ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

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

អាជ្ញាធរចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

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

Before:	**The Co-Investigating Judges**
Date:	**22 April 2014**
Language(s):	**English [Original]**
Classification:	~~**CONFIDENTIAL**~~ **សាធារណៈ / Public**

DECISION ON [redacted] MOTION FOR ANNULMENT OF INVESTIGATIVE ACTION PURSUANT TO INTERNAL RULE 76

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Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 ("ECCC Law");

Noting the Third Introductory Submission, filed on 7 September 2009;[1]

Noting the Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom;[2]

Noting the judicial investigation opened in relation to alleged violations of the **1956 Penal Code**, the **Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949,** and **Crimes against Humanity**, punishable under Articles 3 (new), 4, 5, 6, 29 and 39 of the ECCC Law; and Articles 209, 210, 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code;

Noting Rules 21, 48, 53, 55, 57, 66, 72 and 76 of the ECCC Internal Rules ("Internal Rules");

Considering [redacted] *Motion Requesting an Annulment of Investigative Action Pursuant to Internal Rule 76*, filed on 15 January 2014 ("Motion");[3]

Noting that on 5 April 2013, Judges You Bunleng ("National CIJ") and Harmon ("International CIJ") signed a Written Record of Disagreement concerning, *inter alia*, this Decision;

I- SUBMISSIONS

1. In the Motion, the Defence requests the Co-Investigating Judges ("CIJs") to *"[a]dmit the [...] application; [a]cknowledge that* [redacted] *is not within the category of persons under the jurisdiction of the ECCC; and [i]ssue an order annulling investigative action against* [redacted] *pursuant to procedures under [Internal Rule 76]."*[4]
2. The Defence argues that the Motion is admissible on four grounds:[5]
   a) First, the Defence submits that [redacted] is a charged person as defined in the glossary of the Internal Rules and, as such, has a right to act as a party to the proceedings, including filing the Motion.[6] According to the Defence, in the *Decision on the* [redacted] *Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, filed on 31 July 2013 ("*Decision on*

[1] Case File No. 004-D1, *Co-Prosecutor's Third Introductory Submission*, 20 November 2008 ("Third Introductory Submission"); Case File No. 004-D1/1, *Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission*, 7 September 2009.
[2] Case File No. 004-D65, *Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011.
[3] Case File No. 004-D185, [redacted] *Motion requesting an Annulment of Investigative Action Pursuant to Internal Rule 76*, 15 January 2014.
[4] Motion para. 46.
[5] Motion, paras 1, 3-10, 45-46.
[6] Motion, para. 5.

Suspect's Rights"),[7] the CIJs incorrectly found that [redacted] is not a charged person.[8]

b) Second, the "erroneous classification" of [redacted] as a suspect does not preclude him from filing the Motion. Pursuant to Internal Rule 21(1)(d), a suspect has the right to be defended by a lawyer of his choice.[9] Given that "*the primary, if only, defence that a suspect can bring [at this stage] is an application to annul investigative action on the basis of a procedural defect [...], the right to bring such an action should be recognized by analogy to Internal Rule 76(2).*"[10]

c) Third, the Defence submits that the [redacted] has been substantially affected by the investigation, a criterion that has been referred to in the past by the CIJs in deciding on motions asserting suspects' rights.[11] The Defence contends that [redacted] is substantially affected because of [redacted] fragile health; because domestic and international media have been reporting extensively in connection with the proceedings against [redacted]; because [redacted] has been visited by members of the media on numerous occasions; and [redacted].[12] Therefore, the Defence contends, [redacted] right to participate in the investigation should be granted.[13] The Defence argues that the CIJs, in the *Decision on Suspect's Rights*, erred in finding that [redacted] was not substantially affected by the investigation, as they failed to take into account the cumulative effect of these factors.[14]

d) Finally, the Defence asserts that [redacted] right to bring an application to annul investigative action should be recognised in the interests of justice and fairness, since the purpose of Internal Rule 76 is to provide a means whereby procedural defects may be raised early in the investigative stage.[15] In particular, the Defence states that it is essential that jurisdictional motions be decided at an early stage to avoid unnecessary and costly investigations.[16]

3. With regard to the substantive issue of the scope of ECCC jurisdiction, the Defence states that "*it would be flawed to interpret the outcome in Case 001 as widening the scope of the personal jurisdiction of the ECCC to include alleged*

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[7] Case File No. 004-D121/4, *Decision on the* [redacted] *Defence Requests to Access the Case File and Take Part in the Judicial Investigation,* 31 July 2013.
[8] Motion, para. 5.
[9] Motion, para. 6.
[10] *Ibid.*
[11] Motion, para. 7.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] Motion, para. 8.
[16] Motion, para. 9.

mid- or low-level leaders", especially because the understanding of the ECCC's personal jurisdiction has evolved considerably since Case 001.[17]

4. The Defence submits that, pursuant to Articles 31(1) and 32 of the Vienna Convention on the Interpretation of Treaties of 1969 ("Vienna Convention"), applicable at the ECCC, the intentions of the Royal Government of Cambodia ("RGC") and the United Nations ("UN"), as founding parties to Agreement,[18] are decisive factors in interpreting the Agreement.[19]

5. The Defence submits that the consistent interpretation of the RGC is that the personal jurisdiction of the ECCC is limited to "*the senior leaders who are most responsible*" for the crimes within the jurisdiction of the ECCC.[20]

6. The Defence further submits that "*actors responsible for the effectuation of the UN-RGC Agreement, including the National Co-Prosecutor*" have interpreted the Agreement in the same way as the RGC. This circumstance should be taken into account, for the purpose of interpreting the UN-RGC Agreement, as subsequent practice pursuant to Article 31(3)(b) of the Vienna Convention. Furthermore, according to the Defence, the UN has never contradicted the RGC's publicly available interpretation of personal jurisdiction.[21] This circumstance, argues the Defence, must be understood as the "*UN consenting to such interpretation*" and it is essential that it be taken into account in interpreting the jurisdictional requirements set out in the Agreement.[22]

7. The Defence concludes, by relying the practice on referral of lower profile cases applied at the International Criminal Tribunal for the former Yugoslavia, that "*a founding party to an international criminal tribunal can influence the scope of the jurisdiction and the course of action of the tribunal [...].*" On this basis, the Defence urges the CIJs to act in accordance with the jurisdictional interpretation of the RGC and to only investigate and prosecute senior leaders of Democratic Kampuchea.[23]

8. With regard to the ECCC's jurisdiction over [redacted], the Defence submits that, "*even if one were to accept that the Third Introductory Submission reflects the degree of responsibility of* [redacted] *it is clear that* [redacted] *is not within the category of persons falling under the jurisdiction of the ECCC.*"[24] The Defence concludes that the ECCC does not have jurisdiction over [redacted] and cannot proceed to investigate any further for reasons of legality, expediency and resource-efficiency,

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[17] Motion, paras 23-26.
[18] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed during the Period of the Democratic Kampuchea ("Agreement").
[19] Motion, paras 29, 31.
[20] Motion, paras 27-30, 35, 43.
[21] Motion, paras 32-34, 41-43.
[22] Motion, paras 33-34.
[23] Motion, para. 38.
[24] Motion, para 44.

and that as a result, "*the OCIJ is obliged to annul investigative action, pursuant to Internal Rule 76.*"[25]

II- APPLICABLE LAW

9. Internal Rule 21(1)(d) prescribes that: "*Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.*"

10. Internal Rule 48 provides that: "*Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.*"

11. Internal Rule 50(1) provides that "*[t]he Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses.*"

12. Internal Rule 53(1) provides, in its relevant part, that "*if the Co-Prosecutors 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 Co-Investigating Judges, either against one or more persons or against unknown persons.*"

13. Pursuant to Internal Rule 55(1), "*[a] judicial investigation is compulsory for the crimes within the jurisdiction of the ECCC.*"

14. Internal Rule 55(10) states that: "*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.*"

15. Pursuant to Internal Rule 57, "*[a]t the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the statement immediately. A written record of the statement shall be placed in the case file.*"

16. Pursuant to Internal Rule 66(5), "*[w]here the Co-Prosecutors consider, like the Co-Investigating Judges, that the investigation has been concluded, they shall issue a written, reasoned final submission and return the case file to the Co-Investigating Judges, within 45 (forty-five) days if a Charged Person is detained, and within 3 (three) months in other cases, from the date the Co-Prosecutors*

[25] Motion, para 45.

received the case file. The Co-Prosecutors may request the Co-Investigating Judges to either indict the Charged Person and send him or her for trial, or to dismiss the case."

17. Internal Rule 76(2) states that: "*Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.*"

III- DISCUSSION

18. In the Motion, the Defence formulates three requests to the CIJs: (1) to admit their application; (2) to acknowledge that [redacted] is not within the category of persons under the jurisdiction of the ECCC; and (3) to "*[i]ssue an order annulling investigative action against* [redacted] *pursuant to procedures under [Internal Rule] 76.*" The issue of admissibility will be considered first.

a. Whether [redacted] is a "party" for the purposes of Internal Rule 76

19. Internal Rule 48 provides that an "*investigative [...] action may be annulled for a procedural defect only where the defect infringes the rights of the* ***party*** *making the application*" (emphasis added). Pursuant to Internal Rule 76, "*the parties*" may submit an application to the CIJs requesting them to seize the Pre-Trial Chamber ("PTC") with a view to annulment. Both rules clearly indicate that only a party has standing to file requests pursuant to Internal Rule 76. The Internal Rules on this point are fully consistent with Cambodian law. Pursuant to Article 253 of the Cambodian Code of Criminal Procedure, only the Royal Prosecutor, the charged person, and the civil parties can submit requests for annulment of investigative action.

20. In the Decision on Suspect's Rights, the International CIJ found that [redacted] is not a charged person, and therefore not a party to the proceedings, at this stage of the investigation.[26] In so doing, the International CIJ also rejected the Defence argument that [redacted] was substantially affected by the judicial investigation so as to require a departure from the Internal Rules.[27]

21. On 15 January 2014, the PTC issued considerations on the appeal against the Decision on Suspect's Rights, but was unable to attain the "super" majority

[26] Decision on Suspect's Rights, paras. 42-47 and 62.
[27] Decision on Suspect's Rights, para. 55.

required by Internal Rule 77(13).[28] On 18 February 2014, the Defence requested reconsideration of that Decision,[29] and on 22 April 2014, the International CIJ denied the request.[30] Therefore, the Decision on Suspect's Rights stands.

22. In the Decision on Suspect's Rights the International CIJ found, *inter alia*, that [redacted] was not a Charged Person in Case 004 and that there was no other reason for granting a suspect rights reserved by the Internal Rules to charged persons.[31] In the absence of a change of relevant circumstances since the issuance of the Decision on Suspect's Rights, and considering that the Defence has not put forward any novel arguments in relation to these findings, the International CIJ reiterates that [redacted], as a suspect, is not a party to the proceedings and does not have standing to submit an application for annulment pursuant to Internal Rule 76.

b. Admissibility of the motion in the interests of justice, fairness, and judicial economy

23. The International CIJ will now address the Defence's arguments that a) the right of a suspect to bring an application pursuant to Internal Rule 76 should be recognized in the interests of justice and fairness; and b) that denying admissibility of the Motion would unnecessarily prolong the proceedings, thus leading to unnecessary and costly investigations.

24. The Defence requests the CIJs to acknowledge, prior to the completion of the ongoing judicial investigation and on the basis of evidentially unsupported assertions, that '[redacted] *is not within the category of persons under the jurisdiction of the ECCC.*"[32]

25. The Internal Rules prescribe an investigative scheme that fairly balances the rights of victims to have crimes allegedly committed against them properly investigated and the rights of Suspects and Charged Persons to have their alleged criminal responsibility – including the question of whether they fall within the jurisdiction of the ECCC - fully investigated.

26. After carrying out a preliminary investigation pursuant to Internal Rule 50, the Co-Prosecutors (or one of them[33]), may seize the CIJs of a judicial investigation, by issuing an Introductory Submission pursuant to Internal Rule 53. Pursuant to

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[28] Case File No. 004-D121/4/1/4, *Considerations of the Pre-Trial Chamber on* [redacted] *Appeal against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation* ("PTC Considerations"), 15 January 2014, para.16.

[29] Case File No. 004-D121/4/4, [redacted] *Motion Requesting Reconsideration of International Co-Investigating Judge's Decision on the* [redacted] *Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, 18 February 2014.

[30] Case File No. 004-D121/4/6, *Decision on Request for Reconsideration on International Co-Investigating Judge's Decision to Refuse* [redacted] *Access to the Case File*, 22 April 2014.

[31] *Decision on Suspect's Rights*, para. 62.

[32] Motion, para 46 (b).

[33] *See* Internal Rule 71(4)(c).

Internal Rule 55(1), the CIJs are under an obligation to fully investigate the facts alleged in an Introductory Submission.[34]

27. Whether or not [redacted] falls within the jurisdiction of the ECCC is a question of fact and a matter of investigatory and prosecutorial discretion for the Co-Prosecutors and the CIJs.[35] To make a jurisdictional determination at this stage of the proceedings would not allow the CIJs to have at their disposal sufficient facts by which to determine the fundamental question of jurisdiction. Without the benefit of an investigation on this issue, the CIJs would be fettered in their ability to exercise their discretion properly.

28. Moreover, aborting the investigation of personal jurisdiction before full application of the balanced investigative scheme prescribed by the Internal Rules would not afford the Co-Prosecutors the opportunity to review the complete investigation results on the issue of personal jurisdiction, thereby depriving them of an opportunity to assess the personal jurisdiction evidence in the case file in order to formulate a request to the CIJs, pursuant to Internal Rule 66(5), either to indict the Charged Person or dismiss the case.

29. Accordingly, the International CIJ finds that it would be a breach of the CIJ's mandate and obligations and would be inimical to the interests of justice to make a jurisdictional determination in respect of [redacted] at this stage of the judicial investigation. The Defence's argument that further investigation would be costly and unnecessary is therefore dismissed. On this basis, the International CIJ also rejects the Defence's submission that, at this stage of the investigation, jurisdictional challenges are the "*primary, if only, defence that a suspect can bring*", and that therefore the Motion should be admitted on the basis of [redacted] right to counsel, set forth in Internal Rule 21(1)(d). Moreover, the French Code of Criminal Procedure, which in light of its similarities with the Cambodian system offers useful guidance in interpreting the Internal Rules, limits the right of the assisted witness to make annulment requests until after his first hearing by the Investigating Judge.[36] It is further recalled that recourse to Internal Rule 21, as an admissibility avenue for motions not admissible pursuant to other Internal Rules, has been deemed exceptional and may only be used when particular facts and circumstances so require. The International CIJ does not find, in this instance, that admissibility of the Motion pursuant to Internal Rule 21 is warranted.[37]

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[34] The existence of such obligation was also stated in clear terms by the French Court of Cassation, *See* Cass. Crim., 24 March 1977, No 76-91442, *Bull. Crim.*, No 112, p. 274 (« *Attendu que le juge d'instruction est tenu d'informer sur tous les faits dont il a été régulièrement saisi* »).

[35] Case File No. 001-F28, *Appeal Judgement*, 3 February 2012, para. 79.

[36] French Code of Criminal Procedure, Article 173-1, para. 2: the assisted witness can make requests for annulment "from his first hearing."

[37] While the use of Internal Rule 21 as a procedural avenue to request various forms of relief has been discussed in the ambit of appellate proceedings, the International CIJ finds that the limitations set by the PTC and the Supreme Court Chamber are appropriately applicable also to motions submitted on first instance. *See* Case File No. 002-E154/1/1/4, *Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on its Senior Legal Officer Ex-Parte Communications*, 25 April 2012, paras 14-

c. Admissibility of the specific relief requested in the Motion

30. The Motion does not identify any specific document or investigative act that it claims to be procedurally defective. In fact, the Defence appears to be requesting the annulment of the entire investigation against [redacted]. This is not allowed under Internal Rule 76. Requests for annulment of investigative action must identify the procedurally defective document or act and the specific portion of the proceedings to be annulled as a result thereof. As stated by the PTC in Case 002, requests for annulment of the entire investigation are inadmissible.[38]

31. Second, the Defence is requesting the International CIJ to "*[i]ssue an order annulling investigative action against* [redacted] *pursuant to procedures under IR 76.*"[39] The CIJs do not have the power to annul investigative actions for procedural defects under Internal Rule 76. They may only "*issue an order accepting or refusing the request as soon as possible*".[40] When the CIJs "*accept the application, they shall forward the case file to the [Pre Trial] Chamber.*"[41] As the PTC has clearly stated, "*[i]t is not for the Co-Investigating Judges to determine the annulment application on its merits, this is the role of the Pre-Trial Chamber, which is made clear from Internal Rule 73(b).*"[42]

32. Therefore, the International CIJ finds that the Defence is seeking relief which is both inadmissible and unavailable pursuant to Internal Rule 76.

IV- CONCLUSION

33. The International CIJ finds the Motion inadmissible pursuant to Internal Rule 76 since [redacted] is not a party to the proceedings and finds that Internal Rule 21(1) does not provide [redacted] with an alternative avenue to file the Motion. Further, the International CIJ finds that a jurisdictional determination at this stage of the judicial investigation would be premature, in breach of the CIJs obligations, and contrary to the interests of justice. Finally, the relief requested by the Defence is both inadmissible – since the Defence has not identified any specific investigating act to be annulled – and unavailable pursuant to Internal Rule 76 since the power to annul investigative acts does not rest with the CIJs but rather with the PTC.

15; Case File No. 002-A410/2/6, *Decision on Appeal against the Response of the Co-Investigating Judges on the Motion of Confidentiality, Equality and Fairness*, 29 June 2011, para. 10.

[38] Case File No. 002-D197/5/8, *Decision on Khieu Samphan's Appeal against the Order on the Request for Annulment for Abuse of Process*, 4 May 2010, para. 24.

[39] Motion, para. 46.

[40] Internal Rule 76(2).

[41] Internal Rule 76(3).

[42] Case File No. 002-D263/2/6, *Decision on Ieng Tirith'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 (D236/1)*, 25 June 2010, para. 16.

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

FOR THE FOREGOING REASONS, I, MARK B. HARMON, HEREBY:

35. **DENY** the Motion.

Dated 22 April 2014, Phnom Penh

Judge Mark B. Harmon

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

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