



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

D 164/419

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 24 and 25)

Before:

Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date:

20 October 2009

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PUBLIC

DECISION ON REQUEST TO RECONSIDER THE DECISION ON REQUEST FOR AN ORAL HEARING ON THE APPEALS PTC 24 AND PTC 25

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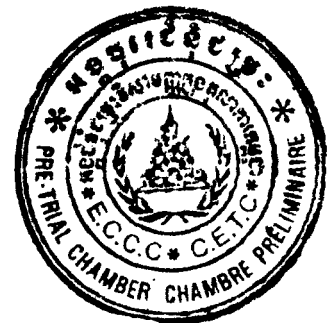
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ឯកសារបានចម្លងតាមគ្រឹះការដើម
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and 25” filed by the Co-Lawyers for the Charged Person Khieu Samphan on 9 September 2009 (the “Request for Reconsideration”).¹

I- PROCEDURAL BACKGROUND

1. On 24 July 2009, the Co-Lawyers for Ieng Thirith, Nuon Chea and Khieu Samphan filed a “Joint Defence Appeal from the [Co-Investigating Judges] Order on the Request for Investigative Action to Seek Exculpatory Evidence in the [Shared Materials Drive] SMD of 19 June 2009” (the “Joint Appeal”) which was registered as case file PTC 24.² The Parties to the Joint Appeal also made a Request for an Oral Hearing.³
2. On 27 July 2009, the Co-Lawyers for Ieng Sary filed an “Appeal Against the Co-Investigating Judges’ Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive” (the “Ieng Sary Appeal”) which was registered as case file PTC25.⁴
3. On 10 August 2009, the Co-Prosecutors filed their “Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the Co-Investigating Judges’ Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive” (the “Co-Prosecutors’ Response”).⁵ In their Response, the Co-Prosecutors submitted their comments in relation to the request for oral hearing.⁶
4. On 20 August 2009, the Pre-Trial Chamber rendered its “Decision on [the] Request for Oral Hearing on the Appeals PTC24 and 25” (the “Decision on Request for Hearing”).⁷

¹ Request to Reconsider the Pre-Trial Chamber’s Decision on Request for an Oral Hearing on the Appeals PTC 24 and 25, filed by the Co-Lawyers for the Charged Person Khieu Samphan on 9 September 2009, (the “Request for Reconsideration”), D164/4/6.

² Joint Defence Appeal from the [Co-Investigating Judges] Order on the Request for Investigative Action to Seek Exculpatory Evidence in the [Shared Materials Drive] SMD of 19 June 2009” (the “Joint Appeal”), D164/4/1.

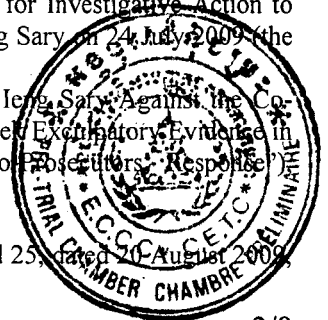
³ The Joint Appeal, paras. 8 and 9.

⁴ Appeal Against the Co-Investigating Judges’ Order Denying the Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, filed by the Co-Lawyers for Ieng Sary on 24 July 2009 (the “Ieng Sary Appeal”), D164/3/1.

⁵ Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the Co-Investigating Judges’ Order Denying a Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, filed by the Co-Prosecutors on 10 August 2009, (the “Co-Prosecutors’ Response”) D164/4/2.

⁶ The Co-Prosecutors Response, paras. 12-16.

⁷ Pre-Trial Chamber’s Decision on the Request for Oral Hearing on the Appeals PTC24 and 25, dated 20 August 2009, (the “Decision on Request for Hearing”) D164/4/3.



5. On 9 September 2009, the Co-Lawyers for Khieu Samphan filed the Request for Reconsideration.
6. On 28 September 2009, the Co-Prosecutors filed their Observations on Khieu Samphan's Request for Reconsideration.⁸

II- SUBMISSIONS OF THE PARTIES

7. In their Request for Reconsideration, the Co-Lawyers request the Pre-Trial Chamber to: 1) Reconsider its decision on the request for a hearing on the appeal; 2) Consider the submissions of the parties in this case regarding the holding of an oral hearing; and 3) to set a hearing date.
8. The Co-Lawyers argue that the conclusion of the Pre-Trial Chamber in its Decision on Request for Hearing represents "two errors of law". They submit that "contrary to the assertion, (1) the general rule applicable to all pre-trial appeals is that a hearing must be held; while it is possible to determine an appeal on the basis of the written submissions of the parties, this is an exception to the principle, and (2) the rule applicable to all appeals is that the hearing must be conducted in camera, as public hearings are subject to certain conditions."⁹ They submit that "in final analysis, the Pre-Trial Chamber's Decision on Request for Hearing results in significantly restricting Charged Persons' rights to a hearing on appeal."¹⁰
9. The Co-Lawyers submit that according to the Internal Rules and the Code of Criminal Procedure of the Kingdom of Cambodia, the set principle is that hearings on appeal must be conducted orally and, as an exception to the principle, appeals may be decided on basis of written submissions alone. They claim that the alternative to the principle of holding a hearing on appeals is subject to the condition, that the Chamber must seek the views of the parties before deciding to determine an appeal on basis of written submissions alone.¹¹ The Co-Lawyers further draw attention to the provision of Internal Rule 21(a) which reads that "ECCC proceedings shall be fair and adversarial."¹²
10. The Co-Lawyers argue that "the confidential nature of the investigation does not justify the Pre-Trial Chamber's departure from the principle that hearings must be conducted orally" and that

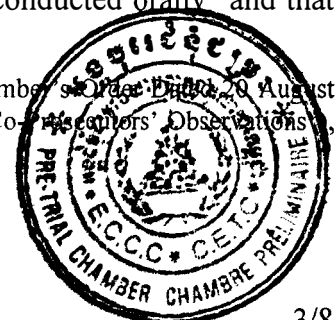
⁸ Observations on Khieu Samphan's Request for Reconsideration of the Pre-Trial Chamber's Order Dated 20 August 2009 About Oral Hearing, filed by the Co-Prosecutors on 28 September 2009, (The "Co-Prosecutors' Observations", D164/4/8.

⁹ Request for Reconsideration, paras. 5-8 and 26.

¹⁰ Request for Reconsideration, para. 27.

¹¹ Request for Reconsideration, paras. 11-12 and 16-17.

¹² Request for Reconsideration, para. 18.



the applicable law “offers all the guarantees to ensure the confidentiality of the investigation [which addresses] the concerns expressed by the Pre-Trial Chamber.”¹³

11. In their Observations on the Request for Reconsideration, the Co-Prosecutors submit “that the Pre-Trial Chamber deny the Request for an oral hearing in the current Appeal” and that “it may, however, consider holding, as a matter of law, that confidential oral hearings may be held in future appeals arising out of requests for investigative actions should the situation so demand.”

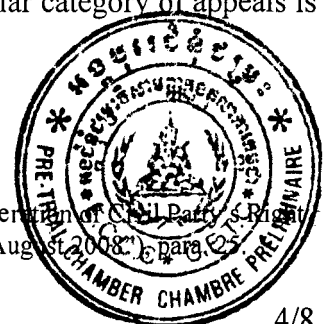
II- CONSIDERATIONS OF THE PRE-TRIAL CHAMBER

12. In its “Decision on Application for Reconsideration of Civil Party’s Right to Address the Pre-Trial Chamber in Person”, the Pre-Trial Chamber found that an application for reconsideration “may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decision.” It further found, on the basis of the jurisprudence of the international tribunals, that it has the inherent power to reconsider a decision it has previously rendered because of a change of circumstances or when it finds that the previous decision was erroneous or that it has caused an injustice.¹⁴
13. The Pre-Trial Chamber notes that in their Request for Reconsideration the Co-lawyers do not agree with the conclusion of the Pre-Trial Chamber in its Decision on Request for Hearing arguing that it represents an error of law and restricts the right of the Charged Person to a hearing on appeal.
14. The Pre-Trial Chamber in its Decision on Request for Hearing, contrary to the assertions of the Defence, does not set a new principle that differs from that provided in the Internal Rules on procedure for all pre-trial appeals. It applies an approach of a “general” nature for only a “particular category of pre-trial appeals” and not for all the appeals under its jurisdiction, as the Defence erroneously asserts. The Pre-Trial Chamber observes that because this approach is only taken in respect of a particular category of appeals and is of a “general” nature, it was not necessary to explain that when the term “general rule” was used, it is implicit that exceptions to any general consideration are possible when the circumstances of a case deem it necessary.¹⁵ The possibility of holding a hearing, where appropriate, on this particular category of appeals is thus not excluded.

¹³ Request for Reconsideration, paras. 22-24.

¹⁴ Case File 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/I/68 (the “Decision of 28 August 2008”), para. 5.

¹⁵ PTC Decision on Request for Hearing, para. 5.



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15. The Pre-Trial Chamber has the obligation and the authority under the applicable law to take such approaches of a general nature in relation to particular categories of appeals under its jurisdiction, where it finds this necessary and appropriate. The Pre-Trial Chamber notes that the wording of the Internal Rules, the Agreement,¹⁶ and the rules of procedure established at the international level indicate that the right to an oral hearing at the pre-trial stage is not an absolute right.

16. The text of the Agreement suggests that the right of the accused to a hearing shall be respected throughout the trial stage, it does not state the same for the pre-trial stage. Article 13 of the Agreement provides in relevant part:

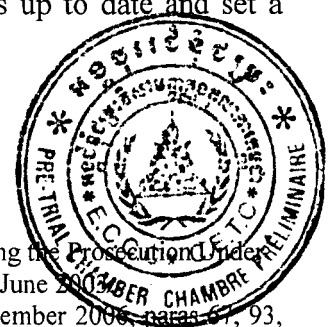
“Rights of the accused

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR) shall be respected throughout the trial proces. Such rights shall, in particular include the right: to a fair and public hearing [...].”

17. In the Chambodian and French systems, it is assumed that a hearing will be held before any decision of the Investigative Chamber is taken.¹⁷ There seems to be no possibility to proceed without a hearing as the failure to respect the formalities associated with the hearing (e.g. notification of the date) leads to the nullity of the decision. This differs from the procedures before the Pre-Trial Chamber of the ECCC, which are governed by the Internal Rules.¹⁸ The Internal Rules differ from the Code of Criminal Procedure of the Kingdom of Cambodia (CCP) in that these rules allow the Pre-Trial Chamber to decide on appeals, where it finds it necessary, on basis of written submissions only.

18. Internal Rule 77(3) states in relevant part:

(a) “The President of the Chamber shall verify that the case file is up to date and set a hearing date;



¹⁶ 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, dated 6 June 2007, paras. 67, 93, 133 and 135.

¹⁷ CCP, Articles 258 and 260; F.-L. COSTE, *Chambre d'instruction, Rép. pén. Dalloz*, December 2006, paras. 67, 93, 133 and 135.

¹⁸ See fifth paragraph of the Preamble to the Internal Rules and Internal Rule 114; See also Pre-Trial Chamber's Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, dated 26 August 2008, D55/I/8, paras. 12 – 15.

(b) The Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only.”

19. The wording of this provision indicates that it is for the Pre-Trial Chamber to decide whether to hold a hearing or not on appeal. A party’s request for a hearing does not create an absolute obligation for the Pre-Trial Chamber to hold a hearing.
20. At the International Criminal Court (ICC), the Rules of Procedure and Evidence (RPE) provide that an appeal at the pre-trial stage is, unless the Appeals Chamber decides otherwise, determined on the basis of written submissions. In this regard, Article 156(3) of the RPE provides:

“The appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing.”

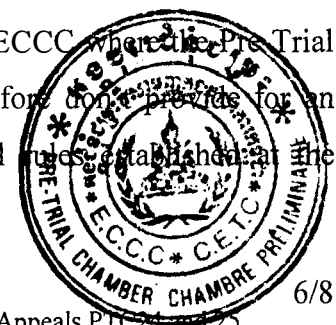
21. The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) similarly provide for the possibility to decide on motions related to Pre-Trial proceedings on the basis of written submissions. Article 116 *bis* (A) of these RPEs provides:

“An appeal under Rule 72 or Rule 73 or appeal from a decision rendered under Rule 11 *bis*, Rule 54 *bis*, Rule 65, Rule 73 *bis* (E), Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs.”

22. Article 14 of the ICCPR provides:

“In the determination of any criminal charge against him, [.....], everyone shall be entitled to a fair and public hearing.”

23. The Pre-Trial Chamber notes that this provision limits the right to a public hearing to where a “determination of any criminal charge” is made against a Charged Person. The Pre-Trial Chamber when deciding appeals against refused requests for investigative actions does not determine any criminal charge.
24. The Pre-Trial Chamber finds that the provisions which apply to the ECCC where the Pre-Trial Chamber can decide on the basis of written submissions and therefore does not provide for an absolute right to a hearing are in accordance with the procedural rules established at the international level.



25. The Co-Lawyers also argue that by deciding on the appeal on basis of written submissions only the adversarial nature of the proceedings is violated.

26. Internal Rule 21(1)(a) provides:

“ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”

27. The Pre-Trial Chamber finds that the principle of conducting an adversarial proceeding is not violated by dismissing a request for hearing on an appeal. The principles relating to adversarial proceedings provide for an adverse argument to be put and to be answered. This can also be achieved through written submissions. The Internal Rules specifically permit matters to be considered on the basis of written submission and the Practice Directions provide for the option of a reply to a response which ensures that, in the absence of a hearing, the party is given the opportunity to provide its adversarial argument.¹⁹

28. The Co-Lawyers argue that the confidential nature of the investigation does not justify the Pre-Trial Chamber’s departure from the principle of hearing on appeal and that it must take into consideration parties views. The Pre-Trial Chamber notes that the fact that it considers the parties views whenever it deals with a request for hearing on appeal does not preclude it from considering the rest of the relevant factors as it is obliged to independently find a balance between all interests involved in the matter.

29. The Pre-Trial Chamber notes that it has a discretion to examine all the arguments it finds relevant for the reasoning of its decision on a raised issue. The Pre-Trial Chamber notes that the procedure is not driven by the parties and therefore it is not obliged to address all the arguments raised. If reasons of a general character are found to be decisive for a decision, the Pre-Trial Chamber has an obligation to the parties to inform them for reasons of transparency and fairness. The Pre-Trial Chamber has used this discretion previously by giving directions to the civil parties regarding their procedural position and where dealing with a new kind of appeal before it, by deciding in general on the scope of review.²⁰



¹⁹ Practice Direction ECCC/01/2007/Rev.4, Article 8.4.

²⁰ Pre-Trial Chamber’s Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53; Pre-Trial Chamber’s Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, para.6; Pre-Trial Chamber’s Directions on Civil Party Oral Submissions during the Hearing on the Appeal Against Provisional Detention Order, 20 May 2008, C20/1/21, para.1; Decision on Admissibility of Civil Party General Observations, 24 June 2008, C22/1/41

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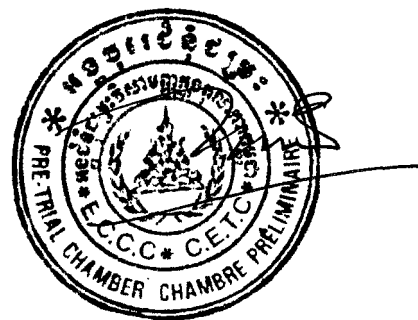
30. The Pre-Trial Chamber reiterates that appeals against orders denying requests for investigative action may reveal information in relation to the conduct of the investigation and, as such, need to be considered as confidential. Each appeal in respect of requests for investigative action shall also be examined individually to assess the need for confidentiality, having in mind the need not to disclose information that could jeopardise the ongoing investigations.
31. Following from this reasoning, the Pre-Trial Chamber finds that the Co-Lawyers Request for Reconsideration does not meet the test to be applied for reconsideration of its Decision on Request for Hearing as mentioned in paragraph 12 of this decision.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

- 1) **REJECTS** the Request for Reconsideration;
- 2) **DIRECTS** the Co-Lawyers to file a Reply to the Co-Prosecutors' Response within the deadline provided in Article 8.4 of the Practice Directions.

Phnom Penh, 20 October 2009

President of the Pre-Trial Chamber



PRAK KIMSAN