



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

**Kingdom of Cambodia
Nation Religion King**

**Royaume du Cambodge
Nation Religion Roi**

Case File No: 003/07-09-2009-ECCC/OCIJ

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

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

**Before: Judge YOU Bunleng
Judge Siegfried BLUNK**

Date: 07 June 2011

Original: English/Khmer

Classification: Public [Redacted Version]

**Decision on Time Extension Request and Investigative Requests by the
International Co-Prosecutor Regarding Case 003**

Co-Prosecutors

CHEA Leang
Andrew CAYLEY



We, **YOU Bunleng** (ឃុំ ប៊ុនហ្គេង) and **Siegfried BLUNK** (ស៊ីកហ្វ្រីដ ប្លង់), Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC");

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

Noting Rules 13, 21, 66, 71 and 72 of the ECCC Rules (Rev.7) (the "Rules");

Noting the Practice Direction on Filing Documents before the ECCC (the "Practice Direction");

Noting the judicial investigation being conducted pursuant to the Co-Prosecutors' Second Introductory Submission;

I - PROCEDURAL HISTORY

1. Following the notification of the conclusion of judicial investigations on 29 April 2011¹ under Rule 66 (1), the International Co-Prosecutor ("ICP") on 10 May 2011, filed before the Co-Investigating Judges ("CIJs") a request for extension of a deadline for submission of Case 003 Civil Party Application² and on 18 May 2011 three investigative requests³ (the "Requests").
2. The CIJs issued an order dated 19 May 2011 requesting the Co-Prosecutors to disclose whether before filing the Requests they had made a decision to delegate power to one of them in accordance with Rule 13(3), or whether they had recorded a disagreement pursuant to Rule 71 (1).⁴
3. The Co-Prosecutors separately filed their respective responses: On 25 May 2011, the National Co-Prosecutor ("NCP") responded that she had not delegated power to the International Co-Prosecutor and that there had not been a recording of disagreement regarding the Requests⁵. On 26 May 2011, the International Co-Prosecutor responded that in his view neither a delegation of power provided in Rule 13(3) nor a formal recording of a disagreement according to Rule 71(1) was necessary because the practice of filing alone had been accepted before, that the National Co-

¹ D13, Notification of Conclusion of Judicial Investigations, 29 April 2011.

² D15, International Co-Prosecutor's Request for Extension of Time for the Filing of Civil Party Application In Case 3, 10 May 2011.

³ D17, International Co-Prosecutor's First Case File 003 Investigative Request to admit Additional Documents and Observations on the Status of the Investigation; 18 May 2011; D18, International Co-Prosecutor's Second Request for Further Investigative Action regarding [Redacted] and related Crime Sites, 18 May 2011; D19, International Co-Prosecutor's Third Investigative Request regarding [Redacted] and related Crime Sites, 18 May 2011.

⁴ D20, Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 19 May 2011.

⁵ D20/1, National Co-Prosecutor's Response to the CIJ' order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, p.1



Prosecutor despite being informed beforehand had chosen not to delegate power or to record a disagreement, and that the initial Disagreement regarding Case File 003 allowed the International Co-Prosecutor to act alone according to the Pre-Trial Chamber's Deliberations⁶. The arguments in this Response are discussed in detail below (II B).

II – REASONS FOR THE DECISION

A. Law

4. Rule 13 (3) provides: *"Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Prosecutors may delegate power to one of them, by a joint written decision, to accomplish such action individually."*

Rule 13 (5) provides:

"In the event of disagreement between the Co-Prosecutors, the Procedure in Rule 71 shall apply".

Rule 71 (1) states:

"In the event of disagreement between the Co-Prosecutors, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreement kept by the Greffier....."

5. These Rules therefore leave no room for a solitary action by one Co-Prosecutor, unless either a delegation of power has taken place according to Rule 13 (3), or a Disagreement between Co-Prosecutors has been recorded pursuant to Rule 71 (1). However, both National and International Co-Prosecutor in their Responses confirmed that neither a delegation of power had taken place nor a disagreement had been recorded⁷.

B. Response by International Co-Prosecutor:

1. Assertion by the International Co-Prosecutor that "the practice of filing alone has previously been accepted by the CIJs"

6. (i) The assertion by the ICP that the Second Introductory Submission was *"filed by the International Co-Prosecutor alone on 7 September 2009 in accordance with the Pre-Trial Chamber's Considerations of 18 August*

⁶ D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011.

⁷D20/1, National Co-Prosecutor's Response to the CIJ' order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, p.1; D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, para.3.



2009"⁸ is misleading because the issue before the PTC was not whether the filing alone of the Introductory Submission was legal, but solely whether the filing had to be forwarded to the CIJs or not.

Accordingly, the PTC in that part of the Considerations which was signed by all 5 Judges clearly pointed out:

*"As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Rule 74 (1) provides that the action of the International Co-Prosecutor shall be executed. In the current case, this means that the International Co-Prosecutor shall, pursuant to Internal Rule 53 (1), forward the New Introductory Submission to the Co-Investigating Judges to open judicial investigations"*⁹.

Thus, the PTC never decided on the legality of filing alone but only on the obligation of the ICP to forward the Introductory Submission to the CIJs. Accordingly, the CIJs were obligated to open judicial investigation, and the question whether they had "accepted" the filing could not arise. That the CIJs opened judicial investigations according to their obligation in no way implies that they accepted the solitary filing of the Introductory Submission as legal.

(ii) The fact that the Rogatory Letter in Case 003¹⁰ was signed by only one Co-Investigating Judge does not further the argument of the ICP, rather disproves it because a Disagreement regarding the Rogatory Letter was recorded by the CIJs.

(iii) In respect to the Request for Clarification¹¹ a Disagreement pursuant to Rule 14.7 was also recorded by the CIJs and placed in the Register for Disagreements according to Rule 72.1. The fact that the Request for Clarification was addressed solely to the ICP meant only that he was intended to be the recipient of the document, and does not support the sweeping assertion by the ICP that "it could only mean in the International Co-Investigating Judge's view that any prosecutorial act taken directly in relation to the Second Introductory Submission ... concerned only one of the two Co-Prosecutors". As regards the ICP's Response to the Request for Clarification¹², that was filed alone, the CIJs refrained from ordering the OCP to disclose whether a Delegation of Power or a Recording of Disagreement had taken place, but this was for the reason that the substance of the Response left the scope of investigations unchanged.

⁸ D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, para.10.

⁹ D1/1.3, Annex I: Public Redacted Version, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, para. 45.

¹⁰ D2, Rogatory Letter dated 9 June 2010.

¹¹ D1/2 Request for Clarification in Case 003, 8 February 2011.

¹² D1/2/1 Response of International Co-Prosecutor to Request for Clarification, 16 February 2011.



(iv) The Request to place Documents from Case File 002 and Other Evidentiary Materials Onto Case File 004¹³ was not, as the ICP asserts, "accepted" by the CIJs, but led to the issuing of an order similar to the Order¹⁴ that was issued for the current Requests¹⁵.

2. Assertion by the ICP that a Case 002 request he had filed without Delegation of Power "was deemed admissible by the Trial Chamber"¹⁶

7. This curious assertion not only ignores the independence of the Trial Chamber on the one hand and the independence of the CIJs on the other, but also remains silent about the manner in which the Request was "deemed" admissible, leaving open whether a decision on admissibility was made at all.

3. Assertion by the ICP that the NCP had opportunity to delegate power or record disagreement but "explicitly has chosen not to do so"¹⁷

8. As this assertion is not borne out by the NCP's response which merely states that she "had not" delegated power and "there has never been" a recording of disagreement regarding the Requests, and as the CIJs are not obligated to ascertain the truth in this internal matter of the OCP, the CIJs cannot consider this assertion to be true.

9. It is for the Co-Prosecutor who files an application alone to either indicate that the legal requirements of Rule 13 or Rule 71 were met, or to demonstrate convincingly that it is impossible to meet them.

4. Assertion by the ICP that the PTC Considerations must be interpreted as encompassing all prosecutorial acts in the context of the Second Introductory Submission¹⁸

10. The PTC in a part of the Considerations which was signed by all 5 Judges stated: "As the Pre-Trial Chamber has not reached a decision on the Disagreement brought before it, Internal Rule 74 (1) provides that the action of the International Co-Prosecutor shall be executed. In the current case, this means that the International Co-Prosecutor shall, pursuant to

¹³ D9, International Co-Prosecutor's Request to Place Documents From Case File 002 and Other Evidentiary Materials onto Case File 004, 3 May 2011; D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, paragraph 10.

¹⁴ D7/1, Order on International Co-Prosecutor's Request to place documents from Case File 002 and other evidentiary material onto Case File 004, 06 June 2011 (Case File 004).

¹⁵ D20 Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 19 May 2011.

¹⁶ D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, paragraph 11.

¹⁷ D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, paragraph 14.

¹⁸ D20/2, Co-Prosecutors' Response to the CIJ' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, paragraph 17.



Internal Rule 53 (1), forward the New Introductory Submission to the Co-Investigating Judges to open judicial investigations¹⁹."

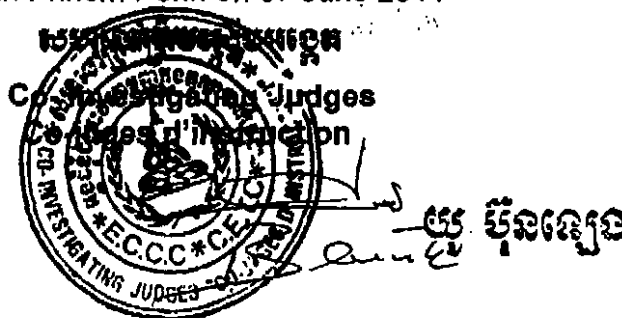
Thus the Considerations dealt solely with the issue of the obligation to forward the Introductory Submission to the CIJs after disagreement within the OCP over the Submission itself, and did not deal with any other issues such as possible future disagreements over prosecutorial acts. In view of this clear wording, no other interpretation is possible, and also there is no need for the following reasons:

11. To delegate power according to Rule 13 or to record a disagreement according to Rule 71 is a matter of minutes; and in no way would "be in contradiction of the expeditiousness of proceedings" as the ICP asserts. Nor would it "result in endless disagreement procedures", because there is no obligation to bring the disagreement before the Pre-Trial Chamber. Nor would it "lead to nonsensical consequences" as the OCP asserts; rather it will lead to the legal certainty and transparency of proceedings pursuant to Rule 21.1 that the CIJs are obligated to safeguard at the stage of judicial investigations.

III – DECISION

12. For these reasons the CIJs reject the Requests as invalid.

Done in Phnom Penh on 07 June 2011



Dr. Siegfried BLUNK

¹⁹ D1/1.3, Annex I: Public Redacted Version, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, paragraph 45.