



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

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**DECISION ON AO AN'S FIFTH REQUEST FOR  
INVESTIGATIVE ACTION**

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## I. PROCEDURAL HISTORY

1. Relevant disagreements in this case were signed on 22 February and 5 April 2013.
2. On 11 August 2015, the Ao An Defence (“Defence”) filed the *Fifth Request for Investigative Action and Request for Expert* (“Request”).<sup>1</sup>

## II. SUBMISSIONS

3. The Request essentially comprises three sub-requests, the nature of which is summarised below.

### A. First Sub-Request

4. In the First Sub-Request, the Defence submit that a protracted civil war, an ongoing humanitarian crisis, government’s policies, aerial bombings by the United States, and other historical factors created difficult living conditions for Cambodians before 1977, including in the Central Zone.<sup>2</sup> The Defence request the Co-Investigating Judges (“CIJs”) to investigate these conditions by undertaking the following investigative action.
5. First, the Defence request the CIJs to identify and interview witnesses similar to other witnesses already interviewed by investigators of the Office of the Co-Investigating Judges (“OCIJ”) and listed in the Request, who may have relevant and probative information about pre-1977 living conditions.<sup>3</sup>
6. Second, the Defence request the CIJs to locate and place on the Case File reports generated by the United States, Russia and China, as well as academic materials, concerning the humanitarian and economic situation in Cambodia between 1970 and 1977, the civil war, and the American aerial bombings.<sup>4</sup>
7. Third, the Defence request the CIJs to develop and implement, with the expert assistance of Dr Liana Epstein, a contextualised survey of the living conditions in the same period.<sup>5</sup> The Defence submit that retaining Dr Epstein is necessary because the development of this survey is beyond the expertise of the Court, and it is “vital” that the living conditions between 1970 and 1977, as well as post 1977, be established accurately and reliably.<sup>6</sup>
8. The Defence submit that these investigative actions are relevant and necessary to ascertaining the truth in the investigation, specifically in relation to the allegation that after the arrival of the Southwest cadres, living conditions in the Central Zone worsened.<sup>7</sup> The Defence also submit that these investigations are likely to yield *prima facie* exculpatory evidence for Ao An, since the events that unfolded in Cambodia before 1977 are likely to have affected conditions post-1977. According to the Defence, a detailed analysis of these

<sup>1</sup> Case File No. 004-D260, *Fifth Request for Investigative Action and Request for Expert*, 11 August 2015.

<sup>2</sup> Request, paras. 20-32.

<sup>3</sup> Request, para. 33. While the Defence allege that, in interviewing these witnesses, OCIJ investigators did not sufficiently enquire into the pre-1977 living conditions, the Defence do not request that they be re-interviewed.

<sup>4</sup> Request, para. 34.

<sup>5</sup> Request, paras 1, 35.

<sup>6</sup> Request, paras 38-39.

<sup>7</sup> Request, para. 36.



events will “rebut the ICP’s allegations of increased deaths and other poor living conditions in the Central Zone post-1977.”<sup>8</sup>

### B. Second Sub-Request

9. The Defence also request the CIJs to identify and interview witnesses who may have information on the conduct of Khmer Rouge cadres before 1977 that may have affected the living condition of the population during and after that year, such as the relocation of the urban population to the countryside in the Central Zone.<sup>9</sup>
10. They submit that this investigation is relevant to determining which alleged crimes may be attributable to the Khmer Rouge cadres in charge of the Central Zone before 1977 as opposed to the Southwest Zone cadres and may lead to *prima facie* exculpatory evidence for Ao An.<sup>10</sup>

### C. Third Sub-Request

11. The Defence further request the CIJs to investigate actions taken by Ao An or the Southwest cadres to ameliorate the living conditions in the Central Zone, which is relevant to the International Co-Prosecutor’s allegation that the living conditions worsened after the arrival of the Southwest Zone cadres.<sup>11</sup>

## III. DISCUSSION

### A. Analysis of the First Sub-Request

#### i. Relevance of evidence of pre-1977 conditions

12. The ECCC is a criminal court with subject matter jurisdiction over a specific set of crimes listed in Articles 3 to 8 of the ECCC Law.<sup>12</sup> The role and responsibility of the CIJs is to investigate the allegations in the Introductory and Supplementary Submissions and to determine, at the end of the investigation, whether the evidence warrants sending a charged person for trial.<sup>13</sup> It is in this context that the reference in Internal Rule 55(5) to “*investigative action conducive to ascertaining the truth*” must be read.
13. The crimes alleged in Case 004, including Ao An’s alleged criminal conduct, relate to events which took place in the Central Zone of Democratic Kampuchea from about February 1977.<sup>14</sup> Events which took place before 1977 are relevant to the investigation of Case 004 only to the extent that they are relevant to determining these allegations.
14. While it is alleged that the living conditions in the Central Zone worsened with the arrival of the Southwest cadres,<sup>15</sup> this, even if proven, would not amount to a crime in and of itself. On the other hand, the imposition of certain

<sup>8</sup> Request, para. 37.

<sup>9</sup> Request, paras 42-44.

<sup>10</sup> Request, para. 45.

<sup>11</sup> Request, paras. 46-51.

<sup>12</sup> See Article 1 of the ECCC Agreement and Article 1 of the ECCC Law.

<sup>13</sup> See Internal Rules 55(1) and 67(1).

<sup>14</sup> Case File No. 004-D1, *Co-Prosecutors’ Third Introductory Submission*, 20 November 2008, paras 16, 18, 85.

<sup>15</sup> Introductory Submission, paras 11 and 22.



living conditions could amount to a crime within the ECCC's jurisdiction even where such conditions were comparatively better than those imposed before 1977. What matters is whether the conduct of the Southwest cadres post 1977, including Ao An's, satisfies the elements of the crimes over which the ECCC has jurisdiction.

15. To the extent that evidence of pre-1977 events may provide relevant contextual information in the assessment of the post-1977 events, I consider it sufficient, as OCIJ investigators have done to date, to question people who experienced life in the Central Zone before 1977. People who lived in the Central Zone both before and after 1977 are especially well placed to provide this type of evidence and evidence from such witnesses is already on the Case File.<sup>16</sup>
16. To assess the allegations made in Case 004, I do not find it necessary to collect and place on the Case File the documentary evidence identified in the First Sub-Request, nor do I consider it necessary to develop the survey requested by the Defence with the assistance of Dr Epstein.

ii. Prima facie exculpatory value of evidence of pre-1977 conditions

17. With regard to the *prima facie* exculpatory value of the evidence sought with the First Sub-Request, the Defence argue that a detailed analysis of the pre-1977 events and living conditions will “rebut the ICP’s allegations of increased deaths and other poor living conditions in the Central Zone post-1977.”<sup>17</sup> Whether deaths increased or diminished after the arrival of the Southwest cadres is not determinative of whether the crimes alleged in Case 004 have been committed from that time. Further, the Defence have not demonstrated how investigating pre-1977 events could rebut allegations of poor living conditions after 1977. Nor have the Defence specified what elements of the alleged crimes and modes of liability this evidence would be relevant to, or how it would impact on Ao An’s alleged criminal responsibility. Therefore, I am not convinced of the *prima facie* exculpatory value of the evidence sought with the First Sub-Request.
18. In addition, evidence on the Case File indicates that harsh living conditions after 1977 were the consequence of policies implemented by the cadres in charge of the Central Zone at that time, rather than of an absolute or however extreme lack of resources which objectively prevented the Southwest cadres in charge of the Central Zone from ensuring more humane living conditions for

<sup>16</sup> See e.g. Case File No. 004-D117/1, Written Record of Interview of Witness Leng Vannang, 11 December 2012, ERN00876150-00876151, A8-A9; Case File No. 004-D117/57, Written Record of Interview of Witness Kean Ley, 24 June 2014, ERN01067907, A5; Case File No. 004-D117/37, Written Record of Interview of Witness Leng Ra, 23 April 2014, ERN01072504-01072505, A3; Case File No. 004-D87, Written Record of Interview of Witness Chhean Heang, 26 August 2014, p. 2; Case File No. 004-D117/46, Written Record of Interview of Witness Iem Channy, 9 May 2014, ERN01032979, A9; Case File No. 004-D117/47, Written Record of Interview of Witness, Aok Chanty, 10 May 2014, ERN01032987-01032988, A2; Case File No. 004-D78, Written Record of Interview of Witness Chin Sinal, 26 August 2011, ERN00740735, A10; Case File No. 004-D117/57, Written Record of Interview of Witness Kean Ley, 24 June 2014, ERN01067908, A12; Case File No. 004-D219/320, Written Record of Interview of Witness Paor San, 12 May 2015, ERN01112019, A2.

<sup>17</sup> Request, para. 37.



- the people who lived there.<sup>18</sup> For instance, a witness from the Kampong Cham province stated that the living conditions were hard in 1977 and 1978 in spite of the fact that the production of rice and other crops was abundant.<sup>19</sup> People were in a position to grow food for themselves, but the ones who were discovered growing food were arrested and possibly killed.<sup>20</sup> Another witness stated that in a worksite in Sector 41 of the Central Zone provision of food varied based on performance, with people who worked harder receiving a sufficient amount of food and others, including the sick, receiving smaller rations.<sup>21</sup> Other evidence indicates that provision of food was at times subject to people's cooperation with the authorities,<sup>22</sup> and that food deprivation was used as a form of punishment for workers whose performance fell short of that required by the cadres in charge.<sup>23</sup> Finally, high ranking cadres in the Central Zone were apparently fed better than ordinary people.<sup>24</sup>
19. Furthermore, to the extent that the conditions imposed on the inhabitants of the Central Zone after 1977 may have had consequences that amount to crimes under the jurisdiction of the ECCC, these consequences were not only due to the amount of food, water, and medical care that the people were provided, but they were the result of a number of factors apparently attributable to the authorities in charge at the time, such as being subjected to hard labour under threats, while sick, and without being given sufficient food to support the hard and long working hours.<sup>25</sup>
20. While a final determination of these issues will only be made at the end of the investigation, based on this evidence, I am not convinced that detailed investigations of the pre-1977 events, as requested by the Defence, would be conducive to determining the allegations against Ao An.
21. Finally, even if scarcity of resources after 1977 were to be partly attributable to prior events, this circumstance would not exonerate a charged person of his or her responsibility, should the evidence show that his or her conduct amounted to one of the crimes under the jurisdiction of the ECCC. This issue

<sup>18</sup> I use the verb "indicates" because this does not constitute a final determination of this issue, which will only be made at the end of the investigation.

<sup>19</sup> Case File No. 004-D117/46, Written Record of Interview of Witness Iem Channy, 9 May 2014, ERN01032980, A11.

<sup>20</sup> Case File No. 004-D219/217, Written Record of Interview of Witness Chhen Ham, 11 March 2015, ERN01088541-01088542, A19-A27.

<sup>21</sup> Case File No. 004-D219/286, Written Record of Interview witness Min Art, 22 April 2015, ERN 01100835-01100836, A12-A14 [*"If we could not finish it we would be provided with only a small bowl of cooked rice ... If we worked a lot, we would receive enough rice to eat our fill"*]; *"Sick workers were given a smaller ration of rice porridge."*].

<sup>22</sup> See e.g. Case File No. D219/290, Written Record of Interview of Witness Sor Chheang, 28 April 2015, ERN01111789, A25.

<sup>23</sup> See e.g. Case File No. 004-D219/331, Written Record of Interview of Witness Phan Sophal, 7 May 2015, ERN 01112053-01112054, A65.

<sup>24</sup> Case File No. 004-D219-348, Written Record of Interview of Witness Um Tan, 2 June 2015, ERN01116133, A18.

<sup>25</sup> See e.g. Case File No. 004-D3/4, Written Record of Interview of Witness Chin Sinal, 17 August 2010, ERN00607236, A10, A13; Case File No. 004-D3/5, Written Record of Interview of Witness Bao Troab, 18 August 2010, ERN00607226, A9; Case File No. 004-D117/60, Written Record of Interview of Civil Party Sum Pet, 4 August 2014, ERN01044586, A18-A19; Case File No. 004-D219/286, Written Record of Interview witness Min Art, 22 April 2015, ERN 01100835-01100836, A13; Case File No. 004-D219/348, Written Record of Interview of Witness Um Tan, 2 June 2015, ERN01116131, A8.



was considered by the ICTY Trial Chamber in persuasive findings in the case of *Prosecutor v. Delalić et al.* The Trial Chamber stated that:

Before proceeding to determine whether these conditions constitute the offences alleged by the Prosecution, the Trial Chamber must here address the principle argument advanced by the Defence. It is the position of the Defence that, in light of the overall situation in the Konjić municipality at the time, no criminal liability can attach to the accused, as the conditions prevailing in the Čelebići prison-camp were the best that could reasonably be provided. The Trial Chamber must, as a matter of law, reject this view. As set out above, the legal standards here at issue are absolute, not relative. They delineate a minimum standard of treatment, from which no derogation can be permitted. Accordingly, it is the Trial Chamber's view that a detaining power, or those acting on its behalf, cannot plead a lack of resources as legal justification for exposing individuals to conditions of detention that are inhumane.<sup>26</sup>

22. For these reasons, I am neither satisfied that the investigative actions requested in the First Sub-Request are necessary, nor that they are likely to yield *prima facie* exculpatory evidence for Ao An.

#### **B. Analysis of the Second Sub-Request**

23. For the same reasons provided in relation to the First Sub-Request, I am not satisfied that the evidence requested in the Second Sub-Request is either necessary or *prima facie* exculpatory for Ao An.

#### **C. Analysis of the Third Sub-Request**

24. To the extent that the Defence argue that the Third Sub-Request is relevant to the allegation that the living conditions worsened after the arrival of the Southwest Zone cadres, I reiterate that this allegation is marginal to ascertaining Ao An's alleged criminal responsibility.

25. As part of the CIJs' investigation of Case 004, witnesses are routinely asked about the Southwest cadres and Ao An's conduct in relation to the allegations in the Central Zone during that period. At the end of the investigation, the CIJs will evaluate this evidence in its entirety to assess his alleged criminal responsibility.

#### **FOR THE FOREGOING REASONS, I:**

26. **INFORM** the Defence that, to the extent that establishing pre-1977 conditions is relevant to the investigation of Case 004, evidence of such conditions has been gathered, and will continue to be gathered, by interviewing people who personally experienced life in the Central Zone during that time;

27. **INFORM** the Defence that investigations on the conduct of Ao An and the Southwest cadres in the Central Zone from 1977 onwards, including any action they may have taken to ameliorate the people's living conditions, are routinely carried out by OCIJ investigators, and that evidence of such conduct will be assessed at the end of the investigation to determine the merits of the allegations against Ao An; and

<sup>26</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 2008, para. 1117.



28. **DENY** the remainder of Request.

Date: 10 November 2015, Phnom Penh



**Judge Michael Bohlander**  
តេជវង្ស ក្រុងស៊ែបអន្តរជាតិ

**International Co-Investigating Judge**  
**Co-juge d'instruction international**