

**BEFORE THE PRE-TRIAL CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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

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Before:

The Pre-Trial Chamber

Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Katinka LAHUIS

Judge Rowan DOWNING

The Co-Prosecutors

CHEA Leang

Robert PETIT

**Civil Party Lawyers and Unrepresented
Civil Parties**

MAY IT PLEASE THE PRE-TRIAL CHAMBER**INTRODUCTION**

1. By Decision dated 20 August 2009, the Pre-Trial Chamber announced that it was dismissing the request of the Co-Lawyers of Ms IENG Thirith, Mr NUON Chea and Mr KHIEU Samphan for an oral hearing to consider their submissions in support of their appeal against the Co-Investigating Judges' order on the request to search for exculpatory evidence in the Shared Materials Drive.¹
2. This is not only a decision in the present case. It effectively sets a new rule regarding appeal hearings according to which "as a general rule, [the Pre-Trial Chamber] would consider this particular category of appeals against Co-Investigating Judges' Orders refusing requests for investigative actions on the basis of written submissions alone".² According to the Chamber, this approach derives from "the confidential nature of the investigation as provided for in Internal Rule 56".³
3. According to this reasoning, it is therefore sufficient for an appeal to fall in this category for there to be no need to consider the possibility of holding a hearing, as it is deemed unnecessary. It is on this basis that the Pre-Trial Chamber rejected the Co-Lawyers for the Defence Request for a hearing on the matter, and thus directed the Co-Lawyers to file a reply to the Co-Prosecutors' Response within the time limit provided for in the Practice Direction.
4. This request for reconsideration concerns both these aspects of the decision: on the one hand, the articulation of a general rule on the holding of hearings on appeal before the Pre-Trial Chamber and, on the other hand, the actual Pre-Trial Chamber Decision on the appeal relating to the hearing concerning the Shared Materials Drive. These are two decisions, which must be addressed separately and successively.

¹ Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 24 July 2009, *D164/4/1* ("the Appeal").

² *Decision on "Request for an Oral Hearing" on the Appeals PTC 24 and 25*, 20 August 2009, *D164/4/3*, para. 5.

³ *Ibid.* para. 5.

I- REQUEST TO RECONSIDER THE DECISION RESTRICTING THE CHARGED PERSONS' RIGHT TO AN ORAL HEARING ON APPEAL

5. The general rule as laid down by the Pre-Trial Chamber derives from the premise that appeals against Co-Investigating Judges' orders refusing requests for investigative action form a "particular category of appeals", which call for a particular rule in relation to hearings, and which are systematically determined on the basis of the parties' written submissions. It is claimed that this exception derives from the confidential nature of the investigation.
6. A careful review of the applicable legal provisions, which are quoted by the Pre-Trial Chamber in its Decision, does not, however, lead to such a conclusion. Accordingly, this is clearly an error of law, as will be demonstrated *infra*.
7. As a matter of principle, the general rule requires all appeals to be litigated adversarially before the Pre-Trial Chamber, and there is no particular category of appeals that are exempt from this principle. In reality, far from imposing the approach adopted by the Pre-Trial Chamber, the confidential nature of the investigation is unrelated to it and prohibits it.
8. The Co-Lawyers for the Defence therefore urge the Pre-Trial Chamber to reconsider their decision on this issue.

A- Relevant legal provisions

➤ **Pre-Trial Appeals**

9. Internal Rule 74(3) provides that "[t]he Charged Person may appeal against the following orders of the Co-Investigating Judges, [the Rule then goes on to enumerate indiscriminately]: "orders of the Co-Investigating Judges: (a) confirming the jurisdiction of the ECCC; (b) refusing requests for investigative action allowed under these IRs; (c) refusing requests for the restitution of seised items; (d) refusing requests for expert reports allowed under these IRs; (e) refusing requests for additional expert investigation allowed under these IRs; (f) relating to provisional detention or bail; (g) refusing an application to seize the Chamber for

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annulment of investigation action; (h) relating to protective measures.”

10. Internal Rule 77 sets the procedure for pre-trial appeals.⁴

➤ **Principle that hearings on appeal must be conducted orally**

11. Pursuant to Rule 77(3) (a), where the Pre-Trial Chamber is seised of an appeal, “the President of the Pre-Trial Chamber shall (...) set a hearing date and inform the Greffier of the Pre-Trial Chamber, who shall inform the Co-Investigating Judges, the parties and their lawyers thereof”.

12. Further to the amendment adopted by the Plenary on 5 September 2008, and as an exception to the principle, the Pre-Trial Chamber may now, “after considering the views of the parties, decide to determine an appeal (...) on the basis of the written submissions of the parties only” (Rule 77(3)(b)).

➤ **Principle of confidentiality of hearings on appeal**

13. Pursuant to Article 121 of the CCP and Internal Rule 56, “judicial investigations shall not be conducted in public”; Internal Rule 77(5) provides that “hearings [of the Pre-Trial Chamber] shall be conducted *in camera*”.

14. Pursuant to Rule 77(6), “[t]he Chamber may, at the request of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court”. (emphasis added)

15. This exception to the principle is consistent with Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR) which enshrines the right of “everyone (...) to a fair and public hearing by a competent (...) tribunal”.

⁴ See *mutatis mutandis*, Article 258 of the Code of Criminal Procedure of the Kingdom of Cambodia.

B- Submissions

1) As a general rule, all appeals should be litigated adversarially before the Pre-Trial Chamber

- *As a rule, appeals shall be heard orally before the Pre-Trial Chamber*

16. The procedure applicable to hearings on appeal at the investigative stage is clearly laid down in Article 258 of the CCP and in Internal Rule 77(3)(a), which provides that where the Pre-Trial Chamber is seised of an appeal, a hearing date shall be set.

17. Originally, there was no exception to the principle. After the amendment adopted by the Plenary on 5 September 2008, and in accordance with the practice of the Pre-Trial Chamber, Rule 77(3) now provides for an alternative to the principle. Under these new provisions, the Chamber may now, “decide to determine an appeal (...) on the basis of the written submissions of the parties only”. This alternative is nonetheless subject to one condition, namely that the Chamber must seek the views of the parties before deciding to determine an appeal on the basis of written submissions only. In practice, the Pre-Trial Chamber has sought a consensus.

18. These provisions are consistent with the general rule laid down in Internal Rule 21(a), which, consistent with international law, provides that “ECCC proceedings shall be fair and adversarial”.

- *There is no “particular category of appeals” requiring a departure from the principle that hearings must be conducted orally*

19. The grounds for pre-trial appeals are laid down in Internal Rule 74. According to this Rule, the Charged Person may, *inter alia*, appeal against orders refusing requests for investigative

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action. This ground for appeal is treated like the others and does not in any way constitute a particular category.

20. There is no other relevant legal provision on this issue. Moreover, the Pre-Trial Chamber has not provided any criterion that could justify the creation of such a category nor has it articulated the basis upon which it proceeded to distinguish this type of appeals from the others types provided for in Rule 74; moreover, it has not explained why this so-called category would call for special treatment.

21. Contrary to the Pre-Trial Chamber's view, appeals against orders refusing requests for investigative action do not form a particular category of appeals; accordingly, the general rule that hearings must be conducted orally, as provided for in the Rules, must apply.

2) The confidential nature of the investigation does not justify the Pre-Trial Chamber's departure from the principle that hearings must be conducted orally

- *The confidential nature of the investigation bears no relation to the principle that hearings must be conducted orally*

22. The Pre-Trial Chamber considers that its approach is warranted by the confidential nature of the investigation, as enshrined in Internal Rule 56. These are however two entirely different notions that are being confused here: on the one hand, the principle that hearings must be conducted orally, and, on the other, the confidentiality principle. In fact, the confidential nature of the investigation has no bearing on the principle that hearings must be conducted orally. The necessity to litigate a matter adversarially before a bench of judges has nothing to do with the fact that the matters being litigated must be kept confidential. This is why the Rules expressly state that hearings shall be held throughout the course of the investigation, notwithstanding the confidential nature of the proceedings.

23. Accordingly, the fact that “unless a request for investigative action has been finally rejected,

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the potential for such investigative action to be undertaken by the Co-Investigating Judges remains effective”⁵ and that “the order can be quashed by the Pre-Trial Chamber, and sent back for reconsideration or with an order to undertake the requested investigative action” has no direct bearing on the confidential nature of the investigation. On the other hand, in principle, this conclusion calls for adversarial hearings, barring exception, after due consideration of the views of the parties. Conversely, the fact that “this action then forms part of the investigations, which are, as a general rule, confidential” has no bearing on the fact that these matters are to be litigated adversarially.

24. This approach is consistent with Internal Rule 77(5), which provides that, in principle, “hearings of the Chamber shall be conducted *in camera*”. Indeed, whereas at the request of any judge or party, the Pre-Trial Chamber may, of course, decide that all or part of a hearing be held in public, this is subject to the condition that the Chamber consider that it is in the interests of justice to do so and that it does not affect public order or any protective measures authorized by the court. Therefore, the applicable law offers all the guarantees to ensure the confidentiality of the investigation and address the concerns expressed by the Pre-Trial Chamber.

- *This exception has no legal basis and restricts the rights of charged persons*

25. The Pre-Trial Chamber considers that appeals against orders refusing requests for investigative action should be systematically decided on the basis of the written submissions of the parties, because such requests must remain confidential and that investigations are not to be conducted in public.

26. This conclusion is based on two errors of law: 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

⁵ Decision on “Request for an Oral Hearing” on the Appeals PTC24 and 25, 20 August 2009, D164/4/3, para. 5.

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conducted *in camera*, as public hearings are subject to certain conditions.

27. Indeed, the Pre-Trial Chamber's interpretation is not based on any other legal provision that could justify such reasoning, in both national and international law. In the final analysis, it results in significantly restricting charged persons' rights to a hearing on appeal; this is fundamentally contrary to Rule 56, which stipulates that judicial investigations shall not be conducted in public "in order to preserve the rights and interests of the parties".

II- REQUEST TO RECONSIDER THE DEFENCE REQUEST FOR AN ORAL HEARING

28. In their appeal, the three appellants expressly requested the Pre-Trial Chamber to hear their submissions in the course of an oral hearing. They submitted, in particular, that "[t]he scope of the OCIJ's investigations is an issue that lies at the heart of the proceedings of the ECCC. It is thus of the utmost importance that this issue be fully discussed and resolved at the PTC stage".⁶

29. In their Response, the Co-Prosecutors instead took the view that "these appeals do not raise complex or important legal issues but rather 'simple and largely technical ones and therefore should be decided on the basis of written submissions which would be in the interests of judicial economy'".⁷

30. The Pre-Trial Chamber did not consider the submissions of the parties on this point. It simply considered that the appeal in question fell within that category of appeals that do not require an oral hearing. As demonstrated, there is no such category. The Co-Lawyers for the Defence therefore urge the Pre-Trial Chamber to consider the parties' submissions, and decide if, like

⁶ Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, 24 July 2009, *D164/4/1*, para. 8.

⁷ Co-Prosecutors Response as quoted in the *Decision on « Request for an Oral Hearing » on the Appeals PTC 24 and 25*, 20 August 2009, *D164/4/3*, para. 3.

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the Defence, it considers that is necessary to hold an oral hearing and the conditions thereof, in view of the centrality of this appeal to the investigation; moreover, it is in the interests of justice to hold such a hearing.

For these reasons,

31. The Co-Lawyers for the Defence invite the judges of the Pre-Trial Chamber:

- To RECONSIDER the decision of the Chamber restricting the Charged Person's rights to a hearing on appeal
- TO CONSIDER the submissions of the parties in this case regarding the holding of an oral hearing and TO SET A HEARING DATE.

**WITHOUT PREJUDICE,
AND JUSTICE WILL BE DONE**

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature