



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

No: D20/4/4

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 (PTC 04)

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

Date: 2 November 2011

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PUBLIC (REDACTED VERSION)

CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE DECISION ON TIME EXTENSION REQUEST AND INVESTIGATIVE REQUESTS REGARDING CASE 003

Co-Prosecutors

CHEA Leang
Andrew CAYLEY



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “International Co-Prosecutor’s Appeal Against the ‘Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003’” filed on 7 July 2011 (the “Appeal”).¹ It is also seised of a Request to Publish a Redacted Version of the First Case File 003 Investigative Request filed by the International Co-Prosecutor on 25 August 2011 (the “Request for Publication”).²

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 7 September 2009, the Acting International Co-Prosecutor submitted to the Co-Investigating Judges the Second Introductory Submission (the “Introductory Submission”), opening a judicial investigation in this case.³
2. On 29 April 2011, the Co-Investigating Judges issued a Notice of Conclusion of the Judicial Investigation.⁴
3. On 10 May 2011, the International Co-Prosecutor filed a Request for an Extension of Time for the Filing of Civil Party Applications (the “Request for an extension of time”),⁵ asking the Co-Investigating Judges to extend the deadline for the filing of civil party applications in this case until 29 June 2011. On 18 May 2011, the International Co-Prosecutor also filed three requests for investigative actions⁶ (together “the Investigative Requests”), identifying further documents

¹International Co-Prosecutor’s Appeal Against the “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003”, 7 July 2011, D20/4/1 (confidential version) and D20/4/2.1 (public redacted version) (the “Appeal”).

²International Co-Prosecutor’s Request to Publish a Redacted Version of the First Case File 003 Investigative Request, 25 August 2011, D20/4/3 (the “Request for Publication”).

³Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

⁴Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁵International Co-Prosecutor’s Request for an Extension of Time for the Filing of Civil Party Applications, 10 May 2011, D15 (the “Request for an extension of time”).

⁶International Co-Prosecutor’s First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 18 May 2011, D17 (the “First Investigative Request”); International Co-Prosecutor’s Second Request for Further Investigative Action Regarding ██████████ and Related Crime Sites, 18 May

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to be transferred from Case File 002 to Case File 003 as well as new documents and seeking that additional investigative actions be undertaken regarding the alleged crime sites, criminal events and responsibility of the Suspects named in the Introductory Submission.

4. On 19 May 2011, the Co-Investigating Judges issued an “Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003” (the “First Order”)⁷ ordering “the Co-Prosecutors to disclose within two working days whether before filing the Time Extension Request and Investigative Requests, they have made decision [sic.] of delegation of power pursuant to Rule 13(3) or they have recorded any disagreement pursuant to Rule 71(1).” The Co-Investigating Judges expressed their will to “ascertain whether the National Co-Prosecutor was given the opportunity to exercise her right under Rule 13(3) and the Rule 71(1)”.⁸
5. The National Co-Prosecutor responded on 25 May 2011 that “[a]s far as the disagreement in Case 003 between the Co-Prosecutors is concerned, there was a written disagreement made on 18 November 2008” and confirmed that there has been no delegation of power nor a disagreement specifically recorded in respect of the Request for Extension of Time and the Investigative Requests (the “Four Requests”).⁹
6. The International Co-Prosecutor responded on 26 May 2011 that the Four Requests were filed by him alone, after having informed and sent copies to the National Co-Prosecutor who stated that she would not file a disagreement nor delegate her authority to the International Co-Prosecutor.¹⁰ The International Co-Prosecutor argued that he has acted pursuant to the

2011, D18 (the “Second Investigative Request”); International Co-Prosecutor’s Third Request Regarding ██████████ and Related Crime Sites, 18 May 2011, D19 (the “Third Investigative Request”).

⁷ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, D20 (the “First Order”).

⁸ First Order, p. 2.

⁹ National Co-Prosecutor’s Response to the Co-Investigating Judges’ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, D20/1.

¹⁰ (International) Co-Prosecutor’s Response to the Co-Investigative Judges’ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, D20/2, paras 10 and 14 (the “International Co-Prosecutor’s Response to the First Order”).

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previously accepted practice and that neither a delegation of power nor a formal recording of a disagreement was necessary to file independently requests in Case File 003 as the initial disagreement is still ongoing and the National Co-Prosecutor has chosen not to register any further disagreement in relation to the the Four Requests.¹¹

7. On 7 June 2011, the Co-Investigating Judges issued their “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003” (the “Impugned Order”)¹² rejecting the Four Requests as invalid on the basis that the Internal Rules “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)”.¹³
8. On 10 June 2011, the International Co-Prosecutor filed a Notice of Appeal¹⁴ and, on 7 July 2011, he filed his Appeal brief. As a preliminary matter, the International Co-Prosecutor submits that he is entitled to file his appeal individually but that, out of an abundance of caution, he had formally recorded a disagreement prior to filing this appeal.¹⁵ On the merits of his Appeal, the International Co-Prosecutor submits that the Impugned Order should be overturned and the Co-Investigating Judges be directed to consider the merits of the Four Requests on the basis that (1) the Co-Investigating Judges erred when they concluded that the Requests filed by the International Co-Prosecutor alone were invalid as, according to the applicable rules and the previous practice before the ECCC, the procedure of recording a disagreement is not mandatory but optional; (2) the initial disagreement regarding the filing of the Introductory Submission in Case 003 encompasses all subsequent actions taken by the International Co-Prosecutor in this case; (3) alternatively, the Co-Investigating Judges erred in rejecting the Requests as invalid

¹¹ International Co-Prosecutor’s Response to the First Order, para. 18.

¹² Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, D20/3 (the “Impugned Order”).

¹³ Impugned Order, para. 5.

¹⁴ International Co-Prosecutor’s Notice of Appeal of the Co-Investigative Judges’ “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003” Pursuant to ECCC Internal Rule 74(2) and 75(1), 10 June 2011, D20/4.

¹⁵ Appeal, para. 2.

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without providing the International Co-Prosecutor the opportunity to remedy the perceived procedural defect, thus failing to take into account the fundamental principles articulated in Internal Rule 21 and; (4) as a further alternative, the Co-Investigating Judges have contravened their obligation to conduct a complete and impartial investigation by not considering the substance of the Four Requests.

9. No responses to the Appeal were filed.
10. On 10 August 2011, the International Co-Prosecutor filed a Request to publish a redacted version of his appeal,¹⁶ which was granted by the Pre-Trial Chamber on 18 August 2011. On 25 August 2011, the International Co-Prosecutor further filed to the Pre-Trial Chamber a Request to publish a redacted version of his First Investigative Request.¹⁷ This Request is still pending and will be addressed hereinafter.

II. DECISION ON THE REQUEST FOR PUBLICATION

11. By his Request for Publication, the International Co-Prosecutor asks the Pre-Trial Chamber to make public a redacted version of his First Investigative Request, which was filed to the Co-Investigating Judges and classified by them as confidential. The International Co-Prosecutor asserts that he has made this request to the Pre-Trial Chamber as the Co-Investigating Judges have refused to deal with matters which are currently the subject of appeals before the Pre-Trial Chamber.¹⁸
12. The Pre-Trial Chamber notes that the International Co-Prosecutor initially requested that his First Investigative Request be classified as confidential when he filed it before the Co-Investigating Judges. Nothing indicates that he had later requested the Co-Investigating Judges

¹⁶ Request to Publish a Redacted Version of the International Co-Prosecutor's Appeal against the "Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor regarding Case 003", 10 August 2011, D20/4/2.

¹⁷ Request for Publication.

¹⁸ Request for Publication, para. 3.

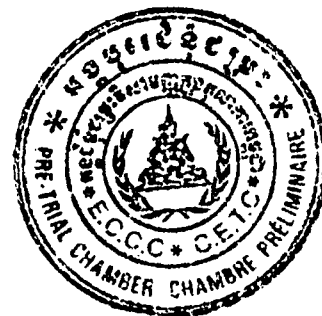
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to reclassify the document; his Request for Publication rather suggests the contrary.¹⁹ Although reclassification of a document may be done by the Pre-Trial Chamber when seised of a case,²⁰ it is in principle the judicial body with whom the document was filed who shall decide on its classification.²¹ Given that the First Investigative Request was filed with, and classified by, the Co-Investigating Judges and that the latter are still seised of the judicial investigation in Case 003, the Pre-Trial Chamber considers that the proper procedure would be for the International Co-Prosecutor to first request the Co-Investigating Judges to reclassify the document before seising the Pre-Trial Chamber of the matter. The Request for Publication is therefore rejected.

III. EXPRESSION OF OPINION AND CONCLUSION ON THE APPEAL

13. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the merits of the Appeal nor on its admissibility. Given that Internal Rule 77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.
14. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Order shall stand.



¹⁹ Request for Publication, para. 3.

²⁰ Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/ Rev. 6, 2 March 2011 (the "Practice Direction on Filing"), Articles 3.14 and 3.12, read in conjunction with Internal Rule 77(2).

²¹ See Article 3.12 of the Practice Direction on Filing; Articles 4(a) and 5(b) and (h) on the Practice Direction on Classification and Management of Case-Related Information, ECCC/004/2009, 5 June 2009.

Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Time Extension and Investigative Requests

IV. DISPOSITION**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

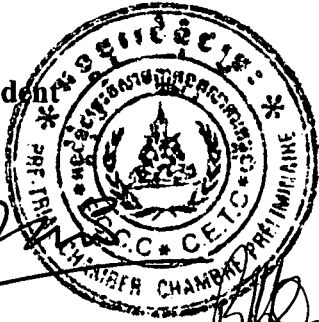
REJECTS the International Co-Prosecutor's Request to Publish a Redacted Version of the First Case File 003 Investigative Request;

UNANIMOUSLY DECLARES that it had not assembled an affirmative vote of at least four judges on a decision on the Appeal.

In accordance with Internal Rule 77(13), there is no possibility to appeal.

Phnom Penh, 2 November 2011

President



Pre-Trial Chamber

PRAK Kimsan

Rowan DOWNING

NEY Thol

Katinka LAHUIS

HUOT Vuthy

Judges Prak, Ney and Huot append their opinion.

Judges Downing and Lahuis append their opinion

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3. Internal Rule 13 (3) provides that “[e]xcept 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.” Reading this provision, we find that we must understand about “the action of the Co-Prosecutors,” that is to find out what action that must be carried out jointly and which action that can be acted individually.
4. As for **action to be accomplished jointly**, the Internal Rules do not provide power to either of the Co-Prosecutors to act alone when he or she receives the power delegation from another co-prosecutor. Besides, as for **action that can be carried out individually**, the Rules provide the Co-Prosecutors with the discretion to consider whether one co-prosecutor should or should not delegate power to another co-prosecutor for him or her to act alone on behalf of the (two) Co-Prosecutors. The delegation of power indicates the agreement [between the two Co-Prosecutors]. However, if none of the Co-Prosecutors delegates his or her power to another co-prosecutor, that co-prosecutor cannot act alone.
5. [The decision] not to delegate power means that there is no agreement (i.e., disagreement) between the Co-Prosecutors. As a result, any action done by one of the Co-Prosecutors, without the agreement from another co-prosecutor, is an invalid action. An action cannot proceed unless either or both of the Co-Prosecutors bring(s) the disagreement to be settled before the Pre-Trial Chamber. This point was already raised by the Pre-Trial Chamber in their considerations concerning the disagreement between the Co-Prosecutors, pursuant to Rule 71 of the Internal Rules¹.
6. According to Internal Rule 71(1), “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 disagreements kept by the Greffier of the Co-Prosecutors.” And Internal Rule 71(2) states that within 30 (thirty) days, either Co-Prosecutor may bring the disagreement before the Pre-Trial Chamber immediately.

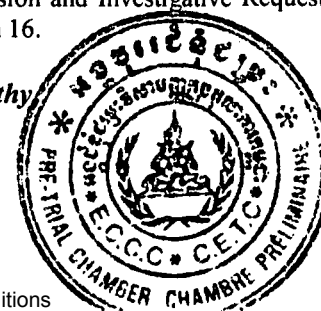
¹ [PTC Judges’] Considerations Concerning the Disagreement between the Co-Prosecutors Pursuant to Rule 71 of the Internal Rules (D1/1.3).

Opinion of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy



7. Based on the ICP's interpretation, the synonym of the word 'may' in Internal Rule 71(1) does provide an option for the Co-Prosecutors; however, for an action to proceed, or for applicable practice, it is necessary for the Co-Prosecutors to *make record of the exact nature of their disagreement* and to place such a record onto the Disagreement Case File for the interest of the lapse of the 30-day period.
8. According to the ICP's response to the Co-Investigating Judges' order on his request the extension of time and his investigative requests in Case File 003, dated on 26 May 2011, the ICP submits that "*all four requests filed by him are directly related to the Second Introductory Submission and still fall under the initial disagreement... At the same time, the only logical consequence of the disagreement procedure, as conducted by the PTC Considerations, is that the International Co-Prosecutor continues to act alone whenever a prosecutorial act concerns the Second Introductory Submission²*". We find that the ICP made no specific reference to any paragraph in the Pre-Trial Chamber's considerations concerning the disagreement between the Co-Prosecutors, pursuant to Rule 71 of the Internal Rules.
9. With regard to the submission of the ICP that the CIJs failed to consider the fundamental principle in Internal Rule 21, we find that *the fundamental principle that needs interpreting for the interest of the suspect, charged person, and victim is provided only in Sub-Rules 21 (a—d) of the Internal Rules*. And we find that these Sub-Rules do not contain provisions that can be interpreted in relation to the requirement by which the Co-Investigating Judges shall abide when carrying out an action. Therefore, we find that the decision by the Co-Investigating Judges does not violate the fundamental rights stipulated in Internal Rule 21.
10. Additionally, according to Paragraph 13 of the ICP's Appeal against the "Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003" which states that "[f]ollowing receipt of the CIJ's decision of 7 June 2011, the ICP formally recorded a


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






disagreement with the National Co-Prosecutor in relation to the civil party application extension request and each of the investigative requests...” and according to Paragraph 14 of this same appeal at which the ICP indicates that “[i]n the alternative, the ICP submitted that: (a) in light of the Rule 21(a) requirement that the proceedings ‘preserve a balance between the parties,’ the CIJs ought to have provided the ICP with an opportunity to remedy the perceived procedural defect...” it shows that the International Co-Prosecutor acknowledges that he did commit procedural error by not complying with the procedural, formal requirement, which led the Co-Investigating Judges to reject his request.

11. The [ICP’s] request, although not a kind of such submissions as Introductory Submission or Supplementary Submission, is a request for investigative action whose scope is broad; and whose reading is specified in the Second and Third Introductory Submissions. The National Co-Prosecutor and the International Co-Prosecutor have disagreed over the Second and Third Introductory Submissions that contain the same facts as those facts set out in the ICP’s request for further investigation. And the disagreement was recorded and brought before the Pre-Trial Chamber for its consideration and decision. As a result, the recording of the disagreement between the Co-Prosecutors is absolutely necessary, and the lapse of the 30-day time limit shall be respected.
12. In this regard, we find that it is correct that the Co-Investigating Judges reject the [ICP’s] request for time extension for the filing of Civil Party applications and the First, Second and Third requests for investigation in Case 003 on the ground that those requests are invalid because there is no power delegation or record of disagreement.

Phnom Penh, 27 November 2009



Judge PRAK Kimsan Judge NEY Thol Judge HUOT Vuthy

Opinion of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy

OPINION OF JUDGES LAHUIS AND DOWNING

1. For the reasons expressed below, we are of the opinion that the Requests were validly filed alone by the International Co-Prosecutor. As a consequence, we are of the view that the Impugned Order should be reversed and the matter should be returned to the Co-Investigating Judges for them to decide on the merits of the Four Requests. Given that our discussion on the merits of the Appeal is determinative of our opinion on its admissibility, we will first express our opinion on the former before addressing the latter.

I- Merits of the Appeal

2. At the outset, we consider that in principle, the Internal Rules provide the possibility for one of the Co-Prosecutors to act alone. In that sense, Internal Rule 1(2) provides in its relevant part that “a reference in these IRs to the Co-Prosecutors includes both of them acting jointly *and each of them acting individually, whether directly or through delegation*, as specified in these IR” (emphasis added). Internal Rule 13, which provides for the possibility of a delegation of power between the Co-Prosecutors,¹ further states that “[i]n the event of disagreement between the Co-Prosecutors, the procedure in Rule 71 shall apply”, thus making clear that one prosecutor can act alone “directly” within the meaning of Internal Rule 1(2) if the rules applicable in case of a disagreement are followed. Such interpretation is in conformity with the previous jurisprudence of the Pre-Trial Chamber.² Hence, the main issue to decide upon is whether conditions are set out in the Internal Rules for one Co-Prosecutor to act alone when the other disagrees with the proposed course of action and whether the non-respect of these conditions may have consequences on the validity of an action undertaken alone.

¹ Internal 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.”

² In its Considerations Regarding The Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, the Pre-Trial Chamber, in para. 16 of the common part of its considerations, found that “Articles 6(1) and (4) of the Agreement, Articles 16 and 20(new) of the ECCC Law and Internal Rule 71(3) clearly indicate that *one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit.*”: Disagreement No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding The Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009 (the “Pre-Trial Chamber’s Considerations on the Disagreement”).



3. We observe that the Internal Rules establish a procedure to deal with situations where there is a disagreement between the two Co-Prosecutors, as foreseen in the 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 (the “Agreement”) (Articles 6(4) and 7)³ and the Law on Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratische Kampuchea (the “ECCC Law”) (Article 20(new)).⁴ The Internal Rules indicate that the use of the procedure provided to settle disagreements is not mandatory but rather optional. In other words, it is a matter of discretion as to whether the disagreement procedure is utilised by either or both Co-Prosecutors and to what extent a matter is taken. In that sense, Internal Rule 71(1) provides that “[i]n the event of a disagreement between the Co-Prosecutors, either or both of them *may* record the exact nature of their disagreement in a signed and dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Prosecutors” (emphasis added). By use of the word “may”, a discretion to record the disagreement is provided and no obligation arises to do so. The same rule further provides, in its paragraph 2, that “[w]ithin 30 (thirty) days, either Co-Prosecutor *may* bring the disagreement before the Pre-

³ Article 6(4) of the Agreement provides: “The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.”

⁴ Article 20(new) of the ECCC Law provides, in its relevant parts:

“In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.”



Trial Chamber by submitting a written statement of the facts and reasons of the disagreement” (emphasis added). Again, there is a discretion whether or not to bring the disagreement before the Pre-Trial Chamber and no obligation arises from this rule, as previously stated by the Pre-Trial Chamber.⁵

4. The purpose of recording a disagreement is to provide evidence of the date of registration, the precise nature of the disagreement and the fact that the disagreement was considered of such a nature that it could be regarded as being possibly introduced to the formal dispute resolution mechanism. The proof of the date of registration is required, as the next formal step of placing the disagreement before the Pre-Trial Chamber, through the Office of Administration, is limited to a period of thirty days after such record being made. After this time, the right to bring the disagreement forward ends and the disagreement must be taken to have lapsed. As such, there would be no reason or power to force a Co-Prosecutor to record a disagreement if he or she does not want to bring the matter further.
5. In assessing the validity of the filing of the Four Requests, we further take into consideration that the recording of a disagreement would have had no effect on the right of the International Co-Prosecutors to file the Four Requests alone. Where a disagreement is registered and during the period of dispute settlement, the rules expressly provide that the action which is the subject of the disagreement shall generally be executed.⁶ The only exceptions set out in the Internal Rules are major issues concerning an Introductory Submission, a Supplementary Submission relating to new crimes, a Final Submission or a decision relating to an appeal.⁷ Only when these actions are subject of a recorded disagreement it is prescribed that no action will be taken until either consensus is achieved, the 30 day period has ended or the Pre-Trial Chamber has been seised and the dispute settlement procedure has been completed as appropriate. Following from this system, in all other cases than the mentioned exceptions, an action taken by one of the Co-Prosecutors will be continued until there is a decision of the Pre-Trial Chamber to stop it.

⁵ Pre-Trial Chamber’s Considerations on the Disagreement, para. 16.

⁶ Internal Rule 71(3); Article 6(4) of the Agreement; Article 20(new) of the ECCC Law.

⁷ Internal Rule 71(3).



Hence, even where a disagreement is recorded and brought before the Pre-Trial Chamber, this has, in general, no effect on the continuation of the action.

6. Finally, we note that the International Prosecutor has submitted before the Co-Investigating Judges that he always provides his submissions to the National Prosecutor to enable her to form an opinion on the matter before filing. We find that this behaviour sufficiently allows for the National Co-Prosecutor to exercise her right to trigger the formal dispute resolution mechanism provided for in the Internal Rules. In addition, the International Co-Prosecutor submitted in the Appeal that in this case the National Co-Prosecutor stated that she would not file a disagreement before he filed the Four Requests. It can therefore be considered that the National Co-Prosecutor has waived her right to use the formal dispute resolution mechanism.
7. For these reasons, we find that the decision of the Co-Investigating Judges in their Impugned Order is not consistent with the provisions of the Internal Rules, as they have erroneously determined that the effect of not having recorded a disagreement in the register of disagreements leads to a conclusion that the action of the International Co-Prosecutor was invalid. On the contrary, we find that if no disagreement is registered, the action can continue as a valid action. If one of the Co-Prosecutors does not agree with a particular course of action proposed by the other and no disagreement is formally registered, it must be assumed that the disagreement was not considered such to be in need of formal resolution. Therefore, we consider that the Four Requests were validly filed by the International Co-Prosecutor and the Pre-Trial Chamber should have referred the matter back to the Co-Investigating Judges to decide on them.
8. In the light of our opinion that the applicable legal provisions allowed the International Co-Prosecutor to act alone, it can further be questioned whether the Co-Investigating Judges were even entitled to initially ask the International Co-Prosecutor about the context of his individual filing as the reasoning set out by the Co-Investigating Judges in the First Order is similar to the one used in their Impugned Order.⁸ The matter of how the two Co-Prosecutors work together is, in our view, an internal issue of the independent Office of the Co-Prosecutors. For this reason,

⁸ First Order, p. 2.

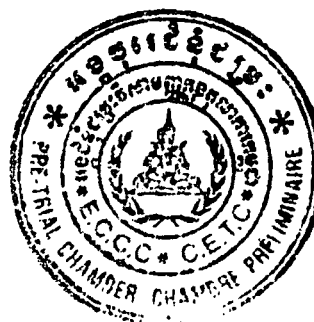


disagreements are recorded in a register of disagreements which is internal to the Office of the Co-Prosecutors and kept confidential.⁹ Where no issue has been raised to the contrary, the outside world can expect the Co-Prosecutors to work together and are therefore assumed to be aware of the actions of the other. Where necessary, they are capable of clearly and formally expressing their disagreement with the course of action proposed or taken by the other. Should this occur, the provisions regarding the resolution of disagreements provide a formal mechanism which they, or either of them, may choose to apply. It is not for the Co-Investigating Judges, or anybody else, to take up a supervisory role of the Office of the Co-Prosecutors. The knowledge of the Co-Investigating Judges that the Co-Prosecutors had previously registered and subsequently brought a disagreement before the Pre-Trial Chamber regarding the filing the Introductory Submission in Case 003, in any event, demonstrates that the Co-Prosecutors are well aware of the nature of the operation of Internal Rule 71 and how to apply it.

9. Furthermore, in the light of the reasoning and conclusion of the Co-Investigating Judges, we understand that they have rejected the requests as “invalid” due to a procedural defect (i.e. the non-recording of a disagreement). We consider the decision of the Co-Investigating Judges to reject the Four Requests as invalid on the basis of mere procedural formalities (which in our view cannot be held against the International Prosecutor) is disproportionate in the present circumstances where i) the Co-Investigating Judges are aware of the fact that the National Co-Prosecutor does not formally want to disagree with such filings, ii) the National Co-Prosecutor has not raised that she suffered harm as a result of the filings; iii) the procedural defects could easily be remedied by the International Co-Prosecutor and iv) not addressing the merits of the Requests, given their importance, may entail serious consequences.

10. We note in particular that the Internal Rules, although not directly addressing the particular issue at stake, generally envisage that a procedural defect would not necessarily lead to the nullity of an impugned action. The harm suffered by the affected party shall be taken into consideration and the latter may even waive the right to request annulment and thus regularise

⁹ Internal Rule 71(1)



the proceedings.¹⁰ Insofar as international practice is concerned, we note that the International Court of Justice (the “ICJ”) has consistently considered that it “should not penalise a defect in a procedural act which the applicant could easily remedy”¹¹ and that international tribunals have refused to exclude evidence on the basis of procedural effects where it was found that no harm resulted from said defect.¹² The underlying principle of this practice is that a party should not be deprived of his or her right of access to the Court on the basis of procedural formalities unless such measure is proportional to the aim it sought to achieve¹³ (i.e. remedy the harm caused to the affected party).

11. In the current case, not only is there no harm resulting from the said procedural defect but we also consider that given its consequences on the conduct of the judicial investigation, rejection of the filing is a disproportionate and unjustified measure to respond to the procedural defect identified by the Co-Investigating Judges. In particular, we emphasise that the three requests for investigative action hold, in the opinion of the International Co-Prosecutor, important information regarding *inter alia* the involvement of the Suspects named in the Introductory Submissions in the crimes alleged therein, which may be relevant for the Co-Investigating Judges to decide whether the Suspects fall within the personal jurisdiction of the ECCC, an issue that the Co-Investigating Judges have said should take priority in view of Internal Rule 55(1)¹⁴ and Article 2

¹⁰ Internal Rules 48 and 76. These rules are in line with Internal Rule 21(1)(a), which directs that the ECCC shall “preserve a *balance* between the rights of the parties.” (emphasis added)

¹¹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Decision on Preliminary Objections, 11 July 1996, para. 26. As stated in para. 26, the International Court of Justice (ICJ) have consistently applied the finding of its predecessor, the Permanent Court, which said in the *Mavrommatis Palestine Concessions*:

“Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.”

¹² See *inter alia*: *Prosecutor v. Brima*, SCSL-04-16-PT, *Brima Decision on Motion for exclusion of Prosecution witness statements and stay of filing of Prosecution statement*, 2 August 2004; *Prosecutor v. Furundzija*, IT-95-17/1, *Scheduling Order*, 29 April 1998 (where both the SCSL and ICTY have denied motions by the Defence to exclude witnesses' statements on the basis of a failure by the Prosecution to disclose these in accordance with the applicable rules.)

¹³ ECtHR, *Levages Prestations Services v. France*, Application no. 21920/93, Judgment, 23 October 1996, paras 40, 42 (Opinion of the Majority) and paras 2 and 4 of the Dissenting Opinion. See also: *Prosecutor v. Brima*, SCSL-04-16-PT, *Brima Decision on Motion for exclusion of Prosecution witness statements and stay of filing of Prosecution statement*, 2 August 2004, para. 20. This is the rationale of Internal Rule 21(1)(a), which provides that the ECCC proceedings shall “preserve a *balance* between the rights of the parties”.

¹⁴ Internal Rule 55(1) provides: “A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”



of the ECCC Law.¹⁵ The request for extension of time, for its part, raises important issues on the rights of the victims to be kept informed of the proceedings in Case 003, as enshrined in Internal Rule 21(1)(c), as well as the possibility for them to exercise their rights under the Internal Rules in Case 003, in particular their right to become civil parties in the case and to participate in the judicial investigation.¹⁶ We cannot understand how the Co-Investigating Judges expect to provide justice in a reasoned decision where they refuse to involve in the judicial investigation the International Co-Prosecutor, who has initiated it, as well as the possible victims, and further know that information exists regarding the issue of personal jurisdiction which they have effectively and directly excluded from the case file.

II- Admissibility of the Appeal

12. Insofar as the admissibility of the Appeal is concerned, we note that the International Co-Prosecutor has, out of caution and reiterating his position that it was not necessary, registered a disagreement prior to filing the Appeal in order to meet the conditions set out by the Co-Investigating Judges in the Impugned Order. The Appeal was filed before the 30 day period from the moment the disagreement was registered had elapsed.¹⁷ We consider that the registration of a disagreement by the International Co-Prosecutor was done under protest and agree with him, for the reasons expressed above, that it was not necessary. In these circumstances, we find it appropriate to disregard the registration of a disagreement and agree with the protest. We are therefore of the view that the Appeal was validly filed and is admissible.





¹⁵ See *inter alia* Decision on International Co-Prosecutor's Re-Filing of Three Investigative Requests in Case 003, 27 July 2011, p. 4.

¹⁶ For a more detailed discussion on this issue, see the Opinion of Judges Lahuis and Downing attached to the Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Application of Robert Hamill, 24 October 2011, D11/2/4/4, para. 5.

¹⁷ Internal Rule 71(3).

Phnom Penh, 2 November 2010



Rowan DOWNING



Katinka LAHUIS