



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

D140/9/S

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 55)

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

Date: 28 June 2010

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PUBLIC

DECISION ON IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING HIS REQUEST FOR APPOINTMENT OF AN ADDITIONAL [REDACTED] EXPERT TO RE-EXAMINE THE SUBJECT MATTER OF THE EXPERT REPORT SUBMITTED BY MS. EWA TABEAU AND MR. THEY KHEAM

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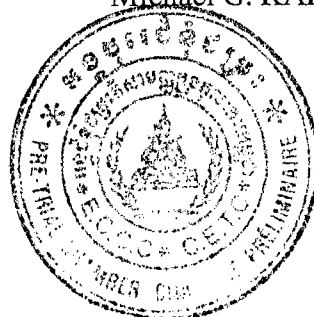
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Charged Person

IENG Sary

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 Mr PICH Ang
 Mr Julien RIVET
 Mr Pascal AUBOIN
 Mr YUNG Phanith

Co-Investigating Judges

YOU Bun Leng
 Marcel Lemonde

Unrepresented Civil Parties

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “Ieng Sary’s Appeal against the Co-Investigating Judges’ Order Denying his Request for Appointment of an Additional [REDACTED] Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam” filed by the Co-Lawyers for Ieng Sary (the “Charged Person”) on 23 March 2010 (the “Second Appeal”).¹

BACKGROUND

1. On 30 October 2008, the Co-Lawyers for Nuon Chea filed before the Co-Investigating Judges their “Sixth Request for Investigative Action” (the “Nuon Chea’s Sixth Request”).² Nuon Chea’s Sixth Request asked for “the [Co-Investigating Judges] to attempt to determine – with the assistance of a qualified [REDACTED] expert (or experts) – [REDACTED]”.³ In addition, it sought the appointment of such an expert or experts.⁴
2. On 10 March 2009 the Co-Investigating Judges responded affirmatively to Nuon Chea’s Sixth Request,⁵ appointing Dr Ewa Maria Tabeau and Mr They Kheam as [REDACTED] experts to report by 31 August 2009.⁶ On 28 April 2009, the Co-Investigating Judges extended the deadline for submission of the expert report to 30 September 2009.⁷
3. On 22 July 2009 the Co-Lawyers for the Charged Person filed before the Co-Investigating Judges “Ieng Sary’s Request for Additional [REDACTED] Expert” (the “First Request”).⁸ The grounds for the First Request were that Dr. Tabeau lacks

¹ Ieng Sary’s Appeal against the Co-Investigating Judges’ Order Denying his Request for Appointment of an Additional [REDACTED] Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 23 March 2010, D140/9/1.

² Sixth Request for Investigative Action, 30 October 2008, D113.

³ Nuon Chea’s Sixth Request, para 9.

⁴ Nuon Chea’s Sixth Request, para 1.

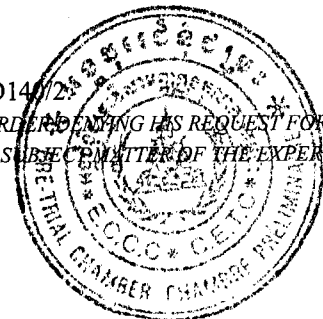
⁵ Response to the Sixth Request for Investigative Action (D113) and Partial Response to the Fifth Request for Investigative Action (D105), 10 March 2009, D113/2 and D105/2.

⁶ Expertise Order, 10 March 2009, D140.

⁷ Expertise Order Correction, 28 April 2009, D140/1.

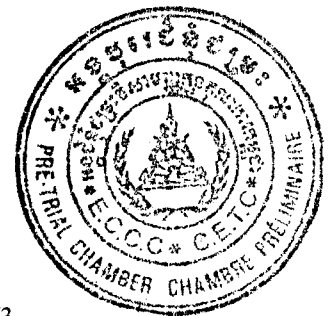
⁸ Ieng Sary’s Request for Additional [REDACTED] Expert, 22 July 2009, D140/2.

DECISION ON IENG SARY’S APPEAL AGAINST THE CO-INVESTIGATING JUDGES’ ORDER DENYING HIS REQUEST FOR APPOINTMENT OF AN ADDITIONAL [REDACTED] EXPERT TO RE-EXAMINE THE SUBJECT MATTER OF THE EXPERT REPORT SUBMITTED BY MS. EWA TABEAU AND MR. THEY KHEAM 3/13



impartiality and competence, and that the Co-Investigating Judges did not consult the Co-Lawyers for the Charged Person prior to appointing [REDACTED] experts.⁹

4. On 18 August 2009 the Co-Investigating Judges denied Ieng Sary's Request (the "First Order").¹⁰ The Co-Investigating Judges found that "there is no evidence that could raise reasonable doubts about the impartiality or competence" of Dr Tabeau, and declared that the [Co-Investigating Judges are] not obliged under the Internal Rules to consult the parties before appointing an expert.¹¹ On 16 September 2009 the Co-Lawyers for the Charged Person filed an Appeal against this Order (the "First Appeal").¹² Subsequent to the filing of the Appeal, on 30 September 2009, Dr Tabeau and Mr They Kheam jointly filed their [REDACTED] Expert Report (the "Expert Report").¹³ On 14 December 2009 the Pre-Trial Chamber found the First Appeal inadmissible (the "Decision on the First Appeal").¹⁴
5. On 6 January 2010 the Co-Lawyers for the Charged Person filed another Request for Appointment of an Additional [REDACTED] Expert to Re-Examine the Subject Matter of the Expert Report submitted by Ms. Tabeau and Mr. They Kheam (the "Second Request").¹⁵ The Co-Lawyers explained that the Second Request "will attempt to more fully explain [Defence's] concerns regarding Ms. Tabeau's bias and incompetence".¹⁶ They requested the Co-Investigating Judges to: 1) appoint an additional [REDACTED] expert to re-examine the matter; 2) consult with the Defence before appointing the additional expert.



⁹ Ieng Sary's Request, para 5.

¹⁰ Order on Request for Additional [REDACTED] Expert, 18 August 2009, D140/3.

¹¹ The Order, paras 14-15.

¹² Ieng Sary's Appeal against the Co-Investigating Judges' Order on Request for Additional Expert filed on 16 September 2009 (the "Appeal"), D140/4/1.

¹³ [REDACTED] Expert Report: Khmer Rouge Victims in Cambodia, April 1975 – January 1979 A Critical Assessment of Major Estimates, 30 September 2009, D140/1/1.

¹⁴ Pre-Trial Chamber's Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order on Request for Additional Expert, 14 December 2009, D140/4/5.

¹⁵ Ieng Sary's Request for Appointment of an Additional [REDACTED] Expert to Re-Examine the Subject Matter of the Expert Report submitted by Ms. Tabeau and Mr. They Kheam, 6 January 2010, D140/7.

¹⁶ Second Request, para.13.

6. On 23 February 2010 the Co-Investigating Judges issued an Order rejecting the Second Request (the “Second Order”).¹⁷ The Co-Investigating Judges in the Second Order, noting that in the Decision on the First Appeal, the Pre-Trial Chamber permitted the defence to “seek appointment of an expert to re-examine a matter now the subject of an expert report”, observed that “with respect to the [Second] Request, they have already rejected the same substantive arguments in a previous request by the Defence relating to the qualification of [the] expert” and “affirmed their position set out in [the First Order].”¹⁸
7. On 23 March 2010 the Co-Lawyers for the Charged Person filed the submissions in the Second Appeal requesting the Pre-Trial Chamber to: 1) Reverse the Second Order, and 2) Order the Co-Investigating Judges to appoint an additional [REDACTED] expert pursuant to Internal Rule 31(10) after consultation with the parties. They submit that “the appeal is made necessary because the [Co-Investigating Judges] erred in determining that there is no evidence which could raise reasonable doubts as to the impartiality or competence of its appointed international [REDACTED] expert, Ms. Eva Tabeau, and further erred in failing to give any reason why an additional [REDACTED] expert should not be appointed.”
8. There was no Response filed to the Second Appeal by the Co-Prosecutors or the Civil Parties.
9. On 25 May 2010 the Pre-Trial Chamber decided to determine the Second Appeal on written submissions.¹⁹
10. On 10 June 2010, the Pre-Trial Chamber announced, in writing, its determination of the final disposition on the Second Appeal indicating that “a reasoned decision in respect of the Appeal shall follow in due course.”

¹⁷ Co-Investigating Judges Order on Ieng Sary’s Request for Appointment of an Additional [REDACTED] Expert, 23 February 2010, D140/8.

¹⁸ Second Order, para. 3.

¹⁹ Decision to Determine the Appeal on Written Submissions, 25 May 2010, D140/9/5.

DECISION ON IENG SARY’S APPEAL AGAINST THE CO-INVESTIGATING JUDGES’ ORDER DENYING HIS REQUEST FOR APPOINTMENT OF AN ADDITIONAL [REDACTED] EXPERT TO RE-EXAMINE THE SUBJECT MATTER OF THE EXPERT REPORT SUBMITTED BY MS. EWA TABEAU AND MR. THEY KHEAM 5/13



THE PRE-TRIAL CHAMBER DECIDED UNANIMOUSLY THAT IT:

1. "Finds the Appeal admissible;
2. Dismisses the Appeal on its merit."²⁰

11. The Pre-Trial Chamber hereby provides the reasons for this decision.

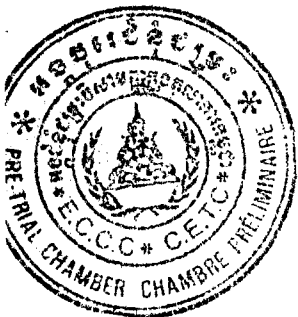
REASONS FOR THE DECISION:**A. RELEVANT LAW**

12. Reference is made to Internal Rules 31, 74 and 75.

B. ADMISSIBILITY

13. On 23 February 2010 the Co-Investigating Judges issued the Second Order. The Second Order was notified to the Charged Person on the same day of 23 February 2010. On 26 February 2010 the Co-Lawyers for the Charged Person filed a Notice of Appeal for the Second Appeal. The submission on the Second Appeal were filed on 23 March 2010 and within the time limit provided for in Internal Rule 75(3).

14. The Pre-Trial Chamber observes that the Second Appeal is submitted "pursuant to Rules 31(10) and 74(3)(e)" and refers to a request for the "appointment of an additional [REDACTED] expert to re-examine the subject matter" of an existing expert report. The Pre-Trial Chamber has found that the "Internal Rules permit the defence



²⁰ Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order Denying his Request for Appointment of an Additional [REDACTED] Expert to Re-Examine the Subject Matter of the Expert Report Submitted by Ms. Ewa Tabeau and Mr. They Kheam, 10 June 2010, D140/9/4.

to seek the appointment of an expert to re-examine a matter now the subject of an expert report.”²¹

C. STANDARD OF REVIEW

15. The Appeal is related to an order of the Co-Investigating Judges refusing a request by the Co-Lawyers for the appointment of an additional expert to re-examine an existing expert report and alleges that the Co-Investigating Judges erred in determining that there is no evidence which could raise reasonable doubts as to the impartiality or competence of one of the experts and in failing to give any reason why an additional [REDACTED] expert should not be appointed. The Co-Lawyers did not make any submission in relation to the standard of review applicable to the errors alleged in the Second Appeal.
16. The Internal Rules are silent in relation to the standard of review for appeals against Co-Investigating Judges’ Orders on requests submitted by the parties under Internal Rules 55(10) and 31(10). Requests submitted by the parties under Internal Rule 31(10) like those submitted under Internal Rule 55(10) aim at asking the Co-Investigating Judges to order or take action(s) which they consider necessary for the conduct of the investigation. In its Decision on Appeal against the Co-Investigating Judges’ Order on Request to Seek Exculpatory Evidence in the Shared Material Drive (the “SMD Decision”),²² the Pre-Trial Chamber, seeking guidance in the jurisprudence of international tribunals, found that the review of such orders is limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion, by applying the test set out in the “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel” in the case of *Milosevic v. Prosecutor* (the “Milosevic Decision”)²³ rendered by the Appeals



²¹ Pre-Trial Chamber’s Decision on the First Appeal, para. 22.

²² Decision on Appeal against the Co-Investigating Judges’ Order on Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, paras. 22-27.

²³ *Milosevic v. Prosecutor*, IT 02-54-AR73.7, “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel”, Appeals Chamber, 1 November 2004.

Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).

The test in the Milosevic Decision was:

“a Trial Chamber’s exercise of discretion will be overturned if 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 Trial Chamber’s discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not believe that counsel should have been imposed on Milosevic, the decision below will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.”²⁴

17. Further guidance from the jurisprudence of international tribunals demonstrates that the same test is applied when reviewing appeals related to orders on requests similar to requests as those submitted under Internal Rule 31(10).²⁵

D. CONSIDERATIONS

I. Alleged error of fact:

18. The Co-Lawyers submit in the Second Appeal that the Co-Investigating Judges “erred in determining that there is no evidence which could raise reasonable doubts as to the impartiality or competence of the [international] expert.”²⁶ The Co-Lawyers explain that they “base much of [their] criticism of the [Co-Investigating Judges’ rejection of [their] requests on the rejection of the First Request through the First Order. This is because the Impugned [Second] Order is extremely brief and simply affirms the First Order.”²⁷

²⁴ *Milosevic Decision*, paras 9-10 (footnotes omitted).

²⁵ *Prosecutor v. Vujadin Popovic et al.*, IT-05-88-AR73.2, “Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness,” Appeals Chamber, 30 January 2008.

²⁶ Appeal, p.1, first paragraph, and para.16/A and B.

²⁷ Appeal, para 16, footnote. 30.

DECISION ON IENG SARY’S APPEAL AGAINST THE CO-INVESTIGATING JUDGES’ ORDER DENYING HIS REQUEST FOR 8/13
APPOINTMENT OF AN ADDITIONAL [REDACTED] EXPERT TO RE-EXAMINE THE SUBJECT MATTER OF THE EXPERT
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19. The Pre-Trial Chamber observes that in the Second Order, the Co-Investigating Judges decided that “they have already rejected the same substantive arguments [as those of the Second Request] in a previous request by the Defence”²⁸ and in the First Order, the Co-Investigating Judges provide the following reasoning for rejecting the First Request:

“REASONS FOR THE DECISION

5. It does not follow that Ms Tabeau’s employment by the OTP-ICTY impacts her ability to produce an impartial report before the OCIJ-ECCC. The ICTY is an *Ad Hoc* Tribunal created under Chapter VII of the UN Charter to investigate the crimes committed in the former Yugoslavia. The ECCC are Chambers within the domestic criminal Courts of Cambodia mandated to investigate crimes committed by senior leaders of Democratic Kampuchea and the most responsible during the period of 17 April 1975 to 6 January 1979. The subject matter, the parties, and the adjudicators are completely different.
6. Rule 55(5) stipulates that the Co-Investigating Judges shall conduct their investigation impartially. This applies to any expert engaged by the OCIJ. Neither the fact that Ms Tabeau worked for the OTP ICTY, nor that two senior members of the OCP previously worked at the ICTY, constitute a sufficient reason to conclude that she is not able to be impartial in the current proceedings before the ECCC.
7. The Defence argues that, given that Trial Chamber II of the ICTY did not rely upon an expert report submitted by Ms Tabeau in *Simic*, the OCIJ should not have engaged her as an expert.
8. In *Simic* the Trial Chamber concluded that the expert reports submitted by Ms Tabeau (and by Defence Expert, Ms Svetlana Radovanović, respectively), were not conclusive as to the occurrence of either ethnic cleansing or forcible displacement of people. As a consequence of this finding the Trial Chamber decided not to rely on said reports.
9. In supporting their submission, the Defence overstated the findings of the Trial Chamber in *Simic*. The Trial Chamber did not conclude that the sources used by Ms Tabeau in her report were “simply manifestly insufficient”²⁹. The Trial Chamber simply held that certain data relied upon by the expert was not sufficiently comparable and that none of the expert reports had used sources that would allow them to draw conclusions regarding certain contested facts. The Trial Chamber concluded that “...the evidence presented by both expert witnesses did not allow [it] to distinguish between voluntary or involuntary departures of civilians”³⁰. This was not an implied criticism of the competence of the experts.

²⁸ Second Order, para. 3.

²⁹ Cf. Request, para. 17 *in fine*.

³⁰ *Simic et al* (TC II, ICTY), Judgement, 17 Oct. 2003, para. 34 *in fine*.



10. The conclusions of the Trial Chamber II in *Simić* as to the weight they gave to the evidence presented by the parties is not a sufficient reason to disqualify Ms Tabeau (or Ms Radovanovic) as an expert on the grounds of incompetence in this case.
11. The Defence further argues that, given that Defence expert Ms Radovanović criticized Ms Tabeau's expert skills in her expert report in *Prlic*³¹, it is inappropriate for OCIJ to rely solely on Ms Tabeau's expertise.
12. The proceedings before the ICTY are primarily based on the common law tradition in which differences of opinion between experts called by opposing parties are common. The fact that an expert called by an opposing party criticized Ms Tabeau's methodology in the context of that case is not a sufficient reason to conclude that Ms Tabeau is not a competent expert in her field.
13. Moreover, it is not true that OCIJ will solely rely on Ms Tabeau's expertise. As it is the practice, OCIJ also assigned a national expert to work with Ms Tabeau for this expertise.
14. In light of the above, we conclude that there is no evidence that could raise reasonable doubts about the impartiality or the competence of Ms Tabeau to be engaged as an expert witness. This conclusion is further supported by the quality and quantity of her publications, the academic degrees that she has earned, the courses that she has taught, the conferences that she has attended and the fact that she has been appointed as an expert in multiple cases before the ICTY".³²
20. The Pre-Trial Chamber notes that, as explained by the Co-Investigating Judges, the examples used by the Co-Lawyers in the First Request to prove Ms. Tabeau's partiality represent observations of a general nature rather than concrete evidence specifically related to the case in question. The Appellant does not satisfy the Pre-Trial Chamber that the Co-Investigating Judges abused their discretion in determining in their First Order that there is no evidence which could raise reasonable doubts as to the impartiality or competence of the expert.
21. In the Second Request the Co-Lawyers submitted to the Co-Investigating Judges that they "will attempt to more fully explain [their] concerns regarding Ms. Tabeau's bias and incompetence in greater detail than in [their First] request."³³

³¹ *Prlic*, (TC, ICTY) Expert report of Dr. Svetlana Radovanović, filed on 19 Oct. 2008.

³² First Order, paras. 5-14 (*footnotes omitted*).

³³ Second Request, para. 13.



22. The Pre-Trial Chamber observes that the Co-Lawyers in their Second Request put before the Co-Investigating Judges some other jurisprudence from the ICTY in order to support their arguments. They submit that that ICTY “will disqualify an expert if that expert is deemed too close to one party in the case to give impartial evidence.”³⁴ This example was taken from the *Dorđević* trial where the expert concerned had taken part “in the preparation of the Prosecution case” in the same case. The Pre-Trial Chamber observes that the use of this authority by the defence defeats their purpose because it demonstrates that the threshold for specificity of evidence that must be used to confirm partiality of experts in international practice is set higher than asserted by the Co-Lawyers to the Co-Investigating Judges. The Co-Lawyers, unlike in the *Dorđević* case, have no concrete evidence to show that Ms. Tabeau has had any prior involvement in this particular case before the OCIJ/ECCC which could give reasonable cause for even appearance of her bias. Given the high threshold and the failure to provide evidence to demonstrate actual or perceived bias, the Pre-Trial Chamber finds that the Co-Investigating Judges were correct in the Second Order not to change the conclusion they reached in their First Order.

23. The Pre-Trial Chamber further observes that in their Second Request, the Co-Lawyers did not specifically refer to examples from the expert report itself, they only briefly submitted that “flaws in the supposed objective and impartial report will likely not be obvious to someone who is not experienced in the collection of [REDACTED] data.”³⁵ In the Second Appeal, the Co-Lawyers allege that “the [REDACTED] Expert Report demonstrates that Ms. Tabeau favours estimates which indicate [REDACTED] – an indication of Ms. Tabeau’s lack of impartiality.”³⁶ Further, in the Second Appeal the Co-Lawyers refer to other alleged flaws in the expert report in submitting that Ms. Tabeau: has failed to conduct original research and [to] draw her own assessment; has failed to explain how she selected the sources she examined; has confused the issue of [REDACTED]; has failed to address [REDACTED] in Cambodia.³⁷ The Pre-Trial Chamber observes that these issues were not raised in

³⁴ Second Request, para. 17.

³⁵ Second Request, para. 12.

³⁶ Second Appeal, para 16/A.

³⁷ Second Appeal, paras. 49-52 and 56/j-m.



the Second Request submitted to the Co-Investigating Judges, therefore the Co-Investigating Judges were under no obligation to address such concerns in the Second Order.

II. Alleged error of law:

24. In the Second Appeal the Co-Lawyers also submit that the Co-Investigating Judges erred “in failing to give any reason why an additional [REDACTED] expert should not be appointed.”³⁸
25. The Pre-Trial Chamber observes that in the Second Order the Co-Investigating Judges, recognizing that the defence may seek appointment of an additional expert to re-examine a matter subject of an expert report, noted that with respect to the Second Request they have already rejected the same substantive arguments and found no reason to vary their previous position.³⁹ In the First Order, the Co-Investigating Judges state that “it is not true that [the Co-Investigating Judges] will solely rely on Ms. Tabeau’s expertise. As it is the practice, [the Co-Investigating Judges] also assigned a national expert to work with Ms. Tabeau for this expertise.”⁴⁰ The Pre-Trial Chamber finds that the reasons provided by the Co-Investigating Judges for not appointing an additional [REDACTED] expert are sufficient. It is also clear from the way the reasoning in the Second Order flows that there was no reason to consider appointing an additional expert under such circumstances where the purpose of the request for additional expert was to have him/her “re-examine the subject mater of the expert report”⁴¹ and the grounds⁴² for such request were found to not have been established.
26. In the Second Appeal, the Co-Lawyers submit that the Co-Investigating Judges’ refusal to appoint additional expert, despite partiality concerns, infringes upon the

³⁸ Second Appeal, para. 16/C.

³⁹ Second Order, para. 3.

⁴⁰ First Order, para. 13.

⁴¹ Second Request, see title and conclusion.

⁴² Alleged impartiality of one of the experts.



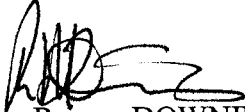



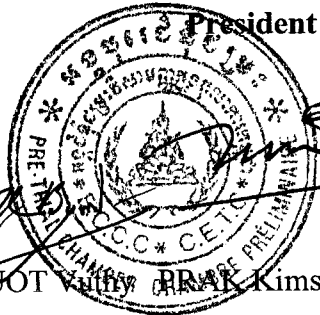
Charged Persons' rights to a fair trial.⁴³ The Pre-Trial Chamber observes that the Co-Lawyers do not further develop this argument, therefore it does not find it necessary to consider it.

27. For all the abovementioned reasons, the Pre-Trial Chamber decided as announced in its determination on Appeal of 10 June 2010.

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

Phnom Penh, 28 June 2010 *ch.*

Pre-Trial Chamber

 Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy ~~BRAR Kimsan~~

⁴³ Appeal first paragraph and paras. 17-19 and 57.

DECISION ON IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' ORDER DENYING HIS REQUEST FOR 13/13 APPOINTMENT OF AN ADDITIONAL [REDACTED] EXPERT TO RE-EXAMINE THE SUBJECT MATTER OF THE EXPERT REPORT SUBMITTED BY MS. EWA TABEAU AND MR. THEY KHEAM