BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "RULE 35 REQUEST CALLING FOR SUMMARY ACTION AGAINST MINISTER OF FOREIGN AFFAIRS HOR NAMHONG"

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 13 August 2012, the defence for Nuon Chea ("Defence") requested that the Trial Chamber take summary action against HE Minister of Foreign Affairs of the Royal Government of Cambodia Hor Namhong under Internal Rule 35 ("Request").[1] The Defence argue that "summary action"[2] is appropriate because HE Hor Namhong's "recent remarks in the Cambodian press—which must be seen as an attempt to unduly influence the Trial Chamber, upcoming witnesses, the Defence, as well as the general public—amount to an interference with the administration of justice at the ECCC."[3] The Defence request that the "summary action" take the form of a public rebuke to the Foreign Minister and an official warning to him "against making any further statements of a similar nature."[4]

2. On 24 August 2012, the Defence filed an "addendum" to their Request ("Addendum").[5] The Addendum seeks to make the additional claim that HE Hor Namhong's statement further interfered with the administration of justice by threatening, intimidating, or otherwise interfering with witness Phy Phuon, who had provided testimony to the Trial Chamber prior to the date of HE Hor Namhong's alleged statement.[6] The Defence claim that the statement pressured Phy Phoun into recanting a portion of his testimony,[7] and requests as an additional remedy that the Trial Chamber "conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings against Hor Namhong" pursuant to Rule 35(2)(b).[8]

3. In this response, the Co-Prosecutors oppose the Defence's Request and Addendum. The Co-Prosecutors submit that the Defence has failed to substantiate a claim of interference with the administration of justice under Internal Rule 35 ("Rule 35").

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[1] **E219** Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs Hor Namhong, 13 August 2012 ("Request"). Notified on 15 August 2012.
[2] **E219** Request, *supra* note 1 at para. 23(b); Rule 35(2)(a) allows the Trial Chamber to deal with an instance of interference summarily.
[3] **E219** Request, *supra* note 1 at para. 1
[4] **E219** Request, *supra* note 1 at para. 23(c).
[5] **E219/1** Addendum to Rule 35 Request for Summary Action Against Minister of Foreign Affairs Hor Namhong, 24 August 2012. Notified 24 August 2012.
[6] **E219/1** Addendum, *supra* note 5 at para. 4.
[7] **E219/1** Addendum, *supra* note 5 at paras. 4, 5.
[8] **E219/1** Addendum, *supra* noate 5 at para. 7 (internal quotation marks omitted).

II. THE REQUEST SHOULD BE DENIED

4. Rule 35 is concerned only with actions that amount to an interference with "the administration of justice." Its purpose is "to ensure that the exercise of a court's jurisdiction is not frustrated and that its basic judicial functions are safeguarded."[9] To that end it is the "*judicious* application of this Rule when the CIJs or a Chamber consider actions taken by an individual threaten the administration of justice" that protect the integrity of the process.[10] The Rule is not a mechanism to embroil the Trial Chamber's scant time and resources unnecessarily.

5. Rule 35(1) states that the Trial Chamber "may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice", or incites or attempts to do so.[11] It further provides a non-exhaustive list of modes of possible interference.[12] Rule 35(2) states that when the Trial Chamber has "reason to believe that a person may have committed any of the acts set out [in Rule 35(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."

6. The relevant analysis "involves an assessment of the presence of … an act or omission which may be construed as threatening, intimidating, causing injury, bribing, or otherwise interfering"[13] with a witness or other relevant person or group. "[T]he purpose of prohibiting conduct that tends to prejudice the administration of justice is to ensure that the exercise of a court's jurisdiction is not frustrated and that its basic judicial functions are safeguarded. This clearly requires that outside actors refrain from seeking to influence a court's judges[, witnesses, or other relevant group] or from acting in a way that could be perceived as an attempt to do so."[14] "[I]t is immaterial whether the witness

[9] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 21.
[10] **D314/2/7** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 38 (emphasis added).
[11] Rule 35(1) & 35(1)(g).
[12] Rule 35(1)(a-f).
[13] **D314/2/7** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 38.
[14] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 21 (internal references omitted).

[or other relevant group] actually felt threatened or intimidated, or was deterred or influenced."[15]

7. To prevent Rule 35's abuse, to focus the matters that properly fall within its purview, and to protect a reasonable realm of free speech, Rule 35 imposes evidentiary thresholds that a moving party must meet in order to trigger the Rule's remedial provisions:

> *According to Internal Rule 35(2), a Chamber seized with allegations of interference with the administration of justice may only act under this rule where it has a reason to believe that a person may have interfered with the administration of justice ... This is a minimum, threshold condition for inquiry, triggered by a "reasonable belief" that conduct with the potential to threaten the administration of justice may have occurred. It gives rise merely to further inquiry and does not require the Chamber to engage in a detailed examination of the merits of an allegation or suspicion of interference, or to assess questions of individual criminal responsibility. This threshold will be satisfied where the material basis for the allegation reasonably leads a Chamber to believe that the allegation is not merely speculative. Where there is a reasonable belief that a person may have interfered with the administration of justice, the Chambers ... may – but need not – take one or more of the courses of action set out in Rule 35(2), which includes dealing with the matter summarily.*[16]

The Supreme Court Chamber has also emphasised that even where a request under Rule 35 is substantiated, taking action is within the discretion of the Trial Chamber.[17] Furthermore:

> *A finding that there is reason to believe does not require or involve a determination as to the merits of an allegation or suspicion of interference. The finding that the reason to believe standard has been met does, however, require the ... Chamber to have concluded that there exists a material basis or* reason *that is the foundation of their* belief. *This material basis or* reason *shall be established based on an examination of the allegation or suspicion, which examination may be subjective in nature.*[18]

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[15] **D314/2/7** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 40, quoting *Prosecution v. Haraqija and Morina*, IT-04-84-R77.4, Contempt Judgement, ICTY, 17 December 2008, paras. 18-20.

[16] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 20 (internal references omitted).

[17] **E116/1/7** Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, para. 38 and fn. 87 ("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'.").

[18] **D314/1/12** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 37 (emphasis in original).

8. In the view of the Co-Prosecutors, additional guidance from the Trial Chamber regarding the functioning of Rule 35 would bring helpful clarity to its interpretation, but is not strictly necessary to the resolution of the instant Request. Regarding the threshold of proof that must be met in order to take summary action under Rule 35(2), the Trial Chamber, as stated above, has opined that summary action may be employed on a finding of reasonable belief.[19] However, the Trial Chamber has also stated that a finding of reasonable belief is a "minimum, threshold requirement for inquiry" that "gives rise merely to a further inquiry" and does not involve "a detailed examination of the merits of an allegation".[20] The Pre-Trial Chamber has agreed that the "[t]he *reason to believe* standard is an extremely low threshold and merely invokes inquiry by the … Chamber."[21] The Co-Prosecutors acknowledge that the clause under Rule 35(2)(a) allowing the Trial Chamber to "deal with the matter summarily" encompasses many potential actions, some of which, such as dismissal of a request, may not need any further evidentiary finding beyond a "reason to believe". However, it would be odd indeed if a minimum threshold requirement for mere *inquiry* would be the same evidentiary standard for conclusively assigning blame summarily.[22] Therefore, the Co-Prosecutors submit that when the summary action involves some determination of guilt, as the requested remedies of the Defence do here, a higher standard of proof is necessary. This is confirmed by ICTY jurisprudence regarding actions under Rule 77 that this Trial Chamber has previously referenced, which requires proof "beyond a reasonable doubt" to find guilt.[23] This Trial Chamber itself has affirmed that "[a]s with ICTY Rule 77, proceedings under Internal

[19] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 20 (internal references omitted).
[20] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 20 (internal references omitted).
[21] **D314/1/12** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 37 (emphasis in original).
[22] The Pre-Trial Chamber has stated that a threshold of "sufficient grounds" is necessary to employ any of the measures under Rule 35(2), although "sufficient grounds" is only mentioned in Rule 35(2)(b). **D314/1/12** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 36 ("The *sufficient grounds* standard must be satisfied to instigate proceedings, deal with the matter summarily, or refer the matter to the authorities of Cambodia or the United Nations."). Furthermore, the Pre-Trial Chamber's definition of "sufficient grounds" is, by the PTC's own definition, also not a high enough standard to determine wrong doing: "[T]he *sufficient grounds* standard requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed." *Ibid.* para. 38.
[23] *In the Matter of Vojislav Šešelj,* Case No. IT-03-67-R77.4, Public Redacted Version of Judgement Issued on 28 June 2012, ICTY, 28 June 2012, para. 42; *see also Prosecutor v. Vojislav Šešelj,* IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008, ICTY, para. 16 ("The Appeals Chamber recalls … that the 'sufficient grounds' standard under Rule 77(D) of the Rules requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed.").

Rule 35 are criminal in nature, and subject therefore to the ordinary principles of criminal liability."[24] The Supreme Court Chamber has likewise indicated that a finding of malfeasance under Rule 35(1) must meet the "beyond reasonable doubt" standard.[25]

9. Furthermore, the Co-Prosecutors submit that the moving party must not only show that the act or omission constituting interference meets the relevant threshold, it must also show that it was done with a *mens rea* of "knowingly and wilfully". There is some tension in the Trial Chamber's previous rulings on this issue. In one decision it held that only where criminal culpability is alleged must the moving party show that the alleged action was committed "knowingly and wilfully" in an attempt to interfere with justice.[26] In another, however, it clearly stated: "The threshold for intervention under [Rule 35] is a reasonable belief that a person 'knowingly and wilfully' interfered in the administration of justice."[27]

10. In the instant Request, the Defence have not alleged criminal liability, however they have requested that the Trial Chamber deal with the matter "by way of summary action"[28]. Rule 35(1) applies the "knowingly and wilfully" standard to any "sanction" imposed by the Trial Chamber, as further delineated in Rule 35(2). One of those potential "sanctions" is for the Trial Chamber to "deal with the matter summarily"[29]. Therefore, the Co-Prosecutors respectfully suggest that any allegation of interference under Rule 35 must meet the "knowingly and wilfully" *mens rea* standard, regardless of whether *criminal* culpability is alleged.[30] As the ICTY has stated in regards to Rule 77, "[f]or each *actus reus* encompassed by Rule 77(A), the [moving party] must establish that the accused acted wilfully and knowingly, that is with specific intent to interfere with the Tribunal's administration of justice. Such intent may be separately proved or inferred from the facts

[24] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, fn. 28.
[25] **E116/1/7** Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 27 April 2012, para. 36 ("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 law79 and/or a finding of misconduct against a lawyer.").
[26] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 22.
[27] **E142/3** Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, 13 March 2012, para. 9; *see also ibid.* at para. 13 (re-affirming knowing and wilful *mens rea* must be shown at the request stage: "In alleging discrepancies between audio recordings and written statements, [the Defence] do not demonstrate, nor seek to demonstrate, that OCIJ personnel knowingly and wilfully falsified the investigative record…").
[28] **E219** Request, *supra* note 1 at para. 23(c).
[29] Rule 35(2)(a).
[30] This position seems to be supported by the Supreme Court Chamber. *See* **E130/4/3** Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring His Presence in Court, 13 January 2012, p. 2 (noting that a non-criminal sanction imposed by the Trial Chamber cannot constitute a "knowing and wilful interference with the administration of justice within the meaning of Rule 35").

of each case."[31] The Defence appear to agree that they must prove the knowing and wilful standard.[32]

11. Regardless, even if summary action may be taken on a "reason to believe" standard and without any showing of *mens rea*, the moving party must show "a material basis or *reason* that is the foundation of their *belief* … based on an examination of the allegation".[33] An examination of the statement attributed to HE Hor Namhong, and the Defence's arguments in support of their Request, do not reveal such a legitimate basis. The Defence's Request falls even shorter if, as the Co-Prosecutors suggest, a higher threshold of proof and a *mens rea* of "knowingly and willfully" are applicable.

12. The entirety of the statement alleged to have interfered with the administration of justice is as follows:

> *It is unfortunate that those who continue to defend the legacy of the Khmer Rouge regime seek, in the interest of their defense, to deflect attention from themselves and their cases, by way of stirring up controversy around public figures like myself. I want to offer this brief statement about my history to dispel this controversy. The Khmer Rouge regime is an epic tragedy that continues to haunt Cambodia's people today. As a prisoner at Boeng Trabek re-education camp where I lost two sisters, their husbands, children, and a niece as well as countless colleagues, I have nothing but sorrow and empathy for the victims and their families. Cambodians continue to suffer from the crimes of the Khmer Rouge even today. The Khmer Rouge not only destroyed a generation of Cambodian people but also, in many ways, a civilization. We are still rebuilding this civilization today. The Extraordinary Chambers in the Courts of Cambodia is a court of law, and not a political forum, and I believe attempts to politicize the court or stir up controversy are inappropriate.*
>
> *My greatest hope is that one day justice is done and the legacy of the Khmer Rouge is given its place in the dustbin of history—without defence or controversy.*

13. The Trial Chamber need look no further than the plain text of the alleged statement to determine that it does not pose an interference with the administration of justice. The

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[31] *The Prosecutor v. Beqa Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, ICTY, 27 May 2005, para. 22.

[32] **E219** Request, *supra* note 1 at para. 10 ("In view of the *mens rea* indicated in Rule 77(A)…") & para. 12 ("In this case, it is clear that Hor Namhong acted willingly and with the knowledge that his conduct was likely to deter or influence a witness or potential witness.").

[33] **D314/1/12** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, para. 37 (emphasis in original).

statement contains no threat or intimidation, and even reiterates that the ECCC "is a court of law, and not a political forum."

14. It is useful to contrast the statement attributed to HE Hor Namhong, with that that the Defence attributed to Prime Minister Samdech Hun Sen which was the subject of a previous ruling under Rule 35 by this Chamber. There, the Defence alleged that the Prime Minister had said: "The killer and genocide (perpetrator) is defending himself in an effort to evade the crime. Everybody knows our country used to have a genocidal regime and [now] we and the world have opened a trial against them".[34] The statements attributed to Prime Minister Hun Sen referred to an Accused by name (as well as the Accused as a group), and stated that he was guilty "as a killer and genocide (perpetrator)".[35] The Trial Chamber found that the Prime Minister's alleged comments, if true, met the "reasonable belief" standard because they were "incompatible with the presumption of innocence" and therefore "risk being interpreted as an attempt to improperly influence the judges in charge of the case".[36] The alleged statement by the Prime Minister is much closer to the statement that resulted in the *Ribemont* judgement that the Defence claim support their cause here, than either of them are to the alleged statement by HE Hor Namhong at issue. In the *Ribemont* case, "some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder."[37] More specifically, in *Ribemont* the Director of the Paris Criminal Investigation Department, who was part of a team "conducting the inquiries in the case"[38], made the remark that "Mr de Ribemont [was] the instigator[] of the murder."[39] That remark was "made in parallel with the judicial investigation [and was] explained by the existence of that investigation and had a direct link with it."[40] Likewise, this Trial Chamber has reiterated that a violation of a presumption of innocence as the result of a public statement by an official occurs when

[34] **E176/2** Decisions on Rule 35 Applications for Summary Action, 11 May 2012, para. 8.
[35] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, paras. 8-9. The Trial Chamber reiterated that those specific words in the alleged statement were central to its conclusions: "In particular, the use of the words "killer and genocide (perpetrator)" would appear to reflect an opinion that NUON Chea is guilty even though he has not been proved so according to law."). *Ibid.* at para. 26.
[36] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 29.
[37] *Case of Allenet de Ribemont v. France*, Application No. 15175/89, Judgement, ECtHR, 10 February 1995, para. 41.
[38] *Case of Allenet de Ribemont v. France*, Application No. 15175/89, Judgement, ECtHR, 10 February 1995, para. 37.
[39] *Case of Allenet de Ribemont v. France*, Application No. 15175/89, Judgement, ECtHR, 10 February 1995, para. 11.
[40] *Case of Allenet de Ribemont v. France*, Application No. 15175/89, Judgement, ECtHR, 10 February 1995, para. 11.

there is a "*declaration of an accused person's guilt* by a public official prior to a verdict being delivered by a court."[41] The relevant test is therefore whether a given official's remarks "would constitute statements incompatible with the presumption of innocence."[42]

15. In striking contrast to *Ribemont* and to the alleged statement by the Prime Minister, HE Hor Namhong's alleged statement does not reference any of the Accused and voices no opinion on the guilt of *anyone* on *any* crimes generally or specifically. The Defence recognize that the statement does not even reference the broad category of the "leadership" of the Khmer Rouge and are relegated to claiming that "the statement that the Khmer Rouge legacy merits no defence at least *suggests* that its leaders merit no defence".[43] Condemnation of the "Khmer Rouge legacy", which is widespread both domestically and internationally, has no bearing on the guilt or innocence of particular members of the leadership of Democratic Kampuchea for particular crimes, and the alleged statement at issue is entirely compatible with a presumption of innocence of the Accused in Case 002 of any crimes.

16. On review of HE Hor Namhong's alleged statement it is equally clear that, contrary to the Defence's claim, it makes no reference to "factual issues that are *sub judice*."[44] As the Trial Chamber can well see for itself, the Defence's characterization of the short, mild statement is far from the "forceful position"[45] and "blatant and inexcusable attempt to convince the judges of the Trial Chamber of Hor Namhong's extrajudicial version of a factual determination"[46] as the Defence seek to characterize it.

17. Despite, or perhaps because of, the dearth of textual support for a claim of interference with the administration of justice, the Defence makes various tenuous arguments in attempts to manufacture an appearance of interference. They claim, without support, that the statement is rendered more ominous by "Hor Namhong's 'untouchable' position as an RGC minister"[47]; they seek to support their request by holding HE Hor Namhong responsible for every alleged action of any member of the Royal Government of Cambodia in regards to Cases 002, 003, and 004[48]; they attempt to place on HE Hor

[41] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 18 (emphasis added).
[42] **E176/2** Decision on Rule 35 Applications for Summary Action, 11 May 2012, para. 29.
[43] **E219** Request, *supra* note 1 at para. 19.
[44] **E219** Request, *supra* note 1 at para. 12.
[45] **E219** Request, *supra* note 1 at para. 14.
[46] **E219** Request, *supra* note 1 at para. 14.
[47] **E219** Request, *supra* note 1 at para. 14.
[48] **E219** Request, *supra* note 1 at para. 17.

Namhong their own inability to heed the Trial Chamber's rulings[49]; and even try to claim that the statement "has the effect, if not the specific purpose" [50] of discouraging *them* from pursuing certain lines of questioning regarding HE Hor Namhong, a claim that is demonstrably false.[51]

18. The Defence's other arguments in support of a claim of interference with the administration of justice are equally specious. They attempt to shoehorn into their Request previously failed attempts to force HE Hor Namhong to testify.[52] They also seek to enlist in their support allegations that HE Hor Namhong has pursued legal action in courts of law.[53] Leaving aside that an individual's attempts to procure redress *through the legal system* can hardly be interference with the administration of justice, it is also worth noting that even according to the Defence's own account these suits were not related to testimony before the ECCC, took place partially in foreign courts, and in one case even before the ECCC existed. These issues have no probative value in the Trial Chamber's determination of the allegation.

19. The additional claim made in the Addendum is likewise premised on the alleged statement of HE Hor Namhong. As explained above, the Co-Prosecutors do not believe that the alleged statement is sufficient to constitute a reason to believe that there has been an interference with the administration of justice under Rule 35. This applies both to past and future witnesses. Furthermore, the Co-Prosecutors note that Phy Phuon's alleged commentary regarding his testimony, even if true, was not done in a way that has any legal bearing on the testimony he provided to the Trial Chamber. The Co-Prosecutors reaffirm the important principles that are protected by Rule 35, however remember that it is the *judicious* use of its powers that contribute to its effectiveness. The Co-Prosecutors submit that the instant allegations do not substantiate further action under Rule 35.

[49] **E219** Request, *supra* note 1 at para. 14 ("Moreover, these identical factors—coupled with Hor Namhong's 'untouchable' position as an RGC minister, [*sic*] must also be seen as an attempt to influence the Trial Chamber—in particular, its Cambodian membership—to continue silencing the Defence on issues the current government considers unplatable.").
[50] **E219** Request, *supra* note 1 at para. 18.
[51] *See, e.g.,* Transcript, 9 August 2012, pp. 77-82; Transcript, 15 August 2012, pp. 36-48.
[52] **E219** Request, *supra* note 1 at paras. 5, 15, 16.
[53] **E219** Request, *supra* note 1 at para. 4.

IV. RELIEF REQUESTED

For these reasons, the Defence have not sufficiently substantiated their claim under Rule 35 and the Co-Prosecutors respectfully request the Chamber to dismiss the Request and Addendum in full.

Respectfully submitted,

Date	Name	Place	Signature
27 August 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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