

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**

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**REQUEST TO CONSIDER ADDITIONAL EVIDENCE**

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Pursuant to ECCC Internal Rules (the ‘Rules’) 104(1) and 108(7), the international Co-Lawyer for Nuon Chea (the ‘Defence’) hereby submits this request to consider additional evidence (‘Request for Additional Evidence’) in connection with its pending Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35:

## I. PROCEDURAL HISTORY

1. 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’).<sup>1</sup> 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’.<sup>2</sup>
2. The Trial Chamber rendered a decision on 22 November 2012 rejecting all of the relief sought in the Original Application (‘Impugned Decision’).<sup>3</sup> On 24 December 2012, the Defence filed an immediate appeal against that decision (‘Appeal’).<sup>4</sup> On 14 January 2013 the Co-Prosecutors responded<sup>5</sup> and on 21 January 2013 the Defence filed a reply.<sup>6</sup>
3. In January 2013, former international Co-Investigating Judge Marcel Lemonde published a book entitled *Un Juge Face Aux Khmer Rouges* (‘Lemonde Book’). The Lemonde Book is a broad overview of Judge Lemonde’s experience at the ECCC. Numerous statements in the book reveal facts previously unknown to the Defence which impact directly on this Chamber’s determination of the Appeal. Accordingly, the Defence seeks to place those statements before this Chamber and submits that they are

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<sup>1</sup> See Document No. **E-189** ‘Application for Immediate Action Pursuant to Rule 35’, 25 April 2012, ERN 00803004-00803019 (‘Original Application’).

<sup>2</sup> Original Application, para. 28.

<sup>3</sup> Document No. **E-189/3**, ‘Decision on Application for Immediate Action Pursuant to Rule 35’, 22 November 2012, ERN 00859224-00859231 (‘Impugned Decision’).

<sup>4</sup> Document No. **E-189/3/1/1**, ‘Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35’, 24 December 2012, ERN 00872601-00872631 (‘Appeal’).

<sup>5</sup> Document No. **E-189/3/1/2**, ‘Co-Prosecutors’ Response to Nuon Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35”’, 14 January 2013, ERN 00878190-00878208.

<sup>6</sup> Document No. **E-189/3/1/3**, ‘Reply to Co-Prosecutors’ Response to Rule 35 Appeal’, 21 January 2013, ERN 00880941-00880947.

relevant for the purposes described herein. The relevant excerpts are attached hereto in their original French.<sup>7</sup>

## II. LEMONDE BOOK

4. The Lemonde Book is a 243 page first-hand account of Judge Lemonde's tenure at the ECCC. The book describes Judge Lemonde's work on Cases 001, 002 and 003 and frequently references his interactions with Cambodian judges, staff and politicians. Many of those references confirm the longstanding claims of the Defence, including in the Original Application and the Appeal, concerning the absence of meaningful judicial independence at the ECCC. Selected relevant excerpts in their original French follow:
- a. Il est évident que, derrière les juges cambodgiens, il y a des gens qui tirent les ficelles au sein du gouvernement. (p. 32)
  - b. Je comprendrai bien plus tard qu'en réalité ils avaient une longueur d'avance sur nous, anticipant sur la possibilité de bloquer des poursuites jugées politiquement inopportunes. (pp. 37-38)
  - c. Avec le recul, je ne suis pas certain que le gouvernement cambodgien ait eu en tête un plan mûrement réfléchi. Plus vraisemblablement, les dirigeants s'en tenaient à un raisonnement qu'ils connaissaient bien, fort simple: quel mal y a-t-il à changer un juge puisque, de toute façon, un juge est là pour exécuter les ordres? (p. 50)
  - d. Dans ce contexte troublé, j'eus aussi l'occasion de recevoir le soutien d'un autre juge cambodgien, qui me toucha en ce qu'il était révélateur d'une marque de confiance considérable de la part de ce magistrat. Il m'expliqua sans détour qu'en fait le gouvernement n'attendait qu'une chose, me voir partir: je ne pouvais que déranger, avec mes réactions par trop différentes de celles auxquelles il était habitué, de la part des diplomates ou des politiques. Poursuivant sa description de la société locale, ce juge ajouta que je devais me méfier de *tous* les magistrats cambodgiens: ou bien ils vivaient dans la peur du pouvoir en place ou bien ils en étaient proches mais, dans tous les cas, aucun n'était fiable ni indépendant. Pendant tout mon séjour au Cambodge, ce fut la seule fois où l'on me parla aussi franchement. (p. 51) (emphasis in original)
  - e. Du côté des intéressés, aucune réponse. Je demande au greffier de repartir à la charge par téléphone et de noter toutes ses conversations. Il est « baladé » de service en service et de numéro absent en numéro incorrect pendant plusieurs semaines. Quand il parvient à joindre un correspondant, celui-ci lui dit généralement qu'il va en référer à l'échelon supérieur, promettant de rappeler, ce qu'il ne fait jamais. Seul le directeur de cabinet de l'une des personnes

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<sup>7</sup> The most important excerpts from the Lemonde Book have been reproduced in the body of this Request and translated into all three languages for that purpose. The broader excerpts upon which the Defence seeks to rely, which are attached to this motion, remain in French only due to the present unavailability of French-Khmer translation.

convoquées se risque un jour à aborder le fond, déclarant tout de go qu'on ne peut pas convoquer ainsi un haut dirigeant, car cela pourrait nuire à sa carrière politique ! You Bunleng demandera discrètement si ce membre de phrase est vraiment indispensable dans le compte rendu...Pour lui faire plaisir, on effacera la malheureuse expression : comme toujours, il faut bien mettre un peu d'huile dans les rouages, si l'on veut ne pas trop compromettre l'avenir. (p. 176) (ellipsis in original)

- f. Quelques mois plus tard, Hor Namhong reviendra sur le sujet, justifiant son refus de témoigner par de pseudo-considérations juridiques, n'hésitant pas à expliquer, lors d'une conférence de presse, que j'avais « violé la loi » en signant seul les convocations :

- Selon les règles établies entre le Cambodge et les Nations Unies, il doit y avoir deux signatures, côté cambodgien et côté international.

Je répondis simplement qu'un juge n'avait pas à polémiquer avec un témoin. Les medias locaux ne furent évidemment pas dupes et confirmèrent le manque de sérieux de l'argument avancé. Cependant, une telle mauvaise foi de la part d'un membre du gouvernement ne laissait pas d'inquiéter : en l'absence de réaction, la liberté d'action des juges internationaux risquait à l'avenir d'être directement menacée. Nous en parlâmes entre nous et, estimant que les déclarations du ministre soulevaient un sérieux problème de principe, nous décidâmes d'en saisir les Nations unies.

Au nom de tous les juges internationaux, Silvia Cartwright envoya donc une lettre à Patricia O'Brien, la conseillère juridique de l'ONU. La réponse qui nous parvint fut décevante : en résumé, notre interlocutrice « partageait nos préoccupations », mais elle relevait, avec satisfaction, que les commentaires qui avaient suivi les propos du ministre avaient rétabli les faits. Il n'y avait donc pas lieu d'aller plus loin. D'ailleurs, le vice-Premier ministre Sok An n'avait-il pas récemment confirmé que le gouvernement soutenait et respectait l'indépendance des CETC ? En somme, il n'y avait pas lieu de s'inquiéter.

Nous dûmes nous contenter de ce « soutien ». (pp. 179-180)

5. The translations of those same excerpts are as follows:
- a. It is clear that behind the Cambodian judges there are people pulling strings from within the government. (p. 32)
  - b. Much later I realized that they were one step ahead of us, as they were preparing for the need to obstruct any proceedings that might be considered politically embarrassing. (p. 37-38)
  - c. In hindsight, I rather doubt the Cambodian government had a carefully thought-out plan. More probably, the leaders followed a very simple and well-rehearsed logic: what harm is there in replacing a judge since, in any case, a judge is only there to obey orders? (p. 50)
  - d. In this uneasy situation, I received an expression of support from another Cambodian judge, which I found gratifying as it revealed a considerable

amount of trust on his part. He explained, without beating about the bush, that the government was waiting for one thing alone: for me to leave. With my reactions that were so different from those it was used to getting from diplomats or politicians, I could only be a troublemaker. As he went on with his depiction of Cambodian society, the judge added that I had to be wary of all Cambodian magistrates: either they lived in fear of the political establishment or they were closely connected to it, but either way, not one of them was reliable or independent. This was the only time someone spoke to me so frankly during my entire stay in Cambodia. (p. 51)

- e. There is no response from the other side. I tell the greffier to get to work over the phone and to note down all of his conversations. For several weeks, he is passed from department to department, from “no one to take your call” to “wrong number”. When he eventually does get through to someone, he is usually told that the matter will be taken up at a higher level and that they will call him back, which they never do. Only the chief of staff of one of the people summoned ventures to state the real issue, namely that such a high ranking official cannot be summoned because it could damage his political career! You Bunleng discreetly asks whether it is truly necessary to include this comment in the report... To do him a favour, the unfortunate expression is deleted. As usual, it is necessary to smooth some ruffled feathers if we are not going to jeopardize the future. (p. 176)
- f. A few months later, Hor Namhong returns to the matter, justifying his refusal to testify with pseudo-legal considerations and stating quite unreservedly during a press conference that I had “breached the law” by signing the summons myself:

- According to the rules established between Cambodia and the United Nations, two signatures are necessary: one from the Cambodian side and one from the international side.

I simply answered that it is not befitting of a judge to argue publicly with a witness. The local media was of course under no illusions, and reported that the argument lacked substance. However, such disingenuousness on the part of a government official was unsettling: in the absence of any reaction, the freedom of manoeuvre of the international judges could be directly compromised in the future. We discussed this among ourselves and, as we felt the minister’s statements raised a fundamental ethical problem, we decided to refer it to the United Nations.

Silvia Cartwright therefore sent a letter on behalf of all of the international judges to Patricia O’Brien, the UN legal advisor. Her answer was disappointing. In a nutshell, O’Brien “shared our concerns” but noted with satisfaction that the comments following the minister’s statements had clarified the facts. There was therefore no need to take the matter further. In fact, had not Deputy Prime Minister Sok An recently confirmed that the government supported and respected the independence of the ECCC? When all was said and done, there was no cause for concern.

This was the “support” we had to make do with. (pp. 179-180)

### III. APPLICABLE LAW

#### A. Admission of New Evidence on Appeal

6. Within the ECCC framework, the admission of new evidence on appeal is governed by Rules 104(1) and 108(7). Pursuant to Rule 104(1), the Supreme Court Chamber ‘may itself examine and call new evidence.’ Rule 108(7) provides, in relevant part:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable prior to trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed.

7. The Chamber has previously exercised its discretion to admit new evidence pursuant to Rule 108(7).<sup>8</sup> A similar rule has been applied to interlocutory appeals at the ICTR.<sup>9</sup>

#### B. Interference with the Administration of Justice

8. The Defence incorporates by reference the principles applicable to Rule 35 relied upon in the Original Application and the Appeal.

### IV. ARGUMENT

#### A. The Request for Additional Evidence is Admissible

9. Rule 104(1) authorizes this Chamber to consider new evidence on appeal. Rule 108(7) expressly contemplates a request for such evidence without further conditions as to admissibility. The present Request is therefore admissible.

#### B. The Lemonde Book was Unavailable at Trial

10. The Lemonde Book was published in January 2013, after the filing of the Original Application, the Impugned Decision and the Appeal. The relevant facts, which include Judge Lemonde’s personal views and interactions and other information not previously publicly available, were furthermore unknown to the Defence prior to the publication of

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<sup>8</sup> Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F-2/5/1**, ‘Decision on Group 1 Civil Parties’ Co-Lawyers’ Supplementary Request to Admit Additional Evidence’, 29 March 2011, ERN 00657389-00657391; Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F-2/4**, ‘Decision on Requests by Co-Lawyers for Accused and Civil Parties Groups 1, 2, 3 to Admit Additional Evidence’, 25 March 2011, ERN 00656514-00656517.

<sup>9</sup> *Prosecutor v. Semanza*, ICTR-97-20-A, ‘Decision’, 31 May 2000.

the book. Although there are no further timeliness requirements in Rule 108(7), the Defence notes that the book was published in France and came available in Phnom Penh only recently. The book is furthermore written in French and required detailed review notwithstanding the lack of French language capabilities within the Nuon Chea Defence team. For these reasons, this Request is filed at the earliest possible opportunity.

**C. The Lemonde Book Further Establishes a Reason to Believe that Government Officials Interfered and Continue to Interfere with the Administration of Justice**

11. The Impugned Decision held that the Original Application failed to ‘identify any tangible impact of the allegations it contained on the fairness of trial proceedings in Case 002.’<sup>10</sup> The Appeal supplies at least five separate reasons why that conclusion was erroneous.<sup>11</sup> The Lemonde Book provides substantial supporting evidence in that regard and therefore ‘could have been a decisive factor in reaching the decision at trial.’

i. Cambodian Judges are Unable to Act Independently in Case 002

12. The Lemonde Book establishes that, contrary to its public proclamations, the RGC does not and has never respected the independence of the ECCC. As Tony Kranh, the Acting Director of the Office of Administration, once warned Judge Lemonde:

Votre attitude risque de donner des arguments à ceux qui, dans les hautes sphères, pensent qu’on a déclenché une machine infernale avec ce procès *qu’on n’arrive plus à contrôler*.<sup>12</sup> (emphasis added)

The ‘attitude’ at issue in this context concerned Judge Lemonde’s effort to have CMS implement a simple reclassification order against the wishes of Judge Bunleng and the RGC.<sup>13</sup> The ‘machine infernale’ consists of an independently functioning court that the government ‘n’arrive plus à contrôler.’ The target of that control – ‘ce procès’ – is not Case 003 or 004 but Case 002. The source of the warning is the senior-most official at the ECCC and the individual most directly responsible for reporting to the Cambodian government. The conclusion, that the RGC fully intends to controls proceedings in Case 002, is unavoidable.

<sup>10</sup> Impugned Decision, para. 10.

<sup>11</sup> Appeal, paras 25-51.

<sup>12</sup> Lemonde Book, p. 177.

<sup>13</sup> See para. 16, *infra*.

13. Judge Lemonde confirms, based on his four years of experience handling politically sensitive material and interacting daily with his Cambodian counterparts, that the RGC is fully capable of implementing this intention. According to Judge Lemonde, the government is ‘pulling strings’ behind the Cambodian judges of the ECCC and fully expects those judges to reliably ‘obey orders.’ Judge Lemonde felt that the only ‘frank’ advice he ever received about the Cambodian judicial system during his four years in Cambodia was that *not a single* Cambodian judge is independent or reliable, a consequence of either their fear of or proximity to power.
14. Unlike Judge Kasper-Ansermet, Judge Lemonde’s experience in that regard cannot be hidden behind the curtain of Cases 003 and 004. Indeed, Judge Lemonde was occupied almost entirely with Cases 001 and 002, with far more limited exposure to Case 003.<sup>14</sup> Yet he made no effort to limit the scope of his conclusions as to the influence of the RGC in any way – let alone to one relatively insignificant aspect of his work at the Court.<sup>15</sup> His general view that *all* national judges are subject to pressures of the Cambodian government must therefore have drawn largely on his experience in Cases 001 and 002.

ii. The RGC Unlawfully Interfered with the Appearance before the OCIJ of the Six High-Ranking Government Officials

15. The Lemonde Book conclusively proves that the failure of the late King Father Sihanouk, Heng Samrin, Chea Sim, Hor Namhong, Keat Chhon, Sim Ka and Ouk Bunchhoeun to respond to Judge Lemonde’s efforts to obtain their testimony infringed Rule 35(1). Judge Lemonde first of all confirms that all seven witnesses were of first-rate importance for the judicial investigation.<sup>16</sup> Judge Lemonde then describes Judge Bunleng’s sustained evasions as Judge Lemonde sought for months to raise the

<sup>14</sup> Case 003 did not even exist until the final 14 months of Judge Lemonde’s nearly four and a half years at the ECCC. Between September 2009, when the Case 003 introductory submission was issued and September 2010, the OCIJ was furthermore occupied with drafting the gargantuan 800 page Case 002 Closing Order. Judge Lemonde resigned effective November 2010, two months after the Case 002 Closing Order was issued.

<sup>15</sup> Indeed, Judge Lemonde apparently experienced first-hand the control of the RGC over Judge Bunleng on a regular basis: *see* Lemonde Book, p. 172 (describing Judge Bunleng’s reluctance to summons the six insider witnesses (*see infra*), ‘Il réagit *comme souvent* dans *ce genre* de circonstances.’) (emphasis added).

<sup>16</sup> Lemonde Book, p. 170-1 (explaining in general terms the relevance of each of the six witnesses, and concluding: ‘Dès le début de l’année 2009, j’avais expliqué à You Bunleng qu’il nous fallait absolument interroger ces témoins.’). *See also* fn 31, *infra*.



question of their appearance.<sup>17</sup> Those efforts culminated in Judge Lemonde's admonition to Judge Bunleng that he would have eventually to choose between the government and his role as an investigating judge.<sup>18</sup> Judge Lemonde finally proceeded to summons the witnesses on his own, only to encounter delay and obstruction on the part of the witnesses and their representatives.<sup>19</sup> That obstruction reached its zenith when the OCIJ was informed by a representative of one of the witnesses that his superior was unable to respect Judge Lemonde's summons because to do so would harm his political career.<sup>20</sup>

16. Judge Lemonde decided at this stage to declassify the summonses so as to inform the general public of these developments. In a scene seemingly copied from Judge Kasper-Ansermet, Judge Lemonde's reclassification order was refused by CMS. Only once Judge Lemonde confronted Judge Bunleng and threatened to issue a press release stating that the Court administration was acting on the instructions of the Cambodian government was his order carried out.<sup>21</sup>
17. This sequence of events establishes beyond any doubt that the witnesses themselves interfered with the administration of justice by refusing to comply with an order of the ECCC;<sup>22</sup> and that Judge Bunleng independently infringed Rule 35 by interfering with the appearance of a potential witness.<sup>23</sup> It also raises a substantial likelihood that the same witnesses were pressured not to testify by members of the Cambodian government.<sup>24</sup>
18. The Supreme Court Chamber has held that the appearance of these witnesses is a question still to be resolved in the course of trial pursuant to Rule 87.<sup>25</sup> Be that as it

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<sup>17</sup> Lemonde Book, pp. 172 ('Je savais, bien sûr, que l'idée n'était pas de nature à lui plaire'), 172-174 (generally).

<sup>18</sup> Lemonde Book, p. 173 ('Je lui disais que j'étais bien conscient de la difficulté de sa position : la question que je le soulevais était à l'évidence plus délicate pour lui que pour moi. Nous échangeons sans aucune animosité personnelle. Simplement, lorsque je lui expliquais qu'entre le gouvernement et le juge d'instruction il faudrait bien qu'il finisse par choisir, il était manifestement embarrassé.').

<sup>19</sup> Lemonde Book, pp. 174-177.

<sup>20</sup> See para. 4(e), *supra*.

<sup>21</sup> Lemonde Book, pp. 177-178.

<sup>22</sup> Rule 35(1)(b).

<sup>23</sup> Rule 35(1)(d).

<sup>24</sup> Rule 35(1)(d). As the Appeal observes, this would constitute a separate and independent violation of Rule 35; the failure to appear is itself an interference with the administration of justice. See Appeal, paras 49-50.

<sup>25</sup> Document No. E-116/7, 'Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation', 27 April 2012, ERN 00794483-00794497, para. 32.

may, the question of whether these six individuals and/or others interfered with the administration of justice is a matter separate from whether they are ultimately heard at trial.<sup>26</sup> The failure of the witnesses to respond to the OCIJ summonses under the circumstances described in the Lemonde Book warrants an investigation pursuant to Rule 35(2) as such.

19. Such an investigation is of more than theoretical interest at this stage. Multiple defence teams continue to seek the appearance of these witnesses at trial,<sup>27</sup> yet the circumstances which apparently caused them to fail to appear during the investigation have not moderated. Indeed, with respect to [REDACTED] and [REDACTED], the International Co-Prosecutor has explicitly acknowledged that although both witnesses are relevant to the allegations in Case 002, their testimony may well prove impossible to obtain.<sup>28</sup> The Lemonde Book establishes, as the Defence had previously argued,<sup>29</sup> that any such failure would constitute an interference with the administration of justice.
20. As to [REDACTED] and [REDACTED], the Trial Chamber has already denied the request of the Defence to hear both witnesses.<sup>30</sup> There is accordingly no need to defer to some future determination concerning their appearance. The Defence notes that the Chamber

<sup>26</sup> Appeal, para. 51.

<sup>27</sup> Document No. E-228, Ieng Sary's Rule 87(4) Request to Hear Testimony from [REDACTED] and [REDACTED] 14 September 2012, ERN 00846399-00846410. The Nuon Chea Defence has repeatedly sought the appearance of [REDACTED] at trial. The Defence outlined its position in that regard most recently in submissions delivered informally to the Chamber shortly after the August 2012 Trial Management Meeting and later circulated to all the parties ('Nuon Chea Witness Request'). Those submissions are attached hereto. *See also* Document No. E-236/5/1, 'Request to Summon TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 February 2013, ERN 00889102-00889104. Although in light of Ieng Sary's recent passing his requests are no longer before the Chamber, the Defence has supported his request in this regard. *See* fn 28, *infra*. The fact that multiple defence teams have sought the appearance of these witnesses furthermore supports the Defence contention that they are of great relevance to Case 002. More importantly, the response of the international co-prosecutor as to [REDACTED] and [REDACTED] continues to demonstrate the active tension between the importance of these witnesses and the difficulty in obtaining their testimony. *See* fns 28 & 33, *infra*.

<sup>28</sup> Document No. E-228/1, 'International Co-Prosecutors' Response to "Ieng Sary's Rule 87(4) Request to Hear Testimony from H [REDACTED]", 28 September 2012, ERN 00849279-00849283, para. 4, fn 2. Although the International Co-Prosecutor does not explicitly characterize that failure to appear as an interference with the administration of justice, the Defence has taken the position that such follows necessarily from the argument advanced by the International Co-Prosecutor. *See* Document No. E-228/2, 'Motion in Support of Ieng Sary's Request to [REDACTED]', 11 October 2012, ERN 00853849-00853853, paras 5-6; Document No. E-228/3, 'International Co-Prosecutor's Response to Nuon Chea's "Motion in Support of Ieng Sary's Request to [REDACTED]"', 29 October 2012, ERN 00857214-00857219, para. 12; Document No. E-228/4, 'Reply to International Co-Prosecutor's Response to Nuon Chea's Motion in Support of Ieng Sary's Request to Hear [REDACTED]', 23 November 2012, ERN 00864439-00864444, paras 9-10.

<sup>29</sup> Appeal, paras 47-50.

<sup>30</sup> Document No. E-236/1, Trial Chamber Memorandum re Population Movement Witnesses, 02 October 2012, ERN 00850147-00850148, para. 6.

took that decision without reasons, failing even to address the argument, advanced by the Defence, that both witnesses are in possession of critically important evidence unavailable from any other source.<sup>31</sup> In the case of ██████████, there is reason to believe that evidence would be directly exculpatory.<sup>32</sup> In light of the evident significance of both witnesses, the failure of the Trial Chamber to substantiate its decision not to hear them and the submissions of the international Co-Prosecutor as to the difficulty in obtaining the appearance of similarly placed witnesses (██████████

<sup>31</sup> Nuon Chea Witness Request, paras 31-37. As the Defence explained in that request, as elsewhere, these are not ordinary witnesses. ██████████ were both top-ranking military officials with first-hand knowledge of the events at issue in the Closing Order. ██████████ in particular was, in Khmer Rouge military parlance, the deputy commander of one of the two Divisions which comprised the East Zone army, and arrived at independence monument in that capacity at 9:00 am on 17 April 1975. In plainer language, ██████████ was within the tiny circle of the highest-ranking officers to actively liberate Phnom Penh. He is *the highest* ranking official still alive today. The importance of that unique perspective to the ongoing trial can only be fully understood in light of two facts: (i) the evacuation of Phnom Penh, beginning on 17 April 1975, is the focus of Case 002/01 (as it then was); (ii) there is substantial evidence that the Zone armies which captured Phnom Penh operated independently and under the control of their Zone leaders – including ██████████ – rather than the CPK party center. *See e.g.* Document No. E-3/20, ‘When the War Was Over’, ERN 00237694-00238316, pp. 173-4 (‘But the armed forces of Democratic Kampuchea were in reality six separate armies, belonging to the Northern, Northeastern, Eastern, Southwestern, Northwestern, and Special Zones. Out of necessity and the revolutionary mandate of the cooperative system, the zone leaders – zone party secretaries appointed earlier by the party leadership – had been in charge of the military, the party and the civilians who lived in their territory. Each zone leader had been expected to operate semiautonomously.’); Document No. E-3/9, ‘Pol Pot, The History of a Nightmare’, ERN 00396177-00396757, pp. 272 (‘To confound the confusion, troops from the four different Zones responsible for occupying the city issued contradictory orders.’), 274 (‘The South-Westerners were also more selective in their treatment of republican soldiers. Some, but not all, senior officers were killed, and junior officers and NCOs were spared.’); Document No. E-3/1593, ‘The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-79’, ERN 00678476-00678740, pp. 38 (‘The Northerners soon became known for their use of methods even more brutal than those of the Southwest and Special Zone forces.’), 43 (‘“The Easterners used kind methods along the road. They gave out medicine and rice.” Unlike the Southwesterners, they did not open fire...The Eastern Zone forces were generally much better behaved.’), 47 (‘... he found the Northern Zone “blackshirts” very harsh to the refugees; at the same time these Khmer Rouge were very critical of the Khmer Rouge across the river, in the Eastern Zone... [The East Zone soldiers] were helpful... good commies soldiers.’’). No other person with knowledge of the relationship between the party center and zone leaders even remotely comparable to ██████████ is under consideration as a potential witness in Case 002 (fittingly, the one possible exception is ██████████, one of the Suspects in Case 003, who is the beneficiary not only of protection from the RGC but also the right to remain silent). In just one manifestation of that unique perspective, these two individuals are the only witnesses to a meeting, held on 20 May 1975, which allegedly concerned among other things DK policy as to former Khmer Republic officials. Both men have described that meeting to Ben Kiernan: whereas ██████████ claims that Nuon Chea ordered that such officials be ‘smashed’, ██████████ specifically rejected his recollection and insisted that Nuon Chea used the substantively different phrase ‘scattered’. ██████████ testimony is therefore directly exculpatory as to allegations against Nuon Chea, and substantiates the longstanding claim of the Defence that any crimes which were committed were ordered either by lower level officials or not at all. As the Chamber no doubt recognizes, ██████████ account of this meeting is relevant not only in itself but also because it begs the question: what else does he know? Because he has refused to cooperate with this Tribunal, the answer is unknown.

<sup>32</sup> Nuon Chea Witness Request, paras 33-34.

and [REDACTED]), the continuing effect of the interference complained of cannot plausibly be denied.<sup>33</sup>

iii. The Freedom of Action of the International Judges is at Risk

21. Most revealing about the Lemonde Book is the risk it raises that not only the national judges but even the international judges may be subject to pressures inconsistent with their duty to act independently at the ECCC. Judge Lemonde describes an instance in which he chose not to disclose highly relevant but politically sensitive information at the request of Judge Bunleng.<sup>34</sup> That is a concrete example of an international judge at the ECCC hewing to the demands of the Cambodian government to shield the reach of its influence over the ECCC from view. It is freely described by the judge himself.
22. The Lemonde Book also reveals that the international judges gathered to discuss the ‘fundamental ethical problem’ posed by a public statement of Hor Namhong assailing the summons seeking his appearance. Judge Lemonde was personally concerned that ‘in the absence of any reaction, the freedom of maneuver of the international judges could be directly compromised in the future.’ Accordingly, Judge Cartwright penned a letter on behalf of *all* of the international judges to Patricia O’Brien, the chief legal adviser to the United Nations. In response, O’Brien assured the international judges that because Sok An had recently indicated the support of the Cambodian government for the independence of the ECCC, there was no cause for concern. Commenting on this incident, Judge Lemonde can only wryly observe that ‘we were forced to be satisfied with this “support”.’
23. To our ears, Judge Lemonde’s tale sounds oddly familiar. In fact, the Defence has complained on numerous occasions about similar statements on the part of similarly placed senior members of the RGC.<sup>35</sup> Time and again, Chambers and even Judge

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<sup>33</sup> For the sake of clarity, the Defence emphasizes that it is not in this motion challenging the decision of the Trial Chamber not to hear these witnesses as such. The Defence alerts the Supreme Court Chamber to this series of facts for the purpose of establishing that it continues to seek the appearance of these witnesses at trial, and that the Trial Chamber has so far been reluctant to hear them. The Defence submits that, seen in the context of the totality of the circumstances it is very likely that the position of these witnesses within the RGC and their refusal to comply with the summonses issued by Judge Lemonde continue (at a minimum) to cloud the decision-making process of the Trial Chamber.

<sup>34</sup> See para. 4(e), *supra*.

<sup>35</sup> Document No. **D-254/2**, ‘Request for Investigation’, 30 November 2009, ERN 00410058-00410960, para. 4; Document No. **E-176**, ‘Application for Summary Action Against Hun Sen Pursuant to Rule 35’, 22 February 2012, ERN 00782947-00782959; Document No. **E-219**, ‘Rule 35 Request Calling for Summary

Lemonde have dismissed our concerns, on at least one occasion recycling vague, formulaic statements of support for the independence of the ECCC from the Cambodian government.<sup>36</sup> Indeed, the *very statement* by which Judge Lemonde was apparently so troubled was the subject of a decision by the CIJs, in which *Judge Lemonde himself* found – without any reasoning – that ‘the allegations in the Request do not warrant the application of the provisions of Rule 35.’<sup>37</sup>

24. As a consequence of the consistent failure of any judicial entity to take action, Hor Namhong’s statement and others like it have, three years later, indeed continued ‘in the absence of a reaction.’ It follows on Judge Lemonde’s own terms that ‘the freedom of manoeuver of the international judges [has been] directly compromised.’

iv. Confidential Information is Leaked to the Cambodian Government

25. In another excerpt, Judge Lemonde describes a reception in July 2009 at the French embassy attended by Keat Chhon as a representative of the Cambodian government. Keat Chhon gave a speech in that capacity. Judge Lemonde describes the scene as follows:

All of the guests gathered around in a circle, and as luck would have it I was standing right opposite [Keat Chhon]. He knew me very well, was well aware of his part in what was happening, and I knew that he knew. When he reached the end of his speech and raised his glass for the toast, he looked me straight in the eyes and declared “To the glory of the French Republic!” For one brief moment I felt like Clint Eastwood facing up to Lee Van Cleef. The scene was set. All it needed was the Ennio Morricone music.<sup>38</sup>

26. This incident proves that the Cambodian government was in possession of information concerning confidential deliberations between the Co-Investigating Judges. Judge Lemonde’s casual attitude in that regard strongly suggests that this was no isolated occurrence. It is also further proof that even the international judges are – and more

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Action Against Minister of Foreign Affairs Hor Namhong’, 13 August 2012, ERN 00834491-00834500; Document **E-219/1**, ‘Addendum to Rule 35 Request for Summary Action Against Minister of Foreign Affairs Hor Namhong’, 24 August 2012, ERN 00838725-00838727.

<sup>36</sup> Document No. **E-219/3**, ‘Decision on Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs HOR Namhong (E219)’, 22 November 2012, ERN 00864703-00864711, para. 14.

<sup>37</sup> Document No. **D-314/3**, ‘Order in Response to the Appeals Chamber’s Decision on Nuon Chea and Ieng Sary’s Requests to Summon Witnesses’, 11 June 2010, ERN 00532792-00532794, paras 5-6.

<sup>38</sup> Lemonde Book, p. 175.

importantly, feel as though they are – subject to intimidation by the RGC. It too was never disclosed to the parties.

v. Conclusion

27. The fundamental lesson of the Lemonde Book is that the divide, in terms of RGC interference, between Cases 003 and 004 on the one hand and Cases 001 and 002 on the other, was never tenable. Judge Lemonde’s experience with CMS is an especially strong echo of Judge Kasper’s Note, but it is only one example of the manner in which RGC influence pervades the ECCC, travelling seamlessly across this alleged chasm. As Judge Lemonde’s experience shows, the RGC’s influence over proceedings at the ECCC is institutional; it is embedded in the task of the Court and the latter’s role in a greater political context. Indeed, Judge Lemonde is complimentary of Judge Bunleng’s *personal* character even while he assails the ethical failings of his *office*.<sup>39</sup> It is that *office* which cannot but be subject to the whims of the Cambodian government. It is surely for that reason that even the international judges, once integrated into this same institutional context, have been subject to those exact same pressures. It is also why the concrete violations of Rule 35 specifically enumerated in Judge Lemonde’s book – numerous though they are – must only be the tip of the proverbial iceberg.

**D. The Supreme Court Chamber Should Not Defer to Findings Made at the Investigative Stage**

28. The Impugned Decision held that the allegations in the Original Application had been previously addressed by both the Trial and Supreme Court Chambers.<sup>40</sup> The decisions cited by the Trial Chamber in that regard largely deferred to determinations previously made at the investigative stage by the CIJs and the Pre-Trial Chamber.<sup>41</sup> The Supreme Court Chamber in particular held that, although it retained a ‘residual power’ to take action under Rule 35 in respect of events which took place during the investigative

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<sup>39</sup> Lemonde Book, p. 31.

<sup>40</sup> Impugned Decision, para. 8.

<sup>41</sup> Document No. **E-116/7**, ‘Decision on Immediate Appeal by NUON Chea Against the Trial Chamber’s Decision on Fairness of the Judicial Investigation’, 27 April 2012, ERN 00794483-00794497 (‘SCC Decision on Fairness of Judicial Investigation’); 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, para. 21.

stage, in this case it was inappropriate to exercise that discretion since the underlying issues had already been the subject of extensive litigation.<sup>42</sup>

29. The Lemonde Book provides good reasons to now exercise that discretion. The book reveals that, although there may have been litigation with regard to some signs of government interference, not all of the relevant information was known to the parties at the time. It was furthermore Judge Lemonde himself who knowingly and willfully withheld that information from the Defence. For the reasons already stated, that information is relevant to the question of whether the Rule 35 standard is satisfied and therefore to the determinations taken at first instance by the CIJs and on appeal by the Pre-Trial Chamber; and subsequently deferred to by both the Trial Chamber and the Supreme Court Chamber.
30. The Lemonde Book also establishes that Judge Lemonde held serious concerns about the independence of Cambodian judges at the ECCC at the very same time that he, along with Judge Bunleng, dismissed as unfounded a series of requests for investigation into that same subject. The Trial Chamber apparently had similar concerns, and went so far as to seek assistance from the United Nations. Yet not a single decision from any authority reflects these judges' actual views about the influence of the RGC over proceedings before the ECCC. The Trial Chamber chose, instead of acting on their own concerns, to sanction the Defence for raising the issue too frequently.<sup>43</sup>
31. The Defence recognizes that the privately held views of a judge are not relevant to the validity of a judicial holding as such. Those opinions are, however, crucial to this Chamber in considering whether those holdings are entitled to deference. Under these circumstances, it is incumbent on the Supreme Court Chamber to exercise its inherent jurisdiction to safeguard the integrity of the proceedings.

#### **E. The Supreme Court Chamber Has an Independent Discretion and Duty to Act**

32. As the language of Rule 35(2) makes clear, any Chamber at the ECCC retains the discretion to order an investigation upon finding a reason to believe that any person has interfered with the administration of justice. This Chamber is therefore not confined as

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<sup>42</sup> SCC Decision on Fairness of Judicial Investigation, paras 31-32.

<sup>43</sup> Document No. E-214/3.2, Complaint to the New York and Amsterdam Bar Associations, ERN 00821219-00821229, p. 10.

such to the narrow terms of Rule 108(7) or the precise findings of the Trial Chamber on appeal, or required to carefully parse exactly which facts have been previously litigated. The Lemonde Book and Judge Kasper-Ansermet's Note present highly reliable new evidence which, together, dramatically alter the existing portrait of political interference in the functioning of this Court. If this Chamber is persuaded that this portrait as a whole demonstrates a reason to believe that *any* person has *or* continues to interfere with the administration of justice, the power to act is within its discretion. Indeed, in light of the seriousness of the issues, the apparent disinclination of the Trial Chamber to act, and the quickly approaching conclusion of trial proceedings, it is so obligated.

#### V. CONCLUSION AND RELIEF SOUGHT

33. For these reasons, the excerpts from the Lemonde Book attached hereto establish, contrary to the conclusions of the Trial Chamber: (i) a reason to believe that the RGC has interfered and continues to interfere in Case 002 before the ECCC; and (ii) that it is inappropriate, under these circumstances, to defer to the conclusions of the CIJs and Pre-Trial Chamber in that respect.
34. Accordingly, the Defence respectfully requests that the Supreme Court Chamber:
- a. Admit the excerpts of the Lemonde Book attached hereto into evidence; and
  - b. Consider those excerpts for the purposes described herein.

INTERNATIONAL CO-LAWYER FOR NUON CHEA



Victor KOPPE