



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

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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D365/3/1/5

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 (PTC52)

THE PRE-TRIAL CHAMBER

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

Date: 13 February 2018

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PUBLIC REDACTED

DECISION ON THE INTERNATIONAL CO-PROSECUTOR'S APPEAL OF DECISION ON REQUEST FOR INVESTIGATIVE ACTION REGARDING SEXUAL VIOLENCE AT PRISON NO. 8 AND IN BAKAN DISTRICT

Co-Prosecutors

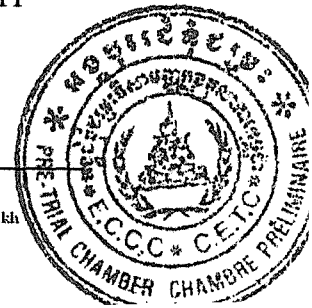
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action”, filed by the International Co-Prosecutor on 25 October 2017 (the “Appeal”).¹

I. INTRODUCTION

1. The International Co-Prosecutor requests the Pre-Trial Chamber to overturn the decision issued by the International Co-Investigating Judge denying his request to investigate allegations of sexual violence at Prison No. 8 and in Bakan District (the “Impugned Decision”),² on the basis that they had not been included in the crimes for which [REDACTED] (the “Respondent”) was formally charged.

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges the Third Introductory Submission, alleging the involvement of the Respondent in criminal acts, including allegations of sexual violence at Prison No. 8 (Kandieng District, Sector 7, Northwest Zone), and proposing to press charges against him.³

3. On 24 April 2014, the International Co-Prosecutor filed the Supplementary Submission regarding forced marriage and sexual or gender-based violence, including allegations of sexual violence in Bakan District (Sector 2, Northwest Zone).⁴

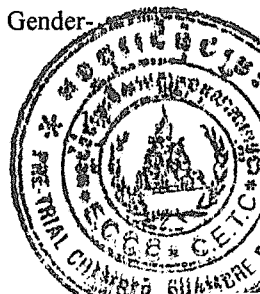
4. On 9 December 2015, the International Co-Investigating Judge notified the Respondent that he was charged, with, *inter alia*, crimes against humanity of murder, extermination, enslavement, imprisonment, persecution on political grounds against East

¹ Case No. 004/07-09-2009-ECCC-OCIJ (“Case 004”), International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action, 25 October 2017, D365/3/1/1 (“Appeal”).

² Case 004, Decision on the International Co-Prosecutor’s Request for Investigative Action Regarding Prison No. 8 and Sexual Violence in Bakan District, 4 September 2017, D365/3 (“Impugned Decision”), notified in English on 4 September 2017 and in Khmer on 25 September 2017.

³ Case 004, Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Third Introductory Submission”), *in particular* para. 72.

⁴ Case 004, Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Supplementary Submission”), *in particular* para. 7.



Zone evacuees and other inhumane acts (confinement and working in inhumane conditions) at Prison No. 8.⁵

5. On 25 August 2016, having noted that there was “clear and consistent evidence that rape [...] may have been committed against Khmer Krom and East Zone women in Bakan district” but “insufficient evidence that [the Respondent] may be responsible for these crimes”,⁶ the International Co-Investigating Judge decided, after having heard the parties,⁷ to proceed with the investigation in relation to these crimes.⁸

6. On 29 March 2017, the International Co-Investigating Judge added charges of, *inter alia*, genocide and crimes against humanity through murder, extermination, imprisonment, torture, persecution on political and racial grounds against the Khmer Krom and other inhumane acts (confinement in inhumane conditions) at five crimes sites in Bakan District.⁹

7. On 13 June 2017, the Co-Investigating Judges notified the parties of the conclusion of the investigation and,¹⁰ on 5 July 2017, extended the 15 days period for filing investigative requests to 28 July 2017.¹¹

8. On 28 July 2017, the International Co-Prosecutor filed a request for investigative action seeking to investigate allegations of crimes, including sexual violence, committed at Prison No. 8 and in Bakan District (the “Investigation Request”).¹²

⁵ Case 004, Written Record of Initial Appearance, 9 December 2015, D281, pp. 5, 12-13, 15-16.

⁶ Case 004, Request for Comments Regarding Alleged Facts Not to Be Investigated Further, 4 March 2016, D302 (“Request for Comments”), para. 3.

⁷ See Case 004, [REDACTED] Submissions on Alleged Facts Not to Be Investigated Further, 8 April 2016, D302/1; Case 004, 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, D302/2.

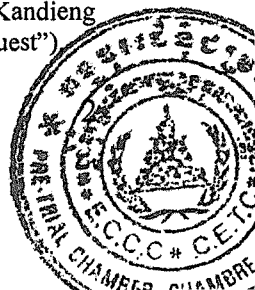
⁸ Case 004, Notice of Provisional Discontinuance Regarding Individual Allegations, 25 August 2016, D302/3 (“Notice of Provisional Discontinuance”), para. 32.

⁹ Case 004, Annex: Notification of Amended Charges Against [REDACTED], 29 March 2017, D350.1 (“Notification of Amended Charges”), pp. 2, 5, 9 (Phum Veal security centre, Svay Chrum security centre, Tuol Seh Nhauv execution site, Prey Kabau execution site and Chanreangsei pagoda execution site).

¹⁰ Case 004, Notice of Conclusion of Judicial Investigation Against [REDACTED], 13 June 2017, D358.

¹¹ Case 004, Decision on [REDACTED] Request for Adequate Preparation Time, 5 July 2017, D361/4.

¹² Case 004, International Co-Prosecutor’s Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District, Pursat Province, 28 July 2017, D365 (“Investigation Request”).



9. On 4 September 2017, the International Co-Investigating Judge issued the Impugned Decision denying, *inter alia*, the request to investigate allegations of sexual violence at Prison No. 8 and in Bakan District.

10. On 5 October 2017, the International Co-Prosecutor filed a notice of appeal¹³ and, on 25 October 2017, his submissions on appeal. The Co-Lawyers for the Respondent (the “Co-Lawyers”) filed their response on 6 November 2017¹⁴ and the International Co-Prosecutor filed a reply on 27 November 2017.¹⁵

III. ADMISSIBILITY

11. The Appeal is filed pursuant to Internal Rules 74(2) and 75(3).¹⁶ The Co-Lawyers submit that the Appeal is inadmissible since the International Co-Prosecutor has not demonstrated any error of law or fact fundamentally determinative of the Co-Investigating Judges’ discretion.¹⁷

12. The Pre-Trial Chamber notes that, pursuant to Internal Rule 74(2), “[t]he Co-Prosecutors may appeal against all orders by the Co-Investigating Judges”. It further observes that the notice of appeal and submissions on appeal were filed in accordance with the time limits set forth in Internal Rule 75(1) and (3) and rejects the arguments raised in the Response, which concern the standard of review of appeals rather than their admissibility.

13. The Pre-Trial Chamber thus finds the Appeal admissible.

¹³ Case 004, International Co-Prosecutor’s Notice of Appeal Against Decision on Request for Investigative Action, 5 October 2017, D365/3/1.

¹⁴ Case 004, [REDACTED] Response to the International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action, 6 November 2017, D365/3/1/3 (“Response”), notified in English and Khmer on 21 November 2017. *See also* Case 004, Urgent Request to file [REDACTED] Response to the International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action in One Language, 6 November 2017, D365/3/1/2.

¹⁵ Case 004, International Co-Prosecutor’s Reply to [REDACTED] Response Regarding Appeal of Decision on Request for Investigative Action, 27 November 2017, D365/3/1/4 (“Reply”), notified in English and Khmer on 28 November 2017.

¹⁶ Appeal, para. 1.

¹⁷ Response, paras 15-19.



IV. STANDARD OF REVIEW

14. Pursuant to the Pre-Trial Chamber's jurisprudence,¹⁸ the Co-Investigating Judges' decisions may be overturned if they are (i) based on an error of law invalidating the decision; (ii) based on an error of fact occasioning a miscarriage of justice; or (iii) so unfair or unreasonable as to constitute an abuse of the judges' discretion. Those criteria apply to the merits of the impugned order.

15. For the Pre-Trial Chamber to overturn the Co-Investigating Judges' exercise of discretion, the appellant must demonstrate that the impugned order is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; and/or (iii) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion. Not all errors will cause the Pre-Trial Chamber to set aside the decision of the Co-Investigating Judges. The error must have been fundamentally determinative of the exercise of the discretion leading to the appealed decision being made.¹⁹

V. APPLICABLE LAW

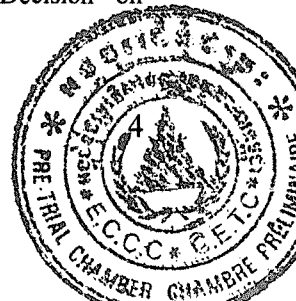
16. Internal Rule 55(10) addresses the right of parties to request investigative actions:

“At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.”

17. The Pre-Trial Chamber has determined that two cumulative conditions have to be satisfied for requests to be granted by the Co-Investigative Judges: (i) the precision requirement and (ii) the *prima facie* relevance requirement. A party who files a request under Internal Rule 55(10) shall identify specifically the investigative action requested and explain

¹⁸ See, e.g., Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”) (PTC35), Decision on Appeal Against Decision on [REDACTED] Twelfth Request for Investigative Action, 16 March 2017, D320/1/1/4 (“Decision on Twelfth Request for Investigative Action”), para. 9.

¹⁹ See, e.g., Decision on Twelfth Request for Investigative Action, para. 10.



the reasons why he or she considers the said action to be necessary for the conduct of the investigation.²⁰

VI. MERITS

A. Submissions

18. The International Co-Prosecutor submits that the International Co-Investigating Judge erred in law by denying the request to investigate allegations of sexual violence at Prison No. 8 and in Bakan District on the basis that they had not been included in the crimes for which the International Co-Investigating Judge had formally charged the Respondent.²¹

19. The International Co-Prosecutor contends, first, that the finding in the Case 004/1 Closing Order on which the Impugned Decision relies, stating that facts not “charged” cannot be indicted, is legally incorrect.²² He points to the Co-Investigating Judges’ holding in Case 002 that, if they “may not indict a person for facts in relation to which he or she has not first been charged”, the Co-Investigating Judges have “the obligation to make a decision, in the Closing Order, with respect to each of the facts of which they have been validly seised, either by issuing an indictment or dismissing the case”.²³ In his view, this jurisprudence simply reaffirms the principle that an individual cannot be indicted unless the co-investigating judge is validly seised by virtue of introductory or supplementary submissions, the purpose of which being to inform the suspect or accused of the nature and cause of the charges against him or her.²⁴ The obligation for the co-investigating judges to make a determinative finding in the closing order on every allegation would indeed cease if they could simply choose to ignore facts by not charging them.²⁵

²⁰ See, e.g., Decision on Twelfth Request for Investigative Action, para. 13.

²¹ Appeal, paras 2, 9, referring to Impugned Decision, paras 40, 50.

²² Appeal, paras 10, 11, referring to Case 004/1/07-09-2009-ECCC/OCIJ (“Case 004/1”), Closing Order (Reasons), 9 August 2017, D308/3, para. 245; Case 004/1 (PTC50), International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017, D308/3/1/1, paras 11-22.

²³ Appeal, para. 12, referring to Case 002/19-09-2007-ECCC-OCIJ (“Case 002”), Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, 20 November 2009, D198/1 (“Case 002 Decision”), para. 10.

²⁴ Appeal, paras 13-15, referring, *inter alia*, to Article 80 of the French Code of Criminal Procedure.

²⁵ Appeal, para. 16.



20. The International Co-Prosecutor also claims that finding that facts not charged cannot be considered for indictment is at odds with the Pre-Trial Chamber's jurisprudence, which has stated unequivocally, without reference to the process of formal charging, that a closing order must contain determinations on all facts of which the Co-Investigating Judges are validly seised.²⁶ He also stresses an alleged contradiction with International Co-Investigating Judge HARMON's statements in Cases 004/1 and 004/2 that the issue of personal jurisdiction shall be determined at the end of the investigation in light of all the evidence gathered.²⁷

21. Secondly, the International Co-Prosecutor submits that the refusal to investigate allegations not formally charged constitutes a violation of the International Co-Investigating Judge's obligation under Internal Rule 55(2) to investigate all facts in the Introductory or Supplementary Submissions, including sexual violence at Prison No. 8 and in Bakan District.²⁸ He points to the Pre-Trial Chamber's jurisprudence²⁹ and contends that Internal Rule 66*bis* provides a mean to reduce the scope of the investigation by excluding facts, but only at the time of the conclusion of the investigation, after hearing the parties and through a decision subject to appeal.³⁰ In the present case, allegations for sexual violence in Bakan District were referred to in the Internal Rule 66*bis* procedure case and finally not included in the reduction of scope of the investigation.³¹ Excluding facts without a reasoned decision, by not formally charging them, would establish a precedent with worrying implications, especially where under-reported crimes of sexual violence are concerned.³²

22. The International Co-Prosecutor further contends that the Impugned Decision amounts to a denial of his right to be heard, as he was not invited to submit on which crimes

²⁶ Appeal, para. 18, referring to Case 001/18-07-2007-ECCC/OCIJ (PTC02), Decision on Appeal Against Closing Order Indicting KAINING Guek Eav alias "Duch", 5 December 2008, D99/3/42 ("Decision on Appeal Against Closing Order Indicting Duch"), paras 29, 32-39.

²⁷ Appeal, para. 21, referring to Case 004/1, Request for Submissions on Whether [REDACTED] Should be Considered a "Senior Leader" or Among "Those Who Were Most Responsible", 24 July 2015, D251, para. 5; Case 004/2, Decision on [REDACTED] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 April 2014, D185/1, para. 28.

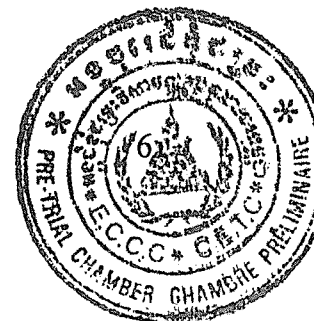
²⁸ Appeal, paras 8, 9, 22-24, referring to Third Introductory Submission, para. 72; Supplementary Submission, para. 7.

²⁹ Appeal, para. 24 and footnote 44.

³⁰ Appeal, para. 25.

³¹ Appeal, para. 26.

³² Appeal, paras 27-28.



the Respondent would be charged,³³ and of his right to appeal.³⁴ He underlines that the Defence was duly put on notice as to the facts which could lead to an indictment through the Introductory and Supplementary Submissions, and actually made specific legal arguments regarding allegations of sexual violence at Prison No. 8 and in Bakan District in response to the Investigation Request and through annulment requests.³⁵

23. The International Co-Prosecutor finally claims that the Appeal should be resolved prior to the forwarding of the case file pursuant to Internal Rule 66(4) and should be made public.³⁶

24. The Co-Lawyers respond that the Appeal proceeds on a number of false premises and should be dismissed.³⁷ They contend, in particular, that the International Co-Prosecutor erred in claiming that the introductory and supplementary submissions are intended to inform the suspect or accused person of the nature of allegations against him or her, while they only display the prosecution's initial case theory.³⁸ It is rather the co-investigating judges who inform the suspect or accused person of the nature of allegations against him or her, following extensive investigation, through the charging process and subsequent amendments to charges, thereby delineating their current view of the case and altering the status and ability of the suspect to participate in the proceedings.³⁹ The Co-Lawyers thus aver that the International Co-Prosecutor is not permitted to seek indictment for any charge beyond those outlined in the last notification of amended charges.⁴⁰ They stress that it was open to him to appeal the order amending the charges and that he chose not to do so.⁴¹

25. The Co-Lawyers further contends that there is no evidence that the allegations of sexual violence at Prison No. 8 and in Bakan District were disregarded and not investigated.⁴²

³³ Appeal, para. 29.

³⁴ Appeal, paras 2, 29-30.

³⁵ Appeal, paras 31-35.

³⁶ Appeal, paras 36-37.

³⁷ Response, p. 1 and paras 21-22.

³⁸ Response, paras 23-24.

³⁹ Response, paras 24-26.

⁴⁰ Response, para. 27, referring to Notification of Amended Charges.

⁴¹ Response, para. 26, referring to Case 004, Order Amending the Charges Against ██████████, 29 March 2017, D350.

⁴² Response, para. 29.



They point, in particular, to the International Co-Prosecutor's acknowledgment that the Case File already contains material regarding sexual violence in Bakan District⁴³ and to the debate concerning alleged facts not to be investigated further.⁴⁴ There is therefore no reason to believe that the International Co-Investigating Judge has not concluded his investigation into the allegation of sexual violence in Bakan District.⁴⁵

26. The Co-Lawyers claim, in particular, that the International Co-Prosecutor conflates the reduction of the scope of the investigation with the dismissal of charges following a proper investigation, thus making his submissions regarding Internal Rule 66 *bis* inapposite.⁴⁶ The Co-Investigating Judges have indeed the discretion to indict or dismiss charges under Internal Rule 67 and are not bound by the International Co-Prosecutor's submissions.⁴⁷ The fact that the Respondent was not notified of charges pertaining to every allegation in the Introductory and Supplementary Submissions merely indicates that the evidentiary threshold for charging was not met⁴⁸ and not that the jurisdictional parameters set out by the International Co-Prosecutor have been amended.⁴⁹

27. The Co-Lawyers finally submit that the claim according to which the co-investigating judges are obliged to provide reasons for their charging decisions prior to the closing order is premature and erroneous, as there is no indication that the Co-Investigating Judges made full determinative findings on allegations set out in the Introductory and Supplementary Submissions.⁵⁰ Accordingly, there has been no denial of the Co-Prosecutor's right to be heard or right to appeal.⁵¹

28. The International Co-Prosecutor reiterates his arguments in reply and underlines that the Investigation Request was denied solely because the Respondent was not charged with

⁴³ Response, para. 30, *referring to* Investigation Request, para. 15.

⁴⁴ Response, paras 31-33, *referring to* Request for Comments, para. 3; Case 004, 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, D302/2, para. 23.

⁴⁵ Response, para. 33.

⁴⁶ Response, paras 34-39.

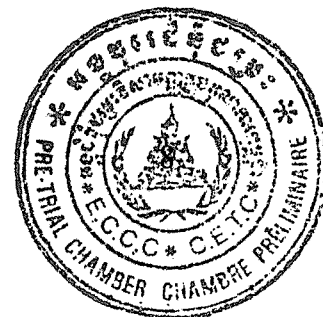
⁴⁷ Response, para. 36.

⁴⁸ Response, para. 37.

⁴⁹ Response, para. 35.

⁵⁰ Response, paras 40-41.

⁵¹ Response, paras 41-42.



the allegations, and that the Impugned Decision contains no other considerations regarding the evidence sought to be adduced.⁵² He repeats that the International Co-Investigating Judge erred in law since, in the Cambodian civil law system, investigative judges have no discretion to *proprio motu* ignore allegations and reduce the scope of investigation without any reasoned decision.⁵³ There is indeed no requirement in the Internal Rules or jurisprudence that an investigation request must relate to charged crimes.⁵⁴ The International Co-Prosecutor further maintain that it is the introductory and supplementary submissions that serve as notice documents during the investigative phase, that he may seek indictment for any allegations contained therein, and that the Respondent always operated in the knowledge that he could be indicted for those crimes, regardless of whether or not he had been charged.⁵⁵

29. The International Co-Prosecutor also stresses that the charging decision was only provisional and that allegations can only be dismissed pursuant to Internal Rules 66 *bis* and 67; before that, they must be properly investigated.⁵⁶ The Impugned Decision therefore amounts to a *de facto* reduction in the scope of the judicial investigation.⁵⁷ He finally challenges the assertion that he could appeal the order amending the charges, which contains no reasoning and is not a final decision, or that he could appeal the closing order, which is purely speculative.⁵⁸

B. Discussion

30. The Pre-Trial Chamber will consider, in turn: (1) whether the Appeal should be resolved before the issuance of the Internal Rule 66(4) forwarding order and be made public; (2) whether the International Co-Investigating Judge erred in denying the Investigation Request on the basis that the alleged crimes were not charged; and (3) whether he violated his obligation to investigate all facts of which he was validly seised.

⁵² Reply, para. 14.

⁵³ Reply, para. 2.

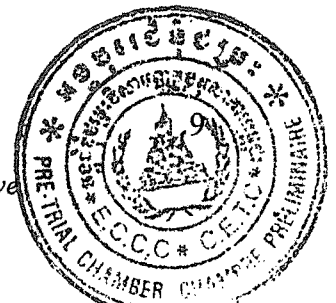
⁵⁴ Reply, para. 4.

⁵⁵ Reply, paras 5-9.

⁵⁶ Reply, paras 11-12. *See also* para. 16.

⁵⁷ Reply, para. 13.

⁵⁸ Reply, paras 17-19.



1. Preliminary issues

31. The International Co-Prosecutor submits that the Appeal should be resolved prior to the forwarding of the case file pursuant to Internal Rule 66(4) and should be made public.⁵⁹

32. Regarding the forwarding of the case file pursuant to Internal Rule 66(4), the Pre-Trial Chamber notes that the Co-Investigative Judges “shall immediately forward the case file to the Co-Prosecutors”, for the purpose of their final submissions, once appeals against rejection orders of requests for investigative action have been “heard”. The Pre-Trial Chamber considers that procedural clarity commands that such appeals have not only been heard but also disposed before the issuance of Co-Prosecutors’ final submissions. In any case, the Pre-Trial Chamber finds that it would be speculative, at this point, to consider that the Co-Investigative Judges made a different interpretation of Internal Rule 66(4) and, reminding that no forwarding order has been issued yet, finds the request moot.

33. With regards to the publicity issue, the Pre-Trial Chamber recalls that, pursuant to Internal Rule 78, it shall publish in full “[a]ll decisions and default decisions of the Chamber [...] except where [...] it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation”. The Pre-Trial Chamber considers appropriate to issue a public version of the decision on Appeal and denies, at this stage, the remaining of the request.

2. Alleged Failure to Consider Facts Not Formally Charged

34. The Pre-Trial Chamber now turns to the contention that it was legally incorrect to find that facts not “charged” cannot be indicted, and thus erroneous to deny the Investigation Request on the basis that the alleged facts had not been formally charged.⁶⁰

Requirement to Have Facts Formally Charged before Indictment

35. In a civil law system, only facts which have been charged beforehand can be considered for indictment. In the Case 002 decision to which the International Co-Prosecutor

⁵⁹ Appeal, paras 36-37.

⁶⁰ See, e.g., Appeal, paras 2, 9-11.



refers,⁶¹ the Co-Investigating Judges indeed made extremely clear that they “may not indict a person for facts in relation to which he or she has not *first been charged*”⁶² and that they would make in the Closing Order a decision in respect of all the facts of which they have been validly seized “either by indicting the charged persons, *after having charged them*, or by issuing a dismissal order [...]”.⁶³ This finding reflects the explicit provisions of Internal Rule 67(1), according to which the closing order can indict “a *Charged Person*”,⁶⁴ and the Cambodian and French criminal procedure, according to which only a person charged beforehand can be indicted and sent for trial.⁶⁵

36. The underlying reason for making the charging process a requirement for subsequent indictment is the protection of the rights of the suspect or accused person. It is through the charging process, and not through the introductory and supplementary submissions, that a person is not only informed but also put in a position to answer allegations and prepare a defence, to such an extent that he or she is able to exercise his or her rights.⁶⁶ The charged person becomes then fully informed of the charges against him or her, as required under Internal Rule 21(d), and can from that moment onwards play an active role in the proceedings.⁶⁷ From a prosecutorial standpoint, the charging process also brings clarity as to which charges, among the initial allegations, have been retained. The fact that the Respondent made legal arguments regarding allegations at Prison No. 8 and in Bakan District during the judicial investigation⁶⁸ does not alleviate this procedural requirement. The suspect may ultimately only be indicted for the facts – to be distinguished from the circumstances surrounding them – for which he has been formally charged.

⁶¹ Appeal, paras 12, 17.

⁶² Case 002 Decision, para. 10 [emphasis added].

⁶³ Case 002 Decision, disposal, p. 6 [emphasis added].

⁶⁴ [Emphasis added]

⁶⁵ See, e.g., French Cass. Crim., 17 September 2014, Case No. 14-84187 (finding that, pursuant to articles 113-5, 179, 204 et 213 of the Code of Criminal Procedure, only a person charged beforehand can be indicted by the investigating judge and sent for judgment before a trial chamber).

⁶⁶ See, e.g., Decision on Appeal Against Closing Order Indicting Duch, para. 138; Case 002 (PTC32), Decision on IENG Sary’s Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C22/9/14, para. 26.

⁶⁷ See, e.g., Case 003/07-09-2009-ECCC-OCIJ (“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 (“Considerations on [REDACTED] Appeal”), para. 13.

⁶⁸ See *supra*, paras 22, 28.



37. The Pre-Trial Chamber moreover considers irrelevant in the present case the submissions as to the application of Internal Rule 66 *bis* and violation of the obligation to make reasoned findings on every allegation. It would be purely hypothetical, at this stage, to speculate which consideration the Co-Investigative Judges will give in the closing order to each and every fact of which they are seised.

38. The Pre-Trial Chamber further recalls that the charges during the investigation stage are provisional.⁶⁹ The Co-Investigation Judges remain seised of all facts and can modify the charges up until the closing order. While the decision to charge a suspect is taken *ex parte*,⁷⁰ the Co-Prosecutors do have a right to participate to the investigation. It is therefore open to them to request additional charges in the form of requests for investigative action during the judicial investigation, in accordance with the time limits set by Internal Rule 66(1), and to raise any appeal against rejection orders pursuant to Internal Rule 74(2).

Denial of the Request on the Basis That Facts Were Not Formally Charged

39. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 55(2), the Co-Investigating Judges have the obligation to investigate *in rem* all the material facts set out in introductory and supplementary submissions,⁷¹ as examined in details in the following section. The Pre-Trial Chamber has further clearly set the two cumulative conditions that have to be satisfied for requests pursuant to Internal Rule 55(10), to be granted, namely the precision and the *prima facie* relevance requirements.⁷²

40. At the outset, the Pre-Trial Chamber notes that the International Co-Investigating Judge required, for requests to be granted at this stage of the investigation, the demonstration of “exceptional circumstances, such as the presence of clear indications that the requested action could yield new evidence capable of substantially changing or rebutting evidence on

⁶⁹ Considerations on ██████████ Appeal, para. 22, referring to Case 002 Decision, para. 10.

⁷⁰ Case 004 (PTC19), Considerations on ██████████ Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *In Absentia*, 1 March 2016, D239/1/8, Opinion of Judges BEAUVALLET and BWANA, paras 19, 21.

⁷¹ Case 002 Decision, para. 6 and footnote 1; Case 003 (PTC20), Decision on ██████████ Appeal Against Co-Investigating Judge HARMON’s Decision on ██████████ Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, Opinion of Judges BEAUVALLET and BWANA, para. 13.

⁷² See *supra*, para. 17.



the Case File”.⁷³ He added that “requests that simply seek to broaden the evidentiary base (where there is already sufficient evidence in relation to a certain matter) will [...] be denied.”⁷⁴ The Pre-Trial Chamber finds that, while the stage of the investigation and the timeliness are relevant factors to take into account in the assessment of a request, the Impugned Decision erred in requiring the demonstration of exceptional circumstances after the notice of conclusion of the investigation, and thus in imposing a higher standard than the demonstration of the *prima facie* relevance of the evidence sought.

41. This being said, the Pre-Trial Chamber considers that the International Co-Investigative Judge did not err in denying the request on the basis that the facts were not charged. In the present case, such absence of charging must be interpreted as reflecting the absence of clear and consistent evidence, upon the conclusion of the investigation, to support the allegations at issue. The Pre-Trial Chamber recalls the margin of appreciation of the Co-Investigative Judges in the conduct of the investigation and in assessing investigation requests,⁷⁵ subject to the control of the appellate court. In particular, it was not unreasonable for the Co-Investigating Judge, at the time of the notification of the conclusion of the investigation, to have reduced and refined the matters in respect of which he was investigating⁷⁶ and to consider the evidence on the case file sufficient to satisfy himself of the point at issue⁷⁷, without making untimely factual determinations.

42. In light of the foregoing, the Pre-Trial Chamber concludes that the International Co-Investigating Judge’s approach does not evince any legal error that would invalidate the decision. This finding presupposes, nonetheless, that the decision not to charge was the result of a fair investigation and that the facts were duly investigated to reach this conclusion.

⁷³ Impugned Decision, para. 30.

⁷⁴ *Ibid.*

⁷⁵ *See, e.g.*, Decision on Twelfth Request for Investigative Action, para. 26.

⁷⁶ *See, e.g.*, Decision on Twelfth Request for Investigative Action, para. 35, *referring to* Case 004/2 (PTC24), Considerations on Appeal Against Decision on ██████████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3 (“Decision on Fifth Request for Investigative Action”), para. 57; Case 002 (PTC43), Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material [*sic*] on the Case File Dated 31 December 2009, 20 May 2010, D313/2/2, para. 29.

⁷⁷ *See, e.g.*, Decision on Fifth Request for Investigative Action, para. 57, *referring to* Case 002 (PTC46), Decision on NUON Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7, para. 26.



3. Alleged Violation of Obligation to Investigate All Facts

43. The Pre-Trial Chamber turns to examine whether the International Co-Investigative Judge actually violated his obligation to investigate all facts, including the allegations of sexual violence at Prison No. 8 and in Bakan District, as contended by the International Co-Prosecutor.⁷⁸ The Defence avers that there are no indicia that these allegations were disregarded and not investigated.⁷⁹

Allegations of Sexual Violence at Prison no. 8

44. The International Co-Prosecutor requested the Co-Investigating Judges to interview or re-interview six civil party applicants – ██████████, ██████████, ██████████, ██████████, ██████████ and ██████████ –, as well as ██████████ and ██████████, and, should they be interviewed on other aspects, ██████████, ██████████, ██████████ and ██████████.⁸⁰ He sought to have clarified when rapes occurred, whether targeted women were segregated, whether there was any sexual violence against East Zone evacuees, and generally the identification of sources.⁸¹

45. While the International Co-Investigating Judge only succinctly notes that the Respondent has not been charged for crimes related to sexual violence at Prison No. 8,⁸² it is clear from a reading of the Impugned Decision as a whole and from the materials gathered during the investigation that such crimes were investigated. In particular, the International Co-Investigating Judge indicated that “[t]he last investigative action related to Prison No. 8 occurred on 22 October 2015”⁸³ and that he considered “the crime base, including [...] authority structure in relation to the security centre, to have been already sufficiently investigated”.⁸⁴ He specifically found unnecessary to try again to interview ██████████, given her illness and advanced age,⁸⁵ ██████████, and ██████████, the relationship

⁷⁸ Appeal, paras 22-24.

⁷⁹ Response, paras 29-33.

⁸⁰ Investigation Request, para. 11.

⁸¹ *Ibid.*

⁸² Impugned Decision, para. 40.

⁸³ Impugned Decision, para. 31.

⁸⁴ Impugned Decision, para. 34.

⁸⁵ Impugned Decision, paras 33, 47.



of the later with the security centre being unclear,⁸⁶ or to re-interview [REDACTED], [REDACTED], who was not detained in Prison No. 8,⁸⁷ and [REDACTED], who never went close to to the security centre.⁸⁸ He was not convinced that further interviews would materially change evidence already on the Case File⁸⁹ and explicitly stated that issues in relation to the authority structure and East Zone evacuees could be explained by other evidence on the Case File.⁹⁰

46. Moreover, the Pre-Trial Chamber has scrutinised the content of the Case File in relation to Prison No. 8 and finds that it confirms that the allegations of sexual violence were investigated, through questions and follow-up queries posed by investigators in interviews of witnesses and civil party applicants.⁹¹ The Pre-Trial Chamber further finds manifestly unfounded the request to interview [REDACTED], as the source document referenced by the International Co-Prosecutor indicates that she is dead.⁹²

Allegations of Sexual Violence in Bakan District

47. The International Co-Prosecutor requested the Co-Investigating Judges to interview four people formally interrogated by the Cambodian Defender's Project⁹³ and three additional persons mentioned by witnesses [REDACTED], [REDACTED] and [REDACTED].⁹⁴ He aimed to "fully explore their knowledge of sexual violence committed by Communist Party of Kampuchea (CPK) cadres and those under their control in Bakan district in 1978 until the end of the DK regime", by having clarified the prevalence and circumstances of sexual violence

⁸⁶ Impugned Decision, para. 34.

⁸⁷ Impugned Decision, para. 39.

⁸⁸ *Ibid.*

⁸⁹ Impugned Decision, para. 36.

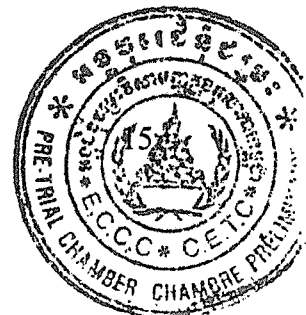
⁹⁰ *Ibid.*

⁹¹ *See, e.g.*, Written Record of Interview of [REDACTED], 27 August 2009, D6.1.761, at ERN 00379316; Written Record of Interview of [REDACTED], 22 March 2012, D105/9, at ERN 00919439; Written Record of Interview of [REDACTED], 3 November 2014, D219/58, at ERN 01053859-01053862; Written Record of Interview of [REDACTED], 6 April 2015, D219/265, at ERN 01098463; Written Record of Interview of [REDACTED], 24 April 2015, D219/279, at ERN 01098536; Written Record of Interview of [REDACTED], 26 May 2015, D219/340, at ERN 01117706; Written Record of Interview of [REDACTED], 22 September 2015, D219/526, at ERN 01168051-01168052; Written Record of Interview of [REDACTED], 20 October 2015, D219/553, at ERN 01178602; Written Record of Interview of [REDACTED], 21 October 2015, D219/554, at ERN 01178622-01178623; Written Record of Interview of [REDACTED], 22 October 2015, D219/555, at ERN 01178644-01178645.

⁹² Investigation Request, para. 11 and footnote 43, *referring to* Complaint of [REDACTED], 29 June 2009, D2.1.85a, at ERN 00888105. *See also* Summary of Complaint of [REDACTED], 29 June 2009, D2.1.85b, at ERN 00461296.

⁹³ Investigation Request, para. 18.

⁹⁴ Investigation Request, paras 19-22.



in Bakan district whilst the Respondent was on the Northwest Zone committee, the sanctions against perpetrators and victims, and the knowledge of CPK cadres.⁹⁵

48. The Pre-Trial Chamber notes that the International Co-Investigating Judge rejected the request, on the basis that the Respondent has not been charged for crimes related to sexual violence in Bakan District, and referred to his reasoning concerning Prison No. 8.⁹⁶ The Pre-Trial Chamber, however, does not accept the claim that he violated his obligation to investigate all facts of which he is validly seised.

49. The Pre-Trial Chamber observes, first, that the International Co-Investigating Judge informed the parties on 4 March 2016 that he was convinced that there was “clear and consistent evidence that rape [...] may have been committed against Khmer Krom and East Zone women in Bakan district”.⁹⁷ There is thus no doubt that he investigated the allegations of sexual violence in Bakan District and surrounding circumstances, to the point to satisfy himself of the point at issue. The examination of the content of the Case File in relation to crimes committed in Bakan District indeed confirms that the allegations of sexual violence were investigated, through questions and follow-up queries posed by investigators,⁹⁸ and through the placement of other documents on the Case File.⁹⁹ The Pre-Trial Chamber,

⁹⁵ Investigation Request, para. 18.

⁹⁶ Impugned Decision, para. 50.

⁹⁷ Request for Comments, para. 3.

⁹⁸ See, e.g., Written Record of Interview of [REDACTED], 11 December 2008, D65.1.56, at ERN 00327162-00327163; Written Record of Interview of [REDACTED], 18 December 2008, D6.1.142, at ERN 00279253; Written Record of Interview of [REDACTED], 29 September 2009, D6.1.757, at ERN 00387502; Written Record of Interview of [REDACTED], 30 September 2009, D6.1.758, at ERN 00387496; Written Record of Interview of [REDACTED], 1 October 2009, D6.1.759, at ERN 00388621; Written Record of Interview of [REDACTED], 20 October 2009, D6.1.845, at ERN 00402823-00402824; Written Record of Interview of [REDACTED], 9 October 2013, D118/124, at ERN 00975898; Written Record of Interview of [REDACTED], 10 October 2013, D118/125, at ERN 00976594-00976595; Written Record of Interview of [REDACTED], 10 October 2013, D118/127, at ERN 00979977-00979978; Written Record of Interview of [REDACTED], 23 April 2014, D118/226, at ERN 01055755; Written Record of Interview of [REDACTED], 9 June 2014, D118/254, at ERN 01025237; Written Record of Interview of [REDACTED], 25 August 2014, D118/289, at ERN 01079690-01079691; Written Record of Interview of [REDACTED], 9 February 2015, D219/170, at ERN 01072582-01072583; Written Record of Interview of [REDACTED], 10 March 2015, D219/221, at ERN 01104769-01104770; Written Record of Interview of [REDACTED], 13 March 2015, D219/224, at ERN 01088613-01088614; Written Record of Interview of [REDACTED], 24 April 2015, D219/279, at ERN 01098538; Written Record of Interview of [REDACTED], 25 May 2015, D219/338, at ERN 01117693-01117694; Written Record of Interview of [REDACTED], 5 January 2016, D219/639, at ERN 01198194-01198195.

⁹⁹ See, e.g., Civil Party Application of [REDACTED], 31 October 2013, D5/946/1, at ERN 00981390-00981391; Written Record of Investigative Action, 30 March 2016, D219/738, with attached Cambodian Defender's Project questionnaires D219/738.1.9, D219/738.1.12, D219/738.1.13, D219/738.1.15, D219/738.1.16, D219/738.1.17, D219/738.1.18, D219/738.1.19, D219/738.1.20, D219/738.1.21, D219/738.1.22, D219/738.1.23, D219/738.1.24, D219/738.1.25, D219/738.1.26, D219/738.1.27, D219/738.1.28, D219/738.1.29, D219/738.1.30, D219/738.1.31, D219/738.1.32, D219/738.1.33, D219/738.1.34, D219/738.1.35, D219/738.1.36, D219/738.1.37, D219/738.1.38, D219/738.1.39, D219/738.1.40, D219/738.1.41, D219/738.1.42, D219/738.1.43, D219/738.1.44, D219/738.1.45, D219/738.1.46, D219/738.1.47, D219/738.1.48, D219/738.1.49, D219/738.1.50, D219/738.1.51, D219/738.1.52, D219/738.1.53, D219/738.1.54, D219/738.1.55, D219/738.1.56, D219/738.1.57, D219/738.1.58, D219/738.1.59, D219/738.1.60, D219/738.1.61, D219/738.1.62, 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recalling that decisions must be read as a whole, thus finds that it was not unreasonable for the International Co-Investigating Judge to consider the evidence of sexual violence sufficient at this stage and to reject a request seeking to broaden the evidentiary base. In particular, it would be highly speculative to believe that [REDACTED], whom the Co-Prosecutor seeks to have interviewed, may yield any relevant evidence, since the witness explicitly stated that she heard of rapes only from one woman [REDACTED].¹⁰⁰

50. Secondly, while the International Co-Investigating Judge acknowledged the “insufficient evidence that [the Respondent] may be responsible for these crimes”,¹⁰¹ he decided on 25 August 2016 to proceed with the investigation in relation to the allegations of sexual violence in Bakan District.¹⁰² The Pre-Trial Chamber indeed observes that, between this date and the notice of conclusion of the investigation on 13 June 2017, several additional witness statements were taken in relation to the structure, roles and responsibilities in Bakan District and Sector 2.¹⁰³ There are therefore no indicia that the question of the imputation of crimes of sexual violence in Bakan District was disregarded and not investigated.

51. The Pre-Trial Chamber further notes that, on 29 March 2017, the International Co-Investigating Judge decided to charge the Respondent for, *inter alia*, genocide and crimes against humanity at five additional crime sites in Bakan District,¹⁰⁴ having found “clear and consistent evidence [that the Respondent] may be criminally responsible”, notably in his capacity of Deputy Secretary of the Northwest Zone, through the modes of responsibility of commission via a joint criminal enterprise, superior responsibility, planning, ordering and instigating.¹⁰⁵ His liability for committing crimes through a joint criminal enterprise in

D219/738.1.24, D219/738.1.26, D219/738.1.27, D219/738.1.28, and D219/738.1.31.

¹⁰⁰ Written Record of Interview of [REDACTED], 24 April 2015, D219/279, at ERN 01098538.

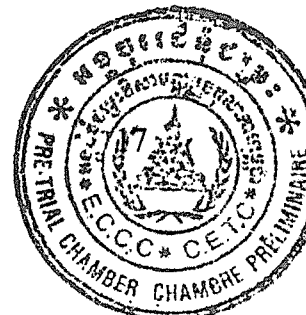
¹⁰¹ Request for Comments, para. 3.

¹⁰² Notice of Provisional Discontinuance, para. 32.

¹⁰³ See, e.g., Written Record of Interview of [REDACTED], 5 October 2016, D219/842; Written Record of Interview of [REDACTED], 6 October 2016, D219/843; Written Record of Interview of [REDACTED], 8 November 2016, D219/861; Written Record of Interview of [REDACTED], 12 February 2017, D219/921; Written Record of Interview of [REDACTED], 27 February 2017, D219/936.

¹⁰⁴ Notification of Amended Charges, pp. 2, 5, 9.

¹⁰⁵ Notification of Amended Charges, pp. 2, 5, 9, 15-16.



specific locations in Bakan District is limited to the implementation of a list of CPK policies¹⁰⁶ and of a plan for the elimination of the Khmer Krom.¹⁰⁷

52. Should the International Co-Prosecutor wish to have clarified, before submitting his final submission, any uncertainty as to why crimes of sexual violence were not specifically charged in Bakan district, he would have requested additional charges, in the form of an investigation request, rather than merely sought to broaden the evidentiary base.

53. In light of the foregoing, the Pre-Trial Chamber cannot identify any failure to investigate the allegations of sexual violence at Prison No. 8 and in Bakan District, and finds that it was well within the discretion of the International Co-Investigating Judge, at this advanced stage of the proceedings and in light of his familiarity with the Case File, to deny the request for further investigation as not conducive to ascertaining the truth.

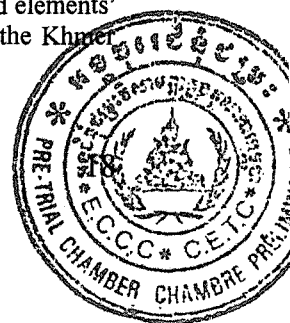
FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- **DISMISSES** as moot the request to have the Appeal resolved prior to the issuance of the forwarding order pursuant to Internal Rule 66(4);
- **GRANTS** in part the request to have the Appeal made public;
- **DISMISSES** the remainder of the Appeal.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

¹⁰⁶ Notification of Amended Charges, p. 15 (including the establishment and operation of cooperatives and worksites, the regulation of marriage, the reeducation through imprisonment and forced labour of 'bad elements' and killing of 'enemies', and the targeting of Northwest Zone CPK cadres and former officials of the Khmer Republic).

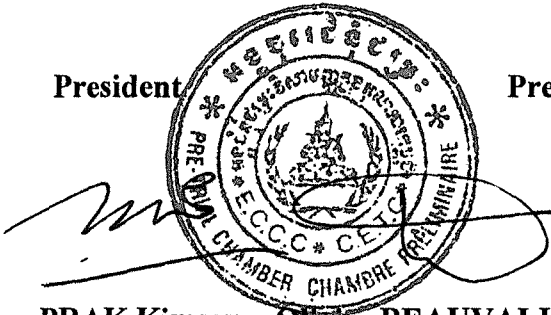
¹⁰⁷ Notification of Amended Charges, pp. 15-16.



Phnom Penh, 13 February 2018

President

Pre-Trial Chamber



[Handwritten signatures of the judges]

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy