ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អច្ចជីនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

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អច្ចបុរេជីនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 57)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **4 August 2010**

PUBLIC

DECISION ON APPEAL OF CO-LAWYERS FOR CIVIL PARTIES AGAINST ORDER ON CIVIL PARTIES' REQUEST FOR INVESTIGATIVE ACTIONS CONCERNING ALL PROPERTIES OWNED BY THE CHARGED PERSONS

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Andrew CAYLEY

Charged Person

IENG Thirith

Co-Lawyers for the Civil Parties

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KONG Pisey
HONG Kim Suon
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CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 04/08/2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

អច្ចបុរេជីនុំជម្រះ PRE-TRIAL CHAMBER CHAMBRE PRÉLIMINAIRE E.C.C.C. C.E.T.C.

Joined by
Mahdev MOHAN
Fabienne TRUSSES-NAPROUS
Laura DEFORGES
Christine MARTINEAU
Isabelle DURAND
Françoise GAUTRY
KIM Menghky
MOCH Sovannary
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Legal Assistant

Katrina GORDON

Unrepresented Civil Parties

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of the Appeal of Co-Lawyers for Civil Parties' against [the Co-Investigating Judges'] Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons filed on 21 March 2010 ("the Appeal").[1]

I. PROCEDURAL BACKGROUND

1. On 12 August 2009, the Co-Lawyers for the Civil Parties ("the Appellants") filed their Third Request for Investigative Actions Concerning All Properties Owned by the Charged Persons IENG Sary, IENG Thirith, NUON Chea, and KHIEU Samphan ("the Request").[2] In the Request, the Co-Lawyers for the Civil Parties request that the Co-Investigating Judges: (i) conduct a full investigation into the properties owned by the charged persons and place all findings in the case file, (ii) take measures to preserve any properties of the charged persons for reparation purposes, and (iii) identify properties transferred to family members of the charged persons to determine the origins of the properties and whether the properties had been obtained as a result of the position of the charged persons in the Khmer Rouge regime.[3] The Pre-Trial Chamber wishes to briefly note that the submissions from the Co-Lawyers for the Civil Parties and all responses thereto, including subsequent appellate filings, are classified as 'confidential.' The Pre-Trial Chamber is mindful of "the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy."[4] The Pre-Trial Chamber has reviewed the submissions and responses of the parties, including the excerpts that are reproduced in this decision. On the basis of the principles noted above and taking note of the particular issues raised in this Appeal, the Pre-Trial Chamber has determined that notwithstanding the classifications suggested by the parties, this decision shall be a public decision.

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[1] Appeal of Co-Lawyers for Civil Parties against [Co-Investigating Judges'] Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 21 March 2010, D193/5/1 ("the Appeal").
[2] Co-Lawyer Civil Parties Third Request for Investigative Actions Concerning All Properties Owned by the Charged Persons IENG Sary, IENG Thirith, NUON Chea and KHIEU Samphan, 12 August 2009, D193 ("the Request").
[3] Request, para. 25.
[4] Practice Direction on Classification of Case-Related Information, ECCC/004/2009, Article 1.2.

2. On 8 September 2009, the defence of IENG Sary ("the IENG Sary Defence") filed IENG Sary's Response to the Co-Lawyers of Civil Parties' Third Investigative Request Concerning the Properties Allegedly Owned by the Charged Persons ("the IENG Sary Response") opposing the Request.[5]

3. On 16 September 2009, the defence of IENG Thirith ("the IENG Thirith Defence") filed the Defence Objection to Civil Parties' Third Investigative Request Concerning Charged Persons' Assets ("the IENG Thirith Objection") opposing the Request.[6]

4. On 1 March 2010, the Co-Investigating Judges issued an order denying the Request ("the Impugned Order").[7] The Co-Investigating Judges provided the following grounds for issuing the Impugned Order: (i) the Request falls outside the scope of the investigation, (ii) certain components of the Request exceed the competencies of the Co-Investigating Judges, whose role is limited to investigation, (iii) the international jurisprudence concerning freezing of assets sets a high threshold for undertaking the actions sought by the Request and the Co-Investigating Judges have no evidence before them that suggests that the Appellants have met that threshold, and (iv) the Defence Support Section has previously found the charged persons indigent and the Co-Investigating Judges are not aware of any grounds to refute that determination.[8]

5. On 9 March 2010, the Appellants filed a notice of appeal against the Impugned Order and on 21 March 2010 the Appellants filed the Appeal. It is noted that four parties to the Appeal were not party to the Request and are noted as being amongst those parties who have "joined" in order to participate in the Appeal. As no objection has been made by any other party and these parties clearly have an interest in the Appeal, the Pre-Trial Chamber permits these parties to join the Appeal.

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[5] IENG Sary's Response to the Co-Lawyers of the Civil Parties' Third Investigative Request Concerning the Properties Allegedly Owned by the Charged Persons, 8 September 2009, D193/2 ("the IENG Sary Response").
[6] Defence Objection to Civil Parties' Third Investigative Request Concerning Charged Persons' Assets, 16 September 2009, D193/3 ("the IENG Thirith Objection").
[7] Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 01 March 2010, D193/4 ("the Impugned Order").
[8] Impugned Order, paras 2-8.

6. The Appellants submit that the Impugned Order contains the following errors of law and fact: (i) the Impugned Order fails to safeguard and respect the rights of victims, as provided for in Internal Rule 21[9] and international instruments, (ii) the Co-Investigating Judges erred in finding that they are not the appropriate body for the enforcement of reparations at the preliminary phase of proceedings, and (iii) the Impugned Order is based on a patently incorrect conclusion of fact as the Appellants find that (a) there is evidence that the charged persons benefitted financially from the alleged crimes, and (b) the Impugned Order is based on speculation by the Co-Investigating Judges as to the findings of an ongoing investigation.[10] In the Appeal, the Appellants request that the Pre-Trial Chamber vacate the Impugned Order and instruct the Co-Investigating Judges to undertake the requested investigative actions.[11]

7. On 19 April 2010, the IENG Thirith Defence filed the "IENG Thirith Defence Response to Civil Parties' Appeal Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons ("the IENG Thirith Defence Response").[12] The IENG Thirith Defence submits that the Appeal should be dismissed because (i) the requested relief is premature, (ii) the applicable law does not provide for individual reparation, (iii) the investigative actions sought by the Appellants fall outside the scope of the investigation, (iv) the Co-Investigating Judges are not the correct body to enforce reparations, and (v) the Appellants wrongly submit that the evaluation of the indigence of the charged persons is ambiguous and further provide no evidence to support the allegation that IENG Thirith possesses vast amounts of money stolen from revolutionary funds.[13]

[9] Internal Rules (Rev. 5), as revised on 9 February 2010.
[10] Appeal, paras 14-30.
[11] Appeal, para. 30.
[12] Ieng Thirith Defence Response to Civil Parties' Appeal Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 19 April 2010, D193/5/2 ("the IENG Thirith Response").
[13] IENG Thirith Response, paras 3-17.

8. By decision dated 5 May 2010, [14] the Pre-Trial Chamber notified the parties that the Appeal would be determined on the basis of written submissions alone in accordance with Internal Rule 77(3)(b).

9. On 10 June 2010, the Pre-Trial Chamber announced its disposition of the Appeal, indicating that "[a] reasoned decision in respect of the Appeal shall follow in due course.

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

DECIDES that the Appeal is inadmissible."[15]

II. ADMISSIBILITY

10. The Impugned Order was notified to the parties on 2 March 2010. The Appellants filed the notice of appeal against the Impugned Order on 10 March 2010. The Appeal was notified on 1 April 2010 and therefore within the time provided for in Internal Rule 75(3).

Internal Rule 74(4) Grounds for Pre-Trial Appeals

11. The present appeal is submitted pursuant to Internal Rule 74(4)(a),[16] according to which a Civil Party may appeal against any order of the Co-Investigating Judges refusing requests for investigative action allowed under the Internal Rules.

12. The Request is submitted pursuant to Internal Rules 55(10) and 59(5).[17] Internal Rule 55(10) provides that:

> At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or

[14] Decision to Determine the Appeal on Written Submissions and Direction for Reply, 5 May 2010, D193/5/3.
[15] Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons, 19 June 2010, D193/5/4.
[16] Appeal, para. 11.
[17] Request, para. 1.

> undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.

Internal Rule 59(5) provides that:

> At any time during an investigation, the Civil Party may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of the factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Civil Party shall immediately be notified of the rejection order, and may appeal to the Pre-Trial Chamber.

13. The Pre-Trial Chamber notes that the Appellants submitted the Request under both Internal Rules 55(10) and 59(5). The Pre-Trial Chamber considers that the Request most closely aligns with a request under Internal Rule 55(10) and will therefore be treated as such for the remainder of this decision. The Pre-Trial Chamber notes that the considerations before the Chamber in this Appeal are the same if the Request is characterised as a request brought pursuant to Internal Rule 59(5) or as a request brought pursuant to Internal Rule 55(10).

14. Whilst the requested action is detailed in form, in order to be granted it must relate to an investigative action allowed under the Internal Rules. A request for investigative action may be granted by the Co-Investigating Judges if the subject matter of the request is within the scope of the investigation.[18] Before the ECCC, the scope of an investigation is determined by the submissions made by the Co-Prosecutors, being the Introductory Submission or any Supplementary Submission.[19] In considering requests made under Internal Rule 55(10), the Co-Investigating Judges are restricted by Internal Rule 55(2), which limits their investigation to those facts set out in the Introductory Submission or a Supplementary Submission.[20] If a request for investigative action concerns facts that are outside the scope of the facts set out in

[18] See Internal Rule 55(2). In the Impugned Order, the Co-Investigating Judges noted that they have always been bound by the formal scope of the investigation. See Impugned Order, para. 3 and footnote 2 for a short list of previous orders of the Co-Investigating Judges reflecting the same.
[19] Internal Rules 53 and 55(3).
[20] Internal Rule 55(2).

the Introductory Submission or a Supplementary Submission (such facts being 'new facts') the Co-Investigating Judges do not have the authority to grant the request. If a request made to the Co-Investigating Judges concerns new facts, Internal Rule 55(3) requires the Co-Investigating Judges to bring the new facts to the attention of the Co-Prosecutors. The Co-Investigating Judges may not investigate unless the Co-Prosecutors submit a Supplementary Submission with respect to the new facts. Internal Rules 55(3) and 55(10) read together limit the power of the Co-Investigating Judges to grant a request to only those matters that fall within the scope of the investigation as shaped by the Introductory Submission or any Supplementary Submission.[21]

15. As has been previously articulated by this Chamber, the Pre-Trial Chamber finds that the restriction imposed by Internal Rule 55(3) on the Co-Investigating Judges applies to requests made by Civil Parties.[22] In the Combined Order Decision, this Chamber held that Civil Parties, "...can bring new facts to the attention of the [Co-Investigating Judges] or the Co-Prosecutors, but have no standing for requesting investigative actions for such facts unless these are included by the Co-Prosecutors in a Supplementary Submission."[23] Since the Civil Parties lacked standing, the appeal was found inadmissible.[24]

16. The Appellants submit that the Appeal is admissible on the basis of Internal Rule 74(4)(a). The Appellants have not demonstrated that the requested investigative action is allowed under the Internal Rules. The Internal Rules do not provide for expansion of an investigation by a Civil Party. The Co-Prosecutors have not expanded the investigation through a Supplementary Submission that would permit the Civil Parties to request: (i) a full investigative action concerning properties owned by the charged persons, (ii) preservation

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[21] Internal Rule 55(3) provides as follows:

> "If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission."

[22] 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, D250/3/2/1/5 ("the Combined Order Decision").

[23] Combined Order Decision, para. 17.

[24] Combined Order Decision, para. 17 (referring to the admissibility of the first appeal only).

measures for any such properties, or (iii) identification of any transferred properties. The ability to expand the investigation beyond the scope of the existing submissions rests with the Co-Prosecutors alone. Since the Civil Parties lack standing to make the Request, the Appeal is inadmissible on the basis of Internal Rule 74(4)(a).

Internal Rule 21

17. It is necessary to consider whether the Pre-Trial Chamber has a duty to otherwise consider the matter as an appeal that is admissible on grounds other than Internal Rule 74(4)(a). The Appellants have not submitted that the Appeal is admissible on the basis of Internal Rule 21. The Pre-Trial Chamber takes notice that the Appeal is based on the Appellants' submission that the Co-Investigating Judges are not strictly limited by the Internal Rules to the submissions of the Co-Prosecutors, but must instead grant the Request on the basis of Internal Rule 21.[25]

18. Internal Rule 21 provides that:

> 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and 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:
> [...]
> c. The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings;[26]

19. An appeal may be admissible under Internal Rule 21 if a party alleges the infringement of the exercise of a right protected by Internal Rule 21.[27] The Appellants contend that Internal Rule 21 "oblige[s] [the Co-Investigating Judges] to investigate the financial situation of the Charged Persons and their families because [the Co-Investigating Judges have] to safeguard and respect the right of Civil Parties to reparations and ensure this right is not on paper

[25] Appeal, paras 16, 19.
[26] Internal Rule 21.
[27] The Pre-Trial Chamber has previously considered that the protection of a right found in Internal Rule 21 can serve as a basis for admissibility of an appeal. See Public Redacted Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12.

only."[28] In support of this claim, the Appellants state that Internal Rule 21 protects the "fundamental right of the Civil Parties to reparation."[29] The Appellants assert that this fundamental right can only be observed if the Co-Investigating Judges undertake the actions contained in the Request "to enable Civil Parties to take the initiative for the enforcement of a potential reparation order."[30]

20. The Appellants misunderstand the application of the right to reparations. There is no provision under applicable law or interest of a Civil Party or any other party that permits the Co-Investigating Judges to undertake investigative action for a matter that is not within the scope of the investigation as delimited by the Co-Prosecutors. Furthermore, the Appellants cannot, by framing the right to reparations as a fundamental right under Internal Rule 21, succeed in expanding the class of persons subject to making reparations from convicted persons to those who are charged persons. The Pre-Trial Chamber finds that a plain reading of the Internal Rules leaves no room for doubt as to the class of persons who may be subject to reparations.

21. The Pre-Trial Chamber further considers that the Appellants have based their Request and, in part, their Appeal, on a mistaken contention that Civil Parties and victims shall receive reparations. In the Request[31] and in the Appeal,[32] the Appellants submit that they have a right to reparations. The Civil Parties only have the right to the possibility of an award of reparations made by a competent chamber against a convicted person. The Civil Parties have a right to seek reparations, not a guarantee of the receipt of reparations. Whether or not an award is made is solely within the discretion of the competent chamber only after a conviction is recorded. It is the right to seek reparations, not the right to reparations, that may be protected by the Pre-Trial Chamber pursuant to Internal Rule 21.

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[28] Appeal, para. 19.
[29] Appeal, para. 17.
[30] Appeal, para. 17.
[31] The Appellants state in the Request that the Co-Investigating Judges should undertake the requested investigative actions because "[a]ny lawful properties belonged [sic] to the charged persons were [sic] bound for reparation to the Civil Parties and victims, once the Court renders its judgment in which the charged persons are found guilty of committing the alleged crimes." Request, para. 2.
[32] See e.g., Appeal, paras 17, 18, 19. In the Appeal, the Appellants acknowledge that an award is "potential." Appeal, para. 17.

22. The Appellants assert that in order to "implement" the "fundamental right to reparation," the Co-Investigating Judges should "undertake steps to enable Civil Parties to take the initiative" for enforcement.[33] The Appellants appear to link the text of Internal Rule 113 to explain why relief should be granted before a conviction and award of reparations. Internal Rule 113 provides that:

> "Internal Rule 113. Enforcement of Sentences and Civil Reparation
> 1. The enforcement of a sentence shall be made at the initiative of the Co-Prosecutors. The enforcement of reparations shall be made at the initiative of a Civil Party..."[34]

23. Contrary to the assertions of the Appellants, Internal Rule 113 does not give the Civil Parties the right to initiate enforcement of reparations at the pre-trial stage of a criminal proceeding. Internal Rule 23 *quinquies* specifies that reparations can only be awarded against a convicted person. As reparations can only be awarded against a convicted person, reparations cannot be *enforced* against an unindicted, untried and unconvicted person. It is outside the jurisdiction of this Chamber to take measures to enforce a potential award of reparations prior to such time as the competent chamber has determined guilt following a trial upon indicted charges, recorded a conviction and determined an award of reparations, if any. While, as described below, the Civil Parties have an interest in the assets of the charged persons, neither the interest itself nor any right in respect of such interest has crystallised. Pursuant to the framework of this Court, the fact that no interest or right has crystallised is dispositive. Granting the requested relief would place the Pre-Trial Chamber and the Co-Investigating Judges in the position of acting beyond our collective jurisdiction.

24. The Pre-Trial Chamber takes notice of the fact that this limitation is specific to this Court. Before other international courts, civil parties and victims may find that investigative actions including tracing, freezing, seising and taking other preservative measures can be ordered prior to a conviction and award of reparations. The statutory scheme of the International Criminal Court ("the ICC") provides for such measures. The power of the ICC to order

[33] Appeal, para. 17.
[34] Internal Rule 113.

individual reparations to victims is firmly established in Article 75 of the Rome Statute.[35] Crucially, the Rome Statute vests the Pre-Trial Chamber with the authority to seek cooperation of States to "take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of the victims."[36] These measures include the "identification, tracing and freezing or seisure of proceeds, property and assets."[37] Victims who have made requests for reparations may directly request that the Pre-Trial Chamber consider taking the aforementioned protective measures.[38] Moreover, the Rules of Procedure and Evidence establish an enforcement mechanism for reparations awards in which the Presidency is charged with seeking the cooperation of States to seise a sentenced person's assets and property.[39] The Pre-Trial Chamber of the ICC has interpreted these statutory provisions as granting the chamber jurisdiction to take preventative measures for the purpose of securing the enforcement of a future reparation award.[40] The Pre-Trial Chamber of the ICC relied heavily on the particular statutory scheme of the ICC, finding that:

> [i]n the Chamber's view, the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. [...] *In this context*, the Chamber considers that early tracing, identification and freezing or seisure of the property and assets of the person against whom a case is launched through the issuance of a warrant of arrest or a summons to appear is a necessary tool [...]." [emphasis added][41]

25. The Pre-Trial Chamber notes that the right to the possibility of an award of reparations as provided for in the Internal Rules is very much more limited than the reparations scheme of the ICC. The ability of the competent chamber of the ECCC to award reparations, being limited to collective and moral reparations, is narrower than the grant of authority to order reparations authorised in Article 75 of the Rome Statute. Furthermore, before the ECCC there is no legal authorisation for a chamber to order the pre-trial freezing of assets, which is explicitly provided for in the Rome Statute and the ICC Rules of Procedure and Evidence.

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[35] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, *entered into force* 1 July 2002, ("the Rome Statute"), Art. 75.
[36] Rome Statute, Art. 57(3)(e).
[37] Rome Statute, Art. 93(1)(k), as referenced by Rome Statute, Art. 57(3)(e).
[38] Rules of Procedure and Evidence of the ICC, U.N. Doc. ICC-ASP/1/3 (2002) ("the ICC Rules of Procedure and Evidence"), Rule 99(1).
[39] ICC Rules of Procedure and Evidence, Rules 217-218.
[40] Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, 24 February 2006 ("*Prosecutor v. Lubanga*") paras 130-141.
[41] *Prosecutor v. Lubanga*, para. 136 (emphasis added) (footnotes omitted).

The ECCC legal framework does not grant any organ of the Court jurisdiction to enforce a reparation award. Finally, the Pre-Trial Chamber notes that the procedures related to the reparations scheme before the ICC reflect the treaty-based nature of the Rome system, insofar as judicial actions must take the form of requests for cooperation from States.[42] The position of the ECCC within the domestic court system of the Kingdom of Cambodia is entirely unlike the legal foundation of the ICC. The differences in the legal framework and jurisdictional scope of the ICC and the ECCC with respect to reparations for victims are substantial and significant. The Pre-Trial Chamber notes that it is bound by the rules and principles enshrined in the legal framework of the ECCC. In this matter, the Pre-Trial Chamber is unable to seek guidance on this issue from the practice of the ICC. The Rome Statute and rules applicable before the ICC bear no resemblance to the relevant provisions in the governing documents of the ECCC.

26. The Appellants have not shown that the failure by the Co-Investigating Judges to grant the Request violates a fundamental right of the Civil Parties that is protected by Internal Rule 21.

27. The Appellants augment their submission that Internal Rule 21 requires the Co-Investigating Judges to conduct the investigative action by citing international human rights instruments and treaties.[43] Cambodia is a signatory to various international agreements and treaties, including the International Covenant on Civil and Political Rights ("the ICCPR").[44] To the extent that an alleged violation of an international instrument or treaty applicable in Cambodia relates to a right that can be applied within the framework of this Court, Internal Rule 21 provides that the rights of persons before this Court, including victims, shall be safeguarded.[45] The Appellants have identified Article 2(3) of the ICCPR as providing the

[42] States Parties to the Rome Statute thus have a treaty-based obligation to cooperate with judicial orders of the chambers of the ICC; *see* Rome Statute, Art. 86.
[43] Appeal, para. 20.
[44] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 ("the ICCPR").
[45] Although the ECCC Law and the Agreement only explicitly incorporate the fair trial protections of Articles 14 and 15 of the ICCPR, Cambodia is a ratified party and is obligated to comply with all of the provisions of the ICCPR. Under the ICCPR, the courts of law of a State Party have the same obligations as a State Party (as applicable). See United Nations Human Rights Committee, *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004) ("General Comment 31"), para. 4. This Court is a duly constituted court of the Kingdom of Cambodia and as

right to an effective remedy.[46] Article 2(3) provides that States Parties to the ICCPR undertake as follows:

> (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) to ensure that the competent authorities shall enforce such remedies when granted.[47]

28. The Appellants have also noted that the United Nations Human Rights Committee General Comment No. 31 advises that Article 2(3) of the ICCPR requires that "States Parties make reparations to individuals whose rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."[48]

29. The Pre-Trial Chamber has considered whether the rights provided to victims pursuant to international instruments and agreements extends to the particular question of whether the right to an effective remedy requires the Co-Investigating Judges to undertake the requested investigative actions. The right to an effective remedy, which is meant to protect victims, is a right that applies subsequent to a finding of a violation. No such finding of a violation can be made in the pre-trial stage of a criminal proceeding.

30. The Pre-Trial Chamber observes that the Appellants do not assert that as a result of the Impugned Order, the Civil Parties do not have an effective remedy.[49] Nor do the Appellants claim that without the requested relief, the Civil Parties will be without an effective remedy.

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such, must protect rights found in the ICCPR, to the extent that such rights do not conflict with the rights and obligations found in the constitutive documents of this Court.

[46] Appeal, para. 20.

[47] ICCPR, Article 2(3).

[48] Appeal, para. 20 citing General Comment 31, para. 16.

[49] In a separate appeal ground, the Appellants state that due to the expiration of the statute of limitations for civil claims in the courts of Cambodia, the courts of Cambodia may not allow the Civil Parties to submit a civil claim. Appeal, para. 25. This statement, read in its intended context as part of a separate appeal ground, is not made in support of the Appellants' reference to Article 2(3) of the ICCPR.

The Appellant states that "ECCC proceedings have to comply with international standards"[50] and that the Impugned Order "violates the international, directly applicable and binding treaties [sic]."[51] The Pre-Trial Chamber finds that the Appellants' submission that the Court has an obligation to investigate in order to "implement effective reparation borne by the convicted person,"[52] without more, does not support their claim that the Appellants are otherwise without an effective remedy. For the same reason, the Pre-Trial Chamber notes that the Appellants have not made submissions on appeal in respect of the other international instruments and treaties cited in the Appeal.

31. The Pre-Trial Chamber observes that the Human Rights Committee has recognised that in certain cases, the right to an effective remedy may entail interim or provisional measures.[53] The Appellants have failed to plead that the requested relief constitutes interim measures and that the requested interim measures meet the requirements for such measures under the ICCPR. An applicant for interim measures must demonstrate that they would have a right to a claim and that irreparable damage to such claim will result if the requested measures are not provided for and implemented.[54] The Appeal does not establish the claim of the Appellants with sufficient precision or clarity, nor do they inform the Pre-Trial Chamber of the reasons why interim measures are necessary and appropriate in this case. The Pre-Trial Chamber will not speculate as to whether the Appellant seeks a certain type of relief on appeal. As the Appellant has not demonstrated that interim measures, on the basis of an existing interest should be granted, the Appeal is not admissible on the basis of the obligations of this Court pursuant to the ICCPR and Internal Rule 21.

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[50] Appeal, para. 20.
[51] Appeal, para. 22.
[52] Appeal, para. 22.
[53] "The Committee further takes the view that the right to an effective remedy may in certain cases require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations." General Comment 31, para. 19.
[54] Rule 92 of the Rules of Procedure of the Human Rights Committee provides that:

> The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication.

Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92.

32. The Pre-Trial Chamber, having found that the submissions of the Appellants for the application of Internal Rule 21 are not sufficiently precise or clear, will not consider appeal grounds which require speculation on its part in respect of the claim being made and any submissions in support of such claim. The Pre-Trial Chamber emphasises that the measures requested by the Appellants, including conducting an investigation, tracing the provenance of assets and implementing measures for preservation of assets, are courses of action that must be authorised by law. This Chamber does not have jurisdiction to make orders that fall outside the competence of this Court, as reflected in its governing law. In the context of States party to the ICCPR, the judiciary has the responsibility to ensure the application of the protections and rights found in the ICCPR within the exercise of their jurisdiction and not at large. When properly seised of jurisdiction, this Chamber recognises appeals brought on the basis of those rights of individuals that are protected by the ICCPR and the obligations of the State Party with respect to those rights and individuals. The judiciary is limited by their jurisdiction and cannot expand jurisdiction on the basis of obligations of the State as a party to the ICCPR. To do otherwise would be to act outside of the law.

33. The Pre-Trial Chamber finds it appropriate to examine whether Internal Rule 21, interpreted broadly, provides a basis for admissibility. The Pre-Trial Chamber cannot identify a present interest of the Civil Parties, other than the right to seek reparations at the appropriate stage of the proceedings. This interest has not been jeopardised by the Impugned Order. The Pre-Trial Chamber cannot identify a present interest of the Appellants, but notes that they have described the requested actions, specifically the identification of all properties and assets of the charged persons and an examination of the acquisition history of the same, as a "prerequisite" to "effective enforcement."[55] The Appellants do not provide the legal basis for adopting "prerequisite" actions, however described. At the highest, the Appellants are asserting that they have concerns about what may or may not happen in the future.[56]

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[55] Appeal, para. 24.

[56] In the Appeal, the Appellants fail to elaborate on the rationale behind seeking prerequisite action for effective enforcement. In the Request, the Appellants suggest that "Civil Parties and other independent judicial observers [are] concerned about [the] existence of the above reparation in the future." Request, para. 12. In a subsequent section of the Request, the Appellants ask the Co-Investigating Judges to "[t]ake any measures concerning the found

34. In order to set aside the Impugned Order and order the Co-Investigating Judges to conduct the investigative actions in the Request pursuant to Internal Rule 21, the Pre-Trial Chamber considers that the Appellants must demonstrate a cognizable interest, even if it is a contingent interest. The Pre-Trial Chamber has considered whether the Appellants have a cognizable interest that is capable of protection by setting aside the Impugned Order. The Appellants assert that the relief sought in the Request is meant to address the Civil Parties' concerns with respect to two groups of assets: "...not only assets that are unlawfully acquired, which could be seised but also after 6 January 1979 legally acquired assets which can not [sic] yet be seised."[57] The Appellant states that "the identification of the latter would likewise facilitate the enforcement of a reparation order, if any."[58]

35. The Pre-Trial Chamber interprets the first part of the first sentence in the excerpt in the immediately preceding paragraph concerning the first group of assets to mean that the Appellant believes that this Court has the power to seise unlawfully acquired assets at this stage in the proceedings. Pursuant to the Law on the Establishment of the Extraordinary Chambers ("the ECCC Law"),[59] the only power of the Court to seise assets that have been unlawfully acquired, or more specifically acquired by criminal conduct, rests with the Trial Chamber. Article 39 new of the ECCC Law provides that:

> Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.
> In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct.
> The confiscated property shall be returned to the State.[60]

36. Article 39 new does not empower or authorise the Pre-Trial Chamber or the Co-Investigating Judges to seise unlawfully acquired assets for several reasons. First, seisure or confiscation of unlawfully acquired assets may form part of the sentencing phase of the proceedings if so

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properties to preserve those properties as reparation for Civil Parties applicants upon the issue of the Court['s] final decision." Request, para. 25.
[57] Appeal, para. 17.
[58] Appeal, para. 17.
[59] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 ("the ECCC Law").
[60] ECCC Law, Article 39 new.

elected by the Trial Chamber. There must be a judgment leading to a conviction before a sentence comprised of imprisonment and confiscation, if any, can be ordered. This capacity naturally resides with the trier of fact, the Trial Chamber, and not with the Pre-Trial Chamber. Second, the requirement that confiscated property be returned to the State means that the Appellants are not the sole holder of an interest in unlawfully obtained assets. The State is the future recipient of unlawfully obtained personal property, real property and money if the Trial Chamber makes an order for confiscation. Since the Internal Rules and ECCC Law do not give the Civil Parties the sole right to unlawfully obtained assets and proceeds, the Appellants cannot claim to have a cognizable interest that supports the request for investigative action. To set aside the Impugned Order in favour of the Appellants in respect of unlawfully obtained assets would (i) potentially favour the interests of the Civil Parties above those of the State without justification, (ii) presume the guilt of the charged persons, and (iii) pre-judge the decision of the Trial Chamber to award reparations and/or order confiscation, in the event of a conviction following a trial on an indictment.

37. It is noted that the inability of the Civil Parties to make a claim or request as a party having an interest in unlawfully obtained property and assets accords with the division of powers and rights between the respective parties to proceedings before this Court.[61] The provision for confiscation of unlawfully obtained property and assets in Article 39 new is part of the sentencing for a convicted person. Only the Co-Prosecutors may make submissions that are penal in nature.[62] The Civil Parties support the Co-Prosecutors at other stages of the proceedings, in particular to assist in establishing the truth relevant to the determination of the guilt or innocence of an accused person. Confiscation of unlawfully obtained assets, if any, is part of the sentence and is not linked to reparations or to the role of the Civil Parties. The Appellants appear to ignore the possibility that the Trial Chamber may order a penal

[61] For a discussion of the competencies of the Civil Parties at various stages of proceedings and the effect of the delimitation of competencies between parties, see Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001-18-07-2007/ECCC/TC, 9 October 2009, E72/3 ("the Trial Chamber Decision on Civil Party Participation").

[62] One judge of the Trial Chamber has noted that "only the Prosecutors have standing to request a sentence. Indeed, it is not the function of the Civil Parties to make submissions on what they may consider to be a just or unjust sentence, or on legal problems that are likely to affect the sentence, such as concurrent or cumulative damages." Dissenting Opinions of Judge Lavergne, Judge of the Trial Chamber, to the Trial Chamber Decision on Civil Party Participation, para. 23.

measure with respect to unlawfully obtained funds through confiscation, and instead base the Request on the assumption that all unlawfully obtained assets may be used for reparations to the Civil Parties.[63] As this is not the case, the Appellants lack standing to make the Request. For this reason, the Appeal is inadmissible on the basis of Internal Rule 21.

38. The Pre-Trial Chamber interprets the second part of the first sentence in the excerpt from the Appeal found in paragraph 34 above to mean that the Appellants believe that this Chamber should set aside the Impugned Order in order to allow the seisure of those assets of the charged persons that were lawfully obtained after 6 January 1979.[64] The Pre-Trial Chamber has examined this submission to determine whether the Appellants have any cognizable, albeit contingent interest in the lawfully obtained property of the charged persons, that falls within the jurisdiction of this Court.

39. An award of reparations, if made by the Trial Chamber, may include associated costs to be borne by the convicted person. This may require access to the assets of such a person. Lawfully obtained, as well as unlawfully obtained assets may be utilised to comply with any potential reparations order. This Court is not vested with the authority to take measures to preserve the assets of any charged person for any purpose. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations do not authorise this Court to freeze, seise or preserve assets in the context of a claim for reparations. The ECCC is not seised of jurisdiction to award damages or compensation.[65] As this Court cannot award this relief, it is also not equipped with the procedural tools used by other courts to take measures aimed at preserving assets for possible future disposition. The Appellants err in basing the Appeal on the premise that the Pre-Trial Chamber could order the Co-Investigating Judges to conduct investigative actions to facilitate the seisure of assets of the

[63] The Appellant states that taking measures to preserve assets for reparation purposes only becomes relevant if it is found that "property exists and this property [was] acquired by illegal means within the temporal jurisdiction of the ECCC." Appeal, para. 13. Further, the Appellant states that "[w]ith a view to an effective enforcement of reparation the prerequisite is the identification of assets and the determination of whether those assets were illegally acquired." Appeal, para. 24.

[64] Appeal, para. 17. The Pre-Trial Chamber considers that notwithstanding the reference to 6 January 1979 in the Appeal, any assets of the charged persons acquired lawfully prior to 6 January 1979 also fall within the scope of the request by the Appellant.

[65] As noted by the Co-Investigating Judges, there is no right to individual financial reparation. Order, para. 2.

charged persons at a later date. Furthermore, even if this Court had the authority to grant the relief requested, it falls beyond the jurisdiction of this Court. The Appellants are seeking relief to facilitate the preservation of assets. Since this Court lacks jurisdiction to implement measures designed to preserve assets, the Appeal is further considered inadmissible.

40. There is no other provision in the Internal Rules or other law applicable before this Court that would, even broadly interpreted, suggest that the Civil Parties have an interest in lawfully obtained and unlawfully obtained assets of the charged persons that would permit seisure or the taking of measures to facilitate seisure by the Pre-Trial Chamber or Co-Investigating Judges.

41. The Pre-Trial Chamber finds that the Civil Parties' rights provided for in Internal Rule 21 are sufficiently safeguarded by the existing legal framework. The Pre-Trial Chamber finds that Internal Rule 21 does not oblige it to interpret the Internal Rules in such a way that the Appeal should be declared admissible.

For the above-mentioned reasons, the Pre-Trial Chamber decided as announced in its determination on 10 June 2010.

In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

Phnom Penh, 4 August 2010 CR

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan