

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

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**ADDENDUM TO RULE 35 REQUEST 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 brief addendum to its ‘Rule 35 Request for Summary Action Against Minister of Foreign Affairs Hor Namhong’ (the ‘Request’) filed on 13 August 2012.²

II. RELEVANT FACTS

2. In addition to the facts already set out in the Request,³ the following events—and, in particular, *their sequence*—are of significant relevance to the question of whether the current Minister of Foreign Affairs of the Royal Government of Cambodia (the ‘RGC’) has recently interfered with the administration of justice at the ECCC:
 - a. As noted in the Request, under questioning by the Defence on 31 July 2012, witness Phy Phuon (alias ‘Cheam’, a former chief of security at the Foreign Ministry during Democratic Kampuchea (‘DK’) and a Deputy Governor of Malai District), confirmed that, for a period of time towards the end of the DK regime, Hor Namhong ‘was in charge of the Boeng Trabek’ detention center.⁴
 - b. Hor Namhong’s public statement (the ‘Statement’), denying any leadership role at Boeng Trabek and asserting that it was ‘inappropriate’ for the ECCC to ‘stir up controversy’, was issued on 2 August 2012 and published in the *Cambodia Daily*, the *Phnom Penh Post*, and several Khmer-language newspapers on the following day.⁵
 - c. Four days later, on 6 August 2012, it was reported by *Cambodia Express News* that ‘Mr Rochoem Ton, alias Phy Phuon, alias Chheam’, claimed to have erroneously implicated Hor Namhong at the ECCC due to ‘bewilderingly

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

² Document No E-219, 13 August 2012, ERN 00834491–00834500.

³ See Request, paras 2–5.

⁴ See Document No E-1/99.1, Trial Transcript, 31 July 2012, (Trial Day 87), ERN 00831888–00831999, p 63:1–4 (‘Q: Thank you, Mr Witness. Was he ever the chairman or the vice-chairman of Boeng Trabek—that is, Mr Hor Namhong? A: When the ministry representative went to receive him, he was in charge of the Boeng Trabek.’)

⁵ See Request, para 2; see also Chhorn Chansy & Julia Wallace, ‘KRT witness recants Hor Namhong claim’, *Cambodia Daily*, 13 August 2012 (the ‘Cambodia Daily Article’), p 17 (‘After news reports of the testimony were published, Mr Namhong released an angry statement castigating the tribunal’s defense lawyers for “stirring up controversy around public figures”.’)

repetitive questions by a foreign co-counsel for the accused'.⁶ The report noted that Phy Phuon 'felt he was forced to testify to what he had no knowledge of'.⁷ Regarding his abrupt about-face, the witness subsequently told the *Cambodia Daily* 'that he would not agree to return to the tribunal if asked to clarify his testimony—unless the government wanted him to go. "I won't go because I am not well. [...] I don't want to go, *but if the government needs me, I would go*".'⁸

The Statement appears to have efficiently and effectively achieved one of its intended results.

III. RELEVANT LAW

3. The Defence hereby adopts by reference the legal submissions set out at paragraphs six through ten of the Request.

IV. ARGUMENT

4. Apart from the unlawful nature of the Statement as such—that is, as the public expression of an RGC official regarding a matter that is currently *sub judice* before the Trial Chamber⁹—it is now evident that a further violation of Rule 35 may have transpired: Hor Namhong has almost certainly 'threaten[ed], intimidate[d] [...] or otherwise interfere[d] with *a witness* [...] who [...] *has given* [...] evidence in proceedings before the [...] Chamber'.¹⁰ In particular, based on the facts outlined above, it is highly likely that witness Phy Phuon publicly recanted his *viva voce* testimony in Case 002¹¹ (and, by implication, his 2000 statement to the press¹²) *because*

⁶ Bayon, 'Witness Claims in Court Vôn Was Head of Boeng Trabek Prison', *Cambodia Express News*, 6 August 2012 (the 'Bayon Article'); *see also* Cambodia Daily Article, p 17.

⁷ Bayon Article.

⁸ Cambodia Daily Article, p 17 (emphasis added).

⁹ *See* Request, paras 12–21.

¹⁰ Rule 35(1)(d) (emphasis added).

¹¹ *See* para 2(a), *supra*.

¹² In July 2000, it was reported that one 'Chhiem'—identified further as 'Pi Puth', a 'former DK Foreign Ministry staffer', and the 'deputy district chief in Phnom Malai'—gave the following statement to the *Cambodia Daily*: 'According to the plan of the [DK Foreign Ministry] ... we wanted Hor Namhong to be on staff. We didn't fully know his stance, so we had to work with him and test his loyalty, whether he believed in DK or not. *So we appointed him to be chief in Boeng Trabek.*' Kelly McEvers & Thet Sambath, 'Government Leaders and the Khmer Rouge: Clouded History', *Cambodia Daily*, 1–2 July 2000, pp 11–12 (emphasis added). *N.B.* Despite the minor discrepancies in the English transliterations of the spoken Khmer, it is obvious that the individual referenced in this article is witness Phy Phuon.

of the pressure brought to bear by the Foreign Minister through the publication of the Statement.¹³

5. Moreover, as emphasized in the Request, a successful Rule 35 application requires ‘[no] proof [...] that the conduct intended to influence the nature of the witness’s evidence produced a result’.¹⁴ Where, however, there is proof that the offending conduct (here: the Statement) achieved its result (here: Phy Phuon’s recanting), such fact will both: (i) support a finding by the Trial Chamber that there is ‘reason to believe’ that an individual may have interfered with the proper administration of justice and (ii) influence the appropriate steps to be taken. It follows that a successful interference may be dealt with more harshly than one that fails to have any effect.
6. The relief sought by the Request (and this addendum) is in no way limited to assessing the impact of the Statement on witness Phy Phuon alone. Rather, Defence efforts in this regard are more broadly aimed at countering the Statement’s chilling effect on those witnesses who have yet to appear in Case 002. As the grave concerns outlined in the Request have briskly moved from the general to the concrete, this Chamber needs to act with equal speed in order to prevent further damage.


V. CONCLUSION

7. In addition to the specific relief sought in the Request,¹⁵ and given the strength of the new evidence contained herein, the Trial Chamber should—pursuant to Rule 35(2)(b)—‘conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings’ against Hor Namhong.

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¹³ *N.B.* While not determinative of the issues raised by the Defence, Phy Phuon’s public remark that he would only return to the ECCC ‘if the government needs [him]’ further informs the reasonable suspicion that his recanting was a direct result of the Statement.

¹⁴ Request, para 10 (quoting ECCC jurisprudence).

¹⁵ See Request, para 23.