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

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Preliminaire

D345/1/6

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC39)

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 11 August 2017

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(PUBLIC REDACTED)

CONSIDERATIONS ON [REDACTED] APPLICATION TO ANNUL INVESTIGATIVE ACTION AND ORDERS RELATING TO KANG HORT DAM

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of an “Application to Annul Investigative Action and Orders Relating to Kang Hort Dam” filed by the Co-Lawyers for [REDACTED] (respectively the “Defence” and “Applicant”) on 21 February 2017 (the “Application”).¹

I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber by the International Co-Investigating Judge (the “ICIJ”) on 14 February 2017.²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor (the “ICP”) filed with the Office of the Co-Investigating Judges (the “OCIJ”) the Third Introductory Submission, alleging the Applicant’s involvement in criminal acts and proposing to press charges against him.³ On 18 July 2011, 24 April 2014 and 4 August 2015, the ICP filed three Supplementary Submissions.⁴ On 5 November 2015, the ICIJ filed a Forwarding Order,⁵ which was followed by the ICP’s Fourth Supplementary Submission.⁶

3. On 9 December 2015, [REDACTED] appeared before the ICIJ who notified him of charges against him for the alleged commission of crimes at, amongst others, Kang Hort Dam (the “KHD”), and granted access to the Case File to his Defence.⁷

¹ [REDACTED] Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 21 February 2017, D345/1/2 (“Application”).

² Decision on [REDACTED] Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 14 February 2017, D345/1 (“Referral Decision”).

³ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Introductory Submission”). See also Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Case 004, Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 (“First Supplementary Submission”); Case 004, Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Second Supplementary Submission”); Case 004, Response to Forwarding Order and Supplementary Submission Regarding Wat Ta Meak, 4 August 2015, D254/1 (“Third Supplementary Submission”).

⁵ Case 004, Forwarding Order, 5 November 2015, D272 (“Forwarding Order”).

⁶ Case 004, 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, D272/1 (“Fourth Supplementary Submission”).

⁷ Case 004, Written Record of Initial Appearance, 9 December 2015, D281 (“Record of Initial Appearance”). See also Case 004, Written Record of Initial Appearance (Request for Correction), 29 February 2016, D281/Corr-1.



4. On 8 April 2016, following a request by the ICIJ,⁸ the ICP filed a corrected Fourth Supplementary Submission.⁹

5. On 7 February 2017, the Defence filed before the OCIJ a request to seise the Pre-Trial Chamber with an application for annulment of investigative actions and orders relating to KHD,¹⁰ which was granted by the ICIJ's Referral Decision.¹¹ On 21 February 2017, pursuant to the Chamber's instructions,¹² the Defence filed the Application before the Pre-Trial Chamber. On 3 March 2017, the ICP filed a Response to the Application,¹³ to which the Defence replied on 13 March 2017.¹⁴

III. ADMISSIBILITY

6. The Defence submitted the Application "pursuant to [Internal] Rule[s] 21 and 76"¹⁵ and contend that the alleged procedural defects infringe upon the Applicant's rights to know the case against him and to adequate time and facilities to prepare his defence.¹⁶

7. Internal Rule 76(4) directs that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: i) does not set out sufficient reasons; ii) relates to an order that is open to appeal; or iii) is manifestly unfounded. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the rights and interests of the appellant;¹⁷ (ii) clearly

⁸ Case 004, Request for Comments Regarding Alleged Facts Not to Be Investigated Further, 4 March 2016, D302, paras 3 (Fact 13), 9.

⁹ Case 004, Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4 (Request for Correction), 8 April 2016, D272/1/Corr-1 ("Corrected Fourth Supplementary Submission").

¹⁰ [REDACTED] Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 7 February 2017, D345.

¹¹ Referral Decision, para. 18.

¹² Case File Officer Notification, Pre-Trial Chamber's Instructions to the Parties by Email in Case File No. 004/07-09-2009-ECCC/OCIJ (PTC39), 15 February 2017.

¹³ International Co-Prosecutor's Response to [REDACTED] Application to Annul Investigative Action and Orders Relating to Kang Hat Dam, 3 March 2017, D345/1/3 ("Response").

¹⁴ [REDACTED] Reply to the International Co-Prosecutor's Response to [REDACTED] Application to Annul Investigative Action and Orders Relating to Kang Hat Dam, 13 March 2017, D345/1/5 ("Reply").

¹⁵ Application, introductory paragraph.

¹⁶ Application, paras 64-67.

¹⁷ See Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC41), Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-trial Chamber with a View to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6 ("IENG Thirith Decision"), para. 24 ("An annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective").



articulated the prejudice,¹⁸ and (iii) where necessary, adduced sufficient evidence to sustain the allegations.¹⁹

8. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met. The contested investigative actions, Supplementary Submission²⁰ and the charges²¹ do not concern any order that is open to appeal. Nothing in the Application suggests that it is evidently unfounded in fact or in law such as to deprive it of any prospect of success. The Chamber is of the further view that the reasoning set forth in the Application is sufficient since it contains logically consistent submissions, underpinned by legal reasoning, whose grounds are set forth, or by factual material pinpointed in the Case File. The Pre-Trial Chamber therefore finds the Application admissible.

IV. APPLICABLE LAW

9. Annulment is foreseen under Internal Rule 48, which provides that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”

10. Accordingly, examination of an application for annulment requires: (1) consideration, in the first place, of procedural defect; and (2) subsequently, where such defect is established, the existence of prejudice to the applicant.²² A procedural irregularity which is not prejudicial to an applicant does not result in annulment.²³

¹⁸ See Case 002 (PTC06), Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8 (“NUON Chea Decision”), paras 40 (“a proven violation of a right [...], recognized in the ICCPR, would qualify as a procedural defect [...]. In such cases, the investigative or judicial action may be annulled.”), 42 (“[W]here a procedural defect would not be prescribed void in the text of the relevant provision, and where there has been no violation of a right recognized in the ICCPR, the party making the application will have to demonstrate that its interests were harmed by the procedural defect.”).

¹⁹ See IENG Thirith Decision, para. 32.

²⁰ See Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC26), Considerations on [REDACTED] Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on [REDACTED] Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8, para. 31.

²¹ See Case 003 (PTC29), Considerations on [REDACTED] Appeal against the International Co-Investigating Judge’s Decision to Charge [REDACTED] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4.

²² NUON Chea Decision, para. 34. See also Case 003 (PTC20), Decision on [REDACTED] Appeal against Co-Investigating Judge HARMON’s Decision on [REDACTED] Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“[REDACTED] Decision on Two Applications”), para. 25.

²³ [REDACTED] Decision on Two Applications, para. 26 referring to IENG Thirith Decision, para. 21.



OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

13. The National Judges of the Pre-Trial Chamber (“PTC”) are presenting their opinions concerning [REDACTED] application to annul the investigative action and orders relating to Kang Hort Dam.

14. The National Judges of the PTC are of the view that the ECCC was established in accordance with the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (“Agreement”), and the Law on the Establishment of the ECCC (“ECCC Law”), and applies its Internal Rules.

15. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia’s national courts. Prosecution and judicial investigation under the national courts merely concern facts, not persons.²⁴ On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions - first, facts “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, persons “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” - are met.²⁵

16. The National and International Co-Prosecutors disagreed over the issuance of the Third Introductory Submission in Case 004. While the International Co-Prosecutor requested to submit the Third Introductory Submission, the National Co-Prosecutor rejected it on the ground that “the suspects are not senior leaders and/or those who were most responsible.”²⁶

²⁴ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

²⁵ Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.

²⁶ National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observation, 22 May 2009, para. 86(a).



The National and International Judges of the PTC also disagreed over this matter. The National Judges of the PTC supported the National Co-Prosecutor's argument.²⁷

17. Therefore, even though the Co-Lawyers' arguments are incorrect, the National Judges of the Pre-Trial Chamber notice that the National and International Co-Prosecutors disagree with this Introductory Submission in Case 004 about the National and International Co-Prosecutors' request for sending the Third Introductory Submission. The National Co-Prosecutor dismisses the Third Introductory Submission based on all the suspects are not senior leaders and also the National and International Judges of the Pre-trial Chamber disagree on these matters. The National Judges of the Pre-trial Chamber agree with the National Co-Prosecutor's argument.

18. The National Judges of the Pre-Trial Chamber consider that no matter if the impugned investigative proceedings are procedurally correct or not, based on our consideration in the previous paragraph, all impugned investigative action and orders relating to Kang Hort Dam shall be considered as invalid.

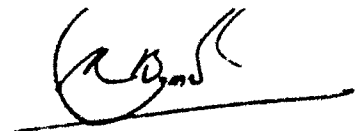
Phnom Penh, 11 August 2017



PRAK Kimsan



NEY Thol



HUOT Vuthy



²⁷ Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009, "[redacted] is not a senior leader of Democratic Kampuchea or among those who were most responsible for the crimes."

**OPINION ON MERIT OF THE APPLICATION BY JUDGES
BEAUVALLET AND BAIK (THE “UNDERSIGNED JUDGES”)**

19. The Defence asks the Pre-Trial Chamber to annul, “insofar as they relate to the investigation of [KHD], the following: 1. Investigative Actions undertaken between the First Supplementary Submission and the Fourth Supplementary Submission, identified in the Annex; 2. The Corrected Fourth Supplementary Submission; 3. Investigative Actions undertaken following the Corrected Supplementary Submission, identified in the Annex; 4. The order charging ██████████ with crimes allegedly committed at KHD, as recorded in the Record of Initial Appearance.”²⁸ The arguments for these requests are presented under four headings, including: A. Relevant Background;²⁹ B. Request to Annul the Investigative Material Regarding KHD;³⁰ C. Request to Annul the Corrected Fourth Supplementary Submission and Related Investigative Acts;³¹ and D. Request to Annul the Order Charging ██████████ With Crimes Allegedly Perpetrated at KHD.³² The Undersigned Judges observe that the background presented in heading ‘A’ serves to supplement the arguments put forward in the other specific headings ‘B’ to ‘D’. Each of these latter headings is comprised of one or more grounds.

A. The Request to Annul the Investigative Material Regarding KHD

20. The Defence asks the Pre-Trial Chamber to annul the investigative actions into KHD on five grounds, namely: i) “The [Co-Investigating Judges (the “CIJs”)] were never seised with the investigation of KHD”;³³ ii) “Ambiguity must be resolved in favour of the Charged Person”;³⁴ iii) “The investigators acted outside the scope of the Rogatory Letter D219”;³⁵ iv) “The investigative action described in 18 January 2016 [Written Record of Investigation Action (the “WRIA”)] breaches Rule 24 and is procedurally defective”;³⁶ and v) “The

²⁸ Application, p. 20.

²⁹ Application, paras 27-46.

³⁰ Application, paras 47-67.

³¹ Application, paras 68-71.

³² Application, paras 72-73.

³³ Application, paras 47-53.

³⁴ Application, paras 54-55.

³⁵ Application, paras 56-58.

³⁶ Application, paras 59-63.



procedural defects have prejudiced the Charged Person”.³⁷ The Undersigned Judges shall now examine each of these grounds.

i) Whether the CIJs were seised with the investigation of KHD

Submissions

21. The Defence submits that “[t]he investigation into KHD conducted prior to the Corrected Fourth Supplementary Submission is procedurally defective because the CIJs were never seized with its investigation”³⁸ and “[a]ccordingly the investigative acts set out in the Annex [to the Application] fall outside the remit of the CIJs.”³⁹ In the Defence’s view, KHD is not mentioned at all in the Third Introductory Submission⁴⁰ or in the body of the First Supplementary Submission and, although mentioned in the footnotes of the latter, “the KHD is not identified as a *separate* crime site to be investigated”.⁴¹ Furthermore, although “[t]he KHD is mentioned in the text of the Second Supplementary Submission”,⁴² according to the Defence, its paragraph twelve “makes it clear that the ICP does not intend to seize the CIJs to investigate KHD as a separate crime site to Tuol Mtes”⁴³ or “to specifically investigate forced marriage or gender-based violence in KHD.”⁴⁴ The Fourth Supplementary Submission, the Defence adds, “did not identify KHD as one of the crime sites under investigation”⁴⁵ either. In the Defence’s view, “[t]he first time that KHD was identified as a geographically and thematically site distinct to Tuol Mtes was when [REDACTED] was charged”⁴⁶ and then, by the ICP, in the Corrected Fourth Supplementary Submission.⁴⁷

22. The ICP responds that “[KHD] is part of the facts alleged by the ICP’s First Supplementary Submission”,⁴⁸ because it is clearly identified “as a worksite related to Tuol Mtes, its location and the criminal conduct alleged there.”⁴⁹ The ICP argues, there are no grounds to annul the impugned investigative actions “taken from February 2013 onwards”,

³⁷ Application, paras 64-67.

³⁸ Application, para. 47.

³⁹ *Ibid.*

⁴⁰ Application, para. 48.

⁴¹ Application, paras 49-50.

⁴² Application, para. 51.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Application, para. 52.

⁴⁶ Application, para. 53.

⁴⁷ *Ibid.*

⁴⁸ Response, paras 8-13.

⁴⁹ Response, paras 8-9 referring to First Supplementary Submission, para. 6 and footnotes 12, 13.



because the “First Supplementary Submission seising the CIJs with allegations relating to [KHD] was filed almost two years earlier, in July 2011.”⁵⁰ According to the ICP, the Defence also “misinterprets the ICP’s Second Supplementary Submission and Response to the CIJ’s Forwarding Order”⁵¹ and “misunderstand[s] the purpose of the charging document”.⁵² “What matters[, the ICP avers,] is that the OCIJ is seised with the allegations of crimes being committed at [KHD]. Whether the CIJ decide to characterise [KHD] as a crime site separate from Tuol Mtes is irrelevant.”⁵³ The ICP maintains that the correction to the Supplementary Submission was filed to reflect a clarification in respect of the supporting allegation from civil party ██████████ which “may have been mistranslated” and “related to forced marriages at a pagoda near [KHD]”.⁵⁴

23. In reply, the Defence reiterates their view, that KHD was not within the scope of the investigation because the First Supplementary Submission “failed to relate KHD to Tuol Mtes”⁵⁵ and its footnotes “[do] not make it clear that KHD was under investigation”,⁵⁶ and add that its paragraph six “could have been referencing any dam”.⁵⁷ The Second and Fourth Supplementary Submissions, and the corrigendum, do not remedy the preceding procedural defects either, the Defence insists.⁵⁸ In the Defence’s view, ICP’s reading of Pre-Trial Chamber Judges’ Opinions is liberal because opinions “are not holdings”⁵⁹ and the Opinions in question take a “fact-specific” approach.⁶⁰

Discussion

24. The Pre-Trial Chamber has stated that the scope of the CIJs’ judicial investigation is defined by Internal Rules 53(1) and (2), and 55(1), (2) and (3).⁶¹ Internal Rule 55(2) states:

⁵⁰ Response, para. 13.

⁵¹ Response, paras 20-25.

⁵² Response, para. 21.

⁵³ Response, para. 22.

⁵⁴ Response, para. 24.

⁵⁵ Reply, para. 17.

⁵⁶ Reply, para. 5.

⁵⁷ Reply, para. 3.

⁵⁸ Reply, para. 16.

⁵⁹ Reply, paras 9-10.

⁶⁰ Reply, para. 11.

⁶¹ NUON Chea Decision, para. 16; Case 001/18-07-2007-ECCC/OCIJ (PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav alias “Duch”, 5 December 2008, D99/3/42 (“Duch Decision”), para. 34. *See also* Internal Rules 53(1)-(2) (providing in relevant part: “(1) [T]he Co-Prosecutors [...] shall open a judicial investigation by sending an Introductory Submission to the Co-investigating Judges [...], (2) The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors”; Internal Rule 55(1) (“A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”).



“The [CIJs] shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”⁶² The CIJs are thus barred from investigating facts which fall outside the Introductory Submission. Internal Rule 55(3) provides:

“If, during an investigation, new facts come to the knowledge of the [CIJs], they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the [CIJs] shall not investigate them unless they receive a Supplementary Submission.”⁶³

25. The Pre-Trial Chamber has previously noted that “the [CIJs] have a duty to investigate all the facts alleged in the Introductory Submission or any Supplementary Submission”,⁶⁴ and, more significantly, that “the [CIJs] are also seized of the circumstances surrounding the acts mentioned in the Introductory or a Supplementary Submission”.⁶⁵ The Pre-Trial Chamber has defined such surrounding circumstances as “[t]he circumstances in which the alleged crime was committed and that contribute to the determination of its legal characterisation”.⁶⁶ The Pre-Trial Chamber has further noted that those circumstances are “not considered as being new facts and are thus parts of the investigation.”⁶⁷

26. Only consideration of the Introductory and subsequent Supplementary Submissions as well as of the annexed evidences, on which the Co-Prosecutors’ (the “CPs”) summary of alleged facts is based, will determine whether the subsequent investigations and impugned acts were within the scope of the matter laid before the CIJs. If outwith the scope, the procedural validity of such investigations is questionable.

27. It is self-evident that to fall within the ambit of the judicial investigation, the acts allegedly committed at KHD site must form part of the factual allegations advanced by the CPs. Before issuing a ruling, the Undersigned Judges must, therefore, engage in careful and

⁶² See also Cambodian Code of Criminal Procedure, art. 124(3) (“An investigating judge may not conduct any investigative acts in the absence of an introductory submission.”).

⁶³ See also Cambodian Code of Criminal Procedure, art. 125; French Code of Criminal Procedure, art. 80 (“[TRANSLATION] The investigating judge may only investigate by virtue of a submission made by the Public Prosecutor.”).

⁶⁴ Duch Decision, para. 35.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*



meticulous scrutiny of the prosecutorial Submissions to ascertain, or rule out, that the site at issue is encompassed by the crime base, as defined by the ICP.⁶⁸

28. In the instant case, the Undersigned Judges agree with the Defence that the KHD site is not mentioned in the Third Introductory Submission.

29. The Undersigned Judges, however, find that allegations made at paragraph five of the First Supplementary Submission, are based on the claim of civil party applicant [REDACTED], who states that: “his older siblings were sent to build the Kong Hat dam.”⁶⁹ Moreover, the Undersigned Judges observe that KHD is also mentioned at paragraph six of the same Submission, which reads: “Tuol Mtes was a nearby worksite at which numerous persons were subject to forced labour, and was used as a tempering site for purged Sector 1 cadres. A large dam and water reservoir was constructed in this area.”⁷⁰ The dam referred to here is the KHD, which is namely quoted in the evidences listed in footnotes twelve and thirteen. One of these statements reads: “[f]ive months later, she was sent to Krahaot Dam in Tuol Mtes”.⁷¹ The criminal allegations at paragraph six are also based on the statement of [REDACTED], which reads: “When I was arrested I was put in Banan Prison. It was a Sector 1 prison. (Investigator asks for exact location). It is today Banan District Office, Sala Srok. I was here for just three days, then they sent me to Tuol Mtes, a tempering place. (check spelling) Tuol Mtes was a work site, there were three group of people, 2 of the group were not prisoner, just people who work hard. Unit 3 was my unit was the prisoner, tempering people, they were called ‘Special Unit’[.] It is under the dam of Kong Hat west side of Phnom Thapadei.”⁷²

30. The ICP has also produced a DK report from Sector 1, dated 28 May 1977, which reads: “[KHD] is now 10 meters high; and we are building it higher and placing stones onto

⁶⁸ Case 004 (PTC23), Considerations on [REDACTED] Application for Annulment of Investigative Action Related to Wat Ta Meak, 16 December 2016, D263/1/5, para. 55; Case 003 (PTC28), Decision Related to (1) [REDACTED] Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) The Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26 (“Decision on Nine Applications”), paras 153, 191.

⁶⁹ First Supplementary Submission, footnote 7 referring to [REDACTED] Civil Party Application, 30 April 2010, D22/3106/1, ERN 00561504-00561505.

⁷⁰ First Supplementary Submission, para. 6.

⁷¹ First Supplementary Submission, footnote 12 referring to [REDACTED] Civil Party Application, 30 April 2010, D22/3882/1, ERN 00571582.

⁷² First Supplementary Submission, footnote 12 referring to OCP Interview of [REDACTED], 1 August 2008, D1.3.11.36, p. 7 (ERN 00210532).



it. Half of the second pole of the sluice gate has been molded.”⁷³ Two other parts of this same report show why the ICP had reason to believe that connections existed between that worksite and the security apparatus. The first part reads: “[a]t [KHD] sluice gate, an enemy stealthily placed pieces of wood in the concrete [with the purpose to destroy the sluice gate]. [His] name is contemptible [REDACTED] who was a house designer from Phnom Penh. He was evacuated after the liberation day to settle in Svay Cheat Collective, Sangke District. We have already handed him over to the Staff.”⁷⁴ The second one follows: “[a]lso at [KHD] contemptible [REDACTED], a base person from Samraong in Koas Kra-la District, whose role is controlling New People’s work forces at [KHD] has successfully persuaded 15 people to flee [from the place where they are supposed to work] on 24 May 1977. Their goal was to escape to Thailand. We have however caught and took back four of them. We are in pursuit of the rest of them.”⁷⁵

31. The Undersigned Judges conclude that, when the First Supplementary Submission was filed, the KHD was included in the scope of the criminal allegations related to Tuol Mtes worksite.

32. The Undersigned Judges further underline that the ICP has since clarified, at paragraph twelve of the Second Supplementary Submission, “that arrests, executions and other crimes committed at the [KHD] site during the period that [REDACTED] was the Secretary of Sector 1 are intended to be encompassed in the ongoing investigation of the Tuol Mtes worksite, Sector 1 security office and purge of the Northwest Zone.”⁷⁶ This clarification is, unambiguously, related to paragraphs five to eight of the First Supplementary Submission.

33. The Undersigned Judges consider that because the First Supplementary Submission predates all the impugned investigative actions,⁷⁷ no grounds exist for their annulment on the basis that they are outside the scope of investigations.

34. Therefore, the Undersigned Judges find no merit in this ground of the Application.

⁷³ First Supplementary Submission, footnote 13 *referring to* DK Report from Sector 1 (Report of Sector 1 re Enemy Situation and the People’s Standard of Living), 28 May 1977, D1.3.10.2 (“DK Report from Sector 1”), ERN 00143568.

⁷⁴ DK Report from Sector 1, ERN 00143567.

⁷⁵ *Ibid.*

⁷⁶ Second Supplementary Submission, para. 12.

⁷⁷ The First Supplementary Submission is dated 18 July 2011, whereas the Annex to the Application refers only to investigative actions dated February 2013 onwards.



ii) *Whether any ambiguity exists that must be resolved in favour of the Charged Person*

Submissions

35. The Defence submits that, “there is significant ambiguity regarding the location of the two sites”,⁷⁸ Tuol Mtes and KHD, and in order to protect his rights, “[a]ny ambiguity [...] must be resolved in favour of the Charged Person.”⁷⁹ According to the Defence, in view of the “requirement to file a sufficiently specific and detailed Supplementary Submission”,⁸⁰ it is “not sufficient to suggest that [KHD’s] investigation can be implied into the investigation of Tuol Mtes.”⁸¹

36. The ICP responds that the level of specificity provided in the Submission is consistent with the requirements of the Internal Rules and beyond that required by the practice of the Pre-Trial Chamber.⁸²

37. The Defence replies that “[t]he ICP misconstrues the Defence submission as to specificity”⁸³ and clarifies that “the Application is concerned with the failure of the [ICP] Submissions to set out clear criminal allegations with limited geographical boundaries”⁸⁴ and that “the Defence does not suggest [...] that the [CPs] should be required to identify every specific location at which crimes occurred”.⁸⁵

Discussion

38. Firstly, the Undersigned Judges note, the Defence does not contend that CP Submissions are required to identify every specific location at which crimes occurred. Secondly, the Chamber recalls, it has already found that the First Supplementary Submission seized the CIJs with the investigation of crimes allegedly committed at the KHD.⁸⁶ Regarding the Defence’s argument that ICP’s Submissions violate the Charged Person’s rights because they fail “to set out *clear* criminal allegations with *limited geographical boundaries*”, the Chamber recalls that Internal Rule 53 reads:

⁷⁸ Application, para. 55.

⁷⁹ Application, paras 54-55 and footnote 49 (*referring to the principle of in dubio pro reo*).

⁸⁰ Application, para. 54 *referring to* Internal Rule 53(3).

⁸¹ Application, para. 54.

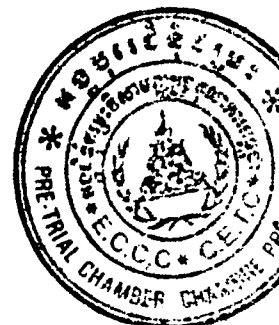
⁸² Response, paras 11-12 *referring to* Internal Rule 53 and to Opinions of Pre-Trial Chamber Judges.

⁸³ Reply, paras 6-7.

⁸⁴ Reply, para. 6.

⁸⁵ Reply, para. 7.

⁸⁶ *See supra* para. 31.



“1. If the [CPs] have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the [CIJs], either against one or more named persons or against unknown persons. The submission shall contain the following information:

- a) a summary of the facts;
- b) the type of offence(s) alleged;
- c) the relevant provisions of the law that defines and punishes the crimes;
- d) the name of any person to be investigated, if applicable; and
- e) the date and signature of both [CPs].

2. The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the [CPs], including any evidence that in the actual knowledge of the [CPs] may be exculpatory.

3. The absence of any of the formalities provided in sub rule 1 shall render the submission void.”

39. The Undersigned Judges observe that Internal Rules 53(1)(a)-(b) requires that CP Submissions set out only a summary of the facts and the type of offence(s) alleged. There is no requirement, in Rule 53, that CP Submissions have to set out criminal allegations “with limited geographical boundaries,” as the Defence puts it. As regards the rights of Charged Persons for specificity of CP Submissions, the Pre-Trial Chamber has previously found that the lack of more details of facts in an Introductory Submission, do “not amount to a lack of notice at this stage of the proceedings”.⁸⁷ Furthermore, “for the Charged Person to exercise [his/]her right to participate in the investigation, the notice requirement must apply to the Introductory Submission to some degree. However, the level of particularity demanded in an indictment cannot be directly imposed upon the Introductory Submission, because the OCP makes its Introductory Submission without the benefit of a full investigation.”⁸⁸

40. After the analysis set out above, of the ICP Submissions, the Undersigned Judges find that there is no ambiguity as to whether the OCIJ was seised with the investigation of crimes allegedly committed at KHD.⁸⁹

41. The Application would consequently be dismissed in that respect.



⁸⁷ Case 002 (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9 (“JCE Decision”), para. 97.

⁸⁸ JCE Decision, para. 95 referring to international jurisprudence.

⁸⁹ See *supra* paras 28-31.

iii) *Whether the Investigators acted outside the scope of the Rogatory Letter D219*

Submissions

42. The Defence submits that “the investigative acts carried out pursuant to [...] Rogatory Letter [219], which purport to investigate crimes committed in KHD as separate to Tuol Mtes, fall outside of its remit and were carried out without the necessary delegated authority of the Judge”,⁹⁰ because: “[Internal] Rule 62 makes it clear that [a] Rogatory Letter shall not be issued in a general form”,⁹¹ the Rogatory Letter 219 “clearly identifies the geographical locations that the ICIJ has identified for investigation, which includes [...] Tuol Mtes”,⁹² and “[n]one of the amendments to date extend the scope of this Rogatory Letter to include an investigation into KHD in accordance with Rule 62.”⁹³

43. The ICP responds that “OCIJ investigators acted within the scope of the relevant rogatory letters”⁹⁴ and submit that the Defence “errs when suggesting that the OCIJ investigators were not delegated the authority to conduct investigations into [KHD] unless it was specifically named [therein]”.⁹⁵ In this regard, the ICP also notes that, a number of the impugned investigative acts “were conducted pursuant to rogatory letter D118 [which] clearly covers the investigation of [KHD],”⁹⁶ and that “the substance of the rogatory letter [D219] clearly [...] includes Tuol Mtes.”⁹⁷ The ICP avers that the Defence’s “rationale that each specific location at which crimes are alleged is required to be individually named in a rogatory letter would lead to absurd results”⁹⁸ and that the “crimes alleged [...] were committed on a widespread and systematic basis.”⁹⁹ The ICP recalls that “inasmuch as the circumstances which came to light in the course of interviews of witnesses conducted pursuant to a rogatory letter remain connected to the facts specified in the Introductory Submission, they duly fall within the matter placed before the [CIJs].”¹⁰⁰

⁹⁰ Application, para. 58.

⁹¹ Application, para. 56.

⁹² Application, para. 57.

⁹³ Application, para. 58.

⁹⁴ Response, paras 14-19.

⁹⁵ Response, para. 16.

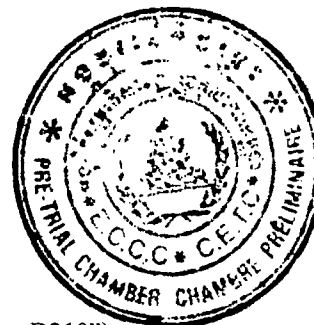
⁹⁶ Response, paras 14-15 referring to D118 Rogatory Letter, 3 December 2012, D118, p. 2.

⁹⁷ Response, para. 16 referring to D219 Rogatory Letter, 4 September 2014, D219 (“Rogatory Letter D219”).

⁹⁸ Response, para. 18.

⁹⁹ *Ibid.*

¹⁰⁰ Response, para. 19.



44. The Defence replies that “[t]he ICP refuses to acknowledge the lack of [KHD] in Rogatory Letters D118 and D219”.¹⁰¹ Reiterating that, “[a]t the issuance of [these] Rogatory Letters [...], the CIJs were not seised with an investigation into KHD”,¹⁰² the Defence argues that the Letters “cannot expand the investigation to include KHD”¹⁰³ and that “reference to alleged crimes at Tuol Mtes does not directly relate to – or clearly specify – KHD.”¹⁰⁴

Discussion

45. Firstly, the Undersigned Judges recall that it has already found that KHD was included in the scope of the investigation into criminal allegations relating to Tuol Mtes worksite.¹⁰⁵ As also noted by the ICP, inasmuch as the circumstances which came to light in the course of interviews of witnesses conducted pursuant to a rogatory letter remain connected to the facts specified in the Introductory Submission, they duly fall within the matter placed before the CIJs.

46. As regards the Defence argument that Investigators acted outside of delegated authority “because [KHD] is not specified in Rogatory Letters D118 and D219”, the Undersigned Judges turn to the provisions of Internal Rule 62, which read:

“1. The [CIJs] may issue a Rogatory Letter requiring any Investigator from their Office, or the Judicial Police, to conduct investigative action. However, only the Judicial Police shall have the power to undertake any coercive action.

2. A Rogatory Letter shall not be issued in a general form, and shall clearly specify the nature of investigative work to be done, which must relate directly to the crime or crimes under investigation. The [CIJs] shall set the time limit for compliance with a Rogatory Letter. The Rogatory Letter must be signed and dated by the [CIJs]. They may withdraw a Rogatory Letter at any time.”

47. The Undersigned Judges observe that the only requirements, set by Internal Rule 62(2), concern: clarity of “the nature of the investigative work”, which “must relate directly to the crime under investigation”; and the time limit for compliance with the Rogatory Letter. The first sentence of Rule 62(2), which requires that “[a] Rogatory Letter shall not be issued in general form”, has to be read in conjunction with the rest of this paragraph and cannot be

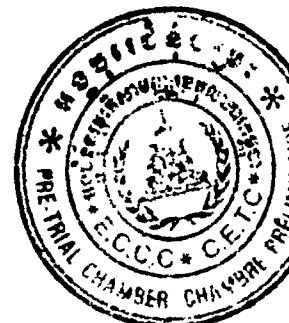
¹⁰¹ Reply, paras 12-14.

¹⁰² Reply, para. 12.

¹⁰³ *Ibid.*

¹⁰⁴ Reply, para. 14.

¹⁰⁵ *See supra* para. 31.



interpreted to add a non-existent requirement “for clarity as regards the geographical locations to be investigated”, as the Defence suggests.

48. In other terms, the prohibition to issue rogatory letters in general form intends to ensure the OCIJ leads, directly or through the delegates acting under his supervision, the judicial investigation within scope. The fact that the ICIJ exercises his discretion to issue amendments to his Rogatory Letters, from time to time, does not mean that he is setting limits to geographical locations to be investigated, and most importantly, it does not import any new requirement under Internal Rule 62. This is rather an indication that he is exercising his direction to lead the judicial investigation in accordance with Rule 62.

49. In the instant case, the Undersigned Judges note that the Rogatory Letter D219 first instructs investigators to: “A. Prepare or complete existing Records of Identification specifying the exact location and describing the characteristics of each of the sites listed in the Annex *and all sites associated with or related to the sites and factual situations listed in the Annex*”.¹⁰⁶ It then instructs the investigators to: “B. Undertake all measurements, whether via GPS, photography or other hardcopy or digital means, needed to specify the geographic location of the sites referred to in the Annex *and all sites associated with or related to the sites and factual situations listed in the Annex*”.¹⁰⁷ As the Tuol Mtes Worksite is explicitly listed in the Annex to Rogatory Letter D219,¹⁰⁸ the Undersigned Judges find that the investigators were precisely instructed to check the KHD as a site “associated with or related to the sites and factual situations listed in the Annex”.

50. Therefore, the Undersigned Judges conclude that the investigations into KHD were carried out within delegated authority, as per the Rogatory Letter D219.

51. Accordingly, the Undersigned Judges do not find merit in this ground for annulment.

¹⁰⁶ Rogatory Letter D219, p. 2 (emphasis added).

¹⁰⁷ *Ibid.*

¹⁰⁸ Rogatory Letter D219, Annex, p.2 (ERN 01023883).



iv) *Whether the investigative action described in the 18 January 2016 WRIA breaches Rule 24 and is procedurally defective*

Submissions

52. The Defence submits that the investigative action described in the WRIA,¹⁰⁹ dated 18 January 2016, which “is conducted pursuant to the Rogatory Letter D219”, and the resulting evidential material, namely that fifteen forced marriages were carried out at KHD, are procedurally defective and breach the requirements of Internal Rule 24,¹¹⁰ because: “calling ██████ to ask about the location of the alleged forced marriages, amounts to the taking of an interview”;¹¹¹ “[t]here is no suggestion that this conversation [...] was undertaken [...] under oath”;¹¹² since there is no corresponding WRI, there is “no way of determining whether the witness was asked an open question [...] or a leading question”;¹¹³ there is “no way of verifying that the person spoken to was actually [the witness in question]”;¹¹⁴ and the conversation in question took place six years after the witness gave the recorded information, while the witness had made it clear that he has memory issues.¹¹⁵

53. The ICP firstly responds that the Defence “mistakes the OCIJ’s clarification of *existing* evidence with that of an interview”;¹¹⁶ secondly recalls, that records taken by the OCIJ investigators enjoy a “presumption of reliability”;¹¹⁷ and thirdly submits that, in any event, this issue is moot because the ICIJ “stated that he will not pursue the allegation relating to the clarification of the civil party’s evidence”.¹¹⁸

54. The Defence replies that “the ICIJ reserved the right to resume the investigation into ██████ allegation”¹¹⁹ and that “it is clear from the ICIJ’s discussion that he merely

¹⁰⁹ Written Record of Investigation Action, 18 January 2016, D219/647 (“WRIA D219/647”).

¹¹⁰ Application, paras 59-63. *See also* Application, paras 43-45 referring to WRIA D219/647.

¹¹¹ Application, para. 59.

¹¹² Application, para. 60.

¹¹³ Application, para. 61.

¹¹⁴ *Ibid.*

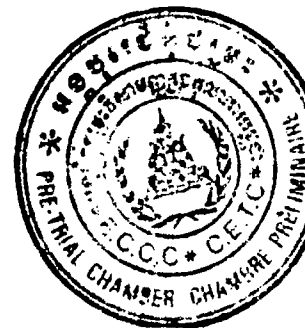
¹¹⁵ Application, para. 62.

¹¹⁶ Response, para. 25.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* referring to D302/3 Notice of Provisional Discontinuance Regarding Individual Allegations, 25 August 2016, D302/3, paras 21, 34.

¹¹⁹ Reply, para. 20.



intends to discontinue his investigation into this specific fact, rather than into all of the allegations identified”.¹²⁰

Discussion

55. The Defence bases their argument, that the investigative action described in WRIA D219/647 breaches the requirements of Internal Rule 24, on their view that “calling ██████████ ██████████ to ask about the location of the alleged forced marriages, amounts to the taking of an interview”.

56. As recorded in the disputed WRIA D219/647 itself,¹²¹ the aim of that investigative action was for the investigator – after having noted that ICP’s Submission “referred to Krahok Village in Banan commune as a location encompassed within the judicial investigation into forced marriage”¹²² and that “the village and sub-district were not located in the geographic database”¹²³ – to verify or “locate the village”.¹²⁴ A review of the source documents revealed “that ‘Krahok’ might be a *spelling error* in the original Khmer [D65.1.5a] and the English translation D65.1.5b, and that the location could possibly be ‘Kang Hort’.”¹²⁵

57. To clear that spelling uncertainty, the investigator requested an OCIJ analyst to call ██████████ “to inquire more into the location of the alleged forced marriages.”¹²⁶ According to WRIA D219/647, the witness stated over the telephone that “15 couples got married in the pagoda near Kang Hort dam, which is now in Banan district, Battambang province.”¹²⁷

58. The Undersigned Judges have to, first, consider whether this telephone call amounts to an interview of witness and, second, if not an interview, whether such telephone calls are legally permitted.

¹²⁰ *Ibid.*

¹²¹ WRIA D219/647, first and second paragraphs.

¹²² WRIA D219/647, first sentence of second paragraph *referring to* Summary of the Supplementary Information of the Civil Party, 4 August 2010, D65.1.5b (“Summary of Supplementary Information”).

¹²³ WRIA D219/647, second sentence of second paragraph.

¹²⁴ WRIA D219/647, third sentence of second paragraph.

¹²⁵ WRIA D219/647, fourth sentence of second paragraph (emphasis added).

¹²⁶ WRIA D219/647, third paragraph.

¹²⁷ *Ibid.*



Whether the telephone call in question amounts to an interview

59. At the outset, the Undersigned Judges find that the Internal Rules do not set any definition for interviews, but rather only spell out some conditions according to which they must be performed. In that sense, Internal Rule 24 does not help in determining whether the telephone call in question amounts to an interview but, instead, it can help determine its procedural regularity, in the event that it amounts to an interview.

60. The Undersigned Judges do not consider that a brief telephone call to check the spelling accuracy of a single word necessarily amounts to an interview. The Undersigned Judges recall that the goal of that phone call was not to collect additional evidence. It rather was to verify whether “a spelling error in the original Khmer and the English translation”, as regards the name of an already alleged crime location, had occurred. The Undersigned Judges observe that this verification was even more necessary since the other supplementary information of the allegations made by the same witness, spelled the location of the alleged forced marriages as “Krahat”,¹²⁸ and not as “Krâhok”.¹²⁹

61. Although it does not consider that the telephone call in question amounts to an interview, the Undersigned Judges find that the investigator still had the option to achieve her goal through a witness interview. Nevertheless, the question rather remains whether such telephone calls are legally permitted.

Whether such telephone calls are legally permitted

62. The Undersigned Judges find that, while Internal Rule 24 sets a clear legal framework for the conduct of witness interviews, it does not explicitly prohibit other ways of interacting with witnesses in order to verify any information they may have. The Undersigned Judges recall that the issue of validity of contact of investigators with witnesses, in order to prepare for a witness interview for instance, has already been raised in another case.¹³⁰ The Undersigned Judges find no provision in the Internal Rules which specifically governs such type of contacts. The Defence’s suggestion that the telephone call in question amounts to a formal and substantive interview is, therefore, pure speculation.

¹²⁸ Supplementary Information of Civil Party Applicant, 16 June 2010, D65.1.5a, p. 2 referring to “Krahat”.

¹²⁹ Summary of Supplementary Information (D65.1.5b), ERN 00587239 referring to “Krâhok”.

¹³⁰ Decision on Nine Applications, para 12.



63. To start with, the Undersigned Judges recall that Internal Rule 55(5) reads: “In the conduct of judicial investigations, the [CIJs] may take *any* investigative action conducive to ascertaining the truth.” Article 131 of the Code of Criminal Procedure of Cambodia (the “CCPC”) provides that an investigating judge may issue a rogatory letter asking a judicial police officer or any unit of the judicial police to undertake certain investigative activities. More precisely, Article 178 of the CCPC states: “Judicial police officer shall establish a written record on his research and findings.” Internal Rule 62(3)(a) provides in similar terms.

64. In the instant case, the Undersigned Judges observe that WRIA D219/647 was prepared “*with reference to [...] Rogatory Letter [D219]*”.¹³¹ Rogatory Letter D219 instructed the investigators to “[p]repare or *complete existing Records of Identification specifying the exact location and describing the characteristics of each of the sites* listed in the Annex and all sites associated with or related to [those] sites”.¹³²

65. The Undersigned Judges also note that WRIA D219/647 is titled “Written Record of Investigation Action” and not “Written Record of Interview”. The Undersigned Judges, having reviewed the disputed record, find that its title mirrors the nature of the action recorded therein, which could in no way be seen as an interview. Therefore, Internal Rule 24 does not govern the regularity of that record.

66. The Undersigned Judges find that the CIJs also have the discretion to check through a witness interview or through “any investigative action conducive to ascertaining the truth”¹³³ in order to clarify any uncertainty about the correct name of the so-called “Krâhok” or “Krahat” site.

67. The Undersigned Judges deem that uncertainty about names of locations due to translation errors is always a possibility and may, sometimes, lead to confusion if left unclarified. The fact that clarification of the spelling has been sought in the present case is rather positive.

68. By producing a WRIA, upon instruction by a rogatory letter and under the supervision of the CIJs, the investigator duly described her searches and findings concerning the accuracy

¹³¹ WRIA D219/647, first paragraph (emphasis added).

¹³² Rogatory Letter D219, ERN 01023880 (Section “A”) (emphasis added).

¹³³ Internal Rule 55(5).



of spelling of the name of a location already mentioned in the allegations of [REDACTED].¹³⁴
The disputed record did not bring anything new, but was rather a plain spelling correction of the name of a location already mentioned.

69. Lastly, the Undersigned Judges note that, since the record in question was placed in the Case File and made available to all the parties, the proceeding remained fair and preserved a balance between the rights of the parties. This is demonstrated by the Defence's possibility to file this very ground for annulment and also by the fact that the Defence has an opportunity to request that [REDACTED] be interviewed, as well.¹³⁵

70. Therefore, the Undersigned Judges would find no procedural defect.

v) *Whether the Charged Person's rights are prejudiced*

Submissions

71. The Defence submits that the alleged procedural defects "both individually and cumulatively prejudice [REDACTED] fair trial rights, namely [...] to know the case against him and to have adequate time and facilities to prepare his defence."¹³⁶ In the Defence's view, the protection of these rights "relies on the ICP setting out the parameters of the allegations"¹³⁷ and "by the CIJs setting out the scope of the investigation in the Rogatory Letters"¹³⁸ which, in turn, "allow the Defence to prepare their case and make appropriate investigative requests".¹³⁹ According to the Defence, failing to identify the KHD has deprived the Charged Person of this opportunity, and therefore, they request the annulment of "all the investigative actions relating to KHD undertaken between the filing of the Third Introductory Submission [...] and the Corrected Fourth Supplementary Submission".¹⁴⁰

72. The ICP responds that "[REDACTED] fails to explain or substantiate how the alleged procedural defects have affected his right[s]".¹⁴¹ Firstly, the ICP avers that, because he knew the facts relating to KHD since when he was charged and received access to the Case File, [REDACTED] claim that he was deprived of the opportunity to make appropriate investigative

¹³⁴ D65.1.5a and D65.1.5b.

¹³⁵ Internal Rule 55(10).

¹³⁶ Application, para. 64.

¹³⁷ Application, para. 65.

¹³⁸ Application, para. 66.

¹³⁹ *Ibid.*

¹⁴⁰ Application, para. 67.

¹⁴¹ Response, para. 26.



requests is unfounded.¹⁴² Secondly, the ICP submits that [REDACTED] simply makes “general assertions”¹⁴³ and has not met “the burden to prove prejudice.”¹⁴⁴

73. Replying to the first prong of ICP’s response, the Defence submits that [REDACTED] ability to prepare his case “is not limited to[] the ability to make appropriate investigative requests.”¹⁴⁵ Furthermore, the Defence reiterates their arguments as regards the effect of Rogatory Letters and of the ICIJ’s statements concerning the investigation into [REDACTED] allegation.¹⁴⁶

Discussion

74. The Undersigned Judges recall that examination of an application for annulment requires: (1) consideration, in the first place, of procedural defect; and (2) subsequently, where such defect is established, the existence of prejudice to the applicant.¹⁴⁷ As no procedural defect has been identified, the Undersigned Judges will not entertain the claim for infringement of the Charged Person’s rights.

75. Therefore, the Undersigned Judges find that no intervention is required.

B. The Request to Annul the Corrected Fourth Supplementary Submission and Related Investigative Acts

Submissions

76. In the Defence’s view, “[t]he Corrected Fourth Supplementary Submission purports to ‘correct’ the submission to include a new allegation against [REDACTED], namely the forced marriage of 15 couples at KHD.”¹⁴⁸ This is procedurally defective, the Defence submits, because firstly, in “*prop[r]io motu* order[ing] the ICP to file the correction[, ...] the ICIJ impinged upon the prerogative of the CPs to identify the scope of the allegations”¹⁴⁹ and, secondly, “[i]n filing the ‘correction’, the ICP failed to follow the procedure for *expanding*

¹⁴² *Ibid.*

¹⁴³ Response, para. 27.

¹⁴⁴ *See ibid.* See also Response, para. 7.

¹⁴⁵ Reply, para. 18 referring to Application, para. 66.

¹⁴⁶ Reply, paras 19-20.

¹⁴⁷ [REDACTED] Decision on Two Applications, para. 25. See also NUON Chea Decision, para. 34.

¹⁴⁸ Application, para. 68.

¹⁴⁹ Application, para. 69.



the scope of an investigation”,¹⁵⁰ which should have been by way of, either a Supplementary Submission or, a clarification. Accordingly, and in view of the alleged prejudice caused, the Defence requests the annulment of the Corrected Fourth Supplementary Submission and of all investigative actions undertaken following its filing, as identified in the Annex.¹⁵¹

77. The ICP responds that he filed a correction “to reflect [the] clarification”¹⁵² relating to the supplementary information of [REDACTED] allegation, and “[i]n response to the OCIJ’s subsequent clarification”.¹⁵³ As regards the investigative actions undertaken after April 2016 – “amounting to two written records of interview”¹⁵⁴ – the ICP submits that they were “conducted pursuant to a valid rogatory letter: D219”¹⁵⁵ and that “[t]here is thus no indication that [they were] conducted as a result of the ICP’s correction of his Second Supplementary Submission.”¹⁵⁶

78. In reply, the Defence reiterates that, the corrigendum “was itself procedurally defective”¹⁵⁷ and, that the ICP errs in his assertion that “Rogatory Letters D118 and D219 cover the investigation into KHD.”¹⁵⁸

Discussion

79. The Defence argues that the correction of the Fourth Supplementary Submission is procedurally incorrect because: i) it purports to “include a new allegation against [REDACTED], namely the forced marriage of 15 couples at KHD”; and ii) in issuing it, the ICP failed to follow the procedure for expanding the scope of an investigation.

80. The Undersigned Judges first recall that they have found that the First Supplementary Submission already seised the CIJs with the investigation of crimes allegedly committed at the KHD.¹⁵⁹

81. Furthermore, having looked at the contents of the Fourth Supplementary Submission, the Undersigned Judges observe that this Submission is twofold, with a first part titled

¹⁵⁰ Application, para. 70.

¹⁵¹ Application, para. 71.

¹⁵² Response, para. 24.

¹⁵³ *Ibid.*

¹⁵⁴ Response, para. 27.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Reply, para. 16.

¹⁵⁸ Reply, para. 12.

¹⁵⁹ *See supra* para. 31.



“Response to Forwarding Order”¹⁶⁰ and a second part titled “Supplementary Submission”.¹⁶¹ In the first part of the Fourth Supplementary Submission, the ICP indeed clarifies that the Second Supplementary Submission “was intended to request the CIJs to investigate forced marriages in these locations,”¹⁶² encompassing KHD,¹⁶³ and that “the reference to ‘other crimes’ in paragraph 6 of the [Second] Supplementary Submission was not intended to expand the investigation beyond the scope previously defined by the [CPs]’ Third Introductory Submission”.¹⁶⁴ The first part of the Fourth Supplementary Submission does not request the OCIJ to start a judicial investigation which, on the other hand, is explicitly done in the second part titled “Supplementary Submission” concerning alleged forced marriages in Samlaut District.¹⁶⁵ There exists a distinction between the portion of the Fourth Supplementary Submission which clarifies the scope of the investigation, by explaining facts that are considered to fall within the scope of the Introductory Submission, and the second portion which includes new facts. The validity of this second portion of the Fourth Supplementary Submission is not challenged by the Defence in the Application. In fact, the Defence does not challenge the first portion of the Fourth Supplementary Submission (D272/1) either. It is only the validity of the subsequent “correction” made in the first portion of the Fourth Supplementary Submission (D272/1/Corr-1) that is challenged.¹⁶⁶ In this regard, the Undersigned Judges, first, note the correction of the Fourth Supplementary Submission was filed “[i]n response to the OCIJ’s subsequent clarification”¹⁶⁷ and, second, recall that it has already found that “the disputed record [WRIA D219/647 also] did not bring anything new, but was rather a plain spelling correction of the name of a location already mentioned [in ██████████ statement].”¹⁶⁸

82. The Undersigned Judges further consider that, while the formality requirements of Internal Rule 53(1) apply to the second part of the Fourth Supplementary Submission,¹⁶⁹ the

¹⁶⁰ Fourth Supplementary Submission, paras 4-9.

¹⁶¹ Fourth Supplementary Submission, paras 10-15.

¹⁶² Fourth Supplementary Submission, para. 6.

¹⁶³ Fourth Supplementary Submission (D272/1), para. 6(b) *referring to* “Krahok Village”. *See also* Corrected Fourth Supplementary Submission (D212/1/Corr-1), para. 6(b) *referring to* “Kang Hât dam”.

¹⁶⁴ Fourth Supplementary Submission, para. 7.

¹⁶⁵ Fourth Supplementary Submission, para. 12 (“[T]he ICP requests that a judicial investigation be opened into forced marriage in Samlaut District during 1978”).

¹⁶⁶ Application, p. 18 (“i. The *correction of the Fourth Supplementary Submission was procedurally defective*”) and paras 68-71.

¹⁶⁷ Response, para. 24 and footnote 46 *referring to* WRIA D219/647.

¹⁶⁸ *See supra* para. 68.

¹⁶⁹ *See* Case 002 (PTC47&48), Combined Order on Co-Prosecutors’ Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for



fact that the first part is filed for clarification purposes only is not a ground to argue for procedural invalidity of the Fourth Supplementary Submission. In any event, by ascertaining already included facts, the first part of this Submission, and the Corrected Fourth Supplementary Submission for that matter, satisfy all the formal conditions of Rule 53(1).

83. The Undersigned Judges also find that the separation of the tasks assigned to the CPs and to the CIJs is a fundamental feature, inherent to the inquisitorial system. As stated in Internal Rule 55(2): “[t]he [CIJs] shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission [by the CPs].” The tasks assigned to each of them are clearly defined. The fact that the ICP clarified the scope of the investigation assists the CIJs in respecting this Rule when investigating the facts falling within that scope.

84. Since the request to annul the Corrected Fourth Supplementary Submission is not meritorious, the procedural regularity of the related investigative actions is not at issue either.

85. This ground for annulment would therefore be dismissed.

**C. The Request to Annul the Order Charging [REDACTED]
With Crimes Allegedly Perpetrated at KHD**

Submissions

86. The Defence notes the provisions of Internal Rule 76(5) and submits that a decision to charge “can fall within the scope [of] an action or order open to annulment.”¹⁷⁰ The Defence invites the Pre-Trial Chamber to annul the charge, for crimes alleged in KHD, and to cancel the relevant parts of the Record of Initial Appearance, on the grounds that they are supported by the allegedly defective investigative acts into KHD.¹⁷¹

87. In response, the ICP submits, in general, that the Defence has “failed to establish a procedural defect in relation to the investigation of [KHD]”¹⁷² and that “[w]ere the [Pre-Trial Chamber] to grant the annulment of the CIJ’s Charging Document as it relates to [KHD, the]

Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, 13 January 2010, D250/3/3, para. 6.

¹⁷⁰ Application, para. 72.

¹⁷¹ Application, para. 73.

¹⁷² Response, para. 1.



CIJ would be free to collect the identical evidence again [which] could only result in wasted time and resources”.¹⁷³

88. In reply, the Defence reiterates, in general, that the investigation into KHD is procedurally defective.

Discussion

89. The Pre-Trial Chamber has previously accepted appeals against *sui generis* charging on the basis that it amounted to a “jurisdictional challenge” pursuant to Internal Rule 74(3)(a) mostly to safeguard the interests of the Charged Person and ensure legal certainty and fair and adversarial proceedings, in exceptional circumstances.¹⁷⁴

90. The Undersigned Judges agree that a decision to charge can fall within the scope of an action or order open to annulment rather than being appealed, in accordance with Internal Rule 76(5).

91. The Undersigned Judges note that ██████████ has indeed been charged after his Initial Appearance with a variety of crimes allegedly committed in KHD.¹⁷⁵

92. The Undersigned Judges have, above all, considered the Defence argument and verified whether the investigations into KHD were procedurally incorrect. The Undersigned Judges came to the conclusion that no procedural defect has occurred. In particular, the OCIJ was properly seised of the crimes he has charged ██████████ with.

93. Therefore, the Undersigned Judges find that the decision to charge ██████████ with crimes allegedly committed at the KHD are not affected by any vices of the procedure, as claimed by the Defence.

94. This part of the Application would, consequently, be dismissed.

¹⁷³ Response, para. 29.

¹⁷⁴ Case 004 (PTC19), Considerations on ██████████ Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *in Absentia*, 2 March 2016, D239/1/8, para. 23. *See also* Case 003 (PTC21) Considerations on ██████████ Appeal Against Co-Investigating Judge HARMON’s Decision to Charge ██████████ *in Absentia*, 30 March 2016, D128/1/9, paras 29-30.

¹⁷⁵ Record of Initial Appearance, pp 3-4, 8-9, 14.



95. In conclusion, the Undersigned Judges would deny the Application in its entirety.



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Phnom Penh, 11 August 2017



Kang Jin BAIK

