BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IMMEDIATE APPEAL AGAINST TRIAL CHAMBER DECISION ON APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35

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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') herby submit this immediate appeal against the Trial Chamber's 'Decision on Application for Immediate Action Pursuant to Rule 35' (the 'Impugned Decision').[2] For the reasons stated below, the Defence argues that: (i) the appeal is admissible; (ii) the Impugned Decision is legally untenable; and (iii) the Supreme Court Chamber can and should exercise its own discretion to remedy the errors committed by the Trial Chamber.

II. PROCEDURAL HISTORY

2. On 25 April 2012, the Defence filed an application pursuant to Rule 35 in response to the resignation of Co-Investigating Judge ('CIJ') Laurent Kasper-Ansermet ('Original Application').[3] In said application, the Defence argued that the resignation of CIJ Kasper-Ansermet was further proof of the degree to which political interference by the Royal Government of Cambodia ('RGC') was compromising the proceedings in all of the cases at the ECCC. As such, the Defence called for a 'full investigation into the effect of RGC interference on the fairness of Case 002' and 'a stay of the proceedings pending the outcome of such inquiry'.[4] On 3 May 2012, the Prosecution filed a response to the Original Application.[5]

3. After waiting for a decision from the Trial Chamber on our Original Application for nearly six months, the Defence filed an Appeal to the Supreme Court Chamber pursuant to Rule 104(4)(d),[6] arguing that the Trial Chamber's failure to make a decision on the Original Application within a reasonable time-frame amounted to a constructive dismissal thereof ('Constructive Appeal').[7] The Trial Chamber finally rendered a decision on our

[1] *See* ECCC Internal Rules (Rev 8), as revised on 3 August 2011.
[2] *See* Document No. **E-189/3** 'Decision on Application for Immediate Action Pursuant to Rule 35', 22 November 2012, ERN 00859224-00859231 ('Impugned Decision').
[3] *See* Document No. **E-189** 'Application for Immediate Action Pursuant to Rule 35', 25 April 2012, ERN 00803004-00803019 ('Request').
[4] *See* Impugned Decision, para. 28.
[5] *See* Document No. **E-189/1**, 'Co-Prosecutors' Response to Nuon Chea Application for Immediate Action Pursuant to Rule 35', 3 May 2012, ERN 00805168-0080518 ('Prosecution Response').
[6] *See* Document No. **E-189/2/1**, 'Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35', 10 October 2012, ERN 00855149-00855151.
[7] *See Ibid*, paras 1-4, 6.

Original Application on 22 November 2012,[8] before the Supreme Court Chamber had the opportunity to decide on the Constructive Appeal. On 26 November 2012, the Supreme Court Chamber rendered a decision ('Appeals Decision'), dismissing the Constructive Appeal as moot but 'without prejudice to the Defence filing a renewed appeal pursuant to rule 104(4)(d) of the Internal Rules on the basis of the Trail Chamber's written reasons for rejecting the Application.'[9]

4. The Impugned Decision rejected all of the relief sought in the Original Application, as well as warning the Defence 'that future misconduct by international counsel for NUON Chea such as repetitious filings or unsubstantiated, discriminatory allegations made against members of the Trial Chamber may merit the imposition of sanctions pursuant to Internal Rule 38.'[10]

III. APPLICABLE LAW

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

5. As per Rule 104(4), decisions under Rule 35(6) are subject to immediate appeal.[11] Such appeals must set 'out the grounds of appeal and arguments in support thereof'[12] and 'identify the finding or ruling [in the Trial Chamber decision] challenged'.[13] Furthermore, appeals provided for in Rule 104(4) must be filed within 30 days of the date of the decision or its notification.[14]

B. Rule 35 Requests

6. The Supreme Court Chamber has delivered the two most authoritative decisions on Rule 35 Request, the 'Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motion for Disqualification of Judge Silvia Cartwright'[15] and the 'Decision on

[8] *See* Impugned Decision.
[9] See Document No. **E-189/2/3**, 'Decision on NUON Chea's "Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35"', 26 November 2012, ERN 00865011-00865013, para. 6 ('SCC Decision').
[10] *See* Impugned Decision, p. 8.
[11] *See* Rule 104(4)(d).
[12] *See* Rule 105(2).
[13] *See* Rule 105(4).
[14] *See* Rule 107(1).
[15] Document No. **E-137/5/1/3**, 'Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motion for Disqualification of Judge Silvia Cartwright', 17 April 2012, ERN 00797036-00797045 ('SCC IENG Sary Appeal').

Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation."[16] These two decisions will be referenced throughout the motion.

IV. ARGUMENT AND GROUNDS OF APPEAL

A. The Appeal is Admissible

7. As the Impugned Decision was made under Rule 35(6), it is subject to immediate appeal as per Rule 104(4)(d).[17] Moreover, the instant submission complies with the criteria set forth in Rule 105(2) and (4),[18] and it has been "filed within 30 (thirty) days of the date of the decision or its notification."[19] Accordingly, the appeal is both admissible and timely.

B. The Trial Chamber Abused its Discretion and/or Erred in Fact or in Law

i. Failure to consider and/or address the substance of the Request

8. The Trial Chamber abused its discretion and/or erred in law by not adequately considering the submissions by the Defence.

Failure to consider and or/address the contents of the 'Note'

9. The Trial Chamber failed entirely to consider and/or address the substantive content of the 'Note', which lies at the heart of the Rule 35 Request.[20]

10. The contents of the Note as issued by Kasper-Ansermet formed a crucial part of the Defence submissions in its Request, and indeed was the direct trigger for its filing. As such, it forms the core of the Request, and is discussed in the very first line of the Argument section: 'Judge Kasper-Ansermet's resignation *and Note* are conclusive proof that no Cambodian member of the ECCC is able to act against the RGC"s judicial agenda."[21] The Note is furthermore discussed at length in the 'Relevant Facts' of the

[16] *See* Document No. **E-116/1/7**, "Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation", 27 April 2012, ERN 00794483-00794497 ("SCC Fairness of Judicial Investigation").
[17] *See* Rule 104(4).
[18] *See* Rule 105(2) and (4). The instant submission sets out the grounds of appeal and identifies the findings in the rulings which are being challenged.
[19] *See* Rule 107(1).
[20] *See* Case Nos. 003 & 004, Document No. **D-38** "Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Case 003 and 004", 21 March 2012, ERN 00791885-00791898 ("Note").
[21] *See* Request, para. 19 (emphasis added).

Request,[22] and the entirety of its contents is adopted by reference.[23] Lastly, the Note is featured prominently in the Relief sought, where an acknowledgement of its injurious impact is requested.[24] In the words of the Request: the Note is 'a scathing, irrefutable indictment of a damaged, degraded institution. In short, it amounts to the closing order on Cambodia's fatally flawed dalliance with international justice.'[25]

11. As such, the contents of the Note form a central component of the Request; this only makes sense, as the Note constitutes a *direct* confirmation, by an independent and international *judge* nonetheless, of the long-espoused Defence position that national staff members at the court, including its judges, cannot function independently of the wishes and directives of the Royal Government of Cambodia ('RGC').[26]

12. The paramount importance of the Note to the Request and to the Defence's arguments and submissions is therefore clear. However, the impugned Decision merely *mentions* the Note in the summing up of the Defence's arguments in paragraph 4,[27] and then fails to revisit the Note or its contents in any way, shape or form in the remainder of the Decision. As the Note, and more importantly the *contents* of the Note (revealing a court divided along national-international lines, with the national side duly following the official RGC position, just as the Defence had always maintained it would) formed a crucial and inextricable component of the Request, the Trial Chamber's failure to address it any way amounts to an abuse of discretion; alternatively, it amounts to an error of law, as the Trial Chamber has failed to exercise its duty to provide adequate reasons for its decisions, as it has in no way explained why the Note is irrelevant in considering the relief requested by the Defence.

Failure to address the reasons for, and facts and circumstances surrounding, Kasper-Ansermet's resignation

[22] *See* Request, paras. 9-11.
[23] *See* Request, para. 11.
[24] *See* Request, para. 28.
[25] *See* Request, para. 11.
[26] While the Note itself mostly criticizes the actions by You Bunleng and his national staff members, it is the Defence submission that these actions are a direct manifestation of the RGC's wishes with regard to Cases 003/004, keeping in mind the forceful positions the RGC, and especially Hun Sen, has always adopted in the matter. (*See*, also, the Request). Whether one agrees with the Defence assessments on these issues is a different matter; the problem here lies in the fact that the Trial Chamber has not even addressed the argument and the issues.
[27] *See* Request, para. 4 ('The international members of the NUON Chea Defence seek an acknowledgement of the injurious impact of Judge Kasper-Ansermet's resignation letter […]').

13. To be sure, the Decision does briefly reference Kasper-Ansermet's *resignation* (separate from the contents of the Note) on a few occasions.[28] But the Trial Chamber fails altogether to address the relevant facts --- the reasons for and facts and circumstances surrounding the resignation as mentioned in the Request[29] --- and in addition inexcusably simplifies the Defence position. The first reference to the resignation can be found in paragraph 3, where the Trial Chamber incorrectly summarizes the Defence arguments: 'The international members of the NUON Chea Defence submit that the resignation of Judge Laurent Kasper-Ansermet from his position as Reserve International Co-Investigating Judge demonstrates that Cambodian officials of the ECCC are affected by governmental influence and are unable to act independently.'[30] Of course, the Defence position has never been that the mere *resignation* of Kasper-Ansermet as such demonstrates anything; it is *the reasons for and circumstances and facts surrounding his resignation* (as described extensively in the Request) that prompted the Defence filing.[31] The Trial Chamber thus fails to address, let alone engage, the *substance* of the Defence's submissions in any way.

14. In paragraph 8, the Trial Chamber embraces the identical approach, where it writes: 'Although attempting to characterize the resignation of Reserve International Co-Investigating Judge Kasper-Ansermet from the investigation in Cases 003 and 004 as a new circumstance warranting the Chamber's intervention in the trial in Case 002 [...].'[32] Again, the Defence never portrayed the mere resignation as such as a new circumstance. The Trial Chamber thus misrepresents the Defence's position, entirely dodging the substantive submissions contained in the Request.[33] This amounts to an abuse of discretion, and the Decision must be quashed for that reason; alternatively, it amounts to an error of law, as the Trial Chamber has failed to exercise its duty to provide adequate

[28] *See* Impugned Decision, paras 2, 4, 8, 10.
[29] *See* Request, paras 6-15.
[30] *See* Impugned Decision, para. 3.
[31] Indeed, paragraph 19 of the Request, which is explicitly referenced by the Trial Chamber, does not merely speak of his resignation, but of his resignation *and* Note. *See* Request, para. 19.
[32] *See* Impugned Decision, para. 8.
[33] Finally, in paragraph 10, the Trial Chamber engages in the same simplification once more, where its states that the Request 'fails to specify or substantiate any alleged impact of the resignation of Judge Kasper-Ansermet from the judicial investigation of Cases 003 and 004 on the on-going trial in Case 002/01.' Again, it is not the resignation as such that the Defence is complaining of. Importantly, footnote 21 of this paragraph is the only evidence of any *substantive* consideration of 'facts' of any sort in the Decision, where the Trial Chamber considers the Press Release of 4 May 2012 by Kasper-Ansermet which speaks of interference by staff members in Cases 003 and 004, and provides a reasoned decision as to why *those* facts do not merit further action by the Trial Chamber. While the Defence takes no issue with this footnote as such, it is telling that the only reasoned discussion of *actual factual circumstances* relates to a press release that did not even form part of the Request (as it was published after the filing date of the latter).

reasons for its decisions, as it has in no way explained why the facts and circumstances surrounding Kasper-Ansermet's resignation are irrelevant in considering the relief requested by the Defence.

ii. Finding of 'Repetitiousness' amounts to an abuse of discretion or an error of law

The Request is the contrary of 'almost entirely repetitious'

15. The Decision is similarly flawed in its conclusion that 'the NUON Chea Application is in fact *almost entirely repetitious* of submissions it has previously made before the Trial Chamber.'[34] This finding is puzzling, and suggests that the Trial Chamber has not even read the Request. To be sure, the Defence would have expected a slightly more engaged Trial Chamber upon being confronted by an extraordinary, unprecedented attack by a sitting judge on the integrity of the Court.[35] But, more importantly from an appellate perspective, the Trial Chamber's allegation of repetitiousness is simply untenable: exactly *4 (four)* out of the Request's *28 paragraphs* summarize *previous* Defence efforts;[36] the remainder and core of the Request is dedicated to addressing the facts and circumstances regarding Kasper-Ansermet's resignation,[37] submissions on the law,[38] and arguments relying on the circumstances of Kasper-Ansermet's resignation.[39] This makes the Request a far cry from 'almost entirely repetitious.'

16. The finding by the Trial Chamber that the Request is 'almost entirely repetitious,' which finding underlies (at least in part) its decision to dismiss the Request,[40] is clearly an abuse of discretion, as the Trial Chamber has blatantly misconstrued the Request, or an error of fact, or an erroneous understanding of 'repetitious' and therefore an error of law.[41] Either way, the Decision must be quashed on this basis.[42]

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[34] *See* Impugned Decision, para. 8 (emphasis added).
[35] It brings to mind Kasper-Ansermet's parting words, as quoted in the Request: "Faced with the hostility of Cambodian judges, **the silence of my international colleagues** and a complacent administration, I find myself puzzled." (Julia Wallace, 'From Phnom Penh with Love', *International Justice Tribune*, 28 March 2012 (emphasis added)).
[36] Request, paras 2-5, helpfully titled: 'Previous Defence efforts'.
[37] *See* Request, paras 1, 6-15.
[38] *See* Request, paras 16-18.
[39] *See* Request, paras 19-26.
[40] *See* Impugned Decision, para. 8. As para. 8 with its 'almost entirely repetitious' language forms part of the findings of the Trial Chamber, it must be assumed to form part of the basis of the Decision to reject all relief.
[41] There is yet another reason why the Trial Chamber's finding of repetitiousness is unfounded. As a basis for its finding of repetitiousness it did it not only erroneously hold that the 'Application is in fact almost entirely repetitious of submissions it has previously made before the Trial Chamber' (see above), it *added* that those

Quoting earlier submissions

17. To be sure, the Request references verbatim the *language* of some of its earlier filings, most notably in paragraph 23. However, the *irony* of this exercise seems to have been lost on the members of the Trial Chamber. The language quoted stems from our earlier Adjournment Request;[43] the irony can be found in the fact that this Adjournment Request was filed in response to *another* resignation, of an entirely *different* co-investigating judge (Judge Blunk), six months *prior* to the filing of the instant Request, which was a resignation *also* as a result of incessant government interference.[44] The repetition of the *identical language* helped to illustrate that, unsurprisingly,[45] six months down the road *nothing had changed* at the ECCC: and indeed, the language of and the arguments advanced in the Adjournment Request were as valid and unaddressed as ever. The difference between the two filings is that the same language held *even more force* at the

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earlier submissions 'have been rejected both by the Trial and the Supreme Court Chambers.' (Request, para. 8). To support that finding it relies on 3 distinct procedures instigated by the Nuon Chea Defence: however, by the time of filing of the Request two of these three procedures had not been irrevocably decided on by the Supreme Court Chamber (Document No. **E-116/1/7** 'Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation', **27 April 2012**), or even the Trial Chamber itself (See Document No. **E-176/2** 'Decision on Rule 35 Application for Summary Action', **11 May 2012**). The Trial Chamber's observation that these submissions 'have been rejected' by the Supreme Court Chambers is accordingly misleading and can hold no weight whatsoever when assessing the putative repetitiousness of the Nuon Chea filing; indeed, at the time of filing of the Request, the Nuon Chea Defence had no way of knowing what the position of the SCC on any of these issues would be. The *third* Nuon Chea filing that underlies the TC's assertion of repetitiousness was the 'Request for Adjournment of Opening Statements and Substantive Hearing.' (*See* Document No. **E-131/2** 'Request for Adjournment of Opening Statements and Substantive Hearing', 26 October 2011, ERN 00749600-00749612). This extensively reasoned, 12 page Request, relying on the circumstances surrounding the resignation of Judge Blunk, was decided upon in the form of a 1-page, wholly inadequately reasoned, Memorandum. (*See* Document No. **E-131/2/1** 'Trial Chamber Response to NUON Chea's Request to Temporarily Stay the Proceedings in Case 001 (131/2)' 2 November 2011) which spectacularly failed to address the *substance* of the Adjournment Request, more specifically the circumstances surrounding the resignation of Judge Blunk. As this 'Memorandum' could not be appealed, the SCC has not ruled on it, and has therefore not 'rejected' it. In short: the only irrevocable legal ruling that was in place when the Defence filed its Request on April 25, 2012, was a defective one-page Memorandum that in no way addressed the merits of the Defence arguments regarding the resignation of judge Blunk. Indeed, if the invocation of Memorandum E131/2/1 by the Trial Chamber serves to show anything, it would be the repetitive and repeated proclivity of this Trial Chamber to refuse to engage substantively (and by way of reasoned decisions) with the not-too-trivial circumstance that successive foreign judges have quit the ECCC because of government interference. As support for a claim that the Defence is filing repetitious requests, it is less helpful.

[42] In addition, the Decision makes clear that it has not considered the facts as contained or referenced in the previous Defence submissions. As these facts provide relevant context, and are undisputed, this amounts to an abuse of discretion or error of law as well.

[43] Document No. **E-131/2**, 'Request for Adjournment of Opening Statements and Substantive Hearing', 26 October 2012, ERN 00749600-00749612 ('Adjournment Request').

[44] In fact, the Request helpfully explained as much in footnote 77.

[45] We use the word unsurprisingly, as no one at the ECCC seems to be willing to take any meaningful action against government interference: not a single judicial entity, domestic or international, 'had Blunk's or Kasper-Ansermet's back'; we can only guess as to the reasons for this.

time of filing of the Request, now that yet *another* international CIJ had decided to throw in the towel on the basis of inexcusable government interference.

iii. Failure to follow procedures established by Supreme Court Chamber

18. The Trial Chamber has failed to apply the clear steps as set out by the Supreme Court Chamber in its Hun Sen Appeal decision, which described the procedural approach that must be followed when a judicial body is confronted with a Request: 'Pursuant to Rule 35, the body seised of a request must examine the allegations; assess whether there is, at a minimum, reason to believe that any of the acts encompassed by Rule 35(1) may have been committed; and decide the appropriate action, if any, to be taken pursuant to Rule 35(2).'[46]

19. As is evident from the Decision, there is no evidence whatsoever that the Trial Chamber has even examined the allegations; as stated before, the Note and other facts and circumstances surrounding the resignation of Kasper-Ansermet are not discussed in any way in the Decision. For this reason alone the Decision must be quashed.

20. More importantly, the Trial Chamber has in no way assessed whether there is, at a minimum, reason to believe that any of the acts encompassed by Rule 35(1) may have been committed. In its eagerness to dismiss the Request on the basis of alleged repetitiousness, and in its blind focus on the alleged separability of Case 002 and Cases 003/004, it has simply never looked at the facts underlying the Defence Request.

21. The structure of the Decision is revealing: the bulk of the Trial Chamber's reasoning can be found under the sub-heading 'Relief Sought.'[47] It is clear that the Trial Chamber, in reaching its Decision, has focused *on the relief sought* (with which it takes serious issue) and dismisses the Request because of this relief sought. This, however, is not the appropriate procedure when assessing a Rule 35 Request: as stated, the Trial Chamber first was under an obligation to examine the allegations, and then had to decide whether there was a reason to believe that someone may have committed a Rule 35 violation. The

[46] *See* Document No. **E-176/2/1/1** 'Immediate Appeal Against Trial Chamber Decision on Rule 35 Request for Summary Action Against Hun Sen', 11 June 2012, 00815298-00815309 ('Hun Sen Appeal'), para. 26.
[47] See Impugned Decision, paras. 9-14.

Trial Chamber did neither. Only after following those steps would the Trial Chamber have to decide on which steps were to be taken.[48]

22. It must furthermore be noted that the rationale underlying Rule 35, which is the protection of the integrity of the proceedings, cannot be squared with a dismissal of a Rule 35 Request *on the basis of the relief sought*: in a situation where a party asks for a stay of proceedings on the basis of interference, and the Trial Chamber indeed does find a reason to believe that someone has interfered, but finds a stay too extreme a measure, the rationale underlying Rule 35 would dictate that the Chamber *proprio motu* take further steps as envisaged in Rule 35(2): conduct further investigations or refer the matter to the appropriate authorities, rather than dismissing the Request. Rule 35 is not and should never become a party-driven procedure; the Trial Chamber has its own inherent interest in protecting the integrity of the proceedings.

23. The foregoing makes clear that the Trial Chamber has not followed the instructions as to how to consider Rule 35 applications, as clearly set out by Supreme Court Chamber case law, and therefore suffers from an error in law. It should therefore be quashed.

24. In addition, it must be noted that one of the grounds for rejecting the Request is that the Trial Chamber incorrectly and with a hint of drama claims that the Defence is seeking 'an *unlimited* general investigation' into the effects of RGC interference on the fairness of Case 002.[49] The Trial Chamber thus neatly (and tellingly) follows the *OCP*'s characterization of our Request,[50] but misrepresents what the Defence in fact asked for: not an *unlimited* investigation but a *full* one; a request that can hardly be considered to constitute overreaching.[51] Perhaps our Request would have fared better if we had asked for a haphazard or perfunctory investigation. Either way, *misrepresenting* the relief sought, using language inherently intended to denigrate our Request, as the Trial Chamber

[48] It must be noted that the rationale underlying Rule 35, which is the protection of the integrity of the proceedings, cannot be squared uneasy with a dismissal of a Rule 35 Request *on the basis of the relief sought*: in a situation where a party asks for a stay of proceedings on the basis of interference, and the Trial Chamber indeed does find a reason to believe that someone has interfered, but finds a stay too extreme a measure, the rationale underlying Rule 35 would dictate that the Chamber proprio motu takes further steps as envisaged in Rule 35(2): conduct further investigations or refer the matter to the appropriate authorities.
[49] *See* Impugned Decision, para. 14 (emphasis added).
[50] *See* Prosecution Response, paras 9-10.
[51] And indeed, we did not even ask for a full investigation into RGC interference with the work of the ECCC as such (which would be an insurmountable task, even for a willing and well-equipped judicial body), we asked for an investigation into the effects of RGC interference on the *fairness* of Case 002: not an unreasonable request, if one is representing a suspect in that case.

has done, and then proceeding to dismiss the Request *on the basis* of that mischaracterization, amounts to an abuse of discretion.

iv. The Trial Chamber incorrectly concluded that events in Case 003/004 are irrelevant for Case 002

25. The closest the Trial Chamber comes to a reasoned discussion of the Request is in paragraph 10, where it states that '[t]he Chamber has also rejected the NUON Chea Defence's earlier and substantially similar requests for investigations pursuant to Internal Rule 35 on grounds that they did not identify any tangible impact of the allegations it contained on the fairness of trial proceedings in Case 002: a decision which was confirmed by the Supreme Court Chamber on appeal.[52] The present NUON Chea Application similarly fails to specify or substantiate any alleged impact of the resignation of Judge Kasper-Ansermet from the judicial investigation of Cases 003 and 004 on the on-going trial in Case *002/01*.'[53]

26. The Trial Chamber's conclusion that the Request fails to specify or substantiate any alleged impact of Kasper-Ansermet resignation from Case 003 and 004 on the on-going trial in case 002/001 is untenable.[54] At the outset, the Defence acknowledges that the Trial Chamber is vested with wide discretion in these matters and is better placed than the Supreme Court Chamber to evaluate the impact of our factual allegations on the proceedings before it.[55] However, no reasonable trier of fact could have failed to appreciate the *prima facie* importance of the facts surrounding Kasper-Ansermet's resignation on the proceedings in Case 002; the Trial Chamber has thus abused its discretion, or committed an error of law by misapplying the exigencies of Rule 35.

The Request made clear that the ECCC as an institution, and more specifically the OCIJ, is affected by RGC interference

[52] It must be noted that the earlier requests were *not* 'substantially similar' to the current one, as the Trial Chamber erroneously concludes. The Trial Chamber has missed the not-too-trivial circumstance that the current Request, unlike the earlier ones, relies on the resignation of not just one, but now, a *second* international co-investigating judge, who has now *himself* described *interference in his work*. *See* Document No. **E-116** 'Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92)', 9 September 2011, ERN 00729330-00729339 ('Fairness of Judicial Investigation Decision') (referenced by the Trial Chamber in the Impugned Decision in support of its contention that the allegations in the Request are 'substantially similar' to those previously addressed by the Chamber).

[53] *See* Impugned Decision, para. 10.

[54] *See* Request. As stated before, the Request does not allege an impact of the resignation of Kasper-Ansermet on Case 002/001 as such; rather, it is much broader, which the Trial Chamber has overlooked. This forms an independent ground of appeal.

[55] See SCC Fairness of Judicial Investigation, para. 33.

27. The Request *does* show how and why the events in Cases 003/004 are relevant for Case 002 as well:[56] Judge Ansermet's Note makes clear that all Cambodian officials at the ECCC are, in the end, beholden to the RGC, and are not free to perform their duties in a truly independent fashion. The lesson of Judge Ansermet's Note is that the extent and pervasiveness of government influence over proceedings at the ECCC is total: from refusing to sign a request for investigative action to hiding an international judge's official stamp, from the Judges at the very top to the drivers at the very bottom. All of these these staff – not least Judge Bunleng – are the *exact same people* who worked on Case 002. The reasoning then is simple: *if* Cambodian officials are not truly independent in Cases 003/004 (and we submit that the Note confirms beyond a doubt that they are not), there is no principled reason to assume that they could be considered adequately independent in Case 002; one is either susceptible to government pressures, or one is not.[57] In other words, the relevance of events in Cases 003/004 is evident, and indeed addressed in the Request. The Trial Chamber's finding that the Defence failed to specify or substantiate an impact is therefore clearly erroneous, and amounts to an abuse of discretion.[58]

28. Indeed, regardless of the *clerical* division of the proceedings before the ECCC in separate cases, all investigations have been conducted by *one and the same* Office of the Co-Investigating Judges. Perhaps even more importantly, the national Co-Investigating Judge has remained the same throughout all the investigations: Judge You Bunleng. The subdivision in different case numbers is nothing more than a *legal* fiction, a fiction enthusiastically embraced by the Trial Chamber; but this does nothing to change the underlying reality of the issue, which is that *one and the same* demonstrably corrupted[59] office has been responsible for all the investigations in all these cases.

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[56] *See* Request, paras 19-24.

[57] Of course, the *desires* of the RGC in the respective cases differ: but this does not say anything about its power to influence the Cambodian officials if it so desires. Indeed, as we have argued multiple times, the RGC's influence on Case 002 can be more *subtle* than it is in Cases 003/004 (even though it is still at times very apparent, such as in the non-appearance of the insider witnesses), because Case 002 has by and large developed along the lines as envisioned by Hun Sen's government: the prosecution of only a handful of suspects, with not too much investigation of the responsibility of lower-downs. However, this does not turn the court into a truly independent one.

[58] As stated in the Request, the RGC interference in Case 002, while clearly discernible, is much more subtle than in Cases 003/004: it is *for this reason* that the Defence requests an investigation into the interference, as the extent of interference remains uncertain.

[59] *See*, the Dissenting Opinion by judges Downing and Lahuis, detailing the backdating and secretly altering of legal documents: Document No. **D-11/2/4/4** 'Public (Redacted Version) Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill', 24 October 2011, ERN 00748542-00748564 ('PTC Appeal'), para. 12-16. *See also* 'ECCC Press Release By the

29. The 'syllogism,' to borrow an expression from a Supreme Court Chamber decision,[60] that the Defence advanced in the Request is breathtakingly simple: if there is strong, direct and undisputed evidence that the main investigative body of an institution is open to (and acts upon) direct outside influence in the conduct of its investigations, *all* the investigations of such an investigative body are inherently suspect, especially those regarding politically sensitive cases, and especially in cases that are factually closely linked to one another. (*See* also paras. 38-43 of this Appeal)

30. The Defence submits that the facts as described in Kasper-Ansermet's note, and in his press releases, combined with Blunk's departure for reasons of government interference in the investigation of cases,[61] as well as Lahuis' and Downing's Dissenting Opinion, provide *ample* reason to believe that the OCIJ, at least the national side, has been under constant, sustained *and effective* outside pressure to achieve certain results or to pursue or not pursue certain routes of investigation. To this observation can be added all the circumstances described in our Request as well as earlier Rule 35 Requests, which make abundantly clear that the RGC does not want Cases 003/004 to happen, and will take drastic steps to achieve that result, not shying away even from directly confronting the Secretary General of the United Nations. To any reasonable observer, the picture is clear: the RGC is actively thwarting investigations in Cases 003/004, and is successful in doing so. This conclusion should lead any self-respecting judicial body within the ECCC to conduct an investigation into outside interference in the work of the RGC, if only to uphold the 'integrity of the judicial process."[62]

31. Instead, all judicial bodies within the ECCC have for years contented themselves with simply passing the hot potato of government interference to their colleagues.[63] Each

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International Co-Investigating Judge', 10 October 2011 (press release from Judge Blunk announcing his resignation due to pervasive government interference).

[60] *See* SCC Fairness of Judicial Investigation, para. 33.

[61] 'ECCC Press Release By the International Co-Investigating Judge', 10 October 2011.

[62] See Document **D-314/2/7** 'Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Request to Summon Witnesses', 8 June 2010, 00527392-00527420, para. 38 ('OCIJ Appeal').

[63] E.g: Document No. **D-314/3** 'Order Responding to the PTC Decision On Appeal On Requests for Summons of Witnesses filed by NUON Chea and IENG Sary', 15 June 2010, ERN 00532792-00532794, para. 6 (the CIJs 'will leave it to the Pre-Trial Chamber, which is in possession of all the material facts, to determine whether it should order such investigations under Rule 35(2)'); OCIJ Appeal (deferring the issue of compelling the insider witnesses to the Trial Chamber); Fairness of Judicial Investigation Decision, para. 21 ('It follows that an investigation pursuant to this Rule can only be 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.').

judicial body at the ECCC has become skilled in explaining why it is not up to them to deal with allegations of government interference, hiding behind the division of judicial competencies, appellate review thresholds and the meaningless numbers that investigations happen to have been assigned.[64] The *result* of this position by the judges is predictable, and should give both judges and monitors pause when reflecting on a disconcerting and embarrassing statistic: not a *single* judicial investigation[65] into government interference has been conducted at the ECCC by a judicial entity, *even though* by now *two* international judges have resigned as a result of it.[66]

The Note establishes a relevant pattern

32. The Note is also important for another reason: it assists in establishing a *pattern*, linking Case 002 and Cases 003/004. The long-held Defence position has been that the RGC is interfering in the work of the ECCC, and that Cambodian staff members, including judges and prosecutors, are indeed influenced by the RGC's action. One of the manifestations of this phenomenon is that Cambodian officials will never gainsay or obstruct an explicit RGC position on a political issue. As the Defence has demonstrated multiple times, Cambodian staff members will time and again conform their judicial and factual actions *to perfection* with stated government positions. This is a *pattern*, and it is a pattern that can

[64] The reason for such reluctance is understandable: *any* investigation by an independent (and presumably international) judge into government interference into ECCC proceedings will inevitably unleash a response by the RGC that will make it abundantly clear that the ECCC is *not* an independent institution, and that the RGC is *not* accountable to any judicial entity in Cambodia, not even the UN-sponsored ECCC. The international judges at the ECCC know this; they also know they stand powerless against the powers of the RGC, and can rest assured that their investigations will be thwarted. They have not forgotten that even Ban Ki-Moon was intimidated by Hun Sen, and that even the UN as a whole stands powerless when it comes to the interference by the executive in the work of the ECCC. While we, the Defence, understand the reluctance of any of the international judges to take on the absolute power of Hun Sen and the CPP, we believe there is merit in trying: it is better to struggle for the ideal of judicial independence and an accountable government, and probably lose, than to simply pretend that government interference does not take place (or, conveniently, needs to be investigated by a colleague). We call on the Supreme Court Chamber to be the one principled actor of the ECCC, and to finally conduct a long-overdue Rule 35 investigation.

[65] It must be noted that judge Blunk, in his resignation letter, states that he initiated "contempt of court" proceedings against the Minister of Information: if this indeed concerned a Rule 35 investigation, it must have been cut short by Blunk's departure.

[66] Of course, this stands in almost comical contrast with sanctions leveled against the Defence, which have been reported to their respective bar associations (in part) for mentioning in court the names of the government witnesses that have failed to appear even though they were validly summonsed. *See* Document No. **E-214/1**, 'Professional Misconduct of Lawyer(s) Admitted to Your Bar Association', 29 June 2012, ERN 00821219-00821229, p. 3. Notwithstanding that the behavior on the part of the witnesses is obviously a *direct violation* of a judge's order, and therefore plainly within the realm of Rule 35, *these* witnesses have in no way been sanctioned or even threatened with sanctions, while the Defence's persistent highlighting of the issue, on the other hand, has resulted in complaints to our bar associations. The message that the Trial Chamber wants to send is clear. But it is not the message that Cambodia needs to hear from an internationalized tribunal such as the ECCC.

be discerned across the different cases that are being investigated before this court. It is also for this reason that upholding the fiction that there is a legally relevant distinction between Case 002 and Cases 003/004, as far as it concerns the demonstration of government interference with the work of the ECCC, amounts to willful blindness. It might be a convenient fiction for the Chamber; but it has no basis in reality.[67] It is in this light that the Note is particularly revealing: it *confirms* beyond any doubt that the patterns that the Defence had flagged in its earlier filings were indeed symptomatic of an underlying corrupted process: Cambodian judges and their staff members will go to extreme lengths to make sure that they do not stray from the stated government line, and are even willing to engage in active interference of the work of an international investigative judge to achieve those goals. In other words: the Note *confirms* that the Defence was right all along: the RGC *does* influence the proceedings at the ECCC; and the Cambodian staff *is* vulnerable to such meddling, and indeed conforms its actions to placate the government's wishes. These findings thus place the earlier Defence submissions on these issues in a relevant context, as they further reinforce the notion of a pattern, and accordingly provide support for these earlier submissions.

The Note indicts You Bunleng

33. Of course, the Note is also relevant in the sense that it is a scathing indictment of judge You Bunleng. The Note describes 'the overall division of the ECCC'[68] along national/international lines, and lays the blame for this division squarely with You Bunleng.[69] You Bunleng has 'opposed all actions his counterpart has attempted to take in order to forward the judicial investigations.'[70] Kasper-Ansermet goes as far as bluntly stating that You Bunleng 'was at the origin of these refusals to cooperate with [a validly

[67] For example, it was the RGC's position that the six insider witnesses should not be heard by the ECCC; and indeed, *all* affected Cambodian judicial entities (Chea Leang, You Bunleng, and the judges of the PTC) aligned their actions to perfection with the RGC's position. In an identical fashion, the Cambodian judges and prosecutors opposed additional investigations into new suspects in Cases 003/004, conforming their actions to perfection with the RGC's position. If such alignment or conformation by Cambodian staff members with their government takes place once, one might argue that it is a coincidence (although it was never); if it happens more often, however, it becomes very hard to maintain with a straight face that the Cambodian staff members are operating in an independent fashion. It is also for *this* reason that actions and revelations from Cases 003/004 are relevant when assessing claims of political interference in Case 002: those actions *enhance* the pattern, and provide a context in which to assess the earlier actions in Case 002.
[68] NB: Based *inter alia* on his experiences with WESU, Kasper-Ansermet speaks of the ECCC as a whole that is divided along national and international lines, rather than just the OCIJ; the Defence shares Kasper-Ansermet's view on this issue.
[69] *See* Note, para. 50.
[70] *See* Note, para. 13.

instigated Rule 35] investigation' into interference with the proper administration of justice within his own office: this is not an accusation that is wielded lightly by one judge versus another one. In addition, in relation to You Bunleng's continued opposition against Kasper-Ansermet's confirmation as a judge, Kasper-Ansermet records doubts as to You Bunleng's impartiality,[71] he finds that You Bunleng holds opinions that have 'no legal basis'[72] and he notes that the constant and active opposition by You Bunleng 'affects the rights of all the parties.'[73]

34. The Note reveals You Bunleng as a man with a mission: a mission to thwart the actions of Kasper-Ansermet, and to block investigations into Cases 003/004, by whatever means necessary. Of course, this is not the first time that controversy surrounds the man: in October 2011, the international judges of the PTC downright found that he backdated and secretly altered legal documents;[74] a mortal sin for any legal professional, inconceivable behavior for a judge. In plain language this translates to: the man cannot be trusted. While the Defence accepts and in fact stresses that the Request is *not* a motion to disqualify You Bunleng, the relevance of You Bunleng's established dishonesty is hard to overstate: after all, this is the man that oversaw and shaped the judicial investigation of Nuon Chea; this is the man that co-decided on all our Requests for Investigative Action; this is the man that co-decided which witnesses to call and which lines of inquiry to follow. And the evidence before you, contained in the Note, the PTC Decision and summarized or mentioned in the Request is: this man is not to be trusted. His ethics are problematic.[75] Of course, this lack of ethics, combined with his proclivity to succumb to RGC pressure, is *prima facie* problematic, *both* for Cases 003/004 and Case 002. Accordingly, the Trial Chamber's position that the findings in Case 003/004 do not affect Case 002, is untenable. The simple fact that the dishonesty of a judge has been established (by international and independent judges) is relevant *by definition*, regardless of 'in which case' he has been dishonest.

35. Similarly, the Note provides us with a shocking image of Prak Kimsan, the President of the PTC, who is accused by Kasper-Ansermet of 'manifest partiality,' and against whom

[71] *See* Note, para. 16 (relating to You Bunleng's role in the Supreme Council of the Magistracy of Cambodia which was vested with the power to decide on Kasper-Ansermet's appointment).
[72] *See* Note, para. 17.
[73] *See* Note, para. 17.
[74] *See* PTC Appeal (Dissenting Opinion by Judges Lahuis and Downing).
[75] To be sure: it is not the *Defence* claiming that You Bunleng is dishonest and interfering with the proper administration of justice: it is the position adopted by different international *judges*, to wit: judge Kasper-Ansermet in his Note, and judges Downing and Lahuis in their dissenting opinion.

Kasper-Ansermet initiated a procedure for disqualification. The importance of this step can hardly be overstated: a judge starting a procedure for disqualification of another judge is surely a rare occurrence, and a step that is not taken lightly. Importantly, this is the very same judge that was presiding over the PTC when it reached its 'non-decision' on our Rule 35 Request in the investigative stage, which dealt with allegations of government interference.[76] Not only must be concluded that the presumption of impartiality and professionalism is irrevocably tainted by the Note (and also Downing and Lahuis' findings in their Dissenting Opinion),[77] these documents also make clear that this judge simply follows the lines as set out by the RGC. *All* PTC decisions in the pre-trial stage are therefore prima facie tainted; but this holds true *especially* for his involvement in the dismissal of the Rule 35 Request: in other words, the Note clearly holds relevance, *also* for the fairness of the proceedings in Case 002.[78]

36. Accordingly, the importance of the Note, apart from and in addition to the fact that it reconfirms a pattern, lies in the fact that it gives the reader an insight into the workings and, more importantly, *failings* of the (national side of) the office of the OCIJ (as well as the PTC). Simply put: if an office is corrupted, it must be stripped of the presumption of impartiality and adherence to ethical standards; and there simply is no room to assume that a 'Chinese Wall' between Cases 003/004 and Case 002 exists. If the national judge and his staff members are willing to go to these illegal lengths to thwart the work of an international judge in one case, there simply is no reason to hold them beyond reproach in another, closely related case. This must form the subject of a proper Rule 35 investigation; the Trial Chamber's decision to not initiate one amounts to an abuse of discretion.

37. Even if one were to assume, for the sake of argument, that the discussed interference actions did not 'harm' Nuon Chea in the sense, for example, that exculpatory evidence was not collected,[79] there remains a simple, straightforward and *prima facie* interest for Nuon Chea to be investigated by a truly independent investigative body that adheres to the

[76] *See* Document No. **D-314/1/12** 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Request to Summons Witnesses', 9 September 2010, ERN 00600748-00600774 ('Second Decision').
[77] *See* PTC Appeal (Dissenting Opinion by Judges Lahuis and Downing).
[78] Also, the Note reveals that Kasper-Ansermet has instigated Rule 35 proceedings against four national side staff members, to investigate an alleged interference with the administration of justice. Again, the importance of such actions are hard to overstate: a judge conducting investigations into interference with proper administration of justice by employees of the judicial body (OCIJ) is certainly not an everyday occurrence, and is of *prima facie* importance when assessing the overall integrity of said office.
[79] *See* paras 42–43, *infra*, for a discussion of this issue.

highest standards of ethics. Indeed, being tried by an independent tribunal is *one of the most fundamental rights* an accused possesses. Accordingly, once it becomes clear that such a body *lacks* the required independence or ethics, Nuon Chea simply has an interest and a corresponding right to have this duly investigated and addressed as part of a Rule 35 investigation. We submit that the Note, together with all the other evidence as listed in the Request, and the dissenting opinion by Downing and Lahuis,[80] makes it abundantly clear that the Cambodian side of the OCIJ as a whole, and You Bunleng more specifically, lack independence and the required ethics.[81] Nuon Chea's right to be tried by an independent tribunal means that this issue must be adequately investigated as part of a Rule 35 investigation.

Cases 003/004 and Case 002 are inextricably linked through the suspects, crimes and crime sites

38. There are more reasons that lead to the conclusion that the facts and circumstances surrounding Kasper-Ansermet's resignation *are* relevant for the proceedings in Case 002. Even though cases 003/004 and 002 have distinctive case numbers, they are inextricable as far as the underlying facts are concerned. Even a superficial glance at the Introductory Submission in Case 003 will reveal this. It reads, as far as relevant: [redacted][82]

[80] *See* PTC Appeal (Dissenting Opinion by Judges Lahuis and Downing).

[81] In addition, although this is not determinative of our argument, it must be considered that certain of the actions that You Bunleng undertook in Case 003/004, such as the 'unsigning' of the summonses, took place *during* the investigation in Case 002. If one assumes that You Bunleng did this because of government pressure, as the Defence does (for which position it finds ex post facto support in the Note, which reveals a You Bunleng remarkably determined to block further investigations, thus aligning himself perfectly with the stated RGC position) one must conclude that You Bunleng was affected by government pressures during the investigation in Case 002: a relevant consideration. A judge is ethical, or he is not. A judge is independent, or he is not. The facts show that You Bunleng is neither. This is cause for concern, and provides ample reason to engage in a rule 35 investigation.

[82] *See* 'Introductory Submission for Case 003', paragraph 5 (emphasis added). Note: while the Introductory Submission in Case 003 is a confidential document, it is widely available in the public domain. The Defence has accessed the document at the website [redacted] most recently on 22 December 2012 ('IS 003'). The Defence is referencing the document in this Appeal, considering that it is in the direct interest of Nuon Chea to use the information contained therein.

39. Moreover, there are numerous highly relevant other connections between the respective cases. In the Introductory Submission for Case 003, for example, [redacted],[83] of which both [redacted] and [redacted] (the suspects in Case 003) were high-ranking members. Nuon Chea is charged in Case 002 with superior responsibility (i.e. the crimes of his alleged subordinates, including [redacted] and [redacted]) and joint criminal enterprise (i.e. the crimes of the [redacted], including [redacted] and [redacted]. It is clear that one simply cannot assess the actions and responsibilities of [redacted] and [redacted] without assessing Nuon Chea's actions and responsibilities, *and vice versa*.

40. Indeed, the [redacted], for example, for which [redacted] and [redacted] are held accountable,[84] feature prominently in the Introductory Submission in Case 003, and are described as '[redacted].' Importantly, those *exact same* [redacted] are part of the charges against Nuon Chea in the Closing Order in Case 002.[85]

41. In addition, [redacted] of which Nuon Chea was also an alleged member. Finally, [redacted] for which Nuon Chea is alleged to have been responsible, form another important part of the Introductory Submission in Case 003. Inversely, one can discern the same pattern: both [redacted] and [redacted] are mentioned several times in the Closing Order against Nuon Chea.[89] Illustrative is paragraph [redacted] which reads: [redacted]

The 'mirror image' of this event can be found in the Introductory Submission in Case 003:

[83] *See* IS 003.
[84] *See* IS 003, para 37.
[85] *See* Document No. **D-427**, 'Closing Order', 15 September 2010, ERN 00604508-00605246 ('Closing Order'), paras. [redacted].
[86] IS 003, para. 86.
[87] IS 003, para. 93.
[88] *See* Closing Order, para. [redacted].
[89] *See* Closing Order, paras [redacted] and footnotes: [redacted]

[redacted]. [90] In other words, the facts that Nuon Chea and [redacted] and [redacted] are charged with are interrelated, interwoven, and sometimes identical.[91] Accordingly, there is no principled distinction to make between Cases 003/004 and 002; the underlying facts and suspects all form part of the one larger investigation into DK era crimes.

42. *Because* of this overlap between and inextricability of the cases, interference in case 003/004 almost by definition amounts to or translates into interference in cases 002.[92] First of all, interference in Case 003/004 simply impedes the assessment of the facts in Case 003/004, and therefore the assessment of those facts that also form part of Case 002. But even more importantly, the interference in Case 003/004 impedes the *proper assessment of the degree of autonomy* of lower-ranking figures such as [redacted] and [redacted], and thereby impedes the assessment of the culpability of the accused in Case 002. After all, and put simply: the more autonomy lower-downs are found (by the OCIJ) to have had, the less responsible the accused in Case 002 must be assumed to have been for actions by these lower-downs. And finally, the interference in Case 003/004 impedes the proper assessment of communication structures between the top level and the lower levels, and impedes the proper assessment of chains of command; this interference directly impacts on the facts of Case 002.

43. The importance of this is hard to overstate: one of the main positions of the Defence in Case 002 has always been that lower-ranking officials had much more autonomy to act than is reflected in the Closing Order, and that these lower downs reported much less frequently (and with less detail) back 'up' the chain than is generally believed. The Defence submits that a *proper* investigation into the actions, autonomy and reporting practice of lower-downs would reflect this, and would therefore be directly *exculpatory*. The interference in Case 003/004, however, directly impedes and affects such an investigation, as it has blocked (at least up to and until the filing of the Request) *any and*

[90] *See* IS 003, para. 93.
[91] The only difference is that in relation to these facts Nuon Chea will often be considered to have been in charge, and [redacted] and [redacted] will be considered to have been following instructions and/or reporting to Nuon Chea; but the facts themselves involve two sides of the same coin.
[92] At the very least: the type of political interference in Case 003/004 that we have witnessed.

all effective investigations into the role and actions of certain prominent lower-downs; this interference in Case 003/004 therefore directly and by definition affects the rights of the accused in Case 002, as it impedes the search for relevant and, the Defence submits, exculpatory evidence.[93] Indeed, the Note makes clear (and part of its importance lies in this fact) that the interference was not of a limited nature, e.g. relating to only a few specific crime sites or witnesses, but absolute and all-encompassing: it was intended to frustrate any and all investigations into the facts. For that reason, the conclusion is inescapable that the interference affected investigations into facts, witnesses and circumstances that would be relevant[94] in Case 002.

44. Concluding, the strict division between the Cases, as far as the assessment of outside influence is concerned, is untenable, as interference in Case 003/004 directly affects the investigation and rights of Nuon Chea in Case 002. The Decision therefore amounts to an abuse of discretion, or an error of law.

v. Direct interference in Case 002

45. While the above makes clear that interference in Cases 003/004 is relevant for Case 002, we must also point to direct indications of interference in Case 002. As stated, the importance of the Note and the circumstances surrounding Kasper-Ansermet's resignation lies in the fact that these provide a relevant *context* in which to view these earlier indications of interference, thereby adding to the strength of those earlier submissions.

46. Accordingly, before we stand accused of relitigating certain issues, or filing repetitious motions, one thing must be made clear from the outset: while it is true that the facts discussed below have formed part of earlier Defence submissions, they have been placed in a relevant *context by the information contained in Kasper-Ansermet's note* (and also: Blunk's letter of resignation). To put it simply: facts that in and of themselves did not

[93] The Defence notes that it has always been our position that the RGC, for political reasons, is keen to portray *only* the accused standing trial in Case 002 as responsible, and the rest of the country as powerless victims; we have submitted that this narrative was first put in place by the Vietnamese as early as 1979, and has been maintained and developed ever since. One of the reasons for this stance is, of course, that numerous of the current-serving government officials were high to very high-ranking DK officials, and as to whom evidence seems to exist that they have blood on their hands (*See* Document No. **E-190.1.398**, 'Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes', ERN 00661455-00661491); the government thus has a vested interest to control the narrative at the ECCC, and maintain the fiction at all cost that only the accused in Case 002 are worth prosecuting.

[94] For the purposes of the Request, the Defence does not even need to allege that the investigation would unearth *exculpatory* evidence (although it does); the simple fact that *relevant* and *probative* evidence for the proceedings in Case 002 is not being investigated is enough to trigger the requested Rule 35 investigation.

warrant a conclusion that government interference had occurred at an earlier stage, can achieve added legal significance by events that follow them. This is not a matter of relitigating the issues: this is a matter of substantiating the current Request by facts that have preceded this Request.[95] It should also be noted, at the outset, that the facts mentioned below have never been *disputed* by any entity as such: there is therefore no reason to not once more simply reference these undisputed facts to further buttress (the reasoning of) the Request.

47. The following facts are relevant when assessing whether there is a 'reason to believe' that someone has interfered with the proper administration of justice before the ECCC, and more specifically in Case 002.

- In Case 002, You Bunleng refused to co-sign summonses for six insider witnesses.
- In Case 002, the six insider witnesses did not appear to testify, although they were duly summonsed.

[95] While it is true that several of the facts as contained in the Request have formed the subject of litigation in the pre-trial stage, it is important to look at what actually transpired in this litigation: the Defence filed two Rule 35 Requests relating to government interference. The first Request was considered by an OCIJ that was *misapplying* the relevant legal standard, according to the PTC, who for that reason quashed the OCIJ's decision: in other words, the Request must be considered to not have been assessed by the OCIJ at all. (*See* Second Decision) The appeal regarding that same Request was eventually dismissed by the PTC *only because it could not reach a majority decision* as required by the Rules. This means that the facts underlying the Request have not been substantively and definitively litigated, but rather that the PTC, on Appeal, failed to reach a decision on the question. (And of course, relevant to the current immediate appeal: the international judges found ample reason to believe that someone had interfered with the administration of justice, while the Cambodian judges did not, applying strained legal reasoning.) As to the Second rule 35 Request, once again the OCIJ failed to assess that substantively, instead dismissing it off-hand on a technicality, which decision was once again quashed by the PTC: once again, the alleged facts were not assessed by the finder of fact, the OCIJ. The PTC, then, did assess the Request, but excluded from consideration the actions by You Bunleng, Chea Leang, So, once again, relevant facts were simply never considered when deciding on our Rule 35 Requests during the investigative stage. (*See* Document No. **D-384/5/2**, 'Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation', 2 November 2010, ERN 00608821-0060883). For that reason alone these facts can underlie the current Request, and appeal. Either way, even if one would consider these facts to have been 'exhaustively litigated' in the investigative phase, there is no reason why they could not be once again used to further buttress this new Request, based on new developments, that have shed light on issues that transpired in the past: as stated before, the facts as such have never been disputed by anyone, and are, by their character, not easily disputable (such as the fact that the insider witnesses never appeared to testify, to name but an example).

- In Case 002, at least one of the insider witnesses claimed that he had not appeared after being summonsed because only the international co-investigative judge had signed the summonses.[96]

- In Case 002, Chea Leang, the national Co-Prosecutor, did not join her international counterpart in calling for the summonsed witnesses to be compelled, if necessary, to appear.

- In Case 002, the national judges of the PTC, voting *en bloc*, found (in a farcical ruling) that there was 'no reason to believe' that someone had interfered with the proper administration of justice in connection with the non-appearance of the government witnesses; a finding wildly at odds with the one reached by their international colleagues.

- *During* the investigation in Case 002, You Bunleng signed and then unsigned the rogatory letters allowing further investigations in Cases 003/004; in other words, the national co-investigative judge undertook questionable[97] legal steps while acting as an investigative judge in Case 002.

- In Case 002, the RGC effectively sabotaged the OCIJ attempts to have Norodom Sihanouk heard as a witness.

48. Relevantly, these events took placed in a context of public statements by RGC representatives as to the RGC's position on the matter.[98] The important thing to note is that the Cambodian officials at the ECCC, without fail, have always *perfectly* aligned their position with that of their government. The Defence submits that these actions by the Cambodian judges and prosecutor in and of themselves, but especially when considered in the context of the media reports on the RGC's position on the matter, provide 'a reason to believe' that interference has occurred.[99] As stated, this conviction is only *strengthened* by

[96] This is of course a clear foreshadowing of the experiences that Kasper-Ansermet would encounter several years later.
[97] This qualification would only be further reinforced by the events that were to follow in Cases 003/004.
[98] We refer to the Request as well as our earlier Rule 35 Requests in the investigative stage, for a more elaborate discussion of why government interference must be assumed with regard to these matters.
[99] As to the question whether the actions by You Bunleng could have been considered by the Trial Chamber, the following is important: the SCC has already held that 'a judge is at least in principle within the jurisdiction of Internal Rule 35, provided that her alleged conduct rises to the level of an interference with the administration of justice within the meaning of that Rule.' *See* SCC IENG Sary Appeal, para. 14. The SCC also referenced the PTC position that 'conduct *involving* a judge may be subject to a Rule 35 investigation even if the Chamber has

the revelations in the Note. The combination of these earlier-addressed facts, and the pattern that is reconfirmed by the Note, clearly leads to the conclusion that there is a reason to believe someone interfered with the proper administration of justice, and should have led the Trial Chamber to undertake an investigation pursuant to Rule 35; the fact that it has not, amounts to an abuse of discretion.

A defiance of a summons amounts to interference with the administration of justice in and of itself

49. Even if the Trial Chamber was not convinced by the Defence submissions on outside interference by the RGC resulting in the non-appearance of witnesses, it should have still initiated an investigation pursuant to Rule 35 simply based on their non-appearance as such when (re-)fronted with the issue through the Request. The Supreme Court Chamber has only *recently* set out its view on the issue of the defiance of summonses by witnesses, when it quoted with approval the Appeals Chamber of the ICTY: 'Any defiance of an order *per se* interferes with the administration of justice for the purposes of a conviction of contempt. No additional proof of harm to the International Tribunal's administration of

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no jurisdiction to investigate or sanction the judge herself.' (*Id.*, Para 16). It should be noted, for the purposes of this Appeal, that the PTC has ruled that the above- referenced 'actions' of Judge You Bunleng, Chea Leang, and the Cambodian judges of the PTC were 'inadmissible' for the purposes of assessing an earlier Nuon Chea rule 35 Request, as neither the OCIJ nor the PTC 'has the jurisdiction to decide whether or not a judicial action of Judge You [or Chea Leang or the Cambodian judges of the PTC] *by itself* satisfies the threshold to initiate an investigation under Internal Rule 35(2)(b).' *See* Document No. **D-384/5/2**, 'Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation', 2 November 2010, ERN 00608821-00608839, paras. 31, 34, 35 (emphasis added). It is accordingly important to stress that the current Request does *not* ask the Trial Chamber to decide whether an action by You Bunleng, Chea Leang and or the Cambodian PTC judges *by themselves* satisfied the threshold to initiate an investigation: indeed, we ask the Trial Chamber explicitly to look at the *totality* of the picture, which reveals an abundance of indications of governmental interference, and to base its assessment on that comprehensive and *prima facie* discernible picture. To be sure: there is no principled reason why actions by a judge, even judicial actions, could not provide supporting evidence when assessing a claim of outside interference. By way of example: if a judge is illegally compelled by someone to reach a certain judicial decision, *e.g.* a surprise acquittal of a certain suspect, there is no reason whatsoever why the very existence of such a surprise acquittal could not be used in order to support a finding that interference has indeed taken place. Similarly, if You Bunleng has engaged in judicial acts and reached judicial decisions that are indicative of or suggestive of government interference, there is no principled reason to not consider these decisions when assessing the question of whether there is a 'reason to believe' that interference has occurred. Indeed, the SCC concurs with that position. *See* SCC IENG Sary Appeal. It is relevant to highlight these points: after all, because of the PTC's formalistic reasoning on this matter, the judicial actions of the Cambodian judges and prosecutors *have simply never been substantively assessed* as part of any Rule 35 Request. In light of the SCC's reasoning in this matter, however, they should have been: this Chamber's decision at E-137/5/1/3, issued on 17 April 2012 (and therefore even before the Request was filed) contained clear language in that regard, and the Trial Chamber was under a legal obligation to heed those instructions and include You Bunleng's earlier actions as referenced in the Request in its assessment, something no other entity at the ECCC has deemed necessary to do, as a result of an erroneous understanding of the exigencies of rule 35.

justice is required."[100] In other words: according to this logic, any defiance of an order by a judge *per se* interferes with the administration of justice. Whatever view one takes of the facts in Case 002, one thing is indisputable: these six government witnesses have *defied* orders by the International Co-Investigating Judge.[101]

50. These witnesses have *therefore*, still following the logic of the Supreme Court Chamber, interfered with the proper administration of justice.[102] To date, *not a single* judicial entity at the ECCC has had the courage to take effective steps to counter such behavior.[103] Even leaving aside that these witnesses are in possession of exculpatory information, and even leaving aside that the international judges of the PTC have acknowledged that it is simply unfair to deprive the Defence of the opportunity to hear these witnesses, there exists a legitimate interest for Nuon Chea to be tried by an institution that takes its own integrity seriously, and that does not accept the non-appearance of witnesses that have initially been called at *his* request.[104] These concerns go to the integrity of the institution that tries Nuon

[100] *See* Document No. **E-176/2/1/4** 'Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Application for Summary Action', 21 September 2012, ERN 00847628-00847662, para. 35, fn 95.
[101] In the words of judge Lemonde himself: 'It is therefore clearly established that the persons concerned have refused to attend for testimony. This is to be regretted: the irony is that elected officials of the ruling party or members of the Government which initiated the establishment of the ECCC are refusing to cooperate with it and ensure its smooth functioning in violation of Article 25 of the Agreement of 6 June 2003.' *See* Document No. **D-301** 'Note by the Co-Investigating Judge', 11 January 2010, ERN 00455446-00455449, p. 3.
[102] Whether these witnesses did not appear out of their own volition, or because they were pressured not to appear, is irrelevant for the question before the Chamber: considering their respective (very) high ranks within the RGC (*e.g.* Chea Sim and Heng Samrin are widely accepted to be the number 2 and 3 of the regime), their actions must be considered to be actions *by or on behalf of the RGC*. If, however, these witnesses were effectively *pressured* into not appearing, it is clear that such directives could only originate from within the absolute center of power of the RGC: either way, the interfering entity that needs to be the target of a Rule 35 investigation is the RGC.
[103] The Defence is obviously aware that the non-appearance of these witnesses formed part of our first Rule 35 Request during the judicial investigation (Document No. **D-254**, 'Request for Investigation', 30 November 2009, ERN 00410838-00410848); as the PTC did not reach a decision on the matter, because of a split Chamber (*see* Second Decision), the issue has not been definitively decided upon, and was therefore included as part of the Request (paras 2, 24). Moreover, the Note reaffirmed the suspicion that You Bunleng conformed his judicial work to the RGC's wishes: this sheds new light on his actions surrounding the six insider witnesses, when he similarly perfectly aligned his actions with the RGC's stated position on the matter. In other words, we are not re-litigating the matter; we point out that the Note reveals fresh and relevant information that should be considered when answering the larger question of whether there is reason to believe that someone has interfered with the administration of justice. More importantly: the SCC only recently issued its Decision which made clear that the non-adherence to judicial orders amounts to interference *per se*; the Trial Chamber should have taken note of this legal development, and acted accordingly.
[104] Even though the following is not directly related to the interest of Nuon Chea, it must be remembered that the non-appearance of government officials when summonsed, and their non-existing accountability before the courts, are an on-going concern in present-day Cambodia: *See*, among many other publications: "Tell them that I want to Kill Them, Two decades of impunity in Hun Sen's Cambodia," Human Rights Watch, 2012: "Senior officials are not held accountable under law." (p.5) "As early as 1995, UN special representative Michael Kirby recommended that a high-level interdepartmental committee be established to investigate and report on judicial complaints concerning refusal or failure of military, police, or other officials to execute court warrants directed at military, police, or political figures or members of their families. Two years later no improvements were

Chea, and he, like all the other parties to the proceedings, is entitled to a strict protection of said integrity by the relevant judicial actors. The decision by the Trial Chamber not to engage in such an investigation, the clear doubts as to the integrity of the OCIJ and the ECCC as a whole notwithstanding, amounts to an abuse of discretion.

Possibility of hearing of witnesses during trial is irrelevant

51. The Decision references the six high-ranking witnesses in passing, where it states that the Trial Chamber has earlier 'indicated the need to weigh the right of all parties to propose individuals to be heard against the right of the Accused to a fair and expeditious trial.'[105] This position by the Trial Chamber reveals that it fails to appreciate the purpose with which the non-appearance of these witnesses was featured in the Request.[106] The probative value of these government witnesses, and more importantly the exculpatory evidence they can provide[107] as well as the fundamental right to challenge their testimony to the extent that it is inculpatory,[108] are indeed important issues and the Defence will continue to highlight this importance in filings and in court. However, the thrust of a Rule 35 Request is an entirely different one: *it aims to uncover interference with the administration of*

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evident and his successor, Thomas Hammarberg, called for determined action to address impunity. Hammarberg's successors […] have repeated these calls. Not only have they been unsuccessful, but Hun Sen has frequently responded to their allegations with angry attacks on their character." (p.64) (http://www.hrw.org/sites/default/files/reports/cambodia1112webwcover_1.pdf); The recent dismissal of criminal charges against Bavet governor Chhouk Bundith ("Court drops triple shooting charge against Bavet governor," Cambodia Daily, 19 December 2012, Khuon Narim and Dene-Hern Chen) is only the most recent incident in a long list of inexcusable shieldings of persons in positions of power: part of the legacy that the ECCC leaves behind should at least be an *attempt* to counter that unsavory phenomenon.

[105] One would hope that, by now, all judicial entities at the ECCC would understand that the right to an expeditious trial cannot be invoked *against* an accused in order to dismiss Defence requests; this issue has been addressed at length and multiple times throughout the judicial investigation. *See* eg: Document No. **D-314/2/6** 'Decision to Determine the Appeal on Written Submissions and Direction for Reply', 12 April 2010, ERN 00492902-00492904, para. 70 ("The Co-Lawyers for both Charged Persons are correct when they assert that the right to a fair trial without undue delay is a right that belongs to the Charged Persons and not the CIJs." This matter might be merely mildly entertaining, but for the fact that Cambodian domestic courts are keen to learn from ECCC case law, and will eagerly embrace such erroneous use of international fair trial principles in order to dismiss valid Defence requests; if only for legacy purposes, it would be nice if the ECCC gets at least this concept right.).

[106] *See* Request, paras 2 and 23.

[107] The Defence submits that all witnesses provide relevant exculpatory information; with regard to Heng Samrin, this will be further substantiated in an upcoming motion.

[108] Not everyone seems to be aware of the fact that statements by Chea Sim, Heng Samrin and Hor Namhong are actually on the case file, and have been tendered into evidence by the OCP; clearly, these individuals must be heard in order to challenge and/or verify their statements. (The Defence, by the way, is not naïve: it predicts that the end result in these proceedings will be that the witnesses will never be called, and that their written statements will not be used as evidence against our client. Some people might call this an elegant solution. The Defence calls this bowing to Cambodian political realities and concomitant lack of accountability for powerful figures, and inexcusably damaging the rule of law in the process.).

justice.[109] Pursuant to Rule 35, as well as the Supreme Court Chamber's explanation of the procedural requirements under the Rule,[110] the Trial Chamber was under a duty to assess whether there is 'a reason to believe' that someone has interfered with the administration of justice; the *probative value* of a witness, or whether that witness may perhaps be called at a later stage to appear, has no bearing whatsoever on this assessment.[111] By failing to realize this, the Trial Chamber has misapplied Rule 35, and has therefore erred in law.[112] The Decision must be quashed.

C. The warnings issued are unfounded and harmful

52. As part of a warning that forms an integral part of the Decision, The Trial Chamber accuses the Defence of engaging in repetitious filings. The issue of repetitiousness has been dealt with in paragraphs 15-16 above; these paragraphs make clear that there is no merit whatsoever in the warning.

53. More troubling is the accusation by the Trial Chamber that the Defence is engaging in discriminatory filings. The Decision states that the Defence levels accusations against members of the Trial Chamber 'on the apparent basis of their nationality alone' and warns that allegations of impropriety 'on discriminatory grounds' may trigger the power to sanction pursuant to Rule 38. These allegations by the Trial Chamber are grave, defamatory, and frankly, insulting. Discrimination on the basis of nationality is an incredibly serious and, indeed, despicable practice. There is good reason why it is prohibited by numerous international treaties, and forms a criminal offense in most every civilized country. For a judicial entity such as the Trial Chamber to casually issue a warning accusing the Defence of such a practice is unacceptable.

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[109] To put it simply: if a summonsed witness is prevented from testifying by a third party, it is entirely irrelevant, when assessing whether 'a reason to believe' that someone has interfered with the administration of justice exist, what the probative value of such a witness is, and whether or not the Defence can be 'compensated' through other means: an interference is an interference. Of course, the type of response by the court may depend on the probative value: it may be justified to sanction someone that interferes with the testimony of a minor witness in a milder manner than one that interferes with a key witness; but this is a question that enters the picture only after assessing the 'reason to believe'.

[110] *See* Document No. **E-176/2/1/4** 'Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Application for Summary Action', 21 September 2012, ERN 00847628-00847662, paras 39-42.

[111] These issues *may*, of course, influence the sanction or response that the Trial Chamber adopts: this is a question that only enters the picture at a later stage, once the Trial Chamber has found that there is a reason to believe that interference has occurred.

[112] Indeed, the Trial Chamber's position is at odds with one of the most fundamental rights an accused possesses, the right to an independent tribunal. If there is proof that (certain bodies of) the tribunal are not independent, this cannot be remedied or compensated by procedural measures during the trial phase.

54. To be absolutely clear: the Defence does not and will not level accusations against anyone 'on the apparent basis of their nationality alone;' the suggestion itself is preposterous. It is almost ridiculous to even have to explain, but the Trial Chamber's position forces us to engage in the following exercise. For the record: Cambodian legal professionals are as capable as legal professionals from any other nationality of being independent jurists. Cambodian legal professionals can be as ethical and as honest as legal professionals from any other nationality. The *nationality* of Cambodian jurists has no bearing *whatsoever* on their trustworthiness or professionalism; indeed, we are convinced that numerous Cambodian jurists strive to be just that: ethical and professional.

55. The Defence concerns, of course, are wholly different. Our position is, has been, and will be, that *any legal professional working within the Cambodian judicial system*, and especially those that live and work in Cambodia, and especially those that have been appointed (directly or indirectly) by the RGC, cannot escape the power and influence of the RGC; they are beholden to the RGC; and they are simply not free to gainsay the government on any issue that the government has an interest in. Repercussions *will* follow if they would. It will hurt their career, if not worse, and might hurt the careers and lives of their family members. This should not come as a surprise to anyone: Cambodia is a dictatorship; there *is* no effective rule of law; and judges and prosecutors have no choice but to obey the government. This holds true for those legal professionals that work in the domestic legal system; it is equally true for those legal professionals that work at the ECCC.

56. Of course, the Defence could have chosen, each and every time we allege that certain individuals are vulnerable to government pressure, to describe these individuals as: 'any judicial professional working within the Cambodian judicial system, and especially those that live and work in Cambodia, and those that have been appointed (directly or indirectly) by the RGC, regardless of nationality.' However, of course, it so happens that *any* person that fits that description is a *Cambodian* legal professional, rather than a legal professional of a different nationality. The Defence therefore chose the convenient shorthand term 'Cambodian' to identify those legal professionals that are beholden to and vulnerable to

the government;[113] no discrimination on the basis of nationality is intended, and indeed cannot reasonably be inferred. One may disagree or be unconvinced by our submissions on the extent of government interference on the ECCC, or even on the extent to which Cambodian legal professionals are beholden to the RGC: but to state that we engage in discrimination on the basis of nationality alone, is absurd.[114]

57. It should furthermore be stressed that the Defence is not leveling these allegations of lack of independence of Cambodian[115] judges and prosecutors lightly. Any perusal of our filings will show that we base our allegations on a very solid and extensive mixture of reports by reputable NGOs, UN reports and reports by independent rapporteurs, which all confirm that the Cambodian judiciary under Hun Sen is not and has never been able to operate independently of government influences, especially in politically sensitive cases.[116] The recent conviction of Mam Sonando provides only the most recent example of politically driven convictions. The ECCC so far spectacularly fails to promote the concept of truly independent courts in Cambodia; a public Rule 35 investigation, such as the one proposed by the Defence, would go a long way in terms of the legacy of the ECCC, even if it gets ultimately thwarted by the RGC: at least, it would demonstrate to Cambodian citizens that the ECCC takes the idea of an independent court seriously, and is not afraid to challenge the executive, if the interests of justice so require.

58. As to the accusation by the Trial Chamber that our allegations are unsupported by reference to the Trial Record:[117] once more, we can only assume that the Trial Chamber

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[113] To be sure: the same shorthand is used in the ECCC Agreement and Law, which provide for a strict distinction at the ECCC between "Cambodian" and "foreign" judges; indeed, this 'discrimination on the apparent basis of nationality alone' is one of the main principles underlying the ECCC.

[114] This approach by the Trial Chamber seems almost intended to discourage the Defence from filing any more motions regarding government interference.

[115] Or: 'any judicial professional working within the Cambodian judicial system, and especially those that live and work in Cambodia, and those that have been appointed (directly or indirectly) by the RGC, regardless of nationality.' *See* Request.

[116] If the OCP cares to dispute this reality, the Defence hereby makes an offer of proof; we estimate that we can submit, upon request, more than 50 independent reports that sharply criticize the lack of independence of the Cambodian judiciary, especially in politically sensitive cases. For reasons of judicial economy, we will quote just one (1). Cambodian, source: 'The Cambodian judiciary's lack of independence continues to be one of the most important factors preventing Cambodia from developing a fair, just and inclusive society, based on the rule of law. The September 2010 report by the Special Rapporteur for Human Rights in Cambodia, Surya Subedi found that "corruption seems to be widespread at all levels of the judiciary" while the October 2010 resolution by the European Parliament described the judicial system as "politically subservient". Political and economic control of the judiciary fuels continuing impunity for major crimes and prevents Cambodians from fair access to land and housing rights, and recognition and protection of their civil and political rights. (Press Release, 2011, 'Situation of Human Rights in Cambodia' by the Cambodian Center for Human Rights)

[117] *See* Impugned Decision, para. 16.

has not been reading our numerous submissions on political interference in any detail, let alone the reports by NGOs and UN entities that were attached. We will therefore repeat, once more: *not a single time*, since the inception of the ECCC, has *any* Cambodian judge or prosecutor reached a decision that was contrary to a stated RGC position. [118] This observation *includes* the judges of the Trial Chamber: these have *never* reached a decision that was contrary to a stated RGC position. *That* is the trial record on which we base our submissions.

59. Of course, one cannot (and we will not) rule out the possibility that exactly these 3 Trial Chamber judges happen to be, through serendipitous circumstances, the very 3 judges that can be found within the Cambodian legal system that can operate and reach decisions entirely immune from RGC influences, and can and will actually antagonize the RGC if the interests of justice so require. It is possible. However, to this day, we have not seen *any* indication of such independence. Like a scientific theory, the Defence position that *all* judges within the Cambodian legal system are ultimately beholden to the RGC, including the judges of the Trial Chamber, is easily falsifiable, by a manifestation of the contrary. For Cambodia's sake, we hope our position is falsified soon. Until then, we maintain our position.

D. The Supreme Court Chamber should act, rather than the Trial Chamber

60. As the Supreme Court Chamber has previously held, '[i]t is […] of utmost importance that throughout the entire course of proceedings judges retain the power to take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice.'[119] Also, the Supreme Court Chamber found that '[t]here are limited circumstances […] in which the demand for efficacy and impartiality in examining allegations of interference with justice may prevail over the general allocation of competence among the

[118] One thing should be clarified, perhaps. The Defence position is not, and never has been, that the RGC controls and instructs every minute aspect of the work of the Cambodian legal staff at the ECCC. The Defence also does not state that the RGC will take a position on each and any issue of political importance, and thereby steer the Cambodian staff members. Indeed, it is clear from the record that the RGC is very comfortable to let *certain* issues slide, and/or leave their resolution to the Cambodian legal professionals at the ECCC. Indeed, the OCP in its Response to the Request listed several decisions by the Trial Chamber on issues that might be considered 'sensitive' in which the Cambodian judges sided with their international counterparts. But this does not mean that the Cambodian judges do not, *eventually*, answer to the RGC; it simply means that the RGC, for reasons known only to itself, did not have enough of an interest in the outcome of those issues to steer their proceedings. In other words: the RGC will always have the *final* word as to what happens at the ECCC, directly or indirectly, even if they choose to provide a certain leeway to the national judges and prosecutors on issues of their choosing.

[119] SCC Fairness of Judicial Investigation, para 30.

ECCC's judicial organs. It follows that any judicial organ seised of a case - presently the Trial Chamber in Case 002 - cannot but withhold a residual power to guarantee that the proceedings comport with the international standards of justice, regardless of when the alleged instances of interference occurred.'[120] The Defence submits that in this instance, it would be appropriate for the Supreme Court Chamber to conduct the investigation, as it is the body that is best equipped to deal with the allegations of government interference as contained in the Defence Request. The Trial Chamber has proven itself utterly unwilling to even pretend to engage with the Defence submissions, and after dealing with the well-reasoned Adjournment Request that was based on allegations of government interference by an international judge in a one-page unreasoned memorandum, it has now, in the impugned Decision, proven itself utterly disinterested in upholding the integrity of the institution of which it is supposed to be one of the flagships.[121]

V. CONCLUSION AND RELIEF REQUESTED

61. For these reasons, the Defence requests the Supreme Court Chamber to

a) Uphold the Appeal;
b) Quash the Impugned Decision;
c) Undertake the investigations as requested in the Request; in the alternative, the Defence requests the Supreme Court Chamber to order the Trial Chamber to undertake these investigations.

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[120] SCC Fairness of Judicial Investigation, para 31.
[121] We request the Trial Chamber to follow the approach a suggested by the international judges of the PTC, which in their Dissenting Opinion stated that 'the most appropriate course of action would have been for the Pre-Trial Chamber to conduct the investigation. This is because, although the OCIJ is the natural investigative body within the ECCC, they have repeatedly refused to investigate this matter and may not, in these circumstances be the body most suitable to conduct an investigation into these allegations of interference.' Second Decision (Dissenting opinion) para.8. Mirroring this finding, we would request the Supreme Court Chamber to conduct the investigation as suggested in the Request, as the Trial Chamber is clearly not eager to do so.