<sup>36</sup> Case File No. 002-E3/1807, *The Number, Qualifying crime against humanity in Cambodia*, 4 December 2012 (“Craig Etcheson Report”).

<sup>37</sup> Craig Etcheson Report, p.7.

<sup>38</sup> Craig Etcheson Report, p.8.

<sup>39</sup> Case File No. 004-D1.3.11.42, *Record of the interview with RATH Pov, on 1 August 2008*, 1 August 2008; Case File No. 004-D1.3.11.5, *Interview of CHAN Ya*, 1 August 2008; Case File No. 004-D1.3.11.9, *Interview of CHHEAN Heang*, 1 August 2008; Case File No. 004-D1.3.11.35, *Interview of NIV Sun*, 1 August 2008; Case File No. 004-D1.3.11.22, *Interview of KHUN Sareth*, 2 August 2008; Case File No. 004-D1.3.11.44, *Interview of RUOS Chhieng alias Achar Chhieng*, 2 August 2008; Case File No. 004-D1.3.11.7, *Interview of CHENG Tol and KUN Sokha*, 2 August 2008; Case File No. 004-D1.3.11.47, *Interview of SENG Srun*, 6 August 2008; Case File No. 004-D1.3.11.11, *Interview of*



*OCP Mission to Batheay District, Kampong Cham Province* (“OCP Mission Report”);<sup>41</sup> and a report by Henri Locard entitled *Kompong Cham: West bank of the Mekong* (“Henri Locard Report”).<sup>42</sup>

22. Nine of the witnesses cited by the ICP were interviewed by Office of the Co-Investigating Judges (“OCIJ”) investigators and their original statements were confirmed.<sup>43</sup> Three of the OCP witnesses have since died and could not be interviewed.<sup>44</sup> In their OCP statements these witnesses describe a worsening of conditions after the arrival of the Southwest Zone cadres. Pao Li was the only one of the 13 witnesses not to be interviewed, as I consider the investigation into Met Sop security centre completed. Met Sop has been extensively investigated. On the basis of Pao Li’s OCP statement, which describes an increase in killing and starvation when the Southwest Zone cadres took control, I am not satisfied that a judicial interview with this witness would likely yield exculpatory evidence.
23. The OCP Mission Report listed above referred to information provided by witness Oum Ros.<sup>45</sup> His evidence is that killings increased with the arrival of the Southwest cadres in 1977.<sup>46</sup> Oum Ros was interviewed by an OCIJ investigator in 2010, and he confirmed the accuracy of his original OCP statement.<sup>47</sup>
24. The Henri Locard Report refers to the evidence of ‘So Si Nuon’.<sup>48</sup> This witness was not interviewed by an OCIJ investigator, as the evidence provided by So Si Nuon only relates to increased killings in 1977 at Prek Kak Pagoda, which falls outside the scope of the investigation in Case 004.

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*CHIN Sinal*, 4 August 2008; Case File No. 004- D1.3.11.45 *Interview of SAN Son*, 5 August 2008; Case File No. 004- D1.3.11.4, *Interview note of BAO Troab*, 5 August 2008; Case File No. 004-D1.3.11.38, *OCP Interview of PAO Li*, 17 November 2016.

<sup>40</sup> Case File No. 004-D1.3.10.9, *Mapping the Killing Fields of Cambodia, 1997: Khet Kampong Thom, DC-Cam Mapping Report, May 1997*, 20 November 2008; Case File No. 004-D1.3.10.12, *DC-Cam report “Mapping Project” entitled “Kampong Cham province”*, 20 November 2008; Case File No. 004-D1.3.10.16, *DC-Cam report “Mapping Project” entitled “Mapping Project 1999: Kampong Thom Province”*, 10 August 1999; Case File No.004-D1.3.10.18, *Kampong Cham 2000*, 28 May 2000.

<sup>41</sup> Case File No.004-D1.3.10.22, *Report entitled “Mission to Batheay District, Kampong Cham Province”*, 30 July 2007 (“OCP Mission Report”).

<sup>42</sup> 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.

<sup>43</sup> Case File No. 004-D74, *Written Record of Interview of witness ROTH Peou*, 26 August 2011; Case File No. 004-D87, *Written Record of Interview of witness CHHEAN Heang*, 26 August 2011; Case File No. 004-D3/10, *Written Record of Interview of NIV Sun*, 19 October 2010; Case File No.004-D93, *Written Record of Interview of witness KHUN Saret*, 16 September 2011; Case File No. 004-D219/327, *Written Record of Interview witness CHENG Tul*, 22 May 2015; Case File No. 004-D76, *Written Record of Interview of Witness SENG Srun*, 25 August 2011; Case File No. 004-D78, *Written Record of interview of Witness CHIN Sinal*, 26 August 2011; Case File No.004-D107/2, *Written Record of Interview of Witness SANN Son*, 16 February 2012; Case File No. 004-D3/5, *Written Record of Interview of BAO Troab*, 18 August 2010.

<sup>44</sup> Chan Ya (death certificate pending); Ruos Chhieng, Case File No.004-D100, *Report of Field investigations Conducted from 25 to 27 August 2011 for Case file 004*, 22 September 2011; Kun Sotha Case File No.004- D100.1, *Death certificate of KUN Sotha*, 22 September 2011.

<sup>45</sup> Case File No. 004- D1.3.10.22, *Report entitled “Mission to Batheay District, Kampong Cham Province”*, 30 July 2007, p. 11.

<sup>46</sup> OCP Mission Report, para. 33.

<sup>47</sup> Case File No. 004-D3/7, *Written Record of Interview of UM Ruos*, 24 September 2010.

<sup>48</sup> Henri Locard Report, p.18.



b) *Identify 'Ethnic minorities'*

25. The reference to 'ethnic minorities' appears in paragraph 48 of the 3IS. The ICP alleges that "of the over 158,000 people who are believed to have been killed in Kampong Cham province during the DK period, approximately 74,000 of those people (almost 50% of the total deaths) are identified as "ethnic minorities." To support the allegation, the ICP cited a DC-Cam mapping report entitled *Mapping The Killing Fields of Cambodia 1997, Kampong Cham* ("Kampong Cham 1997 DC-Cam Report").<sup>49</sup>
26. For the reasons outlined in paragraphs 16 to 20 above, I do not consider it necessary to further investigate the DC-Cam methodology.

c) *Estimate that 32,690 people were killed at Wat O Trau Kuon;*

27. This allegation appears in paragraph 23 of the 3IS. The figure of 32,690 is taken from a DC-Cam report entitled *Report on CGP Mapping Team Visit to Kampong Cham Province* ("Kampong Cham 1995 CGP Report").<sup>50</sup>
28. An OCIJ investigator re-interviewed Seng Srun in Case File 002 and the written record was placed onto Case File 004.<sup>51</sup> He specified that the figure was taken from a prisoner list; however he did not know the current location of this list.<sup>52</sup> He suggested that Chhun Hun or Mao Phirun may know.<sup>53</sup> Chhun Hun could not be interviewed as he is deceased.<sup>54</sup> Mao Phirun is currently the Deputy Governor of Kandal.<sup>55</sup> I do not consider it necessary to interview him regarding the ICP's estimate of 32,690 victims, given that the methodology underlying the ICP's figure was covered in the interview with Seng Srun.

d) *Estimate that there were 400,000 deaths in the Central Zone;*

29. This statement is sourced from paragraph 11 of the 3IS. The figures are elaborated in footnote six, which states that "the total death toll during the DK period in Kampong Thorn province was 324,000, and the total deaths in Kampong Cham province were over 58,000". The ICP presumably combined the two statistics to establish the total death toll of the Central Zone as 400,000. The 3IS cites the Kampong Thom 1997 DC-Cam Report and the Kampong Cham 1997 DC-Cam Report.
30. For the reasons outlined in paragraphs 16 to 20 above, I do not consider it necessary to further investigate the DC-Cam methodology.

e) *Estimate that 10,000 people were executed at Wat Phnom Pros, Wat Angkuonh Dei or Tuol Beng Village*

31. This statement is sourced from paragraph 30 of the 3IS, which cites the Kampong Cham 1995 CGP Report, a report from OCP investigators titled *Mission Report on*

<sup>49</sup> Case File No. 004-D1.3.10.8, DC-Cam report "Mapping Project" entitled "Mapping the Killing fields of Cambodia, 1997: Khet Kampong Cham", 22 June 2010.

<sup>50</sup> Case File No. 004-D1.3.10.5, *Kampongcham 95-96*, 17 October 1995, p. 4.

<sup>51</sup> Case File No. 004-D6.1.381, *Written Record of Interview of SENG Srun*, 23 June 2009.

<sup>52</sup> Case File No. 004-D6.1.381, *Written Record of Interview of SENG Srun*, 23 June 2009, p. 4.

<sup>53</sup> Case File No. 004-D6.1.381, *Written Record of Interview of SENG Srun*, 23 June 2009, p. 4.

<sup>54</sup> Case File No. 004-D219/97, *Written Record of Investigation Action*, 1 December 2014, p. 1.

<sup>55</sup> Case File No. 004-D6.1.381, *Written Record of Interview of SENG Srun*, 23 June 2009, p. 4.



*OCP Mission to Sector 41 (Operation Riverland)* (“OCP Riverland Report”),<sup>56</sup> the Henri Locard Report and an OCP interview with Khloak Lim.<sup>57</sup>

32. The OCP Riverland Report refers to a booklet prepared by the provincial authorities in 2007.<sup>58</sup> This book was later obtained by OCIJ and placed on Case File 004.<sup>59</sup>
33. The Henri Locard Report relied on an interview with Lay Sokha who stated that 8,000 skulls were found near Phnom Pros.<sup>60</sup> Lay Sokha was not interviewed by an OCIJ investigator, as there was no indication that he directly witnessed any of the alleged crimes, and it is suggested that he was in Chamkar Leu during the DK period.<sup>61</sup> Therefore, I regard the figure of 8,000 skulls as unreliable, and I am not inclined, at present, to rely on this evidence in the Closing Order. It follows that I consider a judicial interview with Lay Sokha on this issue as unnecessary for the ascertainment of the truth.
34. Although the 3IS references an OCP interview with Khloak Lim in support of this allegation, the information actually came from his wife, Thuk Nuon,<sup>62</sup> who was apparently present during the interview. An OCIJ investigator interviewed Khloak Lim.<sup>63</sup> However Thuk Nuon was not interviewed, as she only refers to having seen skulls after the fall of the regime, and stated that she did not know where the skulls originated from. Therefore, interviewing her would be unlikely to yield reliable evidence and is unnecessary for the ascertainment of the truth.

*f) Estimate that around 1,000 people were killed at Kok Pring*

35. This statement is sourced from paragraph 32 of the 3IS, which references an OCP interview with San Son<sup>64</sup> and the Kampong Cham 1997 DC-Cam Report.
36. San Son gave the cited figure of 1,000 victims. He has been re-interviewed by an OCIJ investigator.<sup>65</sup>
37. The DC-Cam report stated that as many as 25,000 people may have died at Kok Pring.<sup>66</sup> However, this figure was not relied upon by the ICP. Sin Khin was nonetheless asked by the OCIJ investigator how this figure was obtained.<sup>67</sup>

*g) Estimate that as many as 10,000 Cham were executed at Wat O Trau Kuon Security Centre*

38. This statement is sourced from paragraph 47 of the 3IS, which references the Henri Locard Report and an OCP interview with Moeng Peng Hao.<sup>68</sup>

<sup>56</sup> Case File No. 004-D1.3.10.23, *Mission Report on OCP Mission to Sector 41 (Operation Riverland)*, 8 August 2008 (“OCP Riverland Report”).

<sup>57</sup> Case File No. 004-D1.3.11.21, *Interview of KHLOAK Lim*, 5 August 2008.

<sup>58</sup> OCP Riverland Report, p. 6.

<sup>59</sup> Case File No. 004-D219/812.1, *Attachment: History of Sovan Kiri Ratanak Phnom Pros and the story of Phnom Pros and Phnom Srey*, undated (placed on the Case File on 5 August 2016).

<sup>60</sup> Henri Locard Report, p. 1.

<sup>61</sup> Henri Locard Report, p. 1.

<sup>62</sup> Case File No. 004-D1.3.11.21, *Interview of KHLOAK Lim*, 5 August 2008, p. 4.

<sup>63</sup> Case File No.004-D80, *Written Record of Interview of witness KLOUK Lim*, 26 August 2011.

<sup>64</sup> Case File No. 004-D1.3.11.45, *Interview of SAN Son*, 5 August 2008.

<sup>65</sup> Case File No. 004-D107/2, *Written Record of Interview of SANN Son*, 16 February 2012.

<sup>66</sup> Kampong Cham 1997 DC-Cam Report, p. 8.

<sup>67</sup> Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A21.

<sup>68</sup> Case File No. 004-D1.3.11.31, *Interview of witness MOENG Peng Pao*, 7 August 2008.





39. Moeng Peng Hao, who did not estimate a total number of victims in his original statement, is deceased and could not be re-interviewed.<sup>69</sup>

40. In his report, Henri Locard makes two statements regarding the figure of 10,000 victims at Wat Au Trakuon:

“Prisoners were brought by horse-cart or oxcart at night, some 5 carts each night, with 2-3 up to 8 persons in each. They were brought from Roka Kay, Peang Chikong and Angkor Ban communes - nearly 10,000 Chams from those communes in 1977.”<sup>70</sup>

“In one week, the KR might have killed from 20 to 200 people. If one takes a conservative average of 50, multiplied by the 188 weeks of the regime, we come to some 9,400 victims, or about 10,000.”<sup>71</sup>

41. The Report also refers to a statement by Mao Huo,<sup>72</sup> who was not interviewed by OCP, and will not be interviewed by the OCIJ, because based on information contained in the Henri Locard Report, the witness’ knowledge of the number of victims at Wat Au Trakuon is based on unreliable sources.<sup>73</sup> Therefore, I deem interviewing him unnecessary for ascertaining the truth.

*h) Determine that in Kampong Cham, a 'substantially higher percentage' of ethnic minorities were killed.*

42. This statement is sourced from paragraph 48 of the 3IS, which refers to the Kampong Cham 1997 DC-Cam Report, the Kampong Thom 1997 DC-Cam Report, and the Battambang 1997 DC-Cam Report. The methodology used by DC-Cam in producing these reports has been investigated.

43. For the reasons outlined in paragraphs 16 to 20 above, I do not consider it necessary to further investigate the DC-Cam methodology.

*i) Conclusion*

44. For the reasons stated above, I consider the evidentiary material currently available on the Case File to be a sufficient basis for understanding the methodology applied by the ICP in relation to allegations a) – h) highlighted by the Defence. The Defence have not pointed specifically to any further investigative requests which may be conducive to ascertaining the truth. As mentioned above, it is incumbent on the Defence to identify specific witnesses or other sources of evidence and provide reasons as to why their evidence would be *prima facie* exculpatory.<sup>74</sup>

### **C. Assessment of reliability of methodology**

45. The investigation in Case 004 is still ongoing, even if it is in an advanced stage. As a matter of course, I assess the reliability of all evidence collected throughout the investigation. The Defence have not pointed to any specific investigative action which may yield *prima facie* exculpatory evidence conducive to ascertaining the truth, but rather have requested that I perform a function which is

<sup>69</sup> Case File No. 004- D117/69, *Written Record of Investigation Action*, 19 September 2014.

<sup>70</sup> Henri Locard Report, p .12.

<sup>71</sup> Henri Locard Report, p .12.

<sup>72</sup> Henri Locard Report, p .12.

<sup>73</sup> Henri Locard Report, p .11.

<sup>74</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.



inherent in the exercise of my judicial role as International Co-Investigating Judge.<sup>75</sup>

46. However, I am mindful that the Defence will need to focus their finite resources to the most pertinent aspects of the investigation. I therefore provide the following clarification about the evidence I intend to rely on in the Closing Order.
47. Contrary to the Defence's claim, I do not agree that the DC-Cam methodology "*forms the foundation of the allegations against Ta An*" at this time.<sup>76</sup> Regardless of whether it may have done so for the purposes of the introductory submission, the investigation has moved on since. Also, the original investigative request was filed over two years ago and the amended investigative request still over one year ago. The foundation for any decision to be taken with regard to the Closing Order, and that is what matters now, is the entirety of the evidence found during the judicial investigation since the introductory submission, which may include material relied upon by the ICP for the introductory submission to the extent that it has been found to be relevant and reliable by the judicial investigation.
48. Having assessed the crime site evidence relevant to the allegations against Ao An, I have formed the view that there is sufficient evidence from witnesses who can give direct evidence of the crime sites. In calculating the number of victims attributable to Ao An, I will therefore mainly rely on the evidence from those witnesses. In the Closing Order, I will only rely on the documents which form the basis for the ICP's estimates to the extent that I consider them reliable in the context of the entirety of the investigation. The time for that decision is after the Parties have made their final submissions. Any and all evaluation of the evidence for the purpose of determining the nature and content of the Closing Order will naturally be subject to the full application of the principle *in dubio pro reo*.
49. Further investigating the methodologies and numbers estimated by the ICP is therefore not necessary and will not assist AO An's defence.

#### **D. Dates and causes of death**

50. The Defence is correct to point out that evidence of the time and cause of death is relevant to several crimes with which Ao An has been charged, namely: homicide as a violation of the 1956 Penal Code, murder and extermination as crimes against humanity, and genocide.
51. A forensic investigation some 40 years after the alleged killings would not produce any probative evidence, due to the passage of time, site contamination and movement of remains, as is noted in the Demographic Expertise Report.<sup>77</sup> Accordingly I do not intend to conduct any further exhumations. Instead, I intend to confine the investigation into the time and cause of deaths to evidence gathered through witness interviews.

<sup>75</sup> Case File No. 001-D99/3/42, *Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch"*, 5 December 2008 paras. 33-39.

<sup>76</sup> Case File No. 004-D188/1, *Amended Second Request for Investigative Action*, 7 May 2015, para. 23.

<sup>77</sup> *The proper exhumations of all these remains will never be done due to the large scale of the problem and gradual disappearance of the remains. A sample of exhumations could be certainly most useful but the sample would not offer a complete count of victims either.* Demographic Expertise Report, p.7.



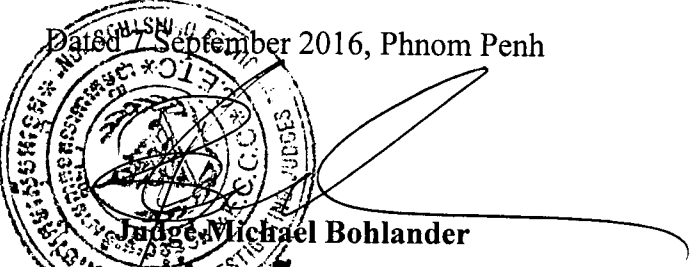
**E. Appointment of expert**

52. Though not focused specifically on the Central Zone, the Demographic Expertise Report sufficiently examined the processes employed by DC-Cam, and other organizations in determining victim data from the Democratic Kampuchea Regime. As the WRIs with Hak Sophal and Sin Khin demonstrate, the DC-Cam methodology in the Central Zone crime sites was the same as the DC-Cam methodology used in the reports cited in the 3IS. It is therefore unnecessary to appoint a new expert on these same issues in Case 004.

**FOR THE FOREGOING REASONS, I:**

53. **INSTRUCT** the OCIJ Greffier to place the Craig Etcheson Report on the Case File;
54. **INFORM** the Defence that I consider the methodologies used by the ICP to determine the eight crime base statistics and factual allegations referred to in the Request to have been sufficiently investigated as explained in the body of this decision;
55. **DENY** the remainder of the Request.

Dated 7 September 2016, Phnom Penh



Judge Michael Bohlander  
 លោកជំទាវម៉ាយហ្គេតឌឺរ  
 International Co-Investigating Judge  
 Co-juge d'instruction internationale