



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: D14/1/3

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 No: 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: 24 October 2011

PUBLIC REDACTED

CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER ON INTERNATIONAL CO-PROSECUTOR'S PUBLIC STATEMENT REGARDING CASE 003

International Co-Prosecutor:

CHEA Leang
Andrew T. CAYLEY

Co-Investigating Judges:

Judge Siegfried BLUNK
Judge YOU Bunleng

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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

I. PROCEDURAL HISTORY

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.²

2. [REDACTED]

3. On 2 February 2011 the Co-Investigating Judges issued a press release updating the public on the ongoing work in Case 003.⁴

4. [REDACTED]

5. On 29 April 2011 the Co-Investigating Judges issued a Notice of Conclusion of the Judicial Investigation.⁶ Following this notification of the conclusion of the judicial investigation, on 9 May 2011, the International Co-Prosecutor released a public statement, under Rule 54 of Internal Rules, entitled “Statement by the International Co-

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

³ [REDACTED]
⁴ Statement from the Co-Investigating Judges, 2 February 2011.
[http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_2_Feb_2011\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_2_Feb_2011(Eng).pdf)

⁵ [REDACTED]
⁶ Notice of Conclusion of Judicial Investigation, Case File Number 003/07-09-2009, 29 April 2011, D13.



Prosecutor Regarding Case File 003” (the ‘Public Statement’).⁷ The International Co-Prosecutor stated that he made this statement, “to ensure that the public is duly informed about ongoing ECCC proceedings, and in particular with regard to the International Co-Prosecutor’s Introductory Submission in Case File 003.”⁸ The International Co-Prosecutor declared that he “will request” additional investigative actions because “he is of the view that the crimes alleged in the Introductory Submission have not been fully investigated.”⁹

6. On 18 May 2011 the Co-Investigating Judges issued an Order demanding the International Co-Prosecutor to publish a retraction, within three working days, to those parts of the Public Statement which contained: i) an expression of his opinion regarding crimes which he believes should be judicially investigated (‘Item A’); and ii) a summary of his intended investigative requests (‘Item B’), (the ‘Retraction Order’).¹⁰
7. On 19 May 2011 the Greffiers of the Co-Investigating Judges recorded a Notice of Appeal from the International Co-Prosecutor against the Retraction Order.¹¹ The notice stated that “the International Co-Prosecutor considers this [Retraction Order], remains stayed, unless the Pre-Trial Chamber orders otherwise pending their final decision on appeal.”¹²
8. Following the Notice of Appeal, the International Co-Prosecutor filed the Appeal on 25 May 2011. The International Co-Prosecutor requests the Pre-Trial Chamber to consider the following:

⁷ Press Release, Statement by the International Co-Prosecutor Regarding Case File 003, 9 May 2011. http://www.eccc.gov.kh/sites/default/files/media/ECCC%20INT-OCJ%209%20May%202011%20ENG_0.pdf

⁸ Public Statement, para 1.

⁹ Public Statement, para 6.

¹⁰ Order on International Co-Prosecutor’s Public Statement regarding Case File 003, 18 May 2011, D14.

¹¹ Co-Prosecutor’s Notice of appeal of the Co-Investigating Judges’ “Order on International Co-Prosecutor’s Public Statement regarding Case File 003” Pursuant to ECCC Internal Rule 74(2) and 75(1), 19 May 2011, D14/1.

¹² Co-Prosecutor’s Notice of appeal of the Co-Investigating Judges’ “Order on International Co-Prosecutor’s Public Statement regarding Case File 003” Pursuant to ECCC Internal Rule 74(2) and 75(1), 19 May 2011, D14/1, at para 1.



“(a) In relation to the Part of the Retraction Order dealing with Item A of the Public Statement:

i) To declare the Order void *ab initio* as it was issued without legal basis,

ii) Further and in the alternative, to hold that the Order is invalid due to an incorrect interpretation of the governing law and/or abuse of discretion;

(b) In relation to the Part of the Retraction Order dealing with Item B of the Public Statement, to hold that the Order is invalid due to an incorrect interpretation of the governing law and/or abuse of discretion.

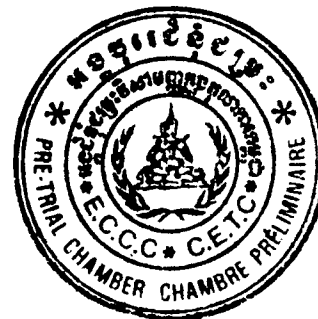
(c) In light of the significant public interest in this matter, and in order to further promote public confidence in the effective and expeditious functioning of the Court:

i) To allow a public, redacted copy of this Appeal to be issued by the Co-Prosecutor now; and

ii) To make its decision on the Appeal public, consistent with the Pre-Trial Chamber's practice to date.”¹³

9. The International Co-Prosecutor submits that the Retraction Order should be overturned on a number of grounds including: Firstly, in relation to the part of the Order dealing with Item A of the Public Statement, he submits the Order is not supported by law and is void *ab initio*. Further, and in the alternative, the International Co-Prosecutor submits that the Co-Investigating Judges erred in declaring that the International Co-Prosecutor had no legal basis for stating his opinion. Finally, the International Co-Prosecutor argues that he acted within his powers and obligations under the law. In relation to the part of the Order dealing with Item B of the Public Statement, the International Co-Prosecutor contends that it does not contain any confidential information that affects the rights of any party and as such, does not contravene Internal Rule 56(1). In addition to these grounds, the International Co-Prosecutor asserts that the Retraction Order is unreasonable, arbitrary and has no effect.

¹³ Appeal, para. 68.



10. On 13 June 2011 the Pre-Trial Chamber issued an order suspending the enforcement of the Retraction Order until final determination of the Appeal (the "Suspension Order").¹⁴

The Pre-Trial Chamber noted as follows:

"On the one hand 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.¹⁵ 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 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."¹⁶

11. No responses to the Appeal were filed.

II. RELEVANT LAW

12. Reference is made to Internal Rules 21, 35, 38, 54, 55, 56 and 66.

III. ADMISSIBILITY OF THE APPEAL

13. The Retraction Order was issued on 18 May 2011. The International Co-Prosecutor submitted the Notice of Appeal on 19 May 2011. Following the Notice of Appeal, the

¹⁴ Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement regarding Case File 003", 13 June 2011, D14/1/2.

¹⁵ Order on International Co-Prosecutor's Public Statement regarding Case File 003, 18 May 2011, D14, paras 2 and 3.

¹⁶ Suspension Order, para 5.



International Co-Prosecutor submitted the Appeal on 25 May 2011 and within the times provided for in Internal Rule 75.

14. The International Co-Prosecutor submits that the Appeal is admissible pursuant to Internal Rule 74(2) or, in the alternative, pursuant to Internal Rule 21.

15. The International Co-Prosecutor puts forward the following arguments in relation to the admissibility of the Appeal:

“Pursuant to Sub rule 74(2) the Co-Prosecutors may appeal all orders of the Co-Investigating Judges. Although this appeal is filed by the International Co-Prosecutor alone, it is admissible as:

- (a) Pursuant to Sub rule 1(2), actions by the Co-Prosecutors may be carried out jointly, or by each of them acting individually.
- (b) Since no disagreement has been registered or disagreement proceedings initiated by either of the Co-Prosecutors, Sub rule 71(3)(d) does not prevent the filing of this appeal.
- (c) The practice of filings by one Co-Prosecutor or one Co-Investigating Judge alone has been recognized as valid in this case.
- (d) If the Pre-Trial Chamber disagrees with the submissions in sub-paragraphs (a) - (c) above, it should nevertheless find the appeal admissible on the basis of Sub rule 21(1), as:
 - i The Retraction Order is addressed to the International Co-Prosecutor alone and directly concerns his interests as an independent officer of the Court. Denying the International Co-Prosecutor a right of appeal against such an order would be inconsistent with the fundamental principles of fairness, legal certainty and transparency enshrined in Sub rule 21(1).
 - ii The Retraction Order raises issues of fundamental importance which have not been adjudicated upon by the Pre-Trial Chamber. The Pre-Trial Chamber's decision on merits will provide guidance to the Co-



Investigating Judges and other parties, and thereby promote greater legal certainty. It will also further strengthen public confidence in the institution.”¹⁷

16. The Pre-Trial Chamber notes that, once read in context and in conjunction with Internal Rule 73, it is clear that Internal Rule 74(2) foresees the rights of appeal of the Co-Prosecutors in relation to such Orders of the Co-Investigating Judges Orders that are related to the criminal investigation. The nature of the impugned Order is not such that purely relates to the criminal investigation, it rather relates to an action from one of the officers of the court. Therefore, the Appeal under Internal Rule 74(2) would represent an incorrect mixture of the factual situation and the legal provision upon which the International Co-Prosecutor rely to establish jurisdiction for the Appeal.
17. The Pre-Trial Chamber observes that neither the Internal Rules nor the Cambodian Code of Criminal Procedure give any indication as to the legal basis for an appeal against an order ordering a party or an officer of the court to retract information. This being the first time the Co-Investigating Judges issue an order of such a nature, the Pre-Trial Chamber shall first examine the legal basis under which the Order was issued and whether such can give rise to a right of appeal under the applicable law.
18. The Co-Investigating Judges held as legal basis for the Retraction Order the following Internal Rules: 21, 54, 55, 56 and 66.
19. Following analysis of these Internal Rules, the Co-Investigating Judges found in the Retraction Order in relation to Item A that:

‘Pursuant to [Internal Rule 54], the International Co-Prosecutor was only entitled to give a summary of his Case 003 Submission, and not to express publicly his opinion

¹⁷ Appeal, para 13.



about "crimes required to be judicially investigated", which by definition (Rule 55.1) are investigations by the Co-Investigating Judges.¹⁸

20. The Co-Investigating Judges emphasize that Rule 54 applies only at the preliminary investigation phase and conclude that the International Co-Prosecutor had no legal basis for issuing the Public Statement:

'Rule 54 further provides "In addition, the Co-Prosecutors may jointly, either personally or through the Public Affairs Section, correct any false or misleading information, provided that the case is still under preliminary investigation".

However, the preliminary investigation (Rule 50) had ended with the sending of the Introductory Submission to the Co-Investigating Judges pursuant to Rule 53.1 on 7 September 2009. In sum, the International Co Prosecutor had no legal basis for issuing Item A of the Public Statement¹⁹

21. In addition, with regard to Item B, the Co-Investigating Judges found that:

'...the International Co-Prosecutor by informing the public in advance and in detail about what according to Rule 66.1 "he will request the Co-Investigating Judges to" do, has violated the Rule of Confidentiality.²⁰

22. The Co-Investigating Judges finally decided:

'For these reasons, the Co-Investigating Judges ORDER the International Co-Prosecutor to publish a retraction of items (A) and (B) of the Public Statement on the ECCC website within three (3) working days from the date of filing.²¹

reasoning this decision as follows:

¹⁸ Retraction Order, para 4.

¹⁹ Retraction Order, para 5-6.

²⁰ Retraction Order, para 7.

²¹ Retraction Order, para 9.



“Because of the lack of legality for Item (A), and the breach of the confidentiality by Item (B) the International Co-Prosecutor has to publish a retraction of the Public Statement, which is to be effected in the same form as the issuance of the statement, and which, to restore public confidence in the legality and confidentiality of the investigations, has to be accomplished in a short period of time.”²²

23. Concerning the Co-Investigating Judges finding in relation to Item A, the Pre-Trial Chamber finds that a close reading of Rules 56 and 66 supports, the finding in paragraph 6 of the Retraction Order that ‘...the International Co-Prosecutor had no legal basis for issuing item A of the Public Statement,’ as the obligations of Co-Prosecutors under Internal Rule 54 explicitly apply *only* during the phase of the *preliminary* investigation and do not extend to the stage of the *judicial* investigation which is the stage the case was when the Public Statement was made.

24. The Pre-Trial Chamber notes that pursuant to Internal Rule 54, the Co-Prosecutors duty to inform the public of the ongoing proceedings is limited to only i) providing an objective summary of the information contained in the Introductory, Supplementary and Final Submissions; and ii) correcting any false or misleading information, *provided that the case is still under preliminary investigation.*²³

25. Further,²⁴ Internal Rule 56 provides that, during the judicial investigation stage, it is only the Co-Investigating Judges who have the responsibility and legal authority to ensure that essential information is made available to the public:

1.”In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.

²² Retraction Order, para 8.

²³ Even if the Public Statement were issued under Art 121, para four of the Cambodian Code of Criminal Procedure (CPC), the Prosecutor would have to have had complied with the requirement that a declaration in public is allowed only “if he considers that false information has been published.”

²⁴ Article 121, paragraph five of the CPC provides that “a breach of confidentiality regarding a judicial investigation is a misdemeanor punishable under the Criminal Law in force.”



2. However, the Co-Investigating Judges, may:

- a) Jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and
- b) Jointly grant limited access to the judicial investigation to the media or other nonparties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38.”

26. Internal Rule 35 provides that:

1.”The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, including any person who:

- a) Discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers [...];

2. When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may:

- a) Deal with the matter summarily;
- b) Conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or

[...]

6. Any decision under this Rule shall be subject to appeal before the Pre-Trial Chamber [..].”

27. The Order of the Co-Investigating Judges holds that the International Co-Prosecutor acted partly without legal basis and further breached the Rule of confidentiality as

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mentioned in Internal Rule 56 (1). The legal basis for this order cannot be found in the Internal Rules mentioned by the Co-Investigating Judges in their order but can be found in Internal Rule 35. Internal Rule 35 (1) dealing with the interference in the administration of justice uses the words “including any person who” and is not limited to the actions specifically mentioned in this part of the rule, they are examples of the types of matters falling within the class of actions which may amount to an interference with the administration of justice. Acting without legal basis and breaching confidentiality as prescribed by law must be seen as willful interference in the administration of justice. The Co-Investigating Judges being in charge of judicial investigations were entitled to make an order concerning, even a perceived, breach of confidentiality to the International Co-Prosecutor as they could deal with the matter summarily as prescribed in Internal Rule 35 (2).

28. As Internal Rule 35 (6) provides for a right of appeal against such orders the International Co-Prosecutor’s appeal is admissible under this Internal Rule. Considering the personal background of the Order, as apparently being based on Internal Rule 35, there is no issue of whether the International Prosecutor is allowed to act alone in filing the appeal.

IV. STANDARD OF REVIEW

29. As previously found, the Pre-Trial Chamber shall determine whether the Co-Investigating Judges committed an error of law or fact or abused their discretion by issuing the Retraction Order.²⁵

V. CONSIDERATION ON MERITS

30. The International Co-Prosecutor submits that the Co-Investigating Judges erred in declaring that the International Co-Prosecutor had no legal basis for stating his opinion and argues that he acted within his powers and obligations under the law. In relation to

²⁵ Decision on Appeal (PTC69) against the Order on Nuon Chea's Second Request for Investigation (Rule 35), 2 November 2010, D384/5/2, paras. 17-19, 38 and 43-45.



the part of the Order dealing with Item B of the Public Statement, the International Co-Prosecutor contends that it does not contain any confidential information that affects the rights of any party and as such, it does not contravene Internal Rule 56(1).

31. The Pre-Trial Chamber finds that the International Co-Prosecutor's right to make public comment or to express public opinion in relation to the judicial investigations carried out by the Co-Investigating judges is not provided in law, it is rather limited by the provisions of the Internal Rules of the ECCC, with which limitations he has an obligation to comply. The justification for his actions which he addresses in the appeal do not excuse the action of the International Prosecutor and ignore the discretion of the Co-Investigating Judges regarding their publication of information during the stage of the judicial investigations. While agreeing that, in principle, and as also enshrined in the applicable international conventions, public access to judicial proceedings constitutes a fundamental fair trial right,²⁶ the Pre-Trial Chamber notes that the provisions of the specific Internal Rules clearly provide on who, under which circumstances, and at which stage of the proceedings has authority to make public statements in relation to an ongoing proceeding. Adherence to such legal requirements is obligatory.

32. Where the International Co-Prosecutor argues in the appeal that "the list contained in Item B cannot be considered anything more than a general summary,"²⁷ he is hereby reminded that the Internal Rules do not require or oblige him to provide a summary of such a nature to the public. Notwithstanding the level of detail in the list, the Pre-Trial Chamber reminds the Prosecutor of its previous observations, specifically in relation to the confidentiality of proceedings regarding to requests for investigation.²⁸

33. Further, where the International Co-Prosecutor is of the opinion that information regarding judicial investigations should be published he should have requested the Co-

²⁶ Appeal, para. 38.

²⁷ Appeal, para 40.

²⁸ Decision on a Request for an Oral Hearing on Appeals PTC24 and 25, D164/4/3, dated 20 August 2009, para. 5. See also Decision on Request to Reconsider the Decision on a Request for an Oral Hearing on Appeals PTC24 and 25, D164/4/9, 20 October 2009, para.30.



Investigating Judges to do so and if refused such order could be appealed to the Pre-Trial Chamber. By not doing so and instead acting by himself, revealing the information as he did, he did not act in accordance with obligations as correctly observed by the Co-Investigating Judges. The order of the Co-Investigating Judges to the International Prosecutor to retract the information could be justified.

34. The Pre-Trial Chamber notes that whereas three of its Judges opine that the Retraction Order should be confirmed in its totality and therefore the Appeal rejected, two of its Judges reason, and vote, that the Order should be only partly upheld as its disposition remains without effect and therefore, in so far, the Appeal should be partly granted. Pursuant to Article 14(2) of the ECCC Law and Internal Rule 77(14), these partially and separate opinions are attached to this decision and shall be notified to the parties. Further, pursuant to Internal Rule 77(13) and as the Chamber has not reached the required majority of affirmative votes of at least 4 (four) judges, the Retraction Order of the Co-Investigating Judges shall stand.

VI. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

- 1) Unanimously, finds the Appeal admissible;
- 2) Unanimously declares that it has not assembled an affirmative vote of at least four judges for a decision on the merits of the Appeal.





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**Opinion of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy
on the Appeal of the International Co-Prosecutor against the Order of the Co-Investigating
Judges on Public Statement of the International Co-Prosecutor Concerning Case File 003**

We find that the public statement made by the International Co-Prosecutor has disclosed confidential information of the ongoing investigation, which constitutes a misconduct of the International Co-Prosecutor. The fact that the Co-Investigating Judges mentioned in their Retraction Order the information sought to be retracted by the International Co-Prosecutor from his previous public statement is only for indicative purposes as to what information is to be retracted. Therefore, we find that the order by the Co-Investigating Judges directing the International Co-Prosecutor to retract the information of Category A and Category B was necessary.

Phnom Penh, 24 October 2011

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 Khmer text and the acronym 'E.C.C.C. C.E.T.C.' and 'CHAMBER PRE TRIAL'.

Judge PRAK Kimsan Judge NEY Thol Judge HUOT Vuthy

**OPINION OF JUDGES ROWAN DOWNING AND KATINKA LAHUIS IN RELATION
TO THE REGULARITY OF THE RETRACTION ORDER:**

1. The Co-Investigating Judges have confused the situation by themselves publically repeating major parts of the confidential information directed to be retracted by them. By doing so their order is, substantially, without any practical effect, as their disclosure of the information must be taken to be an exercise of their discretion to do so, but it has rendered their retraction order itself nugatory and thus of no effect.
2. In this situation rejecting the Appeal in whole and ordering a retraction would be without meaning as its effect would conflict with the substance of the retraction order itself, as the information remains in the public domain. We consider it to be in the best interest of justice to grant the Appeal partly to the extent that the disposition of the Order remains without effect.

Phnom Penh, 24 October 2011


Judge Rowan DOWNING




Judge Katinka LAHUIS