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

FILING DETAILS (08)

Case No: 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors

Filed to: Supreme Court Chamber **Original Language:** English

Date of document: 2 November 2011

ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 02-Nov-2011, 15:57
CMS/CFO: Uch Arun

CLASSIFICATION

Classification of the document suggested by the filing party: Public

Classification by Supreme Court Chamber: សម្ងាត់/Confidential

Classification Status: សាធារណៈ / Public

Review of Interim Classification: 31/01/2012

Records Officer Name: Peang Tola

Signature:

CO-PROSECUTORS' RESPONSE TO NUON CHEA'S APPEAL AGAINST THE TRIAL CHAMBER DECISION REGARDING THE FAIRNESS OF THE JUDICIAL INVESTIGATION

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distribute to:

Supreme Court Chamber
Judge KONG Srim, President
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge A. KLONOWIECKA-MILART
Judge MONG Monichariya
Judge C. N. JAYASIINGHE
Judge YA Narin

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SA Sovan
Jacques VERGES

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 9 September 2011, the Trial Chamber issued its *Decision on Nuon Chea motions regarding fairness of judicial investigations (E51/3, E82, E88 and E92)* (the "Impugned Decision").[1] Disposing of a series of submissions from the Defence team for Accused Nuon Chea (the "Defence"), the Trial Chamber dismissed one request for investigation in relation to alleged interference with the administration of justice under Rule 35 of the Internal Rules ("Rules").[2] The Trial Chamber also granted, in part, a second request under Rule 35 and, after enquiries, determined that no further measures were required.[3]

2. On 10 October 2011, the Defence filed its *Immediate appeal against the Trial Chamber decision regarding the fairness of the judicial investigation* (the "Appeal"),[4] in English only.

3. On 18 October 2011, the Supreme Court Chamber (the "Chamber") granted, in part, the Co-Prosecutors' request for extension of time,[5] allowing the filing of this Response within 15 calendar days commencing on the first day following the service of the Appeal in Khmer.[6] The Khmer version of the Appeal was placed on the Case File on 18 October 2011. Accordingly, the Co-Prosecutors' present Response falls due on 2 November 2011 and complies with the extended time limit.

4. The Co-Prosecutors submit that the four grounds of appeal advanced by Nuon Chea are inadmissible in part and are further substantively unfounded. In addition, the relief requested falls outside the competence of the Chamber. As such, the Appeal does not meet the applicable standard of review and should be dismissed. Nonetheless, the Co-Prosecutors consider that evidence of interference with the administration of justice should be considered *proprio motu* by the Chamber in order to determine whether an investigation under Rule 35 is warranted in the circumstances. The Co-Prosecutors further submit that the Chamber would be competent to conduct a Rule 35 investigation while Case 002 is pending before the Trial Chamber.

---

1 **E116** Decision on Nuon Chea motions regarding fairness of judicial investigation, 9 September 2011.
2 **E82** Request for investigation pursuant to Rule 35, 28 April 2011 ("First Request").
3 **E92** Second request for investigation pursuant to Rule 35, 3 June 2011 ("Second Request").
4 **E116/1/1** Immediate appeal against the Trial Chamber decision regarding the fairness of the judicial investigation, 10 October 2011 ("Nuon Chea Appeal"), notified to the parties on 11 October 2011.
5 **E116/1/2** Co-Prosecutors' request for extension of time to respond to Nuon Chea's immediate appeal under Internal Rule 104(4)(d), 13 October 2011.
6 **E116/1/2/1** Decision on Co-Prosecutors' request for extension of time to respond to Nuon Chea's immediate appeal under Internal Rule 104(4)(d), 18 October 2011.

II. ARGUMENT

1. The Appeal is inadmissible in part

5. The Co-Prosecutors submit that the Appeal is inadmissible in part before the Chamber as two of four grounds of appeal advanced either: (i) have no factual basis in the reasoning of the Trial Chamber; or (ii) wilfully misconstrue the reasoning of the Trial Chamber. As such, these grounds of appeal cannot properly be considered to meet the formal requirements of specificity set out in the Rules.

6. The scope of the Appeal is expressly limited to the Trial Chamber's disposition of the First Request alone.[7] Accordingly, the Trial Chamber's disposition of the Second Request falls outside the scope of the Appeal. The Rules prescribe that the Chamber may only consider issues raised in the Appeal.[8]

7. An *immediate* appeal is available only for four specific categories of decisions of the Trial Chamber: (i) decisions that have the effect of terminating proceedings; (ii) decisions on detention and bail under Rule 82; (iii) decisions on protective measures under Rule 29(4)(c); and (iv) decisions on interference with the administration of justice under Rule 35(6).[9] All other Trial Chamber decisions "may be appealed only at the same time as an appeal against the judgment on the merit."[10] Also, an immediate appeal "does not stay the proceedings before the Trial Chamber."[11] The Co-Prosecutors consider that the Impugned Decision includes a decision under Rule 35(6) for which recourse to immediate appeal is available.[12]

8. The Co-Prosecutors observe that this Appeal advances four grounds of appeal, comprising three errors of law and one discernible error in the exercise of discretion. As errors of law, the Appeal alleges that the Impugned Decision: (i) does not provide reasons for not addressing Defence claims regarding Case 002 ("First Ground");[13] (ii) incorrectly requires action under Rule 35 to be linked to factual matters concurrently within the jurisdiction of the Trial Chamber, and further requires actual harm to an accused person or tangible impact on proceedings with which the Trial Chamber is currently seised

---

7 **E116/1/1** Appeal, *supra* note 4 at para. 1 ("…to the extent it disposes of…").
8 Rule 110(1).
9 Rule 104(4).
10 Rule 104(4).
11 Rule 104(4).
12 **E116** Impugned Decision, *supra* note 1 at paras. 21-23 and dispositive part at p. 10.
13 **E116/1/1** Appeal, *supra* note 4 at paras. 21 and 24.

("Second Ground");[14] and (iii) incorrectly suggests that Rules 35 investigations cannot be initiated by the Trial Chamber upon request of a party to the proceedings ("Third Ground").[15] The Appeal also alleges a discernable error in the exercise of the Trial Chamber's discretion in failing to assign the "proper probative value" to material relating to Cases 003 and 004 in assessing Defence claims regarding alleged interference in Case 002 ("Fourth Ground").[16]

9. The admissibility of *any appeal* to the Chamber is subject to two *formal requirements* that the Appellant "specify" each alleged error when "setting out the grounds of appeal and arguments in support thereof"[17] and "identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber."[18] Even were the Chamber to dilute these requirements to conform to the less stringent language adopted in Rules of Procedure and Evidence of the *ad* hoc Tribunals[19] and the low threshold of specificity for grounds of appeal applied in the jurisprudence of the ICTY and ICTR Appeals Chambers,[20] specificity as to alleged errors would be devoid of meaning as a threshold for admissibility unless, at a minimum, the Chamber requires that grounds of appeal have some discernable factual basis in the Impugned Decision.

10. The Co-Prosecutors submit that neither the First nor the Third Ground of appeal have any factual basis in the Impugned Decision. Further, the Third Ground appears to wilfully misrepresent the reasoning of the Trial Chamber in order to fabricate an entirely baseless ground of appeal.

---

14 **E116/1/1** Appeal, *supra* note 4 at paras. 25-31; the Defence submits that several alleged failures by the Trial Chamber "amount to *an error* on *a question* of law…" (at para. 31). Thus, in this response, the Co-Prosecutors address these alleged failings within the framework of a single alleged error of law.

15 **E116/1/1** Appeal, *supra* note 4 at para. 35.

16 **E116/1/1** Appeal, *supra* note 4 at para. 32-34.

17 Rule 104(2).

18 Rule 104(4).

19 See e.g. Rule 108 of the ICTY Rules of Procedure and Evidence, requiring that appellant "indicate the substance of the alleged errors".

20 See e.g. *Prosecutor v Anto Furundžija*, IT-95-17/1-A, Judgment (ICTY Appeals Chamber), 21 July 2000 at para. 35; *François Karera v Prosecutor*, ICTR-01-74-A, Judgment (ICTR Appeals Chamber), 2 February 2009 at para. 8, noting that the appellant "must be prepared to advance arguments in support of the contention" that an error of law has occurred. See also *Tihomir Blaškić v Prosecutor*, IT-95-14-A, Judgment (ICTY Appeals Chamber), 29 July 2004 at para. 14, requiring the party alleging an error of law to "present arguments in support of its claim".

i. The First Ground of appeal has no factual basis in the Impugned Decision

11. In advancing the First Ground, the Defence alleges that the Impugned Decision "simply ignores"[21] the Defence's "detailed and clearly-pleaded claims"[22] of two allegations of direct interference by the Royal Government of Cambodia ("RGC") in Case 002, and that "this oversight amounts to an error of law – *ipso facto*."[23] These two allegations concern the frustration of the Co-Investigating Judges' attempts to obtain the testimony of His Majesty King Father Norodom Sihanouk and the obstruction of the summonses to the "Six Insiders".[24] The Co-Prosecutors submit that there is simply no factual basis in the Impugned Decision for an assertion that the Trial Chamber has "ignored" these specific Defence submissions. As the Trial Chamber explicitly states in the Impugned Decision, the two allegations of RGC interference in Case 002 were raised by the Defence in its Consolidated Preliminary Objections[25] and repeated in the First Request[26] – the disposal of which is the sole basis for this Appeal. The Impugned Decision further summarises the substance of Defence submissions concerning these two instances of alleged RGC interference.[27] The Trial Chamber proceeds, after two paragraphs of detailed reasoning, to find those portions of the Defence Preliminary Objections concerning "interference with the administration of justice" to be inadmissible.[28] Thus, the First Ground of appeal appears to rest wholly on the basis that the Trial Chamber did not *reconsider* the two allegations of RGC interference, already considered and held inadmissible, in disposing of the First Request.

12. The First Request was filed in April 2011, more than two months after the Preliminary Objections. Both submissions refer to the same two instances of alleged RGC interference in Case 002, and cite the Defence's 2009 Investigative Request to the Office of Co-Investigating Judges, which also refers to the very same allegations.[29] In view of the repeated submission of the same two allegations to the same Trial Chamber, there is no

---

21 **E116/1/1** Appeal, *supra* note 4 at para. 24.
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 **E116** Impugned Decision, *supra* note 1 at para. 6, where the Trial Chamber refers to **E51/3** Consolidated preliminary objections, 25 February 2011 at paras. 6, 10-14 and 57 ("Preliminary Objections").
26 **E116** *Ibid.* at para. 10, where the Trial Chamber states, "In his first Rule 35 Request, the Accused refers to the alleged interference with the administration of justice by the RGC described in his preliminary objections."
27 **E116** Appeal, *supra* note 4 at paras. 6 and 10.
28 **E116** *Ibid.* at para. 17.
29 See **E51/3** Preliminary Objections, *supra* note 25 at paras. 6-7; **D254** Request for investigation, 30 November 2009 at para. 5.

discernable factual basis for an error of law where the Trial Chamber notes and summarises the same two allegations but elects not to re-dispose of these allegations twice over in the same Impugned Decision.

13. The Co-Prosecutors observe in this regard that incorporation by reference of previous arguments – a practice much favoured by the Defence[30] – is a means of concision appropriate only where an issue raised in previous submissions is pending before a Chamber. It cannot be used to secure repeated reconsideration of issues that have already been the subject of judicial consideration and decision. The mere marshalling of footnotes cannot satisfy any threshold of specificity required for the admissibility of a ground of appeal.

ii. The Third Ground of appeal has no factual basis in the Impugned Decision

14. In advancing the Third Ground, the Defence alleges that the Trial Chamber's summary of a finding of the Pre-Trial Chamber[31] in a footnote ("noting that Internal Rule 35 does not provide for the initiation of an investigative action upon request of a party")[32] amounts to a finding that counsel for a party cannot "affirmatively move a Chamber for relief under Rule 35",[33] and that such a finding would be an error of law invalidating the Impugned Decision. The Co-Prosecutors affirm that the Trial Chamber simply does not make any such finding. The Trial Chamber quotes Rule 35(2) in order to justify its finding that "an investigation pursuant to this Rule can only be meaningfully conducted by the judicial body seised of the case." On its face, the Impugned Decision cannot reasonably be read as prohibiting a party from requesting a given judicial authority from initiating a Rule 35 investigation. As such, the Third Ground has no evidentiary basis in the Impugned Decision.

iii. The Third Ground of appeal wilfully misrepresents the reasoning of the Trial Chamber

15. The entirely baseless character of the Third Ground, coupled with the fact that Nuon Chea's Second Request – by which his counsel affirmatively moved the Trial Chamber for Rule 35 relief – was admitted by the Trial Chamber and judicially considered in the

---

30 See *e.g.* **E116/1/1** Appeal, *supra* note 4 at paras. 2 and 34; **E82** First Investigative Request, *supra* note 2 at para. 18.

31 **D158/5/1/15** Decision on Appeal against the Co-Investigating Judges Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009 at para. 29; see **E116/1/1** Appeal *supra* note 4 at n. 97.

32 *Ibid.*

33 **E116/1/1** Appeal, *supra* note 4 at para. 35.

same Impugned Decision, suggests that the Defence has wilfully misrepresented the reasoning of the Trial Chamber in order to fabricate a ground of appeal in this instance.

16. On this basis, the Co-Prosecutors submit that the Chamber should hold inadmissible both the First and Third Ground of appeal for want of any factual basis in the Impugned Decision, which fails to meet any threshold of specificity, whether the explicit admissibility threshold in Rule 105, or the lower threshold reflected in the jurisprudence of the *ad hoc* Tribunals.

2. The appeal fails to meet the standard of appellate review

i. The standard of review requires that the Appellant demonstrate that an alleged error of law invalidates the Impugned Decision

17. Rule 104(1) sets out the general appellate jurisdiction of the Chamber, which is limited to: (i) an error on a question of law which invalidates the decision of the Trial Chamber; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) for immediate appeals only, a discernable error in the exercise of discretion by the Trial Chamber which results in prejudice to the appellant.[34] These three legal standards are mirrored *verbatim* in Rule 105(2), which sets out the requirements for admissibility of an appeal and, by implication, the applicable standard of review. Thus, the Chamber may grant this Appeal only insofar as it finds, on the balance of probabilities: (i) an error a question of law which invalidates the Impugned Decision; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) a discernable error in the exercise of discretion by the Trial Chamber which results in prejudice to the Appellant.

18. This Chamber has clarified the scope of the Rule 104(1), noting that a discernable error in the Trial Chamber's exercise of discretion, "does not…create an exclusive ground for immediate appeals."[35] This Chamber has also reiterated its limited power of review on appeal, as distinguished from the somewhat more expansive powers of other Chambers.[36] Furthermore, when determining the narrow scope of appropriate appellate review, "the Supreme Court Chamber, being the final court of appeal, reviews the impugned decision within the grounds of appeal and consistent with the direction of the appeal."[37] That is, the scope of appellate review is defined by the appeal itself. This does not preclude the

---

34 Rule 104(1).
35 **E50/3/1/4**, Decision on immediate appeal by Khieu Samphan on application for immediate release, 6 June 2011.
36 *Ibid.* at para. 53.
37 *Ibid.* at para. 52.

Chamber engaging its own reasoning, but the issue being considered by the Chamber on appeal must have been the subject of the appeal and there must be factual findings that would permit the correction sought by the appellant.[38]

19. The *ad hoc* Tribunals have adopted a similarly restrained approach when engaging in appellate level review, which supports the view that the primary function of appellate jurisdiction is corrective. The Statutes of the ICTY and ICTR outline very limited standards of review, which has been emphasised in Appeals Chamber jurisprudence: "…while the Chambers *may* find it necessary to address issues, [they] *may also* decline to do so."[39] Further, Appeals Chambers "will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand."[40]

20. In the practice of the *ad hoc* Tribunals, the specific standard of review for errors of law mirrors the standard in Rule 105 set out above. Appeals Chambers have jurisdiction solely over "errors of law which invalidate the decision of the Trial Chamber."[41] By necessary implication, not all errors of law will meet the standard of review. A range of errors of law will not, by their nature or consequences, invalidate the decision of a Trial Chamber.

21. For example, the ICTR Appeals Chamber has acknowledged that the Trial Chamber "committed a discernible error of law", but because the error did not effectively "invalidate […] the Trial Judgement" the particular point of appeal was rejected.[42] In this case, the Appellant Siméon Nchamihigo submitted that the Trial Chamber had erred by commencing his trial before resolving all outstanding matters related to defects in the form of the indictment – an issue especially central to defence rights given the predominantly adversarial character of pre-trial proceedings at the *ad hoc* Tribunals. In response, the Prosecution asserted that the Appellant failed to demonstrate the prejudice to the Appellant's ability to effectively prepare a defence. The Appeals Chamber ruled

---

38 *Ibid.*

39 ICTY Statute; ICTR Statute; *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-A, Judgment (ICTR Appeals Chamber), 1 June 2001 at para. 24 [emphasis added]; quoted with approval in *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Judgment (ICTY Appeals Chamber), 17 September 2003 at para. 8.

40 *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-A, Judgment (ICTR Appeals Chamber), 1 June 2001 at para. 24; quoted with approval in *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Judgment (ICTY Appeals Chamber), 17 September 2003 at para. 8.

41 *François Karera v Prosecutor*, ICTR-01-74-A, Judgment (ICTR Appeals Chamber), 2 February 2009 at para. 7.

42 *Siméon Nchamihigo v Prosecutor*, ICTR-2001-63-A, Judgment (ICTR Appeals Chamber), 18 March 2010 at paras. 31-32.

that the Trial Chamber did indeed violate the express and mandatory provision of Rule 72(A) regarding the disposal of preliminary motions before the commencement of trial, but was not convinced that the error invalidated the Trial Judgement and thus rejected the Appellant's arguments.[43] Thus, to meet the standard of review applicable to errors of law, the Co-Prosecutors submit that the Appellant must not only specify the alleged error but also demonstrate, on the balance of probabilities, how that error invalidates the Impugned Decision.

ii. The Trial Chamber did not err in law such as to invalidate the Impugned Decision

22. The Defence alleges three errors of law in the Impugned Decision: the First, Second and Third Grounds set out in paragraph 3 above. The Co-Prosecutors have argued in paragraphs 11 to 16, above, that the First and Third Grounds of appeal are inadmissible before the Chamber. Should the Chamber find that any or all three grounds of appeal admissible, the Co-Prosecutors submit that in each case, the Trial Chamber did not err in law such as to invalidate the Impugned Decision.

The First Ground of appeal is unfounded

23. In its First Ground of appeal, the Defence alleges that the Trial Chamber erred in law by failing to provide reasons for a purported failure to consider Defence claims concerning RGC interference in Case 002.

24. The applicable law on reasoned decisions clearly establishes that judicial bodies have a duty to provide reasoned decisions, a principle that stems from human rights obligations under international agreements as well as the jurisprudence of international tribunals. The statutes governing the ICC, the ICTY and the ICTR are unanimous in requiring written reasoned opinion for judicial decisions.[44] Furthermore, a reasoned Trial Chamber decision helps to ensure fundamental human rights principles dealing with a criminal defendant's right to a fair trial and the right to an appeal.[45]

---

[43] *Ibid.*

[44] See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, art. 23 (1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 22 (1994); Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference, art. 74 (17 July 1998).

[45] International Covenant on Civil and Political Rights, art. 14, 999 U.N.T.S. 171 (9 December 1996). See also *Prosecutor v Momir Nikolić,* IT-02-60/1-A, Judgment on Sentencing Appeal (ICTY Appeals Chamber), 8 March 2006 at para. 96; *Prosecutor v. Dragoljub Kunarac*, et al., IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002.

25. The ICTY Appeals Chamber has established that a margin of deference to findings of fact by a Trial Chamber is required when assessing whether a decision is properly reasoned:

> *The task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber [when assessing their reasoned decision].*[46]

The "Trial Chamber has a general obligation to set out a reasoned opinion"[47] that provides sufficient reasoning for their assessment and "adequately balanc[es] all the relevant factors."[48] But the "extent of the [Chamber's] reasoning will depend on the circumstances of the case."[49] Furthermore, "while a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail."[50]

26. It is therefore necessary for any appellant claiming an error of law due to the lack of a reasoned opinion to identify the "specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[51]

27. Concerning the extent of reasons expected of a Trial Chamber, the ICC Appeals Chamber has held that sufficient reasoning "will not necessarily require reciting each and every factor that was before the [Chamber] to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."[52] Similarly, the ICTR Appeals Chamber requires that the "Trial Chamber must, at minimum, provide reasons in support

---

46 *Prosecutor v Dragoljub Kunarac*, et al., IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002 at para. 39.

47 *Prosecutor v Momir Nikolić,* IT-02-60/1-A, Judgment on Sentencing Appeal (ICTY Appeals Chamber), 8 March 2006 at para. 96

48 *Prosecutor v Dragoljub Kunarac*, et al., IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber), 12 June 2002 at para. 324.

49 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (OA 5), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC Appeals Chamber), 14 December 2006 at para. 20.

50 *Prosecutor v Radovan Karadžić*, IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial (ICTY Appeals Chamber), 13 October 2009 at para. 20; *Prosecutor v Slobodan Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (ICTY Appeals Chamber), 20 January 2004 at para. 7.

51 *Prosecutor v Miroslav Kvočka* et al., IT-98-30/1-A, Appeal Judgment (ICTY Appeals Chamber), 28 February 2005 at para. 368.

52 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (OA 5), Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC Appeals Chamber), 14 December 2006 at para. 20 (emphasis added).

of its findings on the substantive consideration relevant for its decision."[53] The breadth of the Trial Chamber's written argument is irrelevant so long as the Chamber has provided convincing reasoning.[54]

28. As set out in paragraph 11, above, the Impugned Decision disposes of the two specific Defence claims of RGC interference in Case 002 with reference to the Preliminary Objections, where these claims were initially set out – and not the First Request, were the same claims are repeated. The Trial Chamber sets out two reasoned paragraphs of text to justify this decision.[55] The Trial Chamber properly exercises its discretion in the interests of economy and efficiency not to re-dispose of the same claims in assessing the First Request. The Co-Prosecutors submit that this scope of reasoning meets, if not surpasses, the legal threshold for a properly reasoned decision set out above.

The Second Ground of appeal is unfounded

29. In its Second Ground of appeal, the Defence alleges that the Trial Chamber erred in law through a series of "failings" which require any action under Rule 35 to the linked to factual matters with which the Trial Chamber is concurrently seised, particularly by requiring allegations to have a "tangible impact" on the fairness of the trial proceedings in Case 002.[56] Although the Defence alleges that the Trial Chamber also adds a further erroneous requirement of "actual harm",[57] the Co-Prosecutors can find no reference to such a requirement in the relevant portion of the Impugned Decision.

30. The Co-Prosecutors submit that Rule 35 creates an ancillary jurisdiction for judicial organs of the ECCC at various stages of the proceedings to control the integrity of the judicial process. This ancillary jurisdiction, by necessary implication, rests on a pre-existing, lawful basis for the primary jurisdiction of a given judicial organ, whether at first instance or on appeal. Ruling on submissions from the Defence during the investigative phase, the Pre-Trial Chamber has found that the powers provided to the CIJs or a Chamber by Rule 35 are an effort to safeguard the procedures before the ECCC

---

53 *Prosecutor v Édouard Karemera*, ICTR-98-44-AR73.1, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008 (ICTR Appeals Chamber), 30 January 2009 at para. 19.
54 *Prosecutor v Dragoljub Kunarac*, et al., IT-96-23 & IT-96-23/1-A, Judgement (ICTY Appeals Chamber), 12 June 2002 at para. 324.
55 **E116** Impugned Decision *supra* note 1 at paras. 15-16.
56 See **E116** Impugned Decision, *supra* note 1 at para. 21; see **E116/1/1** Appeal, *supra* note 4 at paras. 25-31
57 **E116/1/1** Appeal, *supra* note 4 at paras. 30.

from inappropriate action that may call into question the fairness of the proceedings.[58] Rule 35 "does not establish an additional primary jurisdiction for the ECCC" as this would clearly fall beyond the scope of the Rules.[59]

31. The threshold requirements that allegations of interference with the administration of justice (i) be linked to factual matters currently before the Trial Chamber; and (ii) have a tangible impact on the fairness of the proceedings are demonstrably consistent with the wording of Rule 35 and the purpose of that Rule to safeguard fairness, as articulated in the jurisprudence of the Pre-Trial Chamber. The Appeal neither substantiates an error of law in this regard nor demonstrates how any purported error invalidates the Impugned Decision. As such, the Co-Prosecutors submit that the Second Ground of appeal is unfounded and should be dismissed by the Chamber.

The Third Ground of appeal is unfounded

32. In its Third Ground of appeal, the Defence alleges that the Trial Chamber erred in law in finding that Rule 35 "does not provide for the initiation of investigative action upon request of a party."[60] As the Co-Prosecutors have argued in paragraphs 14 and 15, above, this ground of appeal aggrandises the footnoted summary of a finding of the Pre-Trial Chamber on a tangential point to the status of a legal finding of the Trial Chamber, either incorrectly or wilfully, and this ground of appeal is accordingly inadmissible.

33. If, in the alternative, the Chamber were to admit the Third Ground of appeal, the consequence is merely that the Impugned Decision includes a footnoted reference to a legal finding of the Pre-Trial Chamber which was "subsequently revised"[61] by that Chamber.[62] The Co-Prosecutors submit that the revised position of the Pre-Trial Chamber has no rational connection to the point of law upheld in the Impugned Decision, namely that "an investigation pursuant to [Rule 35] can only be meaningfully conducted by the judicial body seised of the case."[63] The point of law in the Impugned Decision goes to the issue of whether the Trial Chamber rather than the CIJs or Pre-Trial Chamber may act

---

58 See **D158/5/4/14** Decision on the appeal of the Charged Person against the Co-Investigating Judges' order on Nuon Chea's eleventh request for investigative action, 25 August 2009 at para. 30.
59 **D158/5/4/14** *Ibid.*
60 **E116/1/1** Appeal, *supra* note 4 at para. 35.
61 **E116/1/1** Appeal, *ibid.*
62 The two decisions of the Pre-Trial Chamber are **D158/5/1/15** Decision on appeal against the Co-Investigating Judges' order on the Charged Person's eleventh request for investigative action, 18 August 2009 at para. 29 and **D314/2/7** Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ order on request to summon witnesses, 8 June 2010 at para. 43.
63 **E116** Impugned Decision, *supra* note 1 at para. 21.

under Rule 35 in connection with Cases 003 and 004. The point of law subsequently revised by the Pre-Trial Chamber concerns the standing of a party to request initiation of a Rule 35 inquiry. The Co-Prosecutors affirm, on this basis, that the Third Ground of appeal is unfounded. Whatever minimal error subsists in an incorrect reference to a decision subsequently revised by the Pre-Trial Chamber decision, the Appellant has failed to demonstrate that such an error invalidates the Impugned Decision. As such, the Third Ground of appeal should be dismissed by the Chamber.

iii. The standard of review requires that the Appellant demonstrate that an alleged error in the exercise of discretion is both unreasonable and plainly unjust, resulting in prejudice to the Appellant

34. The ICTY Appeals Chamber has assessed the factors that will be relevant to the appellate review of the exercise of judicial discretion at that Tribunal:

> *Accordingly, an appellant must show that the Trial Chamber*['s] [...] *decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.*[64]

35. The standard of review by the Pre-Trial Chamber at the ECCC is higher, requiring the Appellant to demonstrate an "abuse" of judicial discretion on grounds of unfairness or unreasonableness.[65] The Co-Prosecutors submit that the standard adopted by the ICTY Appeals Chamber, which requires that the Trial Chamber "failed to exercise its discretion properly" is substantially similar to the "discernible error in the exercise of the Trial Chamber's discretion" required by Rule 105 and applicable before this Chamber. The ICTY Appeals Chamber standard will be satisfied only where the impugned decision is "so unreasonable and plainly unjust" as to allow an inference that the Trial Chamber failed to exercise its discretion properly. This qualifying language can be characterised as requiring both *gross unreasonableness* and *plain (or manifest) injustice* before the exercise of judicial discretion by a Trial Chamber is set aside on appeal. The Co-

---

64 *Prosecutor v Zdravko Tolimir* et al., Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release (ICTY Appeal Chamber), 19 October 2005 at para. 4.

65 **D164/4/13** Decision on the Appeal from the Order on the Request to seek exculpatory evidence in the shared materials drive, 18 November 2009at paras. 22-27 (citing *Slobodan Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Defense Counsel, (ICTY Appeals Chamber), I November 2004 at paras. 9-10); **D140/9/5** Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order denying his Request for appointment of an additional expert to re-examine the subject matter of the expert report submitted by Ms Ewa Tabeau and Mr Theay Kheam, 28 June 2010 at paras. 15-17; **D356/2/9** Decision on Nuon Chea's Appeal against the Co-Investigating Judges' Order rejecting Request for a second expert opinion, 1 July 2010 at paras. 16-18.

Prosecutors submit that the Chamber should apply a similar standard in these proceedings.

iv. The Trial Chamber did not discernibly err in the exercise of its discretion resulting in prejudice to the Appellant

36. The Defence alleges one discernible error in the exercise of discretion by the Trial Chamber: the Fourth Ground set out in paragraph 3 above. The Defence alleges that the Trial Chamber did not assign the "proper probative value" to allegations of RGC interference in Cases 003 and 004 when assessing claims about the judicial investigation in Case 002. Concerning the same ground of appeal, the Defence suggests that the Trial Chamber's analysis "appears deliberately evasive",[66] seeking to avoid an "inescapable"[67] finding of *prima facie* interference by the RGC by not characterising material related to Cases 003 and 004 in conjunction with specifically-pleaded Case 002 claims as being "relevant to clarifying the prevailing context and demonstrating a deliberate pattern of RGC conduct."[68]

37. The question before the Chamber, then, is whether the Trial Chamber's exercise of discretion is so unreasonable or plainly unjust as to amount to an error in the exercise if that discretion. The Co-Prosecutors submit that the Trial Chamber has properly exercised its discretion in respect of the relevant Defence claim. As an independent judicial body, it is the Trial Chamber that is best-placed to determine the nature and extent of evidence required to properly exercise its responsibilities under Rule 35. Discretion as to relevant factors or evidentiary material required by a judicial body to control the integrity of its own process – being the evident legal policy objective of Rule 35 – should certainly attract a margin of deference on appellate review.

38. The Impugned Decision demonstrates that the Trial Chamber properly took cognisance of the content and all the allegations in the First Request before disposing of that request, including allegations concerning Cases 003 and 004. In particular, the Trial Chamber summarises the content of the First Request[69] and considers the allegations in the First Request to reflect those in the Defence's Preliminary Objections.[70] The Preliminary Objections, in turn, include two paragraphs addressing alleged RGC interference in Cases

66 **E116/1/1** Appeal, *supra* note 4 at para. 33.
67 **E116/1/1** Appeal, *ibid.*
68 **E116/1/1** Appeal, *ibid.*
69 **E116** Impugned Decision, *supra* note 4 at para. 10.
70 **E116** Impugned Decision *ibid.*

003 and 004, raising points practically identical to the First Request, which was submitted two months after the Preliminary Objections.[71] Thus, the Trial Chamber must have taken cognisance of the substance of the Defence allegations concerning interference in Cases 003 and 004 when reaching its reasoned legal findings on this Defence submission, namely that: (i) proper recourse in this instance would be to the CIJs and the PTC on appeal; and (ii) that the Defence identifies "no tangible impact" of allegations concerning Cases 003 and 004 on the fairness of the trial in Case 002.[72] On this basis, the Co-Prosecutors submit that the Trial Chamber had correctly exercised its discretion in respect to the Defence's claim and that no prejudice to the Defence has been demonstrated by the Appellant. Accordingly, the Fourth Ground of appeal fails to meet the applicable standard of review and should be dismissed.

3. The appeal relies on facts not available to the Trial Chamber

39. The Defence refers to multiple events, statements and documents subsequent to the date of the Impugned Decision – and thus unavailable to the Trial Chamber when rendering the Impugned Decision – in order to make five paragraphs of factual assertions at the outset of the Appeal[73] and to justify legal submissions.[74] In doing so, the Defence does not purport to rely on the Chamber's power to itself examine evidence;[75] does not make a request under Rule 107(7); and does not list these additional materials, which are not in themselves authorities, in one or more tables or to annex these materials as required by Practice Direction 6.5.[76] The Co-Prosecutors submit that the Chamber should properly disregard factual assertions concerning events subsequent to the date of the Impugned Decision when exercising its power of appellate review.

4. The requested investigative remedy is beyond the scope of Rule 35

40. The Defence request the Chamber, *inter alia*, to order a "public investigation pursuant to Rule 35" to be conducted by a judicial body of "proven independence" that does not include any of the individuals whose alleged conduct forms the basis of the First Request or the Appeal. The Co-Prosecutors submit that there is no basis under Rule 35 for the Chamber to "order" any external judicial body to conduct a Rule 35 investigation – it is

---

71 **E51/3** Consolidated preliminary objections, *supra* note 25 at paras. 10-12.
72 **E116** Impugned Decision, *supra* note 4 at para. 21.
73 See, e.g. **E116/1/1** Appeal, *supra* note 4 at paras. 5-10.
74 See, e.g. **E116/1/1** Appeal, *ibid.* at paras. 38-39.
75 Rule 104(1).
76 Practice Direction ECCC/2007/1/Rev.8.

the Chamber itself that assesses whether the first evidentiary threshold ("reason to believe that a person may have committed any of the acts set out in sub-rule 1") has been satisfied, and may then determine, as one of three options, to "refer" a matter to the authorities of the Kingdom of Cambodia or the United Nations.[77]

5. The Chamber may nonetheless act *proprio motu* to investigate interference with the administration of justice in Case 002

41. Once seised of this Appeal, the Co-Prosecutors submit that the Chamber has the necessary ancillary competence to take a range of appropriate actions to promote and uphold the integrity of judicial proceedings. The Co-Prosecutors submit that this interpretation of the scope of competence of the Chamber is most consistent with the Rules, considering in particular the Chamber's express power to examine evidence and call new evidence;[78] the finality of appeals before the Chamber[79] and the impossibility of returning the decision to the Trial Chamber.[80]

42. The Co-Prosecutors observe that on 12 October 2011, the Cambodia Daily newspaper published an article ("Cambodia Daily article") reporting the Appeal, and reproducing parts of the Appeal *verbatim*.[81] The content of the Cambodia Daily article provides reason to believe that the confidential Appeal or its contents have been disclosed to the authors of that article.

43. Although filings to the ECCC must bear a proposed classification, the Chambers may order a different classification pending determination of whether the classification proposed by the filing party is appropriate.[82] Contrary to the request of the Defence, and its troubling assertion that regardless of the classification of the Appeal "the Defence will treat it as" a public document,[83] the Chamber has classified the Appeal as confidential.[84] The Chamber may therefore be regarded as having ordered that the Appeal be temporarily classified as confidential, and therefore that it be open only to the persons listed in Art.

---

77 Rule 35(2).
78 Rule 104(1): "The Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue."
79 Rule 104(3): "Decisions of the Chamber are final…"
80 Rule 104(3): "Decisions of the Chamber…shall not be referred
81 Julia Wallace and Alice Foster, 'Fallout from Blunk's resignation continues', *Cambodia Daily* (Phnom Penh), 12 October 2011 at pp.1-2, ERN 00748643-00748643 (annexed), quoting from **E116/1/1**Appeal, *supra* note 4 at paras. 37 and 38.
82 Practice Direction ECCC/01/2007/Rev. 8: Filing of Documents Before the ECCC (Rev. 8), 17 August 2011, Art. 3.13.
83 **E116/1/1** Appeal, *supra* note 4 at para. 1, note 4.
84 **E116/1/1** Appeal, *supra* note 4 (Title page); cf. *ibid.*, para. 1, note 4.

2(d)(ii) of the Practice Direction on Classification.[85] Thus, the Co-Prosecutors observe that the Appeal and its contents appear to have been disclosed either to unauthorised recipients is in violation of an order of the Chambers.

III. CONCLUSION

44. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

a. find the First and Third Grounds of appeal inadmissible;

b. dismiss the appeal in its entirety as failing to meet the standard of review;

c. take any action that the Chamber may find appropriate to uphold the integrity of the judicial proceedings; and

d. to determine this immediate appeal based on written submissions alone.

Respectfully submitted,

Date	Name	Place	Signature
2 November 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[85] **D314/1/11** Warning for Disclosure of Confidential Information, 9 July 2010, ("Warning for Disclosure"), para. 2(c)-(e); Practice Direction 004/2009: Classification and Management of Case-Related Information, 5 June 2009, Art 2(d)(ii) ("Judges, the Co- Prosecutors, lawyers for the civil parties, defence counsel, authorised court staff and any other person expressly given access by the Court").