D158/5/2/1

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

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APPEAL BY KHIEU SAMPHAN'S DEFENCE AGAINST THE CO-INVESTIGATING JUDGES' ORDER ON REQUEST FOR INVESTIGATIVE ACTION DATED APRIL 2009

Filed by:

Lawyers for Khieu Samphan

SA Sovan
Jacques VERGÈS

Assisted by:

SENG Socheata
Charlotte MOREAU

Filed before:

Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

Office of the Co-Prosecutors

CHEA Leang
Robert PETIT

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MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. Introduction

1. "Of course, the Co-Investigating Judges must guarantee that the ongoing judicial investigations are irreproachable".[1] Of course?
2. In declaring that they lacked jurisdiction to shed light on the allegations of corruption which have dogged the ECCC as in institution for more than two years, the Co-Investigating Judges ignored the obvious with astonishing serenity.
3. The only obligation for the Co-Investigating Judges under the Law is to prosecute senior leaders and those most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979. They could have ordered an administrative inquiry into the allegations of corruption, but did not deem it worthwhile since the Royal Government of Cambodia and the United Nations are seised of the issued.
4. It does not seem to matter that the Royal Government of Cambodia and the United Nations are yet to reach an agreement on this issue, that the results of the inquiry remain confidential and that for months now, the donor countries have refused to fund the Court. It is entirely consistent with the "Law" and common sense for the Co-Investigating Judges to declare that corruption, whether established or not, is not a criminal justice issue.
5. Their declaration of lack of jurisdiction is a clear demonstration of a refusal to do justice on the issue of corruption. Not only that, but it seems to justify it. The Pre-Trial Chamber is now seised of the Co-Investigating Judges' Order by means of an appeal. The Pre-Trial Chamber must not only censure the Co-Investigating Judges' for having declared themselves without of jurisdiction, but also, and especially, but it must also take any necessary measures to deal with the *de facto* situation in which the Charged Persons now find themselves, and in particular, to uphold KHIEU Samphan's "right to due process".
6. Granted the Extraordinary Chambers in the Courts of Cambodia are "extraordinary", but they must not be allowed to become a "Chambers of limited jurisdiction"!

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[1] Co-Investigating Judges' Order on Request for Investigative Action, 3 April 2009, Court Document D158/5, para. 12, (the Order)

II. Legal

- Noting the applicable Cambodian law, notably the Constitution, the Code of Criminal Procedure of the Kingdom of Cambodia (CCP) and the Rules of the National Supreme Council of 10 September 1992 on the organisation of the judicial system, the Provisions related to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period ("Transitional Provisions");
- Noting the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea ("Agreement"), the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law") and the Code of Judicial Ethics;
- Noting Articles 2 and 14 of the International Covenant on Civil and Political Rights (ICCPR); Article 38 of the Vienna Convention and Articles 8 and 10 of the Universal Declaration of Human Rights;
- Noting the international law principle which prohibits miscarriage of justice and the implicit powers principle as developed in international law.

III. Preliminary observations

7. The Pre-Trial Chamber is seised of this appeal under Sub-Rules 74(3)(b), 55(10) and 35(6) of the Internal Rules. In this connection, the Defence recalls that "if the Examining Chamber finds grounds for annulling all or part of the proceedings, it may, on its own, annul such proceedings"[2] and "order additional investigative action which it deems useful",[3] as the Pre-Trial Chamber acknowledged that it had both the obligation and the power to do so in its Decision of 3 December 2007.[4] The Pre-Trial Chamber also reaffirmed the obligation "to ensure that proceedings during the investigation are fair",[5] as stated by the Pre-Trial

[2] Article 261 of the CCP.
[3] Article 262 of the CCP.
[4] Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, *Court Document C5/45*, para. 7.
[5] Decision on Khieu Samphan's Appeal Against the Order on Translation Rights Obligations of the Parties, 20 February 2009, *Court Document A190/I/20*, para. 36.

Chamber.

IV. Argument

◆ Corruption and justice

8. When placed juxtaposed, certain words devour each other, in the sense that one signifies the other's exact opposite or even its absence. The words "corruption" and "justice" are a case in point, given that when one speaks of "corrupt justice", one automatically negates the very idea of justice.

9. In the Khmer language, the word for "corruption" *"Ampeu puk roluoy"* [អំពើពុករលួយ], has three components, namely *"ampeu"*, meaning the act of; *"puk"*, ruining, spoiling, and *"roluoy"*, meaning rotten or decomposed. Corruption therefore signifies the act of ruining, spoiling something to such a point that it becomes rotten, decomposed. In the French and English languages, the word "corruption" derives from the Latin *"cum"*, meaning "a united whole", and *"rupere"*, meaning break, break up. The verb "to corrupt" therefore signifies to break up a whole. Finally, in general, the word "corruption" implies "perversion, corruption of the mind".[6]

10. Generally defined as "abuse of public office for private gain",[7] judicial corruption is punishable by three to seven years imprisonment under Cambodian law.[8] Combated internationally by States under the auspices of the United Nations,[9] proscribed by the Code of Judicial Ethics[10] and considered a breach of morality, corruption is especially, above all else, the antithesis of justice and the Rule of Law.

11. To the extent that it runs counter to the social covenant, the only justification for conferring

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[6] Eric Alt & Irène Luc, *La Lutte Contre la Corruption,* Presses Universitaires de France, page 3.
[7] Definition proposed by Transparency International, Summary: International Global Corruption Report 2007, p.1.
[8] Article 38 – Corruption, Rules of the National Supreme Council, 10 September 1992 on the organisation of the judicial system, criminal law and criminal procedure applicable in Cambodia during the transitional period: "Without prejudice to possible disciplinary action, any civil servant, military personnel or official agent of any of the four Cambodian parties to the Paris Agreement, or any political official who, acting in an official capacity or while performing official duties, solicits or attempts to solicit or who receives or attempts to receive property, a service, money, staff, a professional position, a document, an authorization or any benefit in exchange for any one of these same elements is guilty of the crime of extortion and shall be subject to a punishment of three to seven years in prison."
[9] United Nations Convention Against Corruption, signed by Cambodia on 5 September 2007.
[10] Article 3.1 of the Code of Judicial Ethics, adopted at the Plenary of the ECCC: "Judges shall not directly or indirectly accept, offer or provide any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions or the independence of their office."

public authority and authorising its exercise, corruption necessarily adversely affects the finality of the goal of the institution concerned. Given that it ceases to merit the authority conferred to it, such an institution – which supposed to be at the service of everyone – falls prey to the whims of a few, in that its very existence is called into question.

12. It is therefore easy to see why the international Co-Investigating Judge, Marcel LEMONDE, did not beat about the bush when speaking about corruption:

> "The international judges have maintained that they cannot participate in a trial that would not be a fair trial, before an independent and impartial court (...). This is a non-negotiable issue and, if these conditions were not met, the judges would just have no choice but require the UN to withdraw (...) This is not a threat or, worse, bluff - it's just the reality. [11]

13. However, it would be naive to think that corruption discredits the Court only when established. According to the adage, justice must be done and be seen to be done. If there is the slightest doubt in the minds of the public, and in particular in that of the Charged Person, any semblance of equity vanishes and along with it, any prospect of fair proceedings.
14. In this instance, the sheer number of sources pointing to corruption, the elusive responses of the authorities and the systematic dismissal of efforts by the Defence for NUON Chea[12] have made corruption within the ECCC a reality, not to say, a proven fact,.

◆ The Co-Investigating Judges' jurisdiction or *"submission to the Law"*

15. Faced with this situation, the Co-Investigating Judges considered that continuing the judicial investigation and their duty to *prosecute* did not necessarily entail ordering disclosure of documents that could shed light on the allegations of corruption among the ECCC staff.
16. In so doing, the Co-Investigating Judges invoked their submission the Law as the basis of their lack of jurisdiction and as the canon of the Rule of Law. This begs the question as to whether it is possible to conceive of a principle whose application threatens its every existence. In truth, in invoking "the Law" as the basis of their jurisdiction, the Co-Investigating Judges altered the judicial hierarchy. Instead of conforming to the exigencies of the Rule of Law, they reversed its ultimate logic.
17. This would mean that the ECCC no longer derives its jurisdiction to hear and determine

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[11] Cat Barton, "Kickback Claims Stain the KRT", *The Phnom Penh Post*, 23 February 2007.
[12] We refer here to the submissions contained in the Eleventh Request for Investigative Action, filed by the Defence of NUON Chea to which KHIEU Samphan was joined, Eleventh Request for Investigative Action, 27 March 2009, *Court Document D158.*

cases from the independent and impartial judiciary,[13] but rather from the Law which was devised by the parties which established it. Likewise, it is not as guardians of individual liberties and equity that the Co-Investigating Judges are empowered to hear and determine cases, but rather because they are so required by the Law! It is therefore little wonder that "ascertaining the truth about the period from 1975 to 1979" takes precedence over all other considerations and logic, both judicial and ethical!

18. In order safeguard their tribunal status and their judicial function, the international tribunals, notably the *ad hoc* tribunals, have always viewed their jurisdiction as transcending the will of the parties which established them.[14] According to the International Court of Justice (ICJ) "the Court itself (...) must be the guardian of the Court's judicial integrity".[15] As a court, it possesses the inherent power to do so.[16]

19. The ECCC, which is "distinct from other Cambodian courts in a number of respects (...) and operates as an independent entity within the Cambodian court structure", possesses some characteristics of international tribunals.[17] As judges of the ECCC – and in accordance with the implicit powers principle – the Co-Investigating Judges possess not only "the power to establish their main jurisdiction" *["la compétence de leur competence"]*,[18] but also implicit powers to take

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[13] Yet this is not what is prescribed by Article 109 of the Constitution: "The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens. The Judiciary shall cover all lawsuits including administrative ones. The authority of the Judiciary shall be granted to the Supreme Court and to lower courts of all sectors and levels." (Article 109); "(...). Only judges shall have the right to adjudicate. A judge shall fulfill this duty with strict respect for the laws wholeheartedly, and conscientiously." (Article 110) (Emphasis added).

[14] Accordingly, in *"Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction"* in *Prosecutor v. Dusko Tadic,* 2 October 1995, the Appeals Chamber recalled, para. 15: "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (...), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal", para. 18.

[15] *Case of Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgement,* ICJ Records 1963, p. 15, p. 29.

[16] It is from this inherent power that international organisations and international tribunals derive "implicit powers". This became a viable international law theory following the clear position taken by the ICJ in a 1949 Opinion (Nguyen Quoc Dinh, *Droit Public International,* 1999, p.597).

[17] Decision on the Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, *Court Document C5/45*, para. 20: such characteristics include, "the international court is established by treaty, that is was an expression of the international community, that it is considered part of the machinery of international justice and that its jurisdiction involves trying the most serious international crimes."

[18] ICTY Appeals Chamber, *Prosecutor v. Dusko Tadic alias Dule*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 18.

necessary measures so as to assure proper and effective exercise of such jurisdiction.[19] Such implicit powers include the possibility to regulate their own procedure so as to assure the exercise of such jurisdiction as it has, properly and effectively, as a court of law[20] or to issue interim measures.[21]

20. Even though the Co-Investigating Judges did not explicitly mention the implicit powers principle, they did rely on it in determining the issue of translation rights and obligations of the parties, simply because this issue "(...) g[ave] rise to important questions of general interest."[22]

21. In addition to raising questions of general interest, corruption, established or alleged, *undermines the integrity* of the judicial apparatus. It undermines the very credibility of the Court in that it casts doubt on the Court's ability to deliver fair justice, and to be seen as such. Yet this is supposed to be the Court's main jurisdiction.

22. Seen in this light, corruption affects the process of "ascertaining the truth" for which the Co-Investigating Judges were appointed and they must face the heavy burden it entails. This process cannot be dissociated from the Court as a judicial institution, since it is conducted in the name of the Court and within the Court.[23] In sum, and as summarised by the Human Rights Commission, "the strict guarantees of the proper administration of justice (...) are

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[19] "The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded." ICTY Appeals Chamber, *Prosecutor v. Tihomir Blaskic,* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33. See also *Nuclear Tests Case (New Zealand v. France)*, Judgement of the International Court of Justice, 20 December 1974, para. 23: "(...) it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of t". (*Northern Cameroons, Judgement, ICJ Reports 1963*, p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derive from the mere existence of the Court as a judicial organ established by the consent of States, and in conferred upon it in order that its basic judicial functions may be safeguarded".

[20] *Joseph Kanyabashi v. The Prosecutor*, ICTR-96-15-A, Appeals Chamber, Dissenting Opinion of Judge Shahabuddeen, 3 June 1999: "a judicial body, whether civil or criminal" has "the inherent competence ... to regulate its own procedure in the event of silence in the written rules, so as to ensure the exercise of such jurisdiction as it has, and to fulfil itself, properly and effectively, as a court of law". (p. 17)

[21] See, *inter alia*, Paola Gaeta, Inherent Powers of International Courts and Tribunals in L.C. Vohrah *et al* (Eds.) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassesse,* 2003, p. 357. (http://books.google.fr/books?id=AhYtpy2Rn3wC&printsec=frontcover&source=gbs_summary_r&cad=0#PPA353, M1).

[22] Order on Translation Rights and Obligations of the Parties, *Court Document A190*, Introduction.

[23] On this point, see the arguments in the Eleventh Request for Investigative Action and in the Appeal filed by the Defence of NUON Chea on these points.

essential for the effective protection of human rights".[24]

23. For this reason, far being an abuse of power, ordering disclosure of documents that could shed light on the allegations of corruption was an obligation for the Co-Investigating Judges. The Co-Investigating Judges possessed both the competence and the means issue to order such disclosure.[25] In any event, as members of the Court, the Co-Investigating Judges had the obligation to safeguard its authority for the sake of ethics[26] and honour.
24. In hearing and determining cases, judges must choose an interpretation and take full responsibility for their choice. In this sense, simply evoking the Law is nothing but an illusion. Some would even consider it to be "a convenient fiction, (...) consisting in presenting propositions and standards which are influenced in part by the position held by their proponents in the judicial system as emanating from a transcendent authority, which is beyond the interests, preoccupations, concerns, etc., of the individual who formulates them.[27]

◆ **Refusal to exercise the judicial function and to deliver justice**

25. The Co-Investigating Judges' decision to decline exercise of their competence, whereas all the other remedies had either been exhausted or ineffective[28] epitomizes the persistent refusal to do justice, which is affecting the Charged Persons, including KHIEU Samphan.
26. In fact, the Charged Person all agree that "of course, the Co-Investigating Judges must guarantee that the ongoing judicial proceedings are irreproachable in every way, *especially* by ensuring that all confirmed acts that interfere with the administration of justice are 'sanctioned or referred to the appropriate authorities'". (Emphasis added) This begs the question as to why they failed to act.
27. The fact that corruption has not been established or that the States have already seised of the issue the issue does not prevent the Co-Investigating Judges from taking action, since Sub-

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[24] General Comment No. 13 of the Human Rights Commission, 13 April 1984.
[25] According to Rule 55(5)(b) of the Internal Rules, the Co-Investigating Judges may "seek information and assistance from any State , the United Nations or any other nongovernmental organization, or other sources that they deem appropriate."
[26] Pursuant to Article 1.1 of the Code of Judicial Ethics, the Judges of the ECCC shall uphold "the independence of their office and the authority of the Extraordinary Chambers in the Courts of Cambodia and [to] conduct themselves accordingly in carrying out their judicial functions."
[27] P. Bourdieu, *"les juristes, gardiens de l'hypocrisie collective"* dans Normes juridiques et régulation sociale, Lgdj, coll. "Droit et société'", 1991, cité dans CHAMBON (P.), GUERY (C.), *Droit et pratique de l'instruction préparatoire*, Dalloz action 2007-2008, para. 13.73.
[28] On this point, we refer to the Eleventh Request for Investigative Action, which contains details on the Defence's attempts to assert its rights.

Rule 35(2) the Internal Rules explicitly permits them to conduct "further" investigations if they have "reasons to believe" that anyone has interfered with the administration of justice. This Rule does not envisage an exclusive domain of States and/or the United Nations in this respect. On the contrary, this is precisely part of the judicial function.

28. Also, it is inconsistent and even rather dishonest to assert that the Defence limits itself to raising "speculation as to hypothetical negative effects of any of any form of corruption on the proceedings",[29] as justification for denying access to potential evidentiary materials... Moreover, this reasoning consists in accepting some forms of corruption as being implicitly tolerable. Not only is the reasoning false, but it is also inconsistent with statements made by Judge Lemonde, the international Co-Prosecutor,[30] international judges,[31] NGOs and all those who have spoken out on the issue.
29. While it is true that the Defence cannot prove acts of corruption – this certainly not its role – it is also true that no one is in a position to assert that the ECCC is corruption free. Even Mr Sean Visoth declared that he "could not "say [that the ECCC is] "corruption free".[32]
30. Whatever the case, alleged corruption, not to say corruption *per se*,[33] has already caused tremendous damage to the ECCC's reputation, and this in itself has had a negative effect on the proceedings. Since August 2008, the United Nations Development Programme (UNDP) – which manages the funds that States donate to the national side – has frozen disbursement of funds to the national side until such a time as the allegations are fully dealt with.[34]

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[29] Order, para.12.

[30] According to the international Co-Prosecutor, Mr. Robert Petit, the graft allegations within the ECCC "have to be dealt with. This has to go away so it no longer shares the headlines with the more important work of the court. Half the headlines are about the problem they refuse to deal with. It threatens the continuation of the court. It's a very real problem." (Susan Postlewait, Khmer Rouge Trial Threatened", *Asia Sentinel*, 24 April 2009.

31. At the fourth ECCC Plenary, Judge Silvia Cartwright, of the Pre-Trial Chamber, declared the international judges were prepared to do everything in their power to ensure that the allegations are fully dealt with before the opening of the trial, and added that the trials "must not be tainted by corruption". Speaking on behalf of the international judges at the recent plenary, Judge Cartwright emphasised that they would not allow corruption to hinder the mission of the Court to render justice for the people of Cambodia, and described corruption as a "major issue". Further, the international judges encourage "efforts to ensure that the allegations are dealt with fully (...) and that they are resolved in a transparent manner". (Douglas Gillison, "ECCC Judges Meet to Discuss Trial Procedures", *The Cambodia Daily*, 2 September 2008).

[32] Leslie Hook, "Cambodia's Flawed Search for Justice", *Far Eastern Economic Review*, January-February 2008, page 39.

[33] On this point, it bears noting that, on the contrary, the Request for Investigative Actions is quite explicit regarding the effects corruption could have.

[34]According to Mr. Jo Scheuer, the UNDP Resident Representative in Cambodia, the UNDP will not change its position: "As we have discussed with government and our partners, and have repeatedly shared with media, our position in our continued decision not to release funds remains the same since funding was first suspended last July:

31. Lastly, in view of the failure of the Cambodian Government and the UN to exercise due diligence on this issue in a transparent manner,[35] the Co-Investigating Judges ought to have sought guidance from the principles developed within international tribunals with respect to subsidiarity, and envisaged an independent administrative investigation.
32. In conclusion, and considering that it is absolutely impossible to deliver justice "in this corrupt atmosphere",[36] the Co-Lawyers consider that the Co-Investigating Judges had both the jurisdiction and the obligation to act. This goes to the heart of KHIEU Samphan's right to a fair trial, a right that is non-negotiable!

FOR THE REASONS STATED HEREIN

33. The Co-Lawyers for the Defence invite the Pre-Trial Chamber to OVERTURN the Co-Investigating Judges' Order and to be governed by the dictates of JUSTICE in giving effect to the request formulated in paragraph 22 of the Eleventh Request for Investigative Action, and thus safeguard the right of Khieu Samphan to a fair trial.
34. The Co-Lawyers also request an urgent PUBLIC HEARING on the arguments of each of the parties to this appeal.

As fund manager, UNDP is accountable for those funds and has an obligation to ensure they are used for their intended purpose. We maintain that we need to see allegations resolved and mechanisms put in place to safeguard the funds before we can resume disbursal of funds." Message sent to the Defence Section on 29 April 2009. It bears noting that Japan's recent decision to donate the sum of $4,170,814, at the eleventh hour, for the Cambodian side of the Court budget, at the request of the Cambodian Government was made without consultation with UNDP.

[35] According to *The Phnom Penh Post* issue of 9 April 2009: after three days of talks, the UN and [the] Cambodian government failed to reach an agreement on anti-corruption mechanisms at the hybrid court. Yet this was billed as a last-ditch attempt. According to Taksoe-Jensen, the United Nations representative, the UN did not wish to continue negotiations on this issue. Vice-Minister SOK An declined comment. According to Open Society Justice Initiative: "The continued reluctance from the government to set up reliable mechanisms to prevent or to deal with future corruption is a violation of the [ECCC] agreement that said the court had to be credible and meet international standards". (V. Sokheng, "No Agreement on ECCC graft talks", *Phnom Penh Post*, 9 April 2009).

[36] "The Court on Trial", *The Economist*, 2 April 2009.

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SA Sovan

[*Signed*]

For the Co-Lawyers for the Defence