

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

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**REPLY TO CO-PROSECUTOR'S JOINT RESPONSE
TO IENG THIRITH, IENG SARY, AND NUON CHEA'S
APPLICATIONS FOR DISQUALIFICATION OF THE JUDGES**

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I. INTRODUCTION

1. Pursuant to Rule 34 of the ECCC Internal Rules (the ‘Rules’) and Article 8.4 of the ‘Practice Direction on Filing of Documents Before the ECCC’ (the ‘Practice Direction’),¹ counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this reply to the ‘Co-Prosecutors’ Joint Response to Ieng Thirith, Ieng Sary, and Nuon Chea’s Applications for Disqualification of the Judges’ (the ‘Response’),² which was notified to the parties on 24 February 2011.³

II. SUBMISSIONS IN REPLY

A. The Test for Impartiality at the ECCC is a Broad One

2. Rule 34—which is nowhere mentioned by the Office of the Co-Prosecutors (the ‘OCP’) in the section of its Response entitled ‘The Impartiality Test’—is not nearly as circumscribed as the OCP would have it.⁴ Notwithstanding the various standards advanced in the Response,⁵ it follows from the plain language of Rule 34 that ‘the *conditio sine qua non* to establish a lack of impartiality’⁶ at this tribunal is simply ‘*any association which objectively might affect [a judge’s] impartiality, or objectively give rise to the appearance of bias*’.⁷ And, contrary to the OCP’s suggestion, this standard is capable of encompassing objective shortcomings in either a court’s ‘process’ *or* its ‘outcome’⁸—concepts not mutually exclusive, as the latter can be objectively indicative of flaws in the former. What is crucial in the instant case is that, in the *process* of delivering its judgment against Duch (the ‘Duch Judgment’),⁹ the Trial Chamber arrived

¹ Practice Direction ECCC/01/2007/Rev5. According to Article 8.4: ‘A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the response to which the participant is replying.’

² Document No E-55, ‘Co-Prosecutor’s Joint Response to Ieng Thirith, Ieng Sary and Nuon Chea’s Applications for Disqualification of the Judges’, 23 February 2011, ERN 00647348–00647355 (the ‘Response’).

³ *N.B.* In accordance with Article 8.4 of the Practice Direction, this document has been timely filed.

⁴ See Response, para 3 (discussing the impartiality tests of several *other* jurisdictions).

⁵ *Ibid.*

⁶ Response, para 3.

⁷ Rule 34(2) (emphasis added).

⁸ See Response, para 3 (‘The Co-Prosecutors submit that judicial impartiality pertains to process and not outcome.’)

⁹ Document No E-188, ‘Judgment’, 26 July 2010, ERN 00572517–00572797 (the ‘Duch Judgment’)

at several *outcomes* which, taken together, would lead a properly informed reasonable observer¹⁰ to apprehend bias based on the judges ‘association’ with the Duch Judgment.

3. Referring to certain jurisprudence of the European Court of Human Rights (the ‘ECtHR’) and the *ad hoc* international criminal tribunals,¹¹ the OCP suggests that a lack of impartiality may only be reasonably discerned where those matters previously decided ‘speak to the whole crime’¹² and ‘meet the standard of proof required to convict the Accused’.¹³ While the Defence acknowledges that such criteria are clearly illustrative of judicial bias, they in no way amount to an exhaustive catalog of impermissible predetermination on the part of a court. Far closer to a standard in keeping with the broad text of Rule 34 is the test from *Karadzic* cited in the Response: ‘In order for a prior judgment or decision to be capable of creating an appearance of bias in the manner argued by the Defence, it is necessary that it “[...] directly or *by inference* constitutes findings on the individual criminal responsibility [...]” of the Accused.’¹⁴ By its terms, this less stringent formulation contemplates disqualification based on both *indirect* and *inchoate* determinations that do not necessarily rise to any particular level of evidentiary sufficiency. In other words, it would seem to capture precisely the scenario raised by the Application.
4. Occasions ‘on which an appearance of bias has been found on the basis of a prior judicial decision, particularly in the field of international criminal law’,¹⁵ may indeed be rare; and ‘a degree of overlap between cases’¹⁶ is undoubtedly unavoidable at the *ad hoc* tribunals, as well as (although perhaps less so) in domestic jurisdictions. Yet the Defence is neither overly concerned with the particular track record of other courts nor very much bothered by the existence of *mere* factual overlap. Of far greater significance is the fact that—in this case, at this tribunal—the Trial Chamber objectively appears to have prematurely drawn legal conclusions adverse to the Accused. While judges may at times ‘be required to determine issues in different cases

¹⁰ See Document No E-54, ‘Urgent Application for Disqualification of the Trial Chamber Judges’, 24 February 2011, ERN 00641862–00641877 (the ‘Application’), para 15.

¹¹ See Response, para 6 (citing *Poppe, Karadzic, Ntawukulilyayo, and Hauschildt*).

¹² Response, para 6.

¹³ Response, para 6; see also *ibid*, para 10 (‘As such, these statements were not subject to the criminal standard of proof of “beyond reasonable doubt”, as is reflected in the language of the passages in question’.)

¹⁴ Response, para 6 (citing IT-95-05/18-PT, *Prosecutor v Karadzic*, ‘Decision by Chamber Convened by Order of the Vice President’, 22 July 2009, para 22) (emphasis added).

¹⁵ Response, para 11.

¹⁶ Response, para 11.

grounded in the same or similar set of facts’,¹⁷ they must always refrain from prejudging the guilt (in whole *or in part*) of those individuals not yet before them.

B. The Defence Has Satisfied the Rule 34 Test

5. In addition to being ‘exposed to evidence relating to [...] events in both cases’,¹⁸ the Trial Chamber judges have gone a step further and drawn adverse conclusions thereon. Accordingly, contrary to the OCP’s position, key questions regarding Nuon Chea’s alleged culpability no longer ‘remain open in the second case’.¹⁹ Indeed, such questions have been ‘prejudged by the first judgment’.²⁰ Although not entirely ‘determinative of [Nuon Chea’s putative] guilt’,²¹ these previous findings are irrevocable²² (albeit appealable) and suggest to the properly informed reasonable observer a Trial Chamber lacking sufficient impartiality.
6. The OCP submits that certain ‘passages referred to by the Defence are not judicial determinations as to the truth of matters in respect of Nuon Chea or his role’²³ but, instead, are simply restatements of Duch’s own testimony. However, other portions of the Duch Judgment clearly amount to ‘unqualified statements’²⁴ by the Trial Chamber as to the Accused’s position and role.²⁵ The latter infect the former and, taken as a whole, would appear to a reasonable observer as endorsements of the positions advanced by Duch at his trial, rather than ‘careful references [...] for the sole reason of providing a historical background’.²⁶
7. Although there are no *mens rea* findings with respect to Nuon Chea in the Duch Judgment, this is not dispositive of the impartiality issue. Key *actus reus* elements—the building blocks of the Accused’s alleged ‘individual criminal responsibility’²⁷ in Case 002—have

¹⁷ Response, para 4.

¹⁸ Response, para 4 (citing IT-95-14/2-PT, *Prosecutor v Kordic and Cerkez*, ‘Decision on the Defence Application Requesting Disqualification of Judges Jorda and Riad’, 4 May 1998, p 2).

¹⁹ Response, para 5.

²⁰ *Ibid.*

²¹ *Ibid.*

²² See Response, n 24 (noting that such findings would be binding pursuant to the principle of *res judicata*.) *N.B.* In this regard, it is worth emphasizing that the Duch Judgment—including the references to Nuon Chea contained therein—is a public document.

²³ Response, para 8.

²⁴ *Ibid.*

²⁵ See Duch Judgment, paras 85, 95.

²⁶ Response, para 8 (citing *Karadzic*, para 22).

²⁷ Response, para 9.

already been taken for granted by the Trial Chamber. Nuon Chea's *culpa* may not be wholly addressed in the Duch Judgment,²⁸ but it is undoubtedly impacted by the adverse findings contained therein.²⁹ Ancillary to the primary findings on Duch's own guilt as they may be,³⁰ the references to Nuon Chea, taken together and in conjunction with the Trial Chamber's other adverse findings,³¹ satisfy Rule 34's broad standard.

8. In short, the instant case presents exceptional circumstance in the manner of those confronted by the ECtHR in *Ferrantelli and Santangelo*³² and *Rojas-Morales*.³³ More than 'passing' references,³⁴ the previous adverse findings of the Trial Chamber judges indicate that—from an objective point of view—they will be unable to 'put out of their mind[s]'³⁵ their previously established views on significant elements of the Accused's alleged culpability. Despite the OCP's optimism in this regard,³⁶ providing the Trial Chamber judges with the 'opportunity to undertake a "fresh consideration" of the matters in issue'³⁷ would entail a significant and unjustifiable risk to Nuon Chea's right to a fair trial.

C. The Organizational Structure of the ECCC Cannot Be Taken Into Account When Deciding on the Application

9. Given the OCP's particular reliance on the jurisprudence of the *ad hoc* international criminal tribunals, which are composed of multiple trial chambers, a point raised in the Application bears further emphasis herein: In making its determination, the Disqualification Bench should not be unduly influenced by any practical consequences which may flow from an adverse decision—in particular, the fact that the ECCC is organized and financed in such a fashion that only one trial chamber exists. The unavailability of additional judges (or, more generally, the lack of judicial resources) is in no way an acceptable justification for the violation of Nuon Chea's absolute right to

²⁸ See Response, para 9 ('*Culpa* is addressed only in relation to Duch, and not in relation to the Accused.')

²⁹ See Application, paras 30–33.

³⁰ See Response, para 10 ('[A]ll references to the role of the Accused in the *Duch* case are merely ancillary, or obiter, to the key finding: that of the culpability of Duch for the crimes with which he was charged.'). *N.B.* The Defence has never suggested that the Duch Judgment 'has established the guilt' of Nuon Chea *in toto* or, in any respect, to the requisite standard. Yet, as noted above, this is not strictly required by Rule 34.

³¹ See Application, paras 3–10.

³² See Application, para 16.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Response, para 12.

³⁶ See Response, para 12.

³⁷ Response, para 12.

be tried by impartial judges. As the ECtHR, has held: ‘Contracting States are under the obligation to organize their legal systems so as to ensure compliance with the requirements of Article 6(1) [of the ECHR], impartiality being unquestionably one of the foremost of those requirements’.³⁸ Echoing this finding, the Defence submits that the current organizational and/or financial structure of the ECCC cannot be taken into consideration when deciding on the Application.

III. CONCLUSION

10. For the reasons stated herein, as well as those set out in the Application, the Defence submits that the applicable ‘threshold for establishing an appearance of bias’³⁹ has indeed been met and the Application should accordingly be granted.

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³⁸ ECtHR 32271/04, *Poppe v The Netherlands*, ‘Judgment’, 24 March 2009, para 23.

³⁹ Response, para 2.