



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
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DECISION ON AO AN'S AMENDED FOURTH 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 21 May 2014, the Ao An Defence (“Defence”) filed *Ta An’s Fourth Request for Investigative Action Pursuant to Internal Rule 55(10)*.¹
3. On 23 May 2014, the Greffier of the Office of the Co-Investigating Judges (“OCIJ”) informed the Defence that he had been instructed by the former international Co-Investigating Judge not to place *Ta An’s Fourth Request for Investigative Action Pursuant to Internal Rule 55(10)* on the substantive portion of the Case File.²
4. On 7 May 2015, the Defence filed the *Amended Fourth Request for Investigative Action* (“Request”).³

II. SUBMISSIONS

5. The Request comprises three sub-requests for investigative action.
6. Firstly, the Defence request that I investigate the impact of the bombing of Cambodia by the United States military from 4 October 1965 to 15 August 1973 on the crime-base statistics referenced in the Third Introductory Submission (“3IS”). The Defence ask that I focus particularly on the crime base statistics related to mass graves at Wat Au Traukuon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng”.⁴
7. As part of this investigation, the Defence ask me to determine whether the statistics take into account various effects of the U.S. bombing campaign, namely:
 - a) the large number of fatalities and injuries;
 - b) the large population movements; and
 - c) the possibility that remains exhumed from mass graves were from persons who died as a result of the U.S. bombing.⁵
8. Secondly, the Defence request that I interview Professor Ben Kiernan, Dr Taylor Owen, and Noam Chomsky regarding their research and findings on the U.S. bombings.⁶
9. Thirdly, the Defence request that I identify and interview witnesses who can testify about the impact of the U.S. bombings at Wat Au Traukuon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng.⁷
10. The Defence submit that these investigative requests are likely to reveal probative exculpatory evidence.⁸ The Defence point to the large scale of the U.S. bombing

¹ Case File No. 004-A117/1, *Ta An’s Fourth Request for Investigative Action Pursuant to Internal Rule 55(10)*, 21 May 2014.

² Case File No. 004-A117, *Notification Concerning Ta An’s Fourth Request for Investigative Action Pursuant to Internal Rule 55(10)*, 23 May 2014.

³ Case File No. 004-D244, *Amended Fourth Request for Investigative Action*, 7 May 2015 (“Request”).

⁴ *Ibid.*, para. 25.

⁵ *Ibid.*, para. 26.

⁶ *Ibid.*, para. 27.

⁷ *Ibid.*, para. 28.

⁸ *Ibid.*, para. 29.



campaign, as well as its temporal proximity to the reign of the Khmer Rouge, to argue that the combined effects of deaths, injuries, and population movement may have rendered the crime base statistics cited in the Co-Prosecutors' Third Introductory Submission ("3IS") inaccurate and unreliable.⁹ For example, the Defence comment that people killed as a result of the bombings, either directly or later as a result of injury, may have been buried in the mass graves for which Ao An is alleged to be criminally responsible.¹⁰

11. Finally, the Defence submit that the number of alleged victims and their causes of death go to the heart of culpability in any criminal case, and knowing this information to a reasonable level of accuracy is fundamental to the fairness of the proceedings.¹¹

III. DISCUSSION

12. 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*
- (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

13. 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 Consequently, I am not required to grant general or speculative requests to look for exculpatory evidence.¹⁴ Rather, the requesting party must point specifically towards the presence of the evidence that is sought.¹⁵ For example, the Pre-Trial Chamber 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.¹⁶

14. 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.*"¹⁷ Secondly, the request "*must detail why the requested information is conducive to*

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, paras 13-14.

¹¹ *Ibid.*, para. 29.

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* ("Reconsideration Decision"), 27 September 2010, para. 47.

¹³ *Ibid.*, para. 48.

¹⁴ *Ibid.*, paras 48 & 51.

¹⁵ 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, paras 48, 73.

¹⁶ Reconsideration Decision, para. 48.

¹⁷ *Ibid.*, para. 49.



ascertaining the truth".¹⁸ 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.¹⁹ When the request concerns exculpatory evidence, the requesting party must demonstrate a *prima facie* reason that the investigative action may yield exculpatory evidence.²⁰

A. Crime base statistics in the Third Introductory Submission

15. The Defence request that I investigate the effects of the U.S. bombing of Cambodia on the crime-base statistics referenced in the Third Introductory Submission.²¹ Although the Defence ask me to particularly focus on the crime-base statistics at the five crime sites referred to above, they have not confined their Request to those crime sites, but instead extend their Request to all crime-base statistics referenced in the 3IS.²²
16. A significant amount of witness, expert, and documentary evidence relating to the U.S. bombings is already on Case File 004.²³ Most relevantly, a report by demographic experts Ewa Tabeau and They Kheam, which was prepared for the investigation into Case 002, dealt head-on with the issues raised by the Defence.²⁴ The report's authors were tasked, *inter alia*, to determine the number and causes of deaths during the Khmer Rouge regime, and to distinguish between deaths that were caused by CPK policies, and those are attributable to external factors.²⁵ The report considered the possibility that pre-1975 victims, including the victims of U.S. bombings, were buried in the mass graves together with victims of the Khmer Rouge, and opined that "*it is highly unlikely and practically impossible that the graves mapped so far and the remains contained in them can be linked with non-Khmer Rouge episodes of the Cambodian history.*"²⁶

¹⁸ *Ibid.*, para. 50

¹⁹ *Ibid.*, paras 50-51.

²⁰ 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.

²¹ Request, para. 1.

²² *Ibid.*, para. 25.

²³ Case File No. 004-D107/17.1, *Photos of the site identification Report*, 27 April 2012; Case File No. 004-D117/1, *Written record of witness interview of LENG Vannang*, 1 December 2012, pp. 5-6; Case File No. 004-D107/9, *Written Record of Interview of MEAN Savuth*, 21 February 2012, p. 3; Case File No. 004-D6.1.657, *Written Record of Interview of LUY Bien*, 6 October 2009, pp. 6-7; Case File No. 004-D118/37, *Report of the Execution of Rogatory Letter, dated 10 March 2013: Site Identification Report*, 10 March 2013, pp. 11-13, 20-21; Case File No. 004-D219/366, [Corrected 3] *Written Record of Interview witness SIN Khin*, 16 June 2015, pp. 3, 7; Case File No. 004-D117/8, *Written record of witness interview of SUON Voeun*, 13 December 2012, A14-A16; Case File No. 004-D117/6, *Written record of witness interview of SUON Vann*, 13 December 2012, A27-A30; Case File No. 004-D1.3.10.20, *Kampong Cham 2002*, 20 November 2008, p. 2; Case File No. 004-D6.1.1048, *Report on Siem Reap Province: New North Zone [The relevant information is in an interview of Puth Pom on pages 35-37]*, 2 June 2004, pp. 1-2; Case File No. 004-D117/13, *Written Record of Investigation Action, dated 10 December 2012*, 10 December 2012, p. 2; Case File No. 004-D6.1.940, *Book by Wilfred DEAC entitled "Road to the Killing Fields- The Cambodian War of 1970-1975"*, published in 1997, filed 31 December 2009; Case File No. 004-D219/377, *Written Record of Interview of MORN Mot*, 24 May 2015, A11-A12; Case File No. 004-D219/378, *Written Record of Interview of TEM Chheang*, 24 June 2015, A14.

²⁴ Case File No. 004-D6.1.197, [REDACTED] *Demographic Expertise Report* ("Demographic Expertise Report"), 30 September 2009, pp. 2, 16-17, 51, 56, 59-61.

²⁵ Case File No. 002-D140, *Demographic Expertise Order*, 10 March 2009.

²⁶ Demographic Expertise Report, p. 17.



17. In addition, I will not rely on the crime base statistics cited by the International Co-Prosecutor (“ICP”) in the 3IS without proper scrutiny. The ICP filed the 3IS for the purpose of opening the judicial investigation in Case 004.²⁷ The OCIJ has since investigated the facts set out in the 3IS. The decision in the Closing Order to send the case to trial or dismiss it in whole or in part will be made on the basis of the entirety of the evidence collected during the judicial investigation. This may include material relied upon by the ICP in the Introductory Submission to the extent that the judicial investigation has confirmed the material to be relevant and reliable. 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*.

B. Interview of Ben Kiernan, Taylor Owen, and Noam Chomsky

18. The second part of the Request asks that I interview Ben Kiernan, Taylor Owen, and Noam Chomsky regarding their research and findings on the U.S. bombings.
19. The relevance of Noam Chomsky, according to the Defence, is to enquire into the possibility that “*the American government intentionally confused and exaggerated the death tolls from the Khmer Rouge period to cover up its crimes in bombing Cambodia*”.²⁸ Regardless of the merits of this claim, the ICP did not rely on estimates from the U.S. government,²⁹ and the Defence have not pointed to any tangible impact that any exaggeration of death tolls by the U.S. government would have on the specific case against Ao An.
20. With regard to Ben Kiernan and Taylor Owen, although the Request refers to publications from these experts,³⁰ the Defence have not advanced any *prima facie* reasons why these experts may be able to give further evidence that may be exculpatory or otherwise conducive to ascertaining the truth, beyond their publicly available research. Moreover, Ben Kiernan has for some time now been reluctant to participate in the proceedings before the ECCC. He did not attend court to testify before the Trial Chamber Case 002/01 in 2012, and in 2016 declined an earlier OCIJ request to attend for a judicial interview.³¹
21. Therefore, the Defence have not established any *prima facie* reasons that interviewing Ben Kiernan, Taylor Owen, or Noam Chomsky may yield exculpatory evidence regarding the U.S. bombing of Cambodia.

C. Locate and interview witnesses about the impact of the U.S. bombings at Wat Au Traukuon, Wat Phnom Pros, Wat Angkuonh Dei, Kok Pring, and Tuol Beng

22. As stated above, a significant amount of evidence regarding the impact of the U.S. bombings has been placed on the Case File. The weight of this evidence does not support the Defence’s submission that people killed as a result of the bombings, either directly or later as a result of injury, may have been buried in the mass graves for which Ao An is alleged to be criminally responsible. On the basis of the

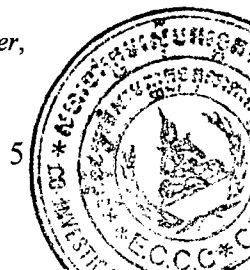
²⁷ Internal Rule 53(1).

²⁸ Request, para. 1.

²⁹ Case File No. 004-D1, [Corrected 1] *Third Introductory submission dated 20-11-2008*, 20 November 2008.

³⁰ *Ibid.*, footnotes 1-3, 14-18, 20, 24-25.

³¹ Case File No. 002/01-E166/1/4, *Proposed testimony of Benedict KIERNAN before the Trial Chamber*, 13 June 2012; Case File No. 004-D219/726, *Written Record of Investigative Action*, 15 March 2016.



evidence collected so far, I am not convinced that there are *prima facie* reasons that locating and interviewing further witnesses about the impact of the U.S. bombings at the five listed crime sites would produce further promising avenues to uncovering exculpatory evidence.

- 23. Moreover, 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 and are therefore in a position to distinguish between deaths that occurred in the early 1970s as a result of the U.S. bombing and deaths that occurred during the reign of the Khmer Rouge.

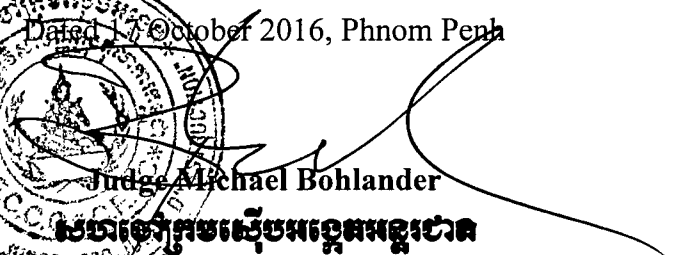
D. General comment on victim number estimates

- 24. I am aware of the relevance which the matters of victim estimates and the inevitable deterioration of the evidentiary situation over time have had on the overall progress of the investigations across all open case files. I should put the parties on notice now that I will use a conservative approach to the evaluation of any evidence related to the calculation of numbers of victims in any crime category charged.
- 25. To illustrate that approach, the following example may be helpful. Frequently, evidence by crime site witnesses in essence states something like: “3 to 4 times per week a lorry carrying 10 – 20 people came to the security centre”. This example would produce a range from 30 to 80 persons per week for an extrapolation of the victim count and an average of 55.
- 26. In light of the effect of the principle of *in dubio pro reo* I will use only the lower count established on the evidence and not the average between that and the maximum count when determining victim numbers for the purposes and in the context of the Closing Order.

FOR THE FOREGOING REASONS, I:

- 27. **INFORM** the Defence that I consider the impact of the U.S. bombing of Cambodia on the crime base statistics in the 3IS to have been sufficiently investigated;
- 28. **DENY** the remainder of the Request.

Dated 17 October 2016, Phnom Penh



Judge Michael Bohlander
 លោកជំទាវម៉ាយហ្គេតហ្គេតហ្គេត
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