

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL
AGAINST THE CLOSING ORDER**

Filed by:

Co-Prosecutors

CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH
SENG Bunkheang
Tarik ABDULHAK
Anees AHMED

Distribution to:

Pre-Trial Chamber

Judge PRAK Kimsan, Presiding
Judge Rowan DOWNING QC
Judge NEY Thol
Judge Catherine Marchi-Uhel
Judge HUOT Vuthy

Counsel for the Appellant

SA Sovan
Jacques VERGÈS
Philippe GRECIANO

Other Defence Counsel

SON Arun
Michiel PESTMAN
Victor KOPPE
PHAT Pouv Seang
Diana ELLIS
ANG Udom
Michael G. KARNAVAS

Counsel for the Civil Parties

KIM Mengkhy
MOCH Sovannary
Martine JACQUIN
Philippe CANONNE
Elizabeth RABESANDRATANA
Annie DELAHAIE
Fabienne TRUSSES-NAPROUS
NY Chandy
LOR Chhunthy
SILKE Studzinsky
KONG Pisey
HONG Kim Suon
YUNG Phanit
SIN Soworn
Mahdev MOHAN
NGUYEN Lyma
Marie GUIRAUD
Patrick BAUDOIN
Olivier BAHOUENE

A. INTRODUCTION

1. The Co-Prosecutors file this response to the appeal (“Appeal”) filed by Khieu Samphan (“Appellant”) challenging the Closing Order of the Co-Investigating Judges indicting the Appellant for genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the Cambodian Penal Code of 1956.¹ The Appellant submits that his Appeal is admissible pursuant to Internal Rules (“Rules”) 74(3)(a) and 21(1) and claims that the Closing Order confirmed the ECCC’s jurisdiction and violated the procedural rules governing the judicial investigation.² On the basis of alleged defects in the form of the Closing Order and procedural defects in the investigation, the Appellant is asking the Pre-Trial Chamber to quash the Closing Order and order the reopening of the judicial investigation.³
2. The Co-Prosecutors are filing a separate response to Khieu Samphan’s Appeal pursuant to an order of the Pre-Trial Chamber.⁴ However, the Co-Prosecutors, in this Response, in the interests of judicial economy and procedural efficiency, intend to rely on those arguments regarding the scope of an appeal on jurisdiction contained in the Co-Prosecutors’ joint response to Nuon Chea, Ieng Sary and Ieng Thirith’s separate appeals against the Closing Order.⁵ These arguments are expressly incorporated by reference into this response. For the same reasons, the Co-Prosecutors also invite the Pre-Trial Chamber to address the substantive appeals of all four accused together.

B. SUMMARY OF THE APPELLANT’S GROUNDS OF APPEAL

3. The Appellant’s grounds of appeal can be divided into two subject areas: the first relates to alleged defects in the form of the Closing Order and the other relates to alleged procedural

¹ Closing Order, Case File No. 002/19-09-2007/ECCC/OCIJ, Co-Investigating Judges, 15 September 2010, D427 (“Closing Order”); Khieu Samphan Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 104), Defence of Khieu Samphan, 18 October 2010, D427/4/3 (“Appeal”).

² Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 6, 17 September 2010, rules 21, 74(3) (“Rules”). *See* Appeal, paras. 4, 50-54.

³ Appeal, para. 118 (unofficial translation by the Office of the Co-Prosecutors).

⁴ Decision on Co-Prosecutors’ Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Closing Order and Consequent Extension of Page Limit, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 28 October 2010 (PTC 75), D427/1/8.

⁵ Ieng Thirith Defence Appeal from the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145), Pre-Trial Chamber, 18 October 2010, D427/2/1; Nuon Chea Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 146), Pre-Trial Chamber, 18 October 2010, D427/3/; Ieng Sary’s Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 75), Pre-Trial Chamber, 25 October 2010, D427/1/6. A detailed table of authorities will also be filed with the Co-Prosecutors’ joint response.

defects arising during the course of the judicial investigation. With respect to the first argument, the Appellant alleges that the Closing Order:

- (a) used improper sources, namely reports from the press, Duch's testimony and Von Vet's "confession";⁶
- (b) failed to clarify the use of "confessions" obtained under torture;⁷
- (c) failed to cite or insufficiently cited certain evidentiary documents, namely the Appellant's psychiatric report, documents from the French Department of Justice and archives of the German Democratic Republic;⁸
- (d) contained evidentiary documents that were not properly translated;⁹ and
- (e) contained unsupported conclusions with respect to Article 3 of the Statute of the Communist Party of Kampuchea, the Appellant's involvement with the Cham, and his participation in the forcible transfer of population.¹⁰

4. With respect to the second argument, the Appellant alleges that:

- (f) the Co-Prosecutors' Final Submission was not translated into French;¹¹
- (g) the Co-Investigating Judge Lemonde was not impartial;¹²
- (h) the rogatory letters were too vague and were filed late;¹³
- (i) investigative requests were denied, the Co-Investigating Judges failed to conduct an inquiry into the Appellant's personality, and to request other countries' cooperation;¹⁴ and
- (j) the Co-Investigating Judges erroneously applied the standard of sufficiency of evidence and did not research the link between the Appellant and the indicted crimes.¹⁵

⁶ Appeal, paras. 88, 105, 113-114.

⁷ Appeal, paras. 110-112.

⁸ Appeal, paras. 87, 93, 104.

⁹ Appeal, paras. 69-73.

¹⁰ Appeal, paras. 107-109.

¹¹ Appeal, paras. 63-68.

¹² Appeal, paras. 96-98.

¹³ Appeal, paras. 75-84.

¹⁴ Appeal, paras. 87, 89, 92, 101.

C. ARGUMENT

C.1. THE APPEAL DOES NOT RAISE JURISDICTIONAL ISSUES

C.1.1 An appeal can only be admitted on jurisdictional issues

5. Rule 74 exhaustively lists the types of orders of the Co-Investigating Judges against which a Charged Person can maintain appeals before the Pre-Trial Chamber.¹⁶ Under this Rule, only an order or decision of the Co-Investigating Judges that “confirm[s] the jurisdiction of the ECCC” can be appealed. Neither the Pre-Trial Chamber, nor any other judicial organ of this Court, sits as a constitutional court that has an unlimited plenary jurisdiction to review all the decisions from the courts below. This practice is also consistent with international jurisprudence.
6. The ICTY has consistently held that the power of appellate review is governed and restricted by the Rules provided in the court’s governing documents. In *Furundžija*, the Trial Chamber noted that it was restrained by the Rules in its ability to discipline the prosecution for contempt.¹⁷ In *Naletilić*, the court held that it cannot go beyond the appellate powers provided by the Rules; rather, the proper procedure for modification of the Rules requires that a party submit a proposed amendment to the plenary of the Tribunal.¹⁸ Similarly, the core documents of this Court, like those of other international tribunals, do not envisage that their judicial chambers modify the Rules.¹⁹ Appeals Chambers of international courts do not have inherent jurisdiction to review all decisions from the lower courts.²⁰ The appellate jurisdiction of this Court is similarly restricted to the appellate powers of review expressly granted in the Rules and Statute.
7. The Rules do not define the meaning of “jurisdiction”. However the Co-Prosecutors invite the Pre-Trial Chamber to be guided by Rule 72(D) of the ICTY Rules of Procedure and Evidence (“ICTY-RPE”) which does define the term “jurisdiction”. The ICTY tries cases

¹⁵ Appeal, paras. 91, 99.

¹⁶ Decision on Khieu Samphan’s Appeal Against the Order on the Translation Rights and Obligations of the Parties, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 20 February 2009, A190/I/20 (“Khieu Samphan Translation Rights Decision”), para. 33.

¹⁷ *Prosecutor v. Furundžija*, The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, IT-95-17/1-PT, ICTY Trial Chamber, 5 June 1998.

¹⁸ *Prosecutor v. Naletilić*, Decision on Prosecution Motion for Approval of Rule 94 *ter* Procedure (Formal Statements), IT-98-34-T, ICTY Trial Chamber, 22 June 2000 (“*Naletilić* Rule 94 Decision”).
Internal Rules, rule 3.

²⁰ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, article 33 new.

of similar magnitude to those before the ECCC and the ECCC has previously relied on the law and practice of the ICTY and other international criminal tribunals, including the International Criminal Tribunal for Rwanda and the International Criminal Court. Rule 72(D) of the ICTY-RPE defines a jurisdictional challenge exclusively as a motion that challenges an indictment on the ground that it does not relate to the personal, territorial or temporal jurisdiction of the Tribunal or legal violations over which the Tribunal has jurisdiction.²¹ Therefore, jurisdictional issues do not extend to assertions of defects in the form of indictment or procedural defects in the investigation.

C.1.2 Defects in the form of indictment are not jurisdictional issues

8. According to ICTY jurisprudence, challenges to defects in the form of the indictment are non-jurisdictional. Rule 72 of the ICTY-RPE clearly distinguishes motions which “challenge jurisdiction” and those which “allege defects in the form of the indictment”.²² The former may not be conflated with the latter. Defects in the form of indictment includes, for example, issues as to whether the prosecution has failed to properly plead an element of a mode of liability,²³ and whether joint criminal enterprise is applicable to crimes of genocide and conspiracy to commit genocide.²⁴ The Appellant’s arguments in paragraph 3 (a) to (e) above are clearly allegations of defects in the form of the Closing Order and are, therefore, inadmissible.
9. Further, the Appellant cannot bring an appeal at this stage of the proceedings on the ground that the Closing Order relies on improper evidence or fails to cite certain documents. According to Rule 87 of the ECCC and Article 321 of the Cambodian Criminal Procedure Code (“CPC”), the admissibility of evidence is a matter for the determination of the Trial Chamber.²⁵ In other words, the Closing Order’s use of

²¹ International Criminal Tribunal for the Former Yugoslavia (“ICTY”), Rules of Procedure and Evidence, adopted 11 February 1994, amended on 10 December 2009, Rule 72 (“ICTY-RPE”).

²² ICTY-RPE, rule 72(A)(i)(ii).

²³ *Prosecutor v. Karadžić*, Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, Joint Criminal Enterprise III – Special Intent Crimes, Superior Responsibility), IT-95-5/18-AR72.1 IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, ICTY Appeals Chamber, 25 June 2009, para. 31.

²⁴ *Prosecution v. Tolimir*, Decision on Tolimir’s Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal, IT-05-88/2, ICTY Appeals Chamber, 25 February 2009, para. 10.

²⁵ Decision on Admissibility of Ieng Sary’s Appeal Against the OCIJ’s Constructive Denial of Ieng Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained Through Torture, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 31), Pre-Trial Chamber, 10 May 2010, D130/7/3/5 (“Ieng Sary Torture Decision”), para. 24.

evidentiary documents does not assume their admissibility at trial. The Appellant will be entitled to object to the admissibility of evidence and bring new evidence at trial.²⁶ This process is in accordance with international procedural standards and safeguards the fair trial rights of the accused.²⁷ The Pre-Trial Chamber has, in general, no jurisdiction to review matters related to admissibility of evidence.²⁸ The issues contained in paragraph 3 (a), (b) and (c) above, therefore, cannot be appealed.

10. Additionally, the Appellant cannot appeal the Closing Order on the ground that some parts of the Closing Order and some evidentiary documents are still being translated. Neither the ECCC Law nor the Internal Rules grant the Charged Persons the right to receive all documents contained in the Case File in their own language or that of their counsel. According to the Pre-Trial Chamber: “[t]he fact that a language is one of the three official languages of the Court does not amount, in itself, to a right for the Charged Person [like the Appellant] to have all documents contained in his case file translated into this language.”²⁹ Also, the Appellant has been provided with the assistance of a translator, free of charge and full time.³⁰ In the Pre-Trial Chamber’s words, this “ensures that all necessary linguistic requirements are properly met for this [pre-trial] stage of the proceedings before the ECCC.”³¹ In addition, in accordance with the Pre-Trial Chamber’s previous finding, the non-translation of only a limited number of documents does not prevent the Appellant from having knowledge of the case brought against him.³² A substantive document should be seen for its content and not for its footnotes. The Appellant’s ground of appeal in paragraph 3(d) above should, accordingly, be dismissed.
11. Consequently, the Appellant’s assertion that the Closing Order is vitiated by defects is not only untenable, it is also non-jurisdictional and, as such, inadmissible.

²⁶ Rules, rule 87.

²⁷ Ieng Sary Torture Decision, para. 35.

²⁸ Decision on Admissibility of the Appeal Against Co-Investigating Judges’ Order on Use of Statements which Were or May Have Been Obtained by Torture, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 27), Pre-Trial Chamber, 27 January 2010, D130/10/12, para. 18.

²⁹ Khieu Samphan Translation Rights Decision, para. 40.

³⁰ Order on Translation Rights and Obligations of the Parties, Case File No. 002/19-09-2007-ECCC/OCIJ, Co-Investigating Judges, 19 June 2008, A190, para. E.3.

³¹ Khieu Samphan Translation Rights Decision, para. 50.

³² Khieu Samphan Translation Rights Decision, para. 45.

C.1.3 Defects arising in the course of the judicial investigation are not jurisdictional issues

12. Challenges to alleged irregularities in the judicial investigation are non-jurisdictional and hence non-appealable. Such challenges can only be made under the annulment procedure contained in Rule 76.³³ As stated by the Pre-Trial Chamber, reparation of procedural irregularities such as that requested by the Appellant through his grounds in paragraph 4 (a) to (e) above may only be achievable through an annulment procedure; neither the abuse of process doctrine nor any other procedure constitutes a proper mechanism for challenging procedural irregularities.³⁴ Therefore, the Appeal is inadmissible to the extent that the Appellant challenges procedural irregularities in the judicial investigation.
13. Further, the remedy sought by the Appellant, effectively an annulment of the Closing Order, cannot be granted by the Pre-Trial Chamber in an appeal under Rule 74(3)(a). The Co-Prosecutors note that the Appellant is not asking for a stay of proceedings for abuse of process, which may be jurisdictional. He is instead seeking an annulment of the Closing Order under Rule 74(3)(a). Annulment appeals are only maintainable under Rule 76 which entails a fundamentally distinct procedural trigger for appeals. The Pre-Trial Chamber explained the fundamental distinction between annulment appeals and abuse of process appeals in these terms:
- if the entire investigation is annulled, all the material will be expunged from the case file, which leads to a consequence which must be differentiated from that of a stay of proceedings for abuse of process. Both procedures apply different standards and result in different consequences.³⁵
14. Therefore, a request for stay of proceedings and a request for annulment on appeal should not be conflated. In other words, the remedy requested by the Appellant could only have been obtained through proceedings under Rule 76, which he failed to undertake at the relevant time during the judicial investigation. Indeed, the Appellant is challenging decisions that have been made during the investigation process, sometimes more than three

³³ Rules, rule 76(2).

³⁴ Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 10 August 2010, D264/2/6, para. 31 (stating "Reparation of procedural irregularities calls for annulment procedure, not a stay of proceedings on the basis of the abuse of process doctrine as it is requested in the present case.").

³⁵ Decision Rejecting Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 25 June 2010, D263/2/6, para. 27.

years ago. For example, he takes issue with the content of the rogatory letters issued as early as 5 October 2007 (ground in paragraph 4(c) above),³⁶ and the refusal of investigative actions dated 14 January 2010 (ground in paragraph 4(d) above).³⁷ The correct time for these challenges has passed. As for the allegation of incompleteness of the investigation (ground in paragraph 4(d) above), the Appellant failed to request further investigative actions in the fifteen days following the notice of closure of the investigation, as required by Rule 66.³⁸

15. The Appellant also seeks to appeal on the basis of a denial of a right to respond to the Co-Prosecutors' Final Submission (ground in paragraph 4(e) above).³⁹ The Appellant failed to claim this right at the proper time. Another Co-Charged Person, Ieng Sary, made and was granted such a request.⁴⁰ In the Pre-Trial Chamber's decision authorizing Ieng Sary to respond to the Final Submission, the Pre-Trial Chamber was guided by Article 175 of the French Code of Criminal Procedure, which provides that the parties have only ten days to comment on submissions.⁴¹ Therefore, the general principle of equality of arms cannot allow the Appellant to bring challenges against the Final Submission more than two months after it was filed. The Appellant cannot use the appeal of the Closing Order to cover his own failure to undertake annulment proceedings under Rule 76. The concerns of the Appellant, if serious, should have been expressed earlier in the proceedings and the decisions of the Co-Investigating Judges contested on time.

³⁶ Rogatory Letters for Interview of Witnesses, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of the Co-Investigating Judges, 5 October 2007, D25. The latest rogatory letter challenged by the Appellant was issued on 25 February 2010. Rogatory Letter for Civil Party Interviews, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of the Co-Investigating Judges, 25 February 2010, D368.

³⁷ Order on Nuon Chea Requests for Investigative Actions Relating to Foreign States (D101, D102, D105, D126 and D128), Case File No. 002/19-09-2007-ECCC/OCIJ, Office of the Co-Investigating Judges, 13 January 2010, D315.

³⁸ Rules, rule 66.

³⁹ Final Submission, Case File No. 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors, 16 August 2010, D390.

⁴⁰ Decision on Ieng Sary's Expedited Appeal against the OCIJ's Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 71), Pre-Trial Chamber, 10 September 2010, D390/1/2/3; Decision on Ieng Sary's Expedited Appeal Against the OCIJ's Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 71), Pre-Trial Chamber, 20 September 2010, D390/1/2/4 ("Ieng Sary Final Submission Response Decision").

⁴¹ French Code of Criminal Procedure, Article 175 *as amended* in 2007. This provision is cited by the Appellant at Appeal, para. 64.

16. With respect to the Co-Investigating Judges' exercise of discretion, the Pre-Trial Chamber has reiterated that "it is not for the Pre-Trial Chamber to replace its view for that of the Co-Investigating Judges".⁴² Here, the Appellant failed to establish that there was any "incorrect interpretation of the governing law, [...] patently incorrect conclusion of fact or [a decision] so unfair as to constitute an abuse of [...] discretion."⁴³ For example, even if the Co-Investigating Judges had used the standard of sufficiency of evidence (Appellant's ground in paragraph 4(j) above), it does not amount to an abuse of discretion. As noted by the Pre-Trial Chamber: "[it] is well within the [Co-Investigating Judges'] discretion to refuse investigative action on the basis that they are in possession of adequate material to satisfy themselves of a point in issue."⁴⁴ Also, the fact that dismissed Defence motions were in greater number than those filed by the Co-Prosecutors is totally immaterial to the issue of impartiality of the investigation.⁴⁵ As stated by the Pre-Trial Chamber: "a judge's work is to render decisions, and unavoidably one of the parties may not be satisfied."⁴⁶ This does not, by itself, constitute a ground of appeal against the Closing Order.
17. Viewed in this light, Khieu Samphan's Appeal against the Closing Order amounts to an attempt to litigate matters which he failed to challenge on time utilising the proper procedural mechanism. In view of the express appellate limitations in the Rules and the principle of judicial efficiency, the Pre-Trial Chamber should not entertain this attempt.

C.1.4 Rule 21 does not render the appeal admissible

18. The Appellant relies on Rule 21 for the admissibility of his otherwise inadmissible appeal. The Co-Prosecutors submit that this provision cannot support a finding of admissibility for this Appeal. Rule 21 does not create any stand-alone right to appeal. In the words of the Pre-Trial Chamber: "Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial

⁴² Decision on Nuon Chea's Appeal Against OCIJ Order on Direction to Reconsider Request D153, D173, D174, D178 and D284, Case File No. 002/19-09-2007-ECCC/PTC (PTC 46), Pre-Trial Chamber, 28 July 2010, D300/1/7 ("Nuon Chea Investigative Action Decision"), para. 15.

⁴³ Nuon Chea Investigative Action Decision, para. 14.

⁴⁴ Nuon Chea Investigative Action Decision, para. 26.

⁴⁵ This argument is articulated at Appeal, para. 101.

⁴⁶ Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case File No. 002/19-09-2007-ECCC/PTC, Pre-Trial Chamber, 14 December 2009, D7 ("Khieu Samphan Disqualification Decision"), para. 35.

rights of the Charged Person are safeguarded.”⁴⁷ A broad interpretation does not mean a new right of appeal. It is significant that the Pre-Trial Chamber, in the same decision, noted, with reference to Rule 74(3)(a), that the Charged Persons are limited in the matters that they may appeal from the Closing Order.⁴⁸ Put differently, Rule 21 only allows an expansive reading of Rule 74(3), but the requirements set out in Rule 74(3) remain. This is so because the ECCC Rules create a *sui generis* procedural system for this Court based on its unique circumstances and reflects the drafters’ careful balancing of interests with the aim of promoting proceedings that are both fair and efficient. The core documents of this Court, like those of other international tribunals, do not envisage their judicial chambers amending the Rules. This role is left to the Plenary of the Judges.⁴⁹

19. Because the Appellant fails to raise any jurisdictional issues the Appeal does not meet the basic requirement under Rule 74(3)(a) and should be dismissed. A recourse to Rule 21, and a broad reading of Rule 74(3)(a) requirements, cannot modify this conclusion.

C.2 SOME GROUNDS OF APPEAL ARE RES JUDICATA

20. Despite the fact that the grounds of appeal raised are unrelated to jurisdictional issues, many of the grounds raised have already been decided by the Pre-Trial Chamber and are, therefore, *res judicata*. The translation rights of the Appellant (grounds in paragraphs 3(a) and 4(a) above), the opportunity to interview former U.S. officials (ground in paragraph 4(d) above), the inclusion on the Case File of documents relating to the Appellant’s “real activity” (ground in paragraph 4(d) above), the use of statements which may have been obtained by torture (ground in paragraph 4(a) above) as well as the impartiality of Co-Investigating Judge Lemonde (ground in paragraph 4(b) above) have all been litigated before and determined by the Pre-Trial Chamber. Consequently, they cannot be challenged again.

⁴⁷ Ieng Sary Final Submission Response Decision, para. 13. *See also* Khieu Samphan Translation Rights Decision, para. 36.

⁴⁸ Ieng Sary Final Submission Response Decision, para. 18, footnote 36.

⁴⁹ *Naletilić* Rule 94 Decision; Rules, rule 3.

21. *Res judicata* is an established principle of international law.⁵⁰ It means that where a competent court issues a final judgment on the merits of a matter, a second claim on the same matter between the same parties is inadmissible.⁵¹ The principle traditionally requires a final decision involving (a) the same parties, (b) the same object, and (c) the same cause.⁵² A decision is final when “it is no longer subject to appeal”.⁵³ The basis for this principle is that there should be an end to litigation and that the need for finality and expeditious resolution of legal disputes requires that once an issue is decided in a particular case, and appeals have been exhausted, it may not be revisited. *Res judicata* does not interfere with the right of a party to appeal a decision, but once appeals have been exhausted and a final decision has been rendered, it prohibits the re-litigation of a matter, unless new decisive facts are diligently discovered.⁵⁴ This principle is also embodied in several articles of the CPC.⁵⁵
22. International tribunals have regularly applied this principle.⁵⁶ As early as 1926, the Polish-German Mixed Arbitral Tribunal considered that “in the interests of legal stability, it is important that what has been decided ought, in principle, to be treated as final.”⁵⁷ Similarly, in *Guinea-Bissau v. Senegal*, the International Court of Justice noted that the irrefutable “presumption of legal truth that attaches to a judicial decision once it has

⁵⁰ *Res judicata* is commonly acknowledged to be one of the “general principles of law recognised by civilized nations” referred to in Article 38 of the Statute of the International Court of Justice. *Barayagwiza v. Prosecutor*, Decision on Prosecutor’s Request for Review or Reconsideration, ICTR 97-19-AR72, ICTR Appeals Chamber, 31 March 2000 (“*Barayagwiza* Reconsideration Decision”), para. 20; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Sweet & Maxwell, 1953; repr. Grotius, Cambridge, 1987) (“Bin Cheng”) pp. 336-372; Malcolm N. Shaw, *International Law* (4th ed. Cambridge University Press, 1997); Rosa Theofanis, *The Doctrine of Res Judicata in International Criminal Law*, *International Criminal Law Review* 3 (2003), p. 195.

⁵¹ See *Prosecutor v. Kajelijeli*, Judgement, ICTR-98-44A-A, ICTR Appeals Chamber, 23 May 2005 (“*Kajelijeli* Appeals Judgement”), para. 202.

⁵² Rosa Theofanis, *The Doctrine of Res Judicata in International Criminal Law*, *International Criminal Law Review* 3 (2003), p. 196.

⁵³ Christoph J.M. Safferling, *Towards an International Criminal Procedure* (2001), p. 322, cited in Rosa Theofanis, *The Doctrine of Res Judicata in International Criminal Law*, *International Criminal Law Review* 3 (2003), p. 204.

⁵⁴ *Barayagwiza* Reconsideration Decision, para. 41; *Kajelijeli* Appeals Judgement, paras. 202-203.

⁵⁵ Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation, first publication September 2008, articles 7, 12, 41, 264, 439, 443.

⁵⁶ *Prosecutor v. Simić*, Decision on (1) Application by Stevan Todorović to Re-open the Decision of 27 July 1999, (2) Motion by the ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, IT-95-9-PT, ICTY Trial Chamber, 28 February 2000; *Barayagwiza* Reconsideration Decision; *Prosecutor v. Delalić*, Judgement, IT-96-21-T, ICTY Trial Chamber, 16 November 1998, para. 228.

⁵⁷ Bin Cheng, pp. 355-356.

become final is an institution common to all systems of law and serves as a basis for the binding character of judicial decisions”.⁵⁸

23. The Pre-Trial Chamber has also applied this principle. In his appeal on the annulment of proceedings, Nuon Chea raised the question whether the waiver of the right to a counsel during his initial appearance and adversarial hearing was valid.⁵⁹ The Pre-Trial Chamber had answered the same question before in its decision on the appeal against Nuon Chea’s provisional detention order.⁶⁰ The Pre-Trial Chamber, therefore, declared the annulment request inadmissible as the matter had already reached finality.⁶¹
24. The same reasoning applies to the Appellant’s assertions concerning his translation rights. On 20 February 2009, the Pre-Trial Chamber decided that (1) the Appellant has no right to have all material translated; (2) non-translation of a limited number of documents does not prevent a Charged Person from having the knowledge of the case against him; (3) the provision of a translator free of charge, and full-time, to the Appellant’s multilingual legal team is an adequate substitute for this purpose.⁶² The translation rights of the Appellant were fully determined for the purposes of the pre-trial proceedings by the Pre-Trial Chamber and, therefore, the Appellant is barred by *res judicata* from raising it again before the same forum, the Pre-Trial Chamber.
25. Further, the Pre-Trial Chamber has already assessed the opportunity to interview former U.S. officials and dismissed all the defence’s arguments. In its decision of 7 June 2010, the Chamber ruled that the Co-Investigating Judges’ decision on this matter did not amount to an abuse of discretion, nor did it amount to a failure to investigate potentially exculpatory theories.⁶³ Similarly, on 7 July 2010, the Pre-Trial Chamber rejected the Appellant’s

⁵⁸ *Guinea-Bissau v. Senegal*, ICJ Reports 1991, para. 7, Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva.

⁵⁹ Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Pre-Trial Chamber, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 26 August 2008, D55/I/8 (“Nuon Chea Annulment Decision”), paras. 29-30.

⁶⁰ Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, Case File No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, 20 March 2008, C11/54.

⁶¹ Nuon Chea Annulment Decision, para. 30.

⁶² Khieu Samphan Translation Rights Decision, paras. 42, 45-50. *See also* Decision on Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 11), Pre-Trial Chamber, 20 February 2009, A190/II/9.

⁶³ Decision on the Appeal Against Order on Nuon Chea’s Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions relating to Foreign States, in Respect of the Denial of the Request for Witness Interviews by Khieu Samphan, Case File No. 002/19-09-2007-ECCC/PTC (PTC 49), Pre-Trial Chamber, 7 June 2010, D315/1/5.

appeal with respect to including in the Case File all the documents relating to his “real activity” during the Democratic Kampuchea period.⁶⁴ The Chamber found the Appellant’s request to be too general, elusive and vague. On 27 January 2010, the Pre-Trial Chamber declared inadmissible the Appellant’s appeal with respect to Co-Investigating Judges’ use of statements which were or may have been obtained by torture.⁶⁵ The Appellant cannot litigate these matters again before the Pre-Trial Chamber.

26. Allegations regarding the partiality of Co-Investigating Judge Lemonde were dismissed by the Pre-Trial Chamber on 14 December 2009. The Appellant had alleged that Judge Lemonde’s statement made on 8 October 2009, as well as a “pattern of public statements that Mr Marcel Lemonde has made over the course of the judicial investigation”,⁶⁶ negate the Judge’s impartiality. Emphasising a strong presumption of impartiality that attaches to a judge, the Pre-Trial Chamber dismissed the application. The issue was fully decided and it is not permissible to re-litigate it after the issuance of the Closing Order. The Pre-Trial Chamber should, therefore, decline consideration of this issue in the present Appeal.

D. PUBLIC ORAL HEARING

D.1 ORAL HEARING IS NOT REQUIRED

27. The Appellant seeks a public oral hearing of his Appeal as it relates to the jurisdiction of this Court.⁶⁷ The Co-Prosecutors observe that the right to an oral hearing is not absolute; the core documents of this Court guarantee this right only at trial and not at the pre-trial stage.⁶⁸ In any event, the right to a hearing does not necessarily mean an oral hearing; it

⁶⁴ Decision on the Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity, Case File No. 002/19-09-2007-ECCC/PTC (PTC 63), Pre-Trial Chamber, 7 June 2010, D370/2/11.

⁶⁵ Decision on Admissibility of the Appeal Against Co-Investigating Judges’ Order on Use of Statements which Were or May Have Been Obtained under Torture, Case File No. 002/19-09-2007-ECCC/PTC (PTC 27), Pre-Trial Chamber, 27 January 2010, D130/10/12.

⁶⁶ Khieu Samphan Disqualification Decision, para. 6. *See also* Decision on Ieng Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case File No. 002/19-09-2007-ECCC/PTC, Pre-Trial Chamber, 9 December 2009, D7; Decision on Nuon Chea’s Application to Disqualify Co-Investigating Judge Marcel Lemonde, Case File No. 002/19-09-2007-ECCC/PTC, Pre-Trial Chamber, 23 March 2010, D4; Decision on Ieng Sary’s Rule 35 Application for Judge Marcel Lemonde’s Disqualification, Case File No. 002/19-09-2007-ECCC/PTC, Pre-Trial Chamber, 29 March 2010, D5; Decision on Ieng Sary’s and on Ieng Thirith Applications under Rule 34 to Disqualify Judge Marcel Lemonde, Case File No. 002/19-09-2007-ECCC/PTC, Pre-Trial Chamber, 15 June 2010, D8.

⁶⁷ Appeal, paras. 58-60.

⁶⁸ Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 24), Pre-Trial Chamber, 20 October 2009, D164/4/9.

may include a reasoned and public determination on written pleadings alone.⁶⁹ If the parties are given sufficient opportunity to put forward their case in writing, and to comment on the submissions of the other parties, it is submitted that the requirements of fairness are complied with and an oral hearing is not required.⁷⁰

28. As shown above, the issues raised in this Appeal are not jurisdictional and the Co-Prosecutors request an *in limine* dismissal of this Appeal. While some of those issues may be important, their disposal on written pleadings alone cannot be any less public or transparent if the filings and decision of the Pre-Trial Chamber are made available in the public domain. It has been the practice of the Pre-Trial Chamber to place all the party filings concerning proceedings before it, and the subsequent decisions, on the ECCC website. The Chamber rarely departs from this practice unless the interest of the parties (particularly, the Charged Persons) are affected.⁷¹ There is no reason to depart from this practice in the present Appeal.
29. International tribunals—trying cases of a similar magnitude and complexity to this Court—regularly decide motions and appeals on written pleadings alone. Indeed, they routinely dismiss applications for oral hearings solely on the ground of “the complexity of issues”.⁷² In the specific context of oral hearings for appeals against the Closing Order, the Pre-Trial Chamber has noted that these proceedings envisage written submissions of the parties and not necessarily an oral hearing.⁷³ In a recent decision, the Pre-Trial Chamber reiterated that when it has sufficient information to decide on an appeal, and it is in the interest of justice to proceed expeditiously in the matter, the Chamber may do so without holding a public hearing.⁷⁴

⁶⁹ *Jussila v. Finland*, Judgement, Application No. 73053/01, Grand Chamber of the European Court of Human Rights, 23 November 2006, para. 41.

⁷⁰ *Vilho Eskelinen v. Finland*, Judgement, Application No. 63235/00, Grand Chamber of the European Court of Human Rights, 19 April 2007, para. 74.

⁷¹ Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Pre-Trial Chamber, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 24), Pre-Trial Chamber, 24 July 2008, A189/1/6, para. 4.

⁷² *Prosecutor v. Marijacić*, Judgement, IT-95-14-R77.2-A, ICTY Appeals Chamber, 27 September 2006, paras. 9-10.

⁷³ Decision to Determine the Co-Prosecutors’ Appeal of the Closing Order on the Basis of Written Submissions Only, Case File No. 001/18-07-2007-ECC/OCIJ (PTC 02), Pre-Trial Chamber, 13 October 2008, D99/3/21.


⁷⁴ Decision on Request for an Oral Hearing on the Appeals, Case File. No. 002/19-09-2007-ECCC/OCIJ (PTC 24-25), Pre-Trial Chamber, 20 August 2009, D164/4/3.

30. In the light of the need for an expeditious resolution of all outstanding issues to enable the public trial to commence as soon as possible, and considering that the parties can sufficiently brief the Pre-Trial Chamber on the relevant factual and legal issues through their written pleadings, the Co-Prosecutors request that the Pre-Trial Chamber reject the request of a public oral hearing of this Appeal.

E. CONCLUSION

31. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber (1) dismiss the Appeal as procedurally barred and substantively devoid of merit, (2) forward the Closing Order to the Trial Chamber as soon as practicable, and (3) maintain the Appellant in provisional detention pending his appearance before the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
15 November 2010	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		