



**Decision on the Cambodian Prime Minister’s Public Statement  
Regarding the Guilt of Accused Nuon Chea**

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There have been numerous allegations over the years that judges, defense counsel, journalists, and Cambodian officials have “interfered with the administration of justice” at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Nevertheless, when, how, and what sanctions should be applied for the assortment of behavior potentially falling within this category of offense remains both untested and opaque. In considering the repercussions of public comments made by the Cambodian Prime Minister, a new Supreme Court Chamber (SCC) decision establishes a framework for the application of the Court’s contempt procedure and takes the Trial Chamber to task for its handling of some related fair trial issues.

During an exchange with Vietnamese journalists in Vietnam at the inauguration of a monument commemorating the establishment of a military unit that participated in the overthrow of the Pol Pot regime, Prime Minister Hun Sen was asked, “Recently at the court trial of Khmer Rouge, [accused] Nuon Chea said something that went against history, made false accusations against Vietnamese volunteer forces. What is your opinion?” The Prime Minister reportedly replied:

I have heard of the statement of Nuon Chea, a person of important position in the Pol Pot regime who has been tried in the past weeks. He did not admit to his wrongdoings but gave lies about the Vietnamese volunteer forces. I consider those statements lies from a murderer. There are always excuses the bad guys resort to so as to dodge their wrongdoings. He said so to lessen his sin so we should not respond but let the court judge. The reality happened contrary to what Nuon Chea said. The truth is that the Vietnamese volunteer forces helped free the Cambodian people from the genocidal Pol Pot regime.<sup>1</sup>

During Case 002 proceedings, the Nuon Chea defense brought this statement to the Trial Chamber’s attention and argued that it violated their client’s right to a presumption of innocence. They asked the Chamber to publicly condemn the Prime Minister’s remarks and ask him to refrain from making similar statements in the future. Fourteen trial days later, and only after repeated prodding by defense counsel, the Trial Chamber issued an oral confirmation that it “will not take account of any public comment concerning the guilt or innocence of any Accused in reaching its verdict.”<sup>2</sup> The Nuon Chea team orally argued that this did not amount to a ruling on their application; however, the President of the Chamber stated that the matter had already been decided.

The Nuon Chea team then filed a written Internal Rule 35 application for interference in the

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<sup>1</sup> Quoted in Decision on NUON Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, ¶ 6 (Sept. 14, 2012).

<sup>2</sup> Transcript of Trial Proceedings—Case 002, 113 (Feb. 2, 2012) (statement in part).

administration of justice,<sup>3</sup> which the Trial Chamber found inadmissible as “a repetitious filing or a disguised appeal.” Nevertheless, after examining jurisprudence of the European Court of Human Rights, the Chamber “clarified” its earlier oral ruling, noting that it was “clear from the international jurisprudence that any declaration of an accused person's guilt by a public official prior to a verdict being delivered by a court is incompatible with the presumption of innocence.”<sup>4</sup> It said that the remarks attributed to the Prime Minister amounted to prejudgment by a senior official and were therefore inappropriate with the public perception of the presumption of innocence<sup>5</sup> but that the remarks would not influence the Chamber’s judgment.

In considering the admissibility of the Nuon Chea appeal, the SCC strongly objected to the Trial Chamber’s characterization of the team’s persistence in this matter, together with other behavior, as evidence of a “consistent pattern of professional misconduct.” Instead, it found such persistence to be “justified given the Trial Chamber’s lack of clarity relating to the Defence’s applications[,]” including its failure to provide a reasoned oral decision.<sup>6</sup>

On the merits of the request, the SCC for the first time laid out a framework for the application of Internal Rule 35. Rule 35(1) gives the Court authority to “sanction or refer to the appropriate authorities [] any person who knowingly and willfully” interferes with the administration of justice, and enumerates six categories of qualifying acts.<sup>7</sup> The SCC found that such acts may, but need not, amount to a crime. Because the ECCC operates within the institutional framework of

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<sup>3</sup> Application for Summary Action against Hun Sen Pursuant to Rule 35 (February 12, 2012). The application includes a request to sanction the Prime Minister’s public reaction after the matter was raised in Court:

I was asked in Vietnam about Pol Pot’s crimes in the Khmer Rouge regime, but Nuon Chea’s lawyer accuses me of interfering in the Khmer Rouge trial. My speeches over Pol Pot, Nuon Chea, Khieu Samphan and Ieng Sary didn’t influence the current court. The court can do whatever it wants but I had the right to condemn Khmer Rouge leaders.

*Cited in* SCC September 2012 Decision, ¶ 7. The Trial Chamber found this application to be without merit.

<sup>4</sup> Decision on Rule 35 Applications for Summary Action, ¶ 18 (May 11, 2012).

<sup>5</sup> *Id.* at ¶ 26.

<sup>6</sup> SCC September 2012 Decision, ¶ 21 and ¶¶ 24-30. *See also*, regarding Trial Chamber decision on defense team’s misconduct, *Expert Commentary on Legal Filings: Decision on Nuon Chea Defence Counsel Misconduct* (July 3, 2012), at <http://www.cambodiatribunal.org/blog/2012/07/expert-commentary-legal-filings-decision-nuon-chea-defence-counsel-misconduct>.

<sup>7</sup> Rule 35 sanctions may be brought against “any person” who:

- a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
- b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers;
- c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;
- 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;
- f) knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC; or
- g) incites or attempts to commit any of the acts set out above.

ECCC Internal Rule 35(1).

Cambodia, Cambodian criminal law controls when the offending acts rise to the level of a crime. With regard to non-criminal offences, the ECCC judges have authority to determine which offenses fall within the scope of the rule. These include not only actual interference with the course of proceedings, but also “conduct [that] undermines the Court’s legitimacy with the parties and the general public,” including “actions undermining the independence and impartiality of ECCC judges.” However, to fall within the ambit of Rule 35, such conduct must be “knowing and willful,” which the SCC defined as “deliberate and not accidental.”<sup>8</sup>

Rule 35(2) provides:

When the ... Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 ..., 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.

As noted by the SCC, the text of this subsection offers little detail. Importantly, as the vagueness of this provision creates potential for abuse, the SCC found that the procedure for establishing liability “should comport with the fundamental requirement of fairness.” To that end, it quoted with approval the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia:

[I]t is “essential that, where a Chamber initiates proceedings for contempt itself, it formulates at an early stage the nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved.”<sup>9</sup>

With regard to which non-criminal sanctions may be applicable, the SCC found that Rule 35(2) encompasses the inherent power to “take measures necessary to ensure the integrity of proceedings[,]”<sup>10</sup> including the imposition of a broad set of corrective administrative sanctions that are both necessary and proportionate. Illustrative examples include “an admonition; notice to self-regulatory bodies, the superior or contracting authority of the culprit; publication of the outcome of proceedings in the media; or a limited administrative fine.”<sup>11</sup>

Reviewing the Trial Chamber’s ruling on the Prime Minister’s remarks, the SCC agreed that there was no question of criminal liability. Importantly for the ECCC’s jurisprudential legacy for the domestic legal system, it made this finding with reference to the Criminal Code of Cambodia, which defines “criminal responsibility for the ‘publication of comments intended to unlawfully influence judicial authorities’” as requiring a “specific intent ‘to influence judicial decision’.”

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<sup>8</sup>*Id.* at ¶¶ 32-38.

<sup>9</sup>*Id.* at ¶ 42, *quoting* Prosecutor v. Aleksovski, Judgement on Appeal by Anto Nobile against Finding of Contempt of Appeals Chamber, ¶ 56 (May 30, 2001).

<sup>10</sup> SCC September 2012 Decision, ¶ 44, *quoting* the ICTY Trial Chamber in Prosecutor v. Beqaj, Judgement on Contempt Allegations, ¶ 13 (May 27, 2005).

<sup>11</sup> SCC September 2012 Decision, ¶ 44.

The SCC said that this was not demonstrated by the overall context of the Prime Minister’s remarks, as he was speaking in Vietnam, was answering a leading question related primarily to a protracted historical debate, and said that “the court can do what it wants.” The SCC therefore found no basis to launch an investigation.<sup>12</sup>

The SCC then engaged in a thorough review of human rights jurisprudence to determine if Nuon Chea’s fair trial rights had been violated, and confirmed the Trial Chamber’s view that “statements by public officials that pronounce on the guilt of an accused are incompatible with the presumption of innocence.”<sup>13</sup>

Finally, concerning the scope of the Court’s duty to preserve the integrity of the proceedings, the SCC noted that the statement had caused potential prejudice to Nuon Chea’s rights as well as the Court’s appearance of impartiality, and found it appropriate to apply a corrective action intended neither to sanction nor embarrass the Prime Minister, “but to ascertain that no prejudice is caused to the trial proceedings.” It therefore endorsed the Trial Chamber’s remedy of affirming the accused’s presumption of innocence and declaring that it will not take public comments regarding their guilt or innocence into account.<sup>14</sup>

Although the SCC reached the same conclusion as the Trial Chamber, it arrived by a divergent route. Its decision offers rich detail not only of the Court’s power to initiate contempt proceedings, but also of the ECCC’s broader fair trial obligations.

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<sup>12</sup> *Id.* at ¶ 47-50.

<sup>13</sup> *Id.* at ¶ 61.

<sup>14</sup> *Id.* at ¶¶ 68, 69.