

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Appeal Nos. : 001/18-07-2007-ECCC/TC
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CO-PROSECUTORS' RESPONSE TO CERTAIN CIVIL PARTIES' REQUEST FOR DISCLOSURE OF THE UN-OIOS REPORT

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I. INTRODUCTION

1. The Co-Prosecutors file this response (“Response”) to the application (“Application”) of certain Civil Parties asking the Trial Chamber to facilitate the disclosure of a United Nations Office of Internal Oversight Services report (“OIOS Report”) relating to an inquiry undertaken by that body into allegations of administrative corruption within this Court.¹

II. ARGUMENT

A. Decision should be deferred

2. The Co-Prosecutors submit that the Trial Chamber should defer its decision on this Application until the Pre-Trial Chamber decides the four substantive appeals before it raising similar issues and seeking a similar remedy.
3. Appeals have been filed before the Pre-Trial Chamber by Charged Persons NUON Chea,² IENG Sary,³ IENG Thirith⁴ and KHIEU Samphan⁵ (“Corruption Appeals”), which separately seek the reversal of the Co-Investigating Judges’ common order on request for investigative action regarding allegations of administrative corruption in this Court.⁶ The request, submitted by NUON Chea (“Investigative Request”⁷), asked the Co-Investigating Judges to obtain and disclose certain information regarding allegations of corruption, including the OIOS Report.⁸

¹ Group 1 – Civil Parties’ Co-Lawyers’ Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 11 May 2009, 001/18-07-2007-ECCC/TC, E65 [*hereinafter* Application].

² *Case of NUON Chea*, Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 21), D158/5/1/1 [*hereinafter* NUON Chea Appeal].

³ *Case of IENG Sary*, Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 20), D158/5/3/1 [*hereinafter* IENG Sary Appeal].

⁴ *Case of IENG Thirith*, Ieng Thirith Appeal Against the Office of the Co-Investigating Judges’ “Order on Request for Investigative Action” of 3 April 2009, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 19), D158/5/4/1.

⁵ *Case of KHIEU Samphan*, *Appel de la défense de M. Khieu Samphan contre l’ordonnance des co-juges d’instruction sur demande d’acte d’instruction en date du 03 avril 2009*, 4 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 22), D158/5/2/1.

⁶ *Case of NUON Chea*, Order on Request for Investigative Action, 3 April 2009, 002/19-09-2007-ECCC-OCIJ, D158/5.

⁷ *Case of NUON Chea*, Eleventh Request for Investigative Action, 27 March 2009, 002/19-09-2007-ECCC-OCIJ, D158 [*hereinafter* Investigative Request].

⁸ *Id.*, para. 22.

4. The Corruption Appeals and the Application essentially concern the same issue—the possible effect of alleged administrative corruption on fair trial rights of defendants before this Court—and raise common or similar facts and questions of law. The decision of the Pre-Trial Chamber on the Corruption Appeals will, therefore, be directly relevant to the issues raised in the Application before this Chamber.
5. The Trial Chamber and the Pre-Trial Chamber are coequal in the judicial hierarchy of this Court. Two coequal organs of the same Court should ordinarily not hear the same issue simultaneously. The Corruption Appeals, filed on 4 May 2009, were first in time and they are expected to be decided jointly and expeditiously. There is also no urgency necessitating the Trial Chamber to decide on this Application before the decision on the Corruption Appeals. The deferral of a decision by the Trial Chamber on this Application until such time as the Pre-Trial Chamber delivers its decision on the Corruption Appeals shall both serve judicial economy and ensure judicial discipline. There is, therefore, nothing to be lost, and much to be gained, by such deferral.

B. The request for the OIOS Report should be denied

6. The Co-Prosecutors' primary submission, as stated above, is that the Trial Chamber's decision should be deferred until the Pre-Trial Chamber decides the Corruption Appeals. However, should the Trial Chamber proceed to decide this Application prior to the Pre-Trial Chamber's determination of the Corruption Appeals, the Co-Prosecutors request that the Application should be dismissed.
7. The Co-Prosecutors filed their joint response to the Corruption Appeals on 29 May 2009 (**Annex A**).⁹ The Co-Prosecutors adopt by reference the arguments made in that joint response for the purposes of this filing. Consistent with the position taken in that joint response, the Co-Prosecutors submit that the Application before this Chamber should be denied for reasons including the following.

⁹ *Case of NUON Chea et al*, Decision on Co-Prosecutors' Application for Extension of Time and Page Limits to file their Joint Response to the Appeals against the Corruption Order, 22 May 2009, 002/19-09-2007-ECCC/OCIJ (PTC 20), D158/5/4/8.

Fair trial rights are fundamental and must be upheld by all organs of this Court

8. While establishing this special internationalised tribunal with its unique mandate, the United Nations and the Government of Cambodia agreed (“Agreement”) that this Court shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (“ICCPR”).¹⁰
9. Article 14 of the ICCPR contains minimum “fair trial rights” of a defendant before this Court.¹¹ The term “fair trial rights” does not necessarily refer to rights enjoyable by a defendant only at trial; indeed, many of these “fair trial rights” necessarily come into play during the investigative and pre-trial phases of this Court’s proceedings.¹² Accordingly, quoting Article 35(new) of the Law on the Establishment of this Court (“ECCC Law”), the Pre-Trial Chamber noted that defendants before this Court enjoy fair trial rights “from the beginning of the judicial investigation.”¹³ In a similar vein, the International Criminal Court (“ICC”) has held that fair trial guarantees are not limited to the trial itself, but also extend to processes preceding the trial, indeed to every aspect of the proceedings.¹⁴ Consistent with the Agreement, Internal Rule 21(1) (“Rules”) also entrenches certain “fundamental principles”, including that proceedings before this Court shall be “fair and adversarial.”¹⁵
10. This fundamental principle that ECCC proceedings shall be fair and adversarial, applies equally to all organs of this Court. Because fair trial guarantees extend to every aspect of the proceedings, it is incumbent on every organ of the ECCC to ensure that these fundamental rights are upheld. Therefore, the obligations and powers of the Trial Chamber and the Office of the Co-Investigating Judges are, in this respect, the same.

¹⁰ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003, art. 12(2) [*hereinafter* Agreement].

¹¹ ECCC Law, art. 35(new).

¹² For example, the right to counsel, the right not to testify, right of presumption of innocence.

¹³ *Case of NUON Chea*, Decision on Nuon Chea’s Appeal Regarding Appointment of an Expert, 002/19-09-2007-ECCC/OCIJ, D54/5/6, para. 25.

¹⁴ *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled “Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06 OA 13, 21 October 2008, Separate Opinion of Judge Georgios M. Pikis, para 44.

¹⁵ Rule 21(1)(a).

Fair trial rights issue has not been raised by the Accused

11. As stated, the issues raised in both the Application and the Corruption Appeals essentially concern the possible effect of alleged administrative corruption on fair trial rights of defendants before this Court. However, the Application before the Trial Chamber has been moved only by certain Civil Parties. The accused DUCH, who is also a party in Case File No. 002, has not raised this issue in either of the Case Files. Indeed, he did not even join the other four Charged Persons in their Corruption Appeals before the Pre-Trial Chamber.
12. The Application does not show, or allege, that the Civil Parties are suffering any unfairness. It is limited to mere speculation regarding claims that DUCH and unspecified others “may” make in the future. As demonstrated below, the Application fails to establish any nexus between the allegations of administrative corruption that are the subject of the OIOS Report, and fair trial rights.

Fair trial rights are not impinged

13. A moving party must prove its case. The Application contends that a “significant risk exists that the judgment will be undermined as a result of”¹⁶ the corruption allegations and implies that the allegations of corruption may threaten the rights of the Accused to a fair trial before an independent and impartial judiciary.¹⁷ However, it fails to explain how fair trial rights of any parties are, or may be, impinged. There is nothing in the Application that demonstrates a nexus between the alleged administrative corruption and the judicial decision making of this Court.¹⁸
14. Absent a nexus between the OIOS Report and the alleged or potential impairment of fair trial rights, the action requested of the Trial Chamber cannot be undertaken.¹⁹ The Application

¹⁶ Application, *supra* note 1, para. 9.

¹⁷ *Id.*, para. 7.

¹⁸ Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008, 002/19-09-2007-ECCC-OCIJ (PTC 01), paras. 19, 20. The United States cases of *Shaw v. Commonwealth of Pennsylvania* (580 A.2d 1379 (Pa. Supreme. Ct. 1990) and *People v. Titone* (600 N.E.2d 1160, 1166 (Ill. 1992)) establish two requirements that must be found before a judge will be rendered biased, or lack of independence/impartiality is established, namely: (1) a nexus between the activities in question [i.e. corruption] and the judge’s conduct at trial; and (2) bias resulting from the trial judge’s extrajudicial conduct.

¹⁹ The International Criminal Tribunal for Rwanda has held that the burden to establish its lack of impartiality by “adequate and reliable evidence” was on the defendant, and that mere “bald allegations” of bias and selective prosecution were insufficient to meet that burden. *Prosecutor v. Akayesu*, Judgment of the Appeals Chamber, Case No. ICTR-96-4, 1 Jun 2001, para. 90.

simply conjectures that the OIOS Report *may* expose the trial judgment to claims that the Accused—who has not himself raised this issue—*may* make in the future alleging that administrative corruption within this Court rendered the trial unfair, constitutes an abuse of process warranting a permanent stay of the proceedings,²⁰ or somehow gives rise to a claim of ineffective representation.²¹

15. If the Trial Chamber had found, or does find, that there was a nexus between the alleged administrative corruption and the judicial decision making of this Court; or that it infringes the fair trial rights of the Accused, then the Trial Chamber has the power to (1) sanction any interference in the administration of justice (Rule 35), or (2) act to disqualify one or more of its judges for bias (Rule 34).²² This Chamber has not been seized of any application pursuant to these Rules.

16. The Application does not provide any evidence of actual unfairness with respect to any party. There is no suggestion of tainted evidence, unfairness in proceedings or abuse of process. It was open to the Applicant Civil Parties, at any time during the judicial investigation, if they considered that any part of the proceedings was null and void, to seek annulment of tainted proceedings for “procedural defects” (Rule 76). As asserted in NUON Chea’s Investigative Request, and the substantive Corruption Appeals before the Pre-Trial Chamber, the allegations of administrative corruption have been raised over a period of more than two years; it was open to the parties to file an application during that time.²³ Further, a proven violation of a right recognised by the ICCPR may also be a cause for an annulment.²⁴ The Applicants have not argued that there has been any procedural defect that has caused an infringement of the rights of the Applicant Civil Parties;²⁵ nor have they ever applied for any annulment of investigative action pursuant to Rule 76.²⁶

This Court is not the appropriate forum to investigate the corruption allegations

17. The investigation (or establishment of any “investigative mechanism”²⁷) of allegations that certain national administrative officials of this Court pay money to obtain or to retain their positions, while clearly unacceptable in any institution, particularly judicial bodies, falls

²⁰ Application, *supra* note 1, para. 2 (emphasis added).

²¹ *Id.*, para. 7 (emphasis added).

²² Although not styled as an application for disqualification of a judge, the Application does not point to anything on the record to suggest that one or more judges of the Trial Chamber should be disqualified.

under either: (1) the disciplinary jurisdiction of the Government of Cambodia (Rule 6(5)), or (2) the ordinary criminal jurisdiction of the municipal court of Phnom Penh.

18. While the Government of Cambodia and the United Nations are engaged in negotiations to conduct meaningful disciplinary proceedings, Charged Person NUON Chea's foreign counsel have initiated criminal proceedings before the municipal court. Both these activities are ongoing. Further, despite the fact that, currently, these external remedies have not produced the desired result, and even assuming that all external remedies were exhausted,²⁸ the Application still does not point to any legal authority which might support the power of the Trial Chamber to initiate the requested action absent an effect on fair trial rights.²⁹

The OIOS Report may be released to uphold this Court's credibility

19. Despite lack of jurisdiction, there are compelling reasons to address, transparently and forcefully, the issue of administrative corruption which may severely endanger this Court's reputation.
20. To this end, the Co-Prosecutors observe that the credibility of this Court's process would be enhanced by a release of the OIOS Report and a timely and credible resolution of this issue.

²³ The factual history of the corruption allegations is set out extensively in the Investigative Request, *supra* note 7, paras. 4-14. See also NUON Chea Appeal, *supra* note 2, paras. 2-6; IENG Sary Appeal, *supra* note 3, para. 2. The Co-Prosecutors take no position on these factual submissions.

²⁴ The Pre-Trial Chamber has held that a proven violation of a right of a Charged Person, recognised in the ICCPR, would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled. Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, 002/19-09-2007-ECCC/OCIJ (PTC06), D55/I/8, para. 40 [*hereinafter* NUON Chea Annulment Decision].

²⁵ The Pre-Trial Chamber has held that, in relation to a request for annulment pursuant to Rule 76(2), there must be: i) the presence of a procedural defect; and ii) where there is such procedural defect, the defect must cause an infringement on the rights of the party making the application. Further, there is no provision in the Rules stating that a Chamber can declare investigative action null and void on its own initiative; therefore, the Chamber is bound by the application made by the party. NUON Chea Annulment Decision, *supra* note 24, paras. 23, 34, 35. Rule 76(2).

²⁷ Application, *supra* note 1, para. 16: "it has [sic] now appears that no investigative mechanism is likely to be established to investigate [...] this complicated issue".

²⁸ *Id.*, paras 17-19.

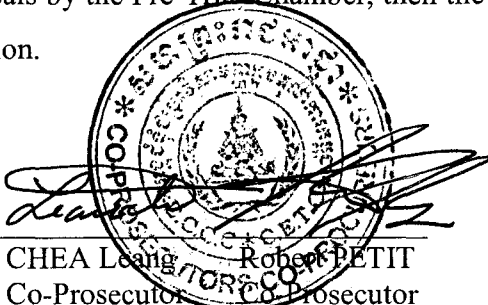
²⁹ See *Prosecutor v Joseph Nzirorera*, Decision on the Request of Accused for Change of Assigned Counsel, Trial Chamber II, 3 October 2001, para. 20. The Trial Chamber acknowledged that the allegation of fee-splitting was a "serious allegation which needs to be investigated by the proper authority" (para. 20); however, it held that the allegation of financial dishonesty by counsel is an administrative matter that falls under the power of the Registry, not a Trial Chamber.

III. REQUEST

21. In conclusion, the Co-Prosecutors make the following submissions for the consideration of the Trial Chamber:

- i. The Trial Chamber should defer its decision on the Application until such time as the Pre-Trial Chamber decides the four substantive Corruption Appeals before it.
- ii. If the Trial Chamber proceeds to decide this Application prior to the determination of the Corruption Appeals by the Pre-Trial Chamber, then the Trial Chamber should dismiss the Application.

Respectfully submitted,



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Co-Prosecutor Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this second day of June 2009.