

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 003/07-09-2009-ECCC/OCIJ **Party Filing:** International Co-Prosecutor

Filed to: Pre-Trial Chamber **Original language:** English

Date of document: 7 July 2011

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC REDACTED

Classification by the Chamber: សម្ងាត់/Confidential

Classification Status:

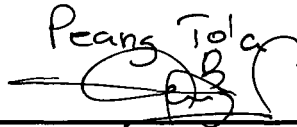
Review of Interim Classification:

សាធារណៈ / Public

15/08/2011

Records Officer Name:

Signature:

Peang Tolay


**INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE "DECISION ON
TIME EXTENSION REQUEST AND INVESTIGATIVE REQUESTS BY THE
INTERNATIONAL CO-PROSECUTOR REGARDING CASE 003"**

Filed by:

International Co-Prosecutor
Andrew CAYLEY

Distribution to:

Pre-Trial Chamber
Judge PRAK Kimsan
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Copy to:

National Co-Prosecutor
CHEA Leang

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	PROCEDURAL HISTORY.....	2
III.	OVERVIEW OF THE APPEAL.....	5
IV.	APPLICABLE LAW.....	7
V.	ARGUMENT	8
V(A).	THE IMPUGNED ORDER IS BASED ON AN INCORRECT INTERPRETATION OF THE LAW	8
	<i>(i) The Decision to Delegate Power or Record a Disagreement is Optional, not Mandatory ...</i>	8
	<i>(ii) The Practice of Filing Alone Has Previously Been Accepted by the CIJs.....</i>	10
	<i>(iii) The CIJ's Interpretation is Inconsistent with the Object and Purpose of the Applicable Law.....</i>	12
V(B).	THE FOUR REQUESTS ARE DIRECTLY RELATED TO THE LARGER DISAGREEMENT OVER CASE FILE 003.....	13
V(C).	ALTERNATIVELY, IF THE PRE-TRIAL CHAMBER CONSIDERS THE DELEGATION OF POWER OR RECORDING OF DISAGREEMENT MANDATORY TO FILE INDEPENDENTLY, THE CIJS ERRED IN REJECTING THE REQUESTS.....	14
	<i>(i) The CIJs failed to take into account the fundamental principles articulated in Rule 21.....</i>	14
	<i>(ii) The CIJs' failure to consider the Requests contravenes the CIJs' legal obligation to conduct a complete and impartial investigation</i>	21
VI.	CONCLUSION.....	23

I. INTRODUCTION

1. Pursuant to ECCC Internal Rules (“Rules”) 66 (2) and (3), 74 (2), 75 (3) and 21, the International Co-Prosecutor (the “ICP”) hereby submits this appeal against the Co-Investigating Judges’ (the “CIJs”) reasoned order¹ entitled “Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003” (the ‘Impugned Order’).²
2. This appeal is admissible. The ICP filed the Notice of Appeal on 10 June 2011 (notified on 13 June 2011) and this appeal on 7 July 2011, thereby complying with the deadlines set out in Subrules 75 (1) and (3). The ICP submits that he was entitled to file this appeal individually, without either receiving a delegation of power pursuant to Rule 13 (3) or recording a disagreement pursuant to Rule 71 (1).³ Notwithstanding this position and out of an abundance of caution, prior to filing this appeal, a disagreement was formally recorded at the ICP’s initiative in a signed, dated document placed in a register of disagreements kept by the Greffier of the Co-Prosecutors.

II. PROCEDURAL HISTORY

3. On 7 September 2009, the Acting International Co-Prosecutor submitted to the CIJs the Second Introductory Submission (the ‘Introductory Submission’) opening a judicial investigation in this case.⁴ The CIJs placed the Introductory Submission on the Case File on 21 April 2010. [REDACTED]

¹ Although the Impugned Order bears the title of “Decision”, there is no doubt in the Internal Rules that the terms “decisions” and “orders” used by the Co-Investigating Judges are interchangeable: Subrules 66 (2) and (3) state that “Where the Co-Investigating Judges decide to reject such requests, they shall issue a reasoned order” and “All the parties may, within 30 (thirty) days from notice of such order, file appeals to the Pre-Trial Chamber”. Rule 74 (1) uses the term “decisions” while in Rules 74 (2) and 74 (4) the term “orders” is used; the English version of the Rules 74 (3) and 75 use “order” and “decision” while the French version of Rule 75 uses “decision” only. Further, Black’s Law Dictionary defines the term “decision” as synonymous with the term “order”. (Black’s Law Dictionary, 8th edition, Garner, B, p. 436.)

² Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 June 2011, D20/3 (hereinafter the ‘Impugned Order’).

³ In addition to the arguments put forward in this motion, see further the arguments developed in the ICP’s Appeal against the “Order on International Co-Prosecutor’s Public Statement Regarding Case File 003”, D14/1/1, 25 May 2011, paras 12-13 which relate specifically to the ICP’s authority to file an appeal motion individually.

⁴ Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’

[REDACTED]
[REDACTED]
[REDACTED] The current International CIJ was appointed and assumed office, on 1 December 2010.⁷

4. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] On 29 April 2011, the CIJs notified the Co-Prosecutors, then constituting the sole party in Case File 003, of their Notice of Conclusion of the Judicial Investigation.¹⁰ Following receipt of the Notice, the ICP undertook an urgent review of the Case File in accordance with his obligations under Rule 66 (5). He concluded that the investigation had not been completed. [REDACTED]
[REDACTED]

[REDACTED] In response to the Notice, the ICP issued a press release on 9 May 2011.¹¹ On 10 May 2011, he filed a Request for an Extension of Time for the Filing of Civil Party Applications¹² and three Investigative Requests pursuant to Rule 66 (1) (together ‘the Requests’) on 18 May 2011.¹³ The Requests included two annexes identifying further documents to be

5

6

7 Press Release – Dr. Siegfried Blunk Appointed as New International Co-Investigating Judge, 1 December 2010 (Annex 1).

8

9

10 Notice of Conclusion of Judicial Investigation, 29 April 2011, D13, at page 2.

11 The press release was the subject of a CIJs’ decision issued on 18 May 2011 (“Retraction Order”): CIJs’ Order on International Co-Prosecutor Public Statement Regarding Case File 003, 18 May 2011, D14. The Retraction Order was appealed by the ICP on 25 May 2011 (D14/1/1) followed by a Pre-Trial Chamber Order Suspending the Enforcement of the ‘Order on International Co-Prosecutor’s Public Statement Regarding Case File 003’, 13 June 2011, D14/1/2.

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

13 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 (with two tables of documents *Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’*)

transferred from Case File 002 to Case File 003 and relevant new documents. They also set out additional investigative actions required to ascertain the truth regarding the alleged crime sites / criminal events and the responsibility of the suspects.

5. On 24 May 2011, the Co-Prosecutors were notified of the CIJs' Order on Time Extension and Investigative Requests by ICP in Case 003 dated 19 May 2011 (the "First Order").¹⁴ By this First Order, the CIJs ordered "the Co-Prosecutors to disclose within two working days whether before filing the Time Extension Request and Investigative Requests, they have made decision [sic] of delegation of power pursuant to Rule 13(3) or they have recorded any disagreement pursuant to Rule 71(1)." In this First Order, the CIJs expressed their will "to ascertain whether the National Co-Prosecutor was given the opportunity to exercise her right under Rule 13(3) and the Rule 71(1)".¹⁵
6. The National Co-Prosecutor (the "NCP") responded on 25 May 2011 that there had been no delegation of power nor a recording of disagreement.¹⁶ The ICP filed his response on 26 May 2011 (the "Response"),¹⁷ arguing that neither a delegation of power pursuant to Rule 13 (3) nor a formal recording of a disagreement pursuant to Rule 71 (1) was legally necessary for the ICP to file independently admissible requests in Case File 003. Specifically, the ICP argued that: (1) there was an accepted practice of filing alone; (2) the NCP chose not to delegate power or record a disagreement; and (3) the initial disagreement regarding the filing of the Introductory Submission in Case File 003 encompasses all subsequent independent prosecutorial acts taken in the context of Case File 003.
7. On 7 June 2011, the Impugned Order was issued by the CIJs. The Impugned Order did not address the question of "whether the National Co-Prosecutor was given the opportunity to exercise her right under Rule 13(3) and the Rule 71(1)" despite this

attached) ("First Investigative Request"); International Co-Prosecutor's Second Request for Further Investigative Action Regarding ██████████ and Related Crime Sites, 18 May 2011, D18 ("Second Investigative Request"); International Co-Prosecutor's Third Investigative Request Regarding ██████████ and Related Crime Sites, 18 May 2011, D19 ("Third Investigative Request").

¹⁴ Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 19 May 2011 (notified on 24 May 2011), D20 (the "First Order").

¹⁵ First Order, p.2, second "Considering".

¹⁶ National Co-Prosecutor's Response to the CIJs' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 25 May 2011, D20/1.

¹⁷ (International) Co-Prosecutor's Response to the CIJs' Order on Time Extension and Investigative Requests by International Co-Prosecutor in Case 003, 26 May 2011, D20/2.

being expressly mentioned as a justification for the issuance of the First Order. Instead, the Impugned Order responded only to the above three arguments presented by the ICP.¹⁸ The CIJs concluded that the Internal Rules leave no room for a solitary action, thereby rejecting the Requests as invalid without assessing them on the merits. The ICP filed a notice of appeal on 10 June 2011 after recording a disagreement with the National Co-Prosecutor pursuant to Rule 71 (1).

8. Since then, on 10 June 2011 the ICP re-filed amended versions of his initial Request for Extension of Time and his initial three Investigative Requests. He did so on the basis that, pursuant to Internal Rule 39 as well as Articles 8 and 9 of the Practice Direction on Filing of Documents before the ECCC, the CIJs have discretion to recognize the validity of those late requests now that the formalities deemed necessary by the CIJs had been clarified in their Impugned Order. Furthermore, although the ICP still disagrees with the CIJs' interpretation of the rules, he nevertheless, acting in good faith, has complied with their decision and recorded the four disagreements. To date, the CIJs have not taken any decision regarding the admissibility of those re-filed requests.

III. OVERVIEW OF THE APPEAL

9. The ICP submits that the Impugned Order should be overturned on the following grounds:
 - (a) The CIJs erred in interpreting the applicable law when they concluded that the Requests filed by the ICP alone were invalid due to the absence of either a delegation of power under Rule 13 (3) or a formal recording of disagreement by one of the Co-Prosecutors under Rule 71 (1). Specifically:
 - (i) According to the Rules, a delegation of power or a recording of disagreement is not mandatory but rather optional. The ability to act alone in some circumstances is clearly provided for by Article 4 of the Agreement, Article 20(new) of the ECCC Law, Rules 1 (2), 13 and 71.
 - (ii) The practice of filing alone has previously been accepted by the International CIJ as well as by both CIJs. This supports the ICP's interpretation of the Rules

¹⁸ Impugned Order, paras. 3, 6, 8-11.

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

as conferring the Co-Prosecutors with a right to delegate power or record a disagreement but not requiring them to do so.

- (iii) The NCP was given the opportunity to exercise her rights prior to the ICP filing the Requests and chose not to delegate her power or to record a disagreement. The CIJs' interpretation of the Rules as nonetheless requiring a delegation of power or recording of a disagreement is inconsistent with the object and purpose of the applicable law.

- (b) Regardless of whether, as a general matter, the Rules require (as opposed to permit) a delegation of power or recording of a disagreement prior to a Co-Prosecutor taking individual action, the ICP submits that it was not required in the present case. The initial disagreement recorded in relation to the Introductory Submission in Case File 003 encompasses all subsequent actions taken by the ICP on Case File 003 and therefore, no new recording of a disagreement was necessary to file the Requests. The CIJ's interpretation of the applicable Law would lead to an absurd result whereby each subsequent action, no matter how minor, undertaken by the ICP in relation to Case File 003 would require a delegation of power or a formal recording of a disagreement in circumstances where the nature of the disagreement has not changed or evolved since the initial disagreement was recorded.

- (c) Alternatively, in the event that the PTC considers a delegation of power or a recording of disagreement to have been required in order for the ICP to file the Requests individually, the ICP submits that the CIJs erred in rejecting the Requests as invalid. Specifically:
 - (i) By declaring the Requests to be invalid the CIJs failed to take into account the fundamental principles articulated in Rule 21. Rule 21 stipulates that in all instances, the fairness, transparency and legal certainty of the proceedings shall be taken into account. Rule 21 also mandates that a balance amongst the rights of all parties, including the rights of the Co-Prosecutors and the victims must be preserved. With respect to the three investigative requests, the rights of the Co-Prosecutors to monitor and ensure the investigation is faithfully carried out have been harmed. With respect to the Request for an Extension of Time for the Filing of Civil Party applications, the rights of the victims have been harmed. In

light of the principles of Rule 21, the CIJs should, and could easily, have provided the ICP with an opportunity to remedy any perceived procedural deficiencies in the Requests instead of rejecting them outright.

(ii) As a further alternative, the CIJs' failure to consider the substance of the Requests contravenes the CIJs' legal obligation to conduct a complete and impartial investigation.

10. In light of the foregoing, the ICP requests that the Chamber overturn the decision of the CIJs and direct the CIJs to consider the ICP's requests on the merits. Furthermore, in view of the central importance of this issue to the integrity and public reputation of the ECCC, the internal procedures of the OCP and every future step to be taken by the ICP in Cases 003 and 004, the ICP respectfully requests the Chamber to issue its decision on this Appeal as expeditiously as possible.

IV. APPLICABLE LAW

11. Article 6 (4) of the Agreement between the United Nations and the Royal Government of Cambodia provides: "In case the prosecutors are unable to agree whether to proceed with a prosecution, *the prosecution shall proceed* unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7". [Emphasis added]
12. Article 20 new of the ECCC Law provides: "[...] In the event of disagreement between the Co-Prosecutors the following shall apply: *The prosecution shall proceed* unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions"; and "A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. [...] If there is no majority as required for a decision, *the prosecution shall proceed*". [Emphasis added]
13. Rule 1 (2) provides: "[...] In particular, unless otherwise specified, a reference in these IRs to the Co-investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation; and *a reference in these IRs to the Co-Prosecutors includes both of them acting jointly and each of them*

acting individually, whether directly or through delegation, as specified in these IRs”.
[Emphasis added]

14. Rule 13 (1) provides: “The Office of the Co-Prosecutors *shall operate as an independent office* within the ECCC”; Rule 13 (3) continues: “Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Prosecutors *may* delegate power to one of them, by a joint written decision, to accomplish such action individually”. [Emphasis added]
15. Rule 71 (1) provides: “In the event of disagreement between the Co-Prosecutors, either or both of them *may* record the exact nature of their disagreement [...]”; (2): “Within 30 (thirty) days, either Co-Prosecutor *may* bring the disagreement before the Pre-Trial Chamber by submitting a written statement of facts and reasons for the disagreement [...]”; (3): “[...] However, *the action or decision which is the subject of the disagreement shall be executed except* for disagreements concerning: a) an Introductory Submission; b) a Supplementary Submission relating to new crimes; c) a Final Submission; or d) a decision relating to an appeal [...]”; (4): “The Chamber shall settle the disagreement forthwith, as follows: [...] c) A decision of the Chamber requires the affirmative vote of at least four judges. [...] If the required majority is not achieved before the Chamber, in accordance with Article 20 new of the ECCC Law, *the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed*”. [Emphasis added]

V. ARGUMENT

V(A). THE IMPUGNED ORDER IS BASED ON AN INCORRECT INTERPRETATION OF THE LAW

16. The CIJs erred in interpreting the applicable Law by concluding that the Requests were invalid due to the absence of either a delegation of power under Rule 13 (3) or a formal recording of disagreement by one of the Co-Prosecutors under Rule 71 (1).
 - (i) *The Decision to Delegate Power or Record a Disagreement is Optional, not Mandatory*
17. It is clear from a plain reading of the Rules that the decision to delegate power or record a disagreement is optional and not mandatory. With respect to a delegation of power, Rule 13 (3) provides that the Co-Prosecutors “may” choose to delegate power.

Similarly, with respect to recording a disagreement, Rule 71 (1) uses the word “may” instead of “shall”. The word “may” is also used in Rule 71 (2), confirming that the decision whether to bring a disagreement before the PTC is entirely a voluntary decision for either Co-Prosecutor. Paradoxically, the CIJs noted in the Impugned Order that were a disagreement to be recorded there was no obligation to bring the disagreement before the Pre-Trial Chamber, thereby seemingly acknowledging the optional nature of the disagreement procedure.¹⁹ The CIJs are inconsistent when interpreting differently the same word “may:” where they state in Rule 71 (1) it imposes an obligation whereas in Rule 71 (2), the word “may” does not create an obligation to bring the disagreement before the PTC.²⁰

18. The PTC has previously agreed with this interpretation: “Articles 6 (1) and (4) of the Agreement, Articles 16 and 20 new of the ECCC Law and Internal Rule 71 (3) clearly indicate that one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit. It is further observed that only in cases of major concern specifically identified in the Internal Rules would a disagreement prevent one Co-Prosecutor from proceeding with a given action pending a decision by the Pre-Trial Chamber. Amongst these matters of major concern is the filing of an Introductory Submission, which is currently at issue”.²¹
19. The PTC’s Considerations in conjunction with the Agreement, ECCC Law and Rules suggest that the underlying principle in relation to disagreements is that the procedure (prosecution or investigation) must go forward unless it is brought to the Pre-Trial Chamber and concerns specific acts as listed in Rule 71(3)(a)-(d). Even then, however, the action or decision of an individual Co-Prosecutor is only stayed if the PTC judges are seized of the disagreement and a supermajority decides to stop the Co-Prosecutor’s action or decision.

¹⁹ Impugned Order, para. 11.

²⁰ Impugned Order, para. 11.

²¹ PTC, Annex I: Public Redacted Version, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 16. *Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’*

(ii) The Practice of Filing Alone Has Previously Been Accepted by the CIJs

20. Contrary to the CIJs' assertions in the Impugned Order, the practice of filing alone has been accepted by both CIJs or by the International CIJ alone in the past. Some examples of where this practice has been adopted are set out below.
21. On 8 February 2011, the International CIJ, acting alone, sought clarification²² in relation to the scope of the investigation from only the ICP. The International CIJ did not address the NCP.²³ The CIJs argue in the Impugned Order that the fact that the Request for Clarification was addressed solely to the ICP and not to both Co-Prosecutors was meaningless as it "meant only that (the ICP) was intended to be the recipient of the document". This argument cannot be accepted. On the contrary, addressing this request to the sole ICP was illustrative, at that time, of the International CIJ's recognition that he could only request clarification from the ICP because, in accordance with the PTC Considerations, the ICP was the only individual with the legal authority to interpret the content of the Introductory Submission filed alone. In short, by addressing solely the ICP, the International CIJ recognized the logic of the ICP's interpretation of the Internal Rules.
22. This is further demonstrated by the fact that both CIJs accepted as valid the filing from the ICP alone, which addressed both CIJs and responded to the International CIJ's solitary Request for Clarification.²⁴ Here again, the justification provided by the CIJs in the Impugned Order is untenable. They contend that "[...] the CIJs refrained from ordering the OCP to disclose whether a Delegation of Power or Recording of Disagreement had taken place . . . [because] the substance of the Response left the scope of investigations unchanged".²⁵ It must be noted that the CIJs never informed the Co-Prosecutors that they had "refrained" from ordering the disclosing of the delegation of power or recording of disagreement. Further, prior to issuing the Impugned Order, the CIJs have never informed the Co-Prosecutors that ordering them to disclose whether a delegation of power or a recording of disagreement had taken place might be a necessary pre-condition to the CIJs' acceptance of the ICP's Requests. If the CIJs had

²² The Impugned Order mentions at para. 6 (iii) that a disagreement pursuant to Rule 14(7) was actually recorded by the CIJs and placed in the Register for Disagreement according to Rule 72(1), which explains why it was filed independently by the Co-Investigating Judge.

²³ International Co-Investigating Judge, Request for Clarification in Case 003, 8 February 2011, D1/2 (addressed solely to Andrew Carley (sic), International Co-Prosecutor).

²⁴ Response of the International Co-Prosecutor to Request for Clarification, 16 February 2011, D1/2/1 (addressed by the International Deputy Co-Prosecutor to both Co-Investigating Judges).

²⁵ Impugned Order, para. 6 (iii).

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

really intended to receive a response from both Co-Prosecutors (or alternatively by one Co-Prosecutor with a delegation of power or after recording a disagreement), the request seeking clarification would not have been sent to only one of them.

23. On 7 March 2011, well before this issue regarding the validity of the ICP's solitary Requests in Case File 003, the NCP independently filed a Request in Case File 002 with the Trial Chamber. She did so without delegating power or recording of a disagreement. As of now, this filing has not led to any objection regarding its admissibility by the Trial Chamber.²⁶ This shows that in both Co-Prosecutors' view, filing alone is acceptable.
24. Finally, as underlined in the ICP's Response, the NCP decided on 25 May 2011 to file her own independent Response to the CIJs' First Order dated 19 May 2011, without delegating power or recording a disagreement beforehand. This demonstrates that, in her view, such formalities were not necessary in order for her Response to be admissible. Paradoxically, the CIJs accepted this time that NCP's solitary Response as valid.²⁷ They also accepted the ICP's solitary Response filed on 26 May 2011 and chose to rule on the merits of the Response.²⁸
25. The examples provided above demonstrate that the practice of filing alone has been accepted by the International CIJ alone and by both CIJs. This supports the ICP's interpretation of the Rules as empowering the Co-Prosecutors with a right to delegate power or record a disagreement but not requiring them to do so.
26. Given this accepted practice, the ICP had no indication that the CIJs would suddenly change their interpretation of the applicable law and reject the four Requests on this procedural technicality. Instead of safeguarding the legal certainty and transparency of the proceedings, the CIJs are contributing to legal uncertainty and inconsistency by modifying their practice and legal interpretation of the applicable law according to the circumstances. As is further argued in sections C (ii) and (iii) below, this type of conduct demonstrates a lack of respect for the fairness and transparency of these proceedings and the independence and responsibilities of the Co-Prosecutors pursuant to Rule 21.

²⁶ Case File 002, (National) Co-Prosecutor's Request for Extension of Time to Response to Objection to the Witnesses and Experts Proposed by the Other Parties, 7 March 2011, E9/14/1/2.

²⁷ Impugned Order, para. 3.

²⁸ Impugned Order, para. 3.

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

(iii) The CIJ's Interpretation is Inconsistent with the Object and Purpose of the Applicable Law

27. The CIJ's interpretation of the Rules as requiring a delegation of power or recording of a disagreement is inconsistent with the object and purpose of the applicable Law, which is to provide a mechanism for a single Co-Prosecutor to advance the prosecution in appropriate circumstances provided that the other Co-Prosecutor has been given the opportunity to raise any objections to the proposed prosecutorial action. This guarantees that the proceedings can progress in an expeditious manner which is in the interests of all parties and of the victims.
28. In the present case, the object and purpose of the applicable law was clearly fulfilled as the NCP was given ample opportunity to exercise her rights under Rule 13 (3) or Rule 71 (1) and she freely decided not to do so.
29. In their First Order dated 19 May 2011, the CIJs held that when faced with solitary action by a Co-Prosecutor, they were obligated "to ascertain whether the National Co-Prosecutor was given the opportunity to exercise her right under Rule 13 (3) and Rule 71 (1)."²⁹ However, in their Impugned Order, the CIJs said nothing with respect to whether the NCP was given an opportunity to exercise her rights.³⁰ Rather, they focused solely on whether a delegation of power under Internal Rule 13 (3) or a disagreement had been recorded pursuant to Internal Rule 71 (1).³¹
30. In fact, the NCP was informed of the content of the Requests prior to their filing. ■■■■■
■■■■■
■■■■■
■■■■■
■■■■■
■■■■■
■■■■■ According to the CIJs' Impugned Order, the purpose behind the recording of a disagreement under Rule 71 (1) is to provide "legal certainty and transparency of the proceedings pursuant to Rule 21 (1)".³² By continually informing each other of their intended decisions and filings and by maintaining their initial disagreement over Case 003, the Co-Prosecutors have provided both legal certainty and transparency as required by the CIJs and Internal Rule 21. The

²⁹ First Order, p. 2.

³⁰ Impugned Order, para 8.

³¹ Impugned Order, paras. 5-11.

³² Impugned Order, para. 11.

CIJs failed to take these matters into account when considering the validity of the Requests.

31. Far from fulfilling the object and purpose of the applicable law, the CIJs' interpretation of the Rules will undermine them by leading to an unnecessary delay in proceedings. Although, as the CIJs state in the Impugned Order, the recording of a disagreement may be only a "matter of minutes", the consequence of doing so may lead to a longer delay in the case of certain submissions. By way of illustration, the ICP's recording of a disagreement prior to the filing of a Supplementary Submission in Case 004 (an action which neither the ICP nor the NCP deemed necessary according to the Rules) has resulted in the rejection of the Supplementary Submission by the CIJs on the grounds that the Supplementary Submission was filed before the expiration of the 30 day time limit specified in Rule 71 (3).³³

V(B). THE FOUR REQUESTS ARE DIRECTLY RELATED TO THE LARGER DISAGREEMENT OVER CASE FILE 003

32. Regardless of whether, as a general matter, the Rules require (as opposed to permit) a delegation of power or recording of a disagreement prior to a Co-Prosecutor taking individual action, the ICP submits that it was not required in the present case.
33. The Requests are directly related to the Introductory Submission and still fall under the initial disagreement. This initial disagreement over Case File 003 was concluded by the PTC Judges on 18 August 2009 when they failed to reach a decision on the matter and determined that, pursuant to Internal Rule 53 (1), the ICP must, on his own, forward the Introductory Submission to the CIJs to open judicial investigations.³⁴
34. Accordingly, the only logical consequence of the earlier disagreement, as resolved by the PTC Considerations, is that the ICP should continue to act alone whenever a prosecutorial act concerns the Introductory Submission. The four Requests all derive from the initial seizure of the CIJs of the criminal facts described in that Introductory Submission.

³³ Decision on Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 28 June 2011, D27/3.

³⁴ PTC, Annex I: Public Redacted Version, Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para 45. *Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'*

35. The fact that the NCP decided not to sign the Requests (and the subsequent acts related to these requests) illustrates her continuous disagreement with the ICP as for any additional prosecutions beyond Case Files 001 and 002. The position of the NCP on this issue has not varied at all since the initial disagreement in Case File 003. Indeed, on 10 May 2011, the NCP issued a public statement confirming her continued opposition to Case 003 proceeding.³⁵

36. [REDACTED]

37. Any interpretation of the Agreement, ECCC Law or Internal Rules that would require that for each and every minor prosecutorial act taken a new disagreement should be recorded, in circumstances where the nature of the agreement has not evolved since the initial disagreement was recorded, would frustrate the object and purpose of the ECCC statutory rules as described in section V (B) (ii) above.

V(C). ALTERNATIVELY, IF THE PRE-TRIAL CHAMBER CONSIDERS THE DELEGATION OF POWER OR RECORDING OF DISAGREEMENT MANDATORY TO FILE INDEPENDENTLY, THE CIJS ERRED IN REJECTING THE REQUESTS

38. In the event that the PTC considers a delegation of power or a recording of disagreement to have been technically required in order for the ICP to file the requests individually, the ICP submits as an alternative argument that the CIJs erred in rejecting the requests.

(i) The CIJs failed to take into account the fundamental principles articulated in Rule 21

39. Rule 21 stipulates that in all instances, the fairness, transparency and legal certainty of the proceedings shall be taken into account. Rule 21 also mandates that a balance amongst the rights of all parties, including the rights of the Co-Prosecutors and the victims must be preserved.

³⁵ Statement from the National Co-Prosecutor Regarding Case File 003, 10 May 2011, available on ECCC website.

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

40. Rule 2 highlights the overriding importance of Rule 21. Rule 2 provides that “when a question arises which is not addressed by the Internal Rules, the Co-Prosecutors, the Co-Investigating Judges or the Chambers shall decide in accordance with Article 12 (1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, *having particular attention to the fundamental principles set out in Rule 21*”.³⁶ [Emphasis added]
41. The PTC has also confirmed the need to take Rule 21 into account in all decision making, including notably decisions on investigative requests. In its September 2010 decision, the PTC held that when considering whether to grant investigate requests it is the “*obligation* of both the Co-Investigating Judges and the Pre-Trial Chamber to take into consideration the fundamental principles laid out in Internal Rule 21”.³⁷ [Emphasis added]
42. Furthermore, the PTC has recognized that pursuant to Rule 21, it has “a duty to ensure that proceedings before the ECCC are fair”.³⁸ The PTC held that this, in part, involves treating all people equally before court and interpreting the law so as to always ‘safeguard the interests of all’ the parties involved.³⁹
43. The ICP submits that the Impugned Order did not pay due regard to Rule 21 considerations regarding fairness, transparency and legal certainty or the interests of the parties.

Fairness, Transparency and Legal Certainty

44. The rejection of the Requests by the CIJs was a disproportionate response given the technical nature of the alleged deficiencies and the fact that any such deficiencies would not have a substantive impact on the proceedings. Ironically, both the Co-Prosecutors and CIJs are in agreement that the delegation of power under Rule 13 (3) and the recording of a disagreement under Rule 71 (1) are mere formalities. In the Impugned Order, the CIJs acknowledged the procedural insignificance of these

³⁶ Rule 2.

³⁷ Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 27 September 2010, D365/2/17, para. 47.

³⁸ Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 35.

³⁹ *Ibid*, para.35

Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’

requirements.⁴⁰ Specifically, the CIJs held that to delegate power according to Rule 13 (3) or to record a disagreement according to Rule 71 (1) “is a matter of minutes”.⁴¹ Further, the CIJs noted that were a disagreement to be recorded there was no obligation to bring the disagreement before the PTC.⁴²

45. Rather than rejecting the Requests, it would have been more appropriate and fair for the CIJs to have either more broadly interpreted the Rules to achieve the object and purpose of the court or to have been more transparent about their interpretation of the Rules in their First Order which would have provided the ICP with an opportunity to remedy the alleged deficiencies.
46. The PTC has clarified that, in certain circumstances, Rule 21 can justify a broader interpretation of the Rules.⁴³ The PTC stated that it is appropriate to do so when there is a serious question regarding “the fairness of the proceedings as provided in Internal Rule 21(1)(a)”⁴⁴ and that it is necessary to determine on a case by case basis “whether, on balance, ‘the facts and circumstances’ of the appeals required a broader interpretation.”⁴⁵ While, to date, Rule 21 has only been invoked by the PTC to broaden the Charged Persons’ right to appeal, the principle of procedural fairness articulated in these decisions could have been followed by the CIJs in the present circumstances to interpret the rights of the Co-Prosecutors as giving them the authority to take action individually.⁴⁶
47. Alternatively, the CIJs could have been more transparent in their First Order about their interpretation of the Rules which would have provided the ICP with the opportunity to remedy the perceived procedural defects in the Requests. As noted above, in their First Order, the CIJs placed emphasis on the need to “ascertain whether the National Co-Prosecutor was given the opportunity to exercise her rights under Rule 13 (3) and Rule

⁴⁰ Impugned Order, para. 11.

⁴¹ Impugned Order, para. 11.

⁴² Impugned Order, para. 11.

⁴³ Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/2/15 (citing Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, D97/15/9, paras. 30-34 and Decision on Abuse of Process, 10 August 2010, D264/2/6, para. 30)

⁴⁴ Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/2/15, para. 71.

⁴⁵ *Ibid.*, para. 73 (citing Decision on Abuse of Process, 10 August 2010, D264/2/6, ERN 00543781-99, para. 14 and Decision on Joint Criminal Enterprise, D97/15/9, ERN 00486521-89, para. 30)

⁴⁶ Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/2/15; Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, D97/15/9; Decision on Abuse of Process, 10 August 2010, D264/2/6.

Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’

71 (1).” However, in the Impugned Order, the CIJs did not place any weight on the fact that the NCP had in fact been given this opportunity and freely decided not to do so. Had the CIJs’ First Order explicitly stated that in order for the CIJs to consider the requests, the Co-Prosecutors must either delegate power under Internal Rule 13 (1) or record a disagreement under Rule 71 (1), the Co-Prosecutors would have been put on notice and could have taken appropriate steps to remedy the perceived procedural deficiency. This would have avoided the need for this appeal and the consequent delay in the proceedings. That the ICP would have taken such steps is supported by the fact that Co-Prosecutors, despite their disagreement with the CIJs’ interpretation of the Internal Rules, recorded four disagreements on 10 June 2011.

48. Furthermore, as examined in section V (A) (ii) above, the CIJs’ rejection of the Requests departed from prior practice at the ECCC, including the CIJs’ own prior practice. By doing so, the CIJs failed to consider the principles of legal certainty and consistency enshrined in Rule 21.
49. Finally, in the Impugned Order, the CIJs required the Co-Prosecutors either to indicate that the legal requirements of Rule 13 or Rule 71 were met or to “demonstrate convincingly that it was impossible to meet them”.⁴⁷ By requiring the latter, the CIJs imposed an additional burden on the Co-Prosecutors that has no legal basis as it is not in either Rule 13 or Rule 71 and therefore could not be foreseen.

Rights of the Parties

50. The Impugned Order violates the rights of the Co-Prosecutors, Civil Parties and victims.
51. With regard to the Co-Prosecutors, the Impugned Order interferes with their rights to control their own internal procedures and to monitor and ensure that investigations are properly carried out. The Office of the Co-Prosecutors is an independent office within the ECCC.⁴⁸ In recognition of its independence, the Rules provide that the Office of the Co-Prosecutors is legally entitled to control its own internal affairs. Specifically, Rule 13 (2) empowers the Co-Prosecutors to adopt and approve administrative regulations of their office following consultation with judicial offices and the Office of

⁴⁷ Impugned Order, para. 9.

⁴⁸ Rule 13 (1).

*Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’
‘Decision on Time Extension Request and Investigative Requests’*

Administration on matters that may affect them.⁴⁹ Rule 13 (6) provides that decisions of the Co-Prosecutors are not subject to appeal.⁵⁰ Accordingly, whether to delegate power or to record a disagreement is an internal matter to be determined by each Co-Prosecutor that should not interfere with the sequence of the investigation, as long as they were each given the opportunity to exercise their rights under Rules 13 (3) and 71 (1).

52. Additionally, under Rules 55 (10) and 66 (1), it is the fundamental right of the Co-Prosecutors to monitor the investigations, which includes filing further investigative requests after the conclusion of the investigation.⁵¹ This monitoring is rendered even more necessary by the fact that the Co-Prosecutors (or the ICP in this Case 003) are precisely the authorities seizing the CIJs of the criminal facts and therefore determining the scope of the mandatory investigations to be conducted. They have the right and the obligation to ensure, as the initiating party, that the mandate given to the CIJs has been fulfilled and the investigations have been properly conducted and are completed.
53. In addition, Rule 21 (1) (a) requires that ECCC proceedings “guarantee the separation between those authorities responsible for prosecuting and those responsible for adjudication”.
54. Provisions such as Rule 56 (1) vest in the ECCC Judges implied powers to enforce the specific duties and obligations of the parties. However, those powers must be exercised in the interests of safeguarding the integrity of the proceedings and consistently with the applicable legislative framework.
55. By issuing an order in this manner, the CIJs have interfered with the internal affairs of the Co-Prosecutors and prevented the ICP from fulfilling his legal obligations to control the scope of and to monitor the investigations.
56. With respect to the victims, their rights have been particularly harmed by the rejection of the Request for an Extension of Time for the Filing of Civil Party applications.

⁴⁹ Rule 13 (2).

⁵⁰ Rule 13 (6).

⁵¹ Rule 55 (10); Rule 66 (1).

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

57. Victims have expansive rights with respect to ECCC proceedings, including but not limited to the right to be informed. These rights are enshrined in the Rules,⁵² and have been recognised and expanded upon by the PTC.⁵³ Specifically, Rule (21) (1) (c) requires the ECCC “to ensure that victims are kept *informed* and that their rights are respected *throughout* the proceedings”.⁵⁴ Additionally, Rule 21 provides that all applicable ECCC law, including the Internal Rules, “*shall* be interpreted so as to *always safeguard the interests* of Suspects, Charged Persons, Accused and *Victims* .”⁵⁵ [Emphasis added.]
58. This right is of utmost importance during the pre-trial stage as access to information concerning the investigation is essential in order for a victim to become a civil party. Given that the victims have not been given adequate access to information, the ICP, as a representative of the public interest, has a moral and legal duty to act on the victims’ behalf in order to safeguard their rights.
59. The PTC has recognized that civil parties, like all other parties to the proceedings, have a right to procedural fairness.⁵⁶ The PTC defined procedural fairness as “a transparent and authorised procedure where the rights and obligations are properly provided, expressed and applied. In this way there is certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner.”⁵⁷ The due process guarantees must extend to the provision of information concerning the scope of the investigation, which enables the victims to file their civil party applications in a timely manner and in accordance with the requirements of the Rules.⁵⁸
60. Furthermore, the PTC has held that pursuant to Rule 21, the CIJs are under an obligation to display due diligence with respect to decisions that implicate the fundamental rights of victims.⁵⁹ Specifically, although it acknowledged that the Rules mandate a level of confidentiality with respect to OCIJ investigations, the PTC

⁵² See, e.g. Rules 21, 23, 23 bis.

⁵³ See generally, Decision on Civil Party Participation in Provision Detention Appeals, 20 March 2008, C11/53, ERN 00172886-905.

⁵⁴ Rule 21 (1) (c).

⁵⁵ Rule 21 (1).

⁵⁶ Decision on Appeals against Co-Investigating Judges’ Combined Order dated 13 January 2010 and Order dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D274/4/5, para. 13.

⁵⁷ *Ibid.*, para. 13.

⁵⁸ International Co-Prosecutor’s Appeal Against the Order on International Co-Prosecutor’s Public Statement Regarding Case File 003, 25 May 2011, D14/1/1, para. 52.

⁵⁹ Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 54.

Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’

nevertheless held that the confidentiality provisions “should, at all times, be read in conjunction with the provisions of the fundamental principles of procedure before the ECCC which require that ‘victims are kept informed and that their rights are respected *throughout* the proceedings’”. The PTC further held that “Internal Rule 21 (1) (c) does not leave room for interpretation”.⁶⁰ [Original emphasis]

61. The right to be informed is essential in order for victims to exercise their rights. According to the Rules, to be admitted as a civil party, an individual must demonstrate that he or she has in fact suffered physical, material or psychological injury, which is a direct consequence of at least one of the crimes being investigated.⁶¹ All civil party applications “must provide details of the status of the Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator”.⁶²
62. The PTC also noted that the victims’ right to be informed throughout the proceedings is particularly necessary because unlike the lawyers of the parties to the proceedings, the legal representatives of the victims do not have an automatic right of access to the case file, making them fully dependent on the information they get from the CIJs.⁶³ Furthermore, the PTC noted that since the decision regarding the admissibility of Civil Parties is solely within the jurisdiction of the CIJs with an appeal to the PTC and not, as it was in the past, within the Jurisdiction of the Trial Chamber, the necessity for proper and timely information to be provided to the victims throughout the pre-trial phase is “significantly more compelling than before.”⁶⁴
63. With respect to Case 003, the victims have not been properly informed. While in Case 002, pursuant to their authority under Rule 56 (2) the CIJs issued a public notice of the sites and criminal events under investigation prior to the conclusion of the investigation,⁶⁵ in Case 003 no such action was taken.⁶⁶

⁶⁰ Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 52.

⁶¹ Rule 23 *bis* (1).

⁶² Rule 23 *bis* (4).

⁶³ Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 52.

⁶⁴ Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 53.

⁶⁵ Statement from the Co-Investigating Judges, Judicial Investigation of Case 002/19-09-2007 ECCC-OCIJ and Civil Party Applications, 5 November 2009, available on the ECCC website.

⁶⁶ First Investigative Request, para. 19.

Public redacted version - International Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ ‘Decision on Time Extension Request and Investigative Requests’

64. The Notice of Conclusion of the Judicial Investigation triggered the 15-day deadline for victims to file civil party applications.⁶⁷ However, prior to this Notice, no public information had been provided concerning the scope of the investigation. Only one Rogatory Letter was declassified; however, it was not made available until after the closure of the investigation.⁶⁸
65. Due to this lack of information, [REDACTED] civil party applications were filed prior to the issuance of the Notice of Conclusion without any official information regarding the scope of the investigation. In contrast, there were 4,128 applications in Case 002.⁶⁹
66. In light of the limited number of applicants, the ICP first disclosed a summary of the information contained in the Introductory Submission in a press release and then submitted a request for an extension of the deadline for Civil Party applications.⁷⁰ The CIJs responded with a press release that extended the deadline by three weeks.⁷¹ However, the victims were not informed about the extension in advance; as a result, potential Civil Parties only learned about the extension on the day the press release was issued, which was one day prior to the expiration of the extended deadline. This amounts to a deliberate gross violation of the Victims' rights.

(ii) The CIJs' failure to consider the Requests contravenes the CIJs' legal obligation to conduct a complete and impartial investigation

67. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.⁷² The CIJs are required by law to take any and all investigative actions that are conducive to ascertaining the truth.⁷³ In all cases, they must conduct their investigation impartially.⁷⁴
68. Further, the CIJs are under a duty to inform the Co-Prosecutors when new facts are discovered during the investigation.⁷⁵ The CIJs are also required to consider all

⁶⁷ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁶⁸ First Investigative Request, paras 3, 14.

⁶⁹ Case 002, Closing Order, 15 September 2010, ERN 00604508-5247, D427, para. 10.

⁷⁰ Request for an Extension of Time.

⁷¹ Press Release, Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor, 7 June 2011, para. 4.

⁷² Rule 55 (1).

⁷³ Rule 55 (5).

⁷⁴ Rule 55 (5).

⁷⁵ Rule 55 (3).

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

investigative requests from the Co-Prosecutors or other parties. If the CIJs do not agree with the request, they shall issue a reasoned order as soon as possible.⁷⁶

69. As stated earlier, the three additional investigative requests are essential as the CIJs' initial investigation is deemed incomplete by the ICP. [REDACTED]

[REDACTED]

by both documentary and testimonial evidence.⁷⁸

70. [REDACTED]

[REDACTED]

71. The ICP believes that his three investigative requests, which include among other things: adding a number of Case File 002 documents to Case File 003; [REDACTED]

[REDACTED]

⁷⁶ Rule 55 (10).

⁷⁷ [REDACTED]
⁷⁸ [REDACTED]
⁷⁹ [REDACTED]
⁸⁰ [REDACTED]
⁸¹ [REDACTED]
⁸² [REDACTED]
⁸³ [REDACTED]
⁸⁴ [REDACTED]

72. The absence of a full investigation provides the possibility that there will be insufficient evidence to rule on a number of essential issues, including but not limited to, whether the ECCC has personal jurisdiction [REDACTED]
73. Given that the PTC has ruled that jurisdictional issues are fundamental,⁸⁶ without further investigations it is highly possible that the entire Case 003 could be dismissed. Considering that there is reason to believe that ample evidence implicating the suspects could be collected,⁸⁷ it is imperative that the ICP's three investigative requests are granted. At this stage in the procedure, it is the (first and) last chance for the ICP to have an impact on the collection of evidence in an investigation that he deemed largely incomplete. Filing a Final Submission or possibly appealing the Closing Order cannot constitute remedies for the deprivation of the right to file investigative requests as the Final Submission and appeal are not likely to influence the collection of evidence but merely contain an analysis and characterization of the evidence gathered.
74. By rejecting the requests on a mere technicality, the CIJs have failed to uphold their legal obligations pursuant to Internal Rule 55 (1) and have interfered with the fundamental purpose of the ECCC, which is to bring to justice the senior leaders of the Democratic Kampuchea and those who were most responsible for crimes referred to article 1 of the Agreement between the Royal Government and the United Nations.

VI. CONCLUSION

75. For the reasons set out above, the International Co-Prosecutor requests the Pre-Trial Chamber:
- (a) To hold that the Impugned Order is invalid on the grounds that:
- (i) The CIJs relied on an incorrect interpretation of the governing law;
- (ii) The initial disagreement recorded in relation to the Introductory Submission in Case File 003 encompasses all subsequent actions and therefore no new recording of a disagreement was necessary;

⁸⁵ [REDACTED]

⁸⁶ Case 002: Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/3/15, p. 32.

⁸⁷ First Investigative Request, para. 8.

Public redacted version - International Co-Prosecutor's Appeal Against the Co-Investigating Judges' 'Decision on Time Extension Request and Investigative Requests'

- (iii) Alternatively, by rejecting the Requests as invalid the CIJs failed to take into account the fundamental principles articulated in Rule 21 and contravened their legal obligation to conduct a complete and impartial investigation.
- (b) To direct the CIJs to consider the ICP's four Requests on the merits.
- (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.
- (d) To expedite its consideration of, and decision on, the Appeal having regard to the central importance of this issue to the integrity and public reputation of the ECCC, the internal procedures of the OCP and every future step to be taken by the ICP in Cases 003 and 004.

Respectfully submitted,

Date	Name	Place	Signature
7 July 2011	Andrew CAYLEY International Co-Prosecutor	