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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D134/1/10

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° 003/07-09-2009-ECCC/OCIJ (PTC20)

Before: **Judge PRAK Kimsan, President**
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Steven J. BWANA
Judge HUOT Vuthy

Date: **23 December 2015**

PUBLIC REDACTED

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

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of "[redacted] Appeal against Co-Investigating Judge Harmon's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action" entered by [redacted] Co-Lawyers on 18 May 2015 (the "Appeal").[1]

I. PROCEDURAL BACKGROUND

1. On 7 September 2009, the acting International Co-Prosecutor filed the Second Introductory Submission Regarding the Revolutionary Army of Kampuchea (the "RAK") (the "Introductory Submission"), whereby he moved the Co-Investigating Judges to investigate a number of crimes allegedly committed by [redacted] and another suspect.[2]

[redacted]

[1] [redacted] Appeal against Co-Investigating Judge Harmon's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 18 May 2015, D134/1/1 (the "Appeal").
[2] Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1 ("Introductory Submission"); Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[redacted]

[redacted]

7. On 8 December 2014, the Co-Lawyers brought an appeal before the Pre-Trial Chamber, claiming that the Co-Investigating Judges had constructively refused to rule on the First and Second Applications.[8] On 23 January 2015, the Pre-Trial Chamber declared that it was divided and so could not rule on the appeal.[9]

[redacted]

[8] [redacted] Appeal against the Co-Investigating Judges' Constructive Refusal to Seize the Pre-Trial Chamber with Two Annulment Applications, 8 December 2014, D103/5/1.

[9] Considerations of the Pre-Trial Chamber of [redacted] Appeal against the Co-Investigating Judges' Constructive Refusal to Seize the Pre-Trial Chamber with Two Annulment Applications, 23 January 2015, D103/5/2.

8. On 3 March 2015, the Co-Investigating Judge charged [redacted] (*in absentia*).[10]

9. On 23 April 2015, the International Co-Judge declined to seise the Pre-Trial Chamber with the First and Second Applications (the "Impugned Order").[11] On 18 May 2015, the Co-Lawyers entered an appeal against the Impugned Order. It was notified in English on 26 May 2015 and in Khmer on 23 June 2015. The Response of the International Co-Prosecutor was filed in English on 13 July 2015and in Khmer on 24 July 2015 (the "Response").[12] On 31 July 2015, the Co-Lawyers filed their Reply in English alone. The Khmer translation was filed on 24 August 2015 (the "Reply").[13]

[redacted]

[10] Decision to Charge [redacted] *In Absentia*, 3 March 2015, D128.
[11] Decision on [redacted] Applications to Seise the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 23 April 2015, D134 ("Impugned Order").
[12] International Co-Prosecutor's Response to [redacted] Appeal Against the International Co-Investigating Judges's Decision on [redacted] Applications to Seise the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 13 July 2015, D134/1/6 ("Response")
[13] [redacted] Reply to International Co-Prosecutor's Response to Appeal against Co-Investigating Judge HARMON's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with two Requests for Annulment of Investigative Action, 31 July 2015, D134/1/9, ("Reply"). See also Decision on [redacted] Request to File Reply to the International Co-prosecutor's Response to [redacted] Appeal against the International Co-investigating Judge's Decision on Meas Muth's Applications to Seise the Pre-trial chamber with two Requests for Annulment of Investigating Action in English with Khmer translation to Follow, D134/1/8, 12 August 2015.
[redacted]

II. THE APPEAL

A. ADMISSIBILITY OF THE APPEAL

11. The Impugned Order was notified on 23 April 2015. Notice of appeal was filed on 30 April 2015,[15] and the Appeal was filed in accordance with the directions of the Pre-Trial Chamber. The Appeal was therefore entered on time.

12. The Appeal was filed pursuant to Internal Rule 76(2),[16] which vests parties with the right to appeal an order of the Co-Investigating Judges which declined to seise the Pre-Trial Chamber with a view to annulment.

13. Internal Rule 74(3)(g) lays down the appeals procedure.[17] The Pre-Trial Chamber has previously held that the parties raising annulment must first submit a reasoned application to the Co-Investigating Judges requesting them to seise the Pre-Trial Chamber.[18]

[redacted]

15. As to the remainder, the instant Appeal is admissible.

B. AMBIT OF THE PRE-TRIAL CHAMBER'S REVIEW

16. The Pre-Trial Chamber has sole jurisdiction over applications to annul investigative action.[19]

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[15] Appeal Register of [redacted] Notice Of Appeal against Co-Investigating Judge HARMON's Decision on [redacted] Applications To Seize The Pre-Trial Chamber With Two Requests For Annulment Of Investigative Action, D134/1, 30 April 2015.
[16] Impugned Order, para. 11.
[17] Appeal, para. 11.
[18] Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, D55/I/8, 26 August 2008 ("Nuon Chea Decision"), para.16.
[19] Internal Rule 73(b).

17. Such applications for annulment may be brought before the Pre-Trial Chamber by the Co-Investigating Judges acting on their own motion pursuant to Internal Rule 76(1) or by the parties, in accordance with Internal Rule 76(2).

18. In the latter case, the Co-Investigating Judges determine whether the Pre-Trial Chamber was duly seised, doing so by reasoned order from which appeal lies.[20] The Pre-Trial Chamber has consistently held that an order of the Co-Investigating Judges ruling on a request to seise the Pre-Trial Chamber with a view to annulment must state the reasons for seizing the Pre-Trial Chamber or for declining to do so.[21]

19. The Pre-Trial Chamber has held that the Co-Investigating Judges must consider such an application in two respects: first, as to whether the application identifies a procedural defect, and second, as to whether the application identifies the prejudice caused by such defect to the applicant.[22] The Pre-Trial Chamber delineated the parameters of the assessment to be undertaken by the Co-Investigating Judges when it identified the test which must be applied in considering such an application. The Pre-Trial Chamber held that "the Co-Investigating Judges were to determine only whether there was an arguable case and not examine the merits of the application".[23] Specifically, the Pre-Trial Chamber determined that in considering an application for annulment founded on Internal Rule 76(2), the Co-Investigating Judges need only be satisfied that the application advances a reasoned argument alleging procedural defect and prejudice.[24]

20. In present case, the Pre-Trial Chamber is of the view that it behoved the International Co-Investigating Judge to satisfy himself that the arguments advanced in the applications could be sustained before the Pre-Trial Chamber,[25] by setting out the alleged procedural defects and the ensuing prejudice, if any, to the charged person.

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[20] Internal Rule 76(2).
[21] Nuon Chea Decision, para. 21.
[22] Nuon Chea Decision, para. 23.
[23] 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, 25 June 2010, D263/2/6, ("Ieng Thirith Decision"), para. 18.
[24] *Ibid*, para. 18.
[25] Impugned Decision, para. 10, referring to the Ieng Thirith Decision, para. 18.

C. ADMISSIBILITY OF THE APPLICATIONS FOR ANNULMENT

21. Internal Rule 76(4)[26] provides that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: (a) does not set out sufficient reasons; (b) relates to an order that is open to appeal; or (c) is manifestly unfounded.

22. 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;[27] (ii) made plain the prejudice;[28] and, if so, (iii) adduced evidence to sustain the allegations.[29]

23. In the matter at bar, the Pre-Trial Chamber is of the view that the motion brought by the applicant – the aforementioned omissions notwithstanding – provided sufficient arguments so as to be admissible.

III. CONSIDERATION OF THE GROUNDS FOR ANNULMENT

24. The Pre-Trial Chamber will consider in turn the grounds for annulment first raised before the Co-Investigating Judges in two separate applications.

25. The Pre-Trial Chamber recalls 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.[30]

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[26] See also article 279 of the Cambodian Code of Criminal Procedure (CCP), which provides: "The Investigation Chamber may declare any request for annulment inadmissible if: -the request does not contain reasons; - the request is related to an order that is subject to appeal; - the request is obviously unfounded. The decision of the Investigation Chamber is not subject to appeal. When the request is declared inadmissible, the case file shall immediately be returned to the investigating judge."

[27] Ieng Thirith Decision, para. 24: "An annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective."

[28] Nuon Chea Decision, para. 40: "a *proven* violation of a right [...], would qualify as a procedural defect [...]. In such cases, the investigative or judicial action *may* be annulled" and para. 42: "the party making the application will have *to demonstrate* that its interests were harmed by the procedural defect"[emphasis added].

[29] Ieng Thirith Decision, para. 32.

[30] Nuon Chea Decision, para. 34.

26. Annulment is foreseen under Internal Rule 48, which provides: "Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application". Accordingly, a procedural irregularity which is not prejudicial to the applicant does not entail annulment.[31]

27. Internal Rule 76(5) further provides: "Where the Chamber decides to annul an investigative action, it shall decide whether the annulment affects other actions or orders". The final step, once prejudice is established, concerns the identification of the parts of the proceedings to be annulled. Where one of the three cumulative elements is not established, annulment cannot proceed and the subsequent assessment need not be undertaken.

28. The Judges of the Pre-Trial Chamber did not secure the affirmative vote of at least four Judges required for a ruling on the First Application, but did so in respect of the Second Application. [redacted]

A. THE APPLICATION FOR ANNULMENT OF PROCEEDINGS CONCERNING [redacted]

1. Submissions of the parties

[redacted]

[31] Ieng Thirith Decision, para. 21.
[redacted]

[redacted]

2. The Pre-Trial Chamber's assessment

33. Internal Rule 53(1) lays down the conditions for issuance of an Introductory Submission. The Rule provides: "[i]f 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".

[redacted]

35. Thus the Pre-Trial Chamber is requested to ascertain that the Introductory Submission with which the Investigating Judges are seised is consistent with the law applicable before the ECCC.

36. The Pre-Trial Chamber notes that the provisions governing Introductory Submissions are found at Internal Rule 53. In brief, Internal Rule 53 sets forth two species of rule for an

[redacted]

Introductory Submission to be valid. In its second part, Internal Rule 53(1) prescribes a number of conditions as to the form of said Submission. Thus, the Introductory 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 Co-Prosecutors.

37. The first part of Internal Rule 53(1) lays down a further condition for validity which may be inferred from the following excerpt: "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 named persons or against unknown persons". This condition is instead substantive.

38. The Pre-Trial Chamber notes that Internal Rule 53(1) makes explicit that non-compliance with the Rule renders the Submission null and void;[38] the provision draws no distinction between formal or substantive conditions and is therefore applicable to both.

[redacted]

[38] Internal Rule 53(3).
[redacted]

[redacted]

43. [redacted]

44. As a matter of fact, after reviewing the facts and setting out his legal reasoning, the International Co-Prosecutor went on to propound a number of possible characterizations and, in so doing, complied strictly with the stipulations of Internal Rule 53(1)(b), which bind him to state his contemplated legal characterizations.

45. The Pre-Trial Chamber takes the view that the International Co-Investigating Judge rightly considered that paragraph 99 of the Introductory Submission merely propounds a legal characterization of the facts which are set out in paragraphs 43 to 66 and does not extend the scope of the investigation of Case 003.[42]

[redacted]

[redacted]

[42] Impugned order, para. 17.

[redacted]

47. The Pre-Trial Chamber notes that the International Co-Investigating Judge recalled that the legal characterisation of the facts will be determined upon conclusion of the judicial investigation.[44] Thereupon, it will rest with the parties to seek, if need be, a remedy in respect of the Co-Investigating Judges' Decision, including in respect of the legal characterisations, should they be adopted.

48. Accordingly, said prayer is hereby dismissed.

B. THE APPLICATION FOR ANNULMENT OF PROCEEDINGS CONCERNING [redacted]

49. The Judges of the Pre-Trial Chamber did not secure the affirmative vote of at least four Judges required for a ruling on the First Application. The opinions of the judges of the Pre-Trial Chamber on the First Application are appended hereto pursuant to Internal Rule 77(14).

[redacted]

[44] See the Impugned Decision, para. 18: "The CIJs are not bound by the legal characterizations proposed by the Co-Prosecutors. Pursuant to Internal Rule 67(2), whether the facts set out in paragraphs 43 to 66 of the Introductory Submission amount to persecution on religious grounds as a crime against humanity is a determination that rests with the CIJs. Such determination will be made at the time of the issuance of the closing order." See also, Case 001 (CP02), Decision on Appeal against Closing Order Indicting *Kaing Guek Eav, alias "Duch"*, 5 December 2008, D99/3/42, para. 37.

IV. DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY:

- FINDS the prayer for annulment of Document D114/47 inadmissible and the remainder of the Appeal admissible;

- DENIES the Second Application;

- DECLARES that it has not secured the affirmative vote of at least four judges required for a ruling on the First Application.

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

Phnom Penh, 23 December 2015

President **The Pre-Trial Chamber**

PRAK Kimsan Olivier BEAUVALLET NEY Thol Steven J. BWANA HUOT Vuthy

Judge PRAK Kimsan, Judge NEY Thol and HUOT Vuthy append their opinion on the First Application hereto.

Judge Olivier BEAUVALLET and Judge Steven BWANA append their opinion on the First Application hereto.

V. OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

A. PROCEDURAL BACKGROUND

1. The Pre-Trial Chamber of the ECCC is seised of "[redacted] Appeal against Co-Investigating Judge Harmon's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action" entered by [redacted] Co-Lawyers (the "Co-Lawyers") on 18 May 2015 (the "Appeal").[45]

2. The Appeal was notified in English on 26 May 2015 and in Khmer on 23 June 2015. The Response of the International Co-Prosecutor was filed in English on 13 July 2015 and in Khmer on 24 July 2015 (the "Response").[46] On 31 July 2015, the Co-Lawyers filed their Reply in English. The Khmer translation was filed on 24 August 2015 (the "Reply").[47]

[redacted]

[45] [redacted] Appeal against Co-Investigating Judge Harmon's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 18 May 2015, D134/1/1.
[46] International Co-Prosecutor's Response to [redacted] Appeal against the International Co-Investigating Judge's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative Action, 13 July 2015, D134/1/6.
[47] [redacted] Reply to International Co-Prosecutor's Response to Appeal against Co-Investigating Judge HARMON's Decision on [redacted] Applications to Seize the Pre-Trial Chamber with two Requests for Annulment of investigative action, 31 July 2015, D134/1/9. See also Decision on [redacted] Request to File Reply to the International Co-Prosecutor's Response to [redacted] Appeal against the International Co-Investigating Judge's decision on [redacted] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigating Action in English with Khmer Translation to Follow, D134/1/8, 12 August 2015.
[redacted]

B. CONSIDERATIONS OF THE NATIONAL JUDGES AS TO THE APPLICATION FOR ANNULMENT CONCERNING THE [redacted] SITES

4. Internal Rules 55(2) and (3) lay down that the Co-Investigating Judges shall only investigate the facts set out in an introductory submission or a supplementary submission. If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, 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 Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]
54 [redacted]

[redacted]

11. In the light of the foregoing, the National Judges find that the discovery [redacted] uncovered new facts which were not set out in the Second Introductory Submission and are not aggravating circumstances of the existing facts. Accordingly, the investigative action into the facts pertaining to [redacted] site must be found to be null and void.

Phnom Penh, 23 December 2015

President PRAK Kimsan, President **Judge NEY Thol** **Judge HUOT Vuthy**

VI. OPINION OF THE INTERNATIONAL JUDGES ON THE APPLICATION FOR ANNULMENT CONCERNING [redacted]

A. SUBMISSIONS OF THE PARTIES

1. In its First Application and the Appeal, the Defence contends that the two crime sites were not identified in the Introductory Submission and, therefore, the International Co-Investigating Judge's investigations into these sites are in violation of Internal Rule 55(2), which provides that only the facts set out in an Introductory Submission or Supplementary Submission may be the subject of judicial investigation.[55] The Defence argues that to so investigate amounts to a procedural defect which is prejudicial to [redacted] inasmuch as it expands the scope of the investigation against him and violates his right to notice of the case against him.[56]

2. In his Response, the International Co-Prosecutor takes the view that the Applicant failed to demonstrate procedural defect or that the acts committed at the impugned sites constitute new facts.[57] He counters that: (i) national laws and the ECCC Law allow the Co-Investigating Judges to investigate facts not expressly set forth in an Introductory Submission;[58] (ii) the acts committed at the two sites are indivisibly linked to the expressly stated facts on account of their geographical and operational ties thereto;[59] and, in the alternative, (iii) the Co-Investigating Judges may undertake urgent, summary verifications of facts not expressly mentioned, but not carry out any coercive acts before the Supplementary Submission is issued, which is what happened in the present case. Thus, even where the facts are new, the questioning of witnesses may not be annulled.[60]

[55] First Application, paras 11-12. See, in particular, Appeal, paras 1, 14, 19, 29 and 59.
[56] *Ibid.*, paras 12 and 14; Appeal, paras 14, 15 and 50.
[57] Response, para. 12.
[58] Response, paras 14-15.
[59] Response, para. 23.
[60] Response, para. 34.

3. In its Reply, the Defence stands by the arguments raised in its appeal.[61]

B. THE INTERNATIONAL JUDGES' ASSESSMENT

4. The International Judges take the view that only consideration of the Introductory Submission and its annexes will determine whether the subsequent investigations and impugned acts were within the scope of the matter laid before the Co-Investigating Judges. If outwith the scope, the investigations will be unsubstantiated.

[redacted]

6. The parameters of said *sub judice* matter must be considered with the utmost circumspection. It would be incorrect to maintain that since no specific mention is at all made of the facts allegedly committed at the sites in question, they fall manifestly outwith the matter laid before the Co-Investigating Judges. Consideration of the application brought by the Defence for [redacted] demands in the first place an analysis of the matter *in rem* before the Co-Investigating Judges for determination.

1. Legal definition of the matter *in rem* [in French: *la saisine in rem*]

7. The analysis of the International Judges draws on the rules of law to which the Pre-Trial Chamber ordinarily has regard [63] – the ECCC law,[64] national legal rules, the Code of Criminal

[61] Reply.
[redacted]
[63] Nuon Chea Decision, para. 32.
[64] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

Procedure of the Kingdom of Cambodia (the "Cambodian Code of Criminal Procedure"), international jurisprudence and, vis-à-vis the particularities of the annulment procedure, the French Code of Criminal Procedure. The issue of the matter *in rem* before the Co-Investigating Judges for determination appears not to have been explored before the Pre-Trial Chamber of the ECCC.[65]

8. Internal Rule 55(2) sets forth the relevant provisions: "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission". These sole facts are the subject of the judicial investigation, with which the Co-Investigating Judges are charged.

9. The Co-Investigating Judges are thus barred from investigating facts which fall outwith the Introductory Submission. Internal Rule 55(3) provides: "If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, 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 Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission. Any fact unmentioned in the Introductory Submission, save where the investigation is subsequently extended by a Supplementary Submission, therefore falls outwith the jurisdiction of the Co-Investigating Judges.

10. Such a separation of the tasks assigned to the Co-Prosecutors and to the Co-Investigating Judges is a fundamental feature, inherent to the inquisitorial system. It appears in explicit terms at article 124(3) of the Cambodian Code of Criminal Procedure: "An investigating judge may not conduct any investigative acts in the absence of an introductory submission". As to the extent of the matter laid before said judge, article 125 of the Cambodian Code affirms that he or she shall be seised of the facts stated in the Introductory Submission and is duty-bound to

[65] Case 001 (PTC02), Decision on Appeal against the Closing Order Indicting Kaing Guek Eav, alias "Duch", 5 December 2008, D99/3/42, para. 35; Case 002 (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 3.

investigate those facts alone.[66] Article 80 of the French Code of Criminal Procedure also provides: "[TRANSLATION] The investigating judge may only investigate by virtue of a submission made by the Public Prosecutor."

11. The International Judges note that neither the Defence nor the International Co-Prosecutor advance a legal definition of "new fact" or "partially new facts".[67] There is no specific legal definition of this notion, which is the offspring of judicial interpretation of the aforementioned provisions. The International Judges consider a "new fact" to denote an event which arose or came to light subsequent to the Introductory Submission.

12. The delineation of the parameters of the judicial investigation is a particularity of the inquisitorial system and a matter extraneous to international jurisprudence.

13. The International Judges further note that the Co-Investigating Judges are bound by the matter before them for determination. Indeed, "*the Co-Investigating Judges shall only investigate* the facts set out [...]",[68] meaning that a duty is cast on the Co-Judges to investigate all of the facts with which they are seised by way of an Introductory Submission. Ultimately, the Co-Investigating Judges are duty-bound to investigate all of the facts, but only those facts which are laid before them.

14. Otherwise put, the Co-Investigating Judges' investigation is limited by the alleged criminal acts defined by the Co-Prosecutors. However, it rests with the Judge to elicit the circumstances of their commission, and the *locus in quo* in particular. Imprecision as to the facts in the Introductory Submission does not preclude judicial investigation.

15. In this regard, the French Court of Cassation has held: "[TRANSLATION] Whereas, judges are barred from adjudicating facts other than those laid before them, it lies with them to draw on all of those facts, which although not expressly stated in the proceedings, constitute mere

[66] Cambodian Code of Criminal Procedure, art. 125, paras 1 and 2.
[67] Appeal, paras 20-28; Response, para. 14; Reply, para. 6.
[68] Internal Rule 55(2); See also Cambodian Code of Criminal Procedure, art.125 paragraph 1 (emphasis added).

circumstances of the principal fact, to which they are connected and which they specifically characterize".[69]

2. Analysis as regards the instant matter

[redacted]

[69] Crim. 10 March 1977, no.75-91-224, Bull. crim. no. 92, p. 219.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(a) As to whether the sites fall within the category of facts set out at paragraphs 43 to 64 of the Introductory Submission

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

32. The evidence of such witnesses,[96] which clearly post-dates the Introductory Submission, describes facts which the International Co-Prosecutor had, in a general sense but unequivocally included in the abovementioned paragraphs of his Introductory Submission. That the International Co-Prosecutor was unapprised of such evidence at the time of filing the Introductory Submission does not mean that the facts are not included in the matter laid before the Co-Investigating Judges. Although unapprised of all of the *loci in quo*, the International Co-Prosecutor had reason to believe that the crimes with which he seised the Co-Investigating Judges had been perpetrated not only at the sites mentioned in the Introductory Submission but at

[redacted]

[96] See Forwarding Order, para. 6.

further sites, which it rested with the Co-Investigating Judges to discover.[97] In that sense, the statements in question do not reveal new facts, [redacted] Rather, as evidentiary material, the statements flesh out the circumstances surrounding the facts which are set forth in the Introductory Submission. At issue here are not new facts but evidence duly gathered in the course of the judicial investigation.

33. [redacted] Thus, the International Judges consider, 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 Co-Investigating Judges.

34. Accordingly, the International Judges are of the view that the facts to which the witnesses attest fall within the ambit of the investigations with which the Co-Investigating Judges were charged by virtue of the Introductory Submission and from that time onward.

[redacted]

[97] See *supra* para. 14.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]As to whether the sites fall within the category of facts adverted to at paragraphs 65 to 66 of the Introductory Submission, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

55. In sum, the International Judges consider that the content of the statements taken by the Reserve Co-Investigating Judge, far from constituting new facts, amounts instead to evidence duly gathered in the course of the investigation with which the investigating judges were tasked.

56. The International Judges would have determined that upon the filing of the Introductory Submission, [redacted] fell within the ambit of the investigations with which the Co-Investigating Judges were charged. Accordingly, the International Judges would have dismissed this ground for annulment.

Phnom Penh, 23 December 2015

Judge Olivier BEAUVALLET **Judge Steven J. BWANA**