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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: 004/2/07-09-2009-ECCC-OCIJ

ឯកសារដើម

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):

.....16...../.....03...../.....2017.....

ម៉ោង (Time/Heure) :.....16:15.....

មន្ត្រីទទួលបន្ទុកឯកសារ (Case File Officer/L'agent chargé du dossier):.....SANN RADA.....

Before: The Co-Investigating Judges
Date: 16 March 2017
Language(s): English and Khmer [Original in English]
Classification: CONFIDENTIAL

DECISION ON AO AN’S THIRTEENTH 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, 22 January 2015, and 16 January 2017.
2. On 16 December 2016, the CIJs notified the parties of the conclusion of the judicial investigation against Ao An, reminded them that they had 15 days from the notification to request further investigations,¹ and ordered the severance of the proceedings against Ao An from Case 004.² On 26 December 2016, I extended the deadline to request further investigative action to 16 January 2017.³
3. On 16 January 2017, the Ao An Defence (“Defence”) filed the *Thirteenth Request for Investigative Action* (“Request”), in which they requested the CIJs to provide an analysis of a number of alleged errors in Written Records of Interviews (“WRIs”).⁴
4. The Co-Prosecutors did not respond to the Request.

II. SUBMISSIONS

5. The Defence submit that they have identified 32 significant inconsistencies between the audio-recordings of witness interviews and their corresponding WRIs. These inconsistencies, they aver, have led to the exclusion from the WRIs of exculpatory evidence and to the addition or exaggeration of inculpatory evidence.⁵
6. The Defence submit that in the majority of these instances, listed in Annex A to the Request, the inconsistencies resulted from the inaccurate English translation provided by the interpreters to the investigators.⁶
7. The Defence request the CIJs to provide an analysis of these inconsistencies and/or to attach transcripts of audio-recordings to the corresponding WRIs to accurately reflect the evidence.⁷
8. In addition, the Defence submit that due to the time-consuming nature of checking the accuracy of WRIs against the corresponding audio-recordings, they were only able to analyse 26 WRIs. They have, however, identified 30 additional “key” WRIs on the Case File with corresponding audio-recordings. Considering “*the prevalence of inconsistencies and their seriousness as demonstrated in Annex A*”, the Defence request the CIJs to order an analysis of potential inaccuracies *proprio motu*, or to grant them 60 days to conduct a further analysis with the view of submitting an addendum to the Request.⁸ The additional 30 WRIs are not identified in either the Request or Annex A.

¹ Case File No. 004-D334, *Notice of Conclusion of Judicial Investigation Against Ao An*, 16 December 2016.

² Case File No. 004-D334/1, *Order for Severance of Ao An from Case 004*, 16 December 2016.

³ Case File No. 004/2-D340/1, *Decision on Ao An's Request for Extension of Time Limit for Requesting Further Investigative Action Following Rule 66 Notice*, 26 December 2016.

⁴ Case File No. 004/2-D345, *Thirteenth request for investigative action*, 16 January 2017.

⁵ *Ibid.*, para. 16; Case File No. 004/2-D345.2, *Annex A* (“Annex A to the Request”).

⁶ Request, paras 19-25.

⁷ *Ibid.*, para. 30.

⁸ *Ibid.*, para. 29.



III. DISCUSSION

A. Nature of the Request

9. The Defence have framed the Request as a request for investigative action. What they are asking for, however, is the correction of the record of investigations already performed by the OCIJ. I am thus not satisfied that the Request falls under the “*further*” investigations that may be requested pursuant to Internal Rule 66(1).
10. Nevertheless, the Request alleges defects in WRIs that include failures to record exculpatory evidence and may thus be prejudicial to Ao An. Internal Rule 76(7) and the jurisprudence of the Trial Chamber indicate that it may not be possible for the Defence to address these alleged inconsistencies at trial, should Ao An be indicted at the end of the investigation, where such inconsistencies could have been detected and raised before the beginning of the trial.⁹ I advise the parties – after consultation with my national colleague – that such correction requests, which are not as such aimed at investigative acts, may in principle be filed outside the period under Internal Rule 66(1). However, it stands to reason that they cannot be filed after the point when the parties are meant to comment on the outcome of the investigations, hence I will not admit them after forwarding the case for final submissions to the Prosecution. Given the purpose of the period in Internal Rule 66(1), even though not applicable here, namely to restrict the filings to the necessary minimum for the proper protection of the parties’ positions after the closure notice, I will also require any party making such a request in the future before the forwarding order to show explicitly for each requested correction that the it is required to avert a *material* prejudice or to correct an otherwise *serious* error which they might be precluded from raising at the trial stage. Mere corrections of document numbers, typographical errors, minor differences between the wording in WRIs and audio recordings that do not distort the meaning of a statement etc. will not normally fall into that category. The parties will in any event not be prevented at trial from again confronting a witness in person with possible inconsistencies in their WRIs.

B. Merits of the Request

i. Preliminary Remarks

11. In the following analysis I will review the alleged defects by reference to the numbering used by the Defence in Annex A to the Request.
12. While the Defence have helpfully provided their transcription and translation of the relevant audio segments, for my own analysis I have had to rely on an independent transcription and translation of those segments provided by the Interpretation and Translation Unit. These transcripts (“OCIJ Transcripts”) will be annexed to this decision.
13. I recall that the Internal Rules do not require the audio-recording of witness interviews,¹⁰ and that the current practice to audio-record them is an optional

⁹ Case File No. 002-E251, *Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation* (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012 (“Decision Concerning Irregularities”), paras 20-22, 25-28.

¹⁰ See Internal Rule 25(4).



procedure that I have decided to adopt for enhanced transparency.¹¹ I further recall that, in light of the safeguards adopted during judicial interviews, including the read-back of the WRI to the witness at the end of the interview with a view of allowing corrections and/or additions to the record, a presumption of reliability attaches to WRIs.¹²

14. Finally, the recording of WRIs at the ECCC is a complex procedure involving, *inter alia*, consecutive (in most cases) interpretation in two languages characterised by very different syntax, grammar, and cultures. The experience with investigations in Cases 003 and 004 has shown that, at times and for a number of different reasons, a WRI may not reproduce the information given by the witness in exactly the same order in which it was provided. This happens, for instance, when after an exchange between the investigator and the witness involving more than one question the transcriber needs the interpreter's assistance to record that exchange. In such instances, it may happen that information given by the witness as part of an answer is recorded in the WRI as part of a following answer.
15. While I have a preference for verbatim records as best practice and have instructed the investigators accordingly, I do not regard this as requiring corrections to the text of a WRI, provided the information recorded in the WRI accurately reflects the evidence given by the witness during the interview. This practice, as I have decided before and as has been upheld by the PTC,¹³ is not meant to set legal minimum standards and deviations from it such as those described above are legitimate under Cambodian and ECCC law.¹⁴

ii. D219/541, Written Record of Interview of Witness Kim Thoeurn

16. **Alleged Defect #1:** As explained supra under Section III(B)(i), audio-recordings are not a legal requirement for witness interviews, and WRIs, which are recorded observing precise procedures and safeguards, enjoy a presumption of reliability. Thus the fact that an answer is inaudible in the audio-recording affects neither the validity nor the reliability of the relevant part of the WRI.
17. With respect to the transcription of the interpreter's sentence "*No, because I was not good at speaking*" as "*I did not know much about the theory*", the Defence have failed to substantiate how the use of the word "theory", instead of "speaking", makes the answer more inculpatory. I find the discrepancy immaterial in the context of the interview.
18. **Alleged Defect #2:** The Defence correctly observe that in Answer 88, the verb 'tortured' is used, while the audio-recording shows that the witness used the verb 'mistreated'. This discrepancy, however, is not present in the original Khmer version of the WRI, where the word 'mistreated' is used. The English translation

¹¹ Case File No. 004-D266, *Memorandum from ICIJ to all OCIJ investigators concerning "Instructions on the Recording of Witness and Civil Party Interviews"*, 22 September 2015.

¹² See Case File 004-D296/1/1/4, *Decision on Ao An's application to Annul Non-Audio-Recorded Written Records of Interview*, 30 November 2016 ("Decision Regarding Non-Audio-Recorded WRIs"), para. 22; Decision Concerning Irregularities, para. 22.

¹³ Decision Regarding Non-Audio-Recorded WRIs, paras 19-26.

¹⁴ In Cambodian law, WRIs are "*report[s] made by the Co-Investigating Judges of the relevant statements made by a witness, a Civil Party or Accused*", see Case File No. 004-D274/1, *Decision on Ao An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File*, 9 August 2016, paras 20-21.



of Answer 88 has now been corrected, and the verb 'tortured' has been replaced by 'mistreated'.

19. The Defence allege that the use of the word 'tortured' is more inculpatory.¹⁵ However, it is the factual circumstances, as they emerge from the evidence, not the terminology used by the witness or a member of the investigation team, which are relevant to the determination of whether the legal elements of a particular crime have been met.
20. **Alleged Defect #3:** The only detail missing from the WRI is the name of the office chairman, "Aun". It is otherwise clear that the witness made reference to an office chairman. Further, the fact that the office chairman was Aun is clearly recorded in Answers 15 and 45.¹⁶ I am thus not satisfied that the Defence have demonstrated the omission of a potentially exculpatory statement from the WRI.
21. **Alleged Defect #4:** The WRI clearly records that the witness had numerous interactions with Aun, who was the witness' superior.¹⁷ The fact that meetings between the two are not recorded in Answer 31 does therefore not amount to an omission of potentially exculpatory evidence from the WRI.

iii. D219/542, Written Record of Interview of Witness Nut Kimnang

22. Preliminarily, I note that while the actual duration of the interview, as recorded in the WRI, was one hour and 26 minutes (including the read-back), the corresponding audio-recording is just 38 minutes long. This interview was conducted by the same investigator who on the following day conducted interview D219/543, discussed in the next sub-section, which also lasted longer than the corresponding audio-recording. This may have been caused by either a technical failure or the inadvertent use of a feature that stops the recorder when nobody is speaking (a feature that can be triggered also when the voice is too low to be detected by the device). These are, however, only hypotheses. Regrettably, even after consulting with the staff that took part in those interviews, the reasons for the partial recording remain unclear.
23. Further, I noticed a number of instances where the witness was only audio-recorded uttering two or three words, but then the interpreter translated full and articulated sentences to the investigator, I instructed my staff to meet with the interpreter who assisted in this interview as well as in D219/543, Mr Saur Sokhalay, to find the cause of these discrepancies. The interpreter had a good recollection of the interviews, and explained that he had adopted a simultaneous – as opposed to consecutive – interpretation technique. The interpreter thus, started translating for the investigator soon after the witness had started speaking, rather than waiting for the witness to have finished with his or her answer, as it is normally the practice in interviews conducted by the OCIJ. The result is that the witness' answers are for the most part inaudible because covered by the interpreter's voice. These cases are essentially the same as those where the witness' voice is inaudible in the recording, and the same reasoning I have provided for Alleged Defect #1 applies.

¹⁵ Annex A to the Request, Alleged Defect # 2.

¹⁶ Case File No. 004/2-D219/541, *Written Record of Interview of Witness Kim Thoeurn*, 5 October 2015, ERN01174520, ERN01174524.

¹⁷ *Ibid.*, ERN01174524, ERN01174525, ERN01174526, ERN01174527, ERN01174528.



24. However, simultaneous interpretation rendering the witness' answer inaudible obviously frustrates the purpose of audio-recording the interviews verbatim. Such practice will no longer be adopted in future interviews conducted by my office and I have instructed the investigators accordingly.
25. **Alleged Defect #5:** The audio-recording does not record the witness as having said that, upon arrival of the Khmer Rouge, they were assigned to farm rice. Yet, this information is recorded in Answer 2 of the WRI.¹⁸ Considering that the witness confirmed the accuracy of the WRI after the read-back, and that a large part of the interview is missing from the audio-recording, I am satisfied that in this instance the interpreter's voice covered the witness', whose answer is thus inaudible.
26. I also note that, in Answer 2, the witness referred to a period immediately following 17 April 1975 and predating the charges against Ao An. In addition, the organisation of collective work is not, *per se*, incriminating evidence.
27. **Alleged Defect #6:** In the audio-recording section pointed out by the Defence, the witness only stated "*since 1973*", while Answer 10 records the witness as having stated that Sreng was in charge from 1973 until 1976, when he was taken away. I am satisfied that the apparent absence of the witness' answer from the record was again caused by the simultaneous interpretation employed by the interpreter. In fact, in Answers 11 to 13 the witness stated that Sreng disappeared and was replaced in 1976, which is very unlikely to be something that the interpreter just guessed in Answer 10 if that information had not been provided by the witness.¹⁹ I am thus satisfied that the 1976 date was not improperly provided by the interpreter, and that it comes from the knowledge of the witness.

iv. *D219/543, Written Record of Interview of Witness Nam Monn*²⁰

28. The Defence alleged many discrepancies between the audio-recording of this interview and the WRI. A preliminary analysis revealed numerous instances where the witness was recorded as having said just one or two words, with the following interpretation being noticeably longer and richer in details. As noted above under D219/542, in this interview the interpreter adopted a simultaneous interpretation technique, which resulted in only the initial parts of the witness' answers to be audible in the recording.
29. However, in light of the numerous instances where this occurred, I have requested the audio-recording to be fully transcribed ("*Nam Monn Transcript*").²¹ The Nam Monn Transcript shows the witness' detailed knowledge about information alleged by the Defence to have been provided by the interpreter, thereby corroborating the interpreter's explanation that the use of simultaneous interpretation rendered parts of the witness' answers inaudible. In my analysis of

¹⁸ Case File No. 004/2-D219/542, *Written Record of Interview of Witness Nut Kimnang*, 6 October 2015, ERN01173595.

¹⁹ *Ibid.*, ERN01173596, ERN01173597.

²⁰ As recorded in the WRI, the effective duration of the interview (excluding the breaks) is of two hours and 21 minutes, including the read-back. The audio-recording, however, only lasts 49 minutes, and includes the read-back conducted at the end of the interview. It follows that between the start and the end of the interview, 92 minutes were not audio-recorded.

²¹ Case File No. 004/2-D345/1.3, *Annex C: OCIJ Transcript (Full) of D219/543R*.



D219/543, I rely on both the Nam Monn Transcript and the (partial) OCIJ Transcript.²²

30. Alleged Defect #17 (see below) is one of the instances where a seemingly two-word answer by the witness was followed by an articulated and detailed answer provided by the interpreter. Follow up questions and answers to Answer 112, in relation to which Defect #17 is alleged, clearly demonstrate that the answer relayed by the interpreter was based on information provided by the witness. Because of its demonstrative value, I will analyse Alleged Defect #17 before analysing the other defects alleged in relation to D219/543.
31. **Alleged Defect #17:** The Defence is correct in noting that the witness cannot be heard providing the information recorded in Answer 112 regarding the presence of two or three graves near Wat Prey Toteung. The Defence allege the interpreter added this information which they submit is inculpatory. However, in Answers 113 to 116, as confirmed by the Nam Monn Transcript, the witness provided detailed information on the two graves mentioned in the interpreter's answer, specifically regarding their location, their state of conservation, and the presence of bloodstains in their vicinity.²³ The witness' detailed answers about the graves prove both that she had knowledge about those graves and that she had already spoken about them (the interpreter could not have invented an answer that just happened to match what the witness had seen during her stay at Wat Prey Toteung). There is no other reasonable conclusion.
32. I will now continue the analysis starting with the first defect alleged in relation to D219/543, bearing in mind that other parts of the interview are likely to be missing from the audio-recording.
33. **Alleged Defect #7:** The information about Prey Totueng in Answer 3 of the WRI was provided by the witness. The interpreter did not interrupt the witness and add information to her answer. Rather, in this instance he again employed simultaneous interpretation. This is also clear from Answers 5, 7, and 11 of the WRI and further confirmed by the Nam Monn Transcript, where the witness is clearly recorded as stating that the truck dropped her and the other prisoners at Prey Totueng, where they were handcuffed.²⁴
34. **Alleged Defect #8:** The information that the witness and other prisoners were driven to Wat Phnum Pros, recorded in Answers 7 and 8, did not come from the interpreter but from the witness. In the Nam Monn Transcript, the witness is recorded as stating: "*They trucked us. They did not.... They got us off and then they trucked the prisoners on to....*" After a brief exchange with the interpreter, during which some parts of the witness' answers are not audible due to simultaneous interpretation, the witness is recorded as specifying that he and the other prisoners had been trucked to "*Phnom Srei Phnom Bros*".²⁵
35. **Alleged Defect #9:** The Defence claim that the information recorded in Answer 15, namely that a) the prisoners were told they were going back to their hometowns; b) that the prisoners were not told why they were being taken to the

²² Case File No. 004/2-D345/1.4, *Annex D: OCIJ Transcript (Partial) of D219/543R* ("OCIJ Partial Transcript of Nam Monn").

²³ Case File No. 004/2-D219/543, *Written Record of Interview of Witness Nam Monn*, 7 October 2015 ("Nam Monn WRI"), ERN01174551, ERN01174552; Nam Monn Transcript, p. 26.

²⁴ Nam Monn WRI, ERN01174538, ERN01174539; Nam Monn Transcript, pp. 6-8.

²⁵ Nam Monn Transcript, p. 7.



prison; and c) that the prisoners were all from Kampong Cham province, was just added by the interpreter in the WRI, without the witness actually having given that evidence.

36. However, the Nam Monn Transcript shows that the information under a) and b) was provided by the witness. With regard to a), the interpreter asked "*When they got you off at Wat Prey Totueng, which was a prison, what did they explain to those people? What did they explain to you in particular?*" to which the witness answered "*They just put me there. They did not explain.*"²⁶ With respect to b), the witness is recorded as having stated, in reference to the prisoners, that "*They were told that they would be allowed to go to their home villages.*"²⁷
37. The fact that prisoners were from Kampong Cham province is not audible in the audio-recording. However, the witness was read back this information at the end of the interview and confirmed its accuracy. Considering that it is unlikely that the interpreter could have known the origin of the prisoners, as well as the other instances of missing audio in this interview, I conclude that the information was provided by the witness but is not audible due to the simultaneous interpretation.
38. **Alleged Defect #10:** The witness stated that if she and the other prisoners protested, "*they would take us away.*"²⁸ The interpreter, however, translated that as "*they would take us to be killed*";²⁹ which is also the language used in the WRI. This is a substantive discrepancy which increases the inculpatory character of the evidence. The reasons for this discrepancy are unclear.
39. The audio-recording of this interview, as already noted, is defective: it is both shorter than the actual interview and parts of it are inaudible due to simultaneous interpretation. However, upon a comparison of the answer given by the witness with the translation provided by the interpreter I have not found strong indications, like in other instances in this interview, that part of the witness' answer are not audible or went unrecorded. Rather, the length and syntax of the witness' answer and of the interpreter's translation suggest that the latter provided a liberal interpretation of the witness' evidence.
40. I note that the witness did confirm the accuracy of that statement after the read-back, which is a factor that I have taken into account on other occasions in accepting the accuracy of the WRI. However, here we are in the presence of a substantive discrepancy in the record, not of an absent or inaudible portion of the audio-recording. While the witness' acceptance of the WRI may suggest that, by stating that prisoners would be taken away, the witness implied that they would be killed (a conclusion that seems plausible in light of the totality of the evidence provided by the witness),³⁰ I am of the view that the circumstances of the case and fairness to the charged person require interpreting Answer 23 in accordance with the audio-recording.
41. The prejudice that this discrepancy may cause is nonetheless low, because the witness was not referring to a specific criminal episode, but rather explaining what she thought *would* happen in case the prisoners had protested. However, I will not

²⁶ Nam Monn Transcript, p. 8.

²⁷ Nam Monn Transcript, pp. 8-9.

²⁸ Nam Monn Transcript, p. 11.

²⁹ OCIJ Partial Transcript of Nam Monn, p. 2.

³⁰ See Nam Monn Transcript, p. 19, where the witness stated that prisoners who were taken away would then disappear.



consider Answer 23 alone as evidence that prisoners would be killed if they protested while detained at Wat Prey Totueng Pagoda.

42. **Alleged Defect #11:** According to the Nam Monn Transcript, the witness stated that, during interrogation, she did not dare reveal her father's name out of fear of being accused of belonging to "*an undesirable network*."³¹ In the WRI, the witness is recorded as stating that she did not dare reveal her father's name as she was afraid that they would think that the witness was affiliated with the CIA.³² Thus, the information was not added by the interpreter, but was provided by the witness. The translation of "*undesirable network*" as CIA is imprecise, but the substance of the evidence is not affected (for the substantive equivalence of the two terms in the context of this interview, see Answer 21 of the WRI where the witness states that prisoners were asked whether they belonged to the CIA³³).
43. **Alleged Defect #12:** The Defence allege that the statement in Answer 54, "*Some of [the soldiers] were ordered to come beat people*" was not stated in the audio-recording and exaggerates the inculpatory evidence. According to the OCIJ Transcript, however, the witness stated that the guards "*went to beat people like that*".³⁴ I am thus satisfied that the WRI reflects the audio-recording with sufficient accuracy.
44. **Alleged Defect #13:** The Defence allege that in Answer 71 in the WRI, the interpreter adds inculpatory information about seeing documents made by Prak Yut at the prison. In contrast to the transcript provided by the Defence, however, the Nam Monn Transcript shows that the witness stated that documents were prepared during the period she spent at Wat Prey Totueng, and that they were then given to messengers, one of whom, from the exchange between the witness and the investigator, appears to have been Prak Yut's messenger.³⁵ The information about documents being generated at the prison was thus not added by the interpreter.
45. The word "documents", however, is recorded in Answer 71 of the WRI as "lists". As it is the case for Alleged Defect #10, here there are no indications, from the transcript, that the witness' sentence is only partially audible. Notably, the witness also specified that she had never seen the content of the documents, which implies that she was not in a position to specify what *type* of documents she saw being delivered to the messengers.
46. With regard to the prejudice that this discrepancy may cause, I am of the view that the word "list", without further specification of what was listed therein and for what purposes, is not *per se* significantly more inculpatory than "documents".
47. In any event, in my evaluation of the evidence I will not rely on Answer 71, on its own, as proof that lists of prisoners were compiled at Wat Prey Totueng.
48. **Alleged Defect #14:** The Defence complain that the information that documents generated at the prison were given to messengers, while recorded in the WRI, is not audio-recorded. As shown by the Nam Monn Transcript, this claim is incorrect. The witness, after being asked about the nature of the documents, is

³¹ Nam Monn Transcript, p. 12.

³² Nam Monn WRI, ERN01174541.

³³ *Ibid.*, ERN01174540.

³⁴ OCIJ Partial Transcript of Nam Monn, p. 3.

³⁵ Nam Monn Transcript, pp. 19-20.



recorded to have stated that she did not know about their content, and that she just “saw them write down and then... the messenger/s took it [sic] and left.”³⁶

49. **Alleged Defect #15:** The Defence complain that the information in Answer 95 was provided by the interpreter, and not by the witness. According to the Defence, when asked “*How did the people there behave when Yeay Yuth arrived?*”, the witness only answered “*The guard was*”.
50. In contrast to the Defence’s transcript, the Nam Monn Transcript shows that the witness answer was that “*They provided protection, they...*”.³⁷ Answer 95 records the witness’ answer as: “*When Yeay Yuth came the soldiers on guard respected her.*” Some of the witness’ answer may be inaudible in the audio-recording. Irrespective of this, Answer 95 is sufficiently reflective of the information provided by the witness, and the difference between the audio and the WRI is immaterial and non-prejudicial.
51. **Alleged Defect #16:** The fact that guards were harsher to prisoners when Prak Yuth was around is not audible in the audio-recording, yet it is recorded in Answer 96.
52. Considering that the witness confirmed the accuracy of this information at the end of the interview, and in the absence of indications to the contrary, I am satisfied that the witness’ answer is merely inaudible due to the use of simultaneous interpretation.
53. **Alleged Defect #18:** In Answer 50, in response to the question “*Do you know who decided the fate of prisoners at Prey Totueng? [...]*”, the WRI records the witness as having answered “*I do not know.*” The Defence allege the answer excludes potentially exculpatory information provided by the witness, specifically that “*I only know Yeay Yuth*”. However, that information is clearly recorded in Answer 51.³⁸ The potentially exculpatory information referred to by the Defence is thus not omitted from the WRI.

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54. **Alleged Defect #19:** With regard to the witness’ answer being inaudible in the audio-recording, I refer to the discussion under Alleged Defect #1 above. With respect to the alleged addition of exculpatory evidence, the witness gave evidence about the killing of prisoners shortly after the exchange singled out by the Defence.³⁹ I am thus satisfied that the WRI is sufficiently accurate and that no inculpatory evidence has been unduly added in it.
55. **Alleged Defect #20:** With regard to the witness’ answer being inaudible in the audio-recording, I refer to the discussion under Alleged Defect #1 above. I also note that the witness had already stated that East Zone evacuees were held in Wat Ta Meak in Answer 24 of the WRI.⁴⁰

³⁶ Nam Monn Transcript, p. 20.

³⁷ Nam Monn Transcript, p. 23.

³⁸ Answer 51 reads: “At that time, I did not know. I just knew there was a woman named Yuth in Charge. I did not know about any men. I knew only that woman named Yuth”, see Nam Monn WRI, ERN01174544.

³⁹ Case File No. 004/2-D345/1.5, Annex E: OCIJ Transcript of D219/544R.

⁴⁰ Case File No. 004/2-D219/544, *Written Record of Interview of Witness Chun Heng*, 9 November 2015, ERN01174559.



56. **Alleged Defect #21:** Answer 74 records the witness as stating that he had never attended wedding ceremonies, but that “*a mass wedding for arranged couples was held on the commune premises.*” The Defence observe that, in the portion of the audio-recording that they have transcribed, the witness only stated that he had never attended weddings. The Defence thus complain that inculpatory information about mass weddings recorded in Answer 74 was added by the interpreter.
57. I note that in Answer 71 the witness is recorded as having stated that five or ten couples “*were arranged at one time in the villages.*” In Answer 75, the witness repeated that he had never attended mass weddings but that he had learnt that five couples had been married at the same time.⁴¹ The Defence have not claimed any discrepancy between Answers 71 and 75 and the corresponding audio-recording. I am thus satisfied that Answer 74 does not improperly add inculpatory information to the WRI, and that the information about arranged group weddings was provided by the witness, and is in fact hearsay evidence.
58. **Alleged Defect #22:** With respect to the inaudible answer, I refer to the discussion under Alleged Defect #1 above.

vi. *D219/606, Written Record of Interview of Witness Chea Kheang Thai*

59. **Alleged Defect #23:** Some details of the witness’ answer appear to have been left out from Answer 43 in the WRI. However, the availability of supplies and the role performed by the Zone and the Sector in their distribution – which is what is missing from Answer 43 – are clearly explained in Answers 44 to 51.⁴² No potentially exculpatory information has thus been omitted from the WRI.

vii. *D219/609, Written Record of Interview of Witness Samrith An*

60. **Alleged Defect #24:** According to the OCIJ Transcript, the witness listed “I” as one of the commune chiefs who had been killed.⁴³ Moreover, in Answer 11, the witness had named the people who he is recorded as saying in Answer 12 had all died. Further, in Answer 13 the witness makes it clear that the commune chiefs had been “*executed [...] under Angkar’s command.*”⁴⁴ I am thus satisfied that the WRI reflects the witness’ statement with sufficient accuracy and that no inculpatory information has been unduly added by the interpreter.

viii. *D219/731, Written Record of Interview of Witness Nhem Chen*

61. **Alleged Defect #25:** The witness stated that the arrests of the former sector committee members happened before Ao An arrived. This is correctly recorded in the WRI. According to the OCIJ Transcript, it is unclear whether the witness said these arrests took place days or months before Ao An’s arrival.⁴⁵ In any event, the WRI does not specify how long before Ao An’s arrival the arrests were carried out. The words “*several months*” in Answer 7 refer to the time when the witness saw the transport of arrested people from the East Zone, not to the time of the

⁴¹ *Ibid.*, ERN01174565.

⁴² Case File No. 004/2-D219/606, *Written Record of Interview of Witness Chea Kheang Thai*, 13 November 2015, ERN01184892, ERN01184893.

⁴³ Case File No. 004/2-D345/1.7, *Annex G: OCIJ Transcript of D219/609R*.

⁴⁴ Case File No. 004/2-D219/609, *Written Record of Interview of Witness Samrith An*, 17 November 2015, ERN01185814, ERN01185815.

⁴⁵ Case File No. 004/2-D345/1.8, *Annex H: OCIJ Transcript of D219/731R* (“OCIJ Transcript of Nhem Chen”).



arrests of former sector members. Thus, the Defence's allegation is based on a misunderstanding.

62. **Alleged Defect #26:** Answer 52 makes it clear that Ngauv was Ke's commander or supervisor.⁴⁶ Thus, the name Ngauv in Answer 51 was not added by the interpreter (who could not have guessed the supervisor's name before the witness stated it). Rather, this seems one of those instances, discussed under Section III(B) above, where the information given by the witness was not recorded in the exact order in which it was provided during the interview.
63. The statement in the WRI that "*both of them were killers*" is not included in the portion of audio-recording reviewed by the OCIJ. In any event, this statement does not unduly add any inculpatory information, since the witness stated that, in killing prisoners, Ke acted pursuant to orders of his commander (Ngauv).
64. **Alleged Defect #27:** The information recorded in Answer 90 is more succinct than the actual exchange between the investigator, the interpreter, and the witness in the interview. However, I find Answer 90 to be a fair summary of the evidence of the witness, for two reasons.
65. Firstly, according to the OCIJ Transcript the witness stated that purges were organised by the Sector, and in Answers 3 ff. of the WRI the witness clearly stated that Ao An was in charge of the Sector.⁴⁷ Secondly, according to the OCIJ Transcript the witness stated, *inter alia*, that "[f]or example, Ke Pauk received order from the top and Ke Pauk invites the sector level to come to the meeting. And then the sector level, for example, Ta An, when he came back, he order -- relays his order to his security person, so -- to carry out the executions."⁴⁸ No inculpatory information was thus unduly added to the WRI.
66. **Alleged Defect #28:** The witness' statement that Ao An did not go to Wat Batheay is recorded in the WRI. This statement implies that, according to that witness, Ao An could not at that time have seen any killings that may have been carried out during the witness' visit. I can see no reduction in exculpatory of that witness' evidence.

ix. *D219/762, Written Record of Interview of Witness Saray Hean*

67. **Alleged Defect #29:** The Defence is correct that Answer 123 does not reflect the witness' statement that Ao An lived far from him. However, it is clear from Answers 1 and 15 that the witness was stationed in Sector 42 and Ao An in Sector 41, which makes it sufficiently clear that the two lived far from each other.⁴⁹
68. Furthermore, the Defence have failed to demonstrate, even *prima facie*, how the information omitted from Answer 123 of the WRI could be exculpatory. The witness did not give, in Answer 123, information on Ao An for the assessment of which the distance could have been a relevant factor (for instance, in assessing the reliability of that information). When the witness gave information about Ao An,

⁴⁶ Case File No. 004/2-D219/762, *Written Record of Interview of Witness Nhem Chen*, 15 March 2016 ("Nhem Chen WRI"), ERN01224108.

⁴⁷ OCIJ Transcript of Nhem Chen; Nhem Chen WRI, ERN01224102, ERN01224103.

⁴⁸ OCIJ Transcript of Nhem Chen, p.3.

⁴⁹ Case File No. 004/2-D219/762, *Written Record of Interview of Witness Saray Hean*, 19 May 2016, ERN01309789, ERN01309792.



he did so on the basis of a visit he made to Sector 41, which – as is clearly recorded in Answers 7 to 14 – was the only time when he ever saw Ao An.⁵⁰

69. The omission identified in Answer 123 is thus immaterial, and no prejudice to Ao An arises.

x. D219/768, *Written Record of Interview of Witness Ly Hak*

70. **Alleged Defect #30:** The Defence correctly identifies a discrepancy between the audio-recording and the WRI which, in the abstract, could render the evidence more inculpatory.⁵¹ The modality of commission of a certain crime may in fact be taken into account at the sentencing stage.⁵²

71. However, considered in its context, the discrepancy contained in Answer 27 is not prejudicial to Ao An, because he is not charged with the incident discussed by the witness, which happened before the temporal scope of the allegations against him.

xi. D219/769, *Written Record of Interview of Witness Veut Him*

72. **Alleged Defect #31:** The Defence complain that the bold part of the following statement of the witness is omitted from the WRI: “*Back then, there were not many killing [sic]. It was after we were called to live in new village, the huge amount of killing was so apparent. However, there were not many killing incidents, when the reform was being carried out.*”

73. The OCIJ Transcript and translation differ substantively from the Defence’s: “*By the time there had not yet been many killings. Later, people were called to move to new cooperatives, new villages, at which time many [killings and/or arrests] happened. Shortly after the reshuffle, many [killings and/or arrests] had not yet happened.*”⁵³

74. Answer 19 of the WRI states: “*at that time, there were not yet many killings. Once they summoned me to go to the new cooperatives, then they were a lot.*”⁵⁴ Based on the OCIJ Transcript, I am satisfied that Answer 19 fairly reproduces the witness’ evidence and that no exculpatory information has been omitted.

75. **Alleged Defect #32:** The Defence is correct that the witness did not use the term “17 April people”, recorded in Answer 26. Rather, the term appears to have been used by the interpreter with reference to what the witness had characterised as people who had been evacuated from Phnom Penh.

76. The term ‘17 April people’, however, is widely known to correspond to urban evacuees in Democratic Kampuchea, which may explain the interpreter’s liberal translation. Further, the witness was not relaying the words of a Khmer Rouge official, or of Ao An himself, thus the imprecise translation is not relevant to establishing the alleged discriminatory policies of the Khmer Rouge or Ao An’s alleged discriminatory intent.

⁵⁰ *Ibid.*, ERN01309791, ERN01309792.

⁵¹ In the audio-recording (Case File No. 004-D219/768R, *CD Record of Interview Witness Ly Hak*), the witness states that “[t]hose selected were taken to be killed, and all of them were dead [...]”, whereas the WRI states that “[t]hose selected were all taken to be beaten to death and disposed of” (see Answer 27).

⁵² Case File No. 001-F28, *Appeal Judgement*, 3 February 2012, para. 375.

⁵³ Case File No. 004/2-D345/1.11, *Annex K: OCIJ Transcript of D219/769R*, p. 1.

⁵⁴ Case File No. 004/2-D219/769, *Written Record of Interview of Witness Veut Him*, 25 May 2016, ERN01309824.



77. I am thus not satisfied that this imprecision has exaggerated the inculpatory value of the evidence, as claimed by the Defence.

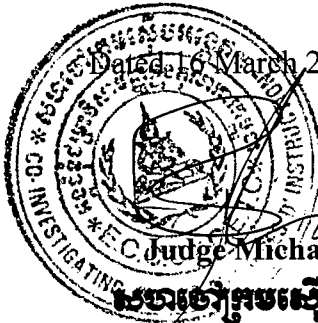
IV. CONCLUSION

78. The analysis above does not support the Defence’s complaint of numerous serious inconsistencies in the WRIs listed in Annex A to the Request.⁵⁵ On the contrary, with the exception of the discrepancies identified under Alleged Defects #10 and #13 and a mistake in the English translation of a WRI in relation to Alleged Defect #2, I have found all the other inconsistencies alleged by the Defence to be either unfounded or immaterial and non-prejudicial to Ao An.
79. The alleged widespread and serious character of defects is the Defence’s basis for the second prong of the Request, which is the request to analyse 30 additional WRIs (not identified in the Request) or the granting of 60 additional days to allow the Defence to conduct their own review. Based on the results of my analysis of the defects alleged in Annex A, I am not satisfied that the Defence’s second request is either necessary or warranted. Nor is the request in this respect sufficiently specific, because the WRIs should at least have been named, even if possibly not analysed.

FOR THE FOREGOING REASONS, I:

80. **GRANT** the Defence’s request to provide an analysis of the defects alleged in Annex A to the Request, which is provided herein;
81. **FIND** it unnecessary to make any corrections to the WRIs identified by the Defence in Annex A to the Request, with the exception of the correction of the English translation specified above under Alleged Defect #2; and
82. **DENY** the request to conduct an analysis of 30 additional WRIs or to grant additional time for the Defence’s own analysis.

Dated 16 March 2017, Phnom Penh



Judge Michael Bohlander
សមាជិកអង្គជំនុំជម្រះអន្តរជាតិ
International Co-Investigating Judge
Co-juge d'instruction internationale

⁵⁵ Request, para. 29.