



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

Before: Judge NIL Nonn, President
 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge YOU Ottara

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DECISION ON APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35

Co-Prosecutors
 CHEA Leang
 Andrew CAYLEY

Accused
 NUON Chea
 IENG Sary
 KHIEU Samphan

Civil Party Lead Co-Lawyers
 PICH Ang
 Elisabeth SIMONNEAU FORT

Lawyers for the Defence
 SON Arun
 Michiel PESTMAN
 Victor KOPPE
 ANG Udom
 Michael G. KARNAVAS
 KONG Sam Onn
 Jacques VERGÈS
 Arthur VERCKEN
 Anta GUISSÉ

1. INTRODUCTION

1. The Trial Chamber is seised of an application pursuant to Internal Rule 35, filed solely by NUON Chea international counsel on 25 April 2012, to which the Co-Prosecutors responded on 3 May 2012.¹ On 13 August 2012, international counsel for the NUON Chea Defence filed an additional Rule 35 Application in relation to statements made by Cambodian Foreign Minister HOR Namhong.²

2. On 14 September 2012, the Supreme Court Chamber (“SCC”) rendered its decision on an appeal by NUON Chea’s international counsel of an earlier Trial Chamber Rule 35 decision regarding public statements by Prime Minister HUN Sen, interpreting the scope of this rule.³ The Trial Chamber today renders separate decisions in relation to both outstanding Rule 35 Applications filed by international counsel for NUON Chea.⁴

2. SUBMISSIONS

3. The international members of the NUON Chea Defence submit that the resignation of Judge Laurent KASPER-ANSERMET from his position as Reserve International Co-Investigating Judge demonstrates that Cambodian officials of the ECCC are affected by governmental influence and are unable to act independently.⁵ It cites reports of tribunal monitors and media commentary regarding Judge KASPER-ANSERMET’s resignation from his duties in Cases 003 and 004 in support of its submission that the ECCC is not “suitably independent” from the Royal Government of Cambodia (“RGC”).⁶

4. The international members of the NUON Chea Defence submit that the integrity of the Case File in Case 002 is “highly suspect”, alleging that key witnesses were not heard during the pre-trial phase and that the departure of Judges Siegfried BLUNK and KASPER-ANSERMET, who were entrusted with investigation of Cases 003 and 004, “must be seen as

¹ Application for Immediate Action Pursuant to Rule 35, E189, 25 April 2012 (the “NUON Chea Application”); Co-Prosecutors’ Response to NUON Chea Application for Immediate Action Pursuant to Rule 35, E189/1, 3 May 2012 (“Co-Prosecutor Response”).

² NUON Chea Defence Team’s Rule 35 Request Calling for Summary Action against Minister of Foreign Affairs HOR Namhong, E219, 13 August 2012.

³ Decision on NUON Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, E176/2/1/4, 14 September 2012 (“SCC Rule 35 Decision”).

⁴ See also Decision on Rule 35 Request Calling for Action against Minister of Foreign Affairs HOR Namhong, E219/3, 22 November 2012.

⁵ NUON Chea Application, para. 19.

⁶ NUON Chea Application, para. 20.

a vote of no confidence in [the national Co-Investigating Judge, YOU Bunleng], one of the men principally responsible for shaping the judicial investigation in Case 002”.⁷ The international members of the NUON Chea Defence further submit that the outcome of Case 002 is pre-ordained and that public statements by Prime Minister HUN Sen on the guilt of the Accused will prevent the Cambodian members of the Trial Chamber from delivering an independent verdict.⁸ According to NUON Chea’s international counsel, alleged RGC interference in Cases 003 and 004 is clear whereas “relatively subtler methods [are] employed by the same individuals in order to ensure convictions in Case 002 and shield RGC officials from potential embarrassment and/or exposure”.⁹ They request the Trial Chamber to decline jurisdiction and further suggest that the international Trial Chamber judges resign from the ECCC or acquit NUON Chea on the basis that a fair trial is impossible.¹⁰ The international members of the NUON Chea Defence seek an acknowledgement of the injurious impact of Judge KASPER-ANSERMET’s resignation letter, a full investigation into the effects of RGC interference on the fairness of Case 002 and a stay of the proceedings pending an outcome of this inquiry.¹¹ In the event the full Trial Chamber denies this Application, they request Judges CARTWRIGHT and LAVERGNE to issue a separate opinion condemning RGC interference.¹²

5. In response, the Co-Prosecutors submit that the international counsel for NUON Chea’s request for a Rule 35 investigation and a stay of proceedings in Case 002 should be rejected. It fails to demonstrate any violation of the Accused’s rights in the on-going trial in Case 002 and is instead based upon speculative conclusions derived from Cases 003 and 004. Further, it is substantially repetitive of previous motions that have been rejected both at trial and on appeal. Rather than identifying specific conduct or tangible issues in Case 002 that should be investigated pursuant to Rule 35, the Application instead requests the Trial Chamber to open an unlimited general investigation into the effects of alleged RGC interference on the fairness of Case 002.¹³

6. The only specific issue raised is the Accused’s request to hear the testimony of the King Father NORODOM Sihanouk and six RGC officials: matters which are before the Chamber

⁷ NUON Chea Application, para. 23a.

⁸ NUON Chea Application, para. 23b.

⁹ NUON Chea Application, para. 24 (citing Judge YOU Bunleng’s refusal to sign summonses of high-ranking RGC witnesses).

¹⁰ NUON Chea Application, para. 26.

¹¹ NUON Chea Application, para. 28.

¹² NUON Chea Application, para. 28.

¹³ Co-Prosecutor Response, paras 1, 4, 9-10.

and which fall within the Trial Chamber's discretion to determine how to proceed with regard to potential witnesses.¹⁴ As the NUON Chea Defence have objected to the witness statements of these individuals being introduced as evidence, the relevance or significance of their testimony must in any case be open to doubt.¹⁵

7. Further, several unanimous Trial Chamber decisions demonstrate the independence of the Trial Chamber and undermine international counsel for NUON Chea's argument that conviction of all Accused is preordained or that alleged political interference will prevent a fair trial of the Accused by this Chamber in Case 002.¹⁶ Finally, the Co-Prosecutors contend that the NUON Chea Application fails to meet the high threshold required for the drastic remedy of termination of proceedings. The rights of the Accused and other parties are instead best safeguarded by continued trial proceedings and the opportunity to examine and confront the witnesses and other evidence from Case File 002.¹⁷

3. FINDINGS

8. Although attempting to characterise the resignation of Reserve International Co-Investigating Judge KASPER-ANSERMET from the investigation in Cases 003 and 004 as a new circumstance warranting the Chamber's intervention in the trial in Case 002, the Chamber notes that the NUON Chea Application is in fact almost entirely repetitious of submissions it has previously made before the Trial Chamber and which have been rejected both by the Trial and the Supreme Court Chambers.¹⁸ The current Application is lodged despite repeated indications from the Chamber that repetitious filings are contrary to the Chamber's previous directions and may jeopardize the Accused's right to an expeditious trial.

¹⁴ Co-Prosecutor Response, para. 4 (citations omitted).

¹⁵ Co-Prosecutor Response, para. 5 ("if the Accused truly believed that the information provided by these witnesses was exculpatory and essential to his defence, he would have withdrawn any objections to these statements and agreed to their admission").

¹⁶ Co-Prosecutor Response, paras 7-8 (citing the Trial Chamber's reduction of the Accused KAING Guek Eav's sentence in response to his unlawful detention by the Cambodian Military Court in Case 001, its decision declaring that the Pre-Trial Chamber's delay in issuing reasons for the continued detention of all Accused in Case 002 resulted in a breach of the Accused's rights (for which they may later seek remedy) and the Trial Chamber's unanimous determination that the Accused IENG Thirith was unfit to stand trial and that proceedings against her should be stayed).

¹⁷ Co-Prosecutor Response, paras 10-16.

¹⁸ See e.g. Request for Adjournment of Opening Statements and Substantive Hearing, E131/2, 26 October 2011; Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, E116/1/1, 10 October 2011; Application for Summary Action Against HUN Sen Pursuant to Rule 35, 22 February 2012, para. 2; Trial Chamber response to NUON Chea's Request to Temporarily Stay the Proceedings in Case 002, E131/2, 2 November 2012 and Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, E116/1/7, 27 April 2012 ("SCC Decision on Immediate Appeal").

3.1. Relief sought

9. The Trial Chamber has previously outlined the extremely high threshold established by the international jurisprudence that must be satisfied in order for a stay of proceedings to be granted. It has also noted that this remedy is inappropriate where the Accused fails to identify any tangible impact of the allegations made on the on-going trial or to show that the extreme remedy of a stay would be the only means available to the Chamber to address any alleged violations of the Accused's rights.¹⁹

10. The Chamber has also rejected the NUON Chea Defence's earlier and substantially similar requests for investigations pursuant to Internal Rule 35 on grounds that they did not identify any tangible impact of the allegations it contained on the fairness of trial proceedings in Case 002: a decision which was confirmed by the Supreme Court Chamber on appeal.²⁰ The present NUON Chea Application similarly fails to specify or substantiate any alleged impact of the resignation of Judge KASPER-ANSERMET from the judicial investigation of Cases 003 and 004 on the on-going trial in Case 002/01.²¹

11. In relation to witnesses proposed by the NUON Chea Defence and mentioned in the NUON Chea Application, the Chamber has elsewhere, in the exercise of its discretion to determine which of the 1054 individuals sought by all parties shall ultimately be heard at trial, indicated the need to weigh the right of all parties to propose individuals to be heard against the right of the Accused to a fair and expeditious trial.²²

¹⁹ Decision on NUON Chea Motions Regarding Fairness of Judicial Investigation, E116, 9 September 2011 ("Decision on Fairness of Judicial Investigations"), para. 18; *see also* Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, E176/2/1/4, 14 September 2012, para. 66 (*noting* a stay of the proceedings is one of "the most radical remedies available for a violation of the presumption of innocence" and is only exceptionally applied in trials involving a jury).

²⁰ Decision on Fairness of Judicial Investigations, para. 21; SCC Decision on Immediate Appeal, para. 33.

²¹ The Trial Chamber's view is unchanged by Judge Kasper-Ansermet's Press Release of 4 May 2012, indicating that certain staff members of the ECCC have interfered with the investigation in Case File 004. The release makes no mention of potential interference with the investigation in Case 002.

²² *See e.g.* Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, E218, 3 August 2012, para. 12 (adverting to NUON Chea filings regarding Defence witnesses and inviting the NUON Chea Defence (and other Defence teams) to indicate briefly which witnesses are considered vital to rebut the allegations against the Accused); *see further* Individuals sought by the Parties to be Heard at Trial (as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer), E236, 2 October 2012 (compiling all requests made for individuals considered by the parties as necessary to hear in addition to those individuals already contained on the Chamber's provisional list of witnesses, experts and Civil Parties to be heard at trial (E131.1/1)). Ultimate determinations of which, if any, of these additional witnesses will be heard at trial remain pending and under review by the Chamber as the trial in Case 002/01 proceeds.



12. On 9 September 2011 the Chamber also noted that “a fair and public trial, in relation to which the Accused has the opportunity, amongst other things, to adduce documentary or other evidence considered necessary to ascertain the truth, and to cross-examine witnesses and otherwise rebut the evidence and allegations against him, [...] constitutes a [...] corrective to any alleged defects in the judicial investigation to date.”²³ This ruling was supported by the Supreme Court Chamber, which held as follows:

The question that remains relevant to the Accused’s rights concerns the availability of certain Defence witnesses who were not heard in the investigative stage. This question is to be determined during the ongoing trial in Case 002, in which a broad range of options is still open to address the concerns that exculpatory evidence might be improperly prevented from entering the trial. This depends, for example, on whether the Defence persists in its requests for evidence, whether such requests are admissible under Rule 87, whether the facts for which the testimonies are proposed are disputed, whether the called witnesses appear and, if they fail to do so, whether the facts upon which they had been called to testify may be established otherwise.²⁴

13. The law applicable to Rule 35 applications was until recently the subject of a pending appeal of a separate Trial Chamber Decision in relation to alleged public statements by Prime Minister HUN Sen, filed by the NUON Chea Defence on 11 June 2012.²⁵ The resultant Supreme Court Chamber Decision is concerned largely with standards of proof for determining whether interference in the administration of justice can be said to have occurred, and does not delineate in detail the Chamber’s power to order an investigation pursuant to Internal Rule 35(2). The SCC in its Decision of 14 September 2012 nonetheless noted, in relation to procedural avenues available under Rule 35(2), that “[c]onsidering its limited time and notoriously limited resources Judges or Chambers [of the ECCC] may decide not to investigate and/or sanction for the sake of efficiency.”²⁶

14. As the current application inappropriately seeks the extreme remedy of a stay of proceedings and an unlimited general investigation into the effects of RGC interference on the fairness of Case 002 on grounds that are either speculative or unrelated to the on-going trial in Case 002, the Chamber declines the relief sought.

²³ Decision on Fairness of Judicial Investigations, para. 19.

²⁴ SCC Decision on Immediate Appeal, para. 32.

²⁵ Immediate Appeal against Trial Chamber Decision on Rule 35 Request for Summary Action against HUN Sen, 11 June 2012, E176/2/1/1.

²⁶ SCC Rule 35 Decision, para. 39.



3.2. Conduct of international members of the NUON Chea Defence

15. Addressing the Cambodian members of the Trial Chamber, the international members of the NUON Chea Defence assert that “the Government’s influence at this tribunal affects *each and every* national staff member and infects *each and every* pending case” and that “[t]he inability of Cambodians at the ECCC (however principled and/or well-intentioned) to act independently in any professional sense is now irrefutable.”²⁷ They also allege the “futility of appealing to the Cambodian members of the bench” and assert that “Cambodian officials simply will not gainsay an official Government position – in any way.”²⁸ They further state that it “would be the height of naiveté, wilful blindness, or worse” if Judges CARTWRIGHT and LAVERGNE “believe that their Cambodian colleagues on the bench are capable of supporting any decision that contradicts the stated or implicit positions of the RGC.”²⁹

16. The international members of the NUON Chea Defence do not support these allegations with reference to decisions of the Trial Chamber nor any other part of the trial record capable of substantiating an assertion that the Cambodian members of the Trial Chamber have acted improperly and in breach of their professional and ethical duties of impartiality. The Trial Chamber warns international counsel for NUON Chea that accusations against Cambodian members of the Trial Chamber, on the apparent basis of their nationality alone and unsupported by reference to the trial record, are disrespectful and contrary to the principles set forth in the codes of conduct applicable before the ECCC.³⁰ Grave, unsubstantiated allegations of impropriety, on discriminatory grounds, may therefore trigger the Chamber’s power to sanction pursuant to Internal Rule 38.³¹


²⁷ NUON Chea Application, para. 19 (emphasis in original).

²⁸ NUON Chea Application, para. 23.

²⁹ NUON Chea Application, para. 19.

³⁰ Cf. ICC Code of Professional Conduct for counsel, Resolution ECC-ASP/4/Res.1 (“ICC Code of Conduct”), Article 9(1) (“Counsel shall not engage in any discriminatory conduct in relation to any other person [...] on grounds of race, colour, ethnic, or national origin, nationality [...]”).

³¹ See Internal Rule 38 (empowering the Chamber, after a warning, to impose sanctions against a lawyer if his conduct is considered offensive, abusive, obstructs the proceedings, amounts to abuse of process or is otherwise contrary to Article 21(3) of the Agreement). Article 21(3) of the Agreement requires Cambodian and international counsel alike to act in accordance with the Cambodian Law on the Statutes of the Bar which in turn states “[t]he lawyer [must] preserve for the judges, in independence and dignity, the respect due to their position”; see also Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Article 24 (unofficial translation). This is consistent with international codes of ethical conduct: see e.g. ICC Code of Conduct, Article 7(1) (“Counsel shall be respectful and courteous in his or her relations with the Chamber [...]”; ICTR Code of Professional Conduct of Defence Counsel, 31 January 2010, Article 17(1) (“Counsel must act fairly, honestly and courteously towards all persons with whom they have professional contact, namely Counsel, their clients, Judges, members of the Office of the Prosecutor and Registry staff”).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**REJECTS** all relief sought in the NUON Chea Application; and**WARNS** that future misconduct by international counsel for NUON Chea such as repetitious filings or unsubstantiated, discriminatory allegations made against members of the Trial Chamber may merit the imposition of sanctions pursuant to Internal Rule 38. 

Phnom Penh, 22 November 2012
President of the Trial Chamber




Nil Nonn