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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

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Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

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**NOTICE OF PROVISIONAL DISCONTINUANCE REGARDING
INDIVIDUAL ALLEGATIONS**

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I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 4 March 2016, in my Request for Comments regarding Alleged Facts Not to Be Investigated Further (“Request for Comments”),¹ I informed the parties of my intention not to investigate further the following facts² alleged in the Submissions:
 - **Fact 1** - All allegations relating to Wat So Ben security centre,³
 - **Fact 2** - All allegations relating to Saom village,⁴
 - **Fact 3** - Allegations of targeting, arrest and execution of Khmer Krom and Vietnamese within Thipakdei cooperative,⁵
 - **Fact 4** - All allegations relating to Wat Banteay Treng security centre,⁶
 - **Fact 5** - Allegations of mass executions at Phnom Tra Cheak Chet,⁷
 - **Fact 6** - All allegations relating to Damnak Reang execution site,⁸
 - **Fact 7** - All allegations relating to Trach Kraol security centre also known as Boeng Bat Kandal prison,⁹
 - **Fact 8** - All allegations relating to the La-Ang Phnom Kuoy Yum caves,¹⁰
 - **Fact 9** - Allegations relating to the targeting, arrest and execution of Vietnamese within Reang Kesei commune,¹¹
 - **Fact 10** - Allegations relating to the rape and murder of two women of Vietnamese descent in Preah Net Preah district,¹²
 - **Fact 11** - Allegations of sexual violence, including rape, and subsequent murder committed against female Khmer Krom and “East Zone Evacuees” within Bakan District,¹³
 - **Fact 12** - All alleged crimes relating to Tuol Purchrey execution site,¹⁴ and
 - **Fact 13** - Allegations of forced marriage near Kang Hat Dam.¹⁵
2. I noted that the above-mentioned facts would *prima facie* appear to be subject to a partial dismissal with the exception of Fact 13, which would be a potential case for the application of Internal Rule 66 *bis*.¹⁶ I invited the parties to file submissions as to whether they consider a dismissal pursuant to Internal Rule

¹ Case File No. 004-D302, *Request for Comments regarding Alleged Facts Not to Be Investigated Further*, 4 March 2016 (“Request for Comments”).

² It should be noted that sets of allegations are being referred to as one fact.

³ Case File No. 004-D65, *Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011 (“1SS”), para. 12.

⁴ 1SS, para. 12.

⁵ Case File No. 004-D191, *Co-Prosecutors’ Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014 (“2SS”), para. 8.

⁶ Case File No. 004-D1, *Co-Prosecutors’ Third Introductory Submission*, 20 November 2008 (“3IS”), para. 62.

⁷ 1SS, para. 7.

⁸ 1SS, para. 9.

⁹ 1SS, para. 16.

¹⁰ 3IS, para. 70.

¹¹ 2SS, para. 8.

¹² 2SS, para. 9.

¹³ 2SS, para. 7.

¹⁴ 3IS, para. 73; 1SS, paras 18-19.

¹⁵ Case File No. 004-D272/1, *Response to Forwarding Order dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4*, 20 November 2015 (“4SS”), para. 6.

¹⁶ Request for Comments, para. 5.



- 67 (3) and/or the application of Internal Rule 66 *bis* to be appropriate in relation to Facts 1 to 13.¹⁷
3. On 8 April 2016, Yim Tith requested the immediate partial dismissal of Facts 1 to 13 pursuant to Internal Rule 67 (3) because such dismissal would be in the interest of expeditiousness and efficiency, safeguard his interests under Internal Rule 21 and narrow the focus of the investigation.¹⁸
 4. Yim Tith also submitted that Internal Rule 66 *bis* should not be applied where there is insufficient evidence or facts fall outside of the temporal scope.¹⁹
 5. On 11 April 2016, the International Co-Prosecutor (“ICP”) filed his Response,²⁰ stating that Facts 8, 10 and 12 did not require further investigation and that he would not object to a dismissal of these facts pursuant to Internal Rule 76 (3) or their exclusion under Internal Rule 66 *bis*.²¹ Facts 1 to 7 and 9, however, should be further investigated as they are “closely related to other crime sites within their respective districts.”²² Lastly, the investigation into Facts 6, 11 and 13 should also continue because of unresolved matters.²³
 6. In addition, the ICP submits that Internal Rule 66 *bis* should be applied to further facts in the Submissions and the ICP’s Response to Forwarding Order D196,²⁴ namely all allegations in relation to sites in Case 004/01 against Im Chaem in Sector 5, Northwest Zone, i.e. Phnom Trayoung security centre and worksite, Spean Spreng and Prey Roneam Dam worksites, Wat Preah Net Preah and related detention and execution sites, Phum Chakrey security centre and execution site, Prey Taruth execution site, Wat Chamkar Khnol execution site and Trapeang Thma Dam worksite (“**Fact 14**”); furthermore, Prison No. 8 in Sector 7, Northwest Zone (“**Fact 15**”), Wat Banteay Neang security centre in Sector 3, Northwest Zone (“**Fact 16**”) and Prey Sokhon execution site and Wat Ang Srei Munny in Sector 13, Southwest Zone (“**Fact 17**”).²⁵
 7. The ICP also submitted that Internal Rule 66 *bis* should be applied where there is insufficient evidence in support of the Submissions because I made “a discretionary decision to cease the investigation early”.²⁶

¹⁷ Request for Comments, para. 10.

¹⁸ Case File No. 004-D302/1, *Yim Tith’s Submissions on Alleged Facts Not to Be Investigated Further*, 8 April 2016, paras 26 and 30 (“Yim Tith’s Submissions on 13 Facts”).

¹⁹ Yim Tith’s Submissions on 13 Facts, para. 16.

²⁰ Case File No. 004-D302/2, *International Co-Prosecutor’s Response to the International Co-Investigating Judge’s Request for Comments regarding Alleged Facts Not to Be Investigated Further*, 11 April 2016 (“ICP Submissions on 13 Facts”).

²¹ ICP Submissions on 13 Facts, para. 17.

²² ICP Submissions on 13 Facts, para. 18. See paragraph 19 for Facts 1 and 2, paragraph 20 for Facts 4 to 7, and paragraph 21 for Facts 3 and 9.

²³ ICP Submissions on 13 Facts, see for Fact 6 paragraph 22, for Fact 11 paragraph 23 and for Fact 13 paragraph 24.

²⁴ Case File No. 004-D196/1, *Response to Forwarding Order D196*, 23 June 2014, para. 2 (“ICP Response to Forwarding Order D196”).

²⁵ See ICP Submissions on 13 Facts, para. 25.

²⁶ ICP Submissions on 13 Facts, para. 15.



II. DISCUSSION

i. Internal Rules 66 bis and 67

8. The time for making the determination on application of Internal Rule 66 *bis* or dismissal pursuant to Internal Rule 67 is at the conclusion of the investigation.
9. Before reducing the scope of the judicial investigation, I shall, pursuant to Internal Rule 66 *bis* (2), notify the details of the intended reduction to the parties, who in turn will have 15 days to file submissions. Equally, where I consider the investigation concluded, I shall notify the parties pursuant to Internal Rule 66 (1). This notification triggers a series of deadlines for investigative requests, subsequent orders and possible appeals, as well as the final submissions by the OCP according to Internal Rule 66.
10. I take note of the submissions of the ICP and Yim Tith relating to the admissibility of the use of Internal Rule 66 *bis* in cases of insufficient evidence²⁷ or facts falling outside of the temporal scope²⁸ and of Yim Tith's request for a partial dismissal, and will give them due consideration at the appropriate juncture.
11. Finally, I consider that Internal Rule 66 *bis* (5) makes it clear that upon the exclusion of facts, the evidence relating to these facts may still be relied upon insofar as it is relevant to the remaining facts. In my view, this applies *mutatis mutandis* to evidence underlying facts that may be subject to a partial dismissal pursuant to Internal Rule 67.
12. Having said that, any complex investigation, especially against an institutional background as it prevails under the ECCC's legal and factual framework, requires pragmatic solutions. In this regard, it would neither make practical sense to issue a formal notification under Internal Rule 66 *bis* (2) which would trigger the 15-day period for submissions from the parties and potentially cause further precautionary litigation which may well later appear unnecessary with the benefit of hindsight, nor would it be helpful to engage in a partial dismissal process now, which would necessitate nothing less than the initiation of the proceedings under Internal Rule 66 leading to a partial closing order pursuant to Internal Rule 67. The efficiency gains achieved by my indication of where I intend to direct my resources for the remainder of the investigation would be more than offset by doing that. Yim Tith has no right to a partial ruling to that effect.
13. Thus, in the present Notice, after taking into account the submissions of the parties, I indicate the reasons for my current intentions regarding Facts 1 to 17, rather than formally notifying any reduction of the scope of the investigation pursuant to Internal Rule 66 *bis* (2) or conclusion of the investigation into any Facts pursuant to Internal Rule 66.
14. Presently, Facts 1 to 17 fall into the following three categories:
 - a. Category A: Facts which would *prima facie* appear to be subject to Internal Rule 66 *bis* and into which the investigation will be discontinued (Facts 6, 13 and 14);

²⁷ ICP Submissions on 13 Facts, para. 15; and Yim Tith's Submissions on 13 Facts, para. 16.

²⁸ Yim Tith's Submissions on 13 Facts, para. 16.



- b. Category B: Facts which would *prima facie* appear to be subject to dismissal pursuant to Internal Rule 67 and into which the investigation will be discontinued (Facts 1 to 5, 7 to 9, 10 and 12); and
 - c. Category C: Facts which will be further investigated (Facts 11, 15 to 17).
15. Where discontinued, the investigation may be resumed if compelling circumstances present themselves. In that case, the parties will be given sufficient time to adapt their own efforts to the changed circumstances (provisional discontinuance).
16. I have taken this approach of provisional discontinuance, not explicitly provided for in the Internal Rules, in order to provide maximum clarity and assurance to the parties regarding matters to which they and I will need to assign our finite resources, and in order to streamline the investigation well in advance of the formal temporal threshold for Internal Rule 66 *bis* and conclusion of the investigation.

ii. Category A: Facts 6, 13 and 14

Fact 6

17. The ICP alleges that Yim Tith is responsible²⁹ for the execution of numerous detainees of the Banan security centre, Sector 1, Northwest Zone, at Damnak Reang near Pailin.³⁰ The ICP does not specify the exact timeframe for these particular crimes, but appears to suggest that they took place in 1978 while Yim Tith is alleged to have been Sector 1 Secretary³¹ and in furtherance of a joint criminal enterprise starting mid-1977.³²
18. The alleged execution site could not be located, and there is thus insufficient evidence to support the allegations.³³ The ICP recommends further investigative steps to better locate the alleged execution site, including enquiries in the remaining communes of Pailin Province,³⁴ a total of seven communes.³⁵
19. Yim Tith was charged with murder and extermination, as well as persecution on political grounds against Northwest Zone cadres, their families and subordinates through the underlying offences of murder and extermination *via* commission through joint criminal enterprise at Banan security centre itself.³⁶ Yim Tith was charged of having committed the crimes in furtherance of a

²⁹ ISS, paras 21 and 23.

³⁰ ISS, para. 9. See also ICP Submissions on 13 Facts, para. 22.

³¹ ISS, para. 10.

³² ISS, para. 21 in conjunction with 3IS, para. 94.

³³ Request for Comments, para. 3. See also Case File No. 004-D105/21, *Written Record of Investigation Action*, 26 April 2012, p. 3; and Case File No. 004-D118/121, *Written Record of Investigation Action*, 25 Oct 2013, p. 2.

³⁴ ICP Submissions on 13 Facts, para. 22.

³⁵ Ou Tavau, Tuol Lvea, and Ba Yakha communes in Pailin district, and Sala Krau, Stueng Trang, Stueng Kach, and Ou Andoung communes in Sala Krau district.

³⁶ Case File No. 004-D281, *Written Record of Initial Appearance*, 9 December 2015 (“Initial Appearance”), p. 9.



common plan which may have extended from early or mid-1977 to at least 6 January 1979.³⁷

20. Even after exclusion of Fact 6 at the time of the conclusion of the investigation, the remaining facts relating to Banan security centre are likely to be representative of the scope of the Submissions geographically, temporally and substantively. Specifically, the remaining facts should be representative in terms of the nature and scale of crimes and the categories of victims.

Fact 13

21. The ICP alleges that Yim, Tith is responsible³⁸ for forced marriages near Kang Hat Dam³⁹ in Sector 1. The allegation is based on an incident of forced marriage of 15 couples in 1978 described by a Civil Party applicant in his application.⁴⁰
22. The ICP submits that the investigation into this Fact should continue because of its “close proximity” to the Kang Hat Dam worksite and Yim Tith’s possible role⁴¹ and suggests further investigative steps.⁴²
23. Yim Tith was charged with forced marriage in Samlaut district, Sector 1, *via* direct commission,⁴³ as well as in Kampong Prieng and Reang Kesei communes in Sector 4, Northwest Zone, *via* planning, ordering, instigating, superior responsibility and commission through joint criminal enterprise.⁴⁴ Yim Tith was charged of having committed the crimes in furtherance of a common plan which may have extended from early or mid-1977 to at least 6 January 1979.⁴⁵
24. Even after exclusion of Fact 13 at the time of the notification of conclusion of investigation, the remaining facts relating to Samlaut district, as well as Kampong Prieng and Reang Kesei communes are likely to be representative of the scope of the Submissions geographically, temporally and substantively. Specifically, the remaining facts should be representative in terms of the nature and scale of crimes and the categories of victims.

Fact 14

25. The ICP alleges that Yim, Tith is responsible⁴⁶ for the detention, forced labour, killings, targeting of Northwest Zone cadres and their associates, and

³⁷ Initial Appearance, pp 15-16.

³⁸ 2SS, para. 14; 4SS, para. 4.

³⁹ 4SS, para. 6.

⁴⁰ Case File No. 004-D65.1.5a, *Attachment 5: Supplementary information of civil party applicant*, 16 June 2010. See also Case File No. 004-D219/647, *Written Record of Investigation Action*, 18 January 2016.

⁴¹ ICP Submissions on 13 Facts, para. 24.

⁴² ICP Submissions on 13 Facts, para. 24.

⁴³ Initial Appearance, p. 9.

⁴⁴ Initial Appearance, p. 11.

⁴⁵ Initial Appearance, pp 15-16.

⁴⁶ 3IS, para. 96. See also ICP Response to Forwarding Order D196.



ill-treatment at sites in Sector 5, Northwest Zone,⁴⁷ from mid-1977 onwards.⁴⁸ He submits that he does not object to the exclusion of Fact 14 pursuant to Internal Rule 66 *bis*.⁴⁹

26. Even after exclusion of Fact 14 at the time of notification of conclusion of investigation, the remaining facts relating to crime sites in Sectors 1, 3 and 4, Northwest Zone are likely to be representative of the scope of the Submissions geographically, temporally and substantively. Specifically, the remaining facts should be representative in terms of the nature and scale of crimes and the categories of victims.

iii. Category B: Facts 1 to 5, 7 to 9, 10 and 12

27. Facts 1 to 5, 7 to 9, 10 and 12 would *prima facie* appear to be subject to a partial dismissal.⁵⁰ I believe that a reasonable investigation into these Facts was conducted and, for the reasons set out in my Request for Comments,⁵¹ I intend not to continue the investigation of Facts 1 to 5, 7 to 9, 10 and 12.
28. Specifically, with regard to a certain number of Facts, I notified the parties that I believe there is insufficient evidence to support the ICP's allegations of specific crimes committed at the relevant sites.⁵² While the ICP seemingly disagrees with my assessment of the existing evidence regarding Facts 1 to 4, 7 and 9, he has not pointed to evidence in support of the assertion that the crimes as alleged in the Submissions were committed at the specific sites.⁵³ I do not consider evidence of possible crimes at other sites, merely because they are geographically close, allegedly connected and/or in the same district, as evidence in support of Facts 1 to 4, 7 and 9.
29. Regarding Fact 1, I note that the ICP alleges in the Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom ("1SS") that Khmer Krom were killed and buried at Wat So Ben.⁵⁴ In the ICP Submissions on 13 Facts, however, the ICP refers to "evidence of a mass execution of 180 Lon Nol soldiers and household chiefs in October 1975".⁵⁵ Since in this regard the 1SS does not mention any other victim groups than the Khmer Krom, I do not consider myself seized of crimes against persons other than Khmer Krom at Wat So Ben.
30. Regarding Fact 5, the evidence suggests that the executions committed are outside of the temporal jurisdiction of the ECCC pursuant to Article 1 of the ECCC Law.⁵⁶ The ICP does not address the issue of the temporal scope of the crimes. Rather, he maintains that Fact 5 was "never intended" to be an "isolated" crime site, but a possible execution site for detainees of the Banan

⁴⁷ See 3IS, paras 71, 74-79; and ICP Response to Forwarding Order D196, para. 2.

⁴⁸ 3IS, paras 54 and 94.

⁴⁹ ICP Submissions on 13 Facts, para. 25.

⁵⁰ Request for Comments, para.5.

⁵¹ Request for Comments, para.3.

⁵² Request for Comments, para.3.

⁵³ See ICP Submissions on 13 Facts, paras 18-21.

⁵⁴ 1SS, para. 12.

⁵⁵ ICP Submissions on 13 Facts, para. 19.

⁵⁶ Request for Comments, para.3.



or Koas Krala security centres.⁵⁷ I note that Yim Tith was charged with murder, extermination, and persecution through the underlying offences of murder and extermination *via* planning, ordering, instigating, superior responsibility and/or commission through joint criminal enterprise at Banan or Koas Krala security centres.⁵⁸

31. Finally, concerning Facts 8, 10 and 12, I take note that the ICP does not believe that further investigation is required at this stage of the judicial investigation.⁵⁹

iv. Category C: Facts 11, 15 to 17

32. At the current stage of the proceedings, I take note of the parties' submissions on Facts 11, 15 to 17,⁶⁰ however the investigation into Facts 11, 15 to 17 is at an advanced stage and it is my intention to proceed with the investigation. No gains in terms of the expeditiousness of the proceedings would be achieved.

33. Should there be any change in circumstances that would cause me to take a different view, I will notify the parties at the appropriate time.


FOR THE FOREGOING REASONS, I:

34. **INFORM** the parties that I will not further investigate Facts 1 to 10, and 12 to 14; but that I will continue to investigate Facts 11, 15 to 17;

35. **INFORM** the parties that I may decide to resume the investigation Facts 1 to 10 and 12 to 14 and will, in that case, ensure that the parties have sufficient time to prepare their case;

36. **INFORM** the parties that the decision on partial dismissal pursuant to Internal Rule 67 or application of Internal Rule 66 *bis* will be taken at the conclusion of the investigation.

August 2016, Phnom Penh



Judge Michael Bohlander
 អ្នកស៊ើបអង្កេតអន្តរជាតិ
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⁵⁷ ICP Submissions on 13 Facts, para. 20.

⁵⁸ Initial Appearance, pp 8-9.

⁵⁹ ICP Submissions on 13 Facts, para. 17.

⁶⁰ Yim Tith's Submissions on 13 Facts, para. 30; and ICP Submissions on 13 Facts, paras 22 and 25.