



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សេសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

អង្គជំនុំជម្រះវិសេសវិស័យក្នុងតុលាការកម្ពុជា

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  
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Case File No: 004/07-09-2009-ECCC-OCIJ

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Before: **The Co-Investigating Judges**

Date: **19 April 2016**

Language(s): **English [Original]**

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**REQUEST FOR COMMENTS REGARDING ALLEGED FACTS  
NOT TO BE INVESTIGATED FURTHER**

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## I. PROCEDURAL HISTORY

1. On 27 March 2015, Ao An attended an initial appearance pursuant to Internal Rule 57 at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).<sup>1</sup> On 14 March 2016, I notified Ao An, through his Co-Lawyers, that there was clear and consistent evidence that he may be responsible for additional crimes.<sup>2</sup>
2. At the hearing on 14 March 2016, I informed Ao An, through his Co-Lawyers, that I was considering not further investigating certain facts alleged in the Third Introductory Submission<sup>3</sup> (“IS”), the Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom<sup>4</sup> (“1SS”), the Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence<sup>5</sup> (“2SS”) (collectively “Submissions”), and the Response to Forwarding Order D237<sup>6</sup> (“Response”) of the Office of the Co-Prosecutors (“OCP”) and that I would invite the parties to make submissions on the matter.<sup>7</sup> In the following, these facts will be referred to as Facts 1 to 8.

## II. DISCUSSION

3. In relation to the following facts<sup>8</sup> alleged in the Submissions and Response, I intend not to take the investigations further:
  - **Fact 1** - All allegations relating to Tuol Ta Phlong Security Centre.<sup>9</sup> The charges already laid are sufficiently representative of the scope of this section of the IS.
  - **Fact 2** - All allegations relating to Wat Kandal Security Centre.<sup>10</sup> The charges already laid are sufficiently representative of the scope of this section of the IS.
  - **Fact 3** - The arrests and executions of Cham in the Eastern Zone.<sup>11</sup> The charges already laid are sufficiently representative of the scope of this section of the IS.
  - **Fact 4** - Torture at Tuol Beng.<sup>12</sup> There is insufficient evidence in support of this OCP allegation.
  - **Fact 5** - Imprisonment and persecution at Wat Phnom Pros.<sup>13</sup> While there is clear and consistent evidence of executions at this site, there is

<sup>1</sup> Case File No. 004-D242, *Written Record of Initial Appearance*, 27 March 2015.

<sup>2</sup> Case File No. 004-D303, *Written Record of Further Appearance*, 14 March 2016 (“Further Appearance”).

<sup>3</sup> Case File No. 004-D1, *Third Introductory Submission*, 20 November 2008 (“IS”).

<sup>4</sup> Case File No. 004-D65, *Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011 (“1SS”).

<sup>5</sup> Case File No. 004-191, *Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence*, 24 April 2014 (“2SS”).

<sup>6</sup> Case File No. 004-D237, *Response to Forwarding Order D237*, 4 February 2015 (“OCP Response”).

<sup>7</sup> Further Appearance, p. 9.

<sup>8</sup> It should be noted that sets of allegations are being referred to as one fact.

<sup>9</sup> IS, paras. 50-51.

<sup>10</sup> IS, para. 52.

<sup>11</sup> IS, paras. 45-46.

<sup>12</sup> IS, paras. 30-33; 2SS, para. 11; OCP Response, paras. 1-2.

<sup>13</sup> IS, paras. 30-31.

insufficient evidence to support the OCP allegations that this site was used as a prison. There is also insufficient evidence to precisely identify which categories of people were specifically targeted at this site.

- **Fact 6** - Persecution of Vietnamese and Chinese at Wat Baray Chan Dek.<sup>14</sup> There is insufficient evidence that Vietnamese and Chinese people were specifically targeted at this site.
- **Fact 7** - Torture at Wat Srange.<sup>15</sup> There is insufficient evidence in support of the OCP allegations of torture at this site.
- **Fact 8** - Ao An's responsibility for all crime scenarios alleged in the 1SS.<sup>16</sup> – I do not consider myself directly seized of Fact 8, nor do I plan to extend the investigation to it, for several reasons: The allegations in the 1SS are geographically limited to the Northwest and Southwest Zones. The crimes alleged by the OCP are described in paragraphs 5 to 20 of the 1SS. In this narrative, there is no mention of any role that Ao An may have played in the commission of the alleged crimes. Ao An is only mentioned in paragraph 23, where he is alleged to have committed, *inter alia*, the crimes described in the 1SS through his participation in the joint criminal enterprise described in paragraph 21<sup>17</sup> of the 1SS and paragraph 16 of the IS. In this regard, I note that paragraph 16 of the IS alleges a joint criminal enterprise limited geographically to the Central Zone: crimes committed in the Northwest and Southwest Zones, therefore, do not appear to fall within its scope. As for paragraph 21 of the 1SS, it describes a nation-wide JCE. However, the allegations of Ao An's membership thereof are very general, and other allegations made by the OCP in the Submissions do not shed further light on Ao An's alleged membership in this nation-wide JCE. There are no offence-specific allegations of fact regarding Ao An, either. From the point of view of investigative strategy, I do therefore not intend to widen the focus of the investigation merely because Ao An is mentioned in the 1SS in a general manner. Another approach would cause me to investigate Nuon Chea and Khieu Samphan as well, because they are also mentioned in that fashion. Despite being seized of the allegations *in rem*, I do not consider it an efficient use of the OCIJ's finite resources to extend the investigation beyond the offences specifically alleged against individual persons. The SCC has, albeit in the context of the personal jurisdiction debate, recognised the allocation of finite resources as a legitimate consideration when determining investigative policy.<sup>18</sup> In my view, similar considerations must apply here.

4. In light of the above, I am currently inclined to exclude Facts 1 to 8 from the investigation. I am moreover satisfied that further investigations will not change the current state of affairs.
5. As a question of law, Facts 4 to 7, *prima facie*, appear to be subject to a partial dismissal, while Facts 1 to 3 are potentially suited for the application of Internal Rule 66*bis*. However, the applicability of Internal Rule 66*bis* to situations where,

<sup>14</sup> IS, para. 53.

<sup>15</sup> IS, para. 49.

<sup>16</sup> 1SS, para. 23.

<sup>17</sup> Paragraph 23 of the 1SS refers to paragraph 18, not 21, but I understand that to be a clerical error.

<sup>18</sup> Case File No. 001-F28, *Appeal Judgement of Case 001*, 3 February 2012, para. 79.

all other criteria of that Rule being fulfilled, there is insufficient evidence to support a charge, is unclear. Further, the Rule has not been applied so far and there is therefore no precedent to shed light on this question. I would therefore welcome the views of the parties on the interpretation of Internal Rule 66*bis* in this context.

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

**FOR THE FOREGOING REASONS, I:**

7. **NOTIFY** the parties that I am currently inclined to exclude Facts 1 to 8 from the investigation;
8. **INVITE** the parties, to file, within one month from the date of the notification of this decision, any submission they may have on the above, in particular whether they consider a dismissal pursuant to Internal Rule 67 and/or the application of Internal Rule 66*bis* appropriate in relation to Facts 1 to 7; and
9. **NOTIFY** the parties that replies and responses to other party filings are not permitted at this time.

Dated 19 April 2016, Phnom Penh



Judge Michael Bohlander  
 សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

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