

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

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**INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST
THE "ORDER ON INTERNATIONAL CO-PROSECUTOR'S PUBLIC STATEMENT
REGARDING CASE FILE 003"**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. Pursuant to Subrules 74(2) and 21 of the ECCC Internal Rules, the International Co-Prosecutor hereby submits this appeal against the Co-Investigating Judges' (CIJ) "Order on International Co-Prosecutor's Public Statement Regarding Case File 003" issued on 18 May 2011 (the 'Retraction Order').¹ Pursuant to Article 7.2 of the Practice Direction on Filing of Documents Before the ECCC (Rev. 6), the International Co-Prosecutor respectfully seeks leave of the Chamber to initially file this Appeal in English, with a translation into Khmer to follow at the first opportunity, and at the latest on Tuesday, 31 May 2011.² The International Co-Prosecutor makes this request in light of the urgency of the matter, which arises both from the coercive nature of the Retraction Order, and from its public issuance.

2. On 7 September 2009, the Acting International Co-Prosecutor submitted to the Co-Investigating Judges the Second Introductory Submission (the 'Introductory Submission') opening a judicial investigation in this case.³ The CIJ placed the Introductory Submission on the Case File on 21 April 2010.

3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The current International Co-Investigating Judge was appointed by His Majesty the King, and assumed office, on 1 December 2010.⁶

¹ Order on International Co-Prosecutor's Public Statement Regarding Case File 003, 18 May 2011, D14 (hereinafter the 'Retraction Order').

² While translation of this appeal into Khmer is already under way, given the complexity of the issues raised, it will require at least four days for revision and finalisation.

³ Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

⁴ Rogatory Letter, 9 June 2010, D2.

⁵

4. On 2 February 2011 the CIJ issued a press release stating that they had established joint working groups whose work was “focused on examining and analyzing the documents available on the Case Files, particularly the existing documents in the previous Case Files 001 and 002.” They also indicated that, “at this stage, no field investigation is being conducted.”⁷ [REDACTED]

5. [REDACTED]

[REDACTED] On 29 April 2011, the CIJ issued a Notice of Conclusion of the Judicial Investigation informing the Co-Prosecutors that the CIJ “consider the investigation has been concluded.”¹¹

[REDACTED]

7. Following receipt of the Notice of Conclusion of the Investigation, the International Co-Prosecutor undertook an urgent review of the Case File in accordance with his obligations under Subrule 66(5), and concluded that the investigation had not been completed. [REDACTED]

⁶ [REDACTED]
⁶ Press Release – Dr. Siegfried Blunk Appointed as New International Co-Investigating Judge, 1 December 2010 (Annex 1).
⁷ Statement from the Co-Investigating Judges, 2 February 2011 (Annex 2).
⁸ [REDACTED]
⁹ [REDACTED]
¹⁰ [REDACTED]

¹¹ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13, at page 2.
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8. On 9 May 2011 the International Co-Prosecutor issued a press release entitled "Statement by the International Co-Prosecutor Regarding Case File 003" (the 'Public Statement') in which he: i) provided an objective summary of the Second Introductory Submission; ii) stated his view that the judicial investigation was not completed; iii) provided a general summary of the investigative requests he intended to file with the CIJ; iv) informed the public that the deadline to file civil party applications was 15 days from the date of issuance of the Notice of Conclusion; and v) indicated that he would request an extension of the deadline for civil party applications by a further six weeks.¹² On 10 May 2011, the International Co-Prosecutor filed his Request for an Extension of Time for the Filing of Civil Party Applications.¹³ On 18 May 2011, the International Co-Prosecutor filed three investigative requests [REDACTED]
9. On the same day, the CIJ issued the Retraction Order, by which they ordered the International Co-Prosecutor to retract, within three working days, those parts of the Public Statement which contained: i) an expression of his opinion regarding crimes which are required to be judicially investigated ('Item A'); and ii) a summary of his intended investigative requests ('Item B'). In relation to Item A, the CIJ held that the International Co-Prosecutor was not entitled to "express publicly his opinion."¹⁵ With respect to Item B, they held that "by informing the public in advance and in detail" about his intended investigative requests, the International Co-Prosecutor "has violated the Rule of Confidentiality."¹⁶
10. The International Co-Prosecutor filed a Notice of Appeal against the Retraction Order on 19 May 2011.¹⁷ As stated in the Notice, unless the Pre-Trial Chamber orders otherwise, the International Co-Prosecutor considers the Retraction Order to be stayed

¹² Press Release: Statement by the International Co-Prosecutor Regarding Case File 003, 9 May 2011 (Annex 3).

¹³ International Co-Prosecutor's Request for an Extension of Time for the Filing of Civil Party Applications, 10 May 2011, D15.

¹⁴ [REDACTED]

¹⁵ Retraction Order, paragraph 4.

¹⁶ Retraction Order, paragraph 7.

¹⁷ Record of Appeals, 19 May 2011, D14/1.

pending the determination of this Appeal. The International Co-Prosecutor respectfully submits that an issuance of a retraction at this stage would render the Appeal moot and frustrate the International Co-Prosecutor's right to seek redress before the Pre-Trial Chamber.

II. OVERVIEW OF THE APPEAL

11. The International Co-Prosecutor submits that the Retraction Order should be overturned on the following grounds:
 - (a) In relation to the part dealing with "Item A:"
 - i The Retraction Order does not make reference to, and is not supported by, any provision of the ECCC Law, the Internal Rules or relevant international legal principles. The Retraction Order therefore lacks any legal basis, and is void *ab initio*.
 - ii Further and in the alternative:
 - (A) The CIJ erred in concluding that the International Co-Prosecutor had no legal basis to express publically his opinion about "crimes required to be judicially investigated;" and
 - (B) In stating the opinion, the International Co-Prosecutor acted within his powers and consistent with his obligations under the Law and the Internal Rules.
 - (b) In relation to the part dealing with "Item B," the Public Statement does not contravene Subrule 56(1), as it does not contain any confidential information the release of which prejudices the rights or interests of any party.
 - (c) In addition to the grounds set out above, the Order is unreasonable, arbitrary and of no effect as it: i) fails to give adequate reasons; ii) directs the International Co-Prosecutor to "retract" information which is in the public domain, and which the CIJ themselves restated publically; iii) interferes with the International Co-Prosecutor's exercise of his obligations under the Law and the Rules; and iv)

serves no purpose other than to act as a public rebuke to the International Co-Prosecutor.

III. ADMISSIBILITY

12. The International Co-Prosecutor received notice of the Retraction Order on 18 May 2011. He filed the Notice of Appeal on 19 May 2011, and these submissions on 25 May 2011, thereby complying within the deadlines set out in Subrules 75(1) and (3).
13. Pursuant to Subrule 74(2) the Co-Prosecutors may appeal all orders of the Co-Investigating Judges. Although this appeal is filed by the International Co-Prosecutor alone, it is admissible as:
 - (a) Pursuant to Subrule 1(2), actions by the Co-Prosecutors may be carried out jointly, or by each of them acting individually.
 - (b) Since no disagreement has been registered or disagreement proceedings initiated by either of the Co-Prosecutors, Subrule 71(3)(d) does not prevent the filing of this appeal.
 - (c) The practice of filings by one Co-Prosecutor or one Co-Investigating Judge alone has been recognised as valid in this case.¹⁸
 - (d) If the Pre-Trial Chamber disagrees with the submissions in sub-paragraphs (a) – (c) above, it should nevertheless find the appeal admissible on the basis of Subrule 21(1), as:
 - i The Retraction Order is addressed to the International Co-Prosecutor alone and directly concerns his interests as an independent officer of the Court. Denying the International Co-Prosecutor a right of appeal against such an

¹⁸ The Introductory Submission was filed by the International Co-Prosecutor in accordance with the Pre-Trial Chamber's considerations of 18 August 2009 (D1/1); [REDACTED]

¹⁹ See, for example, the following decisions by the Pre-Trial Chamber in Case 002: Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, 21 March 2008, A104/II/4, at page 3; Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, at pages 10-14; and Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, at page 9.

order would be inconsistent with the fundamental principles of fairness, legal certainty and transparency enshrined in Subrule 21(1).

- ii The Retraction Order raises issues of fundamental importance which have not been adjudicated upon by the Pre-Trial Chamber. The Pre-Trial Chamber's decision on merits will provide guidance to the Co-Investigating Judges and other parties, and thereby promote greater legal certainty. It will also further strengthen public confidence in the institution.

IV. STANDARD OF REVIEW

14. The International Co-Prosecutor submits that the following standards of review apply to the two parts of the Retraction Order:

- (a) **Item A of the Public Statement**: As indicated above, the International Co-Prosecutor submits that the CIJ acted outside their powers in ordering the retraction of a statement of opinion, and thereby exceeded their jurisdiction. This part of the Order is therefore void *ab initio*, and the applicable standard of review is that which governs errors of jurisdiction – if the judges acted outside their express or implied legal authority, the order must be declared a nullity. However, should the Pre-Trial Chamber find that the CIJ did have the power to order the retraction of an opinion, it should apply the same standard as that set out in subparagraph (b) below. In that case, this part of the Retraction Order should be overturned due to an incorrect interpretation of the law and/or an abuse of discretion by the CIJ.
- (b) **Item B of the Public Statement**: While the International Co-Prosecutor acknowledges that the CIJ have implied discretionary powers to make orders with respect to the confidentiality of the judicial investigation, he submits that the CIJ erred in exercising their discretion. The standard to be applied to this part of the appeal is that set out in the Pre-Trial Chamber's Decision on the "SMD" Appeal. Under this test, an exercise of discretion will be overturned if the challenged decision was: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to

constitute an abuse of the discretion.²⁰ This part of the Order should be overturned on the basis of parts 1 and/or 3 of the test.

V. ARGUMENT

V(A). Item A of the Public Statement

The Order is Void Ab Initio, or Based on an Incorrect Interpretation of the Law

15. In the Retraction Order, the CIJ accept that the International Co-Prosecutor was entitled to issue publicly a summary of the crime sites and criminal events under investigation.²¹ However, they take issue with the International Co-Prosecutor's expression of *an opinion*. While this part of the Retraction Order is not entirely clear, it appears that the CIJ took the view that: i) the International Co-Prosecutor had no right to express an opinion; and / or ii) the opinion that the alleged criminal acts *were required to be judicially investigated* is without legal basis.²² For the sake of completeness, the International Co-Prosecutor will deal with both of these issues.
16. Despite the absence of sufficient reasoning in the Retraction Order, it appears that the CIJ concluded that, since they find that the International Co-Prosecutor did not have a "legal basis" to express an opinion, and / or since the opinion itself is without legal basis (i.e. incorrect), they are empowered to order its retraction. The International Co-Prosecutor submits that this conclusion is fundamentally flawed.
17. The Internal Rules contain provisions pursuant to which the CIJ may issue coercive orders. For example, Subrule 35(1) empowers the CIJ to sanction or refer to appropriate authorities any person who knowingly or willfully interferes with the administration of justice. Nothing in the Order suggests that the CIJ found this, or any other express rule, applicable to the present circumstances.
18. The International Co-Prosecutor accepts that, as guardians of the judicial process in any legal system, the courts have implied powers to make such orders as may be necessary

²⁰ Case 002: Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, at pages 10-11.

²¹ See paragraph 4 of the Retraction Order.

²² See paragraph I(1) of the Retraction Order: "[I]nformation about crimes that according to the opinion of the International Co-Prosecutor required (sic) to be judicially investigated." (emphases added).

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for the effective discharge of their functions.²³ However, the powers to issue coercive orders against parties are confined to circumstances in which there is a risk of an interference with the administration of justice.²⁴ This principle has been recognised by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Dealing with the principle of contempt of court, the ICTY Appeals Chamber “found it necessary to emphasise” that this principle “is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or a tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.”²⁵ Again, nothing in the Retraction Order indicates that the CIJ came to a view that the International Co-Prosecutor’s expression of his legal opinion unduly interfered with the proceedings.

19. Provisions such as Subrule 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. In the present context, the relevant framework includes provisions dealing with the independence of the Co-Prosecutors, as well as principles governing the publicity of the proceedings.
20. Subrule 13(1) states that “[t]he Office of the Co-Prosecutors shall operate as an independent office within the ECCC.” Subrule 13(2) empowers the Co-Prosecutors to adopt and approve administrative regulations of their office following consultation with judicial offices and the Office of Administration on matters which may affect them. Pursuant to Subrule 13(6), decisions of the Co-Prosecutors are not subject to appeal.
21. The following general provisions are also relevant:

Subrule 21(1)(a)

ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. **They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication.** (*emphasis added*)

²³ See, for example, Prosecutor v Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 October 1997, at paragraph 33.

²⁴ In the Case of Prosecutor v Thomas Lubanga Dyilo, Decision on the press interview with Ms Le Fraper du Hellen, Case No ICC-01/04-01/06, 12 May 2010, at paragraph 36.

²⁵ Prosecutor v Dusko Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No IT-94-1-A-R77, 31 January 2002, at paragraph 16.

Article 12(2) of the Agreement on the ECCC (which has the force of law in Cambodia)²⁶:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that **representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings** before the Extraordinary Chambers. **Any exclusion from such proceedings** in accordance with the provisions of Article 14 of the Covenant **shall only be to the extent strictly necessary** in the opinion of the Chamber concerned and **where publicity would prejudice the interests of justice.** (*emphasis added*)

22. The Retraction Order fails to consider any of the above principles. In the CIJ's view, the mere expression of an opinion was sufficient to warrant a retraction. By issuing an order in this manner, the CIJ have acted beyond their lawful authority.²⁷ This part of the Retraction Order is therefore void *ab initio*. In the alternative, it must be overturned as it is based on an erroneous interpretation of the law.

The Order is Issued in Abuse of CIJ's Discretion

23. The Retraction Order also represents an abuse of the CIJ's discretion as it is both unfair and unreasonable. It implies that a court of law may simply censor parties' public statements of legal opinion with which it disagrees. In this regard, it is virtually unprecedented in the jurisprudence of courts dealing with cases of mass crime.
24. In implementing the principle of publicity referred to above and in the Internal Rules, the ECCC Judges, Co-Prosecutors, legal staff and other officials are encouraged to take part in public outreach activities.²⁸ Such activities are an important vehicle for informing the public about the work of the Court. The ECCC Media Policy states:

The ECCC aims to inform Cambodians throughout the country, and the world at large about the work of the Court generally, and the trial process in particular, to facilitate their understanding and involvement, and to foster their support for this work.²⁹

25. As part of outreach activities, ECCC officials are often called upon to express their views regarding various legal duties and obligations provided for in the ECCC Law and

²⁶ Article 47 bis new of the ECCC Law.

²⁷ The CIJ's reference to Subrule 55(1) does not establish a legal basis for the Retraction Order, as that provision simply makes a judicial investigation compulsory.

²⁸ ECCC Media, Outreach and External Relations Policy, January 2008, page 3 (Annex 4).

²⁹ Ibid.

Internal Rules. While they are not binding on the Court, such discussions contribute to public discourse and reinforce the public's confidence in this institution.

26. The Retraction Order effectively seeks to censor this activity: it seeks to prevent the International Co-Prosecutor, a public official charged with a shared responsibility of initiating judicial investigations and conducting prosecutions before the ECCC, from publicly stating his opinion as to the law governing those proceedings. By doing so, it unduly interferes with the exercise by the International Co-Prosecutor of his independent functions and contravenes the principle of separation of prosecutorial and judicial functions within the Court.³⁰
27. If the CIJ disagree with the International Co-Prosecutor's view on the law governing the judicial investigation, they will have the opportunity to state so in a reasoned decision in the Closing Order. They are also free to contribute to the public discussion on the work of the Court, as they have done in the past (including by informing the public, on 2 February 2011, of the types of investigative activities they are undertaking).³¹ However, their disagreement with the International Co-Prosecutor on an issue of legal interpretation does not entitle them to order him to withdraw his publicly stated opinion. As a former Judge of the ICTY has commented in relation to the much more serious challenges presented by unruly defendants:

“On a human level, [judges'] occasional expressions of frustration and disgust are understandable, yet nonetheless unacceptable insofar as a fair and orderly trial is concerned. The judges themselves risk undermining the integrity of the court and the process by reacting in kind to bad behaviour by the defendants or their lawyers.”³²

In any event, the Co-Prosecutor Acted Properly Within His Powers

28. The Co-Prosecutor asserts that, in expressing the opinion contained in Item A, he acted fully within his rights, and consistent with his legal obligations. The United Nations Guidelines on the Role of Prosecutors state:

³⁰ Subrule 21(1)(a). Pursuant to paragraph 10 of the United Nations Guidelines on the Role of Prosecutors (Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990), the office of prosecutors shall be strictly separated from judicial functions.

³¹ Statement from the Co-Investigating Judges, 2 February 2011.

³² Patricia M. Wald, *Tyrants on Trial – Keeping Order in the Courtroom*, Open Society Justice Initiative, 2009, at page 23

Prosecutors like other citizens are entitled to **freedom of expression**, belief, association and assembly. **In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights** and to join or form local, national or international organizations and attend their meetings, **without suffering professional disadvantage by reason of their lawful action** or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.³³ (*emphasis added*)

29. Section V(C) contains detailed submissions on the International Co-Prosecutor's obligations with respect to public communication.
30. For the sake of completeness, the International Co-Prosecutor also submits that his stated legal opinion (that the crimes alleged in the Introductory Submission are required to be judicially investigated) *is* legally sound. The correctness of this statement is plainly evident upon a review of the relevant Rules and the Court's statutory framework. The relevant provisions include:
 - (a) Subrule 49(1), which states that proceedings before the ECCC may be initiated only by the Co-Prosecutors.
 - (b) Subrule 53(1), which requires the Co-Prosecutors to open a judicial investigation if they have reason to believe that crimes within the jurisdiction of the ECCC have been committed.
 - (c) Subrules 55(1) and (2), which make a judicial investigation compulsory and restrict it to the facts set out in an introductory or supplementary submission.
 - (d) Subrule 55(5) which states that the investigation must be conducted impartially, whether the evidence is inculpatory or exculpatory.
 - (e) Subrule 67(1) which states that the CIJ shall conclude the judicial investigation by issuing a Closing Order either indicting a Charged Person or dismissing the case.
 - (f) Article 1 of the ECCC Law which states that the purpose of the law is to bring to trial the senior leaders of Democratic Kampuchea and those most responsible for the crimes committed in the period 17 April 1975 – 6 January 1979.

³³ Guidelines on the Role of Prosecutors, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at paragraph 8. *International Co-Prosecutor's Appeal Against the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003"* Page 12 of 25

- (g) Article 23 new of the ECCC Law, which states that, even in the event of a disagreement between the CIJ as to whether to proceed with an investigation, the investigation “shall proceed” unless a disagreement procedure is initiated and the Pre-Trial Chamber decides by super-majority to terminate the investigation.
31. A contrary view (that crimes alleged in an Introductory Submission may *not* be required to be judicially investigated) would undermine the structural integrity of the proceedings before the ECCC. It would enable the CIJ to simply ignore or dismiss cases initiated by the Co-Prosecutors, a position that is both untenable and inconsistent with the principles underpinning the creation of the Court, and the responsibilities of the CIJ.

V(B). ITEM B OF THE PUBLIC STATEMENT

The Retraction Order Fails to Apply the Correct Legal Test

32. In the Retraction Order, the CIJ assert that the International Co-Prosecutor violated the Rule of Confidentiality in Subrule 56(1) “by informing the public in advance and in detail about what according to Rule 66.1 ‘he will request the Co-Investigating Judges to do.’”³⁴ Subrule 56(1) states:
- 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 (*emphasis added*).
33. It is clear from the language of this provision, and the Internal Rules as a whole, that the rule of confidentiality does not represent an unqualified prohibition. Rather, it serves to preserve “the rights and interests of the parties.” The Glossary of the Internal Rules defines the term “party” to mean “the Co-Prosecutors, the Charged Person/Accused and Civil Parties.” At the time of the issuance of the Public Statement, [REDACTED] the Co-Prosecutors were *the only party* to the proceedings. By definition, therefore, the Public Statement could not contravene Subrule 56(1), since there were no parties whose rights could in any way be affected by it.
34. In the alternative, even if unnamed suspects and witnesses were to be considered “parties” whose rights and interests are protected by Subrule 56(1), the Retraction

³⁴ Retraction Order at page 4.

Order is legally invalid. It suggests that the publication of the general contents of the International Co-Prosecutor's intended investigative requests, without more, amounts to a breach of Subrule 56(1). It therefore fails to:

- (a) identify the rights or interests which may be jeopardised, and
- (b) assess what response is strictly necessary to protect those rights or interests, as mandated by Article 12(2) of the ECCC Agreement.

35. As a matter of logic, a statement that the CIJ will be requested to question unnamed suspects does not prejudice the rights of those individuals. In this regard, it is relevant to note the CIJ's recent decision [REDACTED]

[REDACTED]

36. [REDACTED]
[REDACTED]
[REDACTED] In any event, by publicly stating that he will request the CIJ to interview these individuals, the International Co-Prosecutor cannot be said to have interfered with their legitimate "rights and interests." Similarly, insofar as the International Co-Prosecutor refers to interviews and re-interviews of unidentified witnesses, this cannot be prejudicial to the rights or interests of those individuals.

37. The CIJ seem to have taken the view that there is a general presumption of confidentiality with regard to the judicial investigation. However, Subrule 56(1) is subject to, and must be interpreted consistent with, Subrule 21(1) of the Internal Rules and Article 12(2) of the Agreement. Confidentiality must therefore be applied in light of the need "to ensure legal certainty and transparency of proceedings," and any exclusion of the public from the proceedings must "only be to the extent strictly necessary" and "where publicity would prejudice the interest of justice."

³⁵ [REDACTED]

38. These basic principles have also been recognised by the European Court of Human Rights (the 'ECtHR'), which has consistently held that public access to judicial proceedings constitutes a fundamental fair trial principle enshrined in Article 6(1) of the European Convention on Human Rights. ECtHR has emphasised that the principle of publicity serves both to protect litigants against "the administration of justice in secret with no public scrutiny," and as "one of the means whereby confidence in the courts can be maintained." Transparency and public access to judicial proceedings therefore go hand in hand in securing fair trials: "By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1)."³⁶
39. By failing to consider the above principles, the CIJ have based this part of the Retraction Order on an incorrect interpretation of the governing law, and abused their discretion. The CIJ's abuse of its discretion is perhaps best illustrated by the fact that the Retraction Order restates in full the very information whose retraction it directs, thereby repeating the supposed confidentiality breach. This simple fact reveals that the Retraction Order is not concerned with the protection of legitimate rights and interests of affected parties, but represents an arbitrary, punitive response.
40. The CIJ's failure to properly exercise their discretion extended also to their assessment of the level of detail contained in Item B of the Public Statement. The CIJ assert that the International Co-Prosecutor informed the public "in detail" about what he will request the CIJ to do. And yet, the relevant passage of Item B simply lists five general categories of activities which the CIJ will be requested to undertake – such as "interview additional individuals," "examine further the crime sites," and "place additional evidence on the Case File." [REDACTED]
- [REDACTED] The list contained in Item B cannot be considered anything more than a general summary.

³⁶ See *inter alia* Axen v. Germany, Judgment, 8 December 1983; Application no. 8273/78, at paragraph 25; Pretto v. Italy, Judgment, 8 December 1983, Application No. 7984/77, at paragraph 21; Sutter v. Switzerland, Judgment, 22 February 1984, Application No. 8209/78, at paragraph 26; Diennet v. France, Judgment, 31 August 1995, Case No. 25/1994/472/553, at paragraph 33; and Werner v. Austria, Judgment, 24 November 1997, Case No. 138/1996/757/956, at paragraph 45.

Additional Considerations Relevant to Confidentiality

41. The Retraction Order also fails to consider specific circumstances of the ECCC which must be taken into account when interpreting the scope of the rule of confidentiality in Subrule 56(1). Those circumstances include the fact that the crimes being investigated took place more than 30 years ago, and are not of an ongoing nature. The need for confidentiality before the ECCC is therefore more limited than in trials dealing with recent crimes. This is illustrated, for example, by the fact that virtually the entire trial in Case 001 took place in open sessions without the use of protective measures for witnesses.
42. The ECCC acts as a model of best practices in judicial administration for other Cambodian courts and plays an important role in rule of law reforms in Cambodia. Subjecting the proceedings to an unnecessary level of confidentiality diminishes the ability of observers to analyse the work of the Court and sends the wrong message to national judicial institutions.
43. Undue confidentiality restrictions may also hinder the attainment of the Court's mandate, which includes creating a public historical record of the crimes committed during the period of Democratic Kampuchea. Proceedings before this Court concern events that are of deep personal and historic interest to the people of Cambodia, and reasonable access to all stages of the proceedings is therefore essential. It is relevant to note that excessive reliance on confidentiality has been the subject of stern public criticism:

“[T]he court is missing an opportunity – as well as failing to meet its obligation – to assist the people of Cambodia in understanding its work and the crimes of the Khmer Rouge period. A great deal of information can and should be provided to the public without interfering with the integrity and confidentiality of the investigative and preparatory process.”³⁷

**V(C). ISSUANCE OF THE PUBLIC STATEMENT WAS CONSISTENT WITH THE
INTERNATIONAL CO-PROSECUTOR'S DUTIES**

44. In considering this appeal and the reasonableness of the CIJ's exercise of discretion, the Pre-Trial Chamber should also have regard to the circumstances in which the Public

³⁷ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, October 2008 Update, at page 8 (Annex 5); see also Krista Nelson, 'The Presumption of Confidentiality at the ECCC: The Need for Standards to Protect Private Investigations, Provide Consistent Public Access and Increase Transparency, Searching for the Truth Magazine,' September 2010 (Annex 6). *International Co-Prosecutor's Appeal Against the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003"* Page 16 of 25

Statement was issued. A chronology of the events preceding the issuance of the Statement is set out in Section II. The relevant facts are highlighted briefly here.

45. The Notice of Conclusion of the Judicial Investigation triggered the 15 day deadline for victims to file civil party applications.³⁸ At this time, no public information had been provided concerning the scope of the investigation. [REDACTED]
[REDACTED]
[REDACTED] The CIJ had informed the public in February 2011 that they were undertaking document reviews and that no investigations in the field were taking place. [REDACTED]
[REDACTED]
46. Two years earlier, the CIJ had undertaken to “communicate more systematically about their activities in the future, and [to] publish an increased number of documents with regard to the judicial investigation.”³⁹ Yet, over a period of 20 months since the opening of the judicial investigation in Case 003, the CIJ did not issue a single public decision. In fact, the Notice of Conclusion of the Investigation was the first public decision issued in this case. [REDACTED]
[REDACTED]
[REDACTED] This stood in stark contrast with 4,128 applications in Case 002.⁴⁰
47. In these circumstances, having formed the view that the investigation was not complete and that large numbers of victims had not been able to exercise their rights, the International Co-Prosecutor acted pursuant to Rules 21 and 54 and in good faith to inform the public of the crime sites and of his intended steps in general terms. The considerations which warranted the issuance of the Public Statement are discussed below.

Consideration of Victims' Rights

48. Victim participation is a key component of the criminal procedure applicable before the ECCC. The Rules enable individuals admitted as civil parties to participate in all stages of the proceedings, including the judicial investigation. However, to be admitted as a

³⁸ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13, at page 2.

³⁹ Press Release by the Co-Investigating Judges, 3 March 2009 (Annex 7).

⁴⁰ Case 002: Closing Order, 15 September 2010, D427, at paragraph 10.

civil party, an individual must demonstrate that he / she has in fact suffered physical, material or psychological injury which is a direct consequence of at least one of the crimes being investigated.⁴¹

49. The Rules require the ECCC to ensure that victims are kept informed and that their rights are respected throughout the proceedings.⁴² Similar obligations are imposed on prosecutors by the Code for Prosecutors issued by the International Association of Prosecutors,⁴³ and, as indicated below, by the ICTY Office of the Prosecutor.
50. In commenting on Case 002, observers have noted that “the lack of meaningful and timely information about the nature and progress of the judicial investigation severely limits the ability of victims to exercise their rights as civil parties.”⁴⁴ While in Case 002, the CIJ issued a public notice of the sites and criminal events under investigation prior to the conclusion of the investigation,⁴⁵ in Case 003 such action was not taken.
51. Judges of the Pre-Trial Chamber have held that civil parties have a right to procedural fairness, which is protected by the principles of transparency and certainty.⁴⁶ They 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.”⁴⁷ They recognised that judges may not change procedures as a matter of expediency or for other unauthorised reason.⁴⁸
52. 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 Internal Rules. Furthermore, the provision of such information enhances the Court’s ability to obtain

⁴¹ Subrule 23bis(1).

⁴² Subrule 21(1)(c).

⁴³ Article 4.3 of the *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999.

⁴⁴ Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, November 2009, at page 30 (Annex 8).

⁴⁵ Statement from the Co-Investigating Judges - Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications, 5 November 2009 (Annex 9).

⁴⁶ Case 002: Decision on Appeals against Co-Investigating Judges’ Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D274/4/5, at page 40.

⁴⁷ Ibid.

⁴⁸ Ibid.

the assistance of victims, witnesses and complainants, as was amply demonstrated in Case 002 [REDACTED]

53. The fact that the CIJ chose not to charge any person during the investigation does not preclude potential civil parties from applying for civil party status. The Internal Rules do not require the naming of a charged person before a victim can apply to be a civil party. Subrule 23(1)(a) provides that the purpose of Civil Party action before the ECCC is to:

Participate in criminal proceedings **against those responsible for crimes within the jurisdiction** of the ECCC by supporting the prosecution. (*emphasis added*)

Subrule 23 *bis* (2) states:

A Victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to IR 66(1).⁴⁹

54. The Cambodian Code of Criminal Procedure also does not require a suspect to have been named before a civil party can become involved in proceedings.

Article 139 of the Code states:

The investigating judge confirms the reception of a complaint with an application to become a civil party in an order. The investigating judge sends this request to the Royal Prosecutor. After seeing the complaint with an application to become a civil party, the Prosecutor files an introductory submission with the investigating judge. **This introductory submission may be made against unidentified persons**, even if the civil party names one or more persons.⁵⁰ (*emphasis added*)

Article 124 of the Code provides, in the relevant part:

As provided in the Article 44 (Commencement of Judicial Investigation), paragraph 2, a judicial investigation can be opened against one or more persons whose names are specified in the introductory or **against unidentified persons**.⁵¹ (*emphasis added*)

55. Furthermore, French criminal procedure requires that the victim of an offence be informed at the start of the investigation, in order to be able to exercise his / her civil party rights. The investigating judge must inform the victim of the offence to be

⁴⁹ Internal Rules (Rev. 7) of the Extraordinary Chambers in the Courts of Cambodia, 23 February 2011, Rule 23 bis (2).

⁵⁰ Cambodian Criminal Procedure, Civil Party Application by Way of Intervention, Article 139.

⁵¹ Cambodian Criminal Procedure, Introductory Submissions, Article 124.

investigated that he / she has the right to exercise civil party rights, and the ways in which this may be done.⁵²

56. The above conclusion is supported by CIJ decisions on civil party applications in this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Neither decision held that the absence of a charged person was a bar to victims being admitted as civil parties.

57. In the nine days remaining for the filing of civil party applications after the issuance of the Public Statement, 318 applications were reportedly filed with the Victims Support Section.⁵⁵ The fact that this many applications were filed in such a short period confirms both: i) that the number of potentially interested civil party applicants is extremely high; and ii) that the absence of public information on the scope and status of the investigation prior to 9 May 2011 had severely hindered the ability of large numbers of victims to file civil party applications.

Prosecutor's Duties

58. In light of the circumstances described above, the International Co-Prosecutor was under a professional and ethical obligation to provide publicly information which, while not jeopardising the investigations, has helped protect the rights of victims and restored the confidence of the public in the functioning of the Court. Subrule 66(5) effectively empowers the Co-Prosecutors to authorise the closure of a judicial investigation by sending a final submission to the CIJ. Upon receipt of the Notice of Conclusion of the Judicial Investigation, the International Co-Prosecutor formed the view that the investigation was not completed and that in fact significant additional activity remained to be conducted. He was also mindful that public confidence in the effective conduct of the judicial proceedings in Case 003 appeared to be seriously undermined. Extensive media coverage and expert opinions published during this

⁵² French Code of Criminal Procedure, Devoir d'information à l'égard des victimes, Article 80-3.

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⁵⁵ James O'Toole and Cheang Sokha, KRT judges rap prosecutor Cayley, Phnom Penh Post, 19 May 2011, at page 2 (Annex 10).

handled,' Heindel said. 'And in terms of the legacy of this court, that may well overshadow all of its achievements.'"⁶⁰

59. As representatives of the public interest, prosecutors have an obligation to promote the rule of law as well as public confidence in the judicial process. The 2009 World Summit of Prosecutors General, Attorneys General and Chief Prosecutors emphasised that:

One of the fundamental prerequisites for strengthening general confidence in the criminal justice system, and specifically its prosecutorial branch, is to galvanize public opinion and certainty about the existence of safeguards ensuring that the members of the judiciary and prosecution services fulfill their duties independently and in an impartial and objective manner.⁶¹

60. Standards of Professional Conduct for Prosecution Counsel at the ICTY require prosecutors to serve the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused. They also require prosecutors to always act "expeditiously when required and in good faith."⁶²

61. Similarly, the United Nations Guidelines on the Role of Prosecutors require prosecutors to serve as representatives of the public interest.⁶³ Prosecutors must maintain an active role in criminal proceedings, such that the integrity and transparency of judicial investigations and prosecutions are preserved.⁶⁴ In exercising these duties, prosecutors are expected to, *inter alia*:

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

⁶⁰ Robert Carmichael, Analysis: Cambodia's Khmer Rouge tribunal faces credibility crunch, Deutsche Presse Agentur, 7 May 2011 (Annex 13).

⁶¹ The Third World Summit of Prosecutors General, Attorneys General and Chief Prosecutors, March 23 – 25, 2009, at page 51.

⁶² Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Standards of Professional Conduct for Prosecution Counsel, 14 September 1999, clauses 2(a) and (d).

⁶³ Guidelines on the Role of Prosecutors, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at paragraph 11.

⁶⁴ *Ibid.* The Prosecutors are required to maintain an active role in criminal proceedings including "the investigation of the crime, supervision over the legality of these investigations...and the exercise of other functions as representatives of the public interest."

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁶⁵

62. The importance of acting to uphold transparency of the proceedings, and the impact which this has on the perception of the integrity of the institution is well illustrated by the following statement by the Open Society Justice Initiative ('OSJI'):

"[M]aking confidential the filings of parties and rulings of judges in order to protect the court from embarrassment is a misuse of the secrecy rights of the court and can easily contribute to a cover up rather than a solution to the perception of political interference. Under such circumstances it is difficult for outside observers to determine whether the court is complying with international fair trial standards and avoiding political interference during the pretrial stage."⁶⁶

63. The OSJI has criticised what it has described as the Court's apparent adherence to a presumption of confidentiality, and recommended that this approach be modified in order to increase public confidence in the process: "[t]he presumption of the court should shift dramatically toward openness, even at the pretrial stage."⁶⁷ As further pointed out by these observers, securing transparency of the judicial proceedings is of particular importance for the ECCC, as it is also an essential tool to counter allegations of undue political interference with the judicial proceedings.⁶⁸

64. In these circumstances, and in light of the applicable legal provisions, an Order which effectively asserts a general rule of confidentiality without reference to any legitimate interest it seeks to protect, and which effectively punishes the International Co-Prosecutor for upholding the integrity of the process, must not be upheld.

VI. NATURE OF THE ORDER

65. Finally, in assessing the reasonableness of CIJ's exercise of their discretion in issuing the Retraction Order, it is relevant to consider the nature of the remedy ordered. The Order directs the International Co-Prosecutor to "publish a retraction." The Committee on Publication Ethics defines the purpose of retraction as follows:

The purpose of retraction

⁶⁵ Ibid, at paragraph 13.

⁶⁶ Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, July 2010, at page 28 (Annex 25).

⁶⁷ Ibid, page 30.

⁶⁸ Ibid, page 27.

Retraction is a mechanism for correcting the literature and alerting readers to publications that contain such seriously flawed or erroneous data that their findings and conclusions cannot be relied upon...Retractions are also used to alert readers to cases of redundant publication..., plagiarism, and failure to disclose a major competing interest likely to influence interpretations or recommendations. **The main purpose of retractions is to correct the literature and ensure its integrity rather than to punish authors who misbehave.**⁶⁹

66. The Retraction Order runs contrary to the above principle: that the purpose of retraction is to “correct,” and not to punish authors who “misbehave.” Nothing in the Order requires the International Co-Prosecutor to correct the public record by, for example, publishing an amendment of the Public Statement. In fact, as indicated in Section V(A), the CIJ have failed to demonstrate that any part of the Public Statement was incorrect.
67. As argued in Section V(B), the CIJ have themselves restated publicly the very information which they are directing the International Co-Prosecutor to retract. In these circumstances, the Retraction Order cannot be viewed as anything other than a capricious judicial act designed to publicly reprimand the International Co-Prosecutor. This further reinforces the International Co-Prosecutor’s submission that the Order represents an abuse of discretion and must, as such, be overturned.

VII. CONCLUSION

68. For the reasons set out above, the International Co-Prosecutor requests the Pre-Trial Chamber:
- (a) In relation to the Part of the Retraction Order dealing with Item A of the Public Statement:
- i) To declare the Order void *ab initio* as it was issued without legal basis,
- ii) Further and in the alternative, to hold that the Order is invalid due to an incorrect interpretation of the governing law and / or abuse of discretion;
- (b) In relation to the Part of the Retraction Order dealing with Item B of the Public Statement, to hold that the Order is invalid due to an incorrect interpretation of the governing law and / or abuse of discretion.

⁶⁹ Elizabeth Wager et al, *Retractions: Guidance from the Committee on Publication Ethics*, 2 September 2009, at page 2 (Annex 26).

(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.

Respectfully submitted,

Date	Name	Place	Signature
25 May 2011	Andrew CAYLEY International Co-Prosecutor	Phnom Penh	

