



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ឯកសារដើម

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Nation Religion Roi

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អង្គបុរេជំនុំជម្រះ
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 (PTC71)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge PEN Pichsaly

Date: 20 September 2010

ឯកសារត្រូវបានបញ្ជាក់ថាជាកម្រិតដើម
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du dossier: Ratanak

PUBLIC

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

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Charged Person

IENG Sary

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Ieng Sary’s Appeal against the 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” filed by the Co-Lawyers for the Charged Person Ieng Sary (“the Co-Lawyers”) on 6 September 2010 (“the Appeal”).¹

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 16 August 2010, the Co-Prosecutors (“the OCP” or “the Co-Prosecutors”) filed with the Co-Investigating Judges (“the CIJs”) their Rule 66 Final Submission in Case 002 (“the Final Submission”).² On the same date, the ECCC Public Affairs Section issued a press release informing the public of this filing.³ The Final Submission was notified to the parties on 18 August 2010.
2. On 17 August 2010, the Co-Lawyers filed with the Co-Investigating Judges an expedited Request for extension of page and time limits to file a response to the Final Submission.⁴ The Co-Lawyers indicated the following justification for their Request:

“it is not possible to respond meaningfully to a 931-page Final Submission, analyze it, draft a well-reasoned Response, and translate this Response within 15 days from notification. According to Article 5.4 of the Practice Direction on Filing Documents Before the ECCC, the OCIJ may extend the applicable 15-page limit in exceptional circumstances. According to Rule 39(4) of the ECCC Internal Rules, the OCIJ may extend applicable time limits at the request of a concerned party. In keeping with the due diligence obligations imposed on the Co-Lawyers, a meaningful response cannot be submitted within the 15-page and 15-day limitations.”⁵

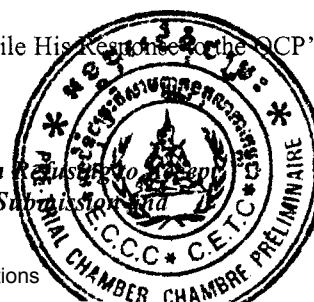
¹ Ieng Sary’s Expedited Appeal against the OCIJ’s Decision Refusing to Accept the Filing of Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 6 September 2010, D390/1/2/1 (“the Appeal”).

² Co-Prosecutors’ Rule 66 Final Submission, filed 16 August 2010, notified 18 August 2010, D390 (“the Final Submission”).

³ Statement of the Co-Prosecutors, ECCC Press Release, 16 August 2010.

⁴ Ieng Sary’s Expedited Request for Extension of Page and Time Limit to File His Response to the OCP’s Final Submission, 17 August 2010, D390/1 (“the Co-Lawyers’ Request”).

⁵ The Co-Lawyers’ Request, p. 1.



3. On 19 August 2010, the Office of the Co-Investigating Judges (“the OCIJ”) rejected the Co-Lawyers Request explaining that “[i]t would appear that there has been another misunderstanding concerning the way in which the procedural system in force at the ECCC functions” and that “nothing in the Internal Rules provides for a response to the Co-Prosecutors’ Final Submissions”.⁶
4. On 1 September 2010, the Co-Lawyers attempted to file their Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations (“the Response to the Final Submission”).⁷ In the Response to the Final Submission, the Co-Lawyers, taking note of the OCIJ’s rejection of their Request for extension of page and time limits, indicate that they “therefore submit this Response within the 15-day deadline for Responses” and explain that they are “unable, however, to comply with the 15-page limit for Responses and requests that the OCIJ accept this Response despite its deviation from the applicable page limit, in the interest of equality of arms”.⁸ They explain further:

“Equality of arms in this context means: **a.** equality for the OCIJ to benefit from legal submissions from both the OCP and the Defence; and **b.** equality for Mr. IENG Sary with respect to Mr. KAING Guek Eav, who was permitted to respond to the OCP Final Submission in Case 001. This Response is simply intended to assist the OCIJ as it prepares the Closing Order and to serve the interests of justice.”⁹

5. On 2 September 2010, the OCIJ issued a Notice of Deficient Filing in relation to the Co-Lawyers’ attempt to file the Response to the Final Submission (“the Notice of Deficient Filing”).¹⁰ The Notice of Deficient Filing provides the following reasoning:

“Upon instructions from the Co-Investigating Judges, the OCIJ Greffiers hereby inform the Defence that their request for extension of page limit has been refused for the following reasons:

⁶ Office of the Co-Investigating Judges Public Response to Ieng Sary’s Expedited Request for Extension of Page and Time Limit to File [Your] Response to the OCP’s Final Submission, 19 August 2010, D390/1/1 (“the OCIJ Response to the Co-Lawyers’ Request”).

⁷ Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3 (“the Response to the Final Submission”). The Response to the Final Submission was only added to the case file as an annex to the Appeal.

⁸ Response to the Final Submission, page 1.

⁹ Response to the Final Submission, page 1.

¹⁰ Office of the Co-Investigating Judges Greffier’s Notice of Deficient Filing, 2 September 2010 (“the Notice of Deficient Filing”).



-The document [*sic*] is four times longer than the imposed page length as set out in Article 5.1 of the Practice Direction on Filing of Documents before the ECCC, which was respected by the submission, filed by counsel in Case File No. 001, referred to by the Defence (D96/1 – 12 pages);

-The request does not refer to any exceptional circumstances, simply advocating the introduction of an adversarial procedure that, as already stated in a previous rejection of this request (D390/1/1), is not provided for at this stage of the proceedings before the ECCC.”¹¹

6. On 2 September 2010, the Co-Lawyers filed a Notice of Appeal against the Notice of Deficient Filing¹² and on 6 September 2010 they filed their Appeal. The Appeal was notified to the parties on 7 September 2010 with a deadline for response(s) by noon on 8 September 2010.
7. In their Appeal the Co-Lawyers request the Pre-Trial Chamber to: a) declare that the appeal is admissible under Internal Rule 21; b) quash the Impugned Decision; and c) mandate that the Response to the Final Submission be accepted by the OCIJ Greffier, placed on the Case File, and considered by the Co-Investigating Judges along with the Final Submission.¹³ The Co-Lawyers submit the Appeal pursuant to Internal Rule 21 on the grounds that “OCIJ has violated Mr. IENG Sary’s fundamental fair trial rights of: a) equality of arms by allowing the [OCP] to submit a 931-page Final Submission setting out what it believes the applicable law to be while denying the Defence the right to file a meaningful Response, which, in this case is 66 pages; b) equal treatment before the law, as demonstrated by a comparison of the OCIJ treatment of Mr. KAING Guek Eav in Case 001 with the treatment the defence received in the Impugned Decision; and c) entitlement to prepare a defence and make a record by refusing to place the Response on the Case File”.¹⁴
8. On 8 September 2010, the OCP filed the “Co-Prosecutors’ Response to Ieng Sary’s Expedited Appeal Against OCIJ’s Refusal to Accept Defence Response to OCP’s Final

¹¹ Notice of Deficient Filing.

¹² Notice of Appeal, 2 September 2010 (“the Notice of Appeal”).

¹³ The Appeal, page 13.

¹⁴ The Appeal, page 1.



Submission and Request for Stay of Proceedings” (“the OCP Response”).¹⁵ In the OCP Response the Co-Prosecutors request that the Pre-Trial Chamber “dismiss the Appeal as procedurally inadmissible and substantively devoid of merit.”¹⁶ The Co-Prosecutors submit that from a procedural point of view, a notice of deficient filing is not an order or decision of the Co-Investigating Judges and, as such, is non-appealable according to the Internal Rules.¹⁷ The Co-Prosecutors submit that the Internal Rules do not provide for an opportunity to the Charged Persons to respond to the Final Submission¹⁸ and that the fair trial rights of the Charged Persons are not violated by an absence of such provision as they have every possibility to argue their submissions of facts, law, and requests for investigative action during the judicial investigation and they have recourse to annulment or appellate provisions against actions of the Co-Investigating Judges.¹⁹ They add that, if indicted, the Accused will have an opportunity to challenge before the Trial Chamber the contents of the Closing Order.²⁰ The Co-Prosecutors conclude their argument by submitting that “in any event, this does not amount to such an abuse of process to compel the Pre-Trial Chamber to disown its jurisdiction and stay proceedings”.²¹

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

THEREFORE, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY DECIDES:

1. The Appeal is admissible;
2. The request for a hearing and stay of proceedings is dismissed as unwarranted;

¹⁵ Co-Prosecutors’ Response to Ieng Sary’s Expedited Appeal against OCIJ’s Refusal to Accept Defence Response to OCP’s Final Submission and Request for Stay of Proceedings, 8 September 2010, D390/1/2/2 (“the OCP Response”).

¹⁶ The OCP Response, para. 4..

¹⁷ The OCP Response, para. 1.

¹⁸ The OCP Response, para. 2.

¹⁹ The OCP Response, para. 3.

²⁰ The OCP Response, para. 3.

²¹ The OCP Response, para. 4.



3. The Co-Investigating Judges are ordered to immediately cause the placement of the Response in the Case File.”²²

II. ADMISSIBILITY OF THE APPEAL

10. The Co-Lawyers submit that Internal Rule 21 “confers an inherent jurisdiction on the Pre-Trial Chamber to hear appeals relating to the Charged Persons’ fundamental fair trial rights”.²³
11. The Co-Prosecutors submit that the Appeal is procedurally inadmissible because it is not an appeal of an order or decision of the Co-Investigating Judges and, as such, is not subject to appeal according to the Internal Rules.²⁴ They add that by their impugned action, the Greffiers “have simply “returned” a deficient filing for correction which can be filed subsequently in its correct form. The filing was both impermissible and deficient. It was sixty-six pages (substantially more than the permitted fifteen pages allowed by the Practice Directions) and it was filed despite an order of refusal of the OCIJ to receive it.”²⁵ The Co-Prosecutors add that “it is noteworthy that the Charged Person has not chosen to appeal the Refusal Order of 19 August 2010.”²⁶

12. Internal Rule 21 reads:

“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

²² Decision on IENG Sary’s Expedited Appeal Against the OCIJ’s 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, 10 September 2010, D390/1/2/3 (“the 10 September 2010 Decision”). For the avoidance of doubt, the Pre-Trial Chamber notifies the parties that the use of the abbreviation “Response” in the 10 September 2010 Decision has the same meaning as the abbreviation “Response to the Final Submission” in this decision.

²³ The Appeal, para. 2.

²⁴ The OCP Response, para. 5.

²⁵ The OCP Response, para. 6.

²⁶ The OCP Response, para. 6.



separation between those authorities responsible for prosecuting and those responsible for adjudication;

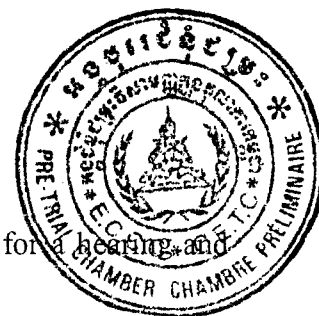
b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;

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

d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

13. The Pre-Trial Chamber makes the preliminary observation that this Appeal is filed against a decision of the Co-Investigating Judges which is disclosed in a Greffier’s Notice of Deficient Filing. 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, as submitted by the Co-Lawyers, Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance. 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, and the particular circumstances of this Appeal, the Pre-Trial Chamber found this Appeal admissible.

III. MERITS OF THE APPEAL



14. The Pre-Trial Chamber made the preliminary finding that the request for a hearing and stay of proceedings is unwarranted.
15. Before considering the Co-Lawyers’ submission on equal treatment before the law, the Pre-Trial Chamber must determine whether the Co-Investigating Judges erred in accepting the filing of the Response to the Co-Prosecutors’ Final Submission in Case 001.²⁷ The principle of equal treatment before the law cannot be construed to imply that an error in one case should be repeated in a future case, even if the error in question is

²⁷ Response of KAING Guek Eav’s Defence Team to the Prosecutor’s Final Submission, 24 July 2008, Case 001/18007-2007-ECCC/OCIJ, D96/1 (“Response to the Co-Prosecutors’ Final Submission in Case 001”).

beneficial to the Charged Person. For the reasons that follow, the Pre-Trial Chamber is of the view that it was not erroneous for the Co-Investigating Judges to accept such filing in Case 001.

16. The Pre-Trial Chamber notes that, like Article 246 of the Code of Criminal Procedure of the Kingdom of Cambodia (“the Cambodian CPC”)²⁸ the Internal Rules do not specifically provide a right for a charged person to respond to the final submission of the Co-Prosecutors.²⁹ The Co-Investigating Judges are nonetheless bound by Rule 21(1)(a) and 21(1)(b), which provides that ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties and that persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.³⁰
17. At the time of the adoption of Article 246 of the Cambodian CPC, Article 175 of the French Code of Criminal Procedure (“the French CPC”), which serves as the model for Article 246, did not foresee the possibility for the defence of a charged person to submit observations in response to the Prosecution’s Requisition (*i.e.* final submissions).³¹ This reflected the traditional inquisitorial model which is a characteristic of a civil law system, such as that in place in the Kingdom of Cambodia. Article 175 of the French CPC has since been amended, in 2007, such that a charged person may submit observations in response to the Prosecution’s Requisition.³² This amendment was made to the French CPC in order to allow for more balance between the parties during the investigative stage. This need for balance at the investigative stage has gained credence in systems with inquisitorial models because of the need to consider the rights of the accused at every stage in penal proceedings.³³ The Pre-Trial Chamber recognises that the Cambodian CPC has not been so amended. The general principle of equality of arms is, however, a

²⁸ Code of Criminal Procedure of the Kingdom of Cambodia, Article 246.

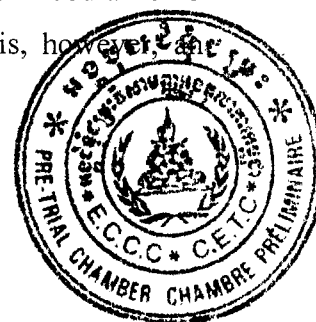
²⁹ Code of Criminal Procedure of the Kingdom of Cambodia, Article 246.

³⁰ Internal Rules (Rev. 5) 21(1)(a) and 21(1)(b).

³¹ French Code of Criminal Procedure, Article 175.

³² French Code of Criminal Procedure, Article 175.

³³ See, *Loi n. 2007-291 du 5 mars 2007 tendant à renforcer l’équilibre de la procédure pénale, Chapitre IV : Dispositions renforçant le caractère contradictoire de la procédure pénale, article 175 para. 5.*



important safeguard in penal proceedings and the Pre-Trial Chamber is satisfied that the decision by the Co-Investigating Judges to accept the Response to the Co-Prosecutors' Final Submission in Case 001 was not erroneous.

18. The Pre-Trial Chamber is not persuaded by the reasons given in the OCP Response and the OCIJ Response to the Co-Lawyers' Request concerning the proper stage for the exercise of the "adversarial debate [that is] characteristic of a fair trial" and the effect on the Charged Person of refusing the Response to the Final Submission.³⁴ The Pre-Trial Chamber recognises that, should a charged person be indicted in the Closing Order, the trial will provide an opportunity for the charged person to challenge the characterisation of the charges, as described in the Closing Order. However, it is certainly understandable that a charged person may wish to have his or her submissions in response to those offered by the Co-Prosecutors in the Final Submission taken into consideration by the Co-Investigating Judges before they issue the Closing Order, which determines whether or not the charged person faces trial and on what charges. Furthermore, before this key step in the ECCC proceedings, the Co-Investigating Judges can only benefit from receiving submissions both of the OCP and of the Co-Lawyers. This is even more so because the Co-Investigating Judges are not bound by the Co-Prosecutors' Final Submission. The Pre-Trial Chamber observes that a judicial body is never bound by the submissions of one party. As such, the Pre-Trial Chamber does not think that the submissions made by the Co-Prosecutors to the effect that the defence should not be given the opportunity to respond because the Final Submissions are not binding on the Co-Investigating Judges are persuasive.³⁵ Finally, the fact that the Defence may appeal certain aspects of the Closing Order cannot be substituted for the right to respond to the Final Submission. The Pre-Trial Chamber notes that the Co-Lawyers are limited in the matters that they may appeal from the Closing Order.³⁶

19. The Pre-Trial Chamber notes that the instruction given to the Greffiers by the Co-Investigating Judges to reject the Response to the Final Submission in the Notice of

³⁴ The OCP Response, para. 3, OCIJ Response to the Co-Lawyers' Request.

³⁵ The OCP Response, para. 7.

³⁶ Internal Rules (Rev. 5) 74(3)(a).



Deficient Filing has to be seen in light of the OCIJ Response to the Co-Lawyers Request of 19 August 2010, rejecting the request for an extension of time and page limit as a matter of principle, on the ground that, nothing in the Internal Rules provides for a response to the Co-Prosecutors' Final Submissions.³⁷ The OCIJ references this previous communication to support the rejection of the Response to the Final Submission as deficient. First, the OCIJ reiterates that granting the relief sought in both the Co-Lawyers' Request and in the attempted filing by the Charged Person of the Response to the Final Submission, would be to sanction the "introduction of an adversarial procedure" that is not provided for at this stage of the proceedings before the ECCC."³⁸ Having found that the Co-Investigating Judges did not err in accepting the filing of a response by the Co-Lawyers of Mr. KAING Guek Eav in Case 001, the Pre-Trial Chamber notes that, the Co-Investigating Judges principled objection to the filing of the Response to the Final Submission by the Co-Lawyers of Ieng Sary would, if left intact, result in unequal treatment before the law to the detriment of the Charged Person Ieng Sary.

20. Next, the Notice of Deficient Filing concludes that the Co-Lawyers' failed to refer to any exceptional circumstances that would justify granting the request for an extension of the page limits. The Pre-Trial Chamber notes that the Co-Lawyers explained both in their Request³⁹ and in their Response to the Final Submission⁴⁰ that there are exceptional circumstances leading them to seek leave to file a longer response than as allowed by the Practice Direction. They cited the fact that they are responding to a 931-page filing as the exceptional circumstance that led them to ask for an extension to 70 pages in total in order to meaningfully respond to the Co-Prosecutors and abide by their due diligence obligations to the Charged Person.⁴¹ In these circumstances, the Pre-Trial Chamber agrees that the length of the Final Submission is a valid reason for the Co-Lawyers to cite in seeking leave to file a response in excess of fifteen pages.

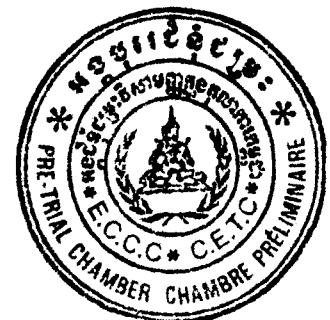
³⁷ The OCIJ Response to the Co-Lawyers' Request.

³⁸ The Notice of Deficient Filing.

³⁹ The Co-Lawyers' Request, p. 1.

⁴⁰ The Response to the Final Submission, p. 1.

⁴¹ The Co-Lawyers' Request, p. 1.



21. As noted by the Co-Investigating Judges in the Notice of Deficient Filing, in Case 001 the Co-Lawyers for Mr. KAING Guek Eav filed a response of less than fifteen pages to an 86-page Final Submission.⁴² The Practice Direction and precedent in Case 001 that is partially relied upon by the Co-Investigating Judges does not differentiate between documents filed and documents filed in response. As the Co-Prosecutors have the right to file a Final Submission in excess of fifteen pages, which is recognised in Internal Rule 66, to categorically deny a request for more than a fifteen page response to a submission that is not subject to page limits would be to ignore the fact that the Final Submission is unlike other filings before the ECCC. The Pre-Trial Chamber finds that the Co-Lawyers have sufficiently identified the exceptional circumstances under which they attempted to file a longer Response to the Final Submission.. The Pre-Trial Chamber is of the view that in light of these exceptional circumstances, the extension of pages sought was reasonable and should have been granted. The Pre-Trial Chamber finds that the Co-Investigating Judges, in instructing their Greffier, erred in fact in stating that the Co-Lawyers for the Charged Person failed to raise exceptional circumstances.
22. The Pre-Trial Chamber also notes that, notwithstanding the refusals by the Co-Investigating Judges to accept that the Co-Lawyers may respond and may need additional pages due to exceptional circumstances, the Co-Lawyers have complied with the time limits prescribed in the Internal Rules and thus have not unnecessarily delayed the proceedings.
23. In light of the foregoing reasons, the Pre-Trial Chamber finds that the actions of the Co-Investigating Judges have infringed upon the fair trial protections provided to the Charged Person by Internal Rule 21, in particular by failing to respect the guarantee to the charged person of those rights that are commonly described as equality of arms and equal treatment before the law. There is no need for the Pre-Trial Chamber to consider the last ground of appeal raised by the Co-Lawyers.

⁴² The Notice of Deficient Filing.



For the above-mentioned reasons, the Pre-Trial Chamber decided as announced in the 10 September 2010 Decision.

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

Phnom Penh, 20 September 2010 ^{CA}

Pre-Trial Chamber



Rowan DOWNING

NEY Thol

Catherine MARCHI-UHEL

PEN Pichsaly

PRAK Kimsan