

D158/5/4/12

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

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**REPLY TO OCP RESPONSE TO THE DEFENCE APPEAL OF IENG THIRITH ON
ALLEGATIONS OF ADMINISTRATIVE CORRUPTION**

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I INTRODUCTION

1. On 16 June 2009, the Pre-Trial Chamber (“PTC”) issued directions to the Co-Lawyers of the Charged Person concerning the issue of admissibility (“Directions”),¹ directing the Co-Lawyers for Madame Ieng Thirith to make submissions limited to the issue of the admissibility of the Ieng Thirith Appeal.² This document is filed pursuant to these Directions.

II BACKGROUND

2. On 30 March 2009 the defence for Madame Ieng Thirith filed a Request for Investigative Action to be undertaken by the Co-Investigating Judges.³ The Request was refused by a decision of 3 April 2009.⁴
3. On 4 May 2009, the defence for Charged Person, Madame Ieng Thirith, filed an appeal against the Order on Request for Investigative Action (“Ieng Thirith Appeal”)⁵ by the Co-Investigating Judges (“OCIJ”), which refused the Request and also that of the other three Charged Persons.⁶
4. On 29 May 2009, the Office of the Co-Prosecutors filed a joint response to the appeals from the four defence teams (“OCP Response”).⁷



¹ PTC, Directions to the Co-Lawyers of the Charged Person Concerning Co-Prosecutors’ ‘Joint Response to Defence Appeals against the Co-Investigating Judges’ Order Denying Request for Investigative Action Regarding Allegations of Administrative Corruption’, 16 June 2009, Document No. D158/5/4/11.

² Directions, para. 3.

³ Motion in Support of Nuon Chea Eleventh Request for Investigative Action for Disclosure of OIOS Report and Related Documents, 30 March 2009, Document No. D158/3.

⁴ Order on Request for Investigative Action, 3 April 2009, Document No. D158/5.

⁵ Ieng Thirith, Ieng Thirith Defence Appeal against the Office of the Co-Investigating Judges’ ‘Order on Request for Investigative Action’ of 3 April 2009, 4 May 2009, Document No. D158/5/4/1.

⁶ Nuon Chea Appeal against Order on Eleventh Request for Investigative Action, 4 May 2009, Document No. D158/5/1/1; Appeal by Khieu Samphan’s Defence against the Co-Investigating Judges’ Order on Request for Investigative Action Dated April 2009, 4 May 2009, Document No. D158/5/2/1; 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, Document No. D158/5/3; Order on Request for Investigative Action, 3 April 2009, Document No. D158/5.

⁷ Co-Prosecutors’ Joint Response to Defence Appeals against the Co-Investigating Judges’ Order Denying Request for Investigative Action Regarding Allegations of Administrative Corruption, 29 May 2009, Document No. D158/5/4/10.

III SUBMISSIONS ON ADMISSIBILITY

5. The PTC Directions invite Co-Lawyers for Madame Ieng to respond to the OCP Response “limited to the matter of the admissibility of the Appeal”.
6. The defence understands that the issue the PTC has identified to be addressed is whether the defence for Ieng Thirith is entitled to advance arguments before the PTC in respect of its Appeal against the afore-mentioned decision of the Co-Investigating Judges, or whether by adopting arguments advanced in writing by the defence of Nuon Chea the defence has forfeited its right to be present at the Appeal and to separately advance arguments in support of the Appeal.
7. The defence has lodged a separate Appeal document and so has not jointly with any other Charged Person appealed the decision of the Co-Investigating Judges. The defence thus retains its own right to appeal the decision. On this point there is no issue between the OCP and the defence as to the admissibility of the Appeal. Section 3.2 of the OCP Response, headed “Admissibility of appeals not denied”, unambiguously sets out their position namely that the OCP does not deny the admissibility of the appeals.
8. Whilst matters of admissibility are ultimately for the court to determine. Where both the defence and the OCP are in agreement we submit this provides a compelling reason to regard the Appeal as admissible.

IV SUBMISSIONS ON ORAL HEARING

9. The defence submits that pursuant to Rule 77 of the Internal Rules the defence is entitled to be present at an oral hearing of the appeal, given that it is a party to these appeal proceedings. The OCP does not take issue with the right of Ieng Thirith to be present at the Appeal hearing.⁸ They question the right of the co-lawyers to address the PTC and to actively by oral argument to safeguards her interests.



⁸ OCP Response, para. 16.

10. The OCP wrongly characterises the presence of the co-lawyers for Ieng Thirith as being “completely superfluous since her Appeal merely adopts the arguments set out in Nuon Chea’s Appeal”.⁹
11. An oral hearing, especially one *in lieu* of a substantive reply, is the only opportunity for the defence to respond to issues raised in the OCP Response, which the defence has not dealt with in its initial document. It would be unfair and prejudicial to the Charged Person to exclude her Co-Lawyers from responding to the arguments raised in the OCP Response, especially where it concerns aspects which were raised in the OCP Response, and not dealt with in the Ieng Thirith Appeal.
12. The oral hearing is not intended to provide an opportunity for the co-lawyers merely to read the written submissions, otherwise there would never be any justification for an oral hearing. The importance of the oral hearing is that it allows for arguments to be advanced and developed before the judges of the PTC. This includes the opportunity to respond to points raised by any other party to the proceedings, namely by the co-lawyers for the other Charged Persons, the co-prosecutors and the judges of the PTC. Inevitably new points arise as a result of the arguments that are advanced and the manner in which matters are interpreted.
13. It is self-evident that by adopting the central points, made on behalf of Nuon Chea in his Appeal document the defence of Ieng Thirith does not in any way concede that his co-lawyers can or should be able to adequately advance the arguments on Appeal on behalf of Ieng Thirith.
14. The defence for Ieng Thirith anticipates it will raise different issues and deal with the same issues differently at the oral hearing from those to be presented by the Co-Lawyers for Nuon Chea, given the different nature of the cases against the respective accused. The fact that the arguments in the initial Appeal were comparable does not mean that the arguments to be raised at a hearing will be similarly identical.
15. It is submitted that it would be unfair and a denial of natural justice for Madame Ieng Thirith to be denied the opportunity to participate in this stage of the Appeal process.

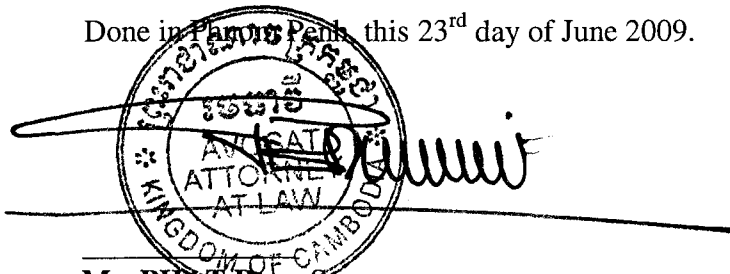
⁹ OCP Response, para. 17.

The defence submits that it would be to the prejudice of Ieng Thirith were her co-lawyers denied the opportunity to advance arguments orally. By the adoption of written submissions it does not logically follow that the co-lawyers do not have significant points to canvass on behalf of the Charged Person at the hearing of the Appeal.

V CONCLUSION

16. For the reasons set out above, the defence for Madame Ieng respectfully submits that:
- (i) the Appeal is admissible;
 - (ii) there should be an oral hearing of the Appeal;
 - (iii) the Charged Person, Madame Ieng Thirith should be present at the oral hearing of the Appeal.
17. The co-lawyers for Madame Ieng Thirith should be permitted to be present at the hearing of the Appeal and be permitted to participate at all stages in the Appeal proceedings.
18. The interests of Madame Ieng Thirith do not coincide with those of Nuon Chea and she cannot be adequately, properly and fairly represented by his co-lawyers.
19. To deny the co-lawyers the ability to actively participate in the Appeal would constitute unfairness in all the circumstances.

Done in ~~Phnom Penh~~ this 23rd day of June 2009.



~~Mr. PHAT POUY Seang~~
Ms. Diana ELLIS, QC
Co-Lawyers for Madame Ieng