



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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(០៨)

Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(08)

ឯកសារដើម

ORIGINAL/ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ (Date): 30-Jan-2012, 17:43

CMS/CFO: Kauv Keoratanak

Before:

Judge KONG Srim, President

Judge Motoo NOGUCHI

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge MONG Monichariya

Judge Chandra Nihal JAYASINGHE

Judge YA Narin

Date:

30 January 2012

Language(s):

English/Khmer

Classification:

PUBLIC

SUMMARY OF THE REASONS

FOR THE DECISION ON IMMEDIATE APPEAL BY NUON CHEA AGAINST THE TRIAL CHAMBER'S DECISION ON FAIRNESS OF JUDICIAL INVESTIGATION

Accused

NUON Chea

Lawyers for the Accused

SON Arun

Michiel PESTMAN

Victor KOPPE

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

Civil Party Lead Co-Lawyers

PICH Ang

Elisabeth SIMONNEAU-FORT

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of an immediate appeal by the Accused, NUON Chea,¹ against the Trial Chamber’s “Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92)” (“Impugned Decision”),² to the extent it disposed of the Accused’s Rule 35 Request;³

I. PROCEDURAL HISTORY

1. On 9 September 2011, the Trial Chamber issued the Impugned Decision in which, *inter alia*, it rejected the Rule 35 Request submitted by the Accused on 28 April 2011.
2. On 10 October 2011, the Accused lodged his Appeal against the Impugned Decision pursuant to Rule 35(6) in English only. The Khmer translation was notified on 18 October 2011.⁴
3. On 2 November 2011, the Co-Prosecutors submitted their Response.⁵
4. On 8 November 2011, the Accused submitted his Reply.⁶
5. Pursuant to Rules 108(4)(*bis*)(a) and 108(2), the Supreme Court Chamber shall decide on this Appeal within three months after receipt of “the case file together with certified copies of the decision and each immediate appeal.” The “case file” includes confidential documents relevant to the present Appeal. As these confidential documents were received by 28 October 2011,⁷ the decision on the Appeal is due by Monday, 30 January 2012.⁸ As permitted by Rule 108(4)(*bis*), the below reasons of the Supreme Court Chamber constitute “a summary of the reasons” for its

¹ Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 10 October 2011, E116/1/1 (“Appeal”).

² 9 September 2011, E116.

³ Request for Investigation Pursuant to Rule 35, 28 April 2011, E82 (“Rule 35 Request”).

⁴ Pursuant to Article 7.2 of the Practice Direction on Filing (Rev.7), the Supreme Court Chamber granted permission to file the Khmer version of the Appeal “at the first opportunity”.

⁵ Co-Prosecutors’ Response to Nuon Chea’s Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 2 November 2011, E116/1/4 (“Response”). The Supreme Court Chamber granted the Co-Prosecutors an extension of time to respond (Decision on Co-Prosecutors’ Request for Extension of Time to Respond to NUON Chea’s Immediate Appeal under Internal Rule 104(4)(D), 18 October 2011, E116/1/2/1).

⁶ Reply to Co-Prosecutors’ Response to Nuon Chea’s Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 8 November 2011, E116/1/5 (“Reply”).

⁷ Rule 108(2) mandates that the Trial Chamber forward the case file to the Supreme Court Chamber “within 10 days of the filing of the appeal...”. Day 1 of this time limit was 19 October 2011, being “the first calendar day following the day of service of the Notification of the document in Khmer and one other official language of the ECCC” (Practice Direction on Filing, Article 8.5).

⁸ Pursuant to Rule 39(3), when time limits, like in the present case, “expire on a Saturday, Sunday or Cambodian public holiday,” they shall be automatically extended to the next working day.

decision on the Appeal, while the Chamber's "full reasons" will follow "as soon as possible thereafter."⁹

II. SUBMISSIONS

Accused's Appeal

6. The Appeal puts forth the following four grounds of appeal to argue that the Impugned Decision should be vacated: (i) the Trial Chamber committed an error of law by failing to provide reasoned grounds for rejecting the Accused's claims of interference relating directly to Case 002; (ii) the Trial Chamber incorrectly rejected the allegations concerning Cases 003 and 004 on the basis that the Trial Chamber can only act pursuant to Rule 35 in relation to matters with which it is seised and that the allegations have no "tangible impact" on the proceedings in Case 002; (iii) the Trial Chamber failed to evaluate the material related to Cases 003 and 004 in conjunction with the claims concerning Case 002; (iv) the Trial Chamber erred in law by suggesting that parties cannot, on their own motion, initiate Rule 35 proceedings.

7. The Accused consequently requests the Chamber to use its broad authority under Rule 35(2) to order an independent judicial body to conduct a public investigation to be completed in advance of the substantive hearing in Case 002. It further requests a public hearing.¹⁰

Co-Prosecutors' Response

8. The Co-Prosecutors argue that the first and fourth grounds of appeal are inadmissible since they are devoid of any factual basis in the Impugned Decision. Additionally, the fourth ground of appeal "appears to wilfully misrepresent" the Trial Chamber's reasoning.¹¹ The Co-Prosecutors further submit that all grounds of appeal are unfounded and request the Chamber to make a determination based on written submissions alone.¹²

Accused's Reply

9. In reply, the Accused submits that the Trial Chamber was obliged to consider its Rule 35 Request independently of his Preliminary Objections¹³ because they were made pursuant to different provisions that raise distinct legal issues.¹⁴

⁹ Rule 108(4)(bis).

¹⁰ Appeal, paras. 36-38, 41.

¹¹ Response, paras. 4, 10.

¹² Response, paras. 4, 44.

¹³ Consolidated Preliminary Objections, 25 February 2011, E51/3 ("Preliminary Objections").

¹⁴ Reply, para. 2.

Breach of confidentiality

10. The Response notes that the Appeal appears to have been disclosed in violation of the Chamber's classification of the document as confidential and therefore requests the Supreme Court Chamber to use its ancillary jurisdiction under Rule 35 to investigate interference *proprio motu*, taking "any action [it] may find appropriate to uphold the integrity of the judicial proceedings."¹⁵ The Defence confirms it has distributed the Appeal to "various members of the local and international press,"¹⁶ since this is in conformity with Cambodian law, the interests of justice, and protects the Accused's rights.¹⁷

III. SUMMARY OF THE REASONS

Admissibility

11. The Appeal is admissible under Rules 35(6) and 104(4)(d) and has been timely filed. The Supreme Court Chamber rejects the request for an oral hearing.

First Ground of Appeal

12. Whereas the concerned portions of the Preliminary Objections and the Rule 35 Request were largely based on the same factual allegations, they were submitted pursuant to distinct provisions. In the Preliminary Objections, the Accused was requested to demonstrate that these factual allegations are so egregious that they warrant a termination of proceedings.¹⁸ In his Rule 35 Request, the Accused seeks to demonstrate that these same factual allegations give rise to a "reason to believe" that a person may have interfered with the administration of justice, and to move the Trial Chamber to initiate investigations into alleged instances of interference to safeguard the integrity of proceedings.

13. The Supreme Court Chamber accordingly finds that the Co-Prosecutors' argument¹⁹ that the Trial Chamber properly disposed of the factual allegations directly concerning Case 002 by declaring the Preliminary Objections inadmissible²⁰ is misplaced. The Trial Chamber committed an error of law by failing to provide stand-alone reasons for the rejection of the Rule 35 Request

¹⁵ Response, paras. 41-44.

¹⁶ Reply, para. 6.

¹⁷ Reply, paras. 6-7.

¹⁸ See Impugned Decision, paras. 16-18.

¹⁹ Response, paras. 12, 28.

²⁰ Impugned Decision, para. 17.

insofar as it relates to the factual allegations directly concerning Case 002. For the reasons set out below, this error does not invalidate the Impugned Decision.

Second and Third Grounds of Appeal

14. Judicial competence over a case at the ECCC is divided according to the stage of the case. The Co-Investigating Judges and Pre-Trial Chamber are competent during the investigative stage while the Trial and Supreme Court Chambers are competent during the trial and final appeal stages. This general allocation of judicial competence, if rigidly applied to Rule 35 applications, would undermine the Court's inherent responsibility to guarantee the integrity of proceedings and the Accused's right to a fair trial.²¹ The present Appeal, nevertheless, does not warrant a departure from such general allocation of competence. The factual allegations directly concerning Case 002,²² albeit overlooked in the Impugned Decision, have undergone extensive litigation and consideration before the Co-Investigating Judges and the Pre-Trial Chamber.²³ It was not for the Trial Chamber, therefore, to adjudicate them over again. The question whether these allegations affect the current proceedings in Case 002 before the Trial Chamber concerns the availability of certain witnesses proposed by the Defence. This question is to be determined during the ongoing trial in Case 002.

15. As for the factual allegations primarily concerning Cases 003 and 004,²⁴ the Supreme Court Chamber defers to the wide discretion vested with the Trial Chamber, which is better placed to evaluate the impact of these allegations on the proceedings before it. The Supreme Court Chamber does not find any error of fact or law or discernible error of discretion in the Trial Chamber's conclusion that the claims related to Cases 003 and 004 are devoid of "tangible impact"²⁵ on the fairness of Case 002.

16. The Supreme Court Chamber also takes note of the Accused's allegations regarding events, statements, and documents unavailable to the Trial Chamber when it rendered the Impugned Decision. The Supreme Court Chamber observes that these allegations are currently being adjudicated by national courts, before which the Defence has requested the initiation of criminal proceedings. Moreover, these allegations are the focus of a diplomatic process between the Royal

²¹ See Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, paras. 10-12.

²² Appeal, paras. 3(b), (c), (d), and 4. The Supreme Court Chamber notes, however, that, contrary to the Accused's submissions, the statements by Prime Minister Hun Sen referred to in the Appeal, para. 3(c), did not refer to any potential witness in particular, as correctly pleaded by the Accused himself in his previous requests (Rule 35 Request, para. 3(b); Request for Investigation, 30 November 2009, D254, para. 6).

²³ Rule 35 Request, fn. 2; Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, paras. 1-17.

²⁴ Appeal, paras. 3(d), 5-6, 9-10.

²⁵ Impugned Decision, para. 21.

Government of Cambodia and the UN Secretary General. The Supreme Court Chamber finds that the Accused has not demonstrated a detrimental effect of these allegations on the fairness of Case 002.

Fourth ground of appeal

17. The Supreme Court Chamber finds that this ground of appeal lacks any factual basis in the Impugned Decision, which cannot be reasonably interpreted as barring a party from requesting the Co-Investigating Judges or a Chamber to take discretionary action pursuant to Rule 35(2).

Breach of confidentiality

18. The disclosure of classified documents, if established beyond reasonable doubt, is an offence under Rule 35(1)(a), possibly leading to a sanction in accordance with Cambodian law²⁶ and/or a finding of misconduct against a lawyer.²⁷ Taking cognisance of the facts of the present case, as confirmed by the Defence,²⁸ the Supreme Court Chamber recalls that the proper course of action would have been for the Defence to request the relevant Chamber to release a public version of the concerned filings.²⁹

19. The Supreme Court Chamber is concerned that the Defence states, suggesting that it is prepared to wilfully disregard future binding orders, that it “will continue to publish its own submissions” if considered to be consistent with Cambodian law and NUON Chea’s interests.³⁰ This Chamber emphasises that it is for the relevant Chamber alone to determine whether certain documents on the case file are to be classified, and therefore treated, as confidential or public and to amend such classification.³¹ Therefore, this Chamber reminds the Defence of its duty to respect judicial orders and classification of filings³² and warns it against further unauthorised disclosure of confidential or strictly confidential information. Such unauthorised disclosure will be dealt with in accordance with Rules 35(2) and 38.³³

²⁶ Rule 35(4).

²⁷ Rules 35(5), 38.

²⁸ Reply, para. 6.

²⁹ Practice Direction 004/2009: Classification and Management of Case-Related Information, 5 June 2009, Article 9.3.

³⁰ Reply, para. 7.

³¹ See *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, “Judgement”, Trial Chamber, 30 August 2006, para. 22.

³² Rule 22(4) (obliging lawyers before the ECCC to respect, *inter alia*, the ECCC Practice Directions).

³³ See Decision on Nuon Chea’s Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 39 and third dispositive paragraph; Warning for Unauthorised Disclosure of Confidential Information, 9 July 2010, D314/1/11, Disposition.

20. In relation to the breach of confidentiality in the present Appeal, the Supreme Court Chamber decides not to initiate proceedings under Rule 35.³⁴ It further decides to declassify the documents included under this immediate appeal: E116/1/1 and its attachments, E116/1/2, E116/1/2/1, E116/1/4 and its attachments and E116/1/5.

IV. DISPOSITION

FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:

REJECTS the Appeal;

WARNS the Defence against further unauthorised disclosure of classified information;

DECIDES to re-classify as public the documents referred to above;³⁵

Pursuant to Rule 108(4)(*bis*), full reasons will follow as soon as possible.



Phnom Penh, 30 January 2012

President of the Supreme Court Chamber

³⁴ Rule 35 vests the Co-Investigating Judges and the Chambers with a discretionary power to deal with interference with the administration of justice, as indicated by its first and second paragraphs, which use the verb “may”. See *Prosecutor v. Nsengimana*, ICTR-01-69-A/ICTR-2010-92, “Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses”, Appeals Chamber, 16 December 2010, paras. 17, 22 (finding that contempt proceedings are discretionary and therefore a trial chamber “may decline to initiate [them] despite the fact that sufficient grounds exist to proceed against a person for contempt”).

³⁵ See *supra* para. 20.