BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER DECISION REGARDING THE FAIRNESS OF THE JUDICIAL INVESTIGATION

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla
Zara LOCKSHIN

Distribution

Co-Accused

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

Co-Lawyers for Civil Parties:
PICH Ang
Elisabeth SIMONNEAU-FORT

I. INTRODUCTION

1. Pursuant to Rules 35, 104, 105, and 107 of the ECCC Internal Rules (the 'Rules'),[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits this immediate appeal against the Trial Chamber's 'Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation' (the 'Impugned Decision'),[2] to the extent it disposes of the Defence's Request for Investigation Pursuant to Rule 35 (the 'Rule 35 Request').[3] For the reasons stated below, the Defence submits that: (a) the appeal is admissible; (b) the Impugned Decision is legally untenable for a number of reasons; (c) the Supreme Court Chamber can and should act upon unresolved claims of political interference in the work of the Tribunal; and (d) a public, oral hearing on the important issues raised herein would serve the interests of justice. As a preliminary matter, the Defence takes the position that the instant submission should be classified as public.[4]

II. RELEVANT FACTS & PROCEDURAL HISTORY

A. Longstanding and Ongoing Political Interference in the Work of the Tribunal

2. For the sake of brevity, the Defence adopts by reference the factual submissions (and underlying supporting material) contained in a number of requests, applications, objections, and appeals (collectively, the 'Defence Submissions') filed between March 2009 and April of this year.[5] As these various documents make clear, it is objectively

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

2 Document No **E-116**, Confidential 'Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88, and E92)', 9 September 2011, ERN 00729330–00729339 (the 'Impugned Decision'). *N.B.* A public, redacted version of the Impugned Decision was also issued by the Trial Chamber. This document was assigned the same document number and ERN range as the confidential version.

3 Document No **E-82**, 'Request for Investigation Pursuant to Rule 35', 28 April 2011, ERN 00680941–00680955 (the 'Rule 35 Request').

4 *N.B.* This appeal contains no material that has not already been the subject of extensive media coverage. And, given the public and institutional importance of the issues raised herein, imposing confidentiality in this case would only serve as an obstacle to fair and transparent proceedings. Indeed, open publication would likely discourage further improper political interference. Moreover, while the Impugned Decision was classified as confidential, the Trial Chamber also released a public, redacted version in which the text of paragraph twenty-one and its footnotes (the only portion of the Impugned Decision reproduced and discussed herein) was published in full. *See* n 2, *supra*. Accordingly, this document should be classified as a public one. In any event, the Defence will treat it as such.

5 *See* Document No **D-158**, 'Eleventh Request for Investigative Action', 27 March 2009, ERN 00294816–00294830 (the 'Eleventh Request'), paras 4–12; Document No **D-158/5/1/1**, 'Appeal Against Order on Eleventh Request for Investigative Action', 4 May 2009, ERN 00323238–00323255 (the 'Corruption Appeal'), paras 2–6; Document No **D-254**, 'Request for Investigation', 30 November 2009, ERN 00410838–00410848, paras 4–7; Document No **D-254/2**, 'Addendum to "First Request for Investigation"', 7 December 2009, ERN 00410958–00410960, para 4; Document No **D-314/2/4**, 'Appeal Against OCIJ Order on Nuon

indisputable that officials and/or agents of the Royal Government of Cambodia (the 'RGC' and the 'Government') have improperly interfered in the work of the court and are continuing to do so.

3. The following is a brief recapitulation of the factual bases underlying the Defence Submissions:

   a. Suggesting that allegations of corruption at the tribunal threatened to undermine its legitimacy and arguing that such an organized regime of institutional graft was symptomatic of the larger issue of Government interference, the Defence sought to uncover any RGC involvement by instituting proceedings in the national courts and subsequently at the ECCC.[6] To date, the affair has not been credibly resolved, and 'cumuli of corruption'[7] continue to hover ominously over the tribunal.[8] Apart from the imposition of certain cosmetic solutions,[9] there has been no indication that the RGC, the United Nations, the donors, or indeed the judicial officers of this court, have ever been willing and/or able to take the necessary steps to truly clear the air. In any event, such minimal efforts as have been undertaken are overshadowed by the fact that the widespread regime orchestrated and initiated by Sean Visoth and his deputies over four years ago *remains in place to this day*,[10] filling the RGC's private coffers will ill-gotten gains and potentially impacting the integrity of all those involved. As the Defence has consistently maintained, this may very well include ECCC staff members within the various chambers.

Chea and Ieng Sary's Request to Summon Witnesses', 16 March 2010, ERN 00484112–00484130, paras 2–12; Special Casefile No 002/17-06-2010-ECCC/PTC(09), Document No **1**, 'Application for Disqualification of Judge You Bunleng', 17 June 2010, ERN 00535168–00515181, paras 2–11; Document No **D-314/2/9**, 'Further Submissions in the Appeal against the OCIJ Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses', 22 June 2010, ERN 00539820–00539827, paras 2–5; Document No **D-384**, 'Second Request for Investigation', 7 July 2010, ERN 00549028–00549031, para 2; Special Casefile No 002/07-07-2010-ECCC/PTC(10), Document No **1**, 'Second Request for Investigation', 7 July 2010, ERN 00553229–00553250, paras 4–15; Document No **E-51/3**, 'Consolidated Preliminary Objections', 25 February 2011, ERN 00648279–00648310, paras 4–14; Rule 35 Request, paras 2–13.

6 *N.B.* On 8 January 2008, three members of the Nuon Chea Defence Team lodged a complaint with the Phnom Penh Municipal Court alleging corrupt activities at the ECCC. Dismissed in the first instance, the case remained on appeal to the Prosecutor-General's Office of the Court of Appeal until 20 October 2009 when it was quietly rejected in summary fashion without any notice being provided to the Defence nor any further investigations. *See* Bridget di Certo, *Cambodia Daily*, 'Court of Appeal Quietly Closed KR Tribunal Corruption Case', 27 July 2011; *see also* Eleventh Request, Corruption Appeal.

7 Ian Andrews, *l'Osservatore Romano*, 'Swiss Guard implicated in Vatican kick-back scandal', 19 June 1974.

8 *See* Eleventh Request, paras 19–20.

9 *See, e.g.*, the creation of the Office of the Independent Counselor.

10 *N.B.* This is based on various reports of confidential informants.

b. In July 2009, Kong Sam Ol, the RGC's Minister to the Royal Palace, actively interfered with attempts by the Office of the Co-Investigating Judges (the 'OCIJ') to interview King Father Norodom Sihanouk, effectively depriving the parties at the ECCC of the opportunity to hear his singularly important testimony.[11] Moreover, National Co-Investigating Judge You Bunleng—himself a senior RGC official—refused to sign OCIJ letters seeking an interview with the former king.[12]

c. In September 2009, RGC Prime Minister Hun Sen publicly indicated that he was opposed to the hearing of six high-ranking RGC officials (the 'Six Insiders') as witnesses in Case File 002.[13] Public comments made by RGC spokesperson Khieu Kanharith in October 2009 echoed the Prime Minister's view, and there is ample reason to believe that the Government's stated position led—directly or indirectly—to the failure of the Six Insiders to appear.[14] Unspecified 'court sources' confirm this suspicion.[15]

d. Since well before the opening of proceedings at the Tribunal, the RGC has publicly and repeatedly expressed its firm position that only the Government's executive arm—and no other body, judicial or otherwise—would *dictate* the terms of any prosecutions beyond Kang Geuk Eav (alias 'Duch') and the four alleged 'senior leaders' in Case 002. And the RGC has consistently made such terms plain: no further prosecutions will move forward. Complicit in executing this politically motivated judicial agenda have been, among others: Co-Prosecutor Chea Leang, Co-Investigating Judge You Bunleng, the Cambodian judges of the PTC, and a host of RGC officials including Khieu Kanharith. The chief architect, if not implementer, of the plan is undoubtedly the RGC's Prime Minister. Yet perhaps the most unlikely collaborator appears to have been Co-Investigating

[11] *See* Document No **D-254**, 'Request for Investigation', 30 November 2009, ERN 00410838–00410848 (the '2009 Request'), para 5.
[12] *See* Case File 002/17-06-2010-ECCC-PTC(09), Document No 1, 'Application for the Disqualification of Judge You Bunleng', 17 June 2010, ERN 00535168–00515181, para 5.
[13] *See* 2009 Request, para 6.
[14] *Ibid*, para 7.
[15] *Ibid*, para 4; *See also* Document No **D-314/2/9**, 'Further Submissions in the Appeal against the OCIJ Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses', 22 June 2010, ERN 0539820–0539827, paras 13–16.

> Judge Siegfried Blunk, who—until very recently[16]—had proved himself to be a compliant partner in the Government's program.[17]

To date, as far as the Defence is aware, none of these incidents has ever been investigated by any organ or official of this Tribunal or any other independent body.[18]

4. Notably, two international judges of the PTC have officially acknowledged the gravity of the problems raised by the Defence.[19] But, unsurprisingly, they were unable to convince their Cambodian counterparts to depart from the Government's political line.[20] Nevertheless, their considered opinion—again, reflecting the view of all objective observers—stands as a sharp rebuke to the ECCC's institutional position with respect to RGC interference:

> In surveying [the material submitted by the Defence] we are of the view that *no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence 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 CIJs*. This finding stands irrespective of whether the witnesses in question may or may not have had more than one reason not to appear to testify. The single most important fact is the comment made by Khieu Kanharith, published in the *Phnom Penh Post*, "that [the] government's position was that they should not give testimony" made in reference to the Six Officials. The context in which this statement was made greatly contributed to the belief that it may amount to an interference or reflect other efforts to prevent the testimony of the Six Officials. […] The comment by Khieu Kanharith satisfies us that there is a reason to believe he, or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge.[21]

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16 *See* para 10, *infra*.

17 *See, e.g.*, John Hall, *The Wall Street Journal*, 'A U.N. Fiasco in Cambodia: Compromised Local Judges and Bungling International Staff Have Brought the Khmer Rouge Tribunal to a Standstill', 5 October 2011 (the 'Hall Op-Ed') ('Siegfried Blunk, the UN-nominated international Co-Investigating Judge jointly presiding over this case, is responsible. While it is to be expected that the Cambodian judge would thwart the investigation, it is outrageous that a UN official did so. At least five UN staff in Mr Blunk's office resigned to protest the decision to terminate the investigation, while others have declined new contracts or accepted reassignment out of the judge's office. When the respected international Co-Prosecutor Andrew Cayley appealed the premature closure of the investigation of Case File 003, the co-investigating judges—including Mr Blunk—ordered his request redacted and claimed that his request mentioned confidential information.'); *see also* Human Right Watch, Press Release, 'Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign: UN Office of Legal Affairs Fails to Act Despite Judicial Misconduct', New York, 3 October 2011 (the 'HRW Press Release').

18 *But see* 'Statement by the [ECCC] International Co-Investigating Judge', 10 October 2011 (in which Judge Blunk refers to the initiation of 'Contempt of Court proceedings'.) *N.B.* No further information is provided..

19 *See* Document No **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses', 9 September 2010, ERN 00600748–00600774 (the 'Second Witness Decision'); in particular, the 'Opinion of Judges Catherine Marchi-Uhel and Rowan Downing' (the 'Dissenting Opinion'), para 5 ('As a result of the repeated failure of the CIJs to act, we are of the view that given the *grave nature of the allegations* of interference the Pre-Trial Chamber must intervene.') (emphasis added).

20 *See ibid*; in particular, the 'Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy'.

21 Dissenting Opinion, para 6 (emphasis added).

Indeed, Judges Marchi-Uhel and Downing went so far as to suggest that the OCIJ, although 'the natural investigative body within the ECCC'[22], would be professionally unsuited 'to conduct an investigation into these allegations of interference'.[23]

5. Since the filing of the Rule 35 Request, the Open Society Justice Initiative ('OSJI') has twice 'called for the United Nations to conduct an independent investigation into allegations that the co-investigating judges at the tribunal are deliberately stymieing investigations into Cases 003 and 004'.[24] Reiterating a similar recommendation made earlier this year, the monitoring organization again questioned the 'judicial independence' of the two Co-Investigating Judges (the 'CIJs').[25] The OCIJ's apparent adoption of the Government's spurious jurisdictional argument vis-à-vis the (officially) unnamed suspects in Cases 003 and 004 has been recently debunked by former OCIJ analyst and Cambodia expert Steve Heder.[26] Anne Heindel, legal advisor to the Documentation Center of Cambodia ('DC-Cam'), has been particularly vocal in her now routine criticisms of the tribunal's continuing support for the RGC's agenda[27]—a position echoing previous critiques from the likes of David Scheffer and Hans Correll, among many other well-informed observers.[28]

6. Having conducted an in-depth review of the ECCC's progress to date, Mark Ellis, Executive Director of the International Bar Association, recently published his findings:[29]

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22 *Ibid*, para 8.

23 *Ibid*.

24 Bridget di Certo, *Phnom Penh Post*, 'Group calls for KRT probe', 22 September 2011, p 2; *see also* Julia Wallace, *Cambodia Daily*, 'Watchdog slams court's treatment of victims', 22 September 2011, p 22.

25 *Ibid*.

26 *See* Steve Heder (with David Boyle), 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia', 1 August 2011.

27 *See, e.g.*, May Titthara & Thomas Miller, *Phnom Penh Post*, 'Frail War Crimes Suspect "not afraid"', 22 August 2011; Thomas Miller, *Phnom Penh Post*, 'Case 004 Sites Revealed', 9 August 2011; Julia Wallace, *Cambodia Daily*, 'KR Judges Narrow Definition of Civil Party to Exclude Family', 21 July 2011; Mike Eckel, *Foreign Policy Magazine*, 'Cambodia's Kangaroo Court', 20 July 2011.

28 *See* David Scheffer, 'The Negotiating History of the ECCC's Personal Jurisdiction', 22 May 2011; Heder, pp 40–41 ('In sum, as Hans Corell has affirmed, it is "crystal clear" from the very texts of the Cambodian law and UN-RGC agreement resulting from the UN-RGC negotiation process described above that they established "two categories of suspects: 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes'," and that any suggestion to the contrary is "close to surrealistic".')

29 *See* Mark Ellis, *International Bar Association*, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future', September 2011 (the 'IBA Report'). *N.B.* 'I was an early supporter of the [ECCC]. Consistent with my belief that we must fight impunity through accountability, I believed in the ECCC's overall mission, including its ability to help bring justice to victims, and accuracy to the historical record. However, as the ECCC's activities increased, my confidence in its judicial process started to decrease. I observed a growing number of problems that made me question the very legitimacy of the Court. I also knew that such concerns were relevant to any defendant appearing before the ECCC. Subsequently, I approached the international co-lawyers representing the defendant Nuon Chea—

> [R]eports and allegations of government interference with the selection of judges to the ECCC and the workings of the ECCC, combined with a lack of transparency, have tainted and undermined the credibility of the Court. Given that the ECCC was established on a weakened foundation, subsequent corrective measures may be difficult, if not impossible.[30]
>
> The experience of the ECCC demonstrates that de jure protections of judicial independence are not sufficient. While the legal framework of the ECCC complies de jure with international standards of fair trial and due process, because of the lack of practical, effective safeguards, the ECCC does not comply de facto. […] Despite these de jure protections, the early concerns about the deficiencies within the Cambodian domestic judicial system permeating the ECCC proceedings have come to fruition. Several allegations have been reported that raise doubts as to the independence and impartiality of the ECCC judiciary. These allegations have tainted the legitimacy of the ECCC and undermined its operations in practice.[31]
>
> The possible witness intimidation […] requires some sort of response by the Court under Internal Rule 35.[32]
>
> The problems associated with the ECCC did not arise from a failure of ideas. Rather, these problems are a result of a failure of the international community to ensure that the Court meets international standards of fairness.[33]
>
> Given that the first ECCC trial was seen as a compelling and rewarding event for many Cambodians, it may be tempting to set a presumption in favor of making the compromises necessary to simply establish a court, even a flawed court. Some could argue that even where the ECCC fails to meet international standards, it far exceeds the norm in Cambodia. However, more is at stake than increasing the legitimacy of a single trial. While scholars may debate the degree to which the ECCC is a success or failure, *there is no doubt that the UN has given its hallmark to a court whose independence fails to meet international standards of due process*. In resting the legitimacy of the ECCC on that of the Cambodian judiciary, the ECCC has weakened the UN brand in the realm of internationalized accountability.[34]

Unlike previous critics, who—perhaps clouded by an overzealous, though no doubt, well-intentioned desire to see Cambodia's dalliance with international justice succeed—have stopped short of condemning the Court's ultimate ability to deliver an acceptable end product, Dr Ellis has unequivocally concluded that to continue along the current path would be tantamount to complicity in a fatally flawed judicial project.

7. Apart from isolated reports by RGC apologists,[35] not a single independent commentator has failed to sound a critical alarm. Even UN Secretary-General Ban Ki-Moon has appeared reluctant to endorse his own judicial appointment within the OCIJ. The best his spokesman could recently muster was a tired platitude: '[T]he United Nations

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Michiel Pestman and Victor Koppe. I mentioned my interest in looking more deeply into my concerns about the ECCC. I asked to join their team and for permission to draft this report. They agreed.' IBA Report, p 6.

30 IBA Report, p 10.

31 IBA Report, p 21.

32 *Ibid*, p 26.

33 *Ibid*, p 45.

34 *Ibid*, p 46 (emphasis added).

35 *See, e.g.*, Douglas Gillison, *Cambodia Daily*, 'Chea Leang Issues Riposte Statement on Case 003', 11 May 2011.

expects the judicial process to be free from external interference'.[36] But when pointedly asked whether Judge Blunk retained the support of Mr Ban and others at UN headquarters, the spokesman 'did not reply'.[37] It seems, in realms where 'UN-speak' is the lingua franca, expectations and reality rarely converge.[38]

8. In light of developments, Human Rights Watch has called for the resignation of both CIJs, suggesting they 'have egregiously violated their legal and judicial duties'.[39] Brad Adams, Asia Director for the organization and a longstanding monitor of ECCC proceedings, delivered a bleak assessment of the prevailing conditions in Cham Chao:

> Since its establishment, the ECCC has been subject to frequent politically motivated interference from the ruling Cambodian People's Party. Many of the government's current leaders are former Khmer Rouge officials. Prime Minister Hun Sen, *who controls the Cambodian judiciary*, in which the ECCC is embedded, has repeatedly said that he objects to cases 003 and 004 proceeding. ECCC sources have told Human Rights Watch that this political interference is responsible for the judges' failure to investigate the cases properly and has led to staff resignations at the Office of the Co-Investigating Judges. […]
>
> 'We have long expressed concern that Cambodian judges on the Khmer Rouge tribunal would have no choice but to do what Hun Sen and other senior officials wanted,' Adams said. '*The ECCC was only going to be as strong as its weakest international link. Judge Blunk is that link.*' […]
>
> 'The UN is *burying its head in the sand* by failing to respond to the numerous credible allegations of judicial misconduct,' Adams said. 'If the UN doesn't act quickly to ensure that these cases are fully investigated, the tribunal's *final shreds of credibility* will be lost and the UN will have some hard questions to answer about its own actions.' [40]

The call from Human Rights Watch came just days before John Hall, a law professor and consistent tribunal observer, ruefully concluded: **'**It is time for the international community to pull the plug on this politically tainted and shamefully mismanaged undertaking.'[41]

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[36] Robert Carmichael, *Voice of America*, 'Cambodia's Khmer Rouge Tribunal Draws New Criticisms', 26 September 2011 (emphasis added) ('Martin Nesirky, a spokesman for U.N. Secretary-General Ban Ki-moon, said by email that the United Nations expects the judicial process to be free from external interference.')

[37] *Ibid* ('Nesirky did not reply to a question asking whether the U.N. appointed Judge Siegfried Blunk retains the support of Ban and UN headquarters.').

[38] *N.B.* In this regard, it appears that the United States' Ambassador-at-Large for War Crimes Issues, Stephen Rapp is a fluent speaker. With respect to the early stages of the Blunk affair, he had this to say: 'I believe in the good faith in each of the good people that I'm talking with. They have very good reason for doing what they're doing.' Mike Eckel, *Associated Press*, 'Cambodia's Khmer Rouge Tribunal in Crisis', 23 June 2011. For an equally empty feat of verbal gymnastics, *see also* 'Statement by the Co-Prosecutors', 7 October 2011 ('Th[e] judicial structure [of the ECCC] demonstrates the level of trust that the international community has placed in the Kingdom of Cambodia.')

[39] HRW Press Release, n 17 *supra*.

[40] *Ibid* (emphasis added).

[41] Hall Op-Ed, n 17 *supra*.

9. As if reacting to the mounting criticism, the RGC Minister of Foreign Affairs was recently quoted as saying: 'only Cambodia can decide how many additional suspects the Khmer Rouge Trial will prosecute'.[42] In response, Iskander Pastrulo neatly summed up the problem with Hor Namhong's skewed take on the concept of separation of powers:

> I am about to state the obvious, but sometime the obvious needs to be stated. At the ECCC, the decision to investigate and prosecute individuals is initially taken by the co-prosecutors, then by the co-investigating judges, and in case of a disagreement or appeal, by the Pre-Trial Chamber. [None] of the three mentioned organs can be described as 'Cambodia', and in fact any influence from the Cambodian government on the three organs would constitute interference in the administration of justice.[43]

Montesquieu himself could not have put it better.

10. In a striking turn of events, Judge Blunk tendered his resignation on 8 October 2011:

> After his appointment on 1 December 2011, the International Co-Investigating Judge of the ECCC proceeded with investigations in Cases 003 and 004 in the expectation that a previous statement reportedly made by the Cambodian Prime Minister during a meeting with the Secretary-General that these cases 'will not be allowed' did not reflect general government policy.
>
> However, on 10 May 2011, the Cambodian Minister of Information stated 'If they want to go into Case 003 and 004, they should just pack their bags and leave.' Although the International Co-Investigating Judge initiated Contempt of Court proceedings against him and expected this to be a warning to other government officials, last week the Cambodian Foreign Minister reportedly stated 'On the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue… This issue must be decided by Cambodia'.
>
> Although the International Co-Investigating Judge will not let himself be influenced by such statements, his ability to withstand such pressure by Government officials and to perform his duties independently, could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004.
>
> Because of these repeated statements, which will be perceived as attempted interference by Government officials with Cases 003 and 004, the International Co-Investigating Judge has submitted his resignation to the Secretary-General as of 8 October 2011.[44]

Coming only days after the call for him to step down, Judge Blunk's departure—whatever its motive—must be understood as a capitulation to pressure from international observers. Long (and inexplicably) a seeming puppet of the RGC,[45] it now appears that the international CIJ has finally had his strings pulled in the proper direction.

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[42] Julia Wallace & Neou Vannarin, *Cambodia Daily*, 'Additional KR arrests in Cambodia's hand, Hor Namhong says', 5 October 2011.
[43] Iskander Pastrulo, Letter to the Editor, *Cambodia Daily*, 'Additional KR arrests domain of tribunal, not government', 7 October 2011.
[44] 'Statement by the [ECCC] International Co-Investigating Judge', 10 October 2011.
[45] *See* Hall Op-Ed, n 17 *supra*.

B. Defence Efforts to Address the Problems

11. Over the course of the judicial investigation and the early stages of the trial phase, the Defence has made numerous efforts to 'clear the cluttered path to justice in Cambodia',[46] culminating in the filing of the Rule 35 Request on 28 April 2011.[47] Among other things, that application sought to highlight: clear instances of political interference in Case 002; the relationship between such meddling and similar acts of interference in Cases 003 and 004; the harm suffered by the Defence and the Court as an institution; and previous episodes of judicial and administrative prevarication.[48] Yet, like the OCIJ and PTC before it, the Trial Chamber was disinclined to take any remedial action.

C. The Impugned Decision

12. Indeed, without even a cursory gloss on the core issues raised by the Defence, the Trial Chamber disposed of the Rule 35 Request in summary fashion:

> Concerning the Accused's allegations of interference with the administration of justice or political interference in relation to Cases 003 and 004, the Trial Chamber notes that […] Rule 35(2) contemplates an investigation into such allegations '[w]hen the Co-Investigating Judges or the Chambers have reason to believe that a person may have knowingly and willfully interfered with the administration of justice'. It follows that an investigation pursuant to this Rule can only […] meaningfully be conducted by the judicial body seised of the case. As these cases are presently in the investigative stage, proper recourse is to the CIJs in the first instance and the Pre-Trial Chamber on appeal. As the First Rule 35 Request identifies no tangible impact of these allegations on the fairness of the trial proceedings in Case 002 (with which the Trial Chamber is seised), it is accordingly rejected.[49]

No discussion regarding the allegations related to Case 002—although these were clearly delineated in the Rule 35 Request[50]—was contained in the Impugned Order.

13. Notably, in rejecting the Rule 35 Request, the Trial Chamber cited a previous decision of the Pre Trial Chamber (the 'PTC') for the following proposition: 'Internal Rule 35 does not provide for the initiation of investigative action upon request of a party.'[51]

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[46] Document **D-158**, 'Eleventh Request for Investigative Action', 27 March 2009, ERN 00294816–00294830, para 21. *N.B.* To date, the Defence has filed more than a dozen discrete submissions aimed at unmasking and remediating, to the extent possible, political interference at the ECCC. *See, e.g,* n 5, *supra*.

[47] *See* n 3, *supra*.

[48] *See* Rule 35 Request, paras 2–12, 19–31.

[49] Impugned Decision, para 21 (internal citations omitted).

[50] *See* paras 24, 34, *infra*.

[51] Impugned Decision, n 45 (citing Document No **D-158/5/1/15**, 'Decision on Appeal against the Co-Investigating Judges Order on the Charged Person's Eleventh Request for Investigative Action', 18 August 2009, ERN 00364033–00364046, para 29).

14. Essentially, the Trial Chamber: (a) flatly disregarded the claims related directly to Case 002 and provided no reasons for such omission; (b) held that an ECCC judicial body may only act pursuant to Rule 35 when claims relate directly to factual matters with which such body is seised; (c) dismissed the Rule 35 Request on that basis with respect to the factual claims related to Cases 003 and 004; and (d) intimated that parties cannot, on their own motion, initiate Rule 35 proceedings. As argued in detail below, each of these positions is untenable.

III. RELEVANT LAW

A. Interference with the Administration of Justice

15. Rule 35(1) provides as follows:

> 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: […] (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; […] (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.

Should the CIJs or *any* of the Chambers 'have 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'.[52]

16. Relying on the text of Rule 35 and jurisprudence related to an analogous provision applicable at the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY'), the PTC determined that there are '*three distinct standards of proof* that require attention when considering an interference with the administration of justice pursuant to Internal Rule 35':[53]

> These standards are (i) reason to believe; (ii) sufficient grounds; and (iii) beyond reasonable doubt. The reason-to-believe standard is expressed in Internal Rule 35(2), which provides three

[52] Rule 35(2) (emphasis added).
[53] Second Witness Decision, para 36 (emphasis added).

> courses of action when the 'Co-Investigating Judges or the Chambers have *reason to believe* that a person may have committed any of the acts' listed in Internal Rule 35(1). 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. The beyond-reasonable-doubt standard of proof must be satisfied before sanctions can be imposed on an individual for a violation of Internal Rule 35(1).[54]

According to the PTC, '[t]he reason-to-believe standard is *an extremely low threshold* and merely invokes inquiry by the CIJs or a Chamber'.[55]

17. A crucial provision in safeguarding the impartiality and independence of the ECCC and in 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 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 [the] 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.[56]

In light of its protective function and general application,[57] the PTC has rightly given Rule 35 a liberal interpretation.

18. Along these lines, the PTC has recognized that ECCC judicial organs have the authority to take discretionary action pursuant to Rule 35 upon application by a party to the proceedings:

> The Pre-Trial Chamber notes its previous decision in which it was stated that 'this Internal Rule [35] does not provide for the initiation of investigative action upon request by a party. It rather leaves the matter under the discretion of the Co-Investigating Judges or the Chamber'. However, the Chamber concurs with the submission made by the Co-Lawyers for Nuon Chea

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[54] *Ibid* (emphasis in original).

[55] *Ibid*, para 37 (emphasis added). *N.B.* 'The broad nature of this threshold is emphasized by the inclusion of *may* in Internal Rule 35(2). 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 CIJs or 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.' *Ibid*; *see also ibid*, paras 38, 39 (regarding the sufficient-grounds and beyond-reasonable-doubt standards).

[56] 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).

[57] *N.B.* Rule 35 falls under the following rubric of the Rules: 'III. Procedure, A. General Provisions'.

> that 'the OCIJ 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*'.[58]

This position correctly places the emphasis of any Rule 35 inquiry on the alleged interference itself, rather than on the procedural avenue by which evidence of such meddling reaches its target audience (the CIJs or one of the Chambers). The former is crucial, whereas the latter—a purely technical matter—is incidental.

B. Admissibility of Appeals Against Decisions Made Pursuant to Rule 35

19. Pursuant to Rule 104(4), 'decisions on interference with the administration of justice under Rule 35(6)' are subject to immediate appeal.[59] A party seeking to appeal such a decision 'shall file an immediate appeal setting out the grounds of appeal and arguments in support thereof'.[60] Such appeals 'shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber'.[61] 'In the case of a decision of the Trial Chamber, which is open to immediate appeal as provided for in Rule 104(4) paragraphs (a) and (d), the appeal shall be filed within 30 (thirty) days of the date of the decision or its notification.'[62]

C. General Standard of Appellate Review for Immediate Appeals

20. 'Pursuant to […] Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds: [a]n error on a question of law invalidating the decision; [a]n error of fact which has occasioned a miscarriage of justice; or [a] discernible error in the exercise of the Trial Chamber's discretion which resulted in

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[58] Witness Decision, para 43 (emphasis added). *N.B.* In a decision in Case 001, the Trial Chamber suggested that it should be possible for parties to file requests pursuant to Rule 35: '[W]hile the Trial Chamber retains the power to sanction any interference in the administration of justice (pursuant to Rule 35 of the Internal Rules) […] it is not presently *seised of any such requests*'. Case No 001/18-07-2007/ECCC-TC, Document No **E-65/9**, 'Decision on Group 1–Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties', 23 September 2009, ERN 00378404–00378404, para 17 (emphasis added). Query: How else, if not by a party, would the Trial Chamber become 'seised of' a Rule 35 request?

[59] Rule 104(4)(d); *see also* Rule 35(6) ('Any decision under this Rule shall be subject to appeal before the Pre-Trial Chamber or the Supreme Court Chamber as appropriate. […] An appeal to the Supreme Court Chamber shall be filed in compliance with Rules 105(2) and 107(1).')

[60] Rule 105(2).

[61] Rule 105(4). *N.B.* Immediate appeals shall: 'be filed with the Greffier of the *Trial Chamber*' and 'be signed by the appellant *or* appellant's lawyers'. Rules 106(2) and 106(4), respectively, (emphasis added).

[62] Rule 107(1).

prejudice to the appellant.'[63] This Chamber has clarified 'that the grounds for appeal listed under […] Rule 105(2), in relation to immediate appeals are to be read as *disjunctive*'.[64] 'For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.'[65]

D. Reasoned Decisions

21. It (nearly) goes without saying that orders and decisions of the Trial Chamber must be sufficiently reasoned. According to the jurisprudence of international criminal tribunals, such a requirement—one of the elements of the broader right to a fair trial[66]—serves two purposes: (i) it 'enables a useful exercise of the [defendant's] right of appeal'[67] and (ii) it 'allows the [appellate body] to understand and review the findings of the [lower court] as well as its evaluation of evidence'.[68] A truly reasoned decision is one in which the rationale is fully 'comprehensible from the decision itself' and which 'set[s] out […] the relevant facts and legal arguments that […] were found to be persuasive for the determination it reached'.[69]

E. Contextual and Pattern Evidence

22. In assessing the substantive charges against an accused person, trial chambers are free to assign probative value to evidence of events outside the temporal jurisdiction of a tribunal when such material is aimed at, *inter alia*, '[c]larifying a given context' or '[d]emonstrating a deliberate pattern of conduct'.[70] Equally then, by analogy, courts may freely assess similar material—that is, contextual and/or pattern evidence—in

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[63] Document No **E-50/2/1/4**, SCC, Public 'Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release', 3 June 2011, ERN 00702255–00702274 (the 'Release Decision'), para 27.

[64] Release Decision, para 28. 'Accordingly, in order to invoke either the first or second of these grounds of appeal (error of law or error of fact), an appellant is not required to additionally demonstrate a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to him or her.' *Ibid*.

[65] Rule 104(1).

[66] *See, e.g.*, *Prosecutor v Momir Nikolic*, Case No IT-02-60/1-A, 'Judgment on Sentencing Appeal', 8 March 2006, para 96; *Prosecutor v Dragoljub Kunarac*, Case No IT-96-23/1-A, 'Judgment', 12 June 2002, para 41.

[67] *Kunarac*, para 41.

[68] *Ibid*.

[69] *Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06 (OA 6), 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"', 14 December 2006, para 33.

[70] *Prosecutor v Nahimana et al*, Case No ICTR-99-52-A, 'Judgement', 28 November 2007, para 315; *see also, e.g.*, FRE 406 ('Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.')

determining whether there has been an interference with the administration of justice. There is no principled reason to apply a stricter approach to the evaluation of evidence offered in support of an application made pursuant to Rule 35 than the one articulated in Rule 87(1): 'Unless provided otherwise in [the Rules], all evidence is admissible.'

IV. ARGUMENT

A. The Appeal is Admissible

23. As the Impugned Decision amounts (in part) to a ruling 'on interference with the administration of justice under Rule 35(6)', it is subject to immediate appeal.[71] Moreover, the instant submission: (a) sets out 'the grounds of appeal and arguments in support thereof';[72] (b) 'identif[ies] the finding [and] ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber';[73] and (c) has been 'filed within 30 (thirty) days of the date of the decision or its notification'.[74] Accordingly, the appeal is both admissible and timely.

B. The Trial Chamber's Decision Not to Act Pursuant to Rule 35 is Untenable for a Number of Reasons

1. The Trial Chamber Disregarded Claims Related Directly to Case 002 and Provided no Reasons for Such Omission

24. The Rule 35 Request contains specific allegations of direct Government interference in Case 002, namely: the RGC's concerted efforts to: (a) frustrate the international Co-Investigating Judge's attempt to obtain the testimony of Norodom Sihanouk[75] and (b) obstruct the execution of duly issued summonses to the Six Insiders.[76] Yet, rather than addressing these detailed and clearly-pleaded claims, the Impugned Decision simply ignores them. As the Trial Chamber is under an obligation to dispose of party applications by way of reasoned decisions,[77] this oversight amounts to an error of law—*ipso facto*. Not only is Nuon Chea's right of appeal frustrated by the omission, this Chamber is in no position 'to understand and review the findings of the [Trial Chamber] as well as its

[71] *See* para 19, *supra*. Though it dealt with a number of related matters, the Impugned Decision clearly disposed of the Rule 35 Request.
[72] Rule 105(2).
[73] Rule 105(4).
[74] Rule 107(1).
[75] *See* Rule 35 Request, para 3(a).
[76] *Ibid*, paras 3(b)–(c).
[77] *See* para 21, *supra*.

evaluation of evidence'.[78] This is because, with respect to the Defence claims related to Case 002, the Trial Chamber has made *no* findings nor engaged in *any* evaluation.

2. The Trial Chamber Erred in Holding that it May Only Act Pursuant to Rule 35 on Claims Related Directly to Factual Matters with Which it is Seised

25. Neither the text of Rule 35 nor its underlying rationale compels the application of an approach as narrow as the one adopted by the Trial Chamber. Rather, the provision's broad language, as well as its clear mandate, militate in favor of a much more open interpretation of the powers bestowed on the OCIJ and the various Chambers when it comes to addressing instances of obstruction of justice.

26. Rule 35(1) vests 'The ECCC'—that is, the institution itself—with wide authority to 'sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice'. The provision is designed to serve 'as a mechanism to preserve the integrity of the judicial process at both the investigative and trial stages'.[79] It simply does not follow from either its text or purpose that 'an investigation pursuant to [Rule 35] can only […] meaningfully be conducted by the judicial body seised of the case'.[80] Nor does the Impugned Decision explain how the Trial Chamber arrived at this conclusory position.

27. The correct approach, the one which the Trial Chamber should have applied to the instant case, has been previously set out by the PTC and bears repetition here:

> 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 [the] 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.[81]

In short, only a 'judicious application' of Rule 35 (that is to say, a sensible one), rather than the formalistic interpretation preferred by the Trial Chamber, will ensure the effective promotion of the important objectives the rule was designed to achieve.

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[78] *Ibid*.
[79] Witness Decision, para 38.
[80] Impugned Decision, para 21.
[81] Witness Decision, para 38 (emphasis added).

28. The overly legalistic (yet ultimately meretricious) methodology demonstrated by the Trial Chamber on this point is, perhaps, the chief error of the Impugned Decision. This is because such reasoning is 'outcome-based', in the sense that it is designed to achieve a predetermined result—in this case, the evasion of protective (and possibly punitive) action. More than legally improper, this type of analysis promotes precisely the kind of responsibility-shirking (what the Defence has previously termed 'judicial buck-passing'[82]) that has quite rightly enraged the chorus of above-referenced critics.

29. It may strain reason to suggest, for example, that this Chamber could (or should) institute Rule 35 proceedings vis-à-vis Case 002 without first giving the Trial Chamber an opportunity to act. However, there is absolutely no legal impediment that would prevent the Trial Chamber from sanctioning an interference *which occurred during the judicial investigation*—should such meddling either: (a) come to light for the first time during the trial phase or (b) as in the instant case, have been improperly ignored by the OCIJ and/or the PTC. The Trial Chamber's suggestion that the claims raised herein are more properly dealt with by 'the CIJs in the first instance and the [PTC] on appeal' is patently irrational. Given the OCIJ's previous stance on the issues raised in the Rule 35 Request, let alone the fact that both CIJs are suspected of abetting the very political interference which forms the heart of the Defence claim, the course of action proposed by the Trial Chamber would amount to an exercise in futility. As the international judges of the PTC have noted, the OCIJ is professionally unsuited 'to conduct an investigation into *these allegations* of interference'.[83]

30. Finally, nothing in the text of Rule 35—nor, as noted above, in the spirit of its application—requires a showing of *actual harm* to an accused person or any *tangible impact* on the proceedings. The reason for this is plain: interference with the administration of justice of the type described in Rule 35(1) is, *per se*, an institutional violation striking at the very integrity of the Tribunal. Such behavior can never be tolerated as a matter of principle, irrespective of any specific effect on the Accused or the proceedings. Accordingly, the Trial Chamber's decision to reject the Rule 35 Request, as it *supposedly* 'identifies no tangible impact of these allegations on the

[82] *See, e.g.*, Document No **D-314/2/4**, 'Appeal Against OCIJ Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses', 16 March 2010, ERN 00484112–00484130.
[83] Dissenting Opinion, para 8 (emphasis added).

fairness of the trial proceedings in Case 002 (with which the Trial Chamber is seised)',[84] is equally erroneous.

31. These failings amount to an 'error on a question of law invalidating the decision'.[85]

3. The Trial Chamber Erroneously Dismissed the Rule 35 Request by Misconstruing the Factual Claims Related to Cases 003 and 004

32. By disregarding Defence claims related to Case 002 (as discussed above[86]) and failing to appreciate the proper probative value of the allegations with respect to Cases 003 and 004, the Trial Chamber has committed 'a discernible error in the exercise of [its] discretion which resulted in prejudice to the appellant'.[87] Assuming, for the sake of argument, that the Defence was required to establish actual harm to one of Nuon Chea's rights and/or a tangible connection to Case 002 (the Impugned Decision's erroneous standard), the Trial Chamber went out of its way to ensure that such result would be impossible. Despite detailed references to issues impacting the instant case, the Trial Chamber chose to focus solely on the 'allegations of interference with the administration of justice or political interference in relation to Cases 003 and 004'.[88] This misplaced emphasis robbed the Rule 35 Request of its evidentiary thrust.

33. In actual fact, the Defence clearly identified instances of Government interference that have directly impacted Case 002. But for open RGC meddling, the case file would now contain the (potentially exculpatory) statements of Norodom Sihanouk, the Six Insiders, and possibly others. It is presently unknown to what extent the integrity of the case file has been further compromised by less overt forms of obstruction on the part of the Government (perhaps executed by ECCC staff members tainted by the corruption scandal[89]). Of course, exposing any such activity was one of the goals of the Rule 35 Request. In disposing of that application, the judges should have viewed the material related to Cases 003 and 004—*in conjunction with the specifically-pleaded Case 002 claims*—as relevant to clarifying the prevailing context and demonstrating a deliberate

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[84] Impugned Decision, para 21. *N.B.* As argued in the following sub-section, this is not in fact the case. *See* paras 32–33, *infra*.
[85] Release Decision, para 27.
[86] *See* para 24, *supra* (where the Defence argues that this failing also amounts to an error of law).
[87] Release Decision, para 27.
[88] Impugned Decision, para 21.
[89] *See* para 3(a), *supra*.

pattern of RGC conduct.[90] Had the Trial Chamber done so, a finding of *prima facie* interference would have been inescapable. Yet the analysis displayed in the Impugned Decision appears deliberately evasive in its refusal to consider the specific allegations of interference canvassed by the Defence and its failure to appreciate the varied nature and degree of relevance of all of the material submitted.

34. A comprehensive review of the *entire factual record* presented by the Defence—including the material specifically adopted by reference[91]—would have led any 'reasonable trier of fact'[92] to the conclusion that there is 'reason to believe that one or more members of the RGC may have knowingly and willfully interfered with witnesses'.[93] As noted by the PTC's international judges, such a finding is sufficient to invoke a preliminary inquiry under Rule 35's reason-to-believe standard[94]—'an extremely low threshold'.[95] Moreover, had the Trial Chamber assessed the obvious instances of interference in Case 002 against the larger context provided by the claims of meddling in Cases 003 and 004, a pattern of RGC interference would have become apparent. While the Trial Chamber has demonstrated a preference for 'piecemeal (and inchoate) approach[es]' to legal issues,[96] assessing facts in isolation will very often lead to erroneous results—as in the instant case.

4. The Trial Chamber Erred in Suggesting That Parties Cannot, on Their Own Motion, Initiate Rule 35 Proceedings

35. Relying on a 2009 decision of the PTC, the Trial Chamber noted that 'Internal Rule 35 does not provide for the initiation of investigative action upon request of a party'.[97] However, the PTC subsequently revised its position, holding that ECCC judicial organs have the authority to take discretionary action pursuant to Rule 35 *upon application by a party to the proceedings*.[98] Nothing in the text of Rule 35 suggests otherwise; and, given the nature and purpose of the provision, this is clearly the correct approach. Any other position would amount to an undeserved victory of form over substance. Lawyers, like

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90 *See* para 22, *supra*.
91 Rule 35 Request, paras 2–13.
92 Dissenting Opinion, para 6.
93 *Ibid*.
94 *Ibid*.
95 Second PTC Decision, para 37.
96 *See, e.g.*, Document No **E-93/9**, Confidential 'Request for Additional Witnesses & Continuation of Initial Hearing', 5 July 2011, ERN 00711970–00711975.
97 Impugned Decision, n 45.
98 *See* para 18, *supra*.

judges, have an obligation to ensure the integrity of the proceedings (pursuant to their respective ethical codes); and it would border on the absurd to suggest that counsel for a party could not affirmatively move a Chamber for relief under Rule 35. As recently put by the Ugandan Constitutional Court (albeit in a different context): a tribunal should 'not close its eyes to an alleged illegality and has a duty to investigate the allegation'.[99] Accordingly, the Trial Chamber's position amounts to 'an error on a question of law'.[100]

C. The Supreme Court Chamber Can and Should Act Upon the Outstanding Issues

36. Given the gravity of the allegations outlined in the Rule 35 Request and above, there is no question that the Trial Chamber should have acted 'without hesitation'. In light of its reluctance to do so, as well as the OCIJ's compromised position vis-à-vis the allegations, the obligation to ensure the integrity of the proceedings and the Tribunal now falls squarely on the Supreme Court Chamber. Rule 35(2) vests 'any Chamber' with such authority and—as argued above—there is no legal requirement that the claims of interference must relate directly to factual matters with which this Chamber is otherwise seised.

37. Simply put, the judges of this Chamber can and should investigate all outstanding allegations of RGC interference (and, if necessary, sanction those responsible).[101] The material facts—much like Hun Sen, Khieu Kanharith, and, only recently, Siegfried Blunk[102]—speak for themselves (assuming words retain their ordinary meaning in this extraordinary setting). That so much of the RGC meddling has taken place in plain view suggests the significant probability of far more insidious interference behind the scenes. And a point perhaps lost in the recent commotion regarding Cases 003 and 004

[99] *Kwoyelo v Uganada*, Constitutional Court of Uganda, Petition No 036/11, 'Ruling of the Court', 22 September 2011, p 6:31–133. *N.B.* Rule 35 is essentially a partial codification of the ECCC's inherent powers. *See, e.g.*, Document No **D-158/5/1/1**, 'Appeal Against Order on Eleventh Request for Investigative Action', 4 May 2009, ERN 00323238–00323255, paras 10–12 (Inherent powers are those that derive, not from statute or other express grant of authority, but rather from a court's very nature as such.)

[100] Release Decision, para 27. *N.B.* The Trial Chamber did not reject the Rule 35 Request on this basis. However, in the interest of promoting the 'judicious application' of Rule 35 at the ECCC, the erroneous position expressed in the Impugned Decision should nevertheless be addressed by the Supreme Court Chamber.

[101] Rule 104(1) ('For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.')

[102] Initially reluctant to speak about his work at the Tribunal, Judge Blunk had become quite vocal in his aggressive attacks against those who have been critical of his approach to Cases 003 and 004. *See, e.g.*, HRW Press Release.

is a crucial corollary: as much as the Government is *refusing* to allow additional prosecutions, it is *supporting* the current ones.[103] In the context of Cambodian politics, such support is never without strings attached. To be sure, the RGC has a considered and consistent view as to how Case 002 should ultimately be resolved.[104] The question remains: to what extent are the Cambodian jurists of this Tribunal unduly adhering to the Government's script.

38. In light of Judge Blunk's resignation, this Chamber cannot credibly dismiss the allegations underlying the Rule 35 Request. His departure must be seen, in part, as an official acknowledgment of the gravity and veracity of RGC interference at this Court. And while the Defence was intrigued to discover that the international CIJ had 'initiated Contempt of Court proceedings against [the RGC Minister of Information]' for his clear, open, and vocal interference, the judge's public revelation of this presumably confidential action—five months to the day after Khieu Kanharith delivered his remarks—is long overdue. If Judge Blunk had indeed expected his action to serve as 'a warning to other government officials', the Defence is hard pressed to discern how such a goal could have been achieved in secrecy. A sealed warning is no warning at all. Given the recent remarks of the RGC Minister of Foreign Affairs, the international CIJ's attempt has had no deterrent effect. In order to succeed where Judge Blunk failed, this Chamber should act publicly, robustly, and without delay.

39. As Mark Ellis has aptly warned, the danger of being swept away in a well-intentioned tide of judicial optimism is as subtle as it is strong. Institutional momentum—like executive interference in an authoritarian state—is not easily overcome. Yet so much is at stake: a fair trial for the four Accused, the integrity of the Tribunal, and (not insignificantly) the personal and professional reputations of those who preside over these proceedings. Indeed, the Defence itself may soon be faced with the difficult task of advising Nuon Chea as to whether or not his continued participation in this trial is warranted. As in any endeavor whose shortcomings are exposed and apprehended only gradually, there comes a point

[103] *N.B.* While the OCIJ under Judges Marcel Lemonde and You Bunleng appeared to focus exclusively on inculpatory material in Case 002, the office in its current incarnation has (by nearly all accounts) developed a strong affinity for exculpatory evidence.

[104] *See, e.g.*, Hall Op-Ed ('By impeding the Tribunal, Mr Hun Sen is able to maintain political control of the process while also shaping the narrative of the Khmer Rouge era so that only a few individuals appear culpable.')

when silence, inaction, and the deliberate avoidance of difficult decisions evolve into complicity.[105] Sadly, the ECCC is fast approaching that juncture.[106]

D. An Oral Hearing Would Serve the Interests of Justice

40. There is a presumption that appeal hearings 'shall be conducted in public'.[107] While the Rules do provide for the determination of 'immediate appeals on the basis of written submissions only',[108] the significance of the various issues raised by the instant appeal calls for a full and frank public debate. The UN has been accused of 'burying its head in the sand by failing to respond to the numerous credible allegations of judicial misconduct'.[109] Rather than following this embarrassing lead, the Supreme Court Chamber should hold its head high and submit the ECCC and the RGC to the public scrutiny both of these extraordinary institutions deserve.

V. CONCLUSION

41. Accordingly, for the reasons stated herein, this Chamber should:

a. admit the instant appeal;

b. declare the Impugned Decision invalid for the reasons set out above;

c. order a public investigation pursuant to Rule 35, along the particular lines set out at paragraph 32 of the Rule 35 Request, to be conducted by a judicial body (of proven independence) that does not comprise any of the specific individuals whose alleged conduct forms the factual basis of the Rule 35 Request and the instant appeal; and

d. complete the initial inquiry and implement any subsequent investigative and/or disciplinary action in advance of the substantive hearing in Case 002.

As noted above, oral argument at an open hearing—in advance of any determination—would be appropriate and is hereby requested.

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[105] *N.B.* Unless and until Nuon Chea provides contrary instructions, the Defence will continue to speak, act, and vocally pose such questions.
[106] *See, e.g.,* Hall Op-Ed ('Now, political interference has *clearly erased* the independence and impartiality of the judiciary.') (emphasis added).
[107] Rule 109(1).
[108] *Ibid* ('The Chamber may decide to determine immediate appeals on the basis of written submissions only.')
[109] HRW Press Release.

CO-LAWYERS FOR NUON CHEA

SON Arun

Michiel PESTMAN & Victor KOPPE