



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

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CONSOLIDATED DECISION ON AO AN’S REQUEST FOR
PROTECTIVE MEASURES

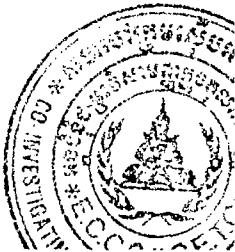
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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 22 February and 5 April 2013, and 22 January 2015.
2. On 20 November 2008, the Co-Prosecutors filed the Third Introductory Submission naming Ao An as an individual whom they had reason to believe was responsible for crimes as described in the submission.¹
3. On 14 February 2014, the Ao An Defence (“Defence”) filed an application requesting the CIJs to order certain protective measures for Ao An (“Request”).²
4. On 11 June 2014, the Defence filed a supplementary motion requesting the CIJs to grant the Request and to put into place the requested protective measures therein or to propose alternative adequate measures (“Supplementary Request”).³
5. On 27 March 2015, my predecessor notified Ao An of his decision to charge him for the commission of certain crimes and granted Ao An and his lawyers access to the Case File.⁴ On the same date, he issued a press release which publicly disclosed Ao An’s name, his status as charged person, and the crimes and crime sites for which he was charged.⁵
6. On 14 March 2016, I charged Ao An with the commission of further crimes.⁶ On the same date, I issued a press release informing the public of the nature of the new charges.⁷

II. SUBMISSIONS

7. The Request and Supplementary Request were filed at a time when Ao An was a suspect in Case 004. In the Request, the Defence asked the CIJs to order effective and immediate measures of protection for Ao An, including, but not limited to, granting the Defence access to the Case File, granting them the ability to participate in the judicial investigation, and imposing sanctions or instituting contempt proceedings against persons who continue to disclose identifying information during the investigative stage of the case.⁸
8. The Request and Supplementary Request arose from circumstances in which, between 2011 and 2013, various media sources and non-government organisations published material that identified Ao An as a suspect in Case 004, set out the allegations against him, and set out details regarding his health, private life, and family life.⁹ The Defence submitted that this information was published as a result of a breach of confidentiality of the judicial investigation,¹⁰

¹ Case File No. 004-D1, *Third Introductory Submission*, 20 November 2008, para. 5(1).

² Case File No. 004-A165, *Ta An’s Motion Requesting Effective Measures of Protection*, 14 February 2014.

³ Case File No. 004-A165/1 *Supplementary Filing in Support of Ta An’s Motion Requesting Effective Measures of Protection*, 11 June 2014.

⁴ Case File No. 004-D242, *Written Record of Initial Appearance of Ao An*, 27 March 2015.

⁵ “The International Co-Investigating Judge charges Ao An in Case 004”, 27 March 2015, available at: <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-ao-case-004>.

⁶ Case File.004- D303, *Written Record of Further Appearance of Ao An*, 14 March 2016.

⁷ “Additional charges announced against Ao An”, 14 March 2016, available at <http://www.eccc.gov.kh/en/articles/additional-charges-announced-against-ao>.

⁸ Request, paras 1. 56.

⁹ Request paras 20-30.

¹⁰ Request, paras 20-23; Supplementary Request, paras 11-16.



specifically noting that the Third Introductory Submission was available online as a result of such a breach at the ECCC.¹¹ The Defence submitted that these breaches caused a serious danger to Ao An's life and health and jeopardised his rights to confidentiality, to privacy, to the presumption of innocence, to a fair trial, and to the equality of arms, and constituted an interference with the administration of justice.¹²

9. The Defence submitted that the requested relief was necessary on the following grounds.
10. Firstly, it was necessary that the Defence be granted access to the Case File and the ability to participate in the investigation so that they could establish the extent of violations of Ao An's rights as well as determine whether additional violations had occurred.¹³
11. Secondly, the requested relief was necessary to protect Ao An's rights in the face of an "*expansive and intense*" media campaign against Ao An which prejudged his guilt and would render a fair trial for Ao An impossible.¹⁴
12. The Defence also submitted that refusing to grant Ao An any protective measures would undermine the principle of equality of arms, given that victims and witnesses, as innocent third party participants, are routinely provided with measures to protect their identities, reputations, and well-being during investigations. To treat Ao An differently to other innocent third party participants because of his status as a suspect at the time the Request was submitted, would be contrary to his right to be presumed innocent.¹⁵
13. Thirdly, the Defence allege that the negative media campaign against Ao An and the cumulative effect of unsolicited visits by media sources had caused Ao An additional physical, emotional and psychological stress and had damaged his reputation, thus placing his health and life at risk.¹⁶ The Defence contended that effective measures of protection were essential to avoid irreparable harm to Ao An's well-being and the integrity of the proceedings.¹⁷
14. Finally, the Defence submitted that the media campaign interfered with the administration of justice by revealing confidential information relating to the investigations, which also risked influencing the testimony and memory of prospective witnesses.¹⁸ The Defence requested that the CIJs grant appropriate protection measures to prevent further interference with the administration of justice and to protect the integrity and confidentiality of the proceedings, noting that such measures were within the CIJs' inherent power.¹⁹

¹¹ See Request, para. 8, footnote 8 (the Defence state that as a result of a breach of confidentiality at the ECCC, the Third Introductory Submissions is available at:

http://www.theinvestigativefund.org/files/managed/Cambodia3rd_Intro_Submission.pdf).

¹² Request, paras 40, 44.

¹³ Request, paras 41-42.

¹⁴ Request, paras 45-46.

¹⁵ Request, para. 47.

¹⁶ Request, paras 48, 50.

¹⁷ Request, para. 48.

¹⁸ Request, paras 51-52.

¹⁹ Request, paras 51, 54, 55.



III. DISCUSSION

A. Admissibility

15. The Defence made submissions regarding the admissibility of the Request, primarily seeking to establish that Ao An had standing as a suspect to file the Request.²⁰ Those submissions were relevant at the time of filing, when Ao An had not yet been charged and his status as a party was thus in issue. That status, however, has not been in issue since 27 March 2015 when he was charged and became a party to the proceedings, with the concomitant ability to participate in the investigation and exercise the rights of a charged person. There is no longer any bar to admissibility on the grounds of Ao An's lack of standing in Case 004. I also accept that the Request is admissible on the basis it alleges violations of Ao An's fundamental fair trial rights enshrined in Internal Rule 21.²¹

B. Granting access to the Case File and the ability to participate in the investigation

16. Ao An has had access to Case File 004 and the ability to participate in the investigation since being charged on 27 March 2015.²² The requests to grant the Defence access to the Case File and to allow the Defence to participate in the judicial investigation are therefore moot.

C. Initiating contempt proceedings and/or issuing sanctions

17. As for the request that I initiate contempt proceedings and/or issue sanctions against any party that has disclosed confidential or identifying information of Ao An during the judicial investigations, I do not consider it a warranted exercise of my discretion under Internal Rule 35 to take such steps on a number of grounds.
18. Firstly, since the filing of the Request and Supplementary Request, both my predecessor and I have issued press releases which – while not revealing the scope of the entire judicial investigation against him – publicly revealed Ao An's status as a charged person, and the nature of crimes and crime sites for which he was charged.²³ Those disclosures were made in the exercise of our discretion in managing the confidentiality of the investigation – a matter which falls within the CIJs' prerogative.²⁴ Additionally, evidence and media coverage from the Case 002 trial proceedings have publicly disclosed information relating to the factual allegations involving Ao An. In light of the information that has already been revealed by such official disclosures, I do not consider that the information

²⁰ Request, paras 3-7.

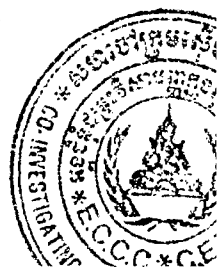
²¹ Request, para. 7.

²² Case File No. 004-D242, *Written Record of Initial Appearance*, 27 March 2015.

²³ "The International Co-Investigating Judge charges Ao An in Case 004", 27 March 2015, available at: <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-ao-case-004>;

"Additional charges announced against Ao An", 14 March 2016, available at <http://www.eccc.gov.kh/en/articles/additional-charges-announced-against-ao>

²⁴ See Internal Rule 56. The Pre-Trial Chamber has confirmed that the confidentiality of the investigation falls within the CIJs' prerogative, and charged persons do not have an inherent right under Internal Rules 21 or 56(1) to a confidential investigation (Case File No. 004-D284/1/4, *Decision on Appeal against Order on Ao An's Responses D193/47, D193/49, d193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23).



contained in the unauthorised disclosures cited by the Defence to cause Ao An significant additional harm.

19. Secondly, while the Defence assert that the media campaign “*risk[s] influencing witnesses’ memory and testimony*”,²⁵ the mere assertion of jeopardy to Ao An’s rights, without any objective and probative indicia of how the information published may actually violate those rights, is insufficient to warrant the CIJs’ intervention. The same could ultimately be said of the coverage of Case 002. I am not persuaded that the type of information published by the media, as cited by the Defence, gives rise to a risk of influencing witnesses in the judicial investigation, interferes with the ongoing administration of justice, or jeopardises Ao An’s right to a fair trial beyond the threshold that is common and to be expected in any high-profile case.
20. Thirdly, an investigation was carried out in 2011 by the Office of the Co-Investigating Judges regarding the leak of the Third Introductory Submission; it concluded that it was unlikely that the source of the leak could be identified.²⁶ The investigation also noted the limitations in investigating the matter with the foreign media organisation involved in disclosing the information on its website, given the relevant individuals to be interviewed were based overseas.²⁷
21. My decision not to institute proceedings or impose sanctions in this instance does not mean that I condone the publication of the Third Introductory Submission or any other confidential information from the investigation without the CIJs’ authorisation. Confidential information, regardless of whether it has been publicly leaked, is still by its very nature confidential. Any future breaches of confidentiality will be taken into serious consideration, investigated and prosecuted where appropriate.

D. Other protective measures

22. Apart from the specific measures requested by the Defence, which I have addressed above, the Defence also make a broader request for protective measures.²⁸ In addition to the reasons already set out above, the following considerations are relevant to the broader request.
23. The Internal Rules envisage the granting of protective measures only to victims and witnesses when there is a risk of serious danger to their life and health, or that of their families. The names of suspects are also kept confidential until a charge is brought; there are no such provisions envisaged for charged persons who must accept a certain level of public scrutiny.²⁹ Media attention is a natural and foreseeable result of any proceeding of this nature and is bound to create a “stigma”, as the Defence describe it,³⁰ against persons charged with such serious crimes. While it is true that such a stigma may cause reputational damage to a charged person, the charged person does not have an inherent right to the protection of his or her reputation.³¹ The Defence assert that this reputational

²⁵ Request, para. 54.

²⁶ Case File No. 004-D72/1.1, *Rogatory Letter Completion Report*, 15 September 2011, p. 4.

²⁷ *Ibid.*

²⁸ Request, paras 1, 56.

²⁹ Internal Rule 29(3).

³⁰ Request, para. 50.

³¹ Case File No. 004-D284/1/4, *Decision on Appeal against Order on AO An’s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23.



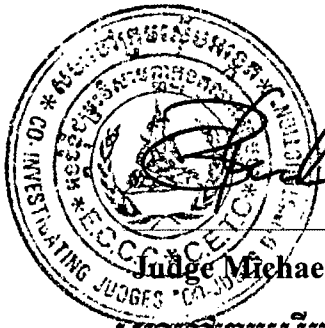

damage has had a knock-on effect on Ao An’s emotional and psychological wellbeing.³² While I am sympathetic to Ao An’s concerns about his overall medical condition, the Defence have not demonstrated with the necessary specificity any objectively serious risk to Ao An’s health or to that of his family as a result of the unauthorised disclosures cited by the Defence.

FOR THE FOREGOING REASONS, I:

- 24. **NOTE** that the requests for access to the Case File and to allow the Defence to participate in the judicial investigation are now moot; and
- 25. **DENY** the remainder of the Request and the Supplementary Request.

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

Dated 29 December 2016, Phnom Penh



Judge Michael Bohlander
សមាជិកក្រុមស៊ើបអង្កេតអន្តរជាតិ

International Co-Investigating Judge
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³² Request, para. 50.