

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

FILING DETAILS

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**OBSERVATIONS BY CIVIL PARTY CO-LAWYERS REGARDING KHIEU
SAMPHAN'S APPEAL AGAINST THE CLOSING ORDER**

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I. INTRODUCTION

1. Civil Party Co-Lawyers wish to file the Observations in respect of KHIEU Samphan's Appeal ("the Appellant") against the Closing Order¹ ("the Appeal"), which was filed by his Defence Co-Counsels on 18 October 2010. Civil Party Co-Lawyers find that the above-mentioned appeal shall be rejected because of its procedural defect and its filing not in the appropriate circumstances allowed by the applicable law.

II. PROCEDURAL BACKGROUND

2. On 15 September 2010, the Co-Investigating Judges issued a Closing Order charging the Accused KHIEU Samphan with crimes against humanity, crime of genocide, grave breaches of the Geneva Conventions of 12 August 1949 (war crimes) and violations of the 1956 Cambodian Penal Code.²
3. The Appellant filed his Notice of Appeal on 21 September 2010 and on 18 October 2010³ his appeal was filed to the Pre-Trial Chamber ("PTC").⁴
4. The Co-Prosecutors filed the response to the Appellant's appeal on 15 November 2010⁵ and the Co-Lawyers for Civil Parties had five days to file their observations related to the Appellant's appeal by supporting the Co-Prosecutors' response. The period of five days started from the date which the Co-Prosecutors notified parties of the response.⁶

III. ADMISSIBILITY OF THE OBSERVATIONS

5. As stated in paragraph 4 above, Co-Lawyers for Civil Parties could file their observations within five days from the date of notification of the Co-Prosecutors' Response to parties in accordance with the decision of the Pre-

¹ Appeal against the Closing Order of the Co-Investigating Judges dated 18 October 2010, D427/4/3.

² The Closing Order, D427.

³ Notice of Appeal dated 21 September 2010, D427/4.

⁴ Appeal against the Closing Order dated 18 October 2010.

⁵ Co-Prosecutors' Response to KHIEU Samphan's Appeal against the Closing Order dated 15 November 2010, D427/4/7.

⁶ Decision on Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of NUON Chea, IENG Sary, KHIEU Samphan, and IENG Thirith against the Closing Order and Consequently Extension of Page Limit dated 28 October 2010, D427/1/8.

Observation of Civil Party Co-Lawyers related to KHIEU Samphan's Appeal against the Closing Order 3

Trial Chamber dated 28 October 2010.⁷ The Co-Prosecutors' Response was notified electronically to parties on 15 November 2010. Therefore, the deadline for filing the observations by the Co-Lawyers for Civil Parties expired on Saturday 20 November 2010. The Co-Lawyers for Civil Parties find that 20 November 2010 fell on weekend and was a national public holiday which included 20, 21, and 22 November 2010, which was Water Festival, and the national public holiday would be extended until 23rd the next day. Therefore, the deadline for filing the observations expires on 24 November 2010. Thus, the observations are admissible.

IV. GENERAL OBSERVATIONS

A. Observation of various reasoning in the appeal

6. Civil Party Co-Lawyers agree with what the Co-Prosecutors stated in their Response to KHIEU Samphan's Appeal against the Closing Order⁸ ("the Response") in paragraphs 3 and 4 concerning the grounds of appeal.
7. In the first ground of appeal starting from paragraph 14 to paragraph 49, the Appellant simply wrote general points concerning the rights of parties, the obligation of the judicial competent sections, and the procedural points which ensure the rights of parties at an appropriate standard level, which only points out legal provisions,⁹ various jurisprudence,¹⁰ and the works and research by experts.¹¹ These issues are not strong support grounds, which shall be responded. However, two major issues that shall be analyzed are 1) whether the subjects of the appeal are right based on circumstances; and 2) that the points of complaint in the Appellant's appeal shall be discussed in great details. Civil Party Co-Lawyers wish to give clear remarks on various points stated in the paragraphs below.

⁷ *Id.*

⁸ Co-Prosecutors' Response to KHIEU Samphan's Appeal against the Closing Order dated 15 November 2010, D427/4/7.

⁹ Fns. 16 and 22 of the Appeal, D427/4/3.

¹⁰ Fns. 13, 14, 15, 17, 18, 19, 20, 21, 28, and 29 of the Appeal, D427/4/3.

¹¹ Fns. 12, 25, and 26 of the Appeal, D427/4/3.

B. Legal grounds and admissibility of the appeal

B.1. The Appellant made a mistake in using the subject (ground) of application for nullification as a subject (ground) of this appeal:

8. The appellant has the right to appeal against the Closing Order as stated in Rule 67(5) of the Internal Rules. Rule 67(5) refers to Rule 74 which shows the objectives and grounds for appeal to the Pre-Trial Chamber.
9. Civil Party Co-Lawyers wish to emphasize that the appeal against the Order as stipulated in Rule 74 of the Internal Rule is different from applications concerning procedural defects of every act of the Co-Investigating Judges (“the CIJs”) and the subjects of the complaint shall also be different. The PTC used to express these differences in its decision of KHIEU Samphan’s appeal against the Order on translation rights and obligation of the parties.¹² Both the ECCC Internal Rules¹³ and the Code of Criminal Procedure of the Kingdom of Cambodia¹⁴ state the objectives which lead to appeals by parties, which point out that the objectives leading to appeals against the Order is different from the objectives leading to applications concerning procedural defects.
10. Civil Party Co-Lawyers observed that the Appellant used the title in his appeal in the form of an appeal against general Order,¹⁵ but he erroneously applied the subjects of applications concerning procedural defects. We wish to examine this matter as the following.
11. In his appeal,¹⁶ the Appellant seemingly intended to show to the PTC two basic points. First, he intended to show various provisional rules which he thought that in his capacity as a party or the Accused/ the Charged Person, his rights and interest shall be guaranteed and protected by those provisional rules, and that the CIJs shall exercise their obligation appropriately.¹⁷ Second, he raised some points in respect of actions taken by the CIJs, most of which are

¹² Decision of KHIEU Samphan’s Appeal against the Order on Translation Rights and Obligation of the Parties, dated 20 February 2009, A190/I/20, para. 33.

¹³ Rules 67(5) and 74 on Appeal against the Order and Rules 48 and 76(2) on Applications Concerning Procedural Defects.

¹⁴ Article 267 on Appeal against the Order of the Co-Investigating Judges filed by the charged person and Article 252 on Applications Concerning Procedural Defects.

¹⁵ Appeal against the Closing Order.

¹⁶ Appeal against the Closing Order dated 18 October 2010, D427/4/3.

¹⁷ Appeal against the Closing Order, D427/4/3, paras. 14 to 49.

proceedings¹⁸ by alleging that the Co-Investigating Judges did not comply with provisional rules appropriately by failing to apply some procedures and erroneously and deficiently applied procedural rules. After that, he expressed the optional prerequisite that the PTC may become an accomplice with the CIJs if the PTC failed to address the issue as he demanded.¹⁹

12. In conclusion, through his assessment, the Appellant showed the viewpoint that his rights and interest had been violated because of every act of the Co-Investigating Judges until the issuance of the Closing Order. At this point, it seems that the Appellant is of the view that the actions violate the provisional rules. Civil Party Co-Lawyers find that if the Appellant found actions which violated the provisional rules and affected his rights and interest, he should not have filed a simple appeal because they are subject to nullification in case he finds that actions taken by the CIJs were really erroneous. Besides, in his appeal, the Appellant referred to Article 261 of the Code of Criminal Procedure of the Kingdom of Cambodia²⁰ which states the decision by the Investigating Chamber in the applications concerning procedural defects.
13. Therefore, filing the appeal by using the subjects of the application for nullification and the application of such arguments do not conform to the ECCC Internal Rules and the Code of Criminal Procedure of the Kingdom of Cambodia. Hence, the Appeal should be overturned by the PTC.

B.2. Reasons for the appeal were erroneously stated

14. In many instances in the appeal, the appellant challenged cases which occurred before the issuance of the Closing Order and most of these cases were already appealed and decided by the PTC. Civil Party Co-lawyers would like to demonstrate three cases as follows:
 1. The translation case²¹: The appellant challenged on this case many times in their appeal²² and they used this reason to support their challenge against the Closing Order. The Civil Party Co-Lawyers would like to submit that

¹⁸ Appeal against the Closing Order, D427/4/3, paras. 61 to 113.

¹⁹ Appeal against the Closing Order, D427/4/3, paras. 116.

²⁰ Appeal against the Closing Order, D427/4/3, para. 57 and fn. 38.

²¹ Appeal against the Closing Order, D427/4/3, paras. 69 to 73.

²² *Ibid.*

translation issue was already decided by PTC in their decision on the appeal against the CIJs' order on the translation rights and obligations of the parties dated 20 February 2009. In their decision, PTC found the appeal inadmissible.²³

2. Inculpatory evidence: appellant mentioned about the CIJs' bias by alleging that CIJs had focused more on inculpatory evidence than on exculpatory evidence. Appellant also noted the unequal treatment toward parties.²⁴ Appellant also equivocally submitted that Judge Marcel LEMONDE was bias and he focused only on inculpatory evidence during the judicial investigation. Appellant submitted so based on the Judge's expression in the media following the issuance of the order.²⁵ The appellant might probably refer to the application to disqualify Judge Marcel LEMONDE by the defence teams²⁶ as a proof of his bias. Once again, these cases have already been decided by the PTC and applications for disqualification were rejected. In this regard, appellant should not raise these same issues again in the appeal against the Closing Order.

3. Denial of right to response to the Final Submission: the appellant also noted in their appeal about the right to response to the Final Submission.²⁷ Civil Party Co-Lawyers observe that PTC has already decided on this case²⁸ in a similar manner as the above-mentioned two cases.

15. The above-mentioned three issues were already decided and not open to appeal. So parties shall not raise these issues as reasons to appeal since doing so will waste time and resources of the court. All parties are fully aware that these cases are not subject to appeal based on the legal provisions.
16. Some other cases were also raised by the appellant concerning the CIJs' course of action before issuing the Closing Order. These cases were the lack of transparency in the Co-Investigation Judges' course of action²⁹ and incomplete

²³ D190/I/20.

²⁴ Appeal against the Closing Order, D427/4/3, paras. 95 to 109.

²⁵ Appeal against the Closing Order, D427/4/3, paras. 95 to 97.

²⁶ Appeal against the Closing Order, D427/4/3, para. 98.

²⁷ Appeal against the Closing Order, D427/4/3, paras. 63 to 68.

²⁸ Decision on the 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 observation and request for stay of the proceedings.

²⁹ Appeal against the Closing Order, D427/4/3, paras. 74 to 84.

investigation.³⁰ Despite the appellant's concerns, Civil Party Co-Lawyers observe that CIJs have fully performed their duties in accordance with the applicable law. The appellant himself have participated in these courses of action by using their rights in requesting for more investigation in many instances.³¹

17. To sum up, all the points raised by the appellant in his appeal, in whatever conditions, cannot be used as reasons to appeal the Closing Order after being issued. However, they could be applied as reasons to annul [the Closing Order] for the procedural defects, if the appellant wishes so and only if permitted by law in requesting such annulment.

B.3. The error in the grounds of appeal

18. The appellant filed an appeal against the Closing Order by stating that this appeal was made in accordance with the rule 74(3) (a) of the Internal Rules of ECCC.³² Appellant stated that *"This Appeal is admissible under Rule 74(3) (a) since the Closing Order recognizes the jurisdiction of the ECCC and under Rule 21(1) since the said Closing Order violates the rules of investigation guaranteeing the right to a fair trial."*
19. Internal Rule 74(3)(a) states that:
- 1.....
 - 2.....
 3. *The charged person or the Accused may appeal against the following orders or decision of the Co-Investigating Judges:*
 - a. *confirming the jurisdiction of ECCC*
20. Appellant seemed to try to interpret Internal Rule 74(3) (a) in a broader sense which actually was an exaggeration when they referred to rule 21 (1) concerning the interpretation of Internal Rules to always safeguard the interest

³⁰ Appeal against the Closing Order, D427/4/3, paras. 86 to 94.

³¹ Requests for Investigative Action by the Defense Counsels including the request for summoning of expert witness as clearly stated in paragraphs 89 and 90 of appeal against Closing Order. Appellants also stated about these issues.

³² Appeal against the Closing Order, D427/4/3, paras. 50 to 52.

- of parties. The appellant also noted the PTC's decisions.³³ Actually, one of PTC's decisions rejected such the appellant's statement.³⁴
21. The Civil Party Co-Lawyers will elaborate whether the subject of this appeal was actually jurisdictional. The Co-Lawyers will also examine whether the appeal against the Closing Order actually challenged on the CIJs' jurisdiction in their closing order. What is the term "Jurisdiction" basically defined?
 22. The actual subjects of this appeal were to express the appellant's dissatisfaction with the results of investigation, the course of action of CIJs and the aspect of closing order concerning the previously performed acts in which the appellant viewed as a violation to their rights. The Civil Party Co Lawyers are in view that these subjects were general and they did not challenge the jurisdiction in whatever means.
 23. The term "Jurisdiction" has a clear meaning and its content is not related to any specific procedures in investigative actions. Its content is, however, related to prosecution by the court for the crimes which are under the legal provisions. These are considered as Subject Matter Jurisdiction³⁵ and Personal Jurisdiction has something to do with those who are responsible for the crimes.³⁶ Article 2 of the agreement between the United Nation and Royal Government of Cambodia ("The agreement") stated the ECCC has personal jurisdiction over the senior leaders and those who were most responsible for the crimes committed during the Khmer Rouge regime.³⁷ Internal Rule 23(1) (a)³⁸ also stated similarly.
 24. Further, the appellant did not specifically challenge the jurisdiction as stated in the Closing Order. The Closing Order from paragraphs 1299 to 1309 stated the subject matter jurisdiction, and from paragraphs 1327 to 1328 stated the personal jurisdiction.
 25. The way appellant did not challenge jurisdiction and the way appellant did not raised the issue of jurisdiction mean that appellant did not appeal in

³³ Appeal against the Closing Order, D427/4/3, para. 53.

³⁴ Decision on the KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties.

³⁵ Closing order paras. 1299 to 1309, D427.

³⁶ Closing order paras. 1327 to 1328, D427.

³⁷ Article 2 of the Agreement between the United Nation and the Royal Government of Cambodia concerning the Prosecution under Cambodian law of Crimes Committed during the Period of Democratic Kampuchea dated 6th June 2003. Available at www.eccc.gov.kh

³⁸ Rule 23(1)(a) of the ECCC's Internal Rules dated 19 June 2007. Available at www.eccc.gov.kh

accordance with rule 74(3) (a). In this regard, the appeal was not filed in accordance with any rules or law so the appeal should be inadmissible.

V. PUBLIC HEARING IS NOT NECESSARY

26. The appellant requests the PTC to conduct public oral hearing in deciding this appeal.³⁹ The appellant failed to rationalize the necessity for the public hearing of this appeal. The Internal Rule 77(3) (b) stated that after considering the views of the parties, PTC may decide to determine an appeal or application on the basis of written submissions of the parties only.
27. Public hearing is not requisite for parties and appellant failed to elaborate the importance of such a public hearing. The Civil Party Co-Lawyers note that decision on appeal should be done on the basis of written submission for the interest of ECCC's resources and procedure.

VI. CONCLUSION AND REQUEST

28. In conclusion, the Civil Party Co-Lawyers observe that appellant appealed against the investigative action and course of action of CIJs. They did not challenge the jurisdiction as stated in the Closing Order. The Internal Rule 74(3) (a) which was used as a ground for the appeal was erroneously applied since the appeal's subjects were all about the procedural issues, not jurisdiction.
29. The Civil Party Co Lawyers submit that such an inappropriate appeal shall be declared inadmissible by the PTC.

The Civil Party Co-Lawyers would like to request the PTC to:

1. Declare the appeal inadmissible,
2. Expeditiously send the Closing Order to the Trial Chamber.

Respectfully submitted,

³⁹ Appeal against the Closing Order D427/4/3 para. 61.

Done in Phnom Penh on 24th November 2010

CHET Vanly

Ty Srinna

VEN Pov