



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: **24 October 2016**
Language(s): **English & Khmer [Original in English]**
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**DECISION ON INTERNATIONAL CO-PROSECUTOR'S
INVESTIGATIVE REQUEST D216**

Distribution:

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Ao An Defence
MOM Luch
Richard ROGERS
Göran SLUITER

Yim Tith Defence
SO Mosseny
Suzana TOMANOVIĆ

Civil Party Lawyers:
CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov
Linda BEHNKE
Laure DESFORGES
Herve DIAKIESE

Ferdinand DJAMMEN-
NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Emmanuel JACOMY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Beini YE



I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February 2013, 5 April 2013, and 21 October 2015.
2. On 22 August 2014, the International Co-Prosecutor (“ICP”) filed an investigative request pursuant to Internal Rule 55(10) for the CIJs to interview Ben Kiernan and Rochelle Braaf, and to conduct further investigations to determine the death of potential witness Ngaol (“Request”).¹
3. On 9 December 2015, I charged Yim Tith with, *inter alia*, crimes against humanity, including forced marriage as an other inhumane act, and genocide at various crime sites across the Northwest Zone and Sector 13 of the Southwest Zone of Democratic Kampuchea. I charged Yim Tith in his former capacities as the Secretary of Kirivong District and Sector 13 Committee member in the Southwest Zone; Secretary of Sector 1, Sector 3, Sector 4; and Deputy Secretary of the Northwest Zone.²

II. SUBMISSIONS

4. In the Third Introductory Submission (“3IS”), the ICP alleges that an individual named “Ngaol”, who was the chief of Ream Andaeuk commune, received orders from Yim Tith to kill a number of people.³ In the Request, the ICP requests that, in order to obtain the best available evidence of Ngaol’s statements regarding Yim Tith’s conduct, the CIJs:
 - a. conduct such further investigations as may be required to confirm the death of Ngaol; and
 - b. interview and obtain a sworn statement of Ben Kiernan, who interviewed Ngaol in August 1980, regarding the circumstances, list of persons present, and the content of:
 - i. his August 1980 interview with Ngaol and copies of any relevant transcripts, audio or video recordings, photographs, or notes, for placement on the Case File; and
 - ii. any information he may have about Ngaol, his family or associates that would assist in ascertaining whether Ngaol is in fact deceased.
5. The ICP requests that the CIJs obtain copies of transcriptions, audio or video recordings, photographs, or interview notes of the interviews cited in Ben Kiernan’s publication, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge 1975-1979*, including, but not limited to those referred to at pages 230 to 246 of the English text concerning the authority structures and purge in the Northwest Zone, for placement on the Case File.⁴ The ICP submits that this request is relevant to the allegations in the 3IS regarding

¹ Case File No. 004-D216, *International Co-Prosecutor’s Investigative Request*, 22 August 2014.

² Case File No. 004-D281, *Written Record of Initial Appearance of Yim Tith*, 9 December 2015, pp. 3-15.

³ Case File No. 004-D1, *Third Introductory Submission*, 20 November 2008, para. 98(c).

⁴ Request, paras 2-3.



Yim Tith's knowledge of, and responsibility for arrests and executions in the Northwest Zone following the arrival of the Southwest Zone cadre.⁵

6. The ICP requests that in order to expedite the investigation of the allegations made in paragraphs 4 to 10 of the Supplementary Submission on Forced Marriage and Sexual or Gender-Based Violence ("SS"),⁶ and to make optimum use of investigative resources and time, the CIJs either interview as a witness or seek an expert opinion from Rochelle Braaf, a Lead Investigator of the Cambodia Defenders Project ("CDP") who published field research entitled "Sexual violence against ethnic minorities during the Khmer Rouge regime" ("CDP Report"),⁷ to assess:
 - a. the nature, scope, methodology, funding sources, and timeframes of her published field research on sexual and gender-based violence committed during the period of Democratic Kampuchea, in particular against the Khmer Krom, Vietnamese, and/or Cham, to ascertain the relevance and reliability of her findings for ascertaining the truth of the factual allegations set out in the SS;
 - b. the nature, characteristics, extent, and locations of allegations of forced marriage, sexual and gender-based violence forming part of the research;
 - c. the likelihood that Rochelle Braaf would be willing to provide the CIJs with anonymised or redacted summaries, transcripts, or recordings of her interviews with the participants of her research; and
 - d. the likelihood that Rochelle Braaf would be willing to approach her interviewees whose testimonies may be conducive to ascertaining the truth of the allegations contained in the SS in order to obtain their informed consent to disclose their names and contact information to the CIJs.⁸

III. DISCUSSION

7. 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").*⁹

⁵ Request, para. 2, citing para. 98(b) of the 3IS.

⁶ Request, paras 1, 4, citing Case File 004-D191, *Co-Prosecutor's Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence in Case 004*, 24 April 2014, paras 4-10.

⁷ Case File No. 004-D219/115.1, *Sexual Violence against Ethnic Minorities during the Khmer Rouge Regime*, 11 December 2014.

⁸ Request, para. 5.

⁹ 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*



8. 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*”.¹⁰ Consequently, I am not required to grant general or speculative requests to look for exculpatory evidence.¹¹ Rather, the requesting party must point specifically towards the presence of the evidence that is sought.¹² For example, the PTC found that a request that does not clearly state the number of documents sought or their exact location within a collection of documents or archives fails to meet this test.¹³
9. 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*.”¹⁴ Secondly, the request “*must detail why the requested information is conducive to ascertaining the truth*”.¹⁵ 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.¹⁶ Where the request concerns exculpatory evidence, the requesting party must demonstrate a *prima facie* reason that the investigative action may yield exculpatory evidence.¹⁷
10. I am satisfied that the Request meets the precision and relevance requirements enunciated by the PTC. Set out below are the investigative actions undertaken by the Office of the Co-Investigating Judges (“OCIJ”) in response to the Request.

A. Investigate the death of Ngaol

11. On 14 October 2014, an OCIJ investigator travelled to the Moueng Russei district and located Ngaol’s daughter, Saut Rani. Saut Rani told the investigator that Ngaol died from malaria in 1996 and that she was with him at the time.¹⁸ She also showed the OCIJ investigator Ngaol’s ashes, which were being kept in a small shrine on her property.¹⁹ Saut Rani stated that there was no death certificate or other record of his death due to the Khmer Rouge fighting within the region at the

which Assists in Proving the Charged Persons’ Knowledge of the Crimes (“Reconsideration Decision”), 27 September 2010, para. 47.

¹⁰ Reconsideration Decision, para. 48.

¹¹ Reconsideration Decision, paras. 48 & 51.

¹² 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-D353/2/3, *Decision on the Ieng Thirith Defence Appeal against ‘Order on Request for Investigative Action by the Defence for Ieng Thirith’ of 5 March 2010*, 14 June 2010, para 47; 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, para. 48 & 73;

¹³ Reconsideration Decision, para. 48.

¹⁴ Reconsideration Decision, para. 49.

¹⁵ Reconsideration Decision, para. 50

¹⁶ Reconsideration Decision, paras. 50-51.

¹⁷ 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.

¹⁸ Case File No. 004-D219/48, *Written Record of Investigative Action*, 22 October 2014, p. 2; *see also* Case File No. 004-D118/309, *Written Record of Investigative Action*, 18 September 2014.

¹⁹ Case File No. 004-D219/48, *Written Record of Investigative Action*, 22 October 2014, p. 2.



time.²⁰ There are no reasons to doubt the veracity of Saut Rani's statement regarding Ngaol's death.

12. The OCIJ investigator spoke to two other individuals who claimed to know Ngaol and stated that Ngaol passed away in Pursat in 1996.²¹ Another witness interviewed by the OCIJ stated that Ngaol died in Battambang Province.²²
13. Given the information provided by Ngaol's daughter and the corroborating statements of the other individuals, I am satisfied that no further investigation is required to confirm the fact of Ngaol's death, and that this aspect of the Request as set out in paragraphs 4.a and 4.b.ii above is answered.

B. Interview Ben Kiernan

14. On 9 March 2016, I wrote to Ben Kiernan requesting: (a) his availability for a judicial interview regarding the circumstances and content of his interview with Ngaol; and (b) his confirmation as to whether he would be willing to provide the CIJs with any transcriptions, audio or video recordings, photographs or notes that he may have relating to his interview with Ngaol or anyone else who provided information regarding "Tith" and the authority structures in the Northwest Zone, including, but not limited to the interviewees cited in pages 230 to 246 of his book, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge 1975-1979*.²³
15. On 13 March 2016, Ben Kiernan responded stating that he was no longer available for a judicial interview with the ECCC. Ben Kiernan did, however, provide his handwritten English translations of his interviews in 1980 with Ngaol and Lieu Sarun, a witness who mentions Ngaol several times in his interview.²⁴ These handwritten translations were subsequently placed on the Case File.²⁵ The OCIJ has obtained English and Khmer transcriptions of both sets of handwritten notes and these will be placed on the Case File. The ICP's request as set out in paragraph 4.b.i above is therefore answered.
16. Given the information obtained by the OCIJ in relation to Ngaol's death,²⁶ and considering the provision of Kiernan's notes of his interview with Ngaol, I do not find it necessary to compel Ben Kiernan to appear for an interview as requested by the ICP.

C. Obtain records of Ben Kiernan's witness interviews

17. As for the request outlined in paragraph 5 above, Ben Kiernan stated in his 13 March 2016 response that he had already provided the OCIJ with the audio recordings of his interview with "San" whose evidence is referenced at pages 230 to 232 and 239 to 241 of his book, *The Pol Pot Regime: Race, Power and*

²⁰ *Ibid.*

²¹ Case File No. 004-D219/48, *Written Record of Investigative Action*, 22 October 2014, pp 1-2.

²² Case File No. 004-D118/46, *Written Record of Witness Interview of PUOCH Seng*, 24 April 2013, ERN00916968, A24.

²³ See Annex A to this Decision: Letter from Michael Bohlander to Ben Kiernan, re "*Availability for Interview with the Office of the International Co-Investigating Judge for on-going Case 004 investigations and Request for Materials*", 9 March 2016.

²⁴ See Annex B to this Decision: Email from Ben Kiernan to Wendy Lobwein, re "*Office of the Co-Investigating Judges (OCIJ)*", 13 March 2016.

²⁵ Case File No. 004-D219/726, *Written Record of Investigation Action*, 15 March 2016.

²⁶ See *supra* paras 11-132.



Genocide in Cambodia under the Khmer Rouge 1975-1979. The audio recordings of this interview are available on Case File 002.²⁷

18. In the audio recordings, San does not provide any evidence that is relevant to the allegations against Yim Tith specifically cited by the ICP in the Request.²⁸ He does, however, give evidence of the structure of the Northwest Zone before and after the arrival of the Southwest Zone cadres in 1977, which is relevant to the allegations of a purge of the Northwest Zone in mid-1977.²⁹ San states that, as a statistician for the Sector 5 committee, he was aware of *Angkar's* plans to transfer 230,000 new people from Phnom Penh to Sector 5 in the Northwest Zone in 1976. This evidence is relevant to the allegations in Case 004 of a state policy to evacuate the cities and transfer the population to the agricultural co-operatives, factories, and worksites.³⁰ The audio recordings, along with their transcriptions, will be placed on Case File 004.
19. Ben Kiernan's book, which is already on Case File 004,³¹ contains evidence from witnesses that appear to be relevant to the broader allegations of leadership structures in the Southwest and Northwest Zones, and the living and working conditions in those zones. Therefore, while from Ben Kiernan's response of 13 March 2016 it appears that he has no further records to provide apart from those listed in his email, I wrote to Ben Kiernan on 13 September 2016 requesting, for the sake of completeness, the audio-recordings, notes, and other records of the interviews he conducted of witnesses whose evidence I considered potentially relevant to those allegations.³² To date, Ben Kiernan has not responded to my letter.
20. That said, based on what can be gleaned from Ben Kiernan's book, there are no indications, even *prima facie*, that the records I requested from Ben Kiernan could be of such relevance and probative value to justify the further expenditure of time and resources in pursuing this enquiry. I also take into consideration the lack of response from Ben Kiernan and the indications in his 13 March 2016 email that he may not have further records.
21. No further investigative action will be taken to obtain records of the witness interviews relied upon by Ben Kiernan in his book.

D. Interview Rochelle Braaf

22. On 27 October 2014, an OCIJ investigator met with Rochelle Braaf and Savorn Duong of the CDP. On that occasion, the OCIJ investigator ascertained that the CDP held the interview records underlying the CDP Report and that the records

²⁷ See Case File No. 002-D269/9/1.5R, *San (Sun Sam) interviewed by Ben Kiernan, Paris, 29-05-1980, Tape 1, #89A*, 29 May 1980; Case File No. 002-D269/9/1.6R, *San (Sun Sam) interviewed by Ben Kiernan, Paris, 29-05-1980, Tape 2, #89B*, 29 May 1980; Case File No. 002-D269/9/1.7R, *San (Sun Sam) interviewed by Ben Kiernan, Paris, 29-05-1980, Tape 3, #89C*, 29 May 1980.

²⁸ Request paras 1-2, citing 3IS paras 98(b), 98(c).

²⁹ See 3IS, paras 4, 8, 10, 17, 54-59.

³⁰ See 3IS, para. 7.

³¹ Case File No. 004-D6.1.1105, *Book by Ben Kiernan entitled "The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79"*, 12 May 1978, filed 25 April 2011.

³² See Annex C to this Decision: Letter from Michael Bohlander to Ben Kiernan, re "*Follow-up request for materials related to the Case 004 investigations*", 13 September 2016.



could be made available to the OCIJ for review in a de-identified form so as not to breach CDP's confidentiality assurances provided to the interviewees.³³

23. On 13 November 2014, an OCIJ investigator interviewed Rochelle Braaf and prepared a written record of the interview ("Braaf WRI").³⁴ Rochelle Braaf gave evidence of her role in the preparation of the CDP Report, the methodology, funding and time period for the field research, and her willingness to provide the OCIJ with redacted and/or de-identified transcripts of any relevant interviews for review.
24. As indicated in the questionnaire annexed to the Braaf WRI, the interviewees in the field research were asked questions about, *inter alia*, their ethnicity, status, and place of residence during the Democratic Kampuchea regime ("DK regime"), the details of their marriages and consummation, evidence of rape, the location and timeframe of such acts, the perpetrators, and the mental and physical impacts to the interviewees of their experiences of violence.³⁵
25. I am therefore satisfied that the information provided in the Braaf WRI and CDP Report, which also sets out in detail the methodology of the field research and its sources of funding,³⁶ answers the ICP's request as set out above in paragraphs 6.a and 6.b.
26. On 13 November 2014, an OCIJ analyst visited the CDP offices and inspected the 105 interview questionnaires underlying the CDP Report, identifying 65 as being potentially relevant to the judicial investigation based on the interviewees' geographic location during the DK regime.³⁷ Copies of the 65 questionnaires, with the interviewees' identifying information removed, were placed on the Case File.³⁸
27. Rochelle Braaf informed the OCIJ that the audio recordings of the interviews had been destroyed for confidentiality purposes.³⁹ Rochelle Braaf provided the OCIJ with the transcripts of the recordings of all 105 interviews without the names of the interviewees, on the condition that the transcriptions be classified as "confidential" and that only the OCIJ, Trial Chamber and parties have access to them.⁴⁰
28. The OCIJ has reviewed the transcripts of the 65 potentially relevant questionnaires and identified 43 as being relevant to the investigation. The transcripts of these 43 questionnaires have been placed on the Case File.⁴¹

³³ Case File No. 004-D219/115, *Written Record of Investigation Action*, 27 November 2014.

³⁴ Case File No. 004-D219/91, *Written Record of Interview of Rochelle Braaf*, 13 November 2014.

³⁵ Case File No. 004-D219/91.1, *CDP Survey for Ethnic Minorities and Sexual Violence Research 2013*, 13 November 2014.

³⁶ CDP Report, pp. x, 15-20.

³⁷ Case File No. 004-D219/115, *Written Record of Investigation Action*, 27 November 2014; Case File No. 004-D219/540, *Written Record of Investigation Action*, 19 October 2015, pp. 1-2.

³⁸ See annexes to Case File No. 004-D219/115, *Written Record of Investigation Action*, 27 November 2014.

³⁹ Case File No. 004-D219/126, *Written Record of Investigation Action*, 17 December 2014, p. 2; Case File No. 004-D219/540, *Written Record of Investigation Action*, 19 October 2015, p. 2; Case File No. 004-D219/738, *Written Record of Investigation Action*, 30 March 2016, p. 3.

⁴⁰ Case File No. 004-D219/738, *Written Record of Investigation Action*, 30 March 2016, p. 3.

⁴¹ See annexes D219/738.1 to D219/738.43 to Case File No. 004-D219/738, *Written Record of Investigation Action*, 30 March 2016, p. 3.

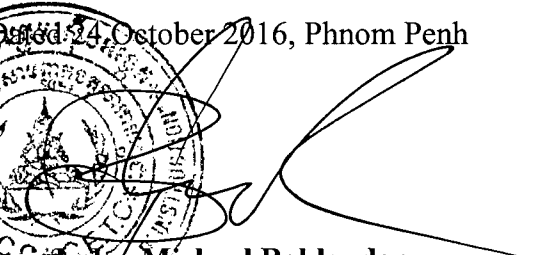


29. The CDP has had custody of the identifying and contact details of the interviewees since Rochelle Braaf's departure from Cambodia in November 2014.⁴² The CDP has confirmed that they are willing to permit OCIJ investigators to access that information.⁴³ While the ICP has not requested this action in the Request, the OCIJ is currently reviewing the transcripts to determine whether the CDP interviewees should be approached for an interview in the Case 004 investigation.
30. In light of the investigative actions taken to date, I consider the ICP's request as set out in paragraph 6.c and 6.d to be answered.

FOR THE FOREGOING REASONS, I:

31. **INFORM** the ICP that I consider the matters sought in the Request to have been sufficiently investigated and the Request accordingly answered; and
32. **INSTRUCT** the Greffier to place onto Case File 004 the documents listed in Annex D to this Decision.

Dated: 24 October 2016, Phnom Penh



Judge Michael Bohlander
សម្រាប់តុលាការស៊ើបអង្កេតអន្តរជាតិ

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⁴² Braaf WRI, A.12, A13.

⁴³ Case File No. 004-D219/540, *Written Record of Investigation Action*, 19 October 2015, p. 2.