



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 RULE 35 REQUEST CALLING FOR SUMMARY ACTION AGAINST MINISTER OF FOREIGN AFFAIRS HOR NAMHONG (E219)

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1. INTRODUCTION

1. The Trial Chamber is seised of an application pursuant to Internal Rule 35, filed solely by NUON Chea international Defence counsel on 13 August 2012, requesting that summary action be taken against Minister of Foreign Affairs HOR Namhong in relation to a statement attributed to him in the press.¹ International counsel for NUON Chea filed an Addendum to this request on 24 August 2012 and the Co-Prosecutors responded to the NUON Chea Request and Addendum on 27 August 2012.² On 14 September 2012, the Supreme Court Chamber (“SCC”) rendered its decision on an appeal by NUON Chea’s international Defence counsel of an earlier Trial Chamber Rule 35 decision regarding public statements by Prime Minister HUN Sen, interpreting the scope of this rule.³

2. STATEMENT ATTRIBUTED TO HOR NAMHONG

2. This statement is contained in press reports in English and Khmer:

**Short Comment of H.E. Deputy Prime Minister Hor Namhong,
Minister of Foreign Affairs and International Cooperation**

It is unfortunate that those who continue to defend the legacy of the Khmer Rouge regime seek, in the interest of their defence, to deflect attention from themselves and their cases, by way of stirring up controversy around public figures like myself. I want to offer this brief statement about my history to dispel this controversy. The Khmer Rouge regime is an epic tragedy that continues to haunt Cambodia’s people today. As a prisoner of Boeng Trabek re-education camp where I lost two sisters, their husbands, children, and a niece as well as countless colleagues, I have nothing but sorrow and empathy for the victims and their families. Cambodians continue to suffer from the crimes of the Khmer Rouge even today. The Khmer Rouge not only destroyed a generation of Cambodian people, but also, in many ways, a civilization. We are still rebuilding this civilization today. The Extraordinary Chamber in the Courts of Cambodia is a court of law, and not a political forum, and I believe attempts to politicize the court or stir up controversy are inappropriate.

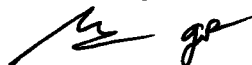
My greatest hope is that one day justice is done and the legacy of the Khmer Rouge is given its place in the dustbin of history – without defence or controversy.⁴

¹ NUON Chea Defence Team’s Rule 35 Request Calling for Summary Action against Minister of Foreign Affairs Hor Namhong, E219, 13 August 2012, (“NUON Chea Request”).

² NUON Chea Defence Team’s Addendum to Rule 35 Request Calling for Summary Action against Minister of Foreign Affairs Hor Namhong, E219/1, 24 August 2012, (“NUON Chea Addendum”); Co-Prosecutors’ Response to NUON Chea’s Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs Nor Namhong, E219/2, 27 August 2012 (“Co-Prosecutors’ Response”).

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”); *see also* Decision on Application for Immediate Action pursuant to Rule 35 (189), E189/3, 22 November 2012.

⁴ ‘Hor Namhong Addresses Boeng Trabek Claims’, *Cambodia Daily*, 3 August 2012 (“Hor Namhong Addresses Claim”); ‘Heritage of Khmer Rouge Hor Namhong: Politicization of Khmer Rouge Court is Not Suitable,’ *Koh Santepheap*, 4-5 August 2012; NUON Chea Request, para. 2.



3. SUBMISSIONS

3. International counsel for the NUON Chea Defence allege that the remarks attributed to the Cambodian Minister of Foreign Affairs HOR Namhong in the Cambodian press “must be seen as an attempt to unduly influence the Trial Chamber, upcoming witnesses, the Defence, as well as the general public [and] amount to an interference with the administration of justice at the ECCC.”⁵ They contend that the statement was issued in response to the public testimony of witness ROCHEOM Ton, who on 31 July 2012 testified that, for a period of time towards the end of the Democratic Kampuchea (“DK”) regime, HOR Namhong was in charge of the Boeng Trabek detention centre.⁶

4. In their Addendum, the international members of the NUON Chea Defence deduce from later press comments attributed to ROCHEOM Ton, in which he allegedly claimed to have erroneously implicated HOR Namhong during his testimony, that “it is highly likely that witness ROCHEOM Ton publically recanted his *viva voce* testimony in Case 002 ... *because of the pressure brought to bear by the Foreign Minister through the publication of the Statement.*”⁷ In consequence, they conclude that HOR Namhong “almost certainly ‘threaten[ed], intimidate[ed] [...] or otherwise interfere[d] with a witness [...] who [...] has given [...] evidence in proceedings before the [...] Chamber’.”⁸ The international members of the NUON Chea Defence further submit that the impact of the remarks attributed to HOR Namhong are amplified by his alleged “untouchable” position as a Minister of the Royal Government of Cambodia, his alleged relationship to the issues in Case 002/01, his refusal to testify before the ECCC when summoned by the Co-Investigating Judges, and his alleged history of “aggressively attempting to silence those who have spoken publicly regarding his DK-era past.”⁹

5. In consequence, the international members of the NUON Chea Defence request the Chamber to acknowledge that HOR Namhong’s remarks amount to an interference with the administration of justice at the ECCC, to issue a public rebuke, to warn him against making

⁵ NUON Chea Request, para. 1.

⁶ NUON Chea Request, para. 3 (*citing* Draft Trial Transcript, 31 July 2012, p. 63).

⁷ NUON Chea Addendum, para. 4 (emphasis in the original).

⁸ NUON Chea Addendum, para. 4.

⁹ NUON Chea Request, paras 13-14.



further comments of a similar nature, and to “conduct further investigations to determine whether there are sufficient grounds” for proceedings to be instigated against him.¹⁰

6. In response, the Co-Prosecutors oppose the relief sought in the NUON Chea Defence Request and Addendum, on grounds that the international members of the NUON Chea Defence fail to substantiate a claim of interference with the administration of justice under Rule 35. The purpose of this rule is to ensure that the exercise of the Chamber’s jurisdiction is not frustrated and that its basic judicial functions are safeguarded. To prevent abuse of this rule, to ensure its focus on matters that properly fall within its purview, and to protect a reasonable realm of free speech, a minimum, threshold condition for inquiry is a “reasonable belief” that conduct with the potential to threaten the administration of justice may have occurred. Where summary action involves a determination of individual culpability, as the requested remedies do here, it must instead be shown that the act or omission alleged to constitute interference was done knowingly and willingly.¹¹

7. The Co-Prosecutors submit that an examination of the statement attributed to HOR Namhong does not substantiate either knowing interference with the administration of justice or a reasonable belief that this may have occurred. The plain text of the statement contains no threat or intimidation, and even reiterates that the ECCC “is a court of law, and not a political forum.”¹² Unlike statements which were the subject of a previous ruling under Rule 35, the statement attributed to HOR Namhong does not reference any of the Accused and voices no opinion on the guilt of any individual for any crime. Nor do these remarks make reference to any factual issues that are *sub judice*.¹³ The NUON Chea Defence characterisation of the statement as a “blatant and inexcusable attempt to convince the judges of the Trial Chamber of HOR Namhong’s extrajudicial version of a factual determination” is unsubstantiated by the text of the statement or otherwise. Nor does NUON Chea’s international counsel show that the statement “has the effect, if not the specific purpose” of discouraging the NUON Chea Defence from pursuing certain lines of questioning regarding HOR Namhong: a submission that is further not supported by the trial record.¹⁴ The Co-Prosecutors therefore request the Chamber to reject the NUON Chea Request and Addendum in full.

¹⁰ NUON Chea Request, para. 23; NUON Chea Addendum, para. 7¹¹ Co-Prosecutors’ Response, paras 7-9.

¹¹ Co-Prosecutors’ Response, paras 7-9.

¹² Co-Prosecutors’ Response, para. 13.

¹³ Co-Prosecutors’ Response, paras 14-16.

¹⁴ Co-Prosecutors’ Response, paras 17-18 (noting that the NUON Chea Defence “attempt to shoehorn into their Request previously failed attempts to force HE HOR Namhong to testify” and referencing portions of the



4. APPLICABLE LAW

8. The Supreme Court Chamber has recently indicated that included within the notion of interference with the administration of justice under Internal Rule 35 are two categories of conduct.¹⁵ The first category includes criminal offenses subject to sanctions contained in the Criminal Code of Cambodia. For this category of offenses, Cambodian criminal law is controlling for issues such as modes of responsibility and elements of a crime.¹⁶

9. The second category includes administrative acts which undermine the court's legitimacy and which constitute conduct proscribed before other internationalized tribunals.¹⁷ In this regard, the Supreme Court Chamber found that "the requirement of specific intent construed by ICTY Trial Chambers for criminal contempt of court is too strict for administrative offences. Rather, it is instead sufficient to establish that the conduct which constituted the violation was deliberate and not accidental."¹⁸ Judicial responses to non-criminal offences must be necessary and proportionate to the conduct and may include "an admonition; notice to self-regulatory bodies [...]; publication of the outcome of the proceedings in the media, or a limited administrative fine."¹⁹

10. By the plain terms of Internal Rule 35, the ECCC may sanction or refer conduct to the appropriate authorities only if a person "knowingly and wilfully" interferes with the administration of justice.²⁰ The Chamber considers that the express terms of this rule require intentional conduct in relation to all proscribed conduct, including that enumerated in the non-exhaustive list of acts prohibited by Internal Rule 35(1). Internal Rule 35(2) sets forth a standard of reasonable belief as the required threshold for the initiation of the procedural steps

trial transcript in which the NUON Chea Defence extensively question the witness, including in relation to the alleged role of HOR Namhong (citations omitted)).

¹⁵ 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"), paras 32-33.

¹⁶ SCC Rule 35 Decision, para. 32.

¹⁷ SCC Rule 35 Decision, paras 38-39 (citations omitted).

¹⁸ SCC Rule 35 Decision, para. 38 (citations omitted).

¹⁹ SCC Rule 35 Decision, para. 44.

²⁰ The express terms of Internal Rule 35(1) are: "The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice", before proceeding to a non-exhaustive list of acts prohibited by this sub-rule; *see also* SCC Decision, para. 37 ("Under Rule 35(1), proscribed conduct must be "knowing and willful" (*cf.* SCC Decision, para. 38)).



available to the Chamber when confronted with allegations of interference with the administration of justice.²¹

5. FINDINGS

11. The international members of the NUON Chea Defence assert that the statement attributed to HOR Namhong in the press give reason to believe that HOR Namhong attempted to unduly influence the Trial Chamber, witnesses, the Defence and the general public.²² As remedies for these alleged violations, the Defence requests the Trial Chamber to publically rebuke HOR Namhong and to officially warn him against making any further statements of a similar nature.²³ The NUON Chea Addendum further requests that the Chamber conduct investigations “to ascertain whether there are sufficient grounds for instigating proceedings” against HOR Namhong, suggesting that they consider the alleged intimidation of witness ROCHEOM Ton to amount to a criminal violation of Internal Rule 35.²⁴

12. Regarding the allegation that HOR Namhong sought to influence a witness in Case 002/01, the Chamber notes that Article 549 of the Cambodian Penal Code criminalizes the publication of material intended to influence the statement of a witness. In order to establish liability for this conduct, there must be proof of intent to influence, intimidate, or otherwise interfere with a witness.²⁵ However, the Chamber considers that the statement attributed to HOR Namhong does not substantiate the view that its author possessed this intent.

13. The statement attributed to HOR Namhong referred to “those who continue to defend the legacy of the Khmer Rouge regime” and not to any named individuals or acts. Condemnation of the “Khmer Rouge legacy”, which is widespread both domestically and internationally, cannot be equated with comment on the guilt or innocence of particular members of the leadership of Democratic Kampuchea for particular crimes. Further, the author of this statement indicates that “[the] Extraordinary Chamber in the Courts of Cambodia is a court of law, and not a political forum, and I believe attempts to politicize the court or stir up

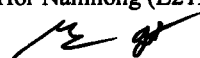
²¹ Internal Rule 35(2) empowers a Chamber either to deal with a matter summarily, to conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings, or to refer a matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.

²² NUON Chea Request, para. 1.

²³ NUON Chea Request, paras 22-23.

²⁴ NUON Chea Addendum, para. 7.

²⁵ Cf. SCC Rule 35 Decision, para. 47.



controversy are inappropriate”, thus appearing to endorse the necessity for the work of the ECCC to proceed without political interference.

14. Nor do the circumstances in which witness ROCHEOM Ton is alleged to have subsequently modified his in-court statement regarding HOR Namhong support an inference that the latter may have sought to influence the witness, whether directly or indirectly. After publication of the statement attributed to HOR Namhong, it was reported that witness ROCHEOM Ton indicated to a Khmer-language news website that he had erroneously implicated Mr. Namhong due to “bewildering repetitive questions by a foreign co-counsel for the Accused”, and that he had neither said that Mr. Namhong was in charge of the Boeung Trabek prison camp nor used the word “prison” during his testimony at all.²⁶ The witness is further quoted as saying: “I was asked at (sic) the same questions again and again, for long hours. I was sick and I was confused with the questions”, and as indicating that he had limited knowledge of the role of HOR Namhong at the time.²⁷ The same media report indicated that the witness stated that no one had pressured him, threatened him, or asked him to make these statements to the media.²⁸

15. Further, the ECCC’s Witness/Expert Support Unit (“WESU”), in the exercise of its responsibility to safeguard the welfare of all individuals testifying before the ECCC, visited witness ROCHEOM Ton on 23 August 2012 to ascertain the circumstances in which the statements attributed to him in the media were made. WESU did not, at the time or subsequently, report any concern to the Chamber, and the Trial Chamber has further verified with WESU prior to issuing this decision that WESU had no reason to believe that the witness made the statements he did to the media due to interference.

²⁶ Chhorn Chansy and Julia Wallace, ‘KRT Witness recants Hor Namhong claim’, *The Cambodia Daily*, 13 August 2012 (“*Cambodia Daily* article, p. 17”), p. 17.

²⁷ *Cambodia Daily* article, p. 17; see also T. 31 July 2012, pp. 50-80 (showing sustained questioning of the witness, including by the NUON Chea Defence regarding the alleged role of HOR Namhong). The witness’ actual in-court comments pertaining to HOR Namhong (under questioning by the Co-Prosecutors) are as follows: “Q. Was there - did Boeng Trabek at some point - was it transferred from under Office 870 to the Ministry of Foreign Affairs? A. In late 1978, Pang disappeared, and then Vorn came to take the place as the Chief of Boeng Trabek. And then Office 870 instructed that it be transferred under the supervision of B-1. At that time, intellectual Seng Hong was the chief and he was there as well, and then later on Brother Hor Namhong was also there” (T., 30 July 2012, p. 52.) Under examination by Mr. IANUZZI, international counsel for NUON Chea, the witness stated: “Q. Thank you, Mr. Witness. Was he ever the chairman or the vice-chairman of Boeng Trabek – that is, Mr. Hor Namhong? A. When the ministry representative went to receive him, he was in charge of the Boeng Trabek” (T., 31 July 2012, pp. 61-63).

²⁸ *Cambodia Daily* article, p. 17.

16. Finally, the Chamber considers the remainder of the NUON Chea Defence allegations regarding the assumed impact of the statement (stemming from HOR Namhong's position in Cambodia and alleged past conduct) to be entirely speculative. In addition, his failure to respond to a summons by the Co-Investigating Judges was a matter already decided upon by the Pre-Trial Chamber and need not be revisited.²⁹ Further, and as the Chamber has indicated, requests by the parties to hear additional witnesses before the Trial Chamber at trial in Case 002/01 remain under review.³⁰

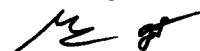
17. Consequently, the Trial Chamber does not consider the language of the statement attributed to HOR Namhong or the circumstances surrounding the media comments attributed to witness ROCHEOM Ton to substantiate, whether directly or inferentially, any intention on the part of HOR Namhong to interfere with a witness to ECCC proceedings. Nor does it provide a reasonable basis to believe that such interference may have occurred sufficient to trigger the Chamber's power to commence an investigation pursuant to Internal Rule 35(2).

18. Finally, and as was recently endorsed by the Supreme Court Chamber, judges are, by virtue of their oath of office, training and experience, "usually presumed unsusceptible to adverse publicity, especially absent any indication of such influence in the overall evaluation of the fairness of proceedings".³¹ The statement attributed to HOR Namhong is in any case silent on any matter that is *sub judice* and makes no reference to the Accused or his alleged conduct. The Chamber nonetheless reaffirms its commitment to the proper administration of justice, which ensures that public comment by officials in relation to the on-going trial in Case 002 will not influence it or any of its individual judges in the exercise of their duties. Whilst the Chamber finds no reason to believe that the statement attributed to HOR Namhong interfered with the administration of justice or was intended to do so, the Chamber stresses

²⁹ Second Decision on Nuon Chea's and IENG Sary's Appeal Against OCIJ Order on Request to Summons Witness, D314/1/12, 9 September 2012; *see also* Internal Rule 76(7) ("Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber.")

³⁰ Decision on Application for Immediate Action pursuant to Rule 35 (189), E189/3, 22 November 2012, para. 11 (noting that the Chamber has, in the exercise of its discretion to determine which of the 1054 individuals sought by all parties shall ultimately be heard at trial, provided additional opportunity to all Defence teams to indicate which witnesses not already contained on the Chamber's provisional list of witnesses, experts and Civil Parties to be heard at trial (E131.1/1)) are considered vital to rebut the allegations against the Accused; *see e.g.* Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 [...], E218, 3 August 2012, para. 12 and 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 (listing all individuals considered by the parties as necessary to hear in addition to those already included in 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.

³¹ SCC Rule 35 Decision, para. 66.



that it is inappropriate for public officials to comment in relation to on-going trials and considers that such statements, which might be interpreted to compromise the ECCC's appearance of independence, should be avoided altogether.³²

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DISMISSES the NUON Chea Defence Request and Addendum on their merits. *NE*

Phnom Penh, 22 November 2012
President of the Trial Chamber



Nil Nonn

³² SCC Rule 35 Decision, paras 65-66.