

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "APPEAL AGAINST
CONSTRUCTIVE DISMISSAL OF APPLICATION FOR IMMEDIATE ACTION
PURSUANT TO RULE 35"**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. The international members of the defence for Nuon Chea (“Defence”) have filed an appeal¹ (“Appeal”) claiming “constructive dismissal” of a previous application² (“Application”) they made requesting “immediate action pursuant to Rule 35”. The Application alleged government interference in the ECCC, and sought as a remedy: (i) “an acknowledgement of the injurious impact of [a note written by former International Co-Investigating Judge Kasper-Ansermet]; (ii) a full investigation into the effects of the alleged RGC interference on the fairness of Case 002; and (iii) a stay of the proceedings pending the outcome of such an inquiry.”³
2. The Co-Prosecutors responded to the Application on 3 May 2012, urging the Trial Chamber to dismiss the Application⁴ (“Response”). The Trial Chamber has not yet ruled on the Application.
3. The Co-Prosecutors hereby respond to the Appeal. The Co-Prosecutors do not object to the admissibility of the Appeal, but maintain their position in opposition to the substance of the Application (and now the Appeal) as put forth in their Response. As the issue of “constructive dismissal” is one of first impression before the Supreme Court Chamber, the Co-Prosecutors offer the following observations should the Supreme Court Chamber find them helpful.

II. OBSERVATIONS

4. The issue of constructive dismissals has been addressed by the Pre-Trial Chamber (PTC), and analysis of their decisions may be instructive to, although not dispositive of, the Supreme Court Chamber’s analysis. As an initial matter, the Co-Prosecutors observe that the concept of “constructive dismissal” should only be available to a party if the subject matter of the original application is one that is subject to immediate appeal under Rule

¹ E189/2/1 Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35, 10 October 2012 (hereinafter “Appeal”). Notified 22 October 2012.

² E189 Application for Immediate Action Pursuant to Rule 35, 25 April 2012.

³ E189 Application for Immediate Action Pursuant to Rule 35, 25 April 2012, p. 15.

⁴ E189/1 Co-Prosecutors’ Response to Nuon Chea Application for Immediate Action Pursuant to Rule 35, 3 May 2012.

104(4).⁵ The subject matter of the Defence's Application is within the terms of Rule 104(4)(d), and so passes this initial threshold.

5. The Trial Chamber has inherent discretion to rule on applications, requests, and motions on a schedule it deems most appropriate. However, like all discretionary acts, those decisions may be challenged as errors in the exercise of discretion.⁶
6. The Defence do not propose any broadly applicable time limit, but argue that a decision must be made in a "reasonable time"⁷ and that in relation to their Application such a period is six months.⁸ The Co-Prosecutors submit that there should be no strict time limit after which a trial chamber can be said to have abused its discretion in waiting to rule on a filing. An analysis of what is a reasonable period within which to rule on a pending request is dependent on the specific circumstances that surround any individual issue. That analysis must, of course, take into account the accused's right to a fair and expeditious trial⁹ and the victims' right of equal and effective access to justice,¹⁰ all of which are facilitated by the timely disposition of matters arising during the course of a trial.
7. In the Pre-Trial Chamber decision cited by the Defence,¹¹ the PTC held that the Co-Investigating Judges' failure to rule on a request (over a period of three and a half months) amounted to a "constructive refusal."¹² However, that decision is at least partially distinguishable from the instant circumstances because the PTC was considering a failure to rule on a request made to call an expert under Rule 31(10). Rule 31(10), unlike Rule 35, states that a request made pursuant to it "shall be ruled upon by the Co-Investigating Judges or the Chambers *as soon as possible*"¹³ No such imperative is contained in Rule 35, and thus the "reasonableness" of the timeline to rule on such a request is arguably longer.

⁵ The PTC reflected this principle in holding an appeal based on constructive refusal admissible because the claim was one "which can be appealed against under Internal Rule 74(3)(d)." **A189/I/8** Decision on Ieng Sary's Appeal Regarding the Appointment of A Psychiatric Expert, 21 October 2008, para. 24.

⁶ See Rule 105(2)(b).

⁷ **E189/2/1** Appeal, at 3.

⁸ **E189/2/1** Appeal, at 4.

⁹ Enshrined in Article 35 new of the Law on the ECCC and Rule 21(1) and (4).

¹⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Sections VII and VIII; Rule 21(1) and (4).

¹¹ **E189/2/1** Appeal, at 3.

¹² **A189/I/8** Decision on Ieng Sary's Appeal Regarding the Appointment of A Psychiatric Expert, 21 October 2008, para. 24.

¹³ Rule 31(10) (emphasis added).

8. The PTC also noted that under Article 170 of the Cambodian Code of Criminal Procedure a charged person may “seize the Investigative Chamber directly when an investigating judge fails to issue an order responding to a request to appoint an expert within thirty days.”¹⁴ Article 133 of the Cambodian Code of Criminal Procedure, which applies to general investigatory requests by Charged Persons, also provides a one month time limit after which the issue may be brought to the Investigation Chamber.¹⁵ The PTC noted this in a separate decision regarding constructive refusal of a purported investigatory request.¹⁶ Thus, the Cambodian Code of Criminal Procedure provides alternative avenues of relief when an applicant is faced with judicial inaction, in specific circumstances. It does not do so in the circumstances applicable in the present case.
9. In holding that the failure to rule on a request “in circumstances where a delay in making a decision deprives the Charged Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of the application”, the PTC relied on the Privy Council decision in *Boodhoo and others v. Attorney General of Trinidad and Tobago*¹⁷. In that case, the Privy Council was addressing a delay of almost two years in issuing a judgement on appeal.¹⁸ The Privy Council held that a delay could be violative of the Constitution of Trinidad and Tobago’s guarantee of “the protection of the law”¹⁹ “only in circumstances where by reason thereof the judge could no longer produce a proper judgement or the parties were unable to obtain from the decision the benefit which they should.”²⁰
10. In regards to the latter situation, the Privy Council gave the example of “an application to prevent the threatened abduction of a child, [where] any delay in giving judgment might deprive both the applicant and the child of the benefit which the legal remedy was there to

¹⁴ **A189/I/8** Decision on Ieng Sary’s Appeal Regarding the Appointment of A Psychiatric Expert, 21 October 2008, para. 22.

¹⁵ Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation, First Publication, September 2008.

¹⁶ **D171/4/5** Decision on Ieng Sary’s Appeal Against the Co-Investigating Judges’ Constructive Denial of Ieng Sary’s Third Request for Investigative Action, 22 December 2009, para. 7.

¹⁷ Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004.

¹⁸ Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004, paras. 3, 4.

¹⁹ Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004, para. 7 (quoting the Constitution of Trinidad and Tobago, section 4(b)).

²⁰ Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004, para. 13.

provide.”²¹ The Privy Council was, however, careful not to prescribe in advance the application of this principle, stating: “Their Lordships do not think it profitable to attempt to define more precisely the circumstances in which this may occur or to specify periods of delay which may bring about such a result, since *cases vary infinitely and each has to be considered on its merits*, applying this principle”²² (emphasis added).

11. The Defence argue that they have been denied the benefit they seek because “[t]he ability of the Defence to challenge the credibility of the evidence presented at trial has been severely constrained, and the purpose of filing the Application *de facto* defeated” without elaborating further how this is so.²³ Even if the Supreme Court Chamber were to find this to be a relevant standard, it is at least questionable whether the Defence have met their burden. This is especially so because their underlying Application is based on a description of alleged government interference in Cases 003 and 004, whereas Nuon Chea is an accused in Case 002. The Supreme Court Chamber has previously observed:

*As for the factual allegations primarily concerning Cases 003 and 004, but alleged to indirectly impair the fairness of Case 002, the Supreme Court Chamber notes that the Appeal advances a syllogism according to which government interference against prosecution in Cases 003 and 004 would necessarily imply interference against the Accused in Case 002. The Supreme Court Chamber defers to the wide discretion vested with the Trial Chamber, which is better placed to evaluate the impact of these factual allegations on the proceedings before it. Since the Defence offers no compelling support in favour of its argument, it has failed to demonstrate 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” on the fairness of Case 002.*²⁴

12. Finally, the Co-Prosecutors note that they have previously made submissions to the PTC on the issue of constructive refusal that may be of interest to the Supreme Court Chamber in document A189/I/5.²⁵

²¹ Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004, para. 13.

²² Judicial Committee of the Privy Council, *Boodhoo vs. The Attorney General of Trinidad and Tobago*, 1 April 2004, para. 13.

²³ E189/2/1 Appeal, at 4.

²⁴ E116/I/7 Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, 27 April 2012, para. 33 (internal citations omitted).

²⁵ A189/I/5 Co-Prosecutors’ Response to Ieng Sary’s Appeal Regarding Appointment of an Expert to Assess His Fitness to Stand Trial, 18 July 2008, paras. 18-22;

III. CONCLUSION

13. Without conceding any of the claims regarding the underlying substantive motion contained in the Appeal, the Co-Prosecutors do not object to its admissibility. Should the Supreme Court Chamber find the Appeal admissible, the Co-Prosecutors reiterate the arguments in their Response, and submit that the Appeal should be dismissed for the reasons stated therein.

Respectfully submitted,

Date	Name	Place	Signature
1 November 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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