

Trial Chamber Rejects Request for Investigation of Government Interference in Case 002

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In April, Nuon Chea's international defense counsel asked the Trial Chamber to stay Case 002 proceedings at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and investigate reserve international Co-Investigating Judge Kasper-Ansermet's allegations that Cambodian Court officials had obstructed his efforts to investigate Cases 003 and 004.¹ By the Defense Team's count, this was its fourth major submission challenging the fairness of Case 002 in light of alleged pervasive Cambodian Government interference in the work of the Court.

In its filing, the Team asserted that Judge Kasper-Ansermet's resignation and public allegations were "conclusive proof" that the Cambodian Government's influence at the Court "affects *each and every* national staff member [including the national Trial Chamber judges] and infects *each and every* pending case." Moreover, it argued that outspoken Government opposition to stymied Cases 003 and Cases 004 has a "crucial corollary" in Case 002: "[A]s much as the Government is *refusing* to allow additional prosecutions [in those Cases], it is *supporting* the current ones[.]" and thus convictions of the accused in Case 002 are inevitable "regardless of the factual record established in court."² The Team said:

It would be particularly objectionable to continue hiding behind the fiction that *only* Cases 003 and 004 are afflicted by Government interference. While the manifestations of [Government] meddling in those cases (overt blocking at every step of the process) are clear, such brazenness does not obscure the relatively subtler methods employed by the same individuals in order to ensure convictions in Case 002 and shield [Government] officials from potential embarrassment and/or exposure.³

Most specifically, the Team alleged that the Government interference has prevented its repeated efforts to have the Court summon (now deceased) King Father Sihanouk and six Government officials to testify as witnesses.⁴

¹ Application for Immediate Action Pursuant to Rule 35, ¶ 28 (Apr. 25, 2012) [hereinafter April 25 Application]. At the time of his resignation, Judge Kasper-Ansermet said that he had opened internal Court investigations for "interference with the administration of justice" due to obstruction of his efforts to investigate Cases 003 and 004. Press Release of the International Reserve Co-Investigative Judge (Mar. 19, 2012). These concerns were detailed in Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004 (Mar. 21, 2012).

² April 25 Application, ¶¶ 3 19 (emphasis in original).

³ *Id.*, ¶ 24 (emphasis in original)

⁴ For discussion of the allegations of government interference in the appearance of these witnesses, see Expert Commentary on Legal Filings: Status of Defense Efforts to Call Government Witnesses at Trial (Aug. 21, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>. King Father Sihanouk passed away on October 15, 2012

In response, the Prosecution argued that the Defense motion “fails to demonstrate any violation of the Accused’s rights in the on-going trial in Case 002 and is instead based upon speculative conclusions derived from Cases 003 and 004.” Moreover, it described the allegations as “substantially repetitive of previous motions that have been rejected both at trial and on appeal.”⁵

In its November ruling on this outstanding application,⁶ the Trial Chamber agreed with the Prosecutors that the Nuon Chea filing is “almost entirely repetitive” of submissions previously rejected by both the Trial and Supreme Court Chambers. It found the motion was “lodged despite repeated indications from the Chamber that repetitious filings ... may jeopardize the Accused’s right to an expeditious trial” and could result in sanctions.⁷ Moreover, it found the Team’s suggestion that Cambodian Trial Chamber judges do not act independently of Government instructions to be disrespectful, discriminatory, and potentially subject to sanction as they were made without “reference to decisions of the Trial Chamber or any other part of the trial record.”⁸

Although the Trial Chamber says that the filing amounts to “misconduct,” its ruling appears to accept implicitly that there are reasons to believe that interference in the administration of justice may have occurred. According to a recent Supreme Court Chamber decision, “Pursuant to Rule 35, the body siesed of a request must examine the allegations, assess whether there is, at a minimum, reason to believe that any of the acts encompassed by Rule 35(1) have been committed; and decide on the appropriate action, if any, to be taken pursuant to Rule 35(2).”⁹ However, in its decision, the Trial Chamber never applies the Rule 35(1) standards of proof to the Kasper-Ansermet allegations, despite the fact that there is no prior ruling addressing this subject. Instead, the Chamber focuses entirely on Rule 35(2), which “delineates procedural avenues open to a Chamber *where there are reasons to believe that a person committed interference with the administration of justice.*”¹⁰ If there were no “reasons to believe,” there would seem to be no need to determine a course of action.

⁵ Decision on Application for Immediate Action Pursuant to Rule 35, ¶ 5 (Nov. 22, 2012) [hereinafter Nov. 22 Decision] (paraphrasing the Co-Prosecutor’s arguments). The Prosecution response, “Co-Prosecutors’ Response to NUON Chea Application for Immediate Action Pursuant to Rule (May 3, 2012)” is not available on the Court’s website.

⁶ In October, the Nuon Chea team appealed to the Supreme Court Chamber, arguing that the Trial Chamber’s failure to rule on its request for nearly six months amounted to “constructive dismissal” of its application. Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35 (Oct. 10, 2012). While the appeal was pending, the Trial Chamber issued its decision. On November 26, the Supreme Court Chamber dismissed the appeal as moot, but “note[ed] with concern the Trial Chamber’s seven-month delay in rendering its effective ruling on the Application[.]” Decision on Nuon Chea’s “Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35,” ¶ 5 (Nov. 26, 2012).

⁷ Nov. 22 Decision, ¶ 8 & disposition.

⁸ *Id.* ¶ 16.

⁹ Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, ¶ 26 (Sept. 14, 2012).

¹⁰ *Id.*, ¶ 39 (emphasis added). For discussion of this decision, see Expert Commentary on Legal Filings: Decision on the Cambodian Prime Minister’s Public Statement Regarding the Guilt of Accused Nuon Chea, at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

In considering the “relief sought,” the Chamber notes that a stay of proceedings is inappropriate in a situation such as the one at issue, “where the Accused fails to identify any tangible impact of the allegations on the on-going trial” or fails to show that a stay is the only way to “address any alleged violations of the Accused’s rights.” With regard to Judge Kasper-Ansermet’s statements “indicating that certain staff members of the ECCC have interfered with the investigation in Case File 004,” the Chamber finds that they do not cure this deficiency because the Judge “makes no mention of potential interference with the investigation in Case 002.” The Chamber therefore emphasizes its discretion under Internal Rule 35(2) to decide not to investigate “for the sake of efficiency,” and notes that a “fair and public trial” is the appropriate remedy for any alleged procedural defects in the investigation.¹¹

Notably, a new international Co-Investigating Judge, Mark Harmon, has recently replaced Judge Kasper-Ansermet and is believed to be working on the Case 003 and 004 investigations. Although only one of the five suspects in these Cases has yet been assigned defense counsel, it may be assumed that their lawyers will raise Judge Kasper-Ansermet’s allegations before both the Co-Investigating Judges and the Pre-Trial Chamber.

As for the six Government witnesses requested by the Nuon Chea team, the Trial Chamber notes that “determinations of which, if any, of these additional witnesses will be heard at trial remain pending and under review by the Chamber as the trial in Case 002/01 proceeds.”¹² Additional efforts by the Nuon Chea Team to secure their testimony should therefore be expected.

¹¹ Nov. 22 Decision, ¶¶ 9-10, n.21, ¶ 12.

¹² *Id.*, ¶ 11 n.22.