



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

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	
07 / 12 / 2016	
ម៉ោង (Time/Heure) : 14:50	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN RADA	

Before: The Co-Investigating Judges

Date: 7 December 2016

Language(s): English [Original]

Classification: CONFIDENTIAL

**DECISION ON INTERNATIONAL CO-PROSECUTOR'S
REQUEST TO PLACE CHAM MATERIALS ON CASE FILE 004**

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
Isabelle DURAND

Emmanuel JACOMY
Martine JACQUIN
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, 22 January 2015, and 21 October 2015.
2. On 9 December 2015, I charged Yim Tith with, *inter alia*, genocide and the crime against humanity of persecution perpetrated in the Southwest and Northwest Zones against the Khmer Krom, and the crime against humanity of extermination.¹
3. On 14 March 2016, I charged Ao An with, *inter alia*, genocide and the crime against humanity of persecution perpetrated in the Central Zone against the Cham, and the crime against humanity of extermination.²
4. On 19 October 2016, the International Co-Prosecutor (“ICP”) filed the *International Co-Prosecutor’s Request for Investigative Action to Place Cham Materials onto Case File 004* (“Request”) in which he requests the CIJs to place nine individual documents and two sets of documents on the Case File (“Materials”).³ The Request includes an Annex with descriptions of the Materials (“ICP Annex”).⁴ On 18 October 2016, the ICP provided the Ao An and Yim Tith Defence teams with confidential electronic copies of the Materials that are not publically available.⁵
5. On 10 November 2016, the Yim Tith Defence filed a response objecting to the Request insofar as it seeks placement on the Case File of two documents purported by the ICP to be relevant to Yim Tith (“Response”).⁶
6. On 16 November 2016, the ICP filed his reply to the Response (“Reply”).⁷
7. The Ao An Defence did not file any response to the Request.

II. SUBMISSIONS

A. Request

8. The ICP requests that the CIJs place the Materials on the Case File as they are relevant to the charges against Ao An regarding crimes against the Cham,⁸ and two of the documents are relevant to the charges against Yim Tith.⁹ The Materials include academic articles, books, Civil Party applications, and photographs.¹⁰

¹ Case File No. 004-D281, *Written Record of Initial Appearance*, 9 December 2015, pp. 5-13.

² Case File No. 004-D303, *Written Record of Further Appearance*, 14 March 2016, pp. 4-8.

³ Case File No. 004-D325, *International Co-Prosecutor’s Request for Investigative Action to Place Cham Materials onto Case File 004*, 19 October 2016.

⁴ Case File No. 004-D325.2, *Annex A: Cham Materials for Placement onto Case File 004*, 19 October 2016.

⁵ Request, para. 8.

⁶ Case File No. 004-D325/1, *Yim Tith’s response to the international co-prosecutor’s request for investigative action to place to place Cham materials onto case file 004 (D325)*, 10 November 2016.

⁷ Case File No. 004-D325/1/1, *International Co-Prosecutor’s Reply to YIM Tith’s Response to the International Co-Prosecutor’s Request for Investigative Action to Place Cham Materials onto Case File 004 (D325)*, 16 November 2016.

⁸ Request, paras 1, 5, 10.

⁹ Request, para. 5, Annex A, documents 6, 7.

¹⁰ Request, para. 6; Annex A, documents 1-11,



9. The Materials, according to the ICP, provide evidence of discriminatory and persecutory acts against the Cham in Kampong Cham during the time Ao An controlled Sector 41, provide relevant contextual information, and evidence of the existence of a plan to destroy the Cham in whole or in part.¹¹ The ICP submits that some of the documents also provide a better understanding of Wat Au Trakuon, a site in Sector 41, where thousands of Cham may have been killed.¹²
10. The ICP submits that documents 6 and 7 are relevant to ascertaining the truth in relation to the charged crimes of murder, extermination, and the persecution and genocide of the Khmer Krom allegedly committed by Yim Tith by providing “a more informed assessment” of other evidence already on the Case File.¹³ Specifically, the ICP submits that these documents are relevant because they explain the various methodologies used by experts to calculate death toll estimates such as the Documentation Centre of Cambodia (“DC-Cam”) mapping project’s findings of mass grave statistics.¹⁴
11. The ICP further submits that the Request is sufficiently specific, conducive to ascertaining the truth, necessary to the investigations, and respectful of the fair trial rights of Ao An and Yim Tith.¹⁵

B. Response

12. The Yim Tith Defence object to the Request only in respect of documents 6 and 7 in the ICP Annex, which the ICP asserts are relevant to the charges against Yim Tith.¹⁶
13. The Yim Tith Defence argue that the ICP fails to meet the precision requirement with regard to document 7, a book by Craig Etcheson, as the ICP has not identified which specific pages of the book are relevant.¹⁷
14. The Yim Tith Defence also argue the ICP fails to meet the *prima facie* relevance requirement in respect of documents 6 and 7.¹⁸ The Yim Tith Defence submit that the documents do not pertain to the Khmer Krom, and the ICP’s argument that the documents clarify other evidence already on the Case File is too broad and does not satisfy the applicable test of relevance for investigative requests.¹⁹

C. Reply

15. The ICP replies that the precision requirement does not require a party to cite particular page numbers within a document, but merely the document itself, which he has done in respect of document 6.²⁰
16. Concerning the relevance requirement, the ICP replies that documents 6 and 7 are relevant to the charges against Yim Tith of murder and extermination, the latter requiring killing on a massive scale.²¹ Because documents 6 and 7 provide “a

¹¹ Request, para. 6; Annex A, documents 1-5, 7-9.

¹² Request, para. 6; Annex A, documents 10, 11.

¹³ Request, paras 5-6; Annex A, documents 6-7.

¹⁴ Request para. 6.

¹⁵ Request, paras 1, 10.

¹⁶ Response, paras 7, 13, 16, 19.

¹⁷ Response, paras 17-19.

¹⁸ Response, paras 13, 16.

¹⁹ Response, paras 7-16.

²⁰ Reply, para. 6.

²¹ Reply, pars. 3-4.



more informed assessment” of the calculations of death toll estimates already appearing on the Case File, they are both relevant.²² Finally, even if documents 6 and 7 are not relevant to Yim Tith, they should still be added to Case File 004 because they are relevant to the charges against Ao An.²³

III. DISCUSSION

A. Standard for the assessment of investigative requests

17. 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”).*²⁴
18. 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”*.²⁵ In other words, the requesting party must point specifically towards the presence of the evidence that is sought.²⁶ 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.²⁷ Whether or not a precision requirement has been met is determined on a case-by-case basis, keeping in mind that *“the degree of precision required will vary depending on the circumstances of the particular request.”*²⁸
19. The *prima facie* relevance requirement contains two sub-requirements. First, the request must be *“relevant to the scope of the investigation pursuant to the limitations and parameters set by the Introductory and Supplementary Submissions.”*²⁹ Second, the request *“must detail why the requested information is conducive to ascertaining the truth”*.³⁰ This requires the requesting party to establish a *prima facie* nexus between the requested investigative action and a

²² Request, para. 6; Reply, para 5.

²³ Reply, para. 7.

²⁴ 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.

²⁵ Reconsideration Decision, para. 48.

²⁶ 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.

²⁷ Reconsideration Decision, para. 48.

²⁸ *Ibid.*

²⁹ Reconsideration Decision, para. 49.

³⁰ Reconsideration Decision, para. 50



matter within the scope of the investigation.³¹ The amount of detail needed to satisfy the degree of the second prong of the *prima facie* relevance requirement is case-specific.³²

B. Analysis of the Request

20. In this Decision I refer to the documents by their numbering in the ICP Annex.
21. The Request meets the precision requirement. The ICP Annex specifically identifies and describes each of the Materials requested to be placed on Case File 004. I do not agree with the Yim Tith Defence's contention that, in respect of document 7, a book by Craig Etcheson, the ICP should have provided the specific page numbers referencing the particular pages to be added to the Case File. The ICP identifies with sufficient specificity the parts of the book that he submits are relevant to Case 004.
22. I am also satisfied that the Request satisfies the *prima facie* relevance requirement with regard to documents 1 to 5 and 8 to 11. They appear relevant to the allegations concerning the Cham and supplement similar evidence already on Case File 004.
23. I am not satisfied, however, that the ICP has established the *prima facie* relevance of documents 6 and 7 in relation to either Ao An or Yim Tith. Document 6 is an article by Bruce Sharp entitled "Counting Hell" in which the author compares and critiques the estimates by various academics of the *nationwide* death toll under the Democratic Kampuchea regime ("DK Regime"). The article makes only one reference to a death toll for the Cham, which appears in a table of death tolls broken down by groups prepared by Ben Kiernan.³³ The article provides no information on how that figure was calculated; the author's expertise and ability to critique the various death toll estimates is unclear; and finally, his analysis does not draw on any direct evidence of death tolls. Thus, the article's tenuous relevance to the Cham allegations is outweighed by reliability concerns and a questionable probative value.
24. Document 7 is a book by Craig Etcheson which provides an overview of the methodology used for the death toll estimates provided by DC-Cam in its Mass Grave Mapping Project. The ICP does not point to any specific reference made in the book to death tolls concerning the Cham or Khmer Krom. Again, I consider the relevance of such material to the matters under investigation to be tenuous. In any event, the most relevant section of document 7 which discusses the limitations of the data obtained by DC-Cam (located at pages 119 to 127 of the book), is almost identical to another article by Craig Etcheson that is already on the Case File.³⁴
25. Further, while the ICP submits that both documents 6 and 7 contribute to a more informed assessment of other evidence already on the Case File,³⁵ he does not indicate what that evidence on the Case File is.

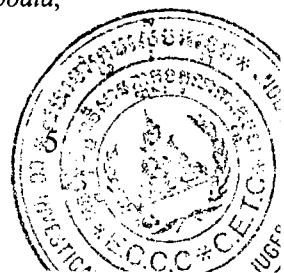
³¹ Reconsideration Decision, paras 50-51.

³² Reconsideration Decision, para. 52.

³³ Case File No. 002-E3/1801, *International Academic article entitles "Counting Hell" by Bruce Sharp*, 4 December 2012, ERN 00078271.

³⁴ Case File No. 004-D188/1/1.1, *The Number, Qualifying Crime Against Humanity in Cambodia*, dated 1999, filed 8 September 2016.

³⁵ Request, para. 6.



26. I have previously stated that in calculating the number of victims attributable to charged persons, I will mainly rely on the evidence of witnesses.³⁶

27. I therefore find the ICP has not demonstrated sufficient *prima facie* reasons to believe that documents 6 and 7 provide evidence that may be conducive to ascertaining the truth regarding the matters under investigation in Case 004.

FOR THE FOREGOING REASONS, I:

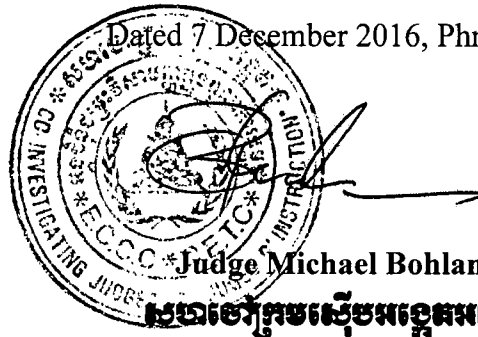
28. **GRANT** the Request in respect of documents 1 to 5, and 8 to 11 of the ICP Annex;

29. **DENY** the Request in respect of documents 6 and 7 of the ICP Annex; and

30. **INSTRUCT** the OCIJ Greffier to place the documents listed in Annex A to this Decision on Case File 004.

This decision is filed in English, with a Khmer translation to follow.

Dated 7 December 2016, Phnom Penh



Judge Michael Bohlander

សមាជិកអង្គការស៊ើបអង្កេតអន្តរជាតិ

International Co-Investigating Judge
Co-juge d’instruction international

³⁶ Case File No. 004-D188/1/1, *Decision on Ao An’s Second Request for Investigative Action*, 7 September 2016, para. 48; Case File No. 004-D189/2, *Decision on Ao An’s Third Request for Investigative Action*, 20 September 2016, para. 20.