



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

អង្គជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D309/6

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° 004/07-09-2009-ECCC/OCIJ (PTC26)

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

Date: 20 July 2016

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(PUBLIC REDACTED)

DECISION ON INTERNATIONAL CO-PROSECUTOR'S APPEAL CONCERNING TESTIMONY AT TRIAL IN CLOSED SESSION

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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 Concerning Testimony at Trial in Closed Session” filed on 22 April 2016 and notified on 26 April 2016 (the “Appeal”).¹

I – INTRODUCTION

1. This Appeal concerns an order of the International Co-Investigating Judge issued on 17 March 2016, which lifts redactions from Case 004 documents previously disclosed into Case 002 and provides, should two Case 004 witnesses identified in Annex B (the “Two Witnesses”) be called to testify in Case 002, they must do so in closed session (the “Impugned Order”).²

a. Background

2. On 16 August 2013, 24 December 2014 and 20 October 2015, the Trial Chamber issued guidelines related to the procedure to apply when Case 004 witnesses or disclosed documents are at issue in Case 002/02.³

3. On 6 November 2015, the International Co-Investigating Judge issued a confidential memorandum concerning the regime of disclosure of material from Cases 003 and 004 to Case 002 (the “Disclosure Memorandum”),⁴ in which he identified a category of witnesses “who are central to live matters in ongoing investigations in Cases 003 or 004” and for who he “would request” the use of closed session to ensure the integrity of the evidence, and by extension of the investigation (the “Category C Witnesses”).⁵

¹ D309/1 (“Appeal”).

² Order Lifting Redactions from Case 004 Documents Previously Disclosed into Case 002, 17 March 2016, D193/66 (“Impugned Order”).

³ Case 002/19-09-2007-ECCC/TC (“Case 002”), Trial Chamber Memorandum Regarding Information Concerning Case 003 and Case 004 Witness Statements that May Be Relevant to Case 002, 16 August 2013, E127/7/1 (“16 August 2013 Guidelines”); Case 002, Decision on Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Witnesses Statements from Case Files 003 and 004, 24 December 2014, E319/7; Case 002, Amended Guidelines on the Use of Case 003 and 004 WRIs, 20 October 2015, E319/7/3.

⁴ International Co-Investigating Judge Confidential Memorandum addressed to the Trial Chamber and Supreme Court Chamber regarding Disclosure of Material from Cases 003 and 004 to Case 002, 6 November 2015, D273 (“Disclosure Memorandum”).

⁵ Disclosure Memorandum, para. 3(c).



4. On 30 November 2015, the Trial Chamber issued an oral decision regarding, *inter alia*, the Category C Witnesses (the “30 November 2015 Oral Guidelines”), stating that it will “see in the future proceedings if it is worthwhile to hold the proceedings in closed sessions” and that it needs to “consider the matter on a case by case basis for all the witnesses in Case 002/02” and “consider the matter of the confidentiality in the on-going investigations in Case 003 and 004”.⁶
5. On 12 January 2016, the International Co-Investigating Judge addressed a confidential memorandum to the Trial Chamber and to the parties in Case 002 (the “Confidential Memorandum”), expressing the view that the conditions he put in place for the eventual use at trial of Case 003 and 004 witnesses were “conditions” and not “requests”, and declining to provide further reasons as to why certain witnesses should testify in closed session since this could have the effect of jeopardising the investigations.⁷
6. On 23 February 2016, the Trial Chamber issued a ruling on closed session for [REDACTED], who were interviewed in Cases 003 and 004, after having received the Confidential Memorandum from the International Co-Investigating Judge and heard submissions from the parties (the “Ruling on Closed Session”). The Trial Chamber based its ruling on the International Co-Investigating Judge’s reasons, noting that “maintaining the confidentiality of an ongoing judicial investigation may amount to ‘good cause’ for closing proceedings” and that “the Office of the Co-Investigating Judges is the only office which can make this assessment within a reasonable time, given its access to the case file and knowledge of investigation strategy”.⁸
7. On 17 March 2016, the International Co-Investigating Judge issued the Impugned Order regarding the Two Witnesses in English only, with a Khmer translation to follow.

⁶ Case 002, Trial Transcript, 30 November 2015 (“30 November 2015 Oral Guidelines”), pp. 13-14.

⁷ Appeal, para. 6 referring to International Co-Investigating Judge Confidential Memorandum addressed to the Trial Chamber and the parties in Case 002, 12 January 2016, E319/35/4. See also Case 002, Ruling on Closed Session for Witnesses 2-TCW-894 and 2-TCW-938, 23 February 2016, E319/35/5 (“Ruling on Closed Session”), para. 1. The Pre-Trial Chamber does not have access to this memorandum, which is confidential and available to the Trial Chamber and parties in Case 002 only.

⁸ Ruling on Closed Session, para. 5.



b. The Appeal

8. On 22 April 2016, the International Co-Prosecutor filed a Notice of Appeal against the Impugned Order, insofar as the Two Witnesses, if called to testify in Case 002, must do so in closed session.⁹
9. On 22 April 2016, the International Co-Prosecutor filed the Appeal in English and Khmer. The Appeal was notified to the parties on 26 April 2016. The International Co-Prosecutor submits that the Appeal is admissible pursuant to Rule 74(2) of the Internal Rules¹⁰ and raises five grounds of appeal based on legal errors.¹¹
10. On 6 May 2016, the Co-Lawyers for ██████ filed a request for authorisation to file their response to the Appeal in English first with the Khmer translation to follow.¹² On the same day, the Co-Lawyers filed the ██████ response to the Appeal in English, which was notified in English alone on 17 May 2016 and in Khmer on 25 May 2016 (the “Response”).¹³
11. On 27 May 2016, the International Co-Prosecutor filed a reply, which was notified on 31 May 2016 (the “Reply”).¹⁴ In addition to replying to the Co-Lawyers’ arguments, the International Co-Prosecutor submits that ██████ had no standing to file the Response.¹⁵
12. On 6 June 2016, pursuant to Pre-Trial Chamber’s instructions,¹⁶ the International Co-Prosecutor filed supplementary submissions as to the admissibility of its Appeal.¹⁷

⁹ Notice of Appeal Against Decision on ██████ Fifth Request for Investigative Action, 16 November 2015, D260/1/1 (“Notice of Appeal”).

¹⁰ Appeal, para. 1.

¹¹ Appeal, para. 15.

¹² Request to File in English First ██████ Response to International Co-Prosecutor’s Appeal Concerning Testimony at Trial in Closed Session, 6 May 2016, D309/2.

¹³ AO An’s Response to International Co-Prosecutor’s Appeal Concerning Testimony at Trial in Closed Session, 6 May 2016, D309/3 (“Response”).

¹⁴ International Co-Prosecutor’s Reply to ██████ Response to International Co-Prosecutor’s Appeal concerning Testimony at Trial in Closed Session, 27 May 2016, D309/4 (“Reply”).

¹⁵ Reply, paras 2-9.

¹⁶ Email from the Pre-Trial Chamber addressed to the parties, NOTIFICATION: Pre-Trial Chamber’s Instructions to the parties in Case File N° 004/07-09-2009-ECCC/OCIJ (PTC26), 2 June 2016.

¹⁷ International Co-Prosecutor’s Supplementary Submissions as to Admissibility of Notice of Appeal, 6 June 2016, D309/5 (“Supplementary Submissions”).



II – ADMISSIBILITY

13. The Pre-Trial Chamber agrees with the International Co-Prosecutor¹⁸ that the Appeal is admissible under Rule 74(2) of the Internal Rules, which provides that “[t]he Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.”
14. The Pre-Trial Chamber notes the International Co-Prosecutor’s submission that, since no Khmer translation of the Impugned Order has yet been notified, the Notice of Appeal and Appeal were filed within the time limit applicable under Internal Rules 20(3) and 75(1), and Article 8.5 of the Practice Direction.¹⁹ Recalling that all judicial decisions shall be at least provided in Khmer and one other language²⁰ and that translation of all judicial decisions and orders should be systematic in the interests of the good administration of justice,²¹ the Pre-Trial Chamber expresses its concern that decisions delivered in English only and not diligently followed by Khmer translation give rise to legal uncertainty. In the particular context of the ECCC, where judicial decisions have to be provided in the official language²² to trigger the running of time limits,²³ the parties may find themselves forced to file appeals before time limits start to run in order to safeguard their interests, or may wait indefinitely until the issuance of a translated decision. However, the Pre-Trial Chamber broadly interprets Internal Rules 75(1) and 75(3) in light of Internal Rule 21(4), which provides that proceedings shall be brought to a conclusion within a reasonable time. Therefore, although the Notice of Appeal and Appeal were not formally within a time limit as it has not yet begun to run, the Pre-Trial Chamber accepts that they were filed in accordance with the rules.
15. Accordingly, the Pre-Trial Chamber finds the Appeal admissible.

¹⁸ Appeal, para. 1.

¹⁹ See Supplementary Submissions.

²⁰ Article 7.1 of the Practice Direction. See also Case 002/21-10-2010-ECCC-PTC (15), Decision on KHIEU Samphan’s Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, 12 January 2011, D2, para. 11.

²¹ Case 002/19-09-2007-ECCC-OCIJ, Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190, para. C2 referring to *Prosecutor v. Delalić*, IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, Trial Chamber, 25 September 1996, para. 14; *Prosecutor v. Muhimana*, ICTR-95-I-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of His Counsel, Trial Chamber, 6 November 2001, paras 29, 32-33.

²² See Article 26(1) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

²³ Article 8.5 of the Practice Direction.



III – PRELIMINARY ISSUE

16. The International Co-Prosecutor submits in reply that ██████ did not have standing to file the Response.²⁴ The International Co-Prosecutor relies on the jurisprudence of the Pre-Trial Chamber²⁵ to contend that, while the Appeal was filed in Case 004, it concerns a question affecting the parties in Case 002/2 only²⁶ and therefore ██████ has no right to intervene in it.²⁷ The International Co-Prosecutor underlines that overlap of witnesses is unavoidable and that non-participant in a trial should not be allowed to make submissions as to whether a witness must testify in closed session.²⁸
17. The Pre-Trial Chamber considers that ██████ has standing to file submissions regarding an appeal filed in Case 004, to which he is a party, notwithstanding the issues this appeal raises. The Pre-Trial Chamber recalls, at the outset, that ██████ is considered a charged person in Case 004 since 27 March 2015 and that his Co-Lawyers have been granted access to the case file since that date.²⁹ The Pre-Trial Chamber further observes that the jurisprudence cited by the International Co-Prosecutor, in fact, supports the principle that a party has standing to file submissions in the case that concerns him or her. In the three decisions cited, where found to lack standing, the applicant was either not a party at all to the case³⁰ or a suspect willing to file an appeal related to the reconsideration of a decision initially filed in another case.³¹ By contrast, in the present case, the applicant is a charged person, with all the rights attached to this quality, who as a party in Case 004 has filed submissions in response to an appeal regularly filed in Case 004 against a decision issued in the same case.

²⁴ Reply, paras 3-9.

²⁵ Reply, para. 5 *citing* Case 001/18-07-2007-ECCC/OCIJ (“Case 001”) (PTC02), Decision on IENG Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, 6 October 2008, D99/3/19; Case 001 (PTC02), Decision on IENG Sary’s Motion to Disqualify *Amicus Curiae*, 14 October 2008, D99/3/23 (collectively “Decisions on IENG Sary’s Requests”); Decision on ██████ Appeal Against the Co-Investigating Judges’ Constructive Denial of His Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 27 February 2015, D229/1/2 (“Decision on ██████ Appeal”), para. 8.

²⁶ Reply, para. 3.

²⁷ Reply, para. 6.

²⁸ Reply, para. 8.

²⁹ Written Record of Initial Appearance, 27 March 2015, D242.

³⁰ *See* Decisions on IENG Sary’s Requests.

³¹ *See* Decision on ██████ Appeal, para. 6.



18. For these reasons, the Pre-Trial Chamber rejects the International Co-Prosecutor's arguments and will take [REDACTED] Response into consideration when deciding on the merits of the Appeal.

IV – STANDARD OF REVIEW

19. Pursuant to the Pre-Trial Chamber's jurisprudence, Co-Investigating Judges' decisions may be overturned if they are a) based on an error of law invalidating the decision; b) based on an error of fact occasioning a miscarriage of justice; or c) so unfair or unreasonable as to constitute an abuse of the judges' discretion.³²
20. The Pre-Trial Chamber further recalls that the ECCC legal framework, particularly under Internal Rule 56, gives a broad discretion to the Co-Investigating Judges in handling confidentiality issues and granting limited access to the judicial investigations.³³

V – MERITS

21. The International Co-Prosecutor submits that: (a) it is solely for the Chamber conducting hearings to decide if exceptional circumstances exist to justify excluding the public from its hearings; (b) the Impugned Order failed to rebut the presumption that hearings shall be conducted in public; (c) the Impugned Order was not a reasoned decision as it failed to provide specific reasons why the two witnesses listed in Annex B should testify at trial in closed session; (d) the Impugned Order was made without providing an opportunity for any of the parties to be heard; and (e) the Impugned Order failed to give due weight to the presumption that proceedings will take place in public.³⁴
22. The Pre-Trial Chamber will examine each ground in turn.

³² See, e.g., Case 002 (PTC64), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22.

³³ Decision on Appeal Against Order on [REDACTED] Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4 ("Decision related to [REDACTED] Responses"), para. 23.

³⁴ Appeal, para. 15.



a. First Ground Related to the Intrusion in the Trial Chamber's Duty*(i) Submissions*

23. The International Co-Prosecutor submits that the Impugned Order erroneously intrudes upon the Trial Chamber's obligation to decide whether exceptional circumstances exist to derogate from the principle that trial proceedings be conducted publicly.³⁵ Relying on Articles 12(2) of the ECCC Agreement³⁶ and on Rules 29(3), 29(4) and 79(6) of the Internal Rules,³⁷ the International Co-Prosecutor contends that the International Co-Investigating Judge may not withhold evidence conducive to ascertaining the truth³⁸ and should have no role in the process of deciding whether a witness at trial should testify in closed session.³⁹ The decision as to whether a witness at trial should testify in closed session is rather a decision to be made solely by the Trial Chamber,⁴⁰ after having received the International Co-Investigating Judge's reasons for his belief and heard the parties.⁴¹
24. The Co-Lawyers for ██████ respond that the International Co-Prosecutor misconstrues the respective roles of the Office of the Co-Investigating Judges and the Trial Chamber.⁴² According to the Co-Lawyers, the Trial Chamber has no authority over judicial investigations and thus cannot release confidential information from Cases 003 and 004 into Case 002/02⁴³. The Trial Chamber should rather "first [seek] approval from the [Office of the Co-Investigating Judges]",⁴⁴ who has solely "the power to decide the conditions" pursuant to which such confidential information may be released.⁴⁵ The Co-Lawyers rely on the broad discretion of the Co-Investigating Judges to grant access to confidential judicial investigations under Internal Rule 56 and on the Trial Chamber's

³⁵ Appeal, para. 16.

³⁶ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 ("Agreement").

³⁷ Appeal, paras 17-19.

³⁸ Appeal, para. 20.

³⁹ Appeal, para. 21.

⁴⁰ Appeal, para. 16.

⁴¹ Appeal, paras 21-22.

⁴² Response, paras 2, 30-34.

⁴³ Response, paras 31-32.

⁴⁴ Response, para. 32.

⁴⁵ Response, para. 34.



deferral to Co-Investigating Judges of decisions regarding the release of confidential material from Cases 003 and 004.⁴⁶

25. The International Co-Prosecutor replies that the core question is not who has the authority to release confidential information from an ongoing investigation to the public, but rather whether the witnesses, if called to testify in the Case 002/02 trial, must do so in closed session.⁴⁷ The International Co-Prosecutor submits that the Co-Lawyers mischaracterise the Trial Chamber's position on whether it is for the Trial Chamber or for the International Co-Investigating Judge to decide if a witness at trial should testify in closed session.⁴⁸

(ii) *Discussion*

26. Rule 79 of the Internal Rules provides, in relevant parts:

Rule 79. General Provisions

6. Hearings of the Chamber shall be conducted in public. [...]

b) Where the Chamber considers that a public hearing would be prejudicial to public order, or to give effect to protective measures ordered under these IRs, it may, by reasoned decision, order that all or part of the hearing be held *in camera*. This decision is not open to appeal. [...]

27. Rule 56 of the Internal Rules provides, in relevant parts:

Rule 56. Public Information by the Co-Investigating Judges

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.

28. At the outset, the Pre-Trial Chamber recalls that every court possesses the inherent power to control the proceedings during the course of trial.⁴⁹ As such, pursuant to Internal

⁴⁶ Response, para. 33, *referring to* the 16 August 2013 Guidelines, para. 2 and to the 30 November 2015 Oral Guidelines, p. 8-9, 13-14.

⁴⁷ Reply, paras 10-11.

⁴⁸ Reply, para. 23.

⁴⁹ *See, e.g., Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, Appeals Chamber, 6 February 2007, para. 14; *Prosecutor v. Milošević*, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Appeals Chamber, 16 May 2002, para. 10.



Rule 79(6)(b), the Trial Chamber has exclusive competence to order, by reasoned decision, that all or part of the hearing be held in closed session. The Pre-Trial Chamber therefore concurs with the International Co-Prosecutor that it is for the Trial Chamber to decide if a witness should testify in closed session at trial and that this prerogative to conduct proceedings is independent from the Co-Investigating Judges' discretion to release confidential information from ongoing investigations.

29. Turning to the Impugned Order, the Pre-Trial Chamber cannot identify any error in the International Co-Investigating Judge's findings warranting its intervention. The Pre-Trial Chamber underlines that the Impugned Order is related to the modalities of disclosure of confidential information from judicial ongoing investigations, under Rule 56, and is in no way a final decision or a binding order as to the conduct of trial proceedings.
30. In particular, the Pre-Trial Chamber considers that the expression used in paragraph 7(d) of the Impugned Order that the Two Witnesses "*must* [testify] in closed session"⁵⁰ should be read in the context of memoranda and orders previously issued by the International Co-Investigating Judge. In particular, in the Disclosure Memorandum, the International Co-Investigating Judge explicitly acknowledged the prerogatives of the Trial Chamber by indicating that he would "request" the use of closed sessions to ensure the integrity of the investigation⁵¹ and by stating that he "would be grateful if the [Trial Chamber] could indicate its agreement with the above-mentioned model".⁵² Consistently, in several disclosure orders, the International Co-Investigating Judge "requested" the Trial Chamber or the Supreme Court Chamber to ensure compliance with "conditions" and "restrictions" imposed for disclosure.⁵³ Furthermore, while the International Co-Investigating Judge

⁵⁰ Impugned Order, para. 7(d) [emphasis added].

⁵¹ Disclosure Memorandum, para. 3(c).

⁵² Disclosure Memorandum, para. 5.

⁵³ See, e.g., Decision on the International Co-Prosecutor's Case 002 Urgent Disclosure Request D167/2, 24 April 2015, D167/3, paras 14-15; Decision on Co-Prosecutor's Urgent Request to Disclose Case 004 Interviews Relevant to 1st Segment of Case 002/02 Trial, 14 October 2014, D193/4, paras 25-26; Decision on International Co-Prosecutor's Urgent Request to Disclose Newly Posted Case 004 Interviews Relevant to 1st Segment of Case 002/02 Trial, 3 November 2014, D193/6, paras 15-16; Partial Decision on International Co-Prosecutor's Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial and Case 002/01 Appeal, Dated 21 January 2015, 21 January 2015, D193/8, paras 17-18; Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D193/7 and D193/9, 4 February 2015, D193/11, paras 13-14; Decision on International Co-Prosecutor's Case 002 Disclosure Requests Concerning a Witness, 24 February 2015, D193/13, paras 10-11; Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D193, D193/7 and D193/9, 11 March 2015, D193/15, paras 12-13; Decision on the International Co-Prosecutor's Case 002 Urgent Disclosure Request D193/14, 11 March 2015, D193/16, paras 11-12; Decision on the International Co-Prosecutor's Case 002 Urgent Disclosure Request D193/17 and D193/20, 6 April 2015,



reiterated in the Confidential Memorandum his stance concerning “conditions” for disclosure,⁵⁴ he maintained that it is for the Trial Chamber to “decide whether to arrange a closed session or not”, and acknowledged that his sole prerogative, should the need arises, would be to revoke a disclosure order.⁵⁵

31. The Pre-Trial Chamber further notes that, notwithstanding the terms used by the International Co-Investigating Judge, the Trial Chamber’s has in practice always exercised its exclusive jurisdiction to issue final decisions on closed session testimonies under Rule 79(6)(b). In the 30 November 2015 Oral Guidelines, the Trial Chamber explicitly stated that it would consider the modalities of testimony of disclosed witnesses on a case-by-case basis.⁵⁶ In the Ruling on Closed Session, while it granted some deference to the International Co-Investigating Judge’s reasons, the Trial Chamber’s formal ruling constituted the only binding decision as to the conduct of the proceedings and it properly balanced the right to a public hearing with the need to maintain confidentiality of ongoing investigations.⁵⁷

32. In these circumstances, the Pre-Trial Chamber finds that the International Co-Prosecutor has not demonstrated any error or abuse of discretion in paragraph 7(d) of the Impugned Order that would invalidate the decision.⁵⁸ The Pre-Trial Chamber further concludes that paragraph 7(d) of the Impugned Order does not affect the Trial Chamber’s inherent jurisdiction to decide on the modalities of testimonies of witnesses at trial, and that there is therefore no reason to vacate it.

D193/21, paras 15-16; Decision on the International Co-Prosecutor’s Case 002 Disclosure Requests D193, D193/7 and D193/23, 18 May 2015, D193/24, paras 15, 16; Decision on the International Co-Prosecutor’s Urgent Case 002 Disclosure Requests D193/25, D193/26, and D193/27, 22 July 2015, D193/28, paras 12-13; Partial Decision on the International Co-Prosecutor’s Disclosure Request D193/29, 31 July 2015, D193/30, paras 14-15; Decision on the International Co-Prosecutor’s Case 002 Disclosure Request D167, D193/7, D193/17, D193/31, and D193/32, 7 August 2015, D193/33, paras 20-21; Decision on the International Co-Prosecutor’s Disclosure Requests D193/23 and D193/29, 10 August 2015, D193/34, paras 16-17; Decision on the International Co-Prosecutor’s Urgent Disclosure Requests D193/36, 12 August 2015, D193/37, paras 13-14; Decision on the International Co-Prosecutor’s Disclosure Request D193/40, 28 September 2015, D193/43, paras 12-13; Decision on the International Co-Prosecutor’s Disclosure Request D193/42, 28 September 2015, D193/44, paras 14-15; Decision on the International Co-Prosecutor’s Disclosure Request D193/52, 17 November 2015, D193/57, paras 16-17; Decision on the International Co-Prosecutor’s Urgent Disclosure Request D193/58, 2 December 2015, D193/59, paras 13-14; Decision on the International Co-Prosecutor’s Disclosure Requests D193/29, D193/35, D193/38, D193/39, D193/42, D193/45, D193/46 and D193/48, 17 December 2015, D193/61, paras 36-37.

⁵⁴ Ruling on Closed Session, para. 1.

⁵⁵ See Appeal, footnote 15 *citing* Confidential Memorandum, paras 5, 12.

⁵⁶ 30 November 2015 Oral Guidelines, pp. 13, 14.

⁵⁷ Ruling on Closed Session, paras 4-6.

⁵⁸ Impugned Order, para. 5.



33. Accordingly, the first ground of appeal is dismissed.

b. Second Ground Related to the Presumption that All Hearings Shall be Public

(i) Submissions

34. The International Co-Prosecutor contends that the Impugned Order cites no legal basis and makes no finding as to whether excluding the public from the trial hearing is necessary to preserve public order or to give effect to protective measures for witnesses. As such, the Impugned Order fails to rebut the presumption in Rule 79(6) of the Internal Rules that all hearings of a Chamber shall be conducted in public.⁵⁹

(ii) Discussion

35. The Pre-Trial Chamber observes that the Impugned Order is an order on modalities of disclosure of investigation material, linked to the Co-Investigating Judges' responsibility to conduct investigations under Articles 5(1) of the ECCC Agreement and 23 *new* of the ECCC Law⁶⁰ and to handle confidentiality issues under Rule 56. By contrast, Rule 79(6)(b) of the Internal Rules expressly confers to the Trial Chamber the authority to order "by reasoned decision [...] that all or part of the hearing be held *in camera*" if it "considers that a public hearing would be prejudicial to public order, or to give effect to protective measures". The Pre-Trial Chamber underlines that the International Co-Investigating Judge is not involved in this procedure, which concerns the trial proceedings exclusively. It is therefore the Trial Chamber's duty to make findings as to whether the public order justifies derogation from the principle of publicity set forth in Internal Rule 79(6) for the reasons provided in the Impugned Order, and not for the International Co-Investigating Judge to rebut any presumption.

36. The Pre-Trial Chamber concludes that the International Co-Prosecutor has not demonstrated any error invalidating the decision. The second ground of appeal is thus dismissed.

⁵⁹ Appeal, para. 23.

⁶⁰ 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, 27 October 2004 ("ECCC Law").



c. Third Ground Related to the Failure to Provide a Reasoned Opinion

(i) Submissions

37. The International Co-Prosecutor, relying on Rule 29(4)(e) and on the jurisprudence,⁶¹ submits that the International Co-Investigating Judge erred in not providing a reasoned decision as to why the Two Witnesses fall within the Category C Witnesses and should testify in closed session.⁶²

(ii) Discussion

38. The Impugned Order assigning Category C to the Two Witnesses is an order on disclosure modalities⁶³ which falls under the broad discretion of the Co-Investigating Judges, pursuant to Internal Rule 56, to handle confidentiality issues and disclose judicial investigations.⁶⁴ The Pre-Trial Chamber observes, by contrast with the express obligation to set out reasons for the rejection of investigative actions under Rule 55(10), that there is no specific onus for the Co-Investigating Judges to provide reasoned disclosure orders under the applicable provisions concerning investigations before the ECCC. As such, the Pre-Trial Chamber finds that the International Co-Investigating Judge gave sufficient reasons when holding in the Impugned Order that it has “reviewed the list of witnesses and their disclosed material”⁶⁵ and assigned special disclosure measures to some witnesses “owing to the confidential and sensitive nature of the ongoing investigations”.⁶⁶ The Pre-Trial Chamber further recalls that the Impugned Order has to be read in the context of the International Co-Investigating Judge’s Confidential Memorandum on which it is based. The International Co-Investigating Judge then clearly stated its reasoning that Category C Witnesses’ evidence should not be disclosed in open session as this “would be detrimental to ongoing investigations for it could endanger future

⁶¹ Appeal, para. 25.

⁶² Appeal, para. 24.

⁶³ *See supra* para. 29.

⁶⁴ Decision related to ██████████ Responses, para. 23.

⁶⁵ Impugned Order, para. 3.

⁶⁶ Impugned Order, para. 7.



interviews with them or with leads generated from them”,⁶⁷ as upheld by the Trial Chamber.⁶⁸

39. The Pre-Trial Chamber concludes that the International Co-Prosecutor has not demonstrated any error or abuse of discretion warranting the intervention of the Pre-Trial Chamber. Accordingly, the third ground is dismissed.

d. Fourth Ground Related to Failure to Hear the Parties

(i) Submissions

40. The International Co-Prosecutor contends that the International Co-Investigating Judge failed to hear the parties before issuing the Impugned Order, contrary to the general duty of a judicial body to give a party the opportunity to make informed submissions prior to making any decision which might affect its interests,⁶⁹ even when exercising *proprio motu* power.⁷⁰ The International Co-Prosecutor further submits that the parties must be given the opportunity to consider the International Co-Investigating Judge’s reasons in order to make informed submissions to the Trial Chamber regarding the necessity that witnesses testify in closed session.⁷¹

(ii) Discussion

41. The Pre-Trial Chamber recalls that the Impugned Order is an order related to the disclosure of confidential material⁷² which, as such, falls under the Co-Investigating Judges’ broad discretion to handle confidentiality issues pursuant to Internal Rule 56.

42. Firstly, the Pre-Trial Chamber notes that the initial decisions to disclose the written records of interview of the Two Witnesses were issued upon referral by the International Co-Prosecutor himself.⁷³ The Pre-Trial Chamber further notes that the International Co-Prosecutor submitted numerous requests related to the disclosure of Cases 003 & 004

⁶⁷ Disclosure Memorandum, para. 3(c).

⁶⁸ Ruling on Closed Session, para. 5.

⁶⁹ Appeal, para. 27.

⁷⁰ Appeal, para. 29 referring to *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, para. 53.

⁷¹ Appeal, para. 30.

⁷² See *supra* para. 29.

⁷³ See Decision on International Co-Prosecutor’s Request for Disclosure of Documents in Case 002, 19 September 2013, D167/1; Decision on International Co-Prosecutor’s Case 002 Disclosure Requests D193, D193/7 and D193/9, 11 March 2015, D193/15.



materials in Case 002 and thus had ample opportunity to express his view on the issue of disclosure modalities.⁷⁴ The Pre-Trial Chamber observes that, when issuing the Disclosure Memorandum on which the Impugned Order is based, the International Co-Investigating Judge considered but “disagree[d]” with the Co-Prosecutor’s position.⁷⁵ In these circumstances, the Pre-Trial Chamber is not convinced that the International Co-Investigating Judge had a duty to hear the parties again prior to issuing a routine order amending the disclosure modalities of already disclosed materials.

43. Secondly, the Pre-Trial Chamber recalls that the Impugned Order is not a final decision regarding the hearing of Two Witnesses in closed session. Should the Two Witnesses be called to testify in Case 002, the International Co-Prosecutor may request to be heard by the Trial Chamber on the issue of closed session, as he did in previous occasions.⁷⁶

44. The Pre-Trial Chamber therefore dismisses the fourth ground of appeal.

e. Fifth Ground Related to the Weight Given to the Importance of a Public Trial

(i) Submissions

45. The International Co-Prosecutor finally contends that the International Co-Investigating Judge erred in not giving adequate weight to the importance of a public trial, which is a cornerstone principle of human rights law as emphasised, *inter alia*, by the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia.⁷⁷ The International Co-Prosecutor underlines the importance for the people of Cambodia and the public in general to follow the proceedings.⁷⁸ Relying on Article 34 *new* of the ECCC Law, Article 12(2) of the ECCC Agreement, Rule 79(6) of

⁷⁴ See, e.g., International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial and Case 002/01 Appeal, 15 December 2014, D193/7, para. 18 referring to International Co-Prosecutor’s Notice of Proposed Procedure for Use of Witness Statements from Case Files 003 and 004, 22 October 2014, E319/2 (“Notice of Proposed Procedure”). The International Co-Prosecutor provided a copy of the Notice of Proposed Procedure to the Co-Investigating Judges. See Case 002, Decision on International Co-Prosecutor’s Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, E319/7, para. 6. For other discussions on disclosure modalities, see International Co-Prosecutor’s Request to Disclose in Case 002/02 the Identity of Certain Witnesses interviewed in Case 004, 24 June 2014, D200; International Co-Prosecutor’s Urgent Request to Disclose Unredacted Versions of Previously Disclosed Case 004 Documents Relevant to Case 002, 7 April 2015, D167/2.

⁷⁵ Disclosure Memorandum, para. 1.

⁷⁶ See Ruling on Closed Session, para. 1.

⁷⁷ Appeal, paras 31-35.

⁷⁸ Appeal, paras 36-37.

the Internal Rules, Article 316 of the Cambodian Code of Criminal Procedure and jurisprudence of the Trial Chamber, the International Co-Prosecutor submits that there must be good cause to derogate from the fundamental principle of publicity of court hearings and that closed sessions should be used sparingly, to the extent strictly necessary.⁷⁹

46. The Co-Lawyers for ██████ respond that the International Co-Prosecutor misapplies the ECCC's standard for holding hearings in closed session,⁸⁰ fails to recognize that the right to a public hearing is mainly for the benefit of the accused⁸¹ and fails to balance the importance of a public trial with the requirement to protect the integrity of ongoing investigations.⁸² The Co-Lawyers further submit that there is good cause in the present case for the International Co-Investigating Judge to order that the Two Witnesses testify in closed session – namely the “confidential and sensitive nature of the ongoing investigations”⁸³ and additionally, ██████ right to the presumption of innocence.⁸⁴ According to the Co-Lawyers, the International Co-Investigating Judge correctly applied the principle of necessity since he ordered closed sessions for only two key witnesses.⁸⁵
47. The International Co-Prosecutor replies that the Co-Lawyers fail to establish any damage to a legitimate interest in case the Two Witnesses testify in open session, and in particular fail to demonstrate that ██████ right to the presumption of innocence or the integrity and fairness of the investigations would be compromised.⁸⁶ The International Co-Prosecutor finally submits that the Co-Lawyers' misconceive the principle of necessity, which requires a showing that part or all of a witness' evidence must be heard in closed session.⁸⁷

⁷⁹ Appeal, paras 38-41.

⁸⁰ Response, paras 2, 30, 35-40.

⁸¹ Response, para. 37 referring to *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through to “M”, 28 April 1997, para. 34.

⁸² Response, para. 37.

⁸³ Response, para. 38.

⁸⁴ Response, para. 39.

⁸⁵ Response, para. 40.

⁸⁶ Reply, paras 13-22.

⁸⁷ Reply, para. 28.



(ii) Discussion

48. The Pre-Trial Chamber cannot find any support in the contention that the consideration of the principle of publicity of trial hearings should have been, at this stage, part of the Co-Investigating Judges' discretionary test for deciding whether to maintain the confidentiality of judicial investigations under Rule 56.
49. The Pre-Trial Chamber notes that the dispositions cited by the International Co-Prosecutor expressly refer to the "Extraordinary Chambers[']" decision to close the proceedings (Article 34 *new* of the ECCC Law), to the "opinion of the Chamber concerned" for any exclusion from public proceedings (Article 12(2) of the ECCC Agreement) and to the Trial Chamber's authority to order closed sessions (Rule 79(6)(b) of the Internal Rules). Similarly, Article 316 of the Cambodian Code of Criminal Procedure provides that it is for "the court" to order a complete or partial closed session hearing.
50. The assessment of the good cause to derogate from the general principle of the publicity of trial proceedings, based on international human rights provisions and international tribunals' jurisprudence, thus clearly falls under the Trial Chamber's prerogatives. The Pre-Trial Chamber considers, given the Trial Chamber's practice,⁸⁸ that the Trial Chamber will conduct its hearings with full respect and due regard for the balance between the right to a public trial hearing and the need to maintain the confidentiality of ongoing investigations, if the Two Witnesses were called to testify in Case 002.
51. The Pre-Trial Chamber therefore concludes that, being seised of an appeal against an order on disclosure modalities that has no binding effect in the trial proceedings, the debate on the importance of a public trial and the principle of necessity is premature. Accordingly, the fifth ground of appeal is dismissed.

⁸⁸ See Ruling on Closed Session, paras 4-6; 30 November 2015 Oral Guidelines, pp. 9, 13.



DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DISMISSES the Appeal.

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

Phnom Penh, 20 July 2016

President

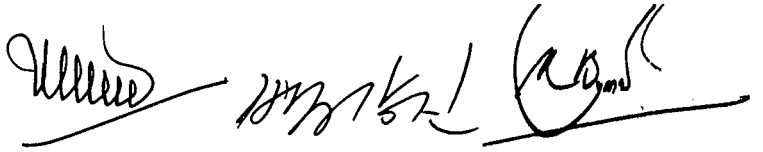


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