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Kingdom of Cambodia
Nation Religion King
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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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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 (PTC147)

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

Date: **29 June 2011**

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

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seized of the "Appeal against the Response of the Co-Investigating Judges' on the Motion on Confidentiality, Equality and Fairness" filed by the Co-Lawyers for the Civil Parties (the "Co-Lawyers") on 12 October 2010 and notified on 22 October 2010 (the "Appeal").[1]

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 18 August 2010, the Co-Lawyers filed a Motion on Confidentiality, Equality and Fairness to the Co-Investigating Judges (the "Co-Laywers' Motion"), alleging that the decision of the Office of the Administration in early July 2010 to relocate them from the Court's premises to the Court's town office, in a shared space, negatively impacted on their working conditions (slow access to Zylab, difficulties to meet short deadlines, insufficient office space and facilities) and made it difficult to ensure their duty to maintain confidentiality. They asked the Co-Investigating Judges to take the necessary steps to restore their working conditions to ensure confidentiality of information and ensure equal treatment with other parties.[2]

2. On 8 September 2010, the Co-Investigating Judges responded, by way of a letter, to the Co-Lawyers' Motion, stating that they have no jurisdiction over the matter and forwarding the motion to the Director and Deputy Director of the Administration for follow-up (the "Co-Investigating Judges' Response").[3]

3. The Co-Lawyers filed a notice of appeal on 20 September 2010[4] and they filed their appeal brief on 12 October 2010. By their Appeal, the Co-Lawyers argue that their working conditions, as stated before the Co-Investigating Judges, are detrimental to either ability to maintain confidentiality and to provide their client with effective representation

[1] Appeal Against the Response of the Co-Investigating Judges on the Motion on Confidentiality, Equality and Fairness, 22 October 2010, A410/2/1 ("the Appeal").
[2] Co-Lawyers for Civil Parties' Motion on Confidentiality, Equality and Fairness, 18 August 2010, A410.
[3] Letter from the Co-Investigating Judges to the Civil Party Lawyers, titled "Your Motion on Confidentiality, Equality and Fairness", dated 31 August, filed on 8 September 2010, A410/1.
[4] Notice of apeal, A410/2.

and equal participation rights to which they are entitled.[5] The Co-Lawyers submit that as Internal Rule 21 requires the ECCC to ensure Victims' rights, but does not further specify which body must guarantee these, it must be interpreted as requiring all bodies to do so. As the Office of Administration had already been seized of the matter, without any significant result, the Co-Lawyers turned to the Co-Investigating Judges as the relevant body to deal with the request at the pre-trial stage. They argue that by rejecting the Motion as inadmissible, the Co-Investigating judges violated the Civil Parties' fair trial rights as enshrined in Article 14(1) of the International Covenant on Civil and Political Rights ("ICCPR"), Rule 21 of the Internal Rules of the ECCC ("Internal Rules") and 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 Law[6].[7] They request the Pre-Trial Chamber to "[d]ecide on the Appellant's 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."[8]

4. The Office of the Administration filed a "Response to 'Co-Lawyers for Civil Party's Motion on Confidentiality, Equality and Fairness filed with the Office of the Co-Investigating Judges of 18 August 2010' and 'Appeal Against the Response of the Co-Investigating Judges on the Motion on Confidentiality, Equality and Fairness of 12 October 2010'" on 1 December 2010[9] (the "Office of Administration's Response to the Appeal") whereby it alleges that i) the application of its duties is limited to the available ressources; ii) the two Co-Lawyers who have filed the Motion have failed to establish a professional domicile in Cambodia, which breaches the Cambodian Bar Association's Code of Ethics; iii) the Co-Lawyers are responsible to ensure compliance with their duty

[5] Appeal, paras 17-21.
[6] UNGA, 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, A/Res/60/147, 21 March 2006.
[7] Appeal, paras 12-13.
[8] Appeal, p. 9.
[9] "Response to 'Co-Lawyers for Civil Party's Motion on Confidentiality, Equality and Fairness filed with the Office of the Co-Investigating Judges of 18 August 2010' and 'Appeal Against the Response of the Co-Investigating Judges on the Motion on Confidentiality, Equality and Fairness of 12 October 2010'", 1 December 2010, A140/2/2.

of confidentiality under Article 7 of the Code of Ethics and iv) the legal team who has filed the Appeal has breached Article 25 of the Code of Ethics by consulting with clients of other lawyers without prior authorisation.

5. Upon an invitation by the Pre-Trial Chamber and after it has decided to determine the Appeal on the basis of written submissions alone,[10] the Co-Lawyers who were referred to specifically in the Office of Administration's Response to the Appeal filed a reply in their own capacity, arguing in essence that they did not breach any of their obligations under the Code of Ethics.[11]

II. ADMISSIBILITY OF THE APPEAL

6. The Pre-Trial Chamber finds that the appeal was filed within the 30 days deadline of the issuance of the Co-Investigating Judges' Response, as 8 and 11 October 2010 were public holidays.

7. The Co-Lawyers submit that the Appeal is admissible based on Internal Rule 21(1)(a) and (c), arguing that the Pre-Trial Chamber has, in the past, adopted a broad interpretation of the Charged Persons' right to appeal and has emphasised the civil party/applicants' right to be heard and to procedural fairness.[12]

8. Internal Rule 21 reads in its relevant parts:

> "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:
>
> 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;
>
> [...]

[10] Decision to determine the Appeal on the basis of written submissions, 7 December 2010, A410/2/3.
[11] Reply to the Response of the Office of Administration, 13 December 2010, A410/2/4 and Reply of the Response of the Office of Administration, 13 December 2010, A410/2/5.
[12] Appeal, paras 5-7.

c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings;"

9. The Pre-Trial Chamber notes that pursuant to Internal Rule 74, not all orders of the Co-Investigating Judges can be appealled by all of the parties and that the Civil Party can only appeal against those orders and decisions enumerated under Internal Rule 74(4). The Co-Investigating Judges' decision appealed against in the current proceedings is not among this list.

10. Furthermore, unlike Internal Rule 74, Rule 21 does not address grounds for pre-trial appeals; rather, it lays out the foundamental principles governing proceedings before the ECCC.[13] While the Pre-Trial Chamber has found, where the facts and circumstances of an appeal required it, that it has compentence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74 through a liberal interpretation of the right to appeal in light of Internal Rule 21, it did not hold as a general rule that it will automatically have competence under Internal Rule 21 to consider grounds of appeal whereby an Appellant raises matters implicating the fairness of the proceedings.[14] On the contrary, resort to Internal Rule 21 to declare an appeal admissible has been exceptional, and only in cases where the particular facts and circumstances required a broader interpretation of the right to appeal.[15]

11. In the current case, the Co-Lawyers have not satisfied the Pre-Trial Chamber that they were prevented from ensuring respect of the fair trial rights of their clients during the pre-trial phase of the proceedings. The Chamber notes that the decision to relocate the Co-Lawyers in the town office, which is at the basis of the current proceedings, was made in "early July 2010", hence after the closing of the investigation in Case File 002 and just before the time where the Co-Lawyers had to submit their appeals againts the Co-Investigatings' orders declaring some of their client's civil party application inadmissible, which was their final task before Case File 002 is brought to trial. While the Pre-Trial Chamber has acknowledged some difficulties the Co-Lawyers may have faced representing an important number of clients, with limited financial and/or material ressources, in these appeals and the previous filing of the civil party applications, it has taken a number of measures to ensure that civil party lawyers were given all possibilities to present the best case for their clients, including: allowing the Co-Lawyers to file additional information with the appeals to support their client's application to become a civil party, asking some Co-Lawyers,

[13] See *inter alia* Decision on Appeals by Ieng Thirith and Nuon Chea's Appeals agains the Closing Order, 15 February 2011, D427/2/15, para. 70.
[14] Decision on Appeals by Ieng Thirith and Nuon Chea's Appeals agains the Closing Order, paras 72-73.
[15] See *inter alia* the exemples quoted in para. 73 of the Decision on Appeals by Ieng Thirith and Nuon Chea's Appeals agains the Closing Order.

in some particular cases, to submit additional information; accepting that the lawyers provide additional information in the form of a statement by the lawyer as long as it was made clear that the lawyer obtained the information from his/her client.[16] As a result, 1728 of the 1747 appellants were admitted by the majority of the Pre-Trial Chamber as civil party in case file 002. The Pre-Trial Chamber is not aware either of any case of misconduct brought against the Co-Lawyers for a breach of their obligation of confidentiality. As for any argument raised by the Co-Lawyers in respect of the difficulties they may encontered during the trial, the Pre-Trial Chamber has no jurisdiction to entertain these.

12. Therefore, the Pre-Trial Chamber does not find that the facts and circumstances of the current case require that it finds the Appeal admissible under a broad interpretation of Internal Rule 21.

THEREFORE THE PRE-TRIAL CHAMBER UNANIMOUSLY DECIDES THAT

The Appeal is inadmissible.

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

Phnom Penh, 29 June 2011

Pre-Trial Chamber **President**

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

[16] See *inter alia* Decisions on Appeals against Orders of the Co-Investigating Judges on the admissibility of civil party applications, 24 June 2011, D404/2/4 and D411/3/6, para. 55 and Separate and Partially Dissenting Opinion of Judge Marchi-Uhel, paras 6, 23 and 39.