



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

D100/32/1/7

*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 (PTC31)

**THE PRE-TRIAL CHAMBER**

Before:

Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

<b>ឯកសារដើម</b>	
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Date: 15 February 2017

**PUBLIC REDACTED**

**DECISION ON [REDACTED] APPEAL AGAINST INTERNATIONAL CO-INVESTIGATING JUDGE'S CONSOLIDATED DECISION ON THE INTERNATIONAL CO-PROSECUTOR'S REQUESTS TO DISCLOSE CASE 003 DOCUMENTS INTO CASE 002 (D100/25 AND D100/29)**

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Beini YE



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “██████████ Appeal Against International Co-Investigating Judge’s Consolidated Decision on the International Co-Prosecutor’s Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29)”, filed by the Co-Lawyers for ██████████ (respectively the “Defence” and “Appellant”) on 21 September 2016 (the “Appeal”).<sup>1</sup>

## I – INTRODUCTION

1. The Appeal concerns a decision, issued on 16 August 2016 by the International Co-Investigating Judge (the “ICIJ”), authorising disclosure of documents, as requested by the International Co-Prosecutor (the “ICP”), under enumerated modalities and restrictions (the “Impugned Decision”).<sup>2</sup>

## II. PROCEDURAL BACKGROUND

2. On 16 May 2016, the ICP filed a request asking the Co-Investigating Judges to authorize the disclosure of eleven written records of interview and three investigative action reports from investigations in Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) into the trial proceedings in Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (the “First Request”).<sup>3</sup> On 25 May 2016, the Defence filed a Response objecting to the First Request<sup>4</sup> and, on 9 June 2016, the ICP filed a Reply.<sup>5</sup>

3. On 6 July 2016, the ICP filed another request for disclosure of three more written records of interview.<sup>6</sup> On 18 July 2016, the Defence filed a Response objecting to the Second

<sup>1</sup> ██████████ Appeal Against International Co-Investigating Judge’s Consolidated Decision on the International Co-Prosecutor’s Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29), 21 September 2016, D100/32/1/1 (“Appeal”).

<sup>2</sup> Consolidated Decision on the International Co-Prosecutor’s Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29), 16 August 2016, D100/32 (“Impugned Decision”).

<sup>3</sup> International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002, 16 May 2016, D100/25 (“First Request”).

<sup>4</sup> ██████████ Response to the International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002, 25 May 2016, D100/27 (“First Response”).

<sup>5</sup> International Co-Prosecutor’s Reply To ██████████ Response to Requested Disclosure of Documents, 9 June 2016, D100/28 (“Reply”).

<sup>6</sup> International Co-Prosecutor’s Request to Disclose Case 003 Documents Into Case 002, 6 July 2016, D100/29 (“Second Request”).



Request.<sup>7</sup>

4. On 16 August 2016, the ICIJ issued the Impugned Decision, authorizing disclosure, into Case 002, of all the requested documents under enumerated modalities and restrictions. The Impugned Decision was available in Khmer language on 30 August 2016.

5. On 7 September 2016, the Defence filed a Notice of Appeal against the Impugned Decision (the “Notice of Appeal”)<sup>8</sup> and the Appeal was filed on 21 September 2016. On 22 September 2016, the ICP filed a request for authorisation to file his response to the Appeal in English first, with the Khmer translation to follow, and for extension of the deadline to file the response by 17 October 2016, which was granted by the Pre-Trial Chamber.<sup>9</sup> On 7 October 2016, the ICP filed his response to the Appeal, which was notified in Khmer on 16 November 2016 (the “Response”<sup>10</sup>). On 18 November 2016, the Defence filed a Reply to the ICP’s Response (the “Reply”).<sup>11</sup>

### III. ADMISSIBILITY

#### 1. Submissions

6. The Defence submits that the appeal is admissible, either under Internal Rule 74(3)(h)<sup>12</sup> or, if there is doubt as to its admissibility under Internal Rule 74(3)(h), it is admissible under Internal Rule 21 alone<sup>13</sup> or based on an adoption of a broad interpretation of

<sup>7</sup> [REDACTED] Response to the International Co-Prosecutor's Request to Disclose Case 003 Documents Into Case 002, 18 July 2016, D100/30 (“Second Response”).

<sup>8</sup> [REDACTED] Notice of Appeal Against International Co-Investigating Judge’s Consolidated Decision on the International Co-Prosecutor’s Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29), filed on 7 September 2016 and notified on 9 September 2016, D100/32/1 (“Notice of Appeal”).

<sup>9</sup> International Co-Prosecutor's Request for Extension of Time to Respond to [REDACTED] Appeal Against the Decision on Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29), filed on 22 September 2016, D100/32/1/2. *See also* Order on International Co-Prosecutor’s Request for Extension of Time to Respond to [REDACTED] Appeal Against the Decision on Requests to Disclose Case 003 Documents Into Case 002 (D100/25 and D100/29), 28 September 2016, D100/32/1/4.

<sup>10</sup> International Co-Prosecutor’s Response to [REDACTED] Appeal Against the International Co-Investigating Judge’s Decision Regarding Disclosure Requests D100/25 and D100/29, 7 October 2016, D/100/32/1/5 (“Response”).

<sup>11</sup> [REDACTED] Reply to International Co-Prosecutor’s Response to [REDACTED] Appeal Against the International Co-Investigating Judge’s Decision Regarding Disclosure Requests D100/25 and D100/29, 18 November 2016, D/100/32/1/6 (“Reply”).

<sup>12</sup> Appeal, para. 10.

<sup>13</sup> Appeal, para. 11 and footnote 29 referring to PTC 02/71.



the right to appeal.<sup>14</sup>

7. Regarding admissibility under Internal Rule 74(3)(h), the Defence avers that the Impugned Decision relates to protective measures because: i) the ICP requested disclosure of documents without protective measures; ii) the Defence asserted, in the Responses to the First and Second ICP Requests, that if disclosure is permitted, documents should be used confidentially, with pseudonyms, and only in closed session, in addition to any other protective measures the CIJs deem necessary; and iii) at paragraphs 53 to 55 of the Impugned Decision, the ICIJ “made a decision on the use of protective measures.”<sup>15</sup>

8. Regarding admissibility under Internal Rule 21, the Defence submits that the Impugned Decision violates ██████████ rights to be presumed innocent and to privacy and reputation and that the harm caused by such violations “is largely irremediable once the material has been disclosed to the Trial Chamber and parties in Case 002, and even more so once it is used in public proceedings.”<sup>16</sup> The Defence adds that, if the Appeal is not admitted, ██████████ will not have an *effective remedy* because “there is no other avenue of relief available to him” and avers that, according to Article 17(2) of the International Covenant on Civil and Political Rights (the “ICCPR”) and General Comment No. 16 of the Human Rights Committee, “everyone has the right to *protection of the law against interference* with the rights to privacy and reputation” and “States are under an obligation to provide adequate legislation [for everyone] to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible.”<sup>17</sup>

9. The ICP responds that the appeal is inadmissible under Internal Rule 74(3)(h) because: i) “under no reasonable reading does the Impugned Decision address ‘protective measures’”;<sup>18</sup> ii) the Defence did not request protective measures *out of concern for the protection of witnesses*;<sup>19</sup> and iii) the Appeal does not concern protective measures.<sup>20</sup> The ICP also objects to admissibility under Internal Rule 21 because no fundamental fair trial

<sup>14</sup> Appeal, para. 13.

<sup>15</sup> Appeal, para. 10 and footnote 28.

<sup>16</sup> Appeal, para. 11.

<sup>17</sup> Appeal, para. 12.

<sup>18</sup> Response, para. 5.

<sup>19</sup> Response, para. 6 referring to Internal Rules 29 and 74(3)(h).

<sup>20</sup> Response, para. 7.



rights are affected.<sup>21</sup> According to the ICP, disclosure of documents from Case 003 investigations to Case 002 trial proceedings has no impact against [REDACTED] since “it neither increases, nor decreases the evidence against [him]”.<sup>22</sup> The ICP further recalls that for appeals to be admissible under Internal Rule 21, the appellant must demonstrate that intervention is necessary to prevent irremediable damage,<sup>23</sup> and notes that the Pre-Trial Chamber has unanimously rejected as inadmissible another appeal brought under Internal Rule 21 on claims for violation of the right to be presumed innocent.<sup>24</sup>

10. The Defence replies that, as regards admissibility under Internal Rule 74(3)(h), the fact that the Trial Chamber has sole discretion as to whether testimony will be given in closed session “does not mean that the [ICIJ’s] decision setting out the protective measures necessary for the disclosure of confidential Case 003 evidence is *any less of a decision on protective measures under [Internal] Rule 74(3)(h)*”,<sup>25</sup> and “in imposing protective measures as a condition of the disclosure [...] the [ICIJ] acts in accordance with the principles [of Internal] Rule 29.”<sup>26</sup> The Defence further contends, “the intent behind a party’s request for protective measures is not relevant to the determination of whether a decision relates to protective measures.”<sup>27</sup> According to the Defence, in the Appeal, they addressed the ICIJ’s “error in applying Internal Rule 56 and defining ‘public,’ which relates to the imposition of protective measures” and “impacts his determination as to whether protective measures are necessary.”<sup>28</sup> As regards admissibility of the appeal under Internal Rule 21, as opposed to ICP’s suggestion that the Pre-Trial Chamber has previously unanimously rejected similar arguments, the Defence calls for a “case by case basis” examination by the Pre-Trial Chamber and argues that *this* Appeal is admissible.<sup>29</sup>

<sup>21</sup> Response, para. 8.

<sup>22</sup> Response, para. 8.

<sup>23</sup> Response, para. 9 referring to PTC jurisprudence.

<sup>24</sup> Response, para. 10 referring to Case 004/07-09-2009-ECCC/OCIJ (“Case 004”) (PTC 25), Decision on Appeal Against Order on [REDACTED] Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016 (“Decision on Case 004 (PTC25)”), paras. 23-24.

<sup>25</sup> Reply, Para. 2.

<sup>26</sup> Reply, para. 3.

<sup>27</sup> Reply, para. 3.

<sup>28</sup> Reply, para. 4 referring to Appeal, paras. 35-39.

<sup>29</sup> Reply, para. 5.



## 1. Discussion:

### 2.1. Whether the Appeal is admissible under Internal Rule 74(3)(h)

11. The Pre-Trial Chamber first makes reference to the provisions of Internal Rule 74(3)(h), which read as follows:

“3. The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges:

h) relating to protective measures”.<sup>30</sup>

12. In suggesting that the Impugned Decision relates to protective measures, the Defence makes reference to its paragraphs 53 to 55, which read:

“53. Both the First Requested Documents and the Second Requested Documents may be disclosed and are assigned the witness Category A.

54. Regarding the ICP's request that all evidence be permitted for use in open court, without pseudonyms, only the following witnesses do not require measures to protect their identity or the contents of their evidence given that they have previously provided statements in Case 002 that are on that Case File, and/or have previously testified in Case 002 without a pseudonym: [...].

55. The ICP has not made any arguments nor provided supporting information as to why pseudonyms are not required in respect of the remaining witnesses from the First and Second Requested Documents.”

13. In the Defence's view, as expressed in the Reply, “in imposing protective measures as a condition of the disclosure, the ICIJ acts in accordance with the principles of [Internal] Rule 29.”

14. The Pre-Trial Chamber notes that, in the paragraphs in question, the Impugned Decision first decides that documents “may be disclosed” and, consequent upon this decision, the ICIJ also addresses ICP's suggestions for modalities of disclosure *during trial proceedings*. The Pre-Trial Chamber recalls that, in dealing with a previous appeal,<sup>31</sup> raising issues with regards to a part, of another ICIJ order, also envisaging modalities for disclosure,<sup>32</sup> it held that “the Impugned Order is *related to the modalities of disclosure of*

<sup>30</sup> ECCC Internal Rules (Rev.9), as revised on 16 January 2015, (the “Internal Rules”).

<sup>31</sup> Case 004 International Co-Prosecutor's Appeal Concerning Testimony at Trial in Closed Session, 22 April 2016, D309/1.

<sup>32</sup> Case 004 Order Lifting Redactions from Case 004 Documents Previously Disclosed into Case 002, 17 March 2016, D193/66, para. 7(d).



confidential information from judicial ongoing investigations, *under [Internal] Rule 56*,<sup>33</sup> and also noted that “in several disclosure orders, the [ICIJ] ‘requested’ the Trial Chamber or Supreme Court Chamber to ensure compliance with ‘conditions’ and ‘restrictions’ imposed for disclosure.”<sup>34</sup> The Pre-Trial Chamber notes that, in making considerations, in the disclosure decisions, for modalities of the allowed disclosure, the ICIJ’s function is limited to providing learned guidance to the Trial Chamber which, in turn, has exclusive jurisdiction to issue decisions on closed session testimonies.<sup>35</sup>

15. The Pre-Trial Chamber finds that, in making considerations, in disclosure decisions, for modalities of the allowed disclosures, the ICIJ does not “act in accordance with the principles of [Internal] Rule 29”, as put by the Defence. According to Internal Rule 29, the CIJs may order measures to ensure the protection of victims and witnesses. The “protective measures” and the “modalities of disclosure” are aimed at safeguarding substantially different values and interests because, on the one hand, modalities of disclosure are aimed at maintaining confidentiality of judicial investigations in order to “preserve the rights and interests of the parties”,<sup>36</sup> and on the other hand, protective measures are aimed at protecting victims and witnesses when there is a risk of serious danger to their life and health, or to that of their families.<sup>37</sup> While the ICIJ’s decisions allowing disclosure are necessitated by a legitimate obligation to cooperate in the truth finding process of another *judicial body* of the ECCC, ICIJ’s considerations on what would be the most appropriate modalities, for the allowed disclosures, are guided by the requirement to safeguard the confidentiality of investigations set in Internal Rule 56.<sup>38</sup> Accordingly, the term “protective measures” in Internal Rule 74(3)(h) has to be read in the light of the provisions of Internal Rule 29(4) and (8). Any request for “modalities of disclosures” by the ICIJ, for the attention of the Trial Chamber, is dictated by the ICIJ’s obligation under Internal Rule 56 to preserve the confidentiality of investigations, and is not subject to pre-trial appeal.

16. Therefore, the Pre-Trial Chamber does not find any “relationship”, between

<sup>33</sup> Case 004 (PTC26) Decision on International Co-Prosecutor’s appeal Concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, (“Decision on Case 004 (PTC04/26)”), para. 29.

<sup>34</sup> Decision on Case 004 (PTC04/26), para. 30.

<sup>35</sup> *Ibid.*

<sup>36</sup> Internal Rule 56(1).

<sup>37</sup> Internal Rule 29(3).

<sup>38</sup> Decision on Case 004 (PTC04/26), paras. 29 and 32.



“protective measures” and “ICIJ’s decisions” on disclosure, or modalities thereof, such that would make appeals against such decisions fall within the ambit of Internal Rule 74(3)(h).

## ***2.2. Whether the Appeal is admissible under Internal Rule 21***

17. The Defence submits that the Appeal is admissible under Internal Rule 21 or under a broad interpretation of the right to appeal in light of Internal Rule 21. The Pre-Trial Chamber makes reference to the provisions of Internal Rule 21 and recalls that it has previously held that Internal Rule 21 does not provide an automatic avenue for appeals raising fair trial rights issues.<sup>39</sup> For the Pre-Trial Chamber to exercise appellate jurisdiction under the said Internal Rule, the appellant must demonstrate that, in the particular circumstances of the case at stake, the Pre-Trial Chamber’s intervention is necessary to prevent irremediable damage to the fairness of the proceedings or the appellant’s fair trial rights.<sup>40</sup>

18. Regarding Defence’s argument that the Impugned Decision violates ██████████ rights, the Pre-Trial Chamber first recalls that it has already found no merit in the interpretation of Articles 83 and 121 of the Cambodian Code of Criminal Procedure and of Internal Rules 21 and 56(1) as conferring the Charged Persons an “inherent right” to integrity in the conduct of the investigations, to a confidential investigation or to the protection of their reputation.<sup>41</sup> The Pre-Trial Chamber has also dismissed claims that disclosure orders violate Charged Persons’ right to presumption of innocence irreparably.<sup>42</sup> The Pre-Trial Chamber is not convinced by Defence’s argument that ██████████ rights, including the right to privacy, are at risk of being irreparably damaged if material is disclosed to the Trial Chamber. In the Pre-Trial Chamber’s view, the mere fact that the ICIJ allows disclosure of documents does not suffice to conclude that that ██████████ rights will be irreparably damaged during trial proceedings, given the Trial Chamber’s competence, to conduct any part of the proceedings *in camera*, under Internal Rules 29(4)(e) and 79(6)(b). The Pre-Trial Chamber recalls that it

<sup>39</sup> Decision on NUON Chea and IENG Thirith’s Appeals against Closing Order, 15 February 2011, D427/2/15, paras 72, 73. Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49. See also Appeal, para. 25 referring in footnote 34 to Pre-Trial Chamber’s Decision D239/1/8.

<sup>40</sup> Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC31) Decision on Admissibility of Ieng Sary’s Appeal Against the OCIJ’s Constructive Denial of Ieng Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained Through Torture, 10 May 2009, D130/7/3/5, para. 39; Case 004 (PTC11) Decision on ██████████ Appeal against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, (“Decision on Case 004(PTC11)”), para. 7; Decision on Case 004 (PTC25), para. 21.

<sup>41</sup> Decision on Case 004 (PTC25), para. 23.

<sup>42</sup> Decision on Case 004 (PTC25), para. 24.





has no jurisdiction to deal with hypothetical matters,<sup>43</sup> and that the impact that disclosure has on ██████████ rights remains, at this stage, purely speculative.

19. As regards the claim that, if the Appeal is found inadmissible, ██████████ would also suffer from lack of an effective remedy because he has, under the ICCPR, a right to *the protection of the law against interference with his rights* to privacy and reputation, the Pre-Trial Chamber finds, as also noted by the Defence, that the wording of Article 17 of the ICCPR<sup>44</sup> is such that it permits interference with privacy, as long as it is not “arbitrary” or “unlawful.”<sup>45</sup> The term “unlawful” means that no interference can take place, except in cases envisaged by the law.<sup>46</sup> The expression “arbitrary interference” can also extend to interference provided for under the law and the concept of “arbitrariness” is intended to guarantee that even interference provided for by law should be reasonable in the particular circumstances.<sup>47</sup> The Pre-Trial Chamber, firstly, recalls that the applicable law does not confer upon Charged Persons an ‘inherent right’ to the protection of reputation,<sup>48</sup> and notes that, in any event, there is no clear evidence of harm caused by the disclosure to ██████████ privacy and reputation.<sup>49</sup> Secondly, the Pre-Trial Chamber notes that the Impugned Order is issued by a competent judicial body, based on law, through an adversarial process,<sup>50</sup> and is reasonably decided in pursuance of the legitimate aim of cooperating with the truth finding mission of another judicial body of the ECCC, hence not arbitrary.

20. Therefore, the Pre-Trial Chamber finds that the appeal is not admissible under Internal Rule 21 or under a broad interpretation of any right to appeal in light of Internal Rule 21.

<sup>43</sup> Case 003 (PTC13) Decision on ██████████ Appeal against the International Co-Investigating Judge’s Order on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, D117/1/1/2, para 15 *citing* Decision on Case 004(PTC11).

<sup>44</sup> Article 17 of the ICCPR reads: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”

<sup>45</sup> See also Appeal, paras. 30 and 31 *referring to* jurisprudence of the ICCPR, the International Criminal Court (“ICC”) and the European Court of Human Rights (“ECtHR”).

<sup>46</sup> ICCPR General Comment No. 16, para. 3. See also Appeal, para 31.

<sup>47</sup> ICCPR General Comment No. 16, para. 4. See also Appeal, para. 31.

<sup>48</sup> Decision on Case 004 (PTC25), para 23.

<sup>49</sup> See Appeal, para, 32, and footnote 66 *referring to* D114/143 and D114/151.

<sup>50</sup> See Defence Responses D100/27 and D100/30.



**3. Conclusion**

21. Therefore, for all these reasons, the Pre-Trial Chamber finds the Appeal inadmissible, under Internal Rule 74(3)(h) alone, under Internal Rule 21 alone, or based on an adoption of a broad interpretation of any right to appeal in light of Internal Rule 21.

**IV. DISPOSITION**

**THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:**

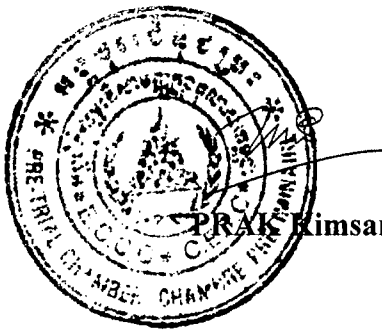
DISMISSES the Appeal as inadmissible.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 15 February 2017

President

Pre-Trial Chamber



*[Handwritten signatures of the Pre-Trial Chamber members]*

**PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy**