



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: D26/1/3

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 06)

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

Date: 15 November 2011

PUBLIC (REDACTED VERSION)

CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE DECISION ON RE-FILING OF THREE INVESTIGATIVE REQUESTS

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
..... 15 / 11 / 2011	
ម៉ោង (Time/Heure):	
..... 14 : 15	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
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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 International Co-Prosecutor’s Re-filing of Three Investigative Requests in Case 003” filed on 26 August 2011 (the “Appeal”).¹

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 7 September 2009, the then Acting International Co-Prosecutor submitted to the Co-Investigating Judges the Second Introductory Submission regarding the [REDACTED] [REDACTED] (the “Introductory Submission”), opening a judicial investigation in Case 003.²
2. On 29 April 2011, the Co-Investigating Judges issued a Notice of Conclusion of the Judicial Investigation.³
3. On 18 May 2011, the International Co-Prosecutor filed three requests for investigative actions⁴ (together the “Investigative Requests”), identifying further documents to be transferred from Case File 002 to Case File 003, requesting that certain documents be included in Case 003 and also 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 7 June 2011, the Co-Investigating Judges issued their “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case

¹ International Co-Prosecutor’s Appeal Against the “Decision on International Co-Prosecutor’s Re-filing of Three Investigative Requests in Case 003”, 26 August 2011, D26/1/1.

² Co-Prosecutor’s Second Introductory Submission regarding the [REDACTED] 20 November 2008, D1; Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

³ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁴ 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, D17 (the “First Investigative Request”); International Co-Prosecutor’s Second Request for Further Investigative Action Regarding [REDACTED] and Related Crime Sites, 18 May 2011, D18 (the “Second Investigative Request”); International Co-Prosecutor’s Third Request Regarding [REDACTED] and Related Crime Sites, 18 May 2011, D19 (the “Third Investigative Request”).
Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests



003” (the “Co-Investigating Judges’ First Decision”)⁵ rejecting the Investigative 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)”.⁶

5. Following receipt of the Co-Investigative Judges’ First Decision, the International Co-Prosecutor formally recorded a disagreement with the National Co-Prosecutor in relation to the Investigative Requests.⁷ On 10 June 2011, the International Co-Prosecutor re-filed the Investigative Requests, asking that these be recognised as valid actions being executed after the expiry of the 15 days time limit set out in Internal Rule 66(1) pursuant to Internal Rule 39(4)⁸ and, at the same time, filed a Notice of Appeal against the Co-Investigating Judges’ First Decision.⁹
6. On 27 July 2011, the Co-Investigating Judges issued their Decision on the International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003 (the “Impugned Order”),¹⁰ rejecting the Three Re-Filed Investigative Requests. First, they stated that they could not decide on the issues raised by the International Co-Prosecutor in the re-filed Requests as the Pre-Trial Chamber was seised at the time of an appeal against their First Decision in which the International Co-Prosecutor raised arguments not only on formalities but also on substantive issues, therefore giving the Pre-Trial Chamber sole jurisdiction to decide on the validity of the Requests originally filed.¹¹ Second, the Co-Investigating Judges stated that they were “unable” to exercise their discretion under Internal Rule 39(4) as requested by the International Co-Prosecutor for the following

⁵ Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, D20/3 (the “Co-Investigating Judges’ First Decision”).

⁶ Co-Investigating Judges’ First Decision, para 5.

⁷ Appeal, para. 13.

⁸ International Co-Prosecutor’s First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 10 June 2011, D22, paras 1-3; International Co-Prosecutor’s Second Request for Further Investigative Action Regarding [REDACTED] and Related Crime Sites, 10 June 2011, D23; International Co-Prosecutor’s Third Request Regarding [REDACTED] and Related Crime Sites, 10 June 2011, D24 (together the “Three Re-Filed Investigative Requests”).

⁹ 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. The Appeal Brief was filed on 7 July 2011.

¹⁰ Decision on International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003, 27 July 2011, D26 (the “Impugned Order”).

¹¹ Impugned Order, para. 5.

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reasons: i) extending the 15 day deadline after the conclusion of the investigation to file requests for investigation, provided for in Internal Rule 66(1), would violate the fundamental principle set out in Internal Rule 21(4) that proceedings shall be brought to a conclusion within a reasonable time; ii) the International Co-Prosecutor, who could have filed requests for investigative action at least from 9 June 2010, chose to wait until after the closure of the investigation; iii) the International Co-Prosecutor appeared to give insufficient consideration to the basic jurisdictional requirement of Article 2 of the ECCC Law, establishing the personal jurisdiction of the ECCC; iv) pursuant to Internal Rule 55(1), the investigations of these basic jurisdictional requirements should take priority and continuing further investigations on other issues would “commit the Court’s resources unnecessarily and irresponsibly”.¹²

7. On 3 August 2011, the International Co-Prosecutor filed a Notice of Appeal against the Impugned Order¹³ and, on 26 August 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 out of an abundance of caution, he had formally recorded a disagreement prior to filing it.¹⁴ On the merits of the Appeal, the International Co-Prosecutor requests the Pre-Trial Chamber to set aside the Impugned Order and direct the Co-Investigating Judges to address the Re-Filed Investigative Requests on the merits. First, he alleges that the Co-Investigating Judges erred in law and abused their discretion in rejecting the Re-Filed Investigative Requests on the basis of a pending appeal before the Pre-Trial Chamber, as the Appeal against the Co-Investigating Judges’ First Decision did not deal with the substance of the Investigative Request and had, in any event, no suspensive effect (the “First Ground of Appeal”).¹⁵ Second, the Co-Investigating Judges committed a patent error of fact in rejecting the Requests on the basis of untimeliness as the Co-Investigating Judges’ failure to notify the Co-Prosecutors of the investigation they had conducted until shortly before issuing their Notice of Conclusion of the judicial investigation under Internal Rule 66(1) meant that the International Co-Prosecutor was unable to monitor the investigation and to make a reasoned decision as to the need for

¹² Impugned Order, para. 6.

¹³ International Co-Prosecutor’s Notice of Appeal Against the Co-Investigating Judges’ Decision on International Co-Prosecutor’s Re-filing of Three Investigative Requests”, 3 August 2011, paras 1-2.

¹⁴ Appeal, para 2

¹⁵ Appeal, paras 23-29.

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further investigative requests prior to 29 April 2011 (the “Second Ground of Appeal, First Branch”).¹⁶ The Co-Investigating Judges also abused their discretion by not extending the 15 day deadline where the International Co-Prosecutor had corrected the alleged technical deficiency (the “Second Ground of Appeal, Second Branch”)¹⁷ and the interests of Suspects, prospective civil parties and Co-Prosecutors were harmed by an investigation that was patently incomplete (the “Second Ground of Appeal, Third Branch”).¹⁸ Third, the Co-Investigating Judges abused their discretion in apparently reaching a conclusion on the personal jurisdiction of the Court over the “basic jurisdictional issues in Case 003” without conducting a diligent investigation into the hierarchical position or status of the Suspects or the criminal conduct they are alleged to have committed, nor issuing a reasoned decision concerning jurisdiction against which any Charged Person or the Co-Prosecutors might appeal. To the extent ascertainable, the Co-Investigating Judges appear to have based this decision on personal jurisdiction on an incorrect interpretation of the law governing personal jurisdiction at the ECCC (the “Third Ground of Appeal”).¹⁹

8. No responses to the Appeal were filed.
9. On 2 November 2011, the Pre-Trial Chamber issued its Considerations regarding the International Co-Prosecutor’s Appeal against the Co-Investigating Judges’ First Decision declaring that the Co-Investigating Judges’ First Decision shall stand pursuant to Internal Rule 77(13) as it had not assembled a super-majority of four votes on the Appeal (the “Pre-Trial Chamber Considerations on the Co-Investigating Judges’ First Decision”).²⁰

II. EXPRESSION OF OPINION AND CONCLUSION ON THE APPEAL

10. 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 Appeal. Given that Internal Rule

¹⁶ Appeal, paras 30-33.

¹⁷ Appeal, paras 34-35.

¹⁸ Appeal, paras 36-37.

¹⁹ Appeal, paras 38-80.

²⁰ 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 003/07-09-2009-ECCC/OCIJ (PTC 06) D20/4/4 (the “Pre-Trial Chamber Considerations on the Co-Investigating Judges’ First Decision”) *Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests*



77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.

11. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Order shall stand

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

UNANIMOUSLY DECLARES that it has 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, 15 November 2011 ^{CR}

President



The seal of the Pre-Trial Chamber of the ECCC is circular, featuring a central emblem with a scale of justice and a sword, surrounded by text in Khmer and English. The English text includes 'PRE-TRIAL CHAMBER' and 'CHAMBRE PRELIMINAIRE'. A signature is written across the seal.

PRAK Kimsan

Rowan DOWNING

Pre-Trial Chamber



NEY Thol



Katinka LAHUIS



HUOT Vuthy

Judges Prak, Ney and Huot append their opinion.

Judges Downing and Lahuis append their opinion

Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigative Requests

OPINION OF JUDGE PRAK KIMSAN JUDGE NEY THOL AND JUDGE HUOT VUTHY

1. Internal Rule 66(1) provides that “[w]here the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers... *The parties shall have 15 (fifteen) days* to request further investigative action...” This 15-day period is an additional period given to the Parties to request further investigative action in order to ensure the fundamental principle of legal certainty and transparency of the proceedings. Besides this time limit, the Internal Rules provide sufficient rights to all the Parties as provided in Rule 55(6) which reads “... At all times, the Co-Prosecutors... shall have the right to examine and make copies of the case file under supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC,” and in Rule 55(10) which provides that “[a]t any time during an investigation, the Co-Prosecutors... may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation”.
2. On the basis of Rule 55 (6) and (10) quoted above, we find that the Co-Prosecutors have had sufficient time to follow the development of the Case File and, where they find there is gap in the investigation that the Co-Investigating Judges fail to act, the Co-Prosecutors may exercise their right to request further investigative action which they consider useful for the conduct of the investigation.
3. In the event that the Co-Investigating Judges granted the three investigative requests by the [International] Co-Prosecutor, there would be violation of Rule 21(4) which provides that “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time” because it would lead to an unreasonable time extension as the Co-Prosecutor himself has failed to exercise his rights enshrined in Sub-Rules (6) and (10) of Internal Rule 55.
4. In respect of the individual jurisdiction issue, the Co-Investigating Judges noted that when considering the status of the suspects in Case 003, the Co-Prosecutor was ambiguous as to whether they must be “senior leaders” or “most responsible.” In the Second Introductory



Submission, the Re-Filed Requests in particular, the suspects were, however, considered by Co-Prosecutor as “senior leaders.”¹

5. The Co-Investigating Judges exercised their discretion by not considering the merit of the case as they noted that “to continue further investigations on other issues would not change the CIJs analysis on the basic jurisdictional issue but would instead commit the Court’s resources unnecessarily and irresponsibly.”²
6. Therefore, we find that the decision of the Co-Investigating Judges which rejects the Re-Filing of Three Investigative Requests of the International Co-Prosecutor in Case File 003 is righteous on the basis of ECCC’s Internal Rules.

Phnom Penh, 15 November 2011 ^{CA}



[Signature]
PRAK Kimsan

[Signature]
NEY Thol

[Signature]
HUOT Vuthy

¹ The impugned order D26 Paragraph 6 (c)

² The impugned order D26 Paragraph 6 (d)

OPINION OF JUDGES LAHUIS AND DOWNING

1. At the outset, we shall emphasise that our Opinion in this Appeal stems from the result of the impossibility for the Pre-Trial Chamber to reach a decision on the Appeal from the International Co-Prosecutor against the Co-Investigating Judges' First Decision, which lead to the conclusion that the latter decision shall stand and, as a result, that the Investigative Requests be rejected.

IV. ADMISSIBILITY OF THE APPEAL

2. 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 their First Decision pending a final determination of his Appeal against the said decision by the Pre-Trial Chamber.¹ Since there is no indication of the date the disagreement was registered, it cannot be ascertained whether the Appeal in the current case, filed on 26 August 2011, was lodged after the 30 day period from the moment the disagreement was registered had elapsed.² However, we consider that this shall not bear any consequence on its admissibility. For the reasons expressed in our Opinion attached to the Pre-Trial Chamber Considerations on the Co-Investigating Judges' First Decision³ and given that the Pre-Trial Chamber did not reach a decision on the need for the Co-Prosecutor to record a disagreement prior to taking an action alone, we consider that the registration of a disagreement by the International Co-Prosecutor prior to filing his Appeal before the Pre-Trial Chamber was effectively done under protest and agree with him that such formality was not necessary. In these circumstances, we find it appropriate to disregard the registration of the disagreement and are accordingly of the view that the Appeal was validly filed by the International Co-Prosecutor alone. We further note that, in any event, 30 days have elapsed from the notification of this Appeal and no disagreement was filed before the Pre-Trial Chamber nor was any submission received from the National Co-Prosecutor.

¹ Appeal, para. 2.

² Internal Rule 71(3).

³ Pre-Trial Chamber Considerations on the Co-Investigating Judges' First Decision, Opinion of Judges Lahuis and Downing, para. 12.



3. As the Appeal falls within the ambit of Internal Rule 74(2) and was filed within the 30 day time limit set out in the Internal Rules,⁴ we find that it is admissible.

V. MERITS OF THE APPEAL

Standard of review

4. By his Appeal, the International Co-Prosecutor requests the Pre-Trial Chamber to overturn the decision of the Co-Investigating Judges to reject his application to file the Three Requests out of time, pursuant to Internal Rule 39(4). Given that this rule allows the Co-Investigating Judges to accept the filing out of time “as they see fit”, it entails the exercise of judicial discretion. Review of the Impugned Order is therefore limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion, in accordance with the following test developed by the Appeals Chamber of the United Nations International Criminal Tribunal for the former Yugoslavia (“ICTY”) which has been consistently applied by the Pre-Trial Chamber when reviewing discretionary decisions:

“[an] exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of [...] discretion.”⁵

Preliminary Issue: The Jurisdiction of the Co-Investigating Judges to recognise the validity of the filing of the Requests out of time

5. The Co-Investigating Judges concluded that they are prevented from deciding upon the validity of the Three Re-Filed Investigative Requests as this would circumvent the jurisdiction of the Pre-Trial Chamber which was, at the time of issuing the Impugned

⁴ We note that pursuant to Internal Rule 39(5), the 30 day time limit to file an appeal would, if the recording of a disagreement was taken into account, be suspended until consensus was achieved, the 30 (thirty) day period had ended or the Pre-Trial Chamber had been seised and had completed its consideration of the dispute, as the case may be.

⁵ *Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Appeals Chamber, 1 November 2004, paras 9-10 (footnotes omitted), quoted *inter alia* in Case 002/19-09-2007-ECCC/OCIJ (PTC 23), Decision on Appeal against the Co-Investigating Judges’ Order on Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, para. 26.



Order, seized of an Appeal by the International Co-Prosecutor against the Co-Investigating Judges' First Decision.⁶ We note that this conclusion is inconsistent with the rest of their reasoning in the Impugned Order whereby they have considered, at least to some extent, the International Co-Prosecutor's request for re-filing out of time. In any event, we find that the matter at stake was fully before the Co-Investigating Judges and that they had full jurisdiction to decide on the issues with which they were seized, as explained below.

6. First, we note that, as a matter of principle, an appeal to the Pre-Trial Chamber does not impact on the continuation of the judicial investigation.⁷ As a result, the filing of the Appeal against the First Decision had, as such, no restrictive effect on the ability of the Co-Investigating Judges to continue their investigation, including their ability to decide on requests for investigative actions, pending a decision of the Pre-Trial Chamber on the Appeal lodged before it, which actually raised a distinct, although correlated issue in this case.

7. Second, the International Co-Prosecutor's Appeal was limited to a very circumscribed and specific issue: whether the Co-Investigating Judges erred in rejecting the Three Investigative Requests as invalid on the basis that no disagreement was recorded prior to their filing by the International Co-Prosecutor alone. As such, the Appeal was directed to a specific alleged procedural error and did not involve the review by the Pre-Trial Chamber of other procedural issues or the merits of the Three Investigative Requests. Once the requests were re-filed in compliance with the requirement set out by the Co-Investigating Judges in their First Decision, a decision could validly be made by the Co-Investigating Judges on other procedural issues as well as on the merits of the Investigative Requests. Such decision would not in any manner be affected by an eventual decision of the Pre-Trial Chamber on the lawfulness of the requirement set out by the Co-Investigating Judges in their First Decision.



⁶ Impugned Order, para. 5. By his First Ground of Appeal, the International Co-Prosecutor alleges that this finding constitutes an error that meets the standard for appellate review.

⁷ Internal Rule 77(11), which provides: "Pending the outcome of proceedings before the Chamber under this Rule, and unless the Chamber orders otherwise, the Co-Investigating Judges may continue their investigation, where applicable."

8. We are of the view that the Co-Investigating Judges committed an error of law when finding that they were prevented from deciding whether to accept the filing out of time. On the contrary, they retained their full jurisdiction and, as such, had an obligation to decide on i) whether they should accept a late filing pursuant to Internal Rule 39(4) and, if accepted, ii) whether the Re-filed Investigative Requests should be granted on the merits pursuant to Internal Rule 55. At the very least, we consider that if the Co-Investigating Judges were persuaded that the Appeal lodged before the Pre-Trial Chamber constituted an impediment for them to decide on any of these two issues, they should have waited for the Pre-Trial Chamber's decision on the Appeal before making any sort of determination.

Review of the Co-Investigating Judges' Decision to refuse the filing of the Requests out of time

9. We note that Internal Rule 39(4) is very broad, as it prescribes that the Co-Investigating Judges can recognise the validity of an action executed out of time "as they see fit". However, this discretion does not exempt the Co-Investigating Judges from their obligations to base their decision on reasonable grounds and ensure respect of fundamental principles governing the proceedings before the ECCC under Internal Rule 21. The exercise of the discretion must take all relevant matters into account. It is noted that the rules of other international or internationalised tribunals give judicial bodies the power to waive or otherwise correct procedural irregularities such as accepting late filings when "a good cause" is demonstrated⁸ or where it is in the interests of justice to do so.⁹ A "good cause" is generally considered to be a good reason given by the filing party explaining his or her belated action.¹⁰ The paramount consideration must be that of the interests of justice in the context of a particular case. When determining whether a late filing should be accepted in the interests of justice, judicial bodies generally take into account on the one hand, the importance of the filing for the rights of the filing party or, more broadly, the

⁸ ICTY Rules of Procedure and Evidence (Rev. 45), Rule 127; SCSL Rules of Procedure and Evidence (as amended on 28 May 2010), Rule 116;

⁹ ICC Regulations of the Court, Regulation 29. See also: *Prosecutor v. Brima*, SCSL-04-16-T, Decision on Urgent Defence Request under Rule 54 with respect to Filing of Motion for Acquittal, Trial Chamber II, 19 January 2006 (where the Trial Chamber accepted, "in the interests of justice", the filing of a Motion for Acquittal out of the time limit it had set out).

¹⁰ *Prosecutor v. Lukić*, IT-98-32/1-AR65.1, Decision on Defence Appal against Trial Chamber's Decision on Sreboje Lukić's Motion for Provisional Release, Appeals Chamber, 16 April 2007 (the "Lukić Decision"), paras 11-12.



importance of the information it contains for determining an issue before them and, on the other hand, the prejudice that may be caused to the other parties by accepting a late filing.¹¹ As the procedural rules established at the international level are in line with the general principle set out in Internal Rule 21(1)(a) that ECCC proceedings shall preserve a balance between the rights of the parties, they can provide guidance when appraising the validity of late filings before the ECCC. Indeed, the Pre-Trial Chamber has previously accepted filings despite procedural irregularities on the basis that it was in the interests of justice to do so.¹²

10. We acknowledge the fundamental requirement that proceedings before the ECCC shall be concluded within a reasonable time.¹³ This must, however, be balanced against the interests of justice, which involves taking into consideration the reasons explaining the late filing as well as the consequences of not making a decision on the merits of the Investigative Requests for the rights of the current and potential parties and the Co-Investigative Judges' obligation to conduct a *complete* judicial investigation.

¹¹ *Lukić* Decision, para. 12 (where the Appeals Chamber of the ICTY considered that it was within the discretion of the Trial Chamber to recognise the late filing of supplementary material to the Prosecution's Response on an appeal on provisional release as validly done in the interests of justice, under the good cause requirement, on the basis that on the one hand, it contained information relevant to determining the Appellant's risk of flight and, on the other hand, the Appellant was afforded the opportunity to reply to it); *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.3, Decision on Ljube Boškoski's Interlocutory Appeal on Second Motion for Provisional Release, Appeals Chamber, 28 August 2006, para. 9 (where the Appeals Chamber of the ICTY accepted the filing of an appeal out of time because it considered it to be in the interests of justice due to the "substantial importance of the Appeal for the rights of the Appellant"); *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Decision on "Accused Tharcisse Muvunyi's Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal'", Appeals Chamber, 19 March 2007, para. 7, fn. 22 (allowing for proposed amendments to a Notice of Appeal within the good cause requirement where the Appeals Chamber finds the amendment to be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded).

¹² Case 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, C11/29, para. 8 (where the Pre-Trial Chamber, in the interests of justice, decided not to examine the question of possible technical defects in the application, which was signed by a lawyer who had not yet been admitted to the Bar of Cambodia and may not have complied with the requirement that the application should be filed "as soon as the party becomes aware of the grounds in question"). See also: Decision on the Co-Prosecutors' Application for Extension of Time and Page Limits to File a Joint Response to Ieng Thirith, Khieu Samphan, Ieng Sary and Certain Civil Parties' Appeals against the Order on Joint Criminal Enterprise, 9 February 2010, D97/14/9, para. 7 (where the Pre-Trial Chamber granted an extension of time and page limit to file submission on the basis that it would "provide the Chamber with sufficient material in order to consider all issues raised in the appeal appropriately", while causing no prejudice to the Charged Persons).

¹³ Impugned Order, para. 6(a).



11. First, we consider that the Co-Investigating Judges committed a patent error of fact in concluding that the International Co-Prosecutor did not show diligence in waiting until the end of the judicial investigation before initially filing the Investigative Requests¹⁴ and committed an error of law in failing to take into account that the re-filing of the Requests out of time was rendered necessary by the Co-Investigating Judges' First Decision.¹⁵ In our view, the only reasonable conclusion that could be drawn in the circumstances of this case is that the International Co-Prosecutor had shown good cause for the late filing of his Re-Filed Requests.
12. In particular, we observe that the Co-Investigating Judges ruled that “[a]s the investigations in Case 003 have been ongoing at least since the issuance of the Rogatory Letter dated 9 June 2010, the [International Co-Prosecutor] had almost a full year to make investigative requests, but chose not to do so until after the closing of the investigations.”¹⁶ As pointed out by the International Co-Prosecutor,¹⁷ the reports prepared by the investigators in execution of the said Rogatory Letter, the only one issued in this case, and the evidence attached to these were not placed into the case file and thus made available to him until 11 March 2011, notwithstanding that the reports were finalised on 10 February 2011.¹⁸ From the case file record it is to be observed that the material collected during the course of the whole investigation was placed into the case file only from 11 March 2011, and most of it was placed in the month preceding the closing of the judicial investigation. For instance, over 1000 documents were transferred from Case 002 on 6 April 2011, with over 130 additional transferred documents being placed in the case file on 26 April 2011. The written records of interviews conducted by the Co-Investigating Judges in Case 003 were only placed in the case file between 26 and 28 April 2011¹⁹ and the civil party applications and complaints by victims were only filed on 29 April 2011, just 45 minutes before investigation was closed. The delays in placing documents in Case File 003, which we have already denounced in our Opinion attached to the Considerations of the Pre-Trial

¹⁴ Impugned Order, para. 6(b); Second Ground of Appeal, First Branch.

¹⁵ By his Second Ground of Appeal, Second Branch, the International Co-Prosecutor rather alleges that the Co-Investigating Judges have abused their discretion in considering that the filings were not timely done.

¹⁶ Impugned Order, para. 6(b).

¹⁷ Appeal, para. 31.

¹⁸ Rogatory Letter Completion Report, 10 February 2011, D2/1.

¹⁹ Written Record of Interview of [REDACTED] 24 March 2011, D6, filed on 26 April 2011. Written Record of Interview of [REDACTED], 25 March 2011, D8, filed on 26 April 2011; Written Record of Interview of [REDACTED], 27 April 2011, D12, filed on 28 April 2011.



Chamber regarding the Appeal against Order on the Admissibility of Civil Party Application of Robert Hamill (the “Opinion on Robert Hamill’s Appeal”),²⁰ have unreasonably prevented the International Co-Prosecutor from having access to an updated and accurate case file as provided under Internal Rule 55(6). As no information was provided to the International Co-Prosecutor on the conduct of the judicial investigation, he was not in a position to monitor it and determine whether further investigative actions were “useful for the conduct of the investigation” as required under Internal Rule 55(10). From a consideration of the sequence and the timing of the filings, we consider that in effect the Co-Prosecutors were excluded from being able to act before the closing of the investigation. We therefore find that the Co-Investigating Judges, when they found that the International Co-Prosecutor “chose” not to request investigative actions before the closing of the investigation, committed a patent error of fact and unfairly disregarded the very restrictions that they had themselves placed upon the International Co-Prosecutor’s right and practical ability to monitor the investigation.

13. Further, we note that the Co-Investigating Judges committed an error of law in failing to take into consideration that the International Co-Prosecutor initially filed the Three Investigative Requests within the 15 days deadline set out in Internal Rule 66(1) and that the re-filing was rendered necessary by the Co-Investigating Judges’ decision to reject the Investigative Requests as invalid on the basis of an alleged procedural defect, where this requirement to record a disagreement prior to a Co-Prosecutor acting alone was set out for the first time. We are of the view that the International Co-Prosecutor acted diligently in re-filing the requests, after having complied with the formalities set out in the First Decision in the days following its issuance. He showed good faith by acting immediately upon the views expressed by the Co-Investigating Judges, and thereby provided good cause in respect of his filing out of time.²¹

²⁰ 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, Opinion of Judges Lahuis and Downing (the “Opinion on Robert Hamill’s Appeal”), para. 9.

²¹ For a similar interpretation, see: *Prosecutor v. Ivica Marijačić and Markica Ristić*, IT-05-14-R77.2-A, Judgement, Appeals Chamber, 27 September 2006, para. 14 (where the Appeals Chamber dismissed the Prosecution’s argument that the Defence’s appeal brief should be rejected because it had been filed out of time on the basis that the said appeal was the first of its kind since the Practice Direction entered into force and, as a result, the Appellant’s purported confusion and misunderstanding about the applicable time limits (and procedures) constituted good cause for its late filing).



14. Second, we consider that the Co-Investigating Judges committed an error of law and abused their discretion by disregarding the rights of the International Co-Prosecutor, as well as their obligation to conduct a complete investigation into the facts of which they are seised, when they rejected the Requests on the basis of mere procedural formalities.²²
15. Insofar as the rights of the International Co-Prosecutor are more particularly concerned, we note that the Co-Investigating Judges first prevented the International Co-Prosecutor from monitoring the investigation due to the belated timing of the placement of the documents pertaining to the investigation onto the case file. After that, the Co-Investigating Judges denied him the right to file requests for investigative actions alone on the basis of mere procedural formalities that they have raised, *proprio motu*, for the first time in the history of the ECCC proceedings.²³ Finally, they denied him the opportunity to file out of time the Investigative Requests after having remedied the alleged deficiency. We consider that taken as a whole, these procedures and decisions had the effect of preventing the International Co-Prosecutor from exercising his right to have a fair determination upon his requests for investigative actions and more generally to monitor the investigation, as provided for in Internal Rules 55(10) and 66(1). As such, the Co-Investigating Judges have abused their discretion when refusing to accept the late filing of the Three Re-Filed Investigative Requests under Internal Rule 39(4).
16. In addition, we consider that the Co-Investigating Judges have not complied with their obligation under Internal Rule 55(1) to conduct a complete investigation by refusing to at least consider the merits of the Requests²⁴ and assess whether the investigative actions proposed by the International Co-Prosecutor would be conducive to ascertaining the truth or useful for the conduct of the investigation, as prescribed in Internal Rules 55(5) and (10). We further emphasise that failure to conduct a complete and impartial investigation would inevitably be detrimental to the rights of the Suspects, the Victims and the Co-

²² This conclusion addresses the Second Ground of Appeal, Third Branch, as well as the Third Ground of Appeal.

²³ Pre-Trial Chamber Considerations on the Co-Investigating Judges' First Decision, Opinion of Judges Lahuis and Downing, paras 9-11.

²⁴ We note that despite their considerations reproduced in next paragraph 17 of this Opinion, the Co-Investigating Judges have refused to accept the filing under Internal Rule 39(4) and that nothing indicates that they have considered the merits of the Three Re-Filed Investigative Requests.



Prosecutors, especially in the context where they have not thus far been afforded the possibility to effectively participate in the said investigation.²⁵

17. In this regard, we note that the Co-Investigating Judges considered in the Impugned Order that the Co-Prosecutors “are not entitled to ignore Rule 55(1) which permits investigations only ‘within the jurisdiction of the ECCC’, from which it follows that the investigations regarding the basis jurisdictional requirement of Article 2 [of the] ECCC Law, have to take priority”²⁶ and then concluded that “[t]o continue further investigations on other issues would not change the [Co-Investigating Judges’] analysis on the basic jurisdictional issue but would commit the Court’s resources unnecessarily and irresponsibly”.²⁷
18. Contrary to what appears to be the position of the Co-Investigating Judges, the applicable Rules do not limit in any way their power to investigate, as long as they remain within the scope of the Introductory and Supplementary Submissions, but rather imposes upon them a legal obligation to conduct a judicial investigation into “the crimes under the jurisdiction of the ECCC”,²⁸ which means that the obligation to investigate is directed towards the criminal acts set out in the Introductory and Supplementary Submissions.²⁹ A decision on the personal jurisdiction of the ECCC to prosecute the persons identified in the Introductory Submission as perpetrators or accomplices cannot be made without conducting a complete investigation into the facts necessary to determine whether these persons can be considered as “senior leaders” and/or “those most responsible” under Article 2 of the ECCC Law³⁰ and after having afforded the parties the opportunity to make

²⁵ For a discussion on the impossibility for the Suspects and Victims to participate in the Case 003 investigation, see: Opinion on Robert Hamill’s Appeal, para. 5.

²⁶ Impugned Order, para. 6(d).

²⁷ Impugned Order, para. 6(d).

²⁸ Internal Rule 55(1). We note that the Co-Investigating Judges misquoted this rule in para. 6(d) of the Impugned Order by omitting the word “crimes”, which is of significant importance.

²⁹ See Internal Rules 55(1) and (2). Indeed, there may even be no suspect identified by the Co-Prosecutor (Internal Rule 53(1)). In any event, the Co-Investigating Judges have the duty to identify the perpetrators responsible for the alleged criminal acts (Internal Rule 55(4), 67(3)(b)).

³⁰ In the French system, which offers constitutive guidance in the current case, a decision declaring the incompetence of the Court where the investigating judge did not conduct the necessary investigation has been said to equate to a refusal to conduct an investigation (*refus d’informer*): Christian Guéry, *Instruction préparatoire*, Rép. pén. Dalloz, para. 147; Pierre Chambon and Christian Guéry, *Droit et pratique de l’instruction préparatoire*, Dalloz Action, 2007-2008, para. 21.14 ; Crim. Cass. 18 July 1991, Bull. Crim. No. 300; Crim. Cass. 26 February 1997, Bull. Crim. No. 77; Crim. Cass. 6 February 1975, Bull. Crim. No. 42.



submissions on the matter.³¹ We note that the legal issue of who can be considered to be “the most responsible” for the crimes committed during the Democratic Kampuchea regime under Article 2 of the ECCC Law is currently pending before the Supreme Court Chamber of the ECCC following the appeal lodged by Kaing Guek Eav alias “Duch” against the Judgement of the Trial Chamber delivered on 26 July 2010.³² The upcoming decision of the Supreme Court Chamber may be of relevance for the Co-Investigating Judges in applying the said provision and determining the issue they consider is at stake. Meanwhile, and given that the Co-Investigating Judges have thus far not provided any indication as to the criteria they consider shall be taken into account when determining the personal jurisdiction of the Court over the Suspects, we note that the International Co-Prosecutor suggests that such decision requires investigation into, *inter alia*, the hierarchical position or status of the Suspects, including their degree of authority, and the notoriety or seriousness of the criminal conduct they are alleged to have committed.³³ As we already set out in our Opinion attached to the Pre-Trial Chamber Considerations on the Co-Investigating Judges’ First Decision, the Investigative Requests hold, in the view 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. This information may therefore be relevant and necessary for the Co-Investigating Judges to decide whether these Suspects fall within the personal jurisdiction of the ECCC.

19. Taking into consideration the interests of justice, as should have been done by the Co-Investigating Judges, we are of the view that the need to conduct a complete investigation in crimes as serious as those set out in the Introductory Submission and to ensure respect of the rights of the parties and victims clearly outweighs the inconvenience that slight delays in the proceedings of such magnitude may cause, especially where the Suspects have not been formally notified of charges nor placed under provisional detention.
20. Given the errors of law and fact committed by the Co-Investigating Judges and their abuse of discretion, the Impugned Order should be overturned, and, for the reasons set out above,

³¹ Internal Rule 21(1)(a), which provides that “ECCC proceedings shall be fair and adversarial”. For a discussion on the right to adversarial proceedings, see Opinion on Robert Hamill’s Appeal, para. 10.

³² Case 001/18-07-2007-ECCC/SCC, Appeal Brief by the Co-Lawyers for Kaing Guek Eav alias “Duch” against the Trial Chamber Judgement of 26 July 2010, 18 November 2010, F14, Ground One.

³³ Appeal, para. 41.



the filing of the Three Re-Filed Investigative Requests out of time should be recognised as valid pursuant to Internal Rule 39(4). As a consequence, we would remit the matter back to the Co-Investigating Judges to decide on the merits of the Three Re-Filed Investigative Requests. Although the Impugned Order stands as the Pre-Trial Chamber could not reach a decision on the Appeal, we note that it remains possible for the Co-Investigating Judges to use their discretion to reconsider the said order,³⁴ taking into account our considerations on the international standards.

Phnom Penh, 15 November 2011^{cr}




Rowan DOWNING


Katinka LAHUIS

³⁴ The Pre-Trial Chamber previously found that it was possible for a judicial body to reconsider a decision and has, itself, reconsidered decisions upon requests filed by the parties or *proprio motu*, after having given the parties the opportunity to be heard. See *inter alia*: Case 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; (PTC53), Decision on the Reconsideration of the Civil Party Applications, 1 July 2011, D364/1/6.