



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

អង្គជំនុំជម្រះតុលាការអំពូល

Supreme Court Chamber
Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
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CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក (២០)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(20)

Before:
Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: 25 March 2013
Language(s): Khmer/English
Classification: PUBLIC

**DECISION ON NUON CHEA’S “IMMEDIATE APPEAL AGAINST TRIAL CHAMBER
DECISION ON APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35”**

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Accused
NUON Chea

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35” filed by the Defence for NUON Chea (“Defence”) on 24 December 2012 (“Appeal”).¹

I. INTRODUCTION

2. The Appeal concerns a decision of the Trial Chamber denying an application by the Defence to launch an investigation into the effects of the Cambodian government’s alleged interference on the fairness of Case 002 (“Impugned Decision” and “Application”, respectively).²

a. Background

3. On 19 March 2012, Reserve International Co-Investigating Judge Laurent KASPER-ANSERMET issued a press release announcing his resignation by reason of his “authority to investigate [C]ases 003 and 004 ha[ving] been constantly contested by the National Co-Investigating Judge, YOU Bunleng, [...] [whose] active opposition to investigations into [C]ases 003 and 004 has led to a dysfunctional situation within the ECCC”.³ Judge KASPER-ANSERMET subsequently authored and filed a detailed description of the circumstances which led him to resign from his post, concluding with the “[n]ote and inform[ation] [to] the Parties that there exist within the ECCC, such serious irregularities, dysfunctions and violations of proper procedure that endanger and impede due process of law, and affect, as they have since our arrival into office, the proper conduct of the investigations in Case Files 003 and 004” (“Note”).⁴

4. On 25 April 2012, the Defence filed the Application, arguing that Judge KASPER-ANSERMET’s resignation and Note are “conclusive proof that no Cambodian member of the ECCC is able to act against the [Royal Government of Cambodia’s] judicial agenda.”⁵ The Defence accordingly requested an acknowledgment of the injurious impact of the Note, a full investigation into the effects of the Cambodian government’s interference on the fairness of Case

¹ E189/3/1/1.

² Decision on Application for Immediate Action Pursuant to Rule 35, E189/3, dated 22 November 2012 and filed on 23 November 2012, *disposing of* Application for Immediate Action Pursuant to Rule 35, E189, 25 April 2012.

³ Press Release by the International Reserve Co-Investigating Judge, 19 March 2012.

⁴ Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, D38, dated 21 March 2012 and filed on 23 March 2012, p. 13.

⁵ Application, para. 19. *See also* Application, paras. 1, 6-11, 20.

002, and a stay of the proceedings pending the outcome of such inquiry.⁶ The Co-Prosecutors responded that the Defence's requests for an investigation and a stay of the proceedings in Case 002 should be rejected.⁷

5. On 22 November 2012, the Trial Chamber rejected the Application in its entirety.⁸

b. The Appeal

6. On 24 December 2012, the Defence filed the Appeal, submitting that it is admissible and that the Impugned Decision contains errors of law, fact, and/or in the exercise of the Trial Chamber's discretion.⁹ The Defence accordingly requests that the Supreme Court Chamber quash the Impugned Decision and exercise its discretion to remedy the Trial Chamber's errors by undertaking the investigations requested in the Application, or, in the alternative, by ordering the Trial Chamber to undertake them.¹⁰ In response, the Co-Prosecutors do not oppose the admissibility of the Appeal, but submit that it should be dismissed as unfounded.¹¹ The Defence replies that the Response is "unpersuasive" as to the substance of the Appeal.¹²

c. Request to Consider Additional Evidence

7. On 15 March 2013, the Defence filed a request pursuant to Rules 104(1) and 108(7) of the Internal Rules¹³ for the Supreme Court Chamber to admit into evidence excerpts of a recently published book by former International Co-Investigating Judge Marcel LEMONDE, and to consider that evidence in connection with the Appeal ("Request").¹⁴

8. Rule 104(1) of the Internal Rules provides, in relevant part, that "[f]or the[] purposes [of deciding an appeal against a judgment or a decision of the Trial Chamber], the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue." Rule 108(7) of the Internal Rules provides:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the

⁶ Application, para. 28. *See also* Application, paras. 16-18, 21-27.

⁷ Co-Prosecutors' Response to NUON Chea Application for Immediate Action Pursuant to Rule 35, E189/1, 3 May 2012.

⁸ Impugned Decision, p. 8. *See also* Impugned Decision, paras. 15-16.

⁹ Appeal, paras. 1, 5-59.

¹⁰ Appeal, paras. 1, 51, 60-61.

¹¹ Co-Prosecutors' Response to NUON Chea's "Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35", E189/3/1/2, 14 January 2013 ("Response").

¹² Reply to Co-Prosecutors' Response to Rule 35 Appeal, E189/3/1/3, 21 January 2013 ("Reply"), para. 1.

¹³ Internal Rules of the ECCC, Revision 8, 3 August 2011 ("Internal Rules").

¹⁴ Request to Consider Additional Evidence, E189/3/1/7, 15 March 2013.

Trial Chamber to which the additional evidence is directed. The other parties affected by the request may respond within 15 (fifteen) days of the receipt of notification of the request.

9. The Request was notified on 18 March 2013.¹⁵ Affected parties must therefore file their response, if any, to the Request, no later than 2 April 2013. However, Rule 108(4)(bis)(a) of the Internal Rules imposes a three-month time limit for the issuance of a decision on the Appeal from the date of the receipt of “the case file together with certified copies of the decision and each immediate appeal”.¹⁶ These items were received on 24 December 2012, placing the deadline for the issuance of a decision on the Appeal on 24 March 2013, which falls on a Sunday. Rule 39(3) of the Internal Rules provides that a time limit that expires on a Saturday, Sunday, or Cambodian public holiday shall automatically be extended to the subsequent working day. The Supreme Court Chamber must accordingly file a decision on the Appeal no later than Monday, 25 March 2013.

10. Given that the Request was notified only one week before the Supreme Court Chamber’s deadline to issue its decision on the Appeal, at the time of the filing and notification of the Request, the Supreme Court Chamber had already decided on the Appeal and the written decision was in the final stages of the translation and editorial process. Because the timing of the filing and notification of the Request and the time limit for a response thereto are irreconcilable with the Supreme Court Chamber’s time limit for the issuance of its decision on the Appeal, the present decision is rendered on the basis of arguments contained in the Appeal, Response, and Reply only.

11. The Defence’s plea that the selected excerpts from Judge LEMONDE’s book be considered in connection with the Appeal is thereby rendered moot, and the Request is accordingly dismissed as such. This is without prejudice, however, to the Defence submitting a future application on the basis of the evidence and arguments contained in the Request.

¹⁵ Electronic notification by the Case File Officer of the Court Management Section of the ECCC, sent 18 March 2013 at 11h16.

¹⁶ Rule 108(2) of the Internal Rules, *referred to in* Rule 108(4)(bis)(a) of the Internal Rules.

II. STANDARDS OF APPELLATE REVIEW

12. Pursuant to Rule 104(4) of the Internal Rules, only the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Rule 82 of the Internal Rules; (c) decisions on protective measures under Rule 29(4)(c) of the Internal Rules; and, (d) decisions on interference with the administration of justice under Rule 35(6) of the Internal Rules. Other decisions may be appealed only at the same time as an appeal against the judgment on the merits.

13. Pursuant to Rules 104(1) and 105(4) of the Internal Rules, the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or, (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

III. ADMISSIBILITY

14. The Defence submits that the Appeal is admissible under Rule 104(4)(d) of the Internal Rules,¹⁷ which provides that “decisions [of the Trial Chamber] on interference with the administration of justice under Rule 35(6) [are subject to immediate appeal].” The Co-Prosecutors do not oppose the admissibility of the Appeal.¹⁸

15. Rule 35(6) of the Internal Rules provides that “[a]ny decision under [...] Rule [35 of the Internal Rules] shall be subject to appeal before the Pre-Trial Chamber or the Supreme Court Chamber as appropriate.” The Application was filed pursuant to Rule 35 of the Internal Rules.¹⁹ The Impugned Decision was accordingly rendered under Rule 35 of the Internal Rules.²⁰

16. The Appeal is therefore admissible under Rule 104(4)(d) of the Internal Rules.

¹⁷ Appeal, para. 7.

¹⁸ Response, para. 7. *See also* Response, para. 2.

¹⁹ *See* Application, paras. 1, 28. *See also* Application, para. 16.

²⁰ *See* Impugned Decision, paras. 1-2.

IV. MERITS

17. In refusing to grant the relief sought by the Defence, the Trial Chamber reasoned that the Application “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 and that it “inappropriately seeks the extreme remedy of a stay of proceedings and an unlimited general investigation into the effects of [the Royal Government of Cambodia’s] interference on the fairness of Case 002 on grounds that are either speculative or unrelated to the on-going trial in Case 002”.²² The Trial Chamber noted that the Application “is in fact almost entirely repetitious of submissions [the Defence] has previously made before the Trial Chamber and which have been rejected both by the Trial and the Supreme Court Chambers.”²³

18. The Trial Chamber also warned the Defence 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”,²⁴ and stated that “[g]rave, unsubstantiated allegations of impropriety, on discriminatory grounds, may therefore trigger the [Trial] Chamber’s power to sanction pursuant to Internal Rule 38.”²⁵

19. The Defence submits that the Trial Chamber erred in: failing to consider and/or address the substance of the Application, namely the contents of the Note and the circumstances surrounding Judge KASPER-ANSERMET’s resignation;²⁶ finding that the Application is “almost entirely repetitious” of previous submissions;²⁷ and, concluding that events in Cases 003 and 004 are irrelevant for Case 002.²⁸ The Defence adds that the Trial Chamber’s warnings and accusations of discrimination are unfounded and harmful.²⁹ The Defence accordingly requests that the Supreme Court Chamber quash the Impugned Decision and undertake the investigations or order the Trial Chamber to undertake them.³⁰

²¹ Impugned Decision, para. 10. *See also* Impugned Decision, fn. 21.

²² Impugned Decision, para. 14. *See also* Impugned Decision, para. 9.

²³ Impugned Decision, para. 8. *See also* Impugned Decision, para. 10, p. 8.

²⁴ Impugned Decision, para. 16. *See also* Impugned Decision, p. 8.

²⁵ Impugned Decision, para. 16. *See also* Impugned Decision, p. 8.

²⁶ Appeal, paras. 8-14, 18-24.

²⁷ Appeal, paras. 15-17.

²⁸ Appeal, paras. 25-51.

²⁹ Appeal, paras. 52-59.

³⁰ Appeal, paras. 1, 60-61.

20. The Co-Prosecutors respond that the Defence's failure to demonstrate any tangible interference in Case 002 constitutes a "fatal flaw" in the Application – rendering unnecessary any in-depth discussion of the contents of the Note or the reasons for Judge KASPER-ANSERMET's resignation – as well as an independent ground for rejecting the Application – rendering inconsequential any alleged errors in the Trial Chamber's determination of the Application's repetitiousness.³¹

21. Rule 35(1) of the Internal Rules provides that "[t]he ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice", and includes a non-exhaustive list of representative acts. Rule 35(2) of the Internal Rules provides that "[w]hen 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." It follows from a plain reading of Rules 35(1) and 35(2) of the Internal Rules that Judges and Chambers enjoy the discretion to decide what procedural avenue to follow against acts of *prima facie* interference with the administration of justice, and that they are also entitled to decide, within the bounds of their discretion, whether to take any procedural action at all, even where they may believe interference to have occurred.³²

22. In the present case, the Trial Chamber did not consider a *prima facie* showing of interference with Case 002 to have been made. The Supreme Court Chamber agrees. In the Application, the only specific harm that the Defence alleged to have suffered relates to an inability to call the King Father Norodom Sihanouk (now deceased) and six high-ranking Cambodian governmental officials as witnesses during the judicial investigatory phase of Case 002.³³ This complaint has been issued by the Defence on prior occasions,³⁴ and has accordingly

³¹ Response, paras. 14-44. The Co-Prosecutors also submit that the Defence violated their ethical and professional obligations to the ECCC in disclosing confidential information. *See* Response, paras. 45-50. The Defence contests allegations of impropriety and replies that the confidential information was already in the public domain. *See* Reply, paras. 2-12. The Supreme Court Chamber has addressed these submissions in an order issued on 21 February 2013 for the Defence to file a public redacted version of the Appeal. *See* Order to File a Public Redacted Version of NUON Chea's Appeal (E189/3/1/1), E189/3/1/4, 21 February 2013.

³² *See* 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 ("14 September 2012 Decision"), para. 39.

³³ Application, paras. 2, 23(a), 24.

³⁴ *See* Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, E116/1/7, 27 April 2012 ("27 April 2012 Decision"), para. 9.

been adequately addressed by the Trial Chamber, including in the Impugned Decision.³⁵ The Supreme Court Chamber has also previously addressed the issue 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 [of the Internal Rules], 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.³⁶

23. In the Application, the Defence also claimed that the Cambodian government has a considered and consistent view as to how Case 002 should ultimately be resolved, as allegedly evidenced by public statements by Prime Minister HUN Sen on NUON Chea's guilt, which the Defence submits no Cambodian member of the Trial Chamber would dare to contravene.³⁷ This claim has also been adequately addressed by the Trial Chamber, including in the Impugned Decision.³⁸ The Supreme Court Chamber has similarly addressed the issue as follows:

Th[e Supreme Court] Chamber observes that the declarant holds one of the most influential positions in the country and his statements were concomitant with the proceedings. It follows that the conduct had the *potential* to prejudice the Accused's fair trial rights and compromise the Court's appearance of independence. Statements of this kind should be avoided altogether. That being said, contrary to what the Defence seems to purport, the gist of the corrective action by the ECCC is not to sanction or otherwise embarrass the Prime Minister but to ascertain that no prejudice is caused to the trial proceedings. The trial is being conducted before professional judges only, who are less likely than jurors and lay assessors to be influenced. The evidentiary proceedings are also on-going leaving open the possibility to prove or disprove relevant facts. Furthermore, regarding the source of the publicity, the Supreme Court Chamber observes that the first statement attributed to the Prime Minister was made to the Vietnamese press. It was neither blatantly inflammatory nor designed to attract attention. The subsequent publicity was not a virulent press campaign aimed at hampering the fairness of the trial. Rather, the subsequent widespread coverage and reaction in Cambodia are mainly attributable to the Defence's efforts to give prominence to their grievance.³⁹

For the foregoing reasons, th[e Supreme Court] Chamber finds appropriate the public affirmation of the presumption of innocence and confirmation that the Trial Chamber will not take into account any public comments concerning the guilt or innocence of any Accused. [...] [T]he Supreme Court [Chamber] emphasises the right of the Accused to be presumed innocent. Public officials must avoid comments incompatible with this

³⁵ Impugned Decision, paras. 4, 6, 11-12. *See also* Decision on Rule 35 Request Calling for Summary Action against Minister of Foreign Affairs HOR Namhong (E219), E219/3, dated 22 November 2012 and filed on 23 November 2012 ("HOR Namhong Decision"), para. 16.

³⁶ 27 April 2012 Decision, para. 32 (internal reference omitted).

³⁷ Application, paras. 3, 5, 23(b), 24.

³⁸ Impugned Decision, paras. 4, 7. *See also* HOR Namhong Decision, para. 18.

³⁹ 14 September 2012 Decision, para. 68 (emphasis in original and internal references omitted).

presumption, as such comments, if repeated, could undermine the Accused's right to a fair trial.⁴⁰

24. In this way, the Supreme Court Chamber concurs with the Trial Chamber's assessment that the Application is repetitious of previous submissions, and the Defence does not demonstrate that the actuality of these holdings would be removed by the new circumstances invoked by the Appeal, namely Judge KASPER-ANSERMET's resignation and Note. The Defence nevertheless retains that, "[a]t the very least, pursuant to their ethical obligations, Judges Cartwright and Lavergne should publicly acknowledge and condemn the critical flaws – finally laid bare by the Note – of the judicial system they have, to a certain extent, legitimized through their taciturn approach to this most troubling of issues at the ECCC. Continued silence on the matter of judicial allegiance to the RGC's political agenda would be deafening."⁴¹ However, a review of the Note shows that, contrary to attacking the independence of the ECCC judiciary as a whole, Judge KASPER-ANSERMET's allegations of judicial impropriety at the ECCC are focused on two specific Judges not belonging to the Trial Chamber,⁴² and in relation to Cases 003 and 004,⁴³ only. In this respect, the Supreme Court Chamber notes that the Office of the Co-Investigating Judges of the ECCC has already taken responsive action.⁴⁴

25. Moreover, the Supreme Court Chamber considers that the indefinite and all-encompassing nature of the Defence's request for "a full investigation[] into the effects of [the Royal Government of Cambodia's] interference on the fairness of Case 002" is non-conducive to judicial action under Rule 35 of the Internal Rules. In the absence of specificity as to what particular offensive conduct or outcome should be investigated, the Defence essentially seeks to engage in an open-ended inquiry whose only purpose appears to be in creating a premise to halt the proceedings in Case 002, a goal against which the Trial Chamber is right to guard.

26. As such, the Supreme Court Chamber finds no error in the Trial Chamber's conclusion that there is no reasonable basis to believe that interference may have occurred in the fairness of the proceedings in Case 002 sufficient to trigger its power to commence an investigation under Rule 35(2)(b) of the Internal Rules. The Supreme Court Chamber further considers that, even if such a basis did exist, the Trial Chamber would have remained within the bounds of its discretion

⁴⁰ 14 September 2012 Decision, para. 69.

⁴¹ Application, para. 21.

⁴² Note, paras. 13-19, 24-29, 34-35, 41-43, 45, 47, 50, 54.

⁴³ Note, paras. 1, 6, 18, 21, 40, pp. 13-14.

⁴⁴ Memorandum from Judge YOU Bunleng, National Co-Investigating Judge, and Judge Mark HARMON, International Co-Investigating Judge, entitled "Response to inquiry re investigations into interference in Cases 003 and 004", E189/3/1/6, confidential, dated 12 March 2013 and filed on 13 March 2013.

to decline to launch such investigation. The Defence has therefore failed to demonstrate any grounds for appellate intervention. The Appeal is accordingly dismissed.

27. With respect to the warning issued by the Trial Chamber, the Supreme Court Chamber considers that accusations of discrimination, if unfounded, are indeed harmful to the Defence. Such warnings should therefore not be issued lightly, and should be reserved for conduct that objectively lends itself to certain qualification as discrimination. Where there is room for doubt, a more cautious approach should be adopted. In the present case, given that the substance of the Application and the Appeal relate to political interference by the Cambodian government with the national component of the ECCC's judiciary, the Defence's repeated references to the Judges of the Trial Chamber along national or international lines do not necessarily demonstrate discriminatory intent. Whether the Trial Chamber erred in its assessment on this point, however, has no bearing on the outcome of the Appeal, and the matter therefore requires no further consideration.

V. DISPOSITION

28. For the foregoing reasons, the Supreme Court Chamber:

ADMITS the Appeal under Rule 104(4)(d) of the Internal Rules; and,

DISMISSES the Appeal in its entirety.

Phnom Penh, 25 March 2013

President of the Supreme Court Chamber



KONG Srim