ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi
A 871/2/12

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

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 (PTC64)

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

Date: **11 June 2010**

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

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Unrepresented Civil Parties:

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("the ECCC") is seized of "IENG Sary's Appeal against the [Co-Investigating Judges'] Rejection of his Defence Team's Request to Conduct Audio/Video Recordings of Meetings in the ECCC Detention Facility" filed by the Co-Lawyers for the Charged Person IENG Sary ("the Charged Person" and "the Appellant") on 23 April 2010 ("the Appeal").[1]

I. Procedural Background

1. On 18 March 2010, the Co-Lawyers for IENG Sary filed their "Request for an Order to the ECCC Detention Facility to allow the Defence to conduct audio/video recording of [the Charged Person] at the Detention Facility" ("the Request").[2] The Request was filed following advice by the Chief of the Detention Facility, informed by the Defence for the Charged Person of its intention to conduct audio/video recordings of client meetings, that such an order was necessary and should be sought from the Co-Investigating Judges.[3] According to the Request, such recording was made necessary due to the need to properly and fully prepare for the pre-trial defence of the Charged Person and was based on Article 13 of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("the Agreement"),[4] Article 35 new of the Law on the Establishment of the Extraordinary Chambers ("the ECCC Law")[5] and Article 14(3)(b) of the International

[1] IENG Sary's Appeal against the Co-Investigating Judges' Rejection of his Defence Team's Request to Conduct Audio/Video Recordings of Meetings in the ECCC Detention Facility, 23 April 2010, A371/2/1.1 ("the Appeal").
[2] Request for an Order to the ECCC Detention Facility to allow the Defence to conduct audio/video recording of our client at the Detention Facility, 18 March 2010, A371 ("the Request").
[3] Request, p. 1.
[4] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 19 October 2004 ("the Agreement").
[5] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 ("the ECCC Law").

Covenant on Civil and Political Rights ("the ICCPR")[6] guaranteeing the right to have adequate time and facilities for the preparation of the defence.[7]

2. On 9 April 2010, the Co-Investigating Judges denied the Request on the ground that there was no legal basis to support it.[8] In particular, the Co-Investigating Judges considered that (1) whilst the Agreement, the ECCC Law and the ICCPR guarantee that a person facing criminal charges be given adequate time and facilities for the preparation of a defence, they do not explicitly or implicitly guarantee a right for recording equipment to be brought into the Detention Facility and operated by a defence team,[9] and (2) taking into account the resources, facilities and assistance currently available to the Charged Person,[10] [the Charged Person's] rights under these instruments are already being fully respected.[11]

3. On 19 April 2010, the Cambodian Co-Lawyer for the Charged Person filed a notice of appeal against the Impugned Order and on 23 April 2010 both Co-Lawyers filed the Appeal. In the Appeal, the Co-Lawyers request the Pre-Trial Chamber to: i) declare the Appeal admissible under Internal Rules 21 and 74(3)(f) (Rev. 5),[12] ii) reverse the Co-Investigating Judges' rejection of the Request, and iii) order the Detention Facility to allow the Defence to conduct audio and video recordings of the Charged Person. The Appellant further requests a public oral hearing, arguing that the Appeal addresses a violation of his fundamental right to a fair trial, is likely to impact on the legitimacy and credibility of the ECCC and thus must be addressed in an open and transparent manner.[13] The Appellant adds that the Request was filed

[6] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 ("the ICCPR"), Article 14(3)(b).
[7] Request, p. 1.
[8] Untitled correspondance from the Co-Investigating Judges to IENG Sary Defence Team, "Subject: Your Request to Conduct Audio/Video Recording of IENG Sary in the Detention Facility", 9 April 2010, A371/1 ("the Impugned Order"), p. 2.
[9] Impugned Order, p. 1.
[10] Impugned Order, footnote 5, referring to Rules 9.15–9.24 and 14 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia.
[11] Impugned Order, p. 2.
[12] Internal Rules (Rev. 5) as revised on 9 February 2010.
[13] Appeal, para. 7.

confidentially only because it was seen by the Defence as a simple administrative formality and that the Appeal does not discuss any confidential issues.[14]

4. On 7 May 2010 the Office of the Co-Prosecutors filed its Response[15] whereby it states its support for the Appeal, but requests that the Pre-Trial Chamber deny the request for an oral public hearing, as the Appeal is substantially uncontested.[16]

5. On 11 May 2010, the Pre-Trial Chamber issued a scheduling order whereby it scheduled the Appeal for *in camera* hearing pursuant to Rule 77(5) of the Rules and indicated that the hearings would proceed on the basis that submissions on appeal, filed pursuant to Internal Rule 75(3), and including the Response of the Co-Prosecutors, shall be taken as read by the Chamber while oral replies will be heard at the hearing.

6. By letter to the Chief of the Detention Facility dated 20 May 2010, the Pre-Trial Chamber requested clarification as to the rules and practices governing the admission of persons and items into the Detention Facility.[17] On 21 May 2010, the Chief of the Detention Facility provided a written clarification to the Pre-Trial Chamber ("the Clarification"),[18] which included as an attachment thereto Notification No. 007/08 M.KH.S.K dated 7 January 2008 ("the Notification"). The Clarification and attached Notification set forth a non-exhaustive list of permitted and prohibited items.[19] By letter dated 24 May 2010, the Pre-Trial Chamber invited the Chief of the Detention Facility to attend the hearing on 25 May 2010.[20]

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[14] Appeal, para. 8.
[15] Co-Prosecutors' Observations on IENG Sary's Appeal on Using Audio-Visual Recording in the Detention Unit, 7 May 2010, A371/2/2 ("the Response").
[16] Response, paras 5-6.
[17] Letter dated 20 May 2010 from Pre-Trial Chamber Re: Regulation and Practice of Detention Facility, 20 May 2010, A371/2/8.
[18] Clarification of Regulation and Practice of Detention dated 21 May 2010, 24 May 2010, A371/2/10 ("the Clarification").
[19] Clarification, p. 1 and Notification, p. 1.
[20] Invitation dated 24 May 2010, 26 May 2010, A371/2/11.

7. On 25 May 2010, the Pre-Trial Chamber held an *in camera* hearing pursuant to Rule 77(5). In addition to hearing the reply of the Appellant, the Chief of the Detention Facility, [redacted], appeared before the court at the invitation of the Pre-Trial Chamber and responded to questions from the Appellant and the Chamber.[21]

8. The fact that submissions will be made available to the public and that the present decision is filed as a public document adequately answers the transparency and publicity concern expressed by the Appellant.

II. Admissibility of the Appeal

9. The Impugned Order was issued on 18 March 2010 and notified to the parties on 5 April 2010. The Cambodian Co-Lawyer for the Charged Person filed a notice of appeal against the Impugned Order on 19 April 2010. The Appeal was filed on 23 April 2010 and therefore within the time provided for in Internal Rule 75(3).

10. The Appeal is made pursuant to Rules 74(3)(f), 21(1) and 21(2). Rule 74(3)(f) provides that:

> "Rule 74. Grounds for Pre-Trial Appeals
>
> 3. The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges:
> [...]
> f) relating to provisional detention or bail."[22]

11. The Pre-Trial Chamber finds that the question of whether an item or device can be brought in and out of the Detention Facility by members of a defence team and used during their meetings with their client in pre-trial detention, forms part of the modalities of the Charged Person's detention. Any aspect of the modalities of pre-trial detention thus shall be

[21] Transcript 25 May 2010, p. 14 (line 1) to p. 23 (line 13).
[22] Internal Rules (Rev. 5) as revised on 9 February 2010, Rule 74(3)(f).

under the effective control of the competent ECCC judicial authorities and strictly limited to the needs of the proceedings.[23] To the extent that it adjudicates one specific aspect of the modalities of the pre-trial detention of the Charged Person, the Pre-Trial Chamber finds that the Impugned Order amounts to an order "relating to provisional detention" in the sense of Internal Rule 74(3)(f) and is thus appealable by the Charged Person.

12. As noted above, the Appellant also submits that the Appeal is admissible pursuant to Rule 21. In this respect, Rule 21 provides, in relevant part:

> "Rule 21. Fundamental Principles
>
> 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 [...]
>
> 2. Any coercive measures to which a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity."[24]

13. The Appellant has submitted that the Impugned Order violates Rule 21 because it fails to "safeguard Mr. IENG Sary's rights to have adequate facilities for the preparation of a defence and to communicate with counsel and because it is a coercive measure which is not strictly limited to the needs of the proceedings."[25] The Pre-Trial Chamber shall examine whether Rule 21 requires that it adopt a broader interpretation of the Charged Person's right to appeal in order to guarantee that the proceedings are fair.

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[23] See, e.g., Rule 21. See also Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, 002/19-09-2007-ECCC/OCIJ(PTC05), ERN: 00184951-00184956, A104/II/7 ("the Visitation Appeal Decision"), paras 15, 17.

[24] Internal Rules (Rev. 5) as revised on 9 February 2010, Rule 21. In addition to Internal Rule 21(2), the Appeal refers to Principle 9 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, passed by a United Nations General Assembly Resolution in 1988. Pursuant to Principle 9, the "authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authorities." Appeal, para. 4.

[25] Appeal, para. 6.

14. Rule 21 protects the fair trial rights of a charged person. The Appellant initially sought relief from the Co-Investigating Judges and now the Pre-Trial Chamber in order to exercise his fair trial rights, as enumerated herein.

15. Article 13(1) of the Agreement states:

> The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proven guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.[26]

16. Article 35 new of the ECCC Law provides, in pertinent part:

> In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.
> [...]
> b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;[27]

17. Article 14(3) of the ICCPR provides, in pertinent part:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> [...]
> b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;[28]

18. Considering the fair trial rights of the Appellant, including pursuant to Article 13 of the Agreement, Article 35 new of the ECCC Law and Article 14(3) of the ICCPR, the Pre-Trial Chamber finds that Rule 21 requires it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21.

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[26] Agreement, Article 13.
[27] ECCC Law, Article 35.
[28] ICCPR, Article 14.

19. Finally, Rule 1 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia provides that "[t]he application of these rules to individual cases may be varied by order of the ECCC Co-Investigating Judges or the ECCC Chambers."[29] The Pre-Trial Chamber finds that the Appeal is also admissible on this basis.

20. The Pre-Trial Chamber turns next to the merit of the Appeal.

III. Merit of the Appeal

21. The Appellant raises the following three grounds of appeal alleging that the Impugned Order: (i) violates the Charged Person's right to a fair trial,[30] (ii) is invalid because the Co-Investigating Judges did not have the authority to deny the Request, and,[31] (iii) is not reasoned.[32]

22. The Pre-Trial Chamber has previously articulated the following standard of review applicable to appeals related to discretionary decisions.[33] Discretionary decisions of the Co-Investigating Judges may only be overturned if the Appellant demonstrates that the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion.[34] The Pre-Trial Chamber wishes to clarify that not every error of law or fact will invalidate the exercise of discretion by the Co-Investigating Judges and lead to a reversal of an order. The onus is on the Appellant to

[29] Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia ("the Detention Facility Rules").
[30] Appeal, paras 18-25.
[31] Appeal, paras 26-29.
[32] Appeal, paras 30-35.
[33] Public Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, 002/19-09-2007-ECCC/OCIJ(PTC24), ERN: 00402746-00402762, D164/4/13 ("the SMD Decision"), paras 25-26 .
[34] SMD Decision, paras 25-26.

demonstrate that (i) the error of law of law invalidated the decision, (ii) the error of fact occasioned a miscarriage of justice, or (iii) that the decision or order is so unreasonable as to force the conclusion that the Co-Investigating Judges failed to exercise discretion judiciously.

23. Before turning to the first ground of appeal, the Pre-Trial Chamber recalls that the Notification lists cameras and camcorders as items that are not permitted to be taken into the Detention Facility.[35] The Pre-Trial Chamber further recalls the testimony of the Chief of the Detention Facility that the list of permitted and prohibited items found in the Notification is not exhaustive and that as such, the Detention Facility has the discretion and in fact has exercised its discretion to exclude audio recording equipment.[36] The Pre-Trial Chamber finally notes that the Chief of the Detention Facility testified that in general, the Detention Facility does not distinguish between visits made by counsel for the Appellant and ordinary visitors in making its assessment as to items that may be brought into the Detention Facility.[37] The Pre-Trial Chamber notes that the Chief of the Detention Facility confirmed in writing that even though the Detention Facility Rules do not allow laptop computers to be brought in, in practice defence teams are permitted to bring in their laptop computers for client meetings.[38]

24. The Pre-Trial Chamber turns now to the first ground of appeal.

A. Does the Impugned Order violate the Charged Person's right to a fair trial?

25. The Appellant argues under this ground of appeal that the Impugned Order violates his fundamental right to have adequate facilities for the preparation of his defence and to communicate with counsel of his own choosing, as guaranteed by Article 31 of the Constitution of Cambodia, Article 13 of the Agreement, Article 35 new of the ECCC Law and Article 14(3)(b) of the ICCPR.[39] In addition to breaching the Appellant's right to

[35] Notification, p. 1.
[36] Transcript 25 May 2010, p. 18 (lines 6-12).
[37] Transcript 25 May 2010, p. 22 (lines 5-13).
[38] Clarification, p. 1.
[39] Appeal, paras 18-25.

communicate with counsel and to adequate facilities to prepare his defence, the Cambodian Co-Lawyer for the Charged Person stated in his oral reply that the fair trial rights of the Charged Person are further infringed as the Impugned Order violates the Charged Person's right to assist in his own defence.[40]

26. In the Response, the Co-Prosecutors submit that the Impugned Order impinges on the fair trial rights of the Appellant, as guaranteed by the instruments cited above.[41] For this reason, the Co-Prosecutors do not oppose the Appeal.[42]

27. It is clear that Article 14(3) of the ICCPR provides that a person facing criminal charges enjoys certain minimum guarantees, including the right to have adequate time and facilities to prepare his defence and to communicate with counsel of his own choosing. The Pre-Trial Chamber is specifically directed to take into account Article 14 of the ICCPR by the operation of Article 13 of the Agreement and by Article 35 new of the ECCC Law. In the instant matter the Pre-Trial Chamber must determine whether, contrary to Rule 21, the Impugned Order deprives the Appellant of the rights guaranteed by Article 14 of the ICCPR.

28. In the Request, the Defence informs the Co-Investigating Judges that an order is sought to allow audio/video recording of meetings between the Charged Person and the defence team "due to the need to properly and fully prepare for the pre-trial defence of [the Charged Person]."[43] The Defence describes the recording of client meetings as a "crucial"[44] and "vital"[45] part of the preparation of the defence of the Charged Person. The Defence notified the Co-Investigating Judges that the recordings will be used "solely for the purpose of" preparation for the pre-trial defence of the Charged Person.[46] In his submission before the Pre-Trial Chamber, the international Co-Lawyer for the Appellant informed the court that

[40] Transcript 25 May 2010, p. 9 (lines 15-18).
[41] Response, paras 1-3.
[42] The support for the Appeal by the Office of the Co-Prosecutors was confirmed during the oral hearing held on 25 May 2010. Transcript 25 May 2010, p. 23 (lines 18-25).
[43] Request, p. 1.
[44] Request, p. 1.
[45] Appeal, para. 22.
[46] Request, p. 2.

the audio/video recordings are necessary for the Charged Person to communicate with counsel of his own choosing.[47] Notwithstanding the statements of the Chief of the Detention Facility, which may have been suggesting that it is incumbent upon the defence team to manage preparation within the existing rules and practices of the Detention Facility,[48] the Charged Person has the right to communicate with counsel of his choosing.

29. The Pre-Trial Chamber finds that Rule 1 of the Detention Facility Rules is sufficiently broad in its scope to permit the Co-Investigating Judges to consider the Request. Rule 1 of the Detention Facility Rules contemplates that matters related to detention may be varied in individual cases and explicitly provides that the Co-Investigating Judges are an appropriate body to make such determinations.

30. In the Impugned Order, the Co-Investigating Judges acknowledge that the Defence relies on guarantees found in the ICCPR, Agreement and ECCC Law in support of the relief sought.[49] The Co-Investigating Judges denied the Request on the basis that "these instruments… do not explicitly or implicitly guarantee a right for recording equipment to be brought into the [D]etention [F]acility and operated by the defence team, for the conduct of such preparation."[50] The Co-Investigating Judges concluded that the rights of the Appellant under the Agreement, the ECCC Law and the ICCPR "are already being fully respected" and that it can find no legal basis for granting an order authorizing the Detention Facility to admit recording equipment.[51]

31. The Co-Investigating Judges are correct that the cited provisions of the Agreement, the ECCC Law and the ICCPR do not explicitly authorize the use of audio/video recording equipment by a defence team in a detention facility. Nevertheless, the Pre-Trial Chamber considers that the absence of explicit authority that grants the right to use this specific type of equipment does not mean that it falls outside the scope of actions that are implicitly

[47] Transcript 25 May 2010, p. 12 (line 23) to p. 13 (line 11).
[48] Transcript 25 May 2010, p. 18 (line 22) to p. 19 (line 3).
[49] Impugned Order, p. 1.
[50] Impugned Order, p. 1.
[51] Impugned Order, p. 2.

authorized by the ICCPR. Such a narrow interpretation of the rights of an accused is not compatible with the object and purpose of fair trial guarantees.[52]

32. Article 6(3)(b) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ("the ECHR") which is substantially similar in wording to Article 14(3)(b) of the ICCPR, has been the subject of judicial interpretation.[53] As is the case under the ICCPR, the guarantee of adequacy of time and facilities in Article 6(3)(b) is provided in the specific context of preparation of the defence. In *Galystan v. Armenia,* a Chamber of the European Court of Human Rights held that the right guaranteed under Article 6(3)(b) of the ECHR implies that the "substantive defence activity ...may comprise everything which is necessary to prepare the main trial."[54] This right is granted to the defence to ensure that the accused has the opportunity to organize "in an appropriate way" and formulate, in full amplitude, all arguments that may be put forth at trial "without restriction."[55] It is an inevitable result of this right and its underlying purpose that the issue of whether a request, such as the Request, is necessary for adequate preparation, must be assessed on a case-by-case basis in light of the circumstances. Adjudging adequacy and necessity requires evaluation and not mere reliance on the fact that certain facilities or a certain amount of time had been provided.

33. The Pre-Trial Chamber considers that there are several factors specific to the pre-trial proceedings of the Charged Person that must be assessed in determining whether the use of audio/video equipment falls within the fair trial rights of the Charged Person in this case. The Defence correctly notes that it would have had no need to submit the Request to the Co-

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[52] The European Court of Human Rights has stated, in a case that concerned the infringement of fair trial rights, that notwithstanding formal or technical compliance by a state with a rights of an accused "it must be borne in mind that the [European Convention on Human Rights and Fundamental Freedoms] is aimed to guarantee not rights that are theoretical or illusory but rights that are practical and effective." *Galystan v. Armenia,* ECHR App No. 26986/03, 'Judgment', 15 November 2007, para. 81.

[53] Article 6(3)(b) states that "Everyone charged with a criminal offence has the following minimum rights: (b) to have adequate time and facilities for the preparation of his defence." Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005 (as amended) ("the ECHR"), Article 6(3)(b).

[54] *Galystan v. Armenia,* ECHR App No. 26986/03, 'Judgment', 15 November 2007, para. 84.

[55] *Galystan v. Armenia,* ECHR App No. 26986/03, 'Judgment', 15 November 2007, para. 84.

Investigating Judges if the Charged Person had been provisionally released.[56] In support of the Appeal, the Co-Prosecutors cite the fact that provisional detention of the Charged Person is not a punitive measure.[57] The fact that a charged person resides in the Detention Facility pursuant to a provisional detention order does not take away his right to adequately prepare his defence. In complex cases, preparing a defence may necessarily encompass many courses of action. A measure that facilitates the preparation of the defence, including by enabling communication between counsel and a charged person, may not be unduly restricted because a charged person resides in the Detention Facility.

34. Second, the Pre-Trial Chamber has considered that (i) the scale and complexity of the case, (ii) the particular translation and interpretive needs of the defence team and attendant difficulties in maintaining verbatim or even detailed records of meetings between the Charged Person and his defence team, and (iii) the fact that the Appellant is providing instruction to his international Co-Lawyer residing abroad, further provide context to the circumstances of the defence team.[58] In the Appeal, the Defence notes that the exchange of information between the Co-Lawyers is necessary so that they can continue to work as a team and "jointly…plan their future work."[59]

35. The Appellant has submitted that the recording of client meetings is necessary for trial preparation and communication with counsel. The Pre-Trial Chamber is persuaded that if the recording is necessary, it is a facility under Article 14(3)(b) of the ICCPR. The Defence has demonstrated to the satisfaction of the Pre-Trial Chamber that the recordings are necessary for effective communication with counsel and trial preparation. In light of the foregoing, the Pre-Trial Chamber finds that the use of audio/video recording equipment for the purpose of

[56] Transcript 25 May 2010, p. 10 (lines 4-10).
[57] Response, para. 1.
[58] The European Commission on Human Rights considered that the "rights secured by Article [6(3)] are those of the accused and the defence in general. In order to determine whether these rights were respected, it is not sufficient to consider the situation in which the accused himself is placed. Consideration must also be given to the situation in which the defence as a whole is placed." *Kurup v. Denmark,* Application No. 11219/84, Report of European Commission of Human Rights, 10 July 1985, at 291. See also Pieter van Dijk *et al., Theory and Practice of the European Convention on Human Rights,* 4th ed. (Intersentia, 2006) at 634 (submitting that under Article 6(3)(b) "not only the rights of the accused are concerned, but equally the rights of counsel, so that for the assessment of the overall situation the position of both of them has to be taken into account").
[59] Appeal, para. 23.

preparing the pre-trial defence of the Charged Person constitutes a facility for the preparation of the defence. Likewise, the use of audio/video recording equipment in the manner specified in the Request is a facility for communication between the Charged Person and counsel. An assessment of the circumstances of this particular case reveals that permitting recordings will ensure that the Charged Person has adequate facilities at his disposal. It is only with the provision of adequate facilities for trial preparation and with the means for effective communication in place that this court can maintain that the fair trial rights of the Charged Person are fully respected.

36. Rather than consider their obligations to safeguard the fair trial rights of the Charged Person pursuant to Rule 21, the Co-Investigating Judges confined their analysis to: (i) concluding that the applicable law does not contain implicit or explicit authorization for audio/video equipment, and (ii) concluding that the rights of the Charged Person were already fully respected by existing resources, facilities and assistance.

37. The Co-Investigating Judges erred in not considering the fair trial rights of the Charged Person. Since they did not consider these rights, they subsequently did not consider whether coercive measures were required and the proper application of such measures to respect the rights and dignity of the Charged Person in accordance with Rule 21(2). This Chamber has previously considered the need to allow detained persons to exercise their rights under Rule 21(1) in the specific context of the proper administration of the Detention Facility and the dictates of Rule 21(2).[60] In the appeal concerning contact between the Charged Person and his wife, who is also a charged person residing in the Detention Facility, this Chamber found that in the exercise of its discretion, the Co-Investigating Judges are limited by Rule 21(2).[61] Any measure imposed as a restriction on the rights of a charged person found in Rule 21(1) must be "strictly limited to the needs of the proceedings."[62]

[60] Visitation Appeal Decision, paras 15, 17.
[61] Visitation Appeal Decision, para. 15.
[62] Visitation Appeal Decision, para. 15.

38. In addition to the Pre-Trial Chamber's own jurisprudence the Chamber has considered interpretations of this right by the Human Rights Committee and the European Court of Human Rights. General Comment No. 32 on Article 14(3)(b) of the ICCPR, as promulgated by the United Nations Human Rights Committee, provides guidance as to the parameters of the guarantee to access to counsel. General Comment No. 32 provides that in the case of criminal charges, counsel must be able to act on behalf of his client "without restrictions, influence, pressure or undue interference from any quarter."[63] Imposing limitations on the right to communicate with counsel under the ECHR is impermissible absent justification.[64] This right of a charged person must be fully recognized in the scenario of a charged person in detention before trial.[65]

39. The Pre-Trial Chamber, (i) having questioned the Chief of the Detention Facility as to the rationale for the rules and practice forming part of the Notification and otherwise governing the admission of materials into the Detention Facility, and (ii) having received no information from the Chief of the Detention Facility or any other party indicating any security concern,[66] other risk to any person or other risk to the integrity of the proceedings

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[63] United Nations Human Rights Committee, *General Comment No. 32: Right to Equality before courts and tribunals and to a fair trial,* UN Doc. CCPR/C/GC/32 (23 August 2007). General Comment No. 32 on Article 14 replaces the Human Rights Committee's General Comment No. 13.

[64] In *Kurup v. Denmark*, the European Commission on Human Rights found that in the interests of protecting the safety of a witness and the integrity of the witness statement, and in accordance with Danish law which permitted the President of the court to order that the accused leave the courtroom in exceptional circumstances, the rights of the accused to prepare his defence had not been violated when he was ordered to leave the courtroom and his counsel was ordered not to reveal the identity of the witnesses to his client. *Kurup v. Denmark*, Application No. 11219/84, Report of European Commission of Human Rights, 10 July 1985, at 292. The *Kurup* court further noted that "[i]t is true that the accused's ability to meet with his counsel is a fundamental part of the preparation of his defence. However, it cannot be maintained that the right to meet with counsel and consult him may not be subject to any restriction." *Kurup v. Denmark*, Application No. 11219/84, Report of European Commission of Human Rights, 10 July 1985, at 291- 292.

[65] One commentator has submitted that "the most important issue under [Article 6(3)(b)] is the right to communicate with a lawyer. This is of particular significance to those persons in detention on remand pending trial…[r]estrictions on lawyer's visits must be justified in public interests such as prevention of escape or prevention of the obstruction of justice. It may be permissible for a lawyer to be restricted from discussing with his client information about the case that would disclose the name of an infomer." Richard Clayton and Hugh Tomlinson, *Fair Trial Rights,* Oxford University Press: 2001,p. 117.

[66] The European Court of Human Rights has noted that the inability to have confidential, out of hearing consultations with counsel may constitute denial of the right to access to a court found in Article 6(1) of the ECHR. *Campbell and Fell v. The United Kingdom,* Application Nos. 7819/77 and 7878/77, Judgment, 28 June 1984, para. 111. However, the Chamber noted that "there may be security considerations which would justify

that could justify restricting the fair trial rights of the Appellant, finds that the Co-Investigating Judges committed an error of law by failing to consider that the fair trial rights of the Appellant protected by Rule 21 had been adversely affected by the refusal to permit the defence team of the Charged Person to take recording equipment into the Detention Facility. This error of law invalidates the Impugned Order.

40. Having determined that the Impugned Order violates the fair trial rights of the Charged Person, the Pre-Trial Chamber finds it unnecessary to consider the remaining grounds of appeal.

41. Whilst the Pre-Trial Chamber has found that the Impugned Order deprived the Appellant of his fair trial rights and cannot stand, the Pre-Trial Chamber is mindful of the need to protect against abuse of the right to bring audio/video equipment into the Detention Facility and all products thereof. With due regard to the rules and procedures of the Detention Facility and the stated purposes of the Appellant for the audio/video recordings, the following restrictions shall apply:

1. The Co-Lawyers for the Appellant and other members of the legal team of the Charged Person, including translators and interpreters as necessary ("the Authorized Persons"), may bring audio/video recording equipment into the Detention Facility. All equipment shall be subject to the inspection procedures and modalities in place for entry of persons and items as are established by the Chief of the Detention Facility. Recordings may only be made in the designated interview room of the Detention Facility or as otherwise directed by the Chief of the Detention Facility.

2. The recordings produced by the Authorized Persons may only be used for the purpose of preparation of the defence of the Charged Person and to communicate with counsel. Under no circumstances may the Appellant or any Authorized Person permit any recording to be made public, published in any form whatsoever or provided to or viewed by any person or organization other than the Authorized Persons and the Appellant, without leave of a Chamber of the ECCC being first obtained.

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some restriction on the conditions for visits by a lawyer to a prisoner." *Campbell and Fell v. The United Kingdom,* Application Nos. 7819/77 and 7878/77, Judgment, 28 June 1984, para. 113..

3. The Authorized Persons, by exercising the right to use audio/video recording equipment in the Detention Facility pursuant to the decision and order of the Pre-Trial Chamber provided herein, acknowledge and agree that all such recordings are 'Documents' as that term is defined in Practice Direction 004/2009 on the Classification and Management of Case-Related Information ("the Practice Direction"). All recordings shall be classified as 'Confidential' as defined in the Practice Direction and otherwise considered "confidential information" as that term is used in the Practice Direction. The Authorized Persons acknowledge and agree that all provisions of the Practice Direction, including but not limited to Article 8 thereof, shall be applicable to the Authorized Persons and all audio/video recordings of meetings with the Charged Person in the Detention Facility. Failure to abide by the restrictions on recordings contained in this decision and order of the Pre-Trial Chamber shall subject the person found to have committed the violation to sanction by this Chamber and any other relevant body. Failure to adhere to the restrictions on the recordings as 'confidential documents' and/or 'confidential information' shall be deemed a violation of the Practice Direction. Any person in violation of this decision and order of the Pre-Trial Chamber shall be subject to the sanctions provided in Article 11 of the Practice Direction.

42. The Pre-Trial Chamber further observes that although not all Charged Persons made or joined in the Request, due to the fact that the right expressed in this decision is a fair trial right, the right expressed in this decision shall extend to the defence teams of the other charged persons currently detained in the Detention Facility, subject to the conditions contained in the immediately preceding paragraph and the order below.

43. The Appellant, the Co-Prosecutors and the Chief of the Detention Facility have liberty to apply to the Pre-Trial Chamber to seek further directions in respect of the implementation of this decision, if required.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES AND DIRECTS THAT:

1. The Appeal is admissible;
2. The Impugned Order is set aside.

3. The Chief of the Detention Facility is ordered to allow the Authorized Persons to bring audio/video recording equipment into the Detention Facility in accordance with this decision and pursuant to such modalities related to inspection and use of such equipment as may be implemented by the Staff of the Detention Facility at the direction of the Chief.
4. The right to use audio/video recording equipment to record client meetings in the Detention Facility is expressly limited by the conditions in paragraph 41 of this decision. For the avoidance of doubt, the conditions in paragraph 41 are incorporated by reference into this order.

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

Phnom Penh, 11 June 2010

Pre-Trial Chamber **President**

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