

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**SECOND REQUEST FOR INVESTIGATION
PURSUANT TO RULE 35**

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I. INTRODUCTION

1. Pursuant to Rules 21 and 35 of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) submit this request for investigation (the ‘Request’) to the Trial Chamber. As recently stated in its Request for Investigation Pursuant to Rule 35,¹ throughout the proceedings the Defence has articulated suspicions that certain individuals are interfering with the administration of justice at the Extraordinary Chambers in the Courts of Cambodia (the ‘ECCC’). Such meddling constitutes a serious threat to the independence of the ECCC as a judicial body and therefore to the administration of justice. It furthermore threatens to unduly compromise the reliability of evidence, as well as Nuon Chea’s right to a fair trial. Accordingly, the Defence urges the Chamber to undertake the specific actions requested herein as a matter of urgency.

II. RELEVANT FACTS

2. [REDACTED] (the ‘Witness’) was interviewed by the Office of the Co-Investigating Judges (the ‘OCIJ’) on 30 April 2008,² and again on 30 November 2009.³ The written record of the interview of 30 April 2008 (the ‘Record’) reads, in relevant part (emphasis added):

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ See Document No **E-82**, (NC) ‘Request for Investigation Pursuant to Rule 35’, 29 April 2011, ERN 00680941-00680955 (the ‘First Request’).

²

³



III. RELEVANT LAW

A. Interference with the Administration of Justice

3. Rule 35(1) and (2) states, in relevant part:

The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, including any person who: [...] (d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber; (e) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or the Chambers; (g) incites or attempts to commit any of the acts set out above;

When 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.

4. The Pre-Trial Chamber (the 'PTC') has identified three distinct standards of proof that govern Rule 35 proceedings. Of these, the 'reason to believe' standard applies to the instant request. The PTC has qualified this standard as 'an extremely low threshold'.⁴
5. For the sake of brevity,⁵ the Defence incorporates by reference its previous legal submissions on Rule 35.⁶

B. Right to a Fair Trial

6. Rule 21(1) reads, in relevant part:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of [...] Charged Persons [...] and so as to encourage legal certainty and transparency of proceedings [...].

C. Independence and Impartiality of the Judiciary

7. For the sake of brevity,⁷ the Defence incorporates by reference its previous legal submissions on this topic.⁸

D. Authority of the Trial Chamber

8. Pursuant to Rule 35(2), this Chamber has the authority to conduct further investigations in situations where willful interference with the administration of justice is suspected.

IV. ARGUMENT

A. Clear Signs of Interference Exist

9. The suggestion of pressure and intimidation that emerges from the transcript of the witness interview (outlined in paragraph 3) speaks for itself;⁹ it provides a reason to

⁴ See Document No **D-314/1/12**, (NC) 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 September 2010, ERN 00600748-00600774 (the 'Second Rule 35 Decision'), paras 36-37.

⁵ There is a strict limit of 15 pages for filings to the Trial Chamber, pursuant to Article 5.1 of the Practice Directions.

⁶ Document No **D-254**, (NC) 'Request for Investigation', 30 November 2009, ERN 00410838-00410848 (the '2009 Request'), paras 10-12; and Document No **002/07-07-2010-ECCC-PTC(10)-1-**, (NC) 'Second Request for Investigation (Rule 35)' filed before the PTC, 7 July 2010, ERN 00553229-00553250, also filed before the OCIJ as Document No **D-384.1**, (NC) 'Annex A: Second Request for Investigation (Rule 35)', 07 July 2010, ERN 00549037-00549058 (the '2010 Request'), paras 18-23.

⁷ See n 5 supra.

⁸ 2010 Request, paras 24-26.

believe that an individual (or individuals) may have intimidated the Witness and/or tried to influence him and/or tried to alter the substance of his statement, and therefore interfered with the administration of justice.¹⁰

10. The Defence notes that it is not its responsibility to provide irrefutable evidence of interference. It suffices for the Defence to provide the Chamber with a ‘reason to believe’ that a person ‘may’ have interfered with the administration of justice; an extremely low threshold.¹¹ The standard of proof for the applicability of Rule 35 has therefore been met by the Defence.

**B. The Chamber Must Investigate as the Accused’s
Fair Trial Rights are Threatened and/or Violated**

11. Pursuant to Rule 21, a Rule 35 investigation is imperative when fair trial rights of an accused are threatened or violated. It is clear that *any* intimidation or instruction of a witness potentially violates the fair-trial rights of an accused; this is all the more true if such a witness then proceeds to provide a statement that might be considered to be inculpatory with regard to an accused by the OCIJ and/or the Trial Chamber.
12. As the PTC has put it:

Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and trial stage. Integrity of the process is guaranteed through the judicious application of this Rule when the CIJs or a Chamber consider actions taken by an individual threaten the administration of justice. The application of this provision, even when there has been no immediate impact upon investigative and judicial decisions, acts as a deterrent to others that may consider influencing the process. The Rule also promotes confidence in both individuals who have given statements and those that may consider providing evidence that the CIJs and/or Chamber will act without hesitation towards those that seek to prevent or influence their involvement with the ECCC. In doing so the credibility of proceedings before the ECCC, at both international and domestic level, will be preserved.¹²

⁹ The procès-verbal of the statement clearly suggests that the testimony of the Witness may have been motivated and/or influenced by fear and/or concern for the personal security and safety of the Witness and/or his family; similarly, inappropriate promises of early release from prison or (conversely) threats of a prolonged detention may have unduly influenced the contents of the witness statement.

¹⁰ The Defence submits that there is reason to believe that (again) this interference originates within the RGC; however, this issue is not dispositive of the outcome of this Rule 35 procedure: *any* form of interference with witnesses and/or their statements should be countered forcefully by the judiciary, regardless of the source of this interference.

¹¹ Whether or not (the substance of the statements of) ██████████ was actually affected by the outside pressure is irrelevant when considering the Request; Rule 35(1)(g) proscribes also mere attempts at interference.

¹² Document No **D-314/7**, ‘Confidential Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses’, 8 June 2010, ERN 00527392-00527420, para 38.

13. Accordingly, this Chamber is under a duty to effectively investigate and address such interference.¹³

C. The Reliability of Potential Evidence is Affected

14. The Defence has a clear interest in the verification of the reliability of evidence that may be used against the Accused. Throughout the proceedings, the Defence has underlined the importance of ensuring the reliability of evidence.¹⁴ The Trial Chamber has confirmed that the ‘verification of the reliability of [material tendered at trial is] a pre-condition for its use as evidence’.¹⁵ Evidence must therefore have sufficient indicia of reliability to be admitted.¹⁶
15. The reliability of the Witness’ testimony has been undermined by the manifestations of intimidation and instruction that become evident when reading the Witness Statement; it is the task of this Chamber to determine the extent of the interference, its origins, its apparent purpose, and the effect it has had on the substantive content of the statement. For reasons of efficiency, this investigation would be best conducted before the Initial Hearing.

A. The Hearing of the Witness at Trial Is Not an Adequate Alternative

16. The hearing of ██████████ during the trial is not an adequate alternative to the initiation of a Rule 35 Procedure. The hearing of the Witness during trial may well succeed in casting doubt on the reliability of the Witness and his statements; but any impeachment will fall short of effectively uncovering, addressing, and remedying the outside interference which the Defence believes occurred. Effectively uncovering,

¹³ Moreover, there is no reason to assume that only this witness has been intimidated and/or instructed, considering the long-standing patterns of interference in the work of the ECCC (see Nuon Chea’s earlier Requests for Investigative Action); the investigation by the TC should therefore not be too limited in scope, and also address pressure (possibly) exerted on other witnesses, if the TC receives (or has received) signals that such pressure has been applied.

¹⁴ See Document No **D-336**, (NC) ‘Twenty-second Request for Investigative Action, 26 January 2010, ERN 00436437-00436445 (the ‘22nd RIA’), para 16; and, Document No **D-319**, (NC) ‘Twentieth Request for Investigative Action’, 13 January 2010, ERN 00432928-00432937 (the ‘20th RIA’) para 16. See also Document No **D-253**, ‘Sixteenth Request for Investigative Action’, 30 November 2009, ERN 00410803–00410810; and Document No **D-265**, ‘Seventeenth Request for Investigative Action’, 8 December 2009, ERN 00411348–00411357.

¹⁵ Case File No 001/18-07-2007-ECCC/TC, Document No **E-5/10/5**, Public ‘Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3’, 29 July 2009, ERN 00356281-00356285, para 8.

¹⁶ See 22nd RIA, para 6; and 20th RIA, para 6.

addressing, and remedying outside interference requires a proper investigation into such interference and concomitant sanctions. Only such an approach will function ‘as a deterrent to others that may consider influencing the process,’¹⁷ something mere impeachment of the Witness at trial will fail to achieve. Furthermore, a Rule 35 investigation is indispensable in order to provide the Defence with the required tools to impeach the Witness at trial. The Defence needs to be presented with¹⁸ a comprehensive account of what exactly transpired, in order to be able to effectively question the Witness. Only an investigation by the Trial Chamber—*before* the hearing of the Witness during trial—can accomplish this.¹⁹

E. A Prompt Decision on This Request Is Necessary

17. As argued herein as well as in earlier Defence submissions, interference seems to have been widespread and protracted. All things considered, there is no good reason to believe that interference is not ongoing at the present juncture. The situation requires nothing less than *prompt* action by this Chamber, (also) to discourage further interference with (statements by) witnesses. Additionally, these violations must be properly documented *in advance* of trial in order for the Trial Chamber to possibly provide adequate remedies during trial and to allow the Defence a meaningful opportunity to react to any (proven) interference and/or investigation. For these reasons, the Defence requests a decision on the instant request within a month.

V. REQUEST

18. The Defence submits that only a comprehensive inquiry can effectively investigate and remedy willful interference with (the statements of) ██████████ (and possibly other witnesses). Consequently, the Defence hereby requests the Trial Chamber to take the following actions as a matter of urgency:

¹⁷ Document No **D-314/7**, ‘Confidential Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses’, 8 June 2010, ERN 00527392-00527420, para 38.█

¹⁸ Again, as is well known, not only does the Defence not have the authority or resources to conduct such an investigation itself, it remains explicitly barred from undertaking any such investigative action.

¹⁹ For the same reason, the decision on and execution of this Request should not be postponed until *after* the Witness has provided testimony in open court. The signs of interference are abundant and clear, so there is no reason to delay the initiation of the investigation; moreover, as argued, for an adequate and effective questioning of the Witness at trial an antecedent investigation is a prerequisite. Deferring the Rule 35 investigation until after hearing the Witness at trial will only increase the likelihood that the Witness will need to be reheard a second time, thus wasting precious court time and resources.

- a. re-interview [REDACTED];²⁰
- b. interview [REDACTED]'s sister and relatives;
- c. interview the 'chiefs' mentioned in [REDACTED]'s statement;
- d. interview [REDACTED]'s niece and wife;
- e. undertake any other measures and pursue any other leads in order to effectively investigate the signs of interference with (the statements made by) [REDACTED];
- f. undertake any other measures and pursue any other leads in order to effectively investigate other signs of willful interference that may be uncovered in the course of this Rule 35 investigation;
- g. effectively sanction any individual that is found to have interfered with the proper administration of justice, (also) in an attempt to discourage future interference with statements by witnesses;
- h. decide on this request within a month of its filing.

CO-LAWYERS FOR NUON CHEA

P.P.



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&



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²⁰ The Defence submits that *at a minimum* the questions that were suggested by the Defence as part of its 22nd RIA (relating to interference) should be asked; see 'Questions to be put to the Witness' submitted by the Defence (Document No **D-336.1**, (NC) 'Annex A: Questions to be put to the Witness', 26 January 2010, ERN 00436459-00436474).