



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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

លេខ/No: D14/1/2

Criminal Case File N° 003/07-09-2009-ECCC/OCIJ (PTC03)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 13 June 2011

PUBLIC

ORDER SUSPENDING THE ENFORCEMENT OF THE “ORDER ON INTERNATIONAL CO-PROSECUTOR’S PUBLIC STATEMENT REGARDING CASE FILE 003”

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Co-Investigating Judges

YOU Bunleng
Siegfried BLUNK

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “International Co-Prosecutor’s Appeal against the ‘Order on the International Co-Prosecutor’s Public Statement regarding Case File 003’”, filed on 25 May 2011 (the “Appeal”).¹

1. The Appeal is lodged against an Order issued by the Co-Investigating Judges on 18 May 2011 (the “Order”), whereby the latter ordered the International Co-Prosecutor to publish, within three (3) working days from the date of filing of the Order, a retraction of some public statements made on a press release issued on 9 May 2011.²
2. In his Notice of Appeal filed on 19 May 2011, the Co-Prosecutor advised that “so as not to render the right to appeal meaningless [he] considers this now impugned order, remains stayed, unless the Pre-Trial Chamber orders otherwise pending their final decision on the appeal”.³
3. Neither the Internal Rules of the ECCC nor the Cambodian Code of Criminal Procedure give any indication as to the effect an appeal against an order ordering a party to retract information may have on the execution of such order.⁴ While an appeal against an interlocutory decision during the Pre-Trial stage does not necessarily have the effect of suspending the execution of said decision, suspension may be appropriate in circumstances where the execution of the decision before determination of the appeal would render any right of appeal meaningless.
4. As there is a *lacunae* in the Internal Rules and the law, the Pre-Trial Chamber seeks guidance in the procedural rules established at the international level as directed by the Agreement between the United Nations and the Cambodian government,⁵ the Pre-Trial Chamber notes that it has been recognized that in instances where their statutory provisions did not expressly or by necessary implication contemplate their power to

¹ International Co-Prosecutor’s Appeal against the “Order on the International Co-Prosecutor’s Public Statement regarding Case File 003, 25 May 2011, D14/1/1.

² Order on the International Co-Prosecutor’s Public Statement regarding Case File 003, 18 May 2011, para. 9.

³ Notice of Appeal, 19 May 2011, D14/1.

⁴ The Internal Rules contain provisions on suspension of enforcement of a decision only in relation to disciplinary actions taken by the Cambodian Bar Association (Internal Rule 38(3)), orders for release during pre-trial procedures or after judgement by the Trial Chamber (respectively Internal Rules 77(15) and 82(6)).

⁵ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, Article 12(1). See also Internal Rule 2.



pronounced on a matter,⁶ international and internationalized tribunals possess an inherent jurisdiction which give them the power “to determine incidental issues which arise as a direct consequence of the procedures of which [they are] seized by reason of the matter falling under [their] primary jurisdiction.”⁷ The inherent jurisdiction is described as being “ancillary or incidental to the primary jurisdiction and is rendered necessary by the imperative need to ensure a good and fair administration of justice”.⁸ As such, “[t]his inherent jurisdiction arises as from the moment the matter over which he Tribunal has primary jurisdiction is brought before an organ of the Tribunal”.⁹ Inherent jurisdiction has been used *inter alia* to order interim measures and to consider matters or issue orders *proprio motu*.¹⁰ The Pre-Trial Chamber has itself used its inherent power in the past when seized *inter alia* of requests for reconsideration¹¹ and to review *proprio motu* procedural errors by the Co-Investigating Judges not raised by the Defence counsel.¹²

5. The Pre-Trial Chamber notes on the one hand that the information the Co-Investigating Judges ask the International Co-Prosecutor to retract is quoted in the Order issued by the Co-Investigating Judges, which they have classified as public.¹³ As such, the information will remain in the public domain even if it is “retracted” by the Co-Prosecutors. Execution of the Order by the Co-Prosecutor pending determination of his Appeal would therefore have no effect on preserving the confidentiality of the information. On the other hand, the Chamber acknowledges that

⁶ Special Tribunal for Lebanon, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order on Jurisdiction and Standing, Appeals Chamber, 10 November 2010 (“STL Appeals Chamber Decision”), paras 46 and 48.

⁷ STL Appeals Chamber Decision, para. 45.

⁸ STL Appeals Chamber Decision, para. 45.

⁹ STL Appeals Chamber Decision, para. 45.

¹⁰ STL Appeals Chamber Decision, para. 46, referring *inter alia*, on interim measures, to, *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(ii), 23 June 2005, para. 9; ECHR, *Mamakutlov and Askarov v. Turkey*, Applications nos 46827/99 and 46951/99, Judgement, 4 February 2005, paras 123-124 and *Veerman case*, Order of 28 October 1957, in *Decisions of the Arbitral Commission on Property, Rights and Interests in Germany*, Vol. I (Koblenz, 1958), p. 120, and on orders issued *proprio motu*, to *Prosecutor v. Nyiramasuhuko et al.*, ITCR-97-21-T, ITCR-97-29-T, ITCR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor’s Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor’s Counsel, 10 July 2001, para. 19 (rephrasing proposed witness protection order *proprio motu*).

¹¹ Although requests for reconsideration filed to the Pre-Trial Chamber have thus far failed, the Pre-Trial Chamber has acknowledged that it has the inherent power to reconsider a previous decision. See *inter alia* Case File no. 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Application for Reconsideration of Civil Party’s Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/1/68, para. 25, referring to the decision *Prosecutor v. Galic*, IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, Appeals Chamber, 16 July 2004, p. 2.

¹² Case File 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order, 3 December 2007, paras 9-12.

¹³ Order, paras 2 and 3.

Suspension Order



the International Co-Prosecutor's right to appeal before it in the present case would be entirely academic should he have to execute the Order before a decision is made on his Appeal. Being seized of an appeal against the Order and considering the short delay given to the International Co-Prosecutor to execute the Order, the Pre-Trial Chamber considers that it is in the interest of fair justice to exercise its inherent jurisdiction in order to suspend *proprio motu* enforcement of the Order pending final determination of the Appeal.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY

ORDERS that enforcement of the Order be suspended until final determination of the Appeal.

Phnom Penh, 13 June 2011 ^{CR}

President of the Pre-Trial Chamber



PRAK KIMSAN