BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAIL

Case no:	002/19-09-2007-ECCC-TC
Filing party:	Nuon Chea Defence Team
Filed to:	Trial Chamber
Original language:	English
Date of document:	13 August 2012

CLASSIFICATION

Classification suggested by the filing party:	PUBLIC
Classification of the Trial Chamber:	**សាធារណៈ/Public**
Classification status:	
Review of interim classification:	
Records officer name:	
Signature:	

RULE 35 REQUEST CALLING FOR SUMMARY ACTION AGAINST MINISTER OF FOREIGN AFFAIRS HOR NAMHONG

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I. INTRODUCTION

1. Pursuant to Rule 35 of the ECCC Internal Rules (the 'Rules'),[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits this application for summary action against Hor Namhong, Cambodia's Minister of Foreign Affairs. For the reasons stated below, the Defence submits that: (a) the application is admissible; (b) 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; and (c) the Trial Chamber must provide a practical and effective remedy. As a preliminary matter, the Defence takes the position that the instant submission should be classified as a public one, as it relates to acts directly and immediately impacting on the integrity of the ECCC. Considering its subject matter, this application must be brought to the attention of the wider public without delay.[2]

II. RELEVANT FACTS

2. The facts material to the instant application are straightforward. On 2 August 2012, Hor Namhong issued the following statement[3] (the 'Statement'):

> **Short Comment of HE Deputy Prime Minister Hor Namhong, Minister of Foreign Affairs and International Cooperation**
>
> It is unfortunate that those who continue to defend the legacy of the Khmer Rouge regime seek, in the interest of their defence, 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.

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1 *See* ECCC Internal Rules (Rev 8), as revised on 3 August 2011.

2 *N.B.* At the first opportunity, the Defence attempted to *publicly* address the impact of the Statement before the Chamber. However, cutting off counsel's microphone (by now, a standard practice), the President immediately advised the Defence to 'submit [its application] in writing'. Draft 'Transcript of Trial Proceedings', 6 August 2012 (Trial Day 90), p 34:21.

3 *See* 'Short Comment of HE Deputy Prime Minister Hor Namhong, Minister of Foreign Affairs and International Cooperation', 2 August 2012 (available at http://cambodinfo.org).

The Statement was printed in its entirety in the *Phnom Penh Post* on 3 August 2012.[4] On the same date, large portions of the Statement were printed in the *Cambodia Daily*, which ran an in-depth article on the Foreign Minister's public remarks.[5] The Statement was also widely carried and covered in other domestic Khmer language publications.[6] On information and belief, Hor Namhong delivered a message similar to the Statement on Cambodian national radio.

3. The Statement was issued in response to the public testimony of witness Phy Phuon (alias Rochoem Ton, alias Cheam), who confirmed on 31 July 2012 that, for a period of time towards the end of the Democratic Kampuchea ('DK') regime, Hor Namhong 'was in charge of the Boeng Trabek' detention center.[7]

4. It is common knowledge in Cambodia that Hor Namhong has utilized defamation lawsuits as vehicles to silence certain individuals—notably King Father Norodom Sihanouk and opposition-party leader Sam Rainsy—who have publicly discussed the Foreign Minister's former position and activities at Boeng Trabek. In this regard, he has achieved some measure of success.[8]

5. Hor Namhong, along with five other senior members of the Royal Government of Cambodia (the 'RGC'), brazenly flouted a 2009 summons to appear as a witness in Case 002 before the Office of the Co-Investigating Judges (the 'OCIJ'). And while the Defence has repeatedly called for their testimony before the Trial Chamber, not a single one of these RGC officials has been scheduled to give evidence in Nuon Chea's case. The facts surrounding such inexcusable government meddling are part of the case-file and a matter of public record. Perhaps less well known is the fact that Hor Namhong's name appears several times in the Case 002 Closing Order. And a statement Hor

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4 *See* 'Comment of HE Hor Namhong', *Phnom Penh Post*, 3 August 2012, p 3.

5 *See* Lauren Crothers, 'Hor Namhong Addresses Boeng Trabek Claims', *Cambodia Daily*, 3 August 2012 (the 'Cambodia Daily Article'), p 1.

6 *See* 'Heritage of Khmer Rouge Hor Namhong: Politicization of Khmer Rouge Court is Not Suitable', *Kohsantepheap*, 6 August 2012; 'Hor Namhong Reveals Accusation Against Him is Not Fair', *Kampuchea Thmey*, 6 August 2012; 'Namhong Reveals his Background when Witness Testified he was Chief of Boeng Trabek Prison', *Free Press Magazine*, 6 August 2012.

7 Draft Trial Transcript, 31 July 2012 (Trial Day 87), p 63:5–6.

8 Cambodia Daily Article ('In 2008, Mr Namhong sued opposition leader Sam Rainsy in France and Cambodia for defaming him in a speech that claimed he had headed the camp. Mr Rainsy was found guilty in both countries, but the French Supreme Court later overturned the French ruling in April 2011. Mr Namhong launched and won a suit against King Father Norodom Sihanouk in France in the early 1990s over similar claims.')

Namhong provided to an interviewer in New York City in 1991 was relied upon by the OCIJ on at least eight separate occasions to buttress the accusations contained in the indictment against Nuon Chea. In short, Hor Namhong is an important witness in Case 002.

III. RELEVANT LAW

6. Regarding the issue of interference with the administration of justice at the ECCC, the Defence hereby adopts by reference the submissions contained in its Application for Summary Action Against Hun Sen Pursuant to Rule 35 (the 'Hun Sen Application')[9] and Immediate Appeal Against Trial Chamber Decision on Rule 35 Request for Summary Action Against Hun Sen (the 'Hun Sen Appeal').[10]

7. A crucial provision in safeguarding the impartiality and independence of the ECCC and further ensuring a fair trial for the accused, Rule 35 is of paramount importance:

> 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 stages. Integrity of the process is guaranteed through the judicious application of this Rule when [...] 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 [...] 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 [...] a 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 an international and domestic level, will be preserved.[11]

8. Moreover, as the Trial Chamber has previously held: 'the purpose of prohibiting conduct which 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 from acting in a way that could be perceived as an attempt to do so'.[12]

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[9] *See* Document No **E-176**, 22 February 2012, ERN 00782947–00782959, paras 8–15.

[10] *See* Document No **E-176/2/1/1**, 11 June 2012, ERN 00815298–00815309, para 9.

[11] Document No **D-314/2/7**, 'Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summon Witnesses', 8 June 2010, ERN 00527392–00527420 (the 'Witness Decision'), para 38 (emphasis added).

[12] Document No **E-176/2**, 'Decision on Rule 35 Application for Summary Action', 11 May 2012, ERN 00806873–00806883 (the 'Hun Sen Decision'), para 21. *N.B.* In this regard, it is useful to recall the public statements attributed to Judge Cartwright in reaction to comments made by Hun Sen in 2009: 'Comments, politically motivated or otherwise, which appear to be an attempt to interfere with [judicial] independence are therefore to be deplored.' Maggie Tait, 'Interference "deplored" by judge', Stuff New Zealand (NZPA), 5 April 2009 (available at http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge) (emphasis added).

9. By force of logic, such sentiments apply equally with respect to executive attempts to influence witnesses, defence counsel, and/or the general public.

10. With regard to the (potential) influencing of (potential) witnesses, the PTC has approvingly quoted the ICTY Trial Chamber in the case of *Prosecutor v Beqaj*:

> The expression 'otherwise interfering with a witness or a potential witness' is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal. In view of the *mens rea* indicated in Rule 77(A), the Chamber considers that otherwise interfering with witnesses encompasses any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness's or potential witness's evidence. There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness's evidence produced a result.[13]

IV. ARGUMENT

A. The Application is Admissible

11. This Chamber has the express authority to sanction 'any person who knowingly and willfully interferes with the administration of justice'.[14] Such interference is defined broadly by the Rules and construed liberally by the relevant jurisprudence.[15] Rule 35 clearly includes within its purview the type of behavior exhibited by the Minister of Foreign Affairs. And both appellate bodies of this Tribunal—the PTC and the Supreme Court Chamber—have acknowledged that parties may seek affirmative relief, on their own motion, pursuant to Rule 35.[16] Accordingly, the application is admissible and this Chamber should address it thoroughly on its merits and issue a fully reasoned decision.

B. Hor Namhong's Public Remarks, a Clear Violation of Nuon Chea's Right to a Fair Trial, Amount to an Interference with the Administration of Justice

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[13] Document No **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witness', 9 September 2010, ERN 00600748–00600774 (the 'Second PTC Decision'), para 34 (original footnote omitted).

[14] Rule 35(1).

[15] *See* paras 9–10, *supra*.

[16] *See* Witness Decision, para 43 (holding that the OCIJ—and, by extension, the Trial Chamber—'has the statutory authority to take discretionary action pursuant to Rule 35 irrespective of the manner in which the relevant information is placed before it'; Document No **E-116/1/6**, 'Summary of Reasons for the Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation', 30 January 2012, ERN 00772881–00772887, para 17 (finding that the Trial Chamber had not improperly barred the Defence from affirmatively requesting discretionary action pursuant to Rule 35(2)).

12. The central question of this application—whether Hor Namhong's public remarks meet Rule 35's 'extremely low threshold'[17]—must be answered in the affirmative. Any important public official ('representative of the state or a public authority') who makes a statement like Hor Namhong's on factual issues that are *sub judice*, and that are moreover the object of ongoing and extensive witness examinations before the Trial Chamber, is by definition interfering with the proper administration of justice. 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.[18]

13. This would hold true in any judicial system, before any court, and at any time: the comments, in and of themselves, if delivered by a public official in such a public manner, amount to interference with the proper administration of justice.[19] In *this* case, considering the realities of present-day Cambodia and the role and prior actions of Hor Namhong with regard to these issues, these considerations hold true *a fortiori*, given the Foreign Minister's well-documented history of aggressively attempting to silence those who have spoken publicly regarding his DK-era past. Any reasonable observer in this country would understand the Statement as an attempt to influence further testimony in Case 002 regarding Hor Namhong's specific role at B-1.

14. Whether or not Hor Namhong was aware of the fact that his statement coincided with the hearing of other witnesses who are called to provide testimony relating to the administrative structure of so-called Office B-1 (the DK's own Ministry of Foreign Affairs) and the Boeng Trabek prison camp is unclear; but the result of this simultaneity is that his public comments are all the more damaging, as there is a considerable chance that the upcoming witnesses will take note of Hor Namhong's forceful position on this issue before testifying. Moreover, these identical factors—coupled with Hor Namhong's 'untouchable' position as an RGC minister, must also be seen as an attempt to influence the Trial Chamber—in particular, its Cambodian membership—to continue silencing the

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[17] *See* Hun Sen Application, para 9.

[18] 'There is nothing to indicate that proof is required that the conduct intended to influence the nature of the witness's evidence produced a result.' Second PTC Decision, para 34 (quoting *Prosecutor v Beqaj*). Furthermore, by force of logic, for a Rule 35 application to be successful it is not necessary to identify any *specific* witness that may have been or could have been intimidated by the remarks: *any* potential witness that could potentially testify with regard to Boeng Trabek or with regard to Hor Namhong's role during the DK regime could be adversely affected by Hor Namhong's remarks; this is the threshold for a successful Rule 35 application.

[19] The interference does not need to have been successful or produced any results to amount to an interference in the sense of Rule 35. *See* para. 10, *supra*.

Defence on issues the current government considers unpalatable. More prosaically, this Statement is a blatant and inexcusable attempt to convince the judges of the Trial Chamber of Hor Namhong's extrajudicial version of a factual determination that is still *sub judice*. This amounts to interference with the proper administration of justice.

15. Of course, while not determinative of the issue, the Statement must also be considered in the context of Hor Namhong's own posture vis-à-vis the proceedings in Case 002. Hor Namhong openly and willingly disregarded a validly-issued summons to appear before the OCIJ for testimony. As the international judges of the PTC plainly stated long ago, 'no reasonable trier of fact could have failed to consider that [the circumstances surrounding the Foreign Minister's refusal to appear] constitute a reason to believe that one or more members of the RGC may have knowingly and willfully interfered with witnesses who may give evidence before' the Co-Investigating Judges.[20]

16. In other words, Hor Namhong has not been willing to appear before the ECCC to give his version of the events that are being investigated, although he was legally bound to do so. He instead chooses to provide his version of the events via the media, where he cannot be questioned by the parties and where he wields significant influence. To refuse to appear when summonsed by a judge, and to then proceed to provide substantive comments in the media on the case that is being tried, plainly amounts to interference with the proper administration of justice.

17. A further relevant factor when considering the Statement is that it fits a firmly established pattern: each and every time something transpires at the ECCC which is unpalatable to the current government, a swift and strong reaction by the RGC is sure to follow. This pattern could be observed when six high-ranking government officials were summonsed by the international Co-Investigating Judge (the 'CIJ'); it could be observed when both the international Co-Prosecutor and the international CIJ attempted to have more individuals prosecuted in Cases 003 and 004; and it can be observed now, during the substantive hearings in Case 002, when facts are discussed that are embarrassing to current high-ranking RGC officials.[21] The fact that the Statement not

[20] Second PTC Decision, separate 'Opinion of Judges Catherine Marchi-Uhel and Rowan Downing', para 6.

[21] *N.B.* Earlier, there was a swift government response relating to factual issues *sub judice* when Chea Sim and Heng Samrin were implicated in a Stephen Heder report which was discussed during trial proceedings in February 2012: 'Jasper Pauw, a defense lawyer for Khmer Rouge leader Nuon Chea, quoted in court from a

only forms a part of, but reinforces, a clear and consistent pattern of inappropriate (and at times arguably criminal[22]) government behavior should provide all the more reason for the Trial Chamber to forcefully condemn such actions.

18. The same reasoning applies to Hor Namhong's qualification of the Defence's strategy as 'stirring up controversy' when, in fact, the Defence is appropriately attempting to verify the organizational structures in place during Democratic Kampuchea, as well as attempting to assess the levels of responsibility and/or autonomy of lower-ranking DK officials. Such forensic exploration is indisputably relevant in order to rebut the alleged level of criminal responsibility ascribed to Nuon Chea by the OCIJ and the Office of the Co-Prosecutors (the 'OCP'). In this regard, the Statement has the effect, if not the specific purpose, of discouraging Defence attempts to properly establish levels of responsibility of lower-ranking DK-officials—in other words, Defence attempts *to ascertain the truth*.[23] This amounts to an interference with the administration of justice.

19. Additionally, the statement that the Khmer Rouge legacy merits no defence at least *suggests* that its leaders merit no defence,[24] which amounts to a violation of Nuon Chea's

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2005 article by historian Stephen Heder alleging that troops under Mr Samrin's command killed Vietnamese civilians in cross-border raids in 1977, and that Mr Sim was allegedly responsible for the deaths of urban evacuees and others in Kompong Cham province's Ponhea Krek district. "The president rescued the people from the Khmer Rouge, yet he is accused of being involved with crimes? I don't understand," said Koam Kosal, chief of Mr Samrin's Cabinet. Mr Kosal ***denied*** the allegations read out in court against Mr Samrin and expressed confusion as to why they were aired at the Khmer Rouge tribunal in the first place. CPP lawmaker and de facto party spokesman Cheam Yeap said that Mr Sim and Mr Samrin were not unusual in having been Khmer Rouge members at the time, but ***neither of them had committed any crimes***. "***They were not high-ranking***," Mr Yeap said. "***When they learned that the party killed people, they left the party.***" Council of Ministers spokesman Phay Siphan said the tribunal could only accuse the top Khmer rouge leaders such as Nuon Chea, who is currently on trial. "***Chea Sim and Heng Samrin were not top-ranking at that time," said Mr Siphan.*** Moreover, Mr Sim and Mr Samrin are now government leaders, with the respect and support of Cambodian people, not criminals, he said. "The [majority of] Cambodian people…vote for Heng Samrin and Chea Sim. They do not vote for Nuon Chea," he said. "***The majority in Cambodia know who murdered.***" Mr Siphan said that Mr Pauw, the defense lawyer, should stick to defending his client: "***They are not supposed to do accusations to anyone. It does not help his client.***" Alice Foster & Phorn Bopha, 'Gov't denies claim aired at KR court', *Cambodia Daily*, 8 February 2012, p 1 (emphasis added). Of course, Chea Sim and Heng Samrin have both been summonsed to appear before the OCIJ at the request of the Defence, to give their version of the events during the DK regime. Like Hor Namhong, they prefer to state their position through RGC spokespeople in the media, and have ignored the OCIJ summons.

[22] *See, e.g.*, Document No **E-131/2.1.1**, 'Criminal Complaint', 24 October 2011, ERN 00749616–00749624.

[23] Of course, this all fits perfectly in the obvious attempts of the current government to place the blame for all DK-era crimes on the shoulders of the four accused who are now standing trial, most clearly demonstrated by the RGC's stance on further prosecutions in Cases 003 and 004. The 'dominant narrative,' as David Chandler has put it, of a few demonic leaders and the rest of the country as innocent victims must be upheld at all costs, for cynical reasons of political expediency. In that sense, the 'controversy' that Hor Namhong wants to avoid (see Statement) seems to be anyone departing from the official 'historical reality' that has always been advocated by the RGC, and before that, the officials of the PRK (which are to a large extent the same individuals.)

[24] *See* para 2, *supra*.

fundamental right to be presumed innocent and, therefore, runs afoul of the rule established in the *Ribemont* case[25]—a piece of international jurisprudence recently acknowledged by this Chamber as directly applicable to the public comments of RGC officials regarding ongoing proceedings in Case 002.[26] Indeed, for the same reasons articulated in the Hun Sen Application,[27] the Statement constitutes a breach of one of Nuon Chea's most basic fair-trial rights, one firmly enshrined in the Cambodian Constitution. Accordingly, the arguments previously advanced by the Defence are hereby adopted by reference, *mutatis mutandis*. Like the comments attributed to the Minister of Interior in *Ribemont*, Hor Namhong's public remarks are 'incompatible with the presumption of innocence'.[28]

20. Finally, while Hor Namhong, as a Cambodian *citizen*, is free to express his opinions and observations regarding his own personal experiences, as an RGC minister he is bound by the strictures of the law, whether he appreciates this or not. Given his role as a government minister,[29] he is manifestly not at liberty to engage in the type of veiled and/or bald rhetoric, which—to any reasonable observer *au fait* with the relevant facts—is designed to undermine the judicial process. '[T]he law requires [executive officials to speak publicly about pending criminal cases] with all the discretion and circumspection necessary' to respect basic fair-trial rights.[30] Unfortunately, the Foreign Minister's recent Statement falls well beyond the boundary of acceptable public discourse for a man of his position and violates Nuon Chea's fair-trial rights.

21. In short, the Statement's assertions that the ECCC 'is a court of law, and not a political forum' and that 'attempts to politicize the court or stir up controversy are inappropriate' is, in light of the well-documented and virtually undisputed ongoing interference by the RGC in the work of the ECCC, *chutzpah* indeed.

C. The Trial Chamber Must Provide a Practical and Effective Remedy

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[25] *See* Hun Sen Application, paras 12–13.
[26] *See* Hun Sen Decision, para 17.
[27] *See* Hun Sen Application, paras 17–20.
[28] *Ribemont v France*, ECHR Application No 15175/89, 'Judgment', 10 February 1995, para 39.
[29] While not determinative of the issue, it is significant to note that the full title of the Statement is: 'Short Comment of ***HE Deputy Prime Minister*** Hor Namhong, ***Minister of Foreign Affairs and International Cooperation***' (emphasis added).
[30] *Ibid*, para 38.

22. In order to prevent further damage, a public condemnation of Hor Namhong's remarks and a public warning that further comments will be met by even more stringent action are the appropriate remedies to be imposed at this stage. Not only does this Chamber have an affirmative duty to denounce actions that interfere with the administration of justice, it should not hesitate to explain to the Foreign Minister and to the public that in functioning democracies the judicial department does not welcome intrusions from the executive branch. As previously argued, the Trial Chamber must demonstrate its independence, its competence, and its commitment to a fair trial for Nuon Chea. If Cambodia truly is the open society that RGC officials profess it to be, then the President and his counterparts should have no reservations regarding the only acceptable course of action in this case: public censure of Hor Namhong and his injurious remarks.

V. CONCLUSION

23. Accordingly, for the reasons stated herein, this Chamber should, pursuant to Rule 35:

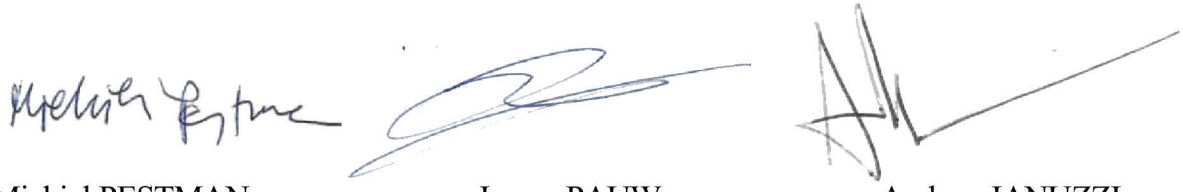
a. admit the instant application;

b. acknowledge that Hor Namhong's remarks amount to an interference with the administration of justice at the ECCC;

c. by way of summary action, publicly rebuke the Foreign Minister and officially warn him against making any further statements of a similar nature.

Oral argument at an open hearing—in advance of any determination—would be appropriate and is hereby requested.

CO-LAWYERS FOR NUON CHEA



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