



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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D361/4/1/10

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

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC46)

THE PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: 13 November 2017

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PUBLIC REDACTED

DECISION ON [REDACTED] APPEAL AGAINST THE DECISION ON [REDACTED] REQUEST FOR ADEQUATE PREPARATION TIME

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

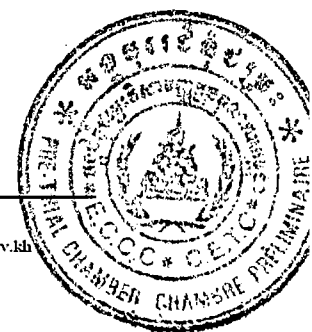
**Co-Lawyers
for the Appellant**

SO Mosseny
Suzana TOMANOVIC
Neville SORAB

Civil Party Lawyers

CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov

Laure DESFORGES
Isabelle DURAND
Emmanuel JACOMY
Martine JACQUIN
Lyma NGUYEN
Nushin SARKARATI



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “██████████ Appeal Against the Decision on ██████████ Request for Adequate Preparation Time”, filed by the Co-Lawyers for ██████████ (respectively the “Defence” and the “Appellant”) on 26 July 2017 (the “Appeal”).¹

I. INTRODUCTION

1. This Appeal concerns a decision issued by the Co-Investigating Judges (the “CIJs”) denying the Appellant’s request for an extension, of at least six months, of the period to submit requests for investigative action after the date of the notification of conclusion of the investigation under Internal Rule 66(1) (the “Impugned Decision”).²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the Acting International Co-Prosecutor filed with the Office of the Co-Investigating Judges (the “OCIJ”) the Third Introductory Submission, alleging the involvement of the Appellant in criminal acts and proposing to press charges against him.³

3. On 13 June 2017, the Co-Investigating Judges (the “CIJs”) notified the parties that they considered that the investigation against the Appellant had been concluded and informed that requests for further investigative action can be filed, pursuant to Internal Rule 66(1), within fifteen days of this notification (the “Notice of Conclusion”).⁴ On 16 June 2017, the Defence filed a request for extension, of the period prescribed in Internal Rule 66(1), to at least six months from the date of the Notice of Conclusion (the “Request”).⁵ On 5 July 2017, the CIJs issued the Impugned Decision granting only a thirty day extension thus setting a new

¹ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), ██████████ Appeal Against the Decision on ██████████ Request for Adequate Preparation Time, 26 July 2017, D361/4/1/5 (“Appeal”), notified in English on 7 August 2017 and in Khmer on 15 September 2017.

² Case 004, Decision on ██████████ Request for Adequate Preparation Time, 5 July 2017, D361/4 (“Impugned Decision”), paras 39-41.

³ Case 004, Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1; Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Case 004, Notice of Conclusion of Judicial Investigation Against ██████████, 13 June 2017, D358, paras 7-8 (“Notice of Conclusion”).

⁵ Case 004, ██████████ Request for Adequate Preparation Time, 16 June 2017, D361, (“Request”) notified in English on 19 June 2017 and in Khmer on 17 July 2017, p. 15.



deadline for 28 July 2017.⁶ On 5 July 2017, the Defence filed before the OCIJ their Notice of Appeal against the Impugned Decision⁷ and, on 10 July 2017, they filed before the Pre-Trial Chamber a request to suspend the deadline set by the Impugned Decision, pending resolution of the appellate proceedings (the “Suspension Request”).⁸ On 19 July 2017, the Pre-Trial Chamber denied the Suspension Request, having found that:

“the Applicant has not shown any exceptional circumstances justifying to suspend the Impugned Decision before submitting their appeal. In particular, it is not established that the compliance with the deadline set for filing investigative action requests would defeat the purpose of the eventual appeal or create an irreversible situation, such as the implementation of the Impugned Decision would have a direct impact on the effectiveness or fairness of the appellate proceedings. Indeed, should the prospective appeal succeed on its merits, the Applicant would simply be given adequate time to prepare and file any additional request he deems necessary.”⁹

4. On 26 July 2017, the Defence filed the Appeal in English only and a request to file the Khmer translation later.¹⁰ The Appeal was notified in English on 7 August 2017 while the Khmer translation was filed and notified on 15 September 2017.

5. On 5 September 2017, the CIJs issued a “Second Notice of Conclusion of the judicial investigation against [REDACTED]” (the “Second Notice of Conclusion”),¹¹ stating that “the granting of additional time after the filing of this second notice of conclusion is an exceptional measure falling under the discretion of the CIJs which mainly depends on the quantity and quality of the evidence gathered after the first notice of conclusion”¹² and informing the parties that “no period for further investigative action is required under the Internal Rules and hence none is granted.”¹³

⁶ Impugned Decision, paras. 40-41.

⁷ Case 004, [REDACTED] Notice of Appeal Against the Decision on [REDACTED] Request for Adequate Preparation Time, 5 July 2017, D361/4/1, notified on 6 July 2017.

⁸ Case 004, [REDACTED] Request for Suspension of D361/4 Deadline Pending Resolution of Appeal Proceedings, 10 July 2017, D361/4/1/1, notified in English on 10 July 2017 and in Khmer on 12 July 2017 (“Suspension Request”), p. 6.

⁹ Case 004 Decision on [REDACTED] Request for Suspension of D361/4 Deadline pending Resolution of Appeal Proceedings, 19 July 2017, D361/4/1/3 (“Decision on Suspension Request”), para. 5.

¹⁰ Case 004, Request to File [REDACTED] Appeal Against the Decision on [REDACTED] Request for Adequate Preparation Time in One Language, 26 July 2017, D361/4/1/4, notified on 27 July 2017.

¹¹ Case 004, Second Notice of Conclusion of Judicial Investigation Against [REDACTED], 5 September 2017, D368 (“Second Notice of Conclusion”).

¹² Second Notice of Conclusion, para. 21.

¹³ Second Notice of Conclusion, para. 28.



6. On 25 September 2017, the International Co-Prosecutor (the “ICP”) filed his Response to the Appeal in English only with a request to file the Khmer translation later.¹⁴ The ICP’s Response was notified in English and Khmer on 10 October 2017 (the “Response”).¹⁵

7. On 16 October 2017, the Defence filed their Reply to the Response in English only and a request to file the Khmer translation later.¹⁶ The Reply was notified in English on 7 November 2017 while the Khmer translation was filed and notified on 10 November 2017 (the “Reply”).¹⁷

III. ADMISSIBILITY

1. Submissions

8. The Defence “requests that the Pre-Trial Chamber [...] admit the Appeal”,¹⁸ submitting it “is admissible under [Internal] Rule 21 because the Impugned Decision breaches [redacted] fundamental rights to adequate time, equality of arms and procedural fairness.”¹⁹

9. The Defence first acknowledges that: (i) the Appeal “does not fall squarely under [...] Internal] Rule 74(3)”,²⁰ (ii) Internal “Rule 21 does not create an automatic avenue for appeal”,²¹ and that (iii) “the appellant must demonstrate [...] that] the intervention of the [Pre-Trial Chamber] is necessary to avoid irremediable damage to the fairness of [...] proceedings, or to the appellant’s fundamental rights.”²² They argue, however, that “for the purposes of

¹⁴ Case 004, International Co-Prosecutor’s request to file his response to [redacted] appeal against the decision on additional time in one language, 26 September 2017, D361/4/1/6.

¹⁵ Case 004, International Co-Prosecutor’s Response to [redacted] Appeal Against the Decision on additional Time, 25 September 2017, D361/4/1/7 (“Response”), notified on 10 October 2017.

¹⁶ Case 004, Request to File [redacted] Reply to the International Co-Prosecutor’s Response to [redacted] Appeal Against the Decision on [redacted] Request for Adequate Preparation Time on One Language, 16 October 2017, D361/4/1/8.

¹⁷ Case 004 [redacted] Reply to the International Co-Prosecutor’s Response to [redacted] Appeal Against the Decision on [redacted] Request for Adequate Preparation Time, 16 October 2017, D361/4/1/9 (“Reply”).

¹⁸ Appeal, para. 97(1).

¹⁹ Appeal, para. 29.

²⁰ Appeal, para. 31.

²¹ *Ibid.*

²² *Ibid.*



determining the admissibility of an appeal, rather than its merits, it is sufficient to identify rather than prove a relevant issue.”²³ The Defence adds that “[f]ailure to admit this appeal [...] would itself constitute a breach”²⁴ because “the Co-Prosecutors may appeal ‘all orders’ of the CIJs under Rule 74(2), [and] the right to equality before the courts [...] demands that the Defence be afforded the same procedural access to the [Pre-Trial Chamber].”²⁵

10. Regarding the “right to adequate time to prepare through proper participation in the investigation,”²⁶ the Defence submits that “in accordance with consistent international law, the CIJs are obliged to grant reasonable requests for additional time to prepare”²⁷ which obligation, they add, “is particularly important since [REDACTED] faces the most serious criminal charges and in view of the magnitude and complexity of the case.”²⁸ Furthermore, to argue that “the only opportunity for [them] to review the evidence on Case File 004 and submit appropriate motions is during the investigation”,²⁹ the Defence points first at: i) Internal Rule 76(7) submitting it prevents “issues concerning [...] procedural defects from being raised at the trial stage”; and second at ii) the trial proceedings in Case 002 submitting “the Trial Chamber [...] has expected [...] that during the judicial investigation the Defence will review the Case file evidence, to the extent that they are trial-ready and will not raise at trial any issues related to the judicial investigation.”³⁰

11. In raising the issue of equality of arms, the Defence first states that it “does not contend [...] that it requires the same amount of time with the Case File as the ICP.”³¹ The Defence argues that “[REDACTED] will be placed at a significant procedural disadvantage vis-à-vis the Prosecution if the Defence is not afforded sufficient opportunity to familiarize

²³ Appeal, para. 32 referring to Considerations on [REDACTED] Appeal Against the International Co-Investigating Judge’s Decision to Charge her In Absentia, 1 March 2016, D239/1/8, (“Decision on Charging [REDACTED] In Absentia”), para 17

²⁴ Appeal, para. 33.

²⁵ *Ibid.*

²⁶ Appeal, para. 34.

²⁷ Appeal, para. 37. See also Appeal, para. 34 referring to international jurisprudence, particularly UN Human Rights Committee, and stating: “the imposition of procedural constraints that may adversely impact [his] ability to seek evidence on his behalf has been found by the [United Nations] Human Rights Committee to contravene the right to adequate time.”

²⁸ Appeal, para. 37.

²⁹ Appeal, para. 36.

³⁰ Appeal, para. 36 referring to Case 002/19-09-2007/ECCC/TC (“Case 002”), Transcript of Trial Proceedings, 6 September 2012, E1/123.1.

³¹ Appeal, para. 38.



itself with the Case File such that it is able to make all necessary investigative requests and necessary motions before the conclusion of the investigation.”³²

12. Lastly, regarding the issue of procedural fairness, the Defence alleges that it “is unfairly precluded from the fulfilment of its basic professional duties”³³ due to “the extremely belated admission of the Defence to Case File 004”³⁴ and then, post admission, due to the “inadequate time to become sufficiently familiar with the material prior to the deadline for the submission of investigative requests”.³⁵ The Defence submits that “[i]n failing to properly consider the fairness of the circumstances created by closure of the investigation at this stage, the judges risk *de facto* [...] promot[ing] the interests of the ICP over those of the Defence [which] is impermissible”.³⁶ In the Defence’s view, “concerns regarding the proper expeditious conduct of the case [...] cannot [...] justify the hasty conclusion of the investigation without granting Mr. [REDACTED] adequate time to participate [...] which] cannot be trumped by perceived countervailing rights of other interested parties”.³⁷ Furthermore, the Defence submits, “the CIJs have potentially fallen foul of the precepts of procedural fairness by failing to provide proper and coherent reasoning in the impugned Decision, such that [REDACTED] [REDACTED] is afforded proper access to effective remedy.”³⁸

13. In response, the ICP submits that the Appeal “fails to meet the admissibility threshold”³⁹ under Internal Rule 21 and that it “does not establish any of [the] claims”⁴⁰ for violation of [REDACTED] rights to adequate time to prepare his defence and to equality of arms, or for lack of procedural fairness. Responding to the Defence assertion, that for the purposes of admissibility it is sufficient to identify rather than prove a relevant issue, the ICP maintains that “the mere reliance on fair trial rights alone, without identification of how they apply to

³² Appeal, para. 39.

³³ Appeal, para. 41: “[t]rough the previous management of Case 004 [...] [REDACTED] [REDACTED] has been excluded from participation in the investigation until an evolved stage” (and footnote 54: “The DSS and then the Defence fought for access to Case File 004 in order to seek to uphold [REDACTED] [REDACTED] fundamental fair trial rights including to seek to preserve the equality of arms from 29 July 2010 until *access was granted on 4 December 2015*”).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Appeal, para. 42.

³⁷ Appeal, para. 43.

³⁸ Appeal, para. 44.

³⁹ Response, para. 1.

⁴⁰ Response, para. 7.



the circumstances as they pertain, is patently insufficient for the purposes of admissibility.”⁴¹ The ICP recalls that “failure to articulate how the right to adequate time and facilities to prepare a defence is concretely impaired is sufficient to render an appeal inadmissible under Rule 21”⁴² and that “an appeal under Rule 21 that is speculative is inadmissible”.⁴³ Lastly, the ICP submits that refusing to admit the appeal would not constitute *de facto* promotion of the Co-Prosecutors interests,⁴⁴ and “goes against the very purpose of [Internal] Rule 74(3).”⁴⁵

14. The ICP further contends that ██████ has failed to demonstrate how his right to adequate time to prepare his defence has been violated,⁴⁶ therefore, “the Appeal is rendered speculative.”⁴⁷ In this regard, the ICP avers that “█████ does not explain the current status of [their] evidential review, why the Defence has not been able to review the evidence [...] since [when] it was granted access to the case file, nor why the 30 days extension [...] was insufficient and why the six months requested is necessary.”⁴⁸ The ICP make the further argument, that “there is every indication that ██████ had sufficient time”⁴⁹ because: he “had access to the Case File for over 18 months”;⁵⁰ he had “resources”;⁵¹ and he “has been on notice of the intended timeline”.⁵² In the ICP’s view, ██████ “chose not to” file any investigation requests during that time.⁵³

⁴¹ Response, para. 8.

⁴² Response, para. 9 referring to Decision on ██████ Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, D208/1/1/2, 22 January 2015, para 12.

⁴³ Response, para 12, referring to Decision on Appeal Against Order on ██████ Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4, para. 24.

⁴⁴ Response, para. 15 referring to Appeal, para. 33.

⁴⁵ *Ibid.*

⁴⁶ Response, para. 9.

⁴⁷ Response, para. 12.

⁴⁸ Response, para. 9.

⁴⁹ Response, para. 10.

⁵⁰ *Ibid.*

⁵¹ Response, para. 10 “[t]he 51 requests and submissions filed by ██████ during this time indicate [...]”.

⁵² Response, para. 11 referring to the Impugned Decision, para 34: “Defence have been on notice of the timeline of the intended conclusion of the investigation through the Completion Plans published on the ECCC website.”

⁵³ Response, para. 10.



15. Regarding the issue of equality of arms, the ICP submits that [REDACTED] fails to “identify how the denial of his request for a six month extension would put him at such a [substantial] disadvantage”.⁵⁴

16. Referring to the issue of procedural fairness, the ICP submits that [REDACTED] argument of late access to the case file preventing his participation in the investigation is “belied” by the Defence’s extensive litigation during the time in which they had access.⁵⁵ Furthermore, the ICP argue that the Defence’s assertion that the CIJ’s failed to provide adequate reasoning is “misconceived” and the appeal does not detail how the decision is supposedly lacking, and how that relates to procedural fairness.⁵⁶

17. The Defence replies that “[t]he ICP mischaracterises Defence arguments throughout the Response in an attempt to dispel them”⁵⁷ and maintains that “the Appeal is substantiated”.⁵⁸ The Defence argues that ICP’s reading of Pre-Trial Chambers’ jurisprudence, on the threshold for admissibility of appeals under Internal Rule 21, is “overly-selective”.⁵⁹ Regarding the argument for the Appellant’s right to have the same access - to the Chamber as an appellate court - as the ICP, the Defence submits that “the ICP reads [Internal] Rule 74(3) in isolation, ignoring [Internal] Rule 74(2) and the [Chamber’s] previous [...] findings with regard to [Internal] Rule 21.”⁶⁰

18. The Defence further submits that by “observ[ing] that ‘the longer an investigation, the more time parties have to make investigative requests’, [the ICP] ignores the exclusion of the Defence from the investigation until December 2015, [...] and thus beautifully illustrates the procedural inequality in this case”.⁶¹ The Defence clarifies that “for the purposes of assessing adequate time [the Defence] refer to the length of the entirety of the investigation (during which the Prosecution was indeed free to make investigative requests at any time) rather than

⁵⁴ Response, para. 13 *referring to* Appeal, paras. 38-39.

⁵⁵ Response, para. 14.

⁵⁶ *Ibid.*

⁵⁷ Reply, para. 10.

⁵⁸ Reply, para. 11.

⁵⁹ Reply, para. 12.

⁶⁰ Reply, para. 13.

⁶¹ Reply, para. 23.



only the period for which the Defence was granted access.”⁶² Lastly, the Defence maintains that “the Impugned Decision was insufficiently reasoned and the ICP’s arguments cannot properly constitute a substitute.”⁶³

2. Discussion

19. The Pre-Trial Chamber notes in approval Defence’s acknowledgments that the Appeal does not fall under Internal Rule 74(3) and that Internal Rule 21 does not create an automatic avenue for appeals. As regards the jurisprudence relied upon in the Appeal to argue that “for the purposes of determining the admissibility of an appeal [under Internal Rule 21 ...], it is sufficient to identify rather than prove a relevant issue”,⁶⁴ the Chamber recalls that it has addressed a similar argument in an earlier decision,⁶⁵ where it stated that:

“[the Chamber] found [redacted] appeal admissible under Rule 21, because the defence *demonstrated* that, unless the Pre-Trial Chamber intervened at the stage when the appeal was filed, [redacted] right to equal treatment would be *irreparably harmed*.”⁶⁶

and concluded that for the purposes of considering admissibility of appeals under Internal Rule 21, it “shall examine whether, in the particular circumstances of [a] case, its intervention at this stage is necessary to prevent irremediable infringement of [redacted] rights to legal certainty, equality and procedural fairness.”⁶⁷ With regards to the other Defence argument, that failure to admit the Appeal would itself constitute a breach because the Co-Prosecutors may appeal all orders of the CIJs under Rule 74(2), the Pre-Trial Chamber notes that, at the ECCC, it is the applicable rules that set different procedural rights to appeal by each party,⁶⁸ and the case-by-case examination of appeals, for admissibility under Internal Rule 21, is

⁶² *Ibid.*

⁶³ Reply, para. 26.

⁶⁴ Appeal, para. 32 and footnote 41 referring to the Decision on Charging [redacted] in Absentia, para. 17 “In the rare instances where the particular facts of a case raised issues of fundamental rights or serious issues of procedural fairness, the Pre-Trial Chamber has admitted appeals under Internal Rule 21.”

⁶⁵ Case 004, Decision on [redacted] Consolidated Appeal Against the International Co-Investigating Judge’s Consolidated Decision on [redacted] Requests for Reconsideration of Disclosure (D193/76 and D193/77) and the International Co-Prosecutor’s Request for Disclosure (D193/72) and Against the International Co-Investigating Judge’s Consolidated Decision on International Co-Prosecutor’s requests to Disclose Case 004 Document to Case 002 (D193/70, D193/72, D193/75 and D193/84), 15 February 2017, D193/91/7 (“Decision on Consolidated Appeal”), paras 20-21.

⁶⁶ Decision on Consolidated Appeal, para. 21.

⁶⁷ Decision on Consolidated Appeal, para. 22.

⁶⁸ See Internal Rules, Revision 9, Rules 74(2) and 74(3). See also Code of Criminal Procedure of the Kingdom of Cambodia (“CCPC”), Articles 266 and 267 (emphasis added).



precisely aimed at safeguarding the rights of all parties. However, as the Defence also agrees,⁶⁹ Internal Rule 21 does not create an *automatic* avenue for appeals.

(i) *The right to adequate time*

20. The Pre-Trial Chamber takes note of the Defence's assertions to the effect that the right to adequate time to prepare one's defence is important⁷⁰ and that "the opportunity for effective representation is particularly important since [REDACTED] faces the most serious criminal charges and in view of the magnitude and complexity of the case."⁷¹ The Chamber observes, however that, apart from making reference to an "imposition of procedural constraints"⁷² and to a "premature curtailment of the opportunity 'to make proper enquiries',"⁷³ the Defence has not demonstrated how the Appellant's right to adequate time is harmed concretely in the instant case.

21. Moreover, with regards to the Defence's arguments to sustain a proposition that if the appeal is not admitted now, the harm, if any, cannot be repaired at later stages of the proceedings,⁷⁴ the Pre-Trial Chamber considers that the reference to Internal Rule 76(7) - concerning any issues of *procedural defect* during investigations - is not directly related to the argument for any lack of adequate time to make *investigative requests* before the OCIJ forwards, pursuant to Internal Rule 66(4), the case file to the Co-Prosecutors. The Chamber further notes that the Defence has already filed 51 other motions,⁷⁵ including annulment applications, and still has the opportunity to do so before a Closing Order is issued.

22. Therefore, the Pre-Trial Chamber finds that, in the particular circumstances of this case, the Defence has not demonstrated that the intervention of the Chamber is necessary at this stage in order to avoid any irremediable damage to [REDACTED] right to adequate time for the preparation of his defence.

⁶⁹ Appeal, para. 31.

⁷⁰ Appeal, paras. 34, 35.

⁷¹ Appeal, para. 37.

⁷² Appeal, para. 34.

⁷³ Appeal, para. 35.

⁷⁴ Appeal, para. 36.

⁷⁵ Impugned Decision, para. 34.



23. In another aspect of the right to adequate time, for which it is not seised, the Pre-Trial Chamber takes note of CIJ's Second Notice of Conclusion.

24. The Pre-Trial Chamber recalls that Internal Rule 66(1) reads in relevant part:

“Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. [...]. The parties shall have 15 (fifteen) days to request further investigative action.”

25. The Pre-Trial Chamber observes that, according to this disposition, the deadline of fifteen days to request further investigative action applies after a “notification” of conclusion of the investigation, no matter whether the notification is the “first”, or a “second” one issued after completion of supplementary investigations.

26. The Chamber further observes that the Second Notice of Conclusion was issued without granting the parties the time, explicitly prescribed under Internal Rule 66(1), to request further investigative action post a notice of conclusion of the investigation.

27. The Pre-Trial Chamber considers that, pursuant to Internal Rule 66(1), fifteen days from the date of notification of the Second Notice of Conclusion must have been granted to the parties to review the *newly collected* evidence.

(ii) Equality of arms

28. The Pre-trial Chamber notes that Defence's Appeal argument about equality of arms is premised on an assumption that the Defence has demonstrated a lack of sufficient time to make all necessary requests for investigative action before the conclusion of investigations.⁷⁶ As no violation of the right to adequate time is demonstrated,⁷⁷ the Chamber shall not entertain the related claim for infringement of the right to equality.

29. Therefore, the Pre-Trial Chamber finds that no intervention is required.

⁷⁶ Appeal, para. 39: “██████████ will be placed at a significant procedural disadvantage vis-à-vis the Prosecution if the Defence is not afforded sufficient opportunity to familiarise itself with the Case File such that it is able to make all necessary investigative requests and necessary motions before the conclusion of the investigation.”

⁷⁷ *Supra*, para. 22.



(iii) Procedural Fairness

30. The Defence further allege that [REDACTED] right to procedural fairness is at stake, because the Defence was ‘unfairly precluded’ from the fulfilment of its professional duties due to the: (i) ‘belated admission to Case File 004’; and then, post ‘admission’, due to (ii) the inadequate time to become familiar with the material in Case File. In this regard, the Pre-Trial Chamber first notes that the right to access the Case File was granted to the Defence *in accordance with the provisions of the Internal Rules* stipulating different procedural rights for “Charged Persons” and “Suspects”,⁷⁸ which defeats any claim for ‘unfair’ belated ‘admission’ and, second, recalls the finding, in the case at hand, that there has been no demonstration for violation of the right to adequate time.⁷⁹

31. Regarding the Defence allegation for unfairness due to the judge’s ‘risk’ of promoting the interests of the ICP over those of the defence,⁸⁰ which, according to the Defence, illustrates procedural inequality in this case, the Chamber notes the CIJ’s unequivocal statements that, “[i]t is the very nature of the mechanism at the ECCC and the ICP’s onus of proof that the ICP has a ‘head start’ on the investigation”⁸¹ and that “[o]nce the case is before the OCIJ the *Prosecution’s right to participate in or carry out investigations is no stronger than that of the Defence* or any other party”.⁸² In any event, unless evidence is provided to rebut the Judge’s presumption of impartiality,⁸³ the Pre-Trial Chamber shall not entertain any claims that the ICP’s interests *may* have been promoted.

⁷⁸ See Case 004, Decision On The [REDACTED] Defence Urgent Motion To Access The Case File And Take Part In The Judicial Investigation, 17 July 2014, D186/3, para. 33: “The Suspect has not been formally charged nor has he been substantially affected by the investigation such as to warrant a departure from the Internal Rules. Therefore his request to access the Case File must at this stage be denied.” See also Case 004 (PTC10) Considerations of the Pre-Trial Chamber on Appeals against the international Co-investigating Judge’s decisions denying his requests to access the case file and to take part in the investigation, 31 October 2014, D186/3/1/2, para. 29: “Reference is also made to Internal Rule 55(6) which provides on procedures applicable for access to the Case File. Each of these Rules which describe rights of a procedural nature and make explicit reference to the term “Charged Person” and not to the term “Suspect”.

⁷⁹ *Supra*, para. 22.

⁸⁰ Appeal, para. 42.

⁸¹ Impugned Decision, para. 37.

⁸² Impugned Decision, footnote 49 referring to Case File No 004 Decision on [REDACTED] Request for the Investigating Judges to Conduct Site Visits, 19 April 2016, D308, para 14.

⁸³ Case 002 (PTC01) Public Decision on [REDACTED] Co-Lawyers’ Urgent Application for Disqualification of [REDACTED] Pending the Appeal Against the Provisional Detention Order in the Case of [REDACTED] 04 February 2008, C11/29, para. 19: “It is for the Appellant to adduce sufficient evidence to satisfy the Pre-Trial



32. The Defence further identifies other concerns regarding the ‘expeditious conduct of the case against [REDACTED] and ‘the hasty conclusion of the investigation’ to support a claim that ‘[t]he right to adequate time [...] cannot be trumped by countervailing rights of other interested parties.’⁸⁴ The Pre-Trial Chamber finds that here, other than identifying concerns, the Defence has not made any demonstration that procedural fairness is at stake in the instant case.

33. Lastly, the Defence contend that inadequate reasoning was provided in the Impugned Decision, such that it may impinge on the right to a reasoned decision. The Pre-Trial Chamber considers that the Defence fails to particularise specific issues requiring further clarification or lack reasoning. In fact, throughout the appeal, the Defence itself identifies that numerous reasons were provided in the Impugned Decision by appealing the various ‘errors of fact’.⁸⁵ The Pre-Trial Chamber concludes that the Defence has not demonstrated a violation of the Appellant’s right to reasoned decisions, either.

34. The Pre-Trial Chamber, therefore, finds that the Defence has not justified the Pre-Trial Chamber’s intervention to prevent irremediable damage based on issues of procedural fairness.

IV. CONCLUSION

35. The Pre-Trial Chamber is not convinced that the rights to adequate time, equality of arms and procedural fairness will be irremediably damaged if it does not intervene at this stage, therefore, the Defence has not met the threshold for admissibility of the Appeal under Internal Rule 21.

Chamber that the judge in question can be objectively perceived to be biased. There is a high threshold to reach in order to rebut the presumption of impartiality.”

⁸⁴ Appeal, para. 43.

⁸⁵ See Appeal paras 46-75 and footnotes 58, 59, 61, 62, 70, 76, 77, 87, 95, 97, 100, 101, 105, 106, 107, 109, 110, 111.



36. Consequently,⁸⁶ the Pre-Trial Chamber denies Defence's request that the Pre-Trial Chamber invoke its inherent jurisdiction to stay the order to conclude the relevant period on 28 July 2017.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:


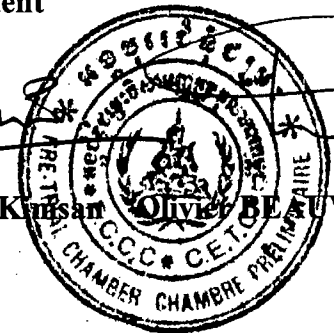
- FINDS the instant Appeal inadmissible;
- DENIES the related Suspension Request.

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

Phnom Penh, 13 November 2017

President

Pre-Trial Chamber



PRAK Kimsan **Olivier BEAUVALLET** **NEY Thol** **Kang Jin BAIK** **HUOT Vuthy**

⁸⁶ See also Decision on Suspension Request, para. 5.