



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Royaume du Cambodge
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Extraordinary Chambers in the Courts of Cambodia
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DECISION ON AO AN'S AMENDED THIRD 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 17 April 2014, the Ao An Defence (“Defence”) filed *Ta An’s Third Request for Investigative Action Pursuant to Internal Rule 55(10)*.¹
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.²
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.³
5. On 7 May 2015, the Defence filed the *Amended Third Request for Investigative Action* (“Request”).⁴
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.⁵

II. SUBMISSIONS

7. The Defence’s Request can be divided into four sub-requests, which I will briefly summarise.
8. Firstly, the Defence request that I conduct a full investigation into the methodology applied by DC-Cam and others to:
 - a) Map and excavate the alleged mass graves located at Wat Au Traukuon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng;
 - b) Exhume the alleged victims therein;
 - c) Determine the victims’ dates and causes of death.
9. Secondly, the Defence ask for an investigation into possible inaccuracies and faulty methodologies employed in making determinations about mass graves, and to assess the reliability of these methodologies.⁶

¹ Case File No. 004-D189, *Ta An’s Third Request for Investigative Action Pursuant to Internal Rule 55(10)*, 17 April 2014.

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

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

⁴ Case File No. 004-D189/1, *Amended Third Request for Investigative Action*, 7 May 2015 (“Request”).

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

⁶ Request, para. 28.



10. Thirdly, the Defence request that I identify and interview witnesses like Mr. Pheng Rasy regarding the challenges in mapping the alleged mass graves in the Central Zone.⁷
11. Fourthly, to assist with the above investigations, the Defence request that I appoint a new expert, different from those appointed in Case No. 002.⁸
12. The Defence submit that the allegations relating to the crime sites listed above are primarily supported by information from DC-Cam's mass grave mapping project,⁹ and this mapping was largely performed by DC-Cam staff members, who are not trained forensic experts.¹⁰ One of the issues raised by the Defence in relation to these mass graves is that it is not possible to distinguish between deaths resulting from acts of the Khmer Rouge and deaths from other causes.¹¹
13. A further complication, according to the Defence, is that the mass graves had previously been disturbed, for example by villagers encouraged by the government of the People's Republic of Kampuchea, in its efforts to collect evidence against Pol Pot.¹² Mass grave pits had also been opened and vandalized, and most of the bones moved to memorial sites.¹³
14. While the Defence acknowledge that the Demographic Expertise Report produced for Case 002 provides an overview of DC-Cam's mass grave mapping methodology, they claim that it does not assess the methodology applied to the specific crime sites in Case 004.¹⁴ The Defence further say that the Demographic Expertise Report was undermined in evidence during the trial phase of Case 002/01.¹⁵

III. DISCUSSION

15. The Pre-Trial Chamber ("PTC") has previously stated that a party requesting investigative action "*must satisfy two cumulative conditions [...] namely, the request must:*
 - (i) *identify the action to be taken or order to be made, as applicable, with sufficient precision ("the precision requirement")*
 - (ii) *demonstrate in detail the reasons why the requested investigative action [...] is prima facie "relevant to ascertaining the truth" ("the prima facie relevance requirement").*¹⁶
16. 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*

⁷ Request, para. 29.

⁸ Request, para. 29.

⁹ Request, para. 6.

¹⁰ Request, para. 8.

¹¹ Request, para. 14.

¹² Request, para. 7.

¹³ Request, para. 10.

¹⁴ Request, para. 11.

¹⁵ Request, para. 11.

¹⁶ 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.



search for".¹⁷ Consequently, I am not required to grant general or speculative requests to look for exculpatory evidence.¹⁸ Rather, the requesting party must point specifically towards the presence of the evidence that is sought.¹⁹ 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.²⁰

17. 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.*"²¹ Secondly, the request "*must detail why the requested information is conducive to ascertaining the truth*".²² 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.²³ Where the request concerns exculpatory evidence, the requesting party must demonstrate a *prima facie* reason that the investigative action may yield exculpatory evidence.²⁴

A. Methodology used by DC-Cam

i. Mapping

18. 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 mapping reports cited in the 3IS.²⁵ In January 2016, OCIJ investigators also interviewed Pheng Pong Rasy.²⁶ Each of these witnesses gave a detailed account of the methodology used by DC-Cam in mapping mass graves throughout the Central Zone.²⁷
19. Having examined these WRIs, I have formed the view that the methodology used by DC-Cam in the Central Zone crime sites was the same as that used in the reports cited in the 3IS. I therefore do not consider it necessary to further

¹⁷ Reconsideration Decision, para. 48.

¹⁸ Reconsideration Decision, paras 48 & 51.

¹⁹ 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; Reconsideration Decision, paras 48 & 73; Case File No. 002-D164/3/6, *Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive*, 12 November 2009, para. 43.

²⁰ Reconsideration Decision, para. 48.

²¹ Reconsideration Decision, para. 49.

²² Reconsideration Decision, para. 50.

²³ Reconsideration Decision, paras. 50-51.

²⁴ 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.

²⁵ 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.

²⁶ Case File No. 004-D219/144, *Written Record of Interview Witness PHENG Pong Rasy*, 15 January 2015.

²⁷ Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A1-A19; Case File No. 004-D219/363, *Written Record of Interview witness HAK Sophal*, 12 June 2015; Case File No. 004-D219/144, *Written Record of Interview Witness PHENG Pong Rasy*, 15 January 2015.



investigate the methodology used by DC-Cam in mapping burial sites at Wat Au Traukon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng.

20. As I have previously stated,²⁸ in calculating the number of victims attributable to Ao An, I will mainly rely on witnesses who can give direct evidence of the crime sites. 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.
21. Further investigating the methodologies used in the preparation of the DC-Cam reports is therefore not necessary and will not assist AO An's defence.

ii. Excavations & exhumations

22. The Defence request that I investigate the methodology used by DC-Cam in excavating and exhuming five mass graves located in the Central Zone. Having perused the WRIs of Sin Khin²⁹ and Hak Sophal,³⁰ as well as the Demographic Expertise Report,³¹ I am satisfied that DC-Cam neither excavated nor exhumed the mass graves at any of the five crime sites listed in the Request. It is therefore not necessary to further investigate this aspect of the Request.

iii. Determine victims' dates and causes of death

23. An OCIJ investigator has investigated this issue during the interview with Sin Khin. The investigator asked him specifically how DC-Cam determined causes and times of death of the victims in the mass graves.³² Sin Khin gave the following evidence:

According to the witnesses with whom we spoke those pits were only used for burying those who were killed. As for those who died of disease, they were buried near the hospital. We did not ask the number of those who had died of old ages. We mostly asked for the information about those who could not work and were brought to be killed. The Khmer Rouge would normally kill the people before they died of the natural causes. They didn't want them to die of the natural causes.³³

24. Sin Khin was also asked how DC-Cam determined "*what year the victims were killed in each pit*":

There were different kinds of pits. Some pits were very old and had already been filled in. For such pits, we got information about their locations from the people near the sites. Some pits were only covered with leaves. In some places, the bulldozers could have been used to dig pits to carry out the mass killings. Some pits were new, and the witnesses could see in those open pits the newly-deceased bodies.³⁴

[...]

²⁸ Case File No. 004-D188/1/1, *Decision on Ao An's Amended Second Request for Investigative Action*, 7 September 2016, para. 48.

²⁹ Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A14-A15.

³⁰ Case File No. 004-D219/363, *Written Record of Interview witness HAK Sophal*, 12 June 2015, A4.

³¹ 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, ERN 00385274.

³² Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A8, A11 & A17.

³³ Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A17.

³⁴ Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A9.



Normally, when I interviewed them, I always recorded the years of the killings. When the witnesses had mentioned the years, I would surely have recorded them in my notebook... When I wrote my reports, when I had information about the years of the killings, I would definitely include them in the reports.³⁵

25. I consider Sin Khin's explanation adequate for understanding how DC-Cam determined the dates and causes of death of victims. In light of my indication above that I will mainly rely on witnesses in calculating the number of people who died as a consequence of the crimes alleged by the Co-Prosecutors, I do not consider it necessary to expend any further resources investigating the methodology used by DC-Cam in determining the cause and time of death of victims.

B. Methodology applied by 'others'

26. The Defence's request that I investigate the methodologies used by "others" is unhelpful. Any request for investigative action must, in order to be valid, first identify the specific evidence that is sought.³⁶ As the PTC has noted, I am "under no obligation to go on 'fishing expeditions' as imprecise requests [...] may unduly delay proceedings".³⁷ I regard the request that I investigate the methodologies used by "others" as insufficiently specific to properly consider it.
27. Even if the Defence had met the criteria of specificity, the only evidence of organised excavations and exhumations are those carried out in 1979 and 1980 by the National Salvation Front ("Renakse"), who encouraged people to collect evidence for the trials of Pol Pot and Ieng Sary.³⁸ Other exhumations were done by local people directly after the fall of the regime, often while looking for valuables.³⁹
28. The Demographic Expertise Report describes and assesses the methodologies applied by Renaskse,⁴⁰ as does the Craig Etcheson Report.⁴¹ The processes were also described by a number of OCP and OCIJ witnesses.⁴²

C. Inaccuracies, faulty methodologies & assessment of reliability

29. As the Defence point out in paragraphs 13 to 17 of the Request, the methodology applied by DC-Cam in its mapping project has already been scrutinised. Two

³⁵ Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A11.

³⁶ Case File No. 002-D164/3/6, *Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive*, 12 November 2009, para. 43; 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, para. 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. 34; Reconsideration Decision, para. 74.

³⁷ Reconsideration Decision, para. 48.

³⁸ Demographic Expertise Report, ERN 00385271,

³⁹ Case File No. 004-D1.3.11.47, *Interview of SENG Srun*, 6 August 2008, p.7; Case File No. 004-D6.1.381, *Written Record of Interview of SENG Srun*, 23 June 2009, p.3; Case File No. 004-D1.3.10.5, *Kampongcham 95-96*, 17 October 1995, p. 3; Case File No. 004-D1.3.10.23, *Mission Report on OCP Mission to Sector 41 (Operation Riverland)*, 4 August 2008, p. 8; Case File No. 004-D3/20, *Written Record of Interview of SREI Kanoen*, 3 December 2010, A3; Case File No. 004-D107/2, *Written Record of Interview of SANN Son*, 16 February 2012, A14.

⁴⁰ Demographic Expertise Report, ERN 00385271, ERN 00385272, ERN 00385273,

⁴¹ Case File No. 002-E3/1807, *The Number, Qualifying crime against humanity in Cambodia*, 4 December 2012, p. 7-8.

⁴² Case File No. 004-D1.3.11.47, *Interview of SENG Srun*, 6 August 2008, p.7; Case File No. 004-D3/20, *Written Record of Interview of SREI Kanoen*, 3 December 2010, A4.



separate expert reports have considered the methodology and appraised its reliability. The methodology has also been the subject of testimony in the Case 002 trial phase.⁴³ Additionally, witness Sin Khin explained how DC-Cam distinguished between violent and natural deaths in their estimates of victim numbers.⁴⁴ He also detailed how DC-Cam determined when the victims had been killed.⁴⁵ I am satisfied that the methodology used by DC-Cam in its mapping project has been thoroughly scrutinised, and I do not consider it necessary to conduct further inquiries on this matter.

D. Identify and interview witnesses like Mr Pheng Rasy

30. The Defence rightly indicate that an OCIJ interview with Pheng Pong Rasy is already on Case File 004. He was asked about the DC-Cam mapping program, including inconsistencies in the data.⁴⁶ As noted above, OCIJ investigators have interviewed two additional former DC-Cam employees: Sin Khin and Hak Sophal, who provided further evidence regarding DC-Cam's mass grave data.⁴⁷ Accordingly, I regard this investigative action as completed.

E. Appointment of expert

31. Though not focused specifically on the Central Zone, the Demographic Expertise Report sufficiently examined the processes employed by DC-Cam, and other organisations 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:

32. **INFORM** the Defence that I consider the methodologies used by DC-Cam in examining mass graves at Wat Au Traukuon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng to have been sufficiently investigated as explained in the body of this decision; and
33. **DENY** the remainder of the Request

⁴³ Case File No. 004-D179/1.2.2 *Transcript of Hearing on the Substance in Case 002*, 23 January 2012; Case File No. 004-D179/1.2.3 *Transcript of Hearing on the Substance in Case 002*, 24 January 2012; Case File No. 004-D179/1.2.4 *Transcript of Hearing on the Substance in Case 002*, 25 January 2012; Case File No. 004-D179/1.2.5 *Transcript of Hearing on the Substance in Case 002*, 26 January 2012.

⁴⁴ File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A17.

⁴⁵ File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015, A8 & A11.

⁴⁶ Case File No. 004-D219/144, *Written Record of Interview Witness PHENG Pong Rasy*, 15 January 2015, A10-A14.

⁴⁷ Case File No. 004-D219/363, *Written Record of Interview witness HAK Sophal*, 12 June 2015; Case File No. 004-D219/366, *Written Record of Interview witness SIN Khin*, 16 June 2015.



Dated 20 September 2016, Phnom Penh



Judge Michael Bohlander

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Co-juge d'instruction international

