ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

លេខ /No: D314/1/12

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 50)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **9 September 2010**

PUBLIC REDACTED

SECOND DECISION ON NUON CHEA'S AND IENG SARY'S APPEAL AGAINST OCIJ ORDER ON REQUESTS TO SUMMONS WITNESSES

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Charged Person
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "Ieng Sary's Submissions to the Co-Investigating Judges' Order Reconsidering the Pre-Trial Chamber's Decision on Ieng Sary and Nuon Chea's Appeal Against OCIJ Order on Requests to Summon Witnesses" ("Ieng Sary's Further Submissions")[1] filed on 21 June 2010 and the "Further Written Submissions in the Appeal Against the OCIJ Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses" ("Nuon Chea's Further Submissions")[2] filed on 22 June 2010.

I. PROCEDURAL BACKGROUND

1. On 28 November 2008, the Co-Lawyers for Nuon Chea filed their "Seventh Request for Investigative Action"[3] ("Seventh Request"). This request sought that the Office of Co-Investigating Judges ("OCIJ") interview [redacted]

2. On 24 February 2009, the Co-Lawyers for Nuon Chea filed their "Tenth Request for Investigative Action"[5] ("Tenth Request") requesting that the OCIJ interview [redacted] they are "likely in possession of documents and information relevant to the pending judicial investigation ... some of which may be exculpatory".[6]

[1] Ieng Sary's Submissions to the Co-Investigating Judges' Order Reconsidering the Pre-Trial Chamber's Decision on Ieng Sary and Nuon Chea's Appeal Against OCIJ Order on Requests to Summon Witnesses, 21 June 2010, D314/1/10 ("Ieng Sary's Further Submissions").
[2] Further Written Submissions in the Appeal Against the OCIJ Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses, 22 June 2010, D314/2/9 ("Nuon Chea's Further Submissions").
[3] Seventh Request for Investigative Action, 28 November 2008, D122 ("Seventh Request").
[4] Ibid, para. 6.
[5] Tenth Request for Investigative Action, 24 February 2009, D136 ("Tenth Request").
[6] Ibid, para. 20.

They also requested that the OCIJ obtain "any and all documents and information (including any potentially exculpatory material) in the possession of [redacted] with respect to issues enumerated.[7] Finally, the Co-Lawyers requested that the OCIJ "[i]dentify all former DK officials currently serving under the Royal Government of Cambodia, and place their names and previous positions on the case file for future reference".[8]

3. In response to the Seventh and Tenth requests for investigative action the International Co-Investigating Judge ("ICIJ") found that "it is conducive to ascertaining the truth to interview" [redacted].[9] The ICIJ acted alone in requesting that [redacted] participate in an interview (via letters dated 15 and 21 July 2009) and when issuing summonses to the remaining individuals.[10] [redacted].

4. On 30 November 2009, the Co-Lawyers for Nuon Chea filed their "Request for Investigative Action", which has been referred to as the Rule 35 Request ("Rule 35 Request").[11] The Co-Lawyers state that the application was filed in response to "(i) public allegations of political interference in the work of the ECCC; (ii) the events surrounding the OCIJ's execution of [redacted]; (iii) Hun Sen's public remarks regarding potential ECCC witnesses; (iv) the RGC's publicly stated position with respect to the six summoned officials…".[12]

5. On 16 December 2009, the Co-Lawyers for Ieng Sary issued a letter requesting the "re-issuance of summonses to, and taking of statements from [redacted]

[7] Tenth Request, para. 21(c).
[8] Ibid, para. 21(d).
[9] Note by the Co-Investigating Judge, 11 January 2010, D301, p. 1 ("CIJ Note").
[10] *See* 'Witnesses Summons' [redacted]
[11] Request for Investigative Action, 30 November 2009, D254 ("Rule 35 Request").
[12] Nuon Chea Appeal, para. 6.

[redacted].[13] A request was also made for the "issuance of a summons to, and taking of a statement from [redacted].[14]

6. On 17 December 2009, the Co-Lawyers for Ieng Sary filed "Ieng Sary's Eleventh Request for Investigative Action"[15] ("Eleventh Request"). It was requested that the OCIJ, *inter alia*, "summon and question [redacted], and any other former members of the Khmer Rouge regime and current members of the Royal Government of Cambodia who are serving in the executive, legislature or judiciary...".[16] The corresponding Order by the CIJ referred to this element of the Request.

7. On 11 January 2010, the ICIJ, unilaterally issued a note detailing the action he had taken in response to the Seventh and Tenth Requests for investigative action filed by Nuon Chea's Co-Lawyers and the letter from Ieng Sary's defence team. [redacted].[18]

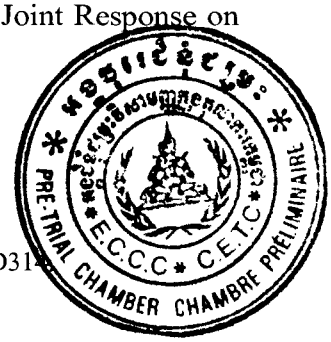
8. In relation to [redacted] the ICIJ notes that summonses were sent to each of these individuals on 25 September 2009.[19] These summonses "were brought to the attention of the witnesses, as noted in the reports of service of summons prepared by the Greffier".[20] Following the failure to receive any response from the summoned individuals he noted that it is

[13] Letter from IENG Sary Defence Team, 16 December 2009, D283 ("Summonses Letter").
[14] Summonses Letter.
[15] Eleventh Request for Investigative Action, 17 December 2009, D284 ("Eleventh Request").
[16] Eleventh Request, p. 10.
[17] CIJ Note, p. 3.
[18] Ibid.
[19] Ibid.
[20] Ibid.

"therefore clearly established that the persons concerned have refused to attend for testimony".[21] He dismissed compelling the witnesses stating that "coercive measures is fraught with significant practical difficulties, and, in the best-case scenario, would unduly delay the conclusion of the judicial investigation, contrary to the need for expeditiousness".[22] He decided that it would be preferable to "defer to the Trial Chamber – should an indictment be issued – for it to decide whether employing such coercive measures is warranted".[23]

9. In response to the above mentioned requests for investigative action the OCIJ issued its "Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses" ("Impugned Order") dated 13 January 2010.[24] The Impugned Order informed the parties [redacted].[25] The National CIJ ("NCIJ") declared that these requests must be dismissed, while the ICIJ confirmed that "while they were accepted in terms of principal, have not been granted for the reasons explained in the separate note …".[26] The other requests were dismissed.

10. On 19 February 2010, the Co-Lawyers for Nuon Chea filed "Request for Extension of Time to File Appeal Against Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses".[27] On 22 February 2010, the Co-Lawyers for Ieng Sary filed "Defence's Notice of Languages for Filing and Receiving Documents and Application for Extension of Time to File Ieng Sary's Application Against the OCIJ's Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses".[28] The Co-Prosecutors filed a Joint Response on



[21] Ibid.
[22] CIJ Note, p. 3.
[23] Ibid.
[24] Order on Nuon Chea & Ieng Sary's Requests to Summon Witnesses, 13 January 2010, D31[illegible]
[25] Ibid, p. 7.
[26] Ibid.
[27] Request for Extension of Time to File Appeal Against Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses, 19 February 2010, D314/2/1.
[28] Defence's Notice of Languages for Filing and Receiving Documents and Application for Extension of Time to File Ieng Sary's Application Against the OCIJ's Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses, 22 February 2010, D314/1/1.

24 February 2010, taking no position on the Requests.[29] The Pre-Trial Chamber granted Nuon Chea an extension until 18 March 2010 and Ieng Sary an extension until 17 March 2010.[30]

11. On 15 March 2010, the Co-Lawyers for Ieng Sary filed "Ieng Sary's Appeal Against the OCIJ's Order On Nuon Chea & Ieng Sary's Request to Summon Witnesses Referred to in his Letter Dated 16 December 2009 and in Paragraph 21(D) of his 11th Investigative Request" ("Ieng Sary Appeal").[31] The Appeal requests that the Pre-Trial Chamber (i) reverse the OCIJ's rejection of the Eleventh Request, insofar as it concerns the summonsing and questioning of [redacted] and other former members of the Khmer Rouge regime and current members of the Royal Government of Cambodia who are serving in the executive, legislature or judiciary; and (ii) reverse the OCIJ's rejection of the letter requesting the re-issuance of summonses to, and the taking of statements from [redacted].[33]

12. On 16 March 2010, the Co-Lawyers for Nuon Chea filed their "Appeal Against OCIJ Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses" ("Nuon Chea Appeal").[34] The Appeal requests that (i) the Impugned Order be vacated; and (ii) the

[29] Co-Prosecutors' Joint Response to Ieng Sary's and Nuon Chea's Applications for Extension of Time to File their Appeals Against the Order on Refusal to Summon Witnesses, 24 February 2010, D314/1/2.
[30] Decision on the Defence Request for Extension of Time to File an Appeal Against Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses, 2 March 2010, D314/2/3 and Decision on the Defence Application for Extension of Time to File Ieng Sary's Appeal Against the OCIJ's Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses, 2 March 2010, D314/1/3.
[31] Ieng Sary's Appeal Against the OCIJ's Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses Referred to in his Letter dated 16 December 2009 and in Paragraph 21(D) of his 11th Investigative Request, 15 March 2010, D314/1/4 ("Ieng Sary Appeal").
[32] The Co-Lawyers for both Charged Persons, as well as the International Co-Prosecutor, has made reference to the International Co-Investigating Judge's summonsing [redacted].
[33] Ibid, p. 29.
[34] Appeal Against OCIJ Order on Nuon Chea & Ieng Sary's request to Summon Witnesses, 16 March 2010, D314/2/4 ("Nuon Chea Appeal").

OCIJ be instructed to carry out the investigative action proposed in the Seventh and Tenth Requests, as well as the Rule 35 Request.[35]

13. On 29 March 2010, the International Co-Prosecutor responded to the appeals and requested that the Pre-Trial Chamber "partly allow the Appeals and remand the matter back to the Co-Investigating Judges to apply the measure envisaged in Internal Rule 60(3) to ensure the appearance, as witnesses only, of [redacted] for testimony in Case No. 002".[36] On 13 April 2010, the Co-Lawyers for Ieng Sary filed a reply to the International Co-Prosecutor response, reiterating the requests contained in their Appeal.[37]

14. On 8 June 2010, the Pre-Trial Chamber issued its "Confidential Decision on Nuon Chea and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses" ("Decision")[38]. In reaching its determination the Chamber (i) found the appeals admissible; (ii) directed the Co-Investigating Judges to reconsider the Requests in light of the correct interpretation of Internal Rule 35; (iii) confirmed the decision by the International Co-Investigating Judge that implementing coercive measures against the six summoned officials would unduly delay the conclusion of the judicial investigation and substituted the reasons given by the International Co-Investigating Judge for those contained in the Decision; and (iv) retained the matter while providing the CIJs with five working days to reconsider the Request, and the Appellant with two working days to lodge a notice of appeal and three days to file written submissions.

15. On 11 June 2010, the CIJs filed their "Order in Response to the Appeals Chamber's Decision on Nuon Chea and Ieng Sary's Requests to Summon Witnesses" ("Impugned Reconsideration").[39] In the Impugned Reconsideration the CIJs ostensibly "reconsidered

[35] Nuon Chea Appeal, para. 51.
[36] International Co-Prosecutor's Observations on Ieng Sary and Nuon Chea's Appeals on the Summoning of Additional Witnesses, 29 March 2010, D314/1/5 ("International Co-Prosecutor's Observations").
[37] Ieng Sary's Reply to the International Co-Prosecutors Observations on Ieng Sary and Nuon Chea's Appeals on the Summoning of Additional Witnesses, 13 April 2010, D314/1/7.
[38] Confidential Decision on Nuon Chea and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8 and D314/2/7 ("Decision").
[39] Order in Response to the Appeals Chamber's Decision on Nuon Chea and Ieng Sary's Requests to Summon Witnesses, 11 June 2010, D314/3 ("Impugned Reconsideration").

the Request in light of the Pre-Trial Chamber's interpretation of Rule 35(1)(d) of the Internal Rules" and affirmed their original decision and rejected the application.[40]

16. On 21 June 2010, the Co-Lawyers for Nuon Chea filed their Further Submissions in response to the Impugned Reconsideration. The Co-Lawyers request that the Pre-Trial Chamber (i) investigate whether comments made by Kong Sam Ol, Khieu Kanharith, and others in the Royal Government of Cambodia may have impacted on the ability or willingness of these witnesses summoned by the International CIJ to participate in interviews; (ii) sanction or take appropriate action against any individual found to have interfered with the administration of justice; and (iii) re-issue summonses and interview the requested witnesses.[41]

17. On 22 June 2010, the Co-Lawyers for Nuon Chea filed their Further Submissions in response to the Impugned Reconsideration. The Co-Lawyers for Nuon Chea request that the Pre-Trial Chamber (i) vacate the Order; and (ii) instruct the OCIJ to fully carry out the investigative actions proposed in the Rule 35 Request.[42] A request for a public hearing was also made.

II. ADMISSIBILITY OF THE APPEALS

18. The Pre-Trial Chamber has jurisdiction to hear this matter pursuant to Internal Rule 73(c) that provides:

> In addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges, as set out in the Agreement and the ECCC Law, the Chamber shall have sole jurisdiction over:
> [...]
> c) the appeals provided for in Rules 11(5) and (6); 35(6), 38(3) and 77 bis of these IRs.

19. Internal Rule 35(6) provides:

> Any decision under this Rule shall be subject to appeal before the Pre-Trial Chamber or the Supreme Court Chamber as appropriate. A notice of appeal to the Pre-Trial

[40] Impugned Reconsideration, para. 4.
[41] Ieng Sary's Further Submissions, p. 5.
[42] Nuon Chea's Further Submissions, p. 7.

> Chamber shall be filed within 15 (fifteen) days of the date of decision or of its notification, as appropriate. An appeal to the Supreme Court Chamber shall be filed in compliance with Rules 105(2) and 107(1).

20. In addition, the Pre-Trial Chamber may hear and make determinations on allegations of interference with the administration of justice *proprio motu* pursuant to Internal Rule 35(2):

> When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may…

21. The Pre-Trial Chamber remitted this application to the CIJs for reconsideration on 8 June 2010. This Chamber provided the CIJ with five working days to reconsider the Request, and the parties with two working days to lodge a notice of appeal and three to file written submissions.[43]

22. The Impugned Reconsideration was notified to the parties in French and Khmer on 11 June 2010 and in English on 15 June 2010. The Co-Lawyers for Ieng Sary notified their notice of intention to appeal on 17 June 2010 and their further submissions on 22 June 2010. The Co-Lawyers for Nuon Chea notified their notice of intention to appeal on 21 June 2010 and their further submissions on 23 June 2010.

23. All documentation was filed and notified within the time limits set by the Pre-Trial Chamber. For these reasons the Pre-Trial Chamber finds the Appeals admissible.

III. MERIT OF THE APPEALS

A. BACKGROUND

24. In the Decision, the Pre-Trial Chamber found that the CIJs had incorrectly interpreted Internal Rule 35 which had led to an error of law. This Chamber noted that "[i]n the Impugned Order, the CIJs appear to have interpreted Rule 35 as having application when the integrity of their decisions or actions has been compromised as a result of interference. In their view, it is only once evidence can be deduced that the CIJs have

[43] Decision, p. 29.

failed to exercise their power or perform a particular function as a consequence of interference that Rule 35 will be engaged."[44] As a result of this error the Pre-Trial Chamber directed the CIJs to "reconsider whether or not an investigation should be conducted, in light of the correct interpretation of [Rule 35], into comments made by those named in the Request and others in the RGC that may have impacted upon the ability or willingness of those witnesses summoned by the ICIJ to participate in interviews".[45]

25. As directed, the CIJs reconsidered the Request and filed their "Order in Response to the Appeals Chamber's Decision on Nuon Chea and Ieng Sary's Requests to Summon Witnesses". They asserted that they had "reconsidered the Request in light of the Pre-Trial Chamber's interpretation of Rule 35(1)(d) of the Internal Rules, in particular for the purpose of ascertaining whether there might be any link between statements by members of the Cambodian Government and the decision of witnesses not to appear".[46] The CIJs then noted that the "only new development since their Order was issued was a statement by [redacted]...".[47] "In view of the foregoing" the CIJs assert, "by themselves the allegations contained in the Request do not warrant the application of the provisions of Rule 35...".[48] They conclude that they will not order further investigations and will "leave it to the Pre-Trial Chamber, which is in possession of all the material facts, to determine whether it should order such investigations under Rule 35(2) upon the appeal before it, should it deem it necessary".[49]

B. SUBMISSIONS

26. In response to the Impugned Reconsideration the Co-Lawyers for Ieng Sary submit that the CIJs have erred in law and abused their discretion. They argue that the "CIJs have not

[44] Decision, para. 35.
[45] Decision, para. 44, citing 'Witnesses Summons' [redacted]
[46] Impugned Reconsideration, para. 4.
[47] Ibid, para. 5.
[48] Ibid, para. 6.
[49] Ibid.

reasoned why they do not consider an investigation should be conducted into comments made by Kong Sam Ol, Khieu Kanharith and others in the Royal Government of Cambodia".[50] In addition, the CIJs have failed to reconsider the Request in light of the correct interpretation of Internal Rule 35 as directed.[51] This, they argue, has resulted in a violation of Ieng Sary's fair trial rights and amounts to an error of law.[52] The Co-Lawyers also argue that the ICIJ has abused his discretion by finding the testimony by the said individuals conducive to ascertaining the truth but failing to investigate why they have failed to respond to their summonses.[53]

27. The Co-Lawyers for Nuon Chea submit that the reasoning expressed in the Impugned Reconsideration erred in law and amounted to an abuse of discretion. The Co-Lawyers state, after listing the factors that may invoke Internal Rule 35:

> It is untenable for the OCIJ to respond to these diverse, detailed, substantiated, and (as of yet) undisputed allegations by merely concluding that they 'do not warrant the application of the provisions of Rule 35' without providing even the slightest justification for such a conclusion. Moreover, while the CIJs refer to the '[PTC]'s interpretation of Rule 35(1)(d)' they fail to demonstrate how this now authoritative standard applies to the facts at issue. Such shortcomings amount to an error of law.[54]

28. The Co-Lawyers for Nuon Chea further submit that the CIJs reference to 'new developments', being the remarks by [redacted], is incomprehensible. They continue that "[t]he Order fails to indicate whether the OCIJ is of the opinion that these remarks *undermine* the allegations in the Rule 35 Request, *buttress* the Defence position, or rather are altogether *irrelevant*".[55] They argue that there is "ample 'reason to believe' that interference with the administration of justice 'may' have occurred" and therefore that CIJs have erred in failing to act.[56] Finally, the Co-Lawyers for Nuon Chea argue that the CIJs have abused their discretion by construing the Rule 35 Request too narrowly.[57]

[50] Ieng Sary's Further Submissions, para. 4.
[51] Ibid, para. 6.
[52] Ibid, paras 6-7.
[53] Ibid, paras 8-10.
[54] Nuon Chea's Further Submissions, para. 12.
[55] Ibid, para. 13.
[56] Ibid, para. 16.
[57] Ibid, paras 17-19.

C. APPLICABLE LAW

29. Internal Rule 35(1) provides:

> The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:
>
> [...]
>
> d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;

30. Internal Rule 35(2) provides:

> When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may:
>
> a) deal with the matter summarily;
>
> b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or
>
> c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.

31. Similar to Internal Rule 35, the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") contain a provision, Rule 77, which provides a mechanism to preserve the integrity of the judicial process before that body. Rule 77 provides the following:

> (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
>
> ...
>
> (iv) threatens, intimidates, causes any injury or offers a bribe to, or *otherwise interferes with*, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;

(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.[58]

32. Given the demonstrable similarities between the provisions regarding the interference with the administration of justice in proceedings before the ECCC and ICTY, the Pre-Trial Chamber has drawn upon the approach adopted by the ICTY where appropriate.

33. The Pre-Trial Chamber has already noted with approval the ICTY jurisprudence on the *actus reus* element of contempt as punishable pursuant to Rule 77, interpreted by Trial Chamber I of that body in the case of *Prosecutor v. Haraqija and Morina*.[59]

> A "threat" is defined as a communicated intent to inflict harm or damage of some kind to a witness and/or the witness's property, or to a third person and/or his property, so as to influence or overcome the will of the witness to whom the threat is addressed." "Intimidation" consists of acts or culpable omissions likely to constitute direct, indirect or potential threats to a witness, which may interfere with or influence the witness's testimony. "Otherwise interfering with a witness" is an open-ended provision which encompasses acts or omissions, other than threatening, intimidating, causing injury or offering a bribe, capable of and likely to deter a witness from giving full and truthful testimony or in any other way influence the nature of the witness's evidence." Finally, for the purposes of establishing the responsibility of the accused, it is immaterial whether the witness actually felt threatened or intimidated, or was deterred or influenced.[60]

34. In the case of *Prosecutor v. Beqaj* Trial Chamber I of the ICTY made a number of valuable observations regarding the material elements of Rule 77. The Chamber noted that "[i]n relation to 'intimidation', the Committee of Experts of Intimidation of Witnesses and the Rights of the Defense of the Council of Europe defined intimidation as 'any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever'".[61] The Chamber also made the following observation in reaching its determination:

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[58] Rule 77, International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.44 (10 December 2009) (emphasis added).
[59] Decision, para. 41.
[60] *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, "Judgement on Allegations of Contempt", Trial Chamber, 17 December 2008, , para. 18.
[61] *Prosecutor v. Beqaj,* IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, , para. 17.

> The expression 'otherwise interfering with a witness or a potential witness' is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal. In view of the *mens rea* indicated in Rule 77 (A), the Chamber considers that otherwise interfering with witnesses encompasses any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness' or potential witness' evidence. There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness's evidence produced a result.[62]

35. The *mens rea* element of Internal Rule 35 requires that the perpetrator of the interference committed the act *knowingly and wilfully*. This Chamber has previously observed that "[i]n establishing the *mens rea* it must be demonstrated that the accused acted willingly and with the knowledge that his conduct was likely to deter or influence a witness or potential witness".[63]

36. There are three distinct standards of proof that require attention when considering an interference with the administration of justice pursuant to Internal Rule 35. These standards are (i) reason to believe; (ii) sufficient grounds; and (iii) beyond reasonable doubt. The *reason to believe* standard is expressed in Internal Rule 35(2), which provides three courses of action when the "Co-investigating Judges or the Chamber have *reason to believe* that a person may have committed any of the acts" listed in Internal Rule 35(1).[64] The *sufficient grounds* standard must be satisfied to instigate proceedings, deal with the matter summarily, or refer the matter to the authorities of Cambodia or the United Nations. The *beyond reasonable doubt* standard of proof must be satisfied before sanctions can be imposed on an individual for a violation of Internal Rule 35(1).

37. The Internal Rules fail to define these differing standards of proof, however, they can be distinguished according to the stage of inquiry. The *reason to believe* standard is an extremely low threshold and merely invokes inquiry by the CIJs or a Chamber. The broad nature of this threshold is emphasised by the inclusion of *may* in Internal Rule

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[62] Ibid, para. 21.
[63] Decision, para. 41.
[64] Internal Rule 35(2) provides that when the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may: a) deal with the matter summarily; b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.

35(2). A finding that there is reason to believe does not require or involve a determination as to the merits of an allegation or suspicion of interference. The finding that the reason to believe standard has been met does, however, require the CIJs or Chamber to have concluded that there exists a material basis or *reason* that is the foundation of their *belief*. This material basis or *reason* shall be established based on an examination of the allegation or suspicion, which examination may be subjective in nature.

38. The second standard of proof, *sufficient grounds,* has been most accurately described by the ICTY Appeals Chamber. The Appeals Chamber observed that the *sufficient grounds* standard "requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed".[65] The Pre-Trial Chamber has previously noted with approval the comparison between the *sufficient grounds* and *prima facie* thresholds.[66]

39. The *beyond reasonable doubt* standard of proof must be satisfied in order to impose sanctions on an individual for a violation of Internal Rule 35(1). This is the universally accepted standard of proof in criminal matters.

D. FACTS

40. The following is an outline of the essential facts as placed before the Pre-Trial Chamber:

    a. On 25 September 2009, the ICIJ summonsed [redacted] ("Six Officials") for

[65] *Prosecutor v. Šešelj*, , IT-03-67-AR77/2, "Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008", Appeals Chamber, 25 July 2008, ,para. 16.

[66] [redacted]

the purpose of being interviewed.[67] The ICIJ issued the summonses following Nuon Chea's Seventh and Tenth Requests for investigative action and based on the determination that their testimony would be conducive to ascertaining the truth.

b. The issuance of the summonses was published in the media.[68] The media also reported that the Six Officials were contemplating their response to the summonses.

c. On 9 October 2009, the Phnom Penh Post published an article titled 'Govt testimony could bias KRT: PM'. The article included the following passage:

> A day earlier, government spokesman Khieu Kanharith said that though the individuals could appear in court voluntarily, the government's position was that they should not give testimony. He said that foreign officials involved in the court could "pack their clothes and return home" if they were not satisfied with the decision.[69]

d. The Royal Government of Cambodia ("RGC") has made no public statement correcting or reversing the comment by Khieu Kanharith.

e. On 11 January 2010, the ICIJ concluded in relation to the Six Officials, based on the information available to him, that the "persons concerned have refused to attend for testimony".[70] As far as the Pre-Trial Chamber is aware the Six Officials have failed to-date to provide testimony as requested.

E. DETERMINATION

41. The Pre-Trial Chamber failed to reach a majority decision on whether or not the CIJs erred in failing to conclude that material placed before them gives rise to a reason to believe that an interference pursuant to Internal Rule 35(1) may have occurred.

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[67] 'Witnesses Summons' [redacted].

[68] 'Hun Sen Critizes Summoning of CPP Officials' Phnom Penh Post, 9 October 2009; 'Govt. testimony could bias KRT: PM', Phnom Penh Post, 9 October 2009; 'ECCC Judge Calls Officials to Testify', Cambodia Daily, 8 October 2009; 'KR Tribunal Summons Top Officials', Phnom Penh Post, 8 October 2009.

[69] 'Govt testimony could bias KRT: PM', Phnom Penh Post, 9 October 2009.

[70] CIJ Note, p. 3.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES:

1. **FINDS** the Appeals admissible;

2. **DISMISSES** the Appeal; and

3. **DISMISSES** the Application.

Phnom Penh, 9 September 2010

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan

OPINION OF JUDGES CATHERINE MARCHI-UHEL AND ROWAN DOWNING

1. The Co-Lawyers for Nuon Chea and Ieng Sary are correct when they submit that the reasoning expressed in the Impugned Reconsideration amounts to an error of law and an abuse of discretion. In its Decision of 8 June 2010 the Pre-Trial Chamber directed the CIJs to "reconsider the Requests in light of the correct interpretation of Internal Rule 35".[71] In response, the CIJs merely assert that they "have reconsidered the Request in light of the Pre-Trial Chamber's interpretation of Rule 35(1)(d) of the Internal Rules" and that they "consider that by themselves the allegations contained in the Request do not warrant the application of the provisions of Rule 35 ... at this stage of the proceedings".[72] The CIJs provide no explanation or basis upon which they reach their conclusion. These unsupported assertions fail to convince us that the CIJs have actually reconsidered the Requests as directed.

2. In affirming their rejection of the Requests the CIJs note that:

> the only new development since their Order was issued was a statement by [redacted].[73]

3. This comment is in no way relevant to the essential facts regarding allegations of possible interference with the administration of justice by the RGC. It has no probative value in assessing the merit of the core allegation.

4. In addition, the CIJs conclude in the Impugned Reconsideration that they "will *leave it* to the Pre-Trial Chamber, which is in possession of all the material facts, to determine whether it should order such investigations under Rule 35(2)...".[74] This deferral of responsibility is unsatisfactory. Internal Rule 35(6) provides the Pre-Trial Chamber with jurisdiction to hear and determine appeals on decisions made by the CIJs regarding alleged violations of Internal Rule 35(1). In addition, Internal Rule 35(2) empowers the

[71] Decision, p. 28.
[72] Impugned Reconsideration, paras 4 , 6.
[73] Ibid, para. 5.
[74] Impugned Reconsideration, para. 6 (emphasis added).

Pre-Trial Chamber to take action independently if satisfied that there is a "reason to believe" an individual "may" have committed an act of interference, however, the Internal Rules provide no basis upon which the CIJs can reject an investigative request or an application pursuant to Internal Rule 35 and instead refer or defer the matter to the Pre-Trial Chamber. It should also be noted that a determination pursuant to Internal Rule 35 is in no way connected to the stage of proceedings as inferred by the CIJs comment that this provision does not warrant application "at this stage of proceedings".[75]

5. As a result of the repeated failure of the CIJs to act, we are of the view that given the grave nature of the allegations of interference the Pre-Trial Chamber must intervene. As previously observed, the CIJs must act pursuant to Internal Rule 35(2) when they have "reason to believe that a person may have committed any of the acts set out in sub-rule 1". The CIJs will only have jurisdiction to act when an allegation of conduct in violation of Internal Rule 35(1) is sufficient so as to provide them with a "reason to believe" that an individual "may" have commented the alleged act. It is important to note that the term "may" lowers the threshold test "reason to believe". In contemplating a possible interference the CIJs need only possess a "reason to believe" that an act prohibited by Internal Rule 35(1)(a)-(g) "may" have occurred. This low threshold can be contrasted with the "sufficient grounds" test that is marginally higher and the ultimate criminal justice standard of "beyond reasonable doubt" that must be satisfied to find an individual in violation of Internal Rule 35(1).

6. We have reviewed the material placed before the Chamber in support of the allegations of possible interference with the administration of justice. In surveying this material we are of the view that no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the RGC may have knowingly and wilfully interfered with witnesses who may give evidence before the CIJs. This finding stands irrespective of whether the witnesses in question may or may not have had more than one reason not to appear to testify. The single more important fact is the comment made by Khieu Kanharith, published in the *Phnom Penh Post*, "that [the] government's position was that they

[75] Impugned Reconsideration, para. 6.

should not give testimony" made in reference to the Six Officials.[76] The context in which this statement was made greatly contributed to the belief that it may amount to an interference or reflect other efforts to prevent the testimony of the Six Officials. The circumstances creating this "reason to believe" include (i) the summonsing of the Six Officials; (ii) the position of the summonsed individuals as [redacted]; (iii) public comments that they "should not give testimony"; (iv) a subsequent failure of any of the Six Officials to make contact with the CIJs to arrange a time to provide testimony; and (v) a failure by the Six Officials to provide testimony. The comment by Khieu Kanharith satisfies us that there is a reason to believe he, or those he speaks on behalf of, may have knowingly and wilfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge.

7. In reaching this conclusion it is important to note that this is not a final determination as to whether this alleged conduct has or has not occurred, it is merely a finding that there is reason to believe that interference may have taken place and therefore, there is a sufficient basis upon which further action is warranted, including by the application of the course of action provided in Internal Rule 35(2)(b). It must also be noted that the Six Officials qualify as "potential witnesses" as described in Internal Rule 35(1)(d).

8. In reaching our determination regarding the allegation of interference we are of the view that the most suitable course of action would be to "conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings" pursuant to Internal Rule 35(2)(b). In the event of reaching a majority decision with regards to the necessity of an investigation, the Pre-Trial Chamber would have been faced with the question of methodology. In our view, the most appropriate course of action would have been for the Pre-Trial Chamber to conduct the investigation. This is because, although the OCIJ is the natural investigative body within the ECCC, they have repeatedly refused to investigate this matter and may not, in these circumstances be the body most suitable to conduct an investigation into these allegations of interference.

[76] 'Govt testimony could bias KRT: PM', Phnom Penh Post, 9 October 2009.

9. An interference with the administration of justice may imply disregard for the independence of the judiciary. Given the serious nature of these allegations and the origin from which the alleged interferences may have emanated, we note that if an investigation were to have met with non- cooperation from any party the Chamber may have utilised Internal Rule 35(2)(c) as a last resort. This provision provides that when the CIJs or Chambers have a reason to believe that a person may have committed an act of interference described in Internal Rule 35(1), they may "refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations".

10. There are two fundamental factors underpinning our decision that further investigations are warranted. First, the Chamber is under an obligation to ensure that the integrity of the proceedings is preserved. As the Chamber previously observed:

> "Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and trial stage. Integrity of the process is guaranteed through the judicious application of this Rule when the CIJs or a Chamber consider actions taken by an individual threaten the administration of justice".[77]

11. The judges of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") must consider their obligation to act when an action taken by an individual threatens the administration of justice. Every judge of the ECCC is bound by Article 1 of the Code of Judicial Ethics, which states that "[j]udges shall uphold the independence of their office and the authority of the ECCC and shall conduct themselves accordingly in carrying out their judicial functions".[78] Once a judge is satisfied that information before him or her establishes a reason to believe that an interference as defined in the Internal Rules may have occurred, the exercise of judicial discretion is curtailed. The judge no longer has broad discretion on the question of the next step to be taken. In this regard, the exercise of judicial discretion is not at all comparable to the discretion otherwise exercised by the CIJs and judges of this Chamber when faced with other types of requests or appeals based on certain requests, such as a request made pursuant to Internal Rule 55(10).

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[77] Decision, para. 38.

[78] Code of Judicial Ethics, Adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008, and amended at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 5 September 2008, Article 1(1).

12. The second factor underpinning our opinion is the charged persons' right to a fair trial. If an interference has occurred or is currently occurring and that interference impedes the judicial investigation, the charged persons may be prevented from obtaining possible advantage that may emerge from the testimony of the Six Officials. Preventing testimony from witnesses that have been deemed conducive to ascertaining the truth may infringe upon the fairness of the trial. The ICTY Appeals Chamber recently stated in the matter of *Prosecutor v. Haradinaj et al.*, "in circumstances of witness intimidation such as this, it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible".[79] The Appeals Chamber continued that countering witness intimidation "is especially pressing when outside forces seek to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, the Trial Chamber must counter witness intimidation by taking all measures that are reasonably open to them...."[80] We share the view expressed by the Appeals Chamber. Importantly, these comments were made by the Appeals Chamber with regard to prosecution witnesses. The view of the Appeals Chamber is apposite and persuasive when applied in the context of the matter before us, as it is a request and subsequent appeal by the defence of the charged persons. It is imperative that this Chamber *do its utmost* to ensure that the charged persons are provided with a fair trial.

Phnom Penh, 9 September 2010

Rowan DOWNING **Catherine MARCHI-UHEL**

[79] *Prosecutor v. Haradinaj et al*, IT-04-84-A, "Judgement", Appeals Chamber, 19 July 2010, para. 35.
[80] Ibid.

OPINION OF JUDGES PRAK Kimsan, NEY Thol and HUOT Vuthy

1. After having considered that the Co-Investigating Judges (CIJs) erred in their interpretation of Internal Rule 35 and that they committed an error of law, the Pre-Trial Chamber (PTC), in its Confidential Decision on NUON Chea's and IENG Sary's Appeal against OCIJ Order on Request to Summons Witnesses dated 8 June 2010 ("Decision on Requests to Summons Witnesses"), "[d]irect[ed] the Co-Investigating Judges to reconsider the Requests in light of the correct interpretation of Internal Rule 35, as set out in paragraphs 32-44".[81]

2. The Pre-Trial Chamber ordered the CIJ to "reconsider whether or not an investigation should be conducted, in light of the correct interpretation [of Internal Rule 35], into comments made by those named in the Request and others in the RGC that may have impacted upon the ability or willingness of those witnesses summoned by the International Co-Investigating Judge to participate in interviews.[82] Importantly, the Pre-Trial Chamber emphasizes that its order is one regarding the correct interpretation of Rule 35 and does not propose to instruct the CIJs as to a particular course of action".[83]

3. In response to the Decision on Requests to Summons Witnesses, the CIJs set out their unanimous findings in their Order in Response to the Appeals Chamber's Decision on Nuon Chea and Ieng Sary's Requests to Summons Witnesses ("Second Order") as follows:

> 1. The Co-Investigating Judges have reconsidered the Request in light of the Pre-Trial Chamber's interpretation of Rule 35(1)(d) of the Internal Rules, in particular for the purpose

[81] Confidential Decision on NUON Chea's and IENG Sary's Appeal against OCIJ Order on Request to Summons Witnesses ("Decision on Requests to Summons Witnesses"), 8 June 2010, Document No. D314/1/8 and D314/2/7, page 28.

[82] *See* "Witness Summons" [redacted].

[83] Decision on Requests to Summons Witnesses, para. 44.

of ascertaining whether there might be any link between statements by members of the Cambodian Government and the decision of witnesses not to appear.

2. As to the merits, they note that the only new development since their Order was issued was a statement by [redacted]",[84].

4. The CIJs come to the above findings on the basis that "*...the allegations contained in the Request do not warrant the application of the provisions of Rule 35 of the Internal Rules at this stage of the proceedings. Accordingly, they will not order further investigations concerning these facts...*"[85]

5. In order to consider whether the exercise of the CIJs' discretion in deciding not to order further investigations as stated in paragraph 4 above is not in error as alleged by the Co-Lawyers of the charged persons Nuon Chea and Ieng Sary, it is appropriate to take into consideration all allegations made by the Co-Lawyers of Nuon Chea and Ieng Sary.

6. The fact that "...RGC spokesperson Khieu Kanharith publicly stated that "though [the six high-ranking officials] could appear in court voluntarily, the government's position was that they should not give testimony...foreign officials involved in the court could pack their clothes and return home" if they were not satisfied with the decision"[86], is cited by the Co-Lawyers of Nuon Chea in the Request for Investigative Action dated 30 November 2009 as demonstrative of the alleged interference with the administration of justice.

[84] Order in Response to the Appeals Chamber's Decision on Nuon Chea and Ieng Sary's Requests to Summons Witnesses, 11 June 2010, Document No. D314/3, ("Second Order"), paras 4-5.
[85] Second Order, para. 6 (emphasis added).
[86] Nuon Chea's Request for Investigative Action, 30 November 2009, Document No. D254, para 7.

7. In respect of this allegation, we find that the statements of the spokesperson, Mr. Khieu Kanharith, cannot obstruct, prevent, or threaten directly or even indirectly the appearance of the six high-ranking officials before this Court. The spokesperson acknowledges that "these [high-ranking] witnesses could appear in court voluntarily".[87] The spokesperson continued, that if they appeared, "the government's position was that they should not give testimony".[88] These statements are, by their nature, not threatening, intimidating, or coercive directly or indirectly, in the case of these six high-ranking individuals. Mr. Khieu Kanharith used the term "should not" rather than "shall not." The latter has the character of an absolute order, while the former does not. In addition, he did not assert that he expressed his opinion in the name of the Government.

8. We also note that even if the statement of a representative of the Government, as made to a journalist and reported in a newspaper, is deemed to reflect an accurate record of the statement, we do not find that this statement is adequate and reliable evidence that would cause us to have reason to believe that a person may have committed any of the acts in Internal Rule 35(1).

9. The six witnesses are dignitaries of a higher status, rank and title than Mr. Khieu Kanharith, who is himself a minister with the status, position and title of minister and spokesperson. According to hierarchy of ministers, ministers of lower status, such as Mr. Khieu Kanharith, are in principle not entitled to order or coerce those of higher status to follow the formers' orders. Even if the RGC spokesperson Mr. Khieu Kanharith did make the statements in question, there are no written documents indicating that these six high-ranking witnesses will not come and give their testimony because they are intimidated by the statements of the RGC spokesperson.

10. We would uphold the Second Order and supplement the reasoning provided by the Co-Investigating Judges with our reasoning in paragraphs 7, 8 and 9 above to find that

[87] "Govt testimony could bias KRT: PM", Phnom Penh Post, 9 October 2009.
[88] "Govt testimony could bias KRT: PM", Phnom Penh Post, 9 October 2009.

the Second Order reflects the proper exercise of discretion by the Co-Investigating Judges in deciding not to order further investigation.

11. We, PRAK Kimsan, NEY Thol and HUOT Vuthy JJ., therefore, would uphold the Second Order dated 11 June 2010.

Phnom Penh, 9 September 2010

PRAK Kimsan **NEY Thol** **HUOT Vuthy**