

A410/2/2

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

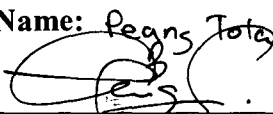
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**APPEAL AGAINST THE RESPONSE OF THE CO-INVESTIGATING JUDGES
ON THE MOTION ON CONFIDENTIALITY, EQUALITY AND FAIRNESS**

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I. PROCEDURAL BACKGROUND AND INTRODUCTION

1. On 18 August 2010, Co-Lawyers for Civil Parties filed a “Motion on Confidentiality, Equality and Fairness”¹ in which different matters related to the working conditions for Civil Party Lawyers in the public Information Center down town are raised. Among others, Co-Lawyers for Civil Parties note that they are unable to guarantee the compliance with professional confidentiality obligations under the current working conditions. Co-Lawyers for Civil Parties incorporate by reference and refer in this appeal to paragraphs 1-29 of the motion.
2. On 31 August 2010, the Co-Investigating Judges (“*CIJs*”) responded to the motion and found that the raised matters of concern are outside of their jurisdiction.² *CIJs* sent the motion to the Director and Deputy Director of the Administration although Co-Lawyers for Civil Parties had already raised all matters of concern before the Chiefs of Administration several times, but without any substantive response. *CIJs* were informed about this.
3. On 20 September 2010, Co-Lawyers for Civil Parties gave notice of Appeal against the *CIJs*’ response.³ This Appeal aims that the PTC declares the admissibility of this appeal and decides on the substance of the Motion.

II. APPLICABLE LAW AND RULES

4. The relevant Law and Internal Rules to which this Appeal refers are Internal Rules (“*IR*”) 21 and 35, Article 20 new, 23 new and 33 new of the Law on the Establishment of the Extraordinary Chambers⁴ (“*ECCC Law*”) the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁵ (“*UN*

¹ Co-Lawyers for Civil Parties’ Motion on Confidentiality, Equality and Fairness, 18 August 2010, Doc.no.A410.

² Response by *CIJs* on the Motion on Confidentiality, Equality and Fairness, 31 August 2010, A410/1, p.2.

³ Notice of Appeal, A410/2.

⁴ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, as promulgated on 27 October 2004, at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁵ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 23 September 2010].

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Basic Principles”), the International Covenant on Civil and Political Rights⁶ (“*ICCPR*”) and the Code of Ethics for Lawyers licensed with the Bar Association of the Kingdom of Cambodia.

III. ADMISSIBILITY OF THE APPEAL

5. This Appeal is admissible in accordance with IR 21 (1) (a) and (c). It states:
 - “The applicable ECCC Law, Internal Rules Practice Directions and Administrative Regulations shall be interpreted so as to always **ensure the interests of ...Victims** and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
 - a) The ECCC proceedings shall be **fair** and adversarial and preserve a balance between the rights of the parties....
 - b) (..)
 - c) The **ECCC** shall ensure that the victims are kept informed and that their **rights are respected** throughout the proceedings.” (Emphasis added)
6. On 20 September 2010, the Pre-Trial Chamber held an Appeal of the Ieng Sary Defence admissible pursuant to IR 21. The PTC held: “Although the applicable law does not specifically grant the Charged Persons the right to appeal against a Notice of Deficient Filing, the Pre-Trial Chamber has determined that...Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Persons’ right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance.”⁷
7. Judges of the Pre-Trial Chamber already emphasized the right to be heard and the right

⁶ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A[XXI], 16 December 1966.

⁷ Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, D390/1/2/4, para 13.

The Pre-Trial Chamber had previously ruled that with respect to its jurisdiction it “will examine whether Internal Rule 21 requires that it adopts a broader interpretation of the Charged Person’s right to appeal in order to ensure that proceedings are fair”, see Decision on Khieu Samphan’s Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/1/20, para 36 and Decision on Ieng Sary’s Appeal against Co-Investigating Judges’ Order Denying request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, A371/2/12, para 13-14.

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to procedural fairness for Civil Parties/Applicants⁸ who are parties to the proceedings. Given the gravity of the matter and being otherwise without any remedy Co-Lawyers for Civil Parties submit that the Pre-Trial Chamber should admit this Appeal against the CIJs' (non)-response and non-action on the basis of IR 21 (1) (a) and (c).

IV. PRELIMINARY REMARKS

8. Co-Lawyers for Civil Parties note that the legal representation is mandatory for Civil Parties. However, the ECCC does not provide any legal aid system in order to guarantee that Civil Parties and Applicants are legally represented. Only three national lawyers have consultancy contracts with the ECCC to represent Civil Parties. Their clients do not even have international lawyers although on several occasions victims have raised that they feel more equally treated towards the defence if they have both, national and international lawyers.
9. Around 2/3 of all Civil Parties/Applicants are represented by non-Court funded national and international lawyers who disburden the Court from its obligations to provide (mandatory) legal representation. Consequently, as a minimum the Court must provide the necessary support that all other parties enjoy at the premises of the Court.
10. To exclude one of the parties from the premises of the Court and dispose this party in a public Information Center is already an alarm sign. In addition, Parties cannot fully work from outside of the Court as the electronic system of this Court does not grant full remote access to all electronic facilities such as G-drive and S-drive, Case Map program and outlook archive folders. It is imperative that Civil Party lawyers work within the Courts' electronic network.

⁸ 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, Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties, 27 April 2010, D250/3/2/1/5, para 13 and Order Declaring Civil Party Application D22/288 Inadmissible, Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties, 13 January 2010, D364, para 12.

In addition Judge Rowan Downing expressed in an dissenting opinion to allow an unrepresented Civil Party to address the Chamber personally for the reason of fairness pursuant IR 21 (1) (a) in Written Version of Oral Decision of 1 July on the Civil Party's Request to Address the Court in Person, 3 July 2010, C22/1/54.

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V. ARGUMENT

GROUND OF APPEAL

CIJs Erred in Law/Rules, IR 21 and Fact by Declaring that the Civil Party Request is outside of their Jurisdiction

11. Co-Lawyers for Civil Parties had demanded the CIJs to restore their working conditions comparable to those at the Court in which the non-disclosure of (strictly) confidential materials can be guaranteed and restore working conditions for Co-Lawyers for Civil Parties equal to those of the other parties.

The CIJs simply rejected the request of Co-Lawyers for Civil Parties for the reason that they had no jurisdiction over the request.

By doing this CIJs violated Internal Rules 21 and 35 and simultaneously erred in fact.

12. Internal Rule 21 obliges the “ECCC” to ensure that rights of Victims are preserved and fairness is given. As the Rules do not further specify which body of the ECCC has to guarantee Victims’ rights can be only interpreted in a way that all bodies of the ECCC have to meet these standards and guarantees. The Pre-Trial Chamber correctly applied this approach in their decision: “As this is a matter involving the principles of ‘equal treatment before the law’ and ‘equality of arms’, **taking into account the Chamber’s duty as prescribed under Internal Rule 21....**” (Emphasis added)

13. After the Director and the Deputy Director have been already seized with all matters several times and no significant change was visible, Co-Lawyers for Civil Parties addressed the CIJs because they were the relevant acting body during the Pre-Trial phase to deal with the request and to comply with their duties according to IR 21 if the Administration already failed to follow the Internal Rules in this regard.

a) Confidentiality

14. The CIJs who hold the confidentiality of the investigation pursuant to IR 56 (1) extremely high, have the inherent duty to take all necessary and appropriate steps in order to have the investigations protected from any disclosure that could arise from the working conditions of Co-Lawyers for Civil Parties and that Co-Lawyers for Civil Parties can meet their professional duty to confidentiality.

15. All Lawyers who act before the ECCC, including the international lawyers, have to be registered with the Cambodian bar association, IR 11 (2) (b), (39 and 22 (1) (a) and have to abide by the Ethic Code for lawyers. Article 7 of the Code of Ethics for Lawyers states: “The lawyer is absolutely bound by professional confidentiality. Confidentiality may not be waived by anyone, not even the client.”⁹
16. With regard to confidentiality OCIJ would have had the absolute **duty** to act **immediately**, both to protect the confidentiality of the investigations and to allow lawyers to abide by the Ethics of the bar association. In addition, after having been informed on this matter CIJs would have had to take the initiative to examine if there “may be reason to believe that a person may have committed any of the acts set out in sub-rule 35 (1).”¹⁰
- Since the Administration does not care about the matters, that were brought before it and does not comply with Internal Rule 21, it is CIJs very own duty to take appropriate steps to resolve the problem(s) and to timely avoid any potential interference with the Administration of Justice.

b) Working conditions

17. Co-Lawyers for Civil Parties also submitted to OCIJ the request to restore the conditions as it was before with regard to slower access to zylab, shortened deadlines and the lack of sufficient office space and facilities. By rejecting this request for the reason that the CIJs do not have jurisdiction, the CIJs failed to comply with IR 21, the UN Basic Principles on Victims and the ICCPR. Further, they erred on the facts.
18. According to the Internal Rules, Civil Parties have participation rights and the right to reparation. In order to be able to perform these rights Lawyers for Civil Parties must have working conditions under which they are able to work. If these conditions are not granted the performance of rights is impossible or at least cannot be implemented.
19. The UN Basic Principles stipulate for victims of gross human rights violations access to justice, to fair proceedings and require to take “measures to minimize the inconvenience to victims and their representatives”, “to provide proper assistance to victims

⁹ Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, at http://www.bigpond.com.kh/council_of_jurists/judicial/jud002g.htm, article 7.

¹⁰ Internal Rule 35 (2).

seeking access to justice” and “to make available all appropriate legal...means to ensure that victims can exercised their rights...”¹¹.

20. The right to a fair determination of a matter and the access to a Court which is a prerequisite thereof, and whether it be a criminal matter or a civil law suit or the latter within a criminal proceeding is a right protected by Article 14 (1) of the International Covenant for Civil and Political Rights, which states:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

21. If the access to a Court is insufficient and if the working conditions to which Co-Lawyers for Civil Parties are subjected, are significantly worse than the conditions of the other parties, the guarantees to a fair proceeding as outlined in Art 14 (1) ICCPR, are not given.

22. Consequently, the otherwise uncontrolled factual refusal by the Administration to restore equal working conditions obliges the CIJs, as the competent body during the pre-trial phase, to take the necessary and appropriate steps. By rejecting the request CIJs violated fair trial rights of Civil Parties as they are outlined in Art. 14 (1) of the ICCPR, IR 21 and the UN Basic Principles. Co-Lawyers for Civil Parties submit that CIJs erroneously held that the request was outside of their jurisdiction.

23. Co-Lawyers for Civil Parties note the PTC’s observed “repeated failure of the CIJs to act”¹² and request therefore the Pre-Trial Chamber to intervene to ensure that Civil Party Lawyers have sufficient office space and facilities at the Court premises, particularly at the trial phase.

24. Therefore, Co-Lawyers for Civil Parties respectfully request that the PTC:

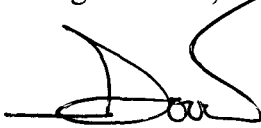
¹¹ Supra note 5, para. 12 and 12 (b), 12 (c), 12 (d).

¹² Second Decision on Nuon Chea’s and Ieng Sary’s Appeal against OCIJ Order on Requests to Summon Witnesses, 9 September 2010, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, para.5.

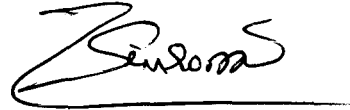
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(i) Declare the Appeal admissible;

(ii) Decide on the Appellants' request to take the necessary steps to restore Civil Party Lawyers to working conditions comparable to working conditions at the Court in which the non-disclosure of (strictly) confidential materials can be guaranteed, and to restore working conditions equal to those of all other parties.

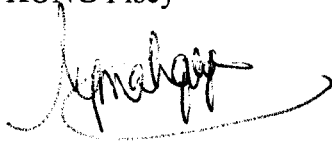


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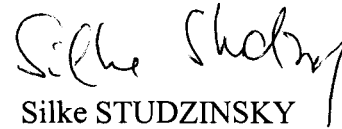
SIN Soworn

KONG Pisey



Lyma NGUYEN

YUNG Phanit



Silke STUDZINSKY

Signed in Phnom Penh, Kingdom of Cambodia on this twelfth day of September, 2010.