

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

FILING DETAILS

Case no: 002/19-09-2007-ECCC/TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 25 April 2012



CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សាធារណៈ/Public
Classification status:
Review of interim classification:
Records officer name:
Signature:

APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35

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I. INTRODUCTION

1. Pursuant to Rule 35 of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) hereby submit this application for immediate action in response to the resignation of Co-Investigating Judge (‘CIJ’) Laurent Kasper-Ansermet. For the reasons stated below, the Defence submits that such action is long overdue. In light of the important issues raised herein and the general interest in transparent trial proceedings, this request should be classified as a public one. In any event, the Defence will treat it as such.

II. RELEVANT FACTS

A. Previous Defence Efforts

2. Defence efforts regarding the fairness of the judicial investigation in Case 002 and longstanding and ongoing political interference in the work of the tribunal as a whole are summarized in three key documents filed in October of last year.¹ In these submissions—the Fairness Appeal, the Complaint, and the Adjournment Request—the Defence argued, among other things, that ‘it is objectively indisputable that officials and/or agents of the Royal Government of Cambodia (the ‘RGC’ and the ‘Government’) have improperly interfered in the work of the court and are continuing to do so’.² In particular, the Defence has consistently raised the following issues: (i) Cambodian CIJ You Bunleng, in conjunction with certain RGC officials, stymied efforts by his international counterpart to hear Norodom Sihanouk as a witness;³ (ii) six high-ranking Government officials failed to appear before the Office of the Co-Investigating Judges (the ‘OCIJ’) pursuant to validly-issued summonses, and Hun Sen and other members of the RGC orchestrated and/or endorsed such failure;⁴ and (iii) the Prime Minister, aided and abetted by various members of the RGC, is firmly committed to thwarting Cases 003 and 004.⁵
3. Regarding the last issue, the Defence has asserted a clear link to the instant case: ‘That so much RGC meddling has taken place in plain view suggests the significant probability of far more insidious interference behind the scenes. And a point perhaps lost in the recent commotion regarding Cases 003 and 004 is a crucial corollary: as much as the Government

¹ Document No E-116/1/1, ‘Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation’, 10 October 2011, ERN 00746636–00746658 (the ‘Fairness Appeal’); Document No E-131/2.1.1, ‘Criminal Complaint’, 24 October 2011 ERN 00749616–00749624 (the ‘Complaint’); Document No E-131/2, ‘Request for Adjournment of Opening Statement and Substantive Hearing’, 26 October 2011, ERN 00749600–00749612 (the ‘Adjournment Request’).

² Fairness Appeal, para 2.

³ Fairness Appeal, para 3(b); Adjournment Request, para 2(a).

⁴ Fairness Appeal, para 3(c); Adjournment Request, paras 2(b)–(d).

⁵ Fairness Appeal, para 3(d); Adjournment Request, paras 2(e)–(i).

is *refusing* to allow additional prosecutions, it is *supporting* the current ones. In the context of Cambodian politics, such support is never without strings attached. To be sure, the RGC has a considered and consistent view as to how Case 002 should ultimately be resolved.⁶ Indeed, the Prime Minister has gone so far as to publicly label Nuon Chea a genocidaire.⁷ It is inescapable that the Cambodian jurists of this Tribunal will ultimately condemn him as such—regardless of the factual record established in court.

4. In addition to the three documents referenced above (in paragraph two), the Defence has publicly called for the resignation of Judge Bunleng.⁸ Reacting to revelations that the Cambodian CIJ had ‘committed major procedural irregularities, including backdating documents, secretly altering documents, and failing to send proper notifications to lawyers’⁹ in Case 003, the Defence reached ‘the almost inevitable conclusion that [Judge Bunleng] [...] ha[d] engaged in behavior that can only be described as criminal’.¹⁰ Moreover, given his ‘principal role in shaping the judicial investigation and crafting the Closing Order in Case 002, the recent revelations [...] cast further doubt on the integrity of the case-file and Closing Order’.¹¹ The Defence forwarded a copy of its letter to the Supreme Council of the Magistracy (the ‘SCM’)—of which Judge Bunleng is a member—‘along with a request to initiate a disciplinary investigation into [his] delinquent conduct’.¹² As stated, the Defence was ‘of the firm opinion that [his] continued presence at the ECCC will only further discredit this already critically debased institution’.¹³
5. Since the beginning of the substantive hearing in November 2011, the Defence has consistently reiterated its positions with respect to political interference. Notably, immediate relief was sought from the Trial Chamber in response to Hun Sen’s public description of Nuon Chea as a deceitful killer and a perpetrator of genocide.¹⁴ Yet, to date, this Chamber has expressed very little public concern and shown no interest in addressing the problem. The judges, it seems, prefer to go on fiddling while Rome burns.

⁶ Fairness Appeal, para 37 (internal citations omitted).

⁷ See para 5, *infra*.

⁸ See letter from Nuon Chea Defence Team to Judge You Bunleng re ‘Request for list of tainted material in Case 002 and call for resignation’, 27 October 2011 (the ‘YBL Letter’).

⁹ Julia Wallace, *Cambodia Daily*, ‘KRT Judges List Failings of Blunk, Bunleng’, 26 October 2011.

¹⁰ YBL Letter, p 1.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, p 2.

¹⁴ See Document No **E-176**, ‘Application for Summary Action Against Hun Sen Pursuant to Rule 35’, 22 February 2012, ERN 00782947–00782959 (the ‘Hun Sen Application’), para 2.

B. Judge Kasper-Ansermet's Efforts, Resignation, and Disclosure

6. In the wake of the ignominious departure of Judge Siegfried Blunk, Judge Kasper-Ansermet, assumed his duties as reserve CIJ late last year. On 2 December 2011, he attempted to revive the moribund investigation crippled by Judges Blunk and Bunleng.¹⁵ However, by way of an erroneous interpretation of the ECCC's constitutive instruments, the RGC—employing the SCM¹⁶ as its expedient—refused to recognize Judge Kasper-Ansermet as a fully empowered judicial officer at the Tribunal. Nevertheless, the United Nations (in the person of David Scheffer, special advisor to the UN Secretary-General) announced its full support for Judge Kasper-Ansermet and cautioned the RGC to respect its treaty obligations. The Government, ever intransigent in the face of what it disingenuously considers international interference, held firm. Thus, a bizarre legal drama of sorts unfolded at the ECCC, with Judge Kasper-Ansermet acting in good faith on his putative authority¹⁷ while the Cambodian members of the OCIJ, under the command and control of Judge Bunleng, blocked the international CIJ at every turn.
7. On 9 February 2012, Judge Kasper-Ansermet publicly announced the filling of official disagreements between himself and Judge Bunleng as well as the failure of the Pre-Trial Chamber (the 'PTC') to recognize the validity of such disputes on the basis of the former's unconfirmed position. Noting that '[t]his situation raises serious concerns about the lack of impartiality of Mr Prak Kimsan, President of the [PTC], the international CIJ submitted 'an application for his disqualification [...] to the [PTC] calling upon Mr Prak Kimsan to step down voluntarily from any proceedings related to [Cases 003 and 004]'.¹⁸ A press release issued by the international PTC judges revealed that the 'matter [had been] returned without deliberation or consultation with the judges of the [PTC] to [Judge Kasper-Ansermet] by the President of the [PTC]'.¹⁹
8. Hinting at the gravity of the situation within the OCIJ, Judge Kasper-Ansermet spoke frankly to the press on 16 March 2012: 'This doesn't make the tribunal's work any easier, [...]. *This dispute will have fallout, including the current trials of former Khmer Rouge leaders.*'²⁰ Three days later, the international CIJ announced that his 'authority to investigate Cases 003 and 004 ha[d] been constantly contested by [Judge Bunleng]' and

¹⁵ See Case Nos 003 & 004, Document No **D-28**, 'Order on Resuming the Judicial Investigation', 2 December 2011.

¹⁶ As noted previously, Judge Bunleng is a member of the SCM.

¹⁷ *N.B.* On 9 February 2012, Judge Kasper-Ansermet announced his 'full legal authority to undertake his functions regardless of the SCM's rejection of his appointment as standing co-investigating judge.'

¹⁸ Press Release, International Reserve Co-Investigating Judge, 9 February 2012.

¹⁹ Statement by Judges Downing and Chung, International Judges of the Pre-Trial Chamber, 20 March 2012.

²⁰ Frédéric Burnand, 'Uncovering the truth in the Killing Fields', *SwissInfo*, 16 March 2012 (emphasis added).

that such ‘active opposition [...] has led to a dysfunctional situation within the ECCC’.²¹ Judge Kasper-Ansermet further noted that ‘[a] description of the situation [would] be published’ in due course and that ‘internal investigations [had] been opened [...] under [...] Rule 35 for “interference with the administration of justice”’.²² Describing ‘ultimatums’ from his Cambodian colleague ‘demanding that he immediately cease his “unlawful activity”,’ Judge Kasper-Ansermet concluded that ‘the present circumstances no longer allow him to properly and freely perform his duties’ and consequently ‘tendered his resignation with effect from 4 May 2012’.²³

9. The promised ‘description of the situation’ materialized on 21 March 2012. Aptly styled as ‘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 Cases 003 and 004’²⁴ (the ‘Note’), it amounts to a fourteen-page litany of ten patently dubious and possibly criminal ‘incidents’ that have occurred within the OCIJ since Judge Kasper-Ansermet’s arrival.²⁵ Those implicated in the Note include Judge Bunleng and nearly all of his Cambodian staffers, Judge Kimsan, HE Tony Krahn (the Acting Director of Administration), members of the Court Management Section (including interpreters and drivers) and the Witness and Evidence Support Unit, and officials within the RGC Ministry of Interior.
10. According to the Note: (i) Judge Bunleng’s behavior ‘demonstrates the existence of such serious irregularities and dysfunctional situation so as to impede the proper pursuit of investigations’;²⁶ (ii) Judge Kasper-Ansermet has a ‘duty to inform the parties [...] of the many dysfunctions that have affected the aforementioned judicial investigations and of the overall incapacity he and his office now face in performing their judicial obligations dutifully, diligently, and efficiently’;²⁷ (iii) the impediments put in place by Judge Bunleng ‘amount to a breach of due process of law and the proper administration of justice’;²⁸ (iv) ‘the decision not

²¹ Press Release, International Reserve Co-Investigating Judge, 19 March 2012.

²² *Ibid.*

²³ *Ibid.*

²⁴ Case Nos 003 & 004, Document No **D-38**, 21 March 2012, ERN 00791885–00791898.

²⁵ The ten incidents are described in the Note as follows: (i) ‘Judge You Bunleng’s refusal to acknowledge or support Judge Kasper-Ansermet’s standing as International Co-Investigating Judge’, paras 10–17; (ii) ‘Disagreement procedure before the Pre-Trial Chamber pursuant to Internal Rule 72’, paras 18–27; (iii) ‘Irregularities in the disqualification process of Judge Prak Kimsan’, paras 28–32; (iv) ‘Refusal to place any document filed by International Reserve Co-Investigating Judge on Case File’, paras 33–38; (v) ‘Refusal for Civil Party to access Case File after an order granting admissibility’, paras 39–40; (vi) ‘Withdrawal of the OCIJ seal’, paras 41–43; (vii) ‘Obstruction to the internal investigation’, paras 44–47; (viii) ‘Unavailability of drivers and transcribes for investigative missions’, para 48; (ix) ‘Non-cooperation from the Witness and Expert Support Unit’, paras 49–50; and (x) ‘Improper procedures before the Rules and Procedure Committee’, paras 51–54.

²⁶ Note, para 1.

²⁷ Note, para 6.

²⁸ *Ibid.*, para 9.

to appoint [Judge Kasper-Ansermet] to the permanent position [...] “is a breach of article 5, paragraph 6, of the Agreement”²⁹ and, most troubling, (v) Cambodian staff *at all levels of the tribunal* recognize and accept ‘the authority of National Co-Investigating Judge You Bunleng as being *the sole decider of the policy within the OCIJ*’.³⁰

11. Acknowledging the impossibility of his position, Judge Kasper-Ansermet concluded that ‘there exist within the ECCC such serious irregularities, dysfunctions, and violations of proper procedures that endanger and impede due process of law, and affect, as they have since [the international CIJ’s] arrival into office, the proper conduct of the investigations in Case Files 003 and 004’.³¹ In this regard, the Note speaks loudly and clearly for itself and its contents, in their entirety, are hereby adopted by reference. Described in the press as proof of ‘an utterly riven court in which national staff at all levels made every effort to obstruct Judge Kasper-Ansermet’s work, largely at the behest of Cambodian Co-Investigating Judge You Bunleng’,³² the Note is just that—and more: 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.

C. Official Reactions

12. As expected, reactions from veteran tribunal monitors were strong and swift:
 - a. Most severe was the assessment of the Open Society Justice Initiative (‘OSJI’). Speaking for that organization, Clair Duffy denounced the UN’s consistent failure to reign-in mounting RGC interference over the years: ‘The problem is that the more the issue has been allowed to unravel, the more institutional damage has been done, *and we know that some of these problems in 003 and 004 have potentially bled into Case 002*.’³³ Referring to the Note as conclusive proof of Judge Bunleng’s ‘inaction’ and ‘unlawful [...] conduct’, Ms Duffy called upon the UN and donors to finally ‘stand

²⁹ Note, para 16 (citing UN Press Statement, 20 January 2012).

³⁰ *Ibid*, para 45 (emphasis added).

³¹ *Ibid*, p 13 (concluding paragraph).

³² Julia Wallace & Kuch Naren, ‘Judge Details “Dysfunction” At Tribunal’, *Cambodia Daily*, 22 March 2012; *see also* Bridget Di Certo, ‘Judge decries 003, 004 “sabotage”’, *Phnom Penh Post*, 22 March 2012 (‘The 14-page missive from the judge names names and meticulously documents the “egregious dysfunctions” of the tribunal that impede any proper investigations into the two cases Prime Minister Hun Sen has said will not be “allowed.”’)

³³ Julia Wallace, ‘Swiss judge quits Khmer Rouge Tribunal’, *Cambodia Daily*, 20 March 2012 (emphasis added); *see also* Irwin Loy ‘Cambodian War Crimes Tribunal Under Pressure After Judge Resigns’, *Voice of America*, 20 March 2012 (‘“The problem here is the UN hasn’t actually done anything concrete to address the government continuing to try to control the court’s docket,” said Duffy. “Last year we repeatedly asked the UN to investigate the government’s interference in the court and it didn’t. All we’ve seen in recent months is that crisis deepening.”’)

upright [...] and address the heart of this issue'.³⁴ In a strongly-worded press release, OSJI called upon the UN to reconsider its commitment to the Khmer Rouge tribunal'.³⁵ Referring to the 'damning' incidents outlined in the Note, the organization plainly stated the conundrum facing the tribunal's international backers: 'The United Nations must now determine whether its continued partnership in the ECCC is a genuine search for truth and justice, or rather an international endorsement of a Cambodian government-controlled and politically-driven process. [...] The worst result would be for the parties to the ECCC agreement to use a legal fiction to cover up political and financial obstacles to justice in Cambodia.'³⁶ Assisted 'at every level of the court by every Cambodian that has touched the files throughout the substance of the investigation',³⁷ blame was laid squarely at the feet of Judge Bunleng, 'the central figure' in implementing the RGC's plan.³⁸

- b. Amnesty International urged the UN 'to immediately set conditions for its continued involvement at the court, including an end to political interference by the government'.³⁹ Emphasizing the futility of further lip-service, Rupert Abbott was direct in his assessment: 'What is at stake here now is the UN as the key driver of international justice. If it keeps using strong words but never takes any action, [...] it demonstrates that interference by the [RGC] will win [...] and impunity overrules accountability.'⁴⁰
- c. Echoing previously articulated Defence concerns, Ou Virak, president of the Cambodian Center for Human Rights ('CCHR'), cut to the heart of the matter: 'If the government is willing to go to such lengths to block cases it doesn't want to go

³⁴ Bridget Di Certo, "'Blocked" judge quits court: UN appointee slams "dysfunctional"', *Phnom Penh Post*, 20 March 2012.

³⁵ OSJI Press Release, 'UN Must Reconsider Commitment to Khmer Rouge Court', 21 March 2012.

³⁶ *Ibid.*

³⁷ Bridget Di Certo, 'Judge decries 003, 004 "sabotage"', *Phnom Penh Post*, 22 March 2012 ('The Open Society Justice Initiative's Clair Duffy said it is "the most dismal it has ever been for cases 003 and 004 being salvaged". "It just adds to the mountain of material that is already out there that evidences the government's control over the court," Duffy said. "This is the government's publicly expressed will being put into action at every level of the court by every Cambodian that has touched the files throughout the substance of the investigation. "I can't see at this point there being any room at all for the UN to ignore the seriousness of the situation."')

³⁸ Julia Wallace & Kuch Naren, 'Judge Details "Dysfunction" At Tribunal', *Cambodia Daily*, 22 March 2012 ('"The content of that document is very damning in terms of the extent to which nationals inside the court have fallen in line with the government's desires, and You Bunleng has been the central figure in making sure all of that happened, as well as senior administrators in the court," Ms Duffy said. "It's almost like it worked as an efficient machine in blocking him at every turn."')

³⁹ Julia Wallace, 'Swiss judge quits Khmer Rouge Tribunal', *Cambodia Daily*, 20 March 2012; *see also* 'Cambodia: Khmer Rouge Tribunal at risk as second judge resigns', *Amnesty International*, 20 March 2012 ('"The UN must demand that the Cambodian government desists from this political interference, and make clear the consequences should it continue," said Rupert Abbott.')

⁴⁰ Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012.

ahead, how confident can we really be that it hasn't already determined the outcome in the cases that have been allowed to go ahead—Cases 001 and 002?'⁴¹ Such comments highlight what is perhaps the UN's greatest fear with respect to the ECCC, reportedly expressed last year by UN Under-Secretary General for Legal Affairs Patricia O'Brien: '[T]he UN [does] not want to conduct an investigation because it could potentially jeopardize Case 002, the court's showpiece trial.'⁴²

- d. As Human Rights Watch—like OSJI, Amnesty, and CCHR—called for a serious UN rethink in response to the latest revelations,⁴³ others contemplated the underlying problem: 'This is just clear political interference. It's about protecting yourself,' noted longtime tribunal-supporter Henri Locard, referring obliquely to RGC officials.⁴⁴ Opposition leader Sam Rainsy was more explicit, explaining that Hun Sen and his associates 'fear a serious investigation. Any serious and in-depth investigation would show that several members of the current government were involved in the Khmer Rouge crimes [...]. It is why several members of the current government[—including Heng Samrin and Chea Sim⁴⁵—]have refused to testify or respond to summons.'⁴⁶

Summing up his own dilemma, Judge Kasper-Ansermet emphasized the RGC's impediments: 'I am truly blocked in every aspect. [...] It is illegal, and I cannot validate this situation anymore.'⁴⁷ In his last public comment at the time of filing, the judge struck an exasperated note: 'Faced with the hostility of Cambodian judges, the silence of my international colleagues and a complacent administration, I find myself puzzled.'⁴⁸

⁴¹ Julia Wallace & Kuch Naren, 'UN "Concerned" About Judge's Resignation', *Cambodia Daily*, 21 March 2012; see also Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012 ('Despite assurances from the UN that allegations of political interference were being dealt with, we find ourselves with another international investigating judge tendering his resignation on grounds of interference. This is not acceptable.')

⁴² Julia Wallace & Kuch Naren, 'UN "Concerned" About Judge's Resignation', *Cambodia Daily*, 21 March 2012.

⁴³ See Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012 ('"The UN will have to think hard about whether to continue its participation in the Khmer Rouge trials," HRW Asia director Brad Adams said.')

⁴⁴ 'Second UN judge quits Cambodia's Khmer Rouge tribunal', *Reuters*, 19 Mar 2012.

⁴⁵ *N.B.* Both Heng Samrin and Chea Sim have been implicated in DK-era crimes, which arguably fall under the ECCC's jurisdiction. See Stephen Heder, 'Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective', March 2003, ERN 00661455–00661491, n 207 ('Various evidence implicates Heng Samrin in war crimes—massacres of Vietnamese of civilians—committed by troops under his command during cross-border raids into Vietnam in 1977.') and n 208 ('Chea Sim has been accused of responsibility for murders of new people and others in the district of which he was Secretary, Ponhea Kraek in Sector 20 of the East Zone. [...] [L]ocal informants estimate that thousands of people were killed at the district security office while Chea Sim was district secretary, with the worst killings under his rule coming in late 1977 and early 1978.') These issues have been raised in court by the Defence. See Document No E-1/39.1, 'Transcript of Trial Proceedings', 6 February 2012 (Trial Day 27), ERN 00778068–00778180, p 72:20–22 and pp 72:24–73:7. These pages are attached hereto.

⁴⁶ 'Cambodian Opposition Leader Blasts Tribunal Interference', *Voice of America*, 23 March 2012.

⁴⁷ Bridget Di Certo, "'Blocked" judge quits court', *Phnom Penh Post*, 20 March 2012.

⁴⁸ Julia Wallace, 'From Phnom Penh with Love', *International Justice Tribune*, 28 March 2012.

13. The UN's immediate response was characteristically guarded: '[T]he situation of the ECCC continues to be of serious concern and we are examining it closely.'⁴⁹ Later, it was announced that the organization was in the process of 'assessing the situation with the assistance of David Scheffer'.⁵⁰ Mr Scheffer had previously (and naively) expressed 'optimism that Judge Kasper-Ansermet would be able to fully investigate the two cases'.⁵¹ At the time of filing, Mr Scheffer had not made an official comment.⁵² However, the UN Secretary-General reiterated that 'the decision not to appoint Laurent Kasper-Ansermet as international [CIJ] of the ECCC is a breach [...] of the Agreement between the [UN] and the [RGC]', adding that 'the failure of Cambodia's Supreme Council of Magistracy to endorse his appointment caused the current impasse'.⁵³
14. While the tribunal itself was unable to provide an official response,⁵⁴ Judge Bunleng initially attempted to downplay the situation and toed the RGC line: 'I did not obstruct him, I just did not recognize his work, and I told him that what he is doing is not the legal procedure.'⁵⁵ He later issued a lengthy official reaction welcoming Judge Kasper-Ansermet's departure.⁵⁶ Described as a 'gossipy counter-narrative' containing 'bizarre revelations',⁵⁷ the response 'confirms [the international CIJ's] account of profound dysfunction in an office paralyzed by a schism along Cambodian-international lines'.⁵⁸ Supporting their colleague in the OCIJ, the Cambodian judges of the PTC issued a

⁴⁹ UN Department of Public Information, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General; *see also* Julia Wallace, 'Swiss judge quits Khmer Rouge Tribunal', *Cambodia Daily*, 20 March 2012 ('A spokesman for Mr Ban did not respond to a request for comment.');

Julia Wallace & Kuch Naren, 'UN "Concerned" About Judge's Resignation', *Cambodia Daily*, 21 March 2012 ('The UN's statement on the resignation, although short, was stronger than its response to the resignation of Siegfried Blunk in October, which was also precipitated by political interference in cases 003 and 004. At that time, the UN simply thanked Judge Blunk for his service.');

Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012 ('In a press briefing yesterday, Eduardo del Buey, deputy spokesperson for UN secretary-general Ban Ki-moon, said the UN was examining the situation at the Khmer Rouge tribunal closely, but would say no more.')

⁵⁰ Julia Wallace, 'UN reiterates concern over dysfunction KR tribunal', *Cambodia Daily*, 23 March 2012; Bridget Di Certo, 'State says the KRT is a model court', *Phnom Penh Post*, 23 March 2012.

⁵¹ Julia Wallace, 'Swiss judge quits Khmer Rouge Tribunal', *Cambodia Daily*, 20 March 2012.

⁵² *See ibid* ('David Scheffer, the UN's newly appointed special expert on the tribunal, declined to comment on the resignation.');

Bridget Di Certo, 'Judge decries 003, 004 "sabotage"', *Phnom Penh Post*, 22 March 2012 ('The office of the spokesperson of the secretary-general of the UN did not respond to requests for comment, nor did UN Special Expert David Scheffer, who is out of the country.')

⁵³ Bridget Di Certo, 'State says the KRT is a model court', *Phnom Penh Post*, 23 March 2012.

⁵⁴ *See* Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012 ('[As] "the court" has several independent and autonomous chambers and entities, it is not possible to provide a single response to this question.')

(quoting ECCC legal affairs spokesperson Lars Olsen); Julia Wallace, 'Swiss judge quits Khmer Rouge Tribunal', *Cambodia Daily*, 20 March 2012 ('There is no reserve. He was the reserve.')

(ditto).

⁵⁵ Bridget Di Certo, 'Judge's exit shakes KR tribunal', *Phnom Penh Post*, 21 March 2012; *see also* Bridget Di Certo, "'Blocked" judge quits court: UN appointee slams "dysfunctional"', *Phnom Penh Post*, 20 March 2012 ('I actually never have had any dispute with him.')

⁵⁶ *See* Press Statement by National Co-Investigating Judge, 26 March 2012.

⁵⁷ Julia Wallace, 'Bunleng Fights Back at Swiss Judge's Accusations', *Cambodia Daily*, 27 March 2012.

⁵⁸ *Ibid*; *see also* Bridget Di Certo & Cheang Sokha, "'Security risks" alleged at KRT', *Phnom Penh Post*, 27 March 2012.

statement attacking Judge Kasper-Ansermet as a ‘manipulator’ who ‘shamelessly caused problems’ at the court and firmly insisting that he ‘is not a true judge’.⁵⁹

15. Speaking for the RGC, Council of Ministers spokesman Ek Tha issued trademark denials: ‘All I can say is that the [RGC] is very clear and has never and will never interfere with the work of the ECCC.’⁶⁰ ‘The [RGC] has never breached any agreement with the United Nations.’⁶¹ ‘I would like to emphasize and stress that the [RGC] does not see any problems with the ECCC. [...] The government point of view is that the Cambodian side has not breached any internal regulations.’⁶² As if observing events on another planet, he added ‘that, in his opinion, the tribunal was a “model court” and the Cambodian and international sides were working “side by side” to ensure genocide is never repeated’.⁶³ Returning to earth, he spoke with his government’s characteristic bluntness: ‘Whatever my prime minister says, I respect his decision.’⁶⁴

III. RELEVANT LAW

A. Interference with the Administration of Justice

16. For the sake of brevity, the Defence hereby adopts by reference the legal submissions contained in the Fairness Appeal⁶⁵ and the recently filed ‘Application for Summary Action Against Hun Sen Pursuant to Rule 35’.⁶⁶ Moreover, the Supreme Court Chamber has recently held as follows:

Judicial competence over a case at the ECCC is divided according to the stage of the case. The Co-Investigating Judges and the Pre-Trial Chamber are competent during the investigative stage, while the Trial and Supreme Court Chambers are competent during the trial and final appeal stages. *This general allocation of judicial competence, if rigidly applied to Rule 35 applications, would undermine the Court’s inherent responsibility to guarantee the integrity of the proceedings and the Accused’s right to a fair trial.*⁶⁷

⁵⁹ Julia Wallace, ‘Bunleng Fights Back at Swiss Judge’s Accusations’, *Cambodia Daily*, 27 March 2012.

⁶⁰ Bridget Di Certo, “Blocked” judge quits court: UN appointee slams “dysfunctional”, *Phnom Penh Post*, 20 March 2012.

⁶¹ Julia Wallace, ‘UN reiterates concern over dysfunction KR tribunal’, *Cambodia Daily*, 23 March 2012.

⁶² Bridget Di Certo, ‘State says the KRT is a model court’, *Phnom Penh Post*, 23 March 2012.

⁶³ *Ibid.*

⁶⁴ ‘Impunity at KRouge court won’t be tolerated: UN’, *Agence France Presse*, 23 March 2012.

⁶⁵ Fairness Appeal, paras 15–18.

⁶⁶ Document No E-176, ERN 00782947–00782959, paras 8–10.

⁶⁷ Document No E-116/1/6, ‘Summary of the Reasons for the Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation’, 30 January 2012, ERN 00772881–00772887 (the ‘Fairness Decision’), para 14 (emphasis added) (citing Document No D-314/1/12, ‘Second Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses’, 9 September 2010, Separate Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, paras 10–12).

Without a doubt, therefore, this Chamber can and should act liberally—pursuant to its ‘wide discretion’ under Rule 35⁶⁸—in the interests of ensuring the legitimacy of its own proceedings.

B. Ethical Duty on the Part of Judges and Lawyers to Attempt to Ensure Legitimacy of Proceedings

17. The Defence hereby adopts by reference its previous legal submissions on the issue of the independence of the judiciary.⁶⁹ Additionally, Article 1 of the ECCC Code of Judicial Ethics is relevant to the instant application:

1. Judges shall uphold the independence of their office and the authority of the [ECCC] and shall conduct themselves accordingly in carrying out their judicial functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.⁷⁰

Equally, counsel for the Accused—as members of the Bar Association of the Kingdom of Cambodia (the ‘BAKC’)—are bound to protect the interests of their clients by, among other things, taking action aimed at ensuring legitimate proceedings. According to Article 16 of the Code of Ethics for Lawyers Licensed with the BACK, a ‘lawyer assures that the process remains within the framework of guaranteed assurances’. Of course, international lawyers at the ECCC are further bound by the terms of their respective domestic ethical codes, which may require more robust action. As submitted previously, there may come a point when counsel is ‘faced with the difficult task of advising [its client] as to whether or not his continued participation in this trial is warranted’.⁷¹

C. Power to Stay the Proceedings

18. International jurisprudence and ECCC case-law both acknowledge that courts, in their role as guardians of the judicial process, have the discretionary power to stay proceedings—on a permanent or temporary basis—where alleged violations are of such an egregious nature that they ‘would prove detrimental to the court’s integrity’.⁷² Indeed, relying on *Lubanga* and

⁶⁸ Fairness Decision, para 15.

⁶⁹ See, e.g., Document No **E-171**, ‘Third Application for Disqualification of Judge Cartwright’, 14 February 2012, ERN 00778399–00778412, para 5.

⁷⁰ ECCC Code of Judicial Ethics, Article 1.

⁷¹ Fairness Appeal, para 39; see also Code of Ethics for Lawyers Licensed with the BACK, Article 16 (‘If the lawyer accepts [representation], he or she must see the assignment through to its completion unless discharged by the client. However, the lawyer may, for reasons relating to personal conviction, decide to terminate the assignment provided that he or she has informed the client in time to permit the client to provide for his or her interests.’)

⁷² See *Prosecutor v Radovan Karadzic*, Case No IT-95-5/18-AR73.4, ‘Decision on Karadzic Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement’, 12 October 2009, para 45; Document No **D-264/2/6**, ‘Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process’, 10 August 2010, ERN 00543794–00543799 (the ‘Ieng Thirith Stay Decision’), paras 22–28. See also *Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, ‘Public

other authorities, the PTC has previously held that such course of action could be necessary in ‘exceptional and very serious cases of violations of the rights of the [Accused] which cannot be rectified or contravene the court’s sense of justice’.⁷³ In such circumstances, the PTC reasoned, it is up to the Court ‘to strike the correct balance between the fundamental rights of the [Accused] and the interests of the international and national communities in the prosecution of persons charged with serious violations of international humanitarian law and national law’.⁷⁴ The Appeals Chamber of the ICTY has stated: ‘in circumstances of witness intimidation [...], it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible’.⁷⁵ Countering such interference ‘is especially pressing when outside forces seek to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, the Trial Chamber must counter witness intimidation by taking all measures that are reasonably open to them [...]’.⁷⁶

IV. ARGUMENT⁷⁷

A. The Note Demonstrates to a Certainty That Cambodian Officials at the ECCC, Including Judges, Are Beholden to the Government

19. 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. Pervasive in scope, the Government’s influence at this tribunal affects *each and every* national staff member and infects *each and every* pending case. The inability of Cambodians at the ECCC (however principled and/or well-intentioned) to act independently in any professional sense is now irrefutable. Accordingly, the only meaningful question left open to this tribunal is the one posed in court on 26 March 2012: Do the international judges of this Chamber—namely Silvia Cartwright and Jean-Marc Lavergne—sincerely believe that their Cambodian colleagues on the bench are capable of supporting any decision that contradicts the stated or implicit positions of the RGC?⁷⁸ The Defence submits that to answer such question in the affirmative, as suggested by the OCP,⁷⁹ would be the height of naïveté, willful blindness, or worse.

Redacted Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending’, 8 July 2010, para 31.

⁷³ Ieng Thirith Stay Decision, para 28.

⁷⁴ *Ibid.*

⁷⁵ *Prosecutor v Haradinaj et al*, Case No IT-04-84-A, ‘Judgment’, 19 July 2010, para 35.

⁷⁶ *Ibid.*

⁷⁷ *N.B.* Given the fact that the positions advanced in the Adjournment Request continue to apply, only now with greater force in light of the Note, and the fact that the Trial Chamber utterly failed to address those previously raised concerns (see Document No E-131/2/1), the Defence repeats (verbatim) many such arguments herein.

⁷⁸ See Document No E-1/53.1, ‘Transcript of Trial Proceedings’, 26 March 2012 (Trial Day 41), ERN 00795037–00795152, pp 60:20–65:21 (submissions by Co-Lawyer Michiel Pestman).

⁷⁹ See *ibid.*, pp 65:24–67:5 (submissions by Deputy Co-Prosecutor William Smith).

20. To reiterate, ‘[t]he [situation is] clear. Objective observers of the Tribunal—once optimistically cautious in their criticism—have ceased to speak in the conditional tense. What have for years been described as troubling possibilities, fears, concerns, and anxieties are no longer couched in such qualified terms. That Government interference at the ECCC is a fact of life cannot be credibly denied. Damning international reports by respected scholars, [the resignation of two international CIJs], the [UN’s emasculated bargaining position], further Government machinations: these realities cannot be wished away. Simply put, this court is not—nor has it ever been—suitably independent from the RGC’s executive (strong) arm. Should anyone of sufficient sanity continue to doubt this, they need only consult the Council of Ministers: “The government doesn’t want failure; that is why it only allows Case 002 to take place.”’⁸⁰
21. At the very least, pursuant to their ethical obligations, Judges Cartwright and Lavergne should publicly acknowledge and condemn the critical flaws—finally laid bare by the Note—of the judicial system they have, to a certain extent, legitimized through their taciturn approach to this most troubling of issues at the ECCC. Continued silence on the matter of judicial allegiance to the RGC’s political agenda would be deafening.

B. Action Pursuant to Rule 35 is Authorized and Required in Order to Determine the Extent to Which Case 002 Has Been Compromised

22. Without a doubt, the Trial Chamber *can* act pursuant to Rule 35.⁸¹ Moreover, given the latest factual developments,⁸² it *should* do so in order to protect the integrity of these proceedings. As previously argued: ‘Unless and until the “toxic atmosphere” that has engulfed the entire premises of the ECCC as a result of political interference by the [RGC] is cleansed, no substantive decision of the tribunal can be considered a legitimate one.’⁸³
23. While the Defence has resigned itself to the futility of appealing to the Cambodian members of the bench, the international judges should finally address (for the record) the following arguments, which to date have been ignored by the entire Chamber:
- a. ‘With respect to Case 002, the damage is already done. Key witnesses have not been heard, nor is there any reason to expect they ever will be. And [the departure of two international CIJs] must be seen as a vote of no confidence in [Judge Bunleng], one of the men principally responsible for shaping the judicial investigation in Case 002. Most

⁸⁰ Adjournment Request, para 12 (internal citation omitted).

⁸¹ See para 16, *supra*.

⁸² See paras 6–15, *supra*.

⁸³ Adjournment Request, para 1 (quoting former OCIJ analyst Steve Heder).

troubling, perhaps, is the recent revelation that the very office responsible for that inquiry has been engaged in delinquent, not to say criminal, behavior. Accordingly, the integrity of the Case 002 file—the foundation of [this] trial—is highly suspect. Nothing sound can arise from such unstable groundwork.⁸⁴

- b. '[T]he official RGC view on Case 002 is preordained. As noted by Phay Siphon: 'failure' will not be tolerated. Precisely what kind of success the Government has in mind is obvious: *convictions of Nuon Chea and his co-accused*. And what matters—or what should matter to the judges of this Chamber—is that when the RGC expresses an opinion on a particular issue in this country, two things are certain: (i) the import of the Government position is crystal clear to those officials and agents expected to ensure its implementation and (ii) the envisaged result will surely come to pass. As noted [...], overt RGC support for Case 002—like the Government's blatant resistance to further trials—is, in effect, a judicial call to arms.'⁸⁵ In this respect, the Prime Minister's public remarks have 'prejudged the assessment of the facts by the [Cambodian members of the bench]'.⁸⁶ By issuing what must be understood as a clear directive to his underlings—that Nuon Chea is *a deceitful killer and a perpetrator of genocide*⁸⁷—Hun Sen has in effect delivered a 'judgment' in Case 002 that no Cambodian member of this Chamber would dare to contravene.
- c. Given the lack of necessary remedial action, '[w]e are all of us working in what is now, undoubtedly, a flawed institution. Case 002, though not yet terminal, is in critical condition. While the Defence, as previously noted, will (and must) continue to act in the interests of its client, no party should be forced to [endure] a trial under conditions that—every day the UN and international judges fail to act—spiral further and further away from the very ideals the ECCC was designed to promote.'⁸⁸

To be sure, it is a foregone conclusion that this Chamber *as a whole* will never address the substantive merits of these arguments. That, sadly, is one of the inescapable conclusions to be drawn from the Note: Cambodian officials simply will not gainsay an official Government position—in any way. And, of course, the stated RGC view on political interference at the

⁸⁴ Adjournment Request, para 13.

⁸⁵ *Ibid*, para 14.

⁸⁶ Hun Sen Application, para 17 (internal quotations and citations omitted).

⁸⁷ See para 5, *supra*.

⁸⁸ Adjournment Request, para 15.

tribunal is the utterly disingenuous one described above.⁸⁹ However, there are two individuals at this institution capable of publicly handling the thorny questions raised by the Defence. Judges Cartwright and Lavergne have both the legal authority and the ethical duty to act.

24. It would be particularly objectionable to continue hiding behind the fiction that *only* Cases 003 and 004 are afflicted by Government interference. While the manifestations of RGC meddling in those cases (overt blocking at every step of the process) are clear, such brazenness does not obscure the relatively subtler methods employed by the same individuals in order to ensure convictions in Case 002 and shield RGC officials from potential embarrassment and/or exposure. Indeed such subtlety cries out for a proper investigation of the type envisaged by Rule 35. And there are ample *prima facie* indications that such interference has occurred. In light of the recent revelations, it is particularly relevant that Judge You Bunleng long ago refused to sign summonses of high-ranking RGC witnesses, thus perfectly aligning himself with the stated Government position on the issue.
25. Another certainty is that the UN will never act to *effectively* remedy the problem.⁹⁰ That institution is, of course, engaged in a kind of political interference of its own, endeavoring to ensure that the manner in which RGC meddling has affected Case 002 is never uncovered or investigated.⁹¹ As previously argued: ‘The UN, as an organization supposedly committed to ensuring justice in Cambodia, has sadly left its foot soldiers with no cover. What little measures that have been taken are manifestly inadequate. The organization—impotent, complicit, or both—can no longer be considered an effective or credible leader in the fight against impunity in Cambodia.’⁹²
26. Accepting these unfortunate realities (as one must), ‘there will [ultimately] remain only two legitimate options open to the international judges of the Trial Chamber: to quit or

⁸⁹ See para 15, *supra*.

⁹⁰ See ‘Statement Attributable to the Spokesperson for the Secretary-General on the [ECCC]’, 30 March 2012.

⁹¹ See para 12(c).

⁹² Adjournment Request, para 16; see also Peter Maguire, ‘UN Has No Right to Sanctimony Over “Dysfunctional KRT” (Op-Ed), *Cambodia Daily*, 27 March 2012 (‘However, it is too late for the UN to reclaim its political virginity in Cambodia as it entered this Faustian “mixed tribunal” arrangement with open eyes. Rather than express “concern”, “serious concern”, or “grave concern”, the UN should make good on years of hollow threats and withdraw once the second trial is complete and relegate the “mixed tribunal” model to the dustbin of history.’); Mark McDonald, ‘The Tortuous Path to Justice in Cambodia’, *International Herald Tribune*, 27 March 2012 (‘Nate Thayer, a journalist with deep knowledge of Cambodia and the Khmer Rouge, also has a deep disdain for the tribunal, which he told me Tuesday was “an insidious, dangerous mockery of the rule of law that sets an unacceptable new model for legitimizing a 21st-century version of a Stalinist show trial”. [...] Mr Thayer said “the judicial process is entirely under the control of former Khmer Rouge.” Referring to [You Bunleng], he said, “The judge is bought and paid for in the most mockingly transparent manner. It is a scandal only that the UN allows itself to be a party to the farce. The only thing the UN and donor countries can do to put some faith back into those who had relied on the system of international law is to pull out now,” Mr Thayer said. “If the Cambodians want to hold a political show trial, let them do it without the support of the so-called properly organized world.”’)

acquit, on the basis that a fair trial is simply not possible at this tribunal. What is at stake—as simple as it is undiminished by repetition—is the obligation of courts in democratic societies, through the actions of their jurists, to inspire confidence ‘in the public and above all, as far as criminal proceedings are concerned, in the accused’.⁹³


C. The Current Situation Calls for a Stay of the Proceedings

27. ‘The scenario now facing the ECCC amounts to a serious violation of Nuon Chea’s right to be tried before an independent tribunal. According to the case-law cited above, such breach, “egregious” by its very nature, would justify the “extreme measure” of declining jurisdiction’,⁹⁴ or—at a minimum—a stay of the proceedings. ‘[T]he danger of being swept away in a well-intentioned tide of judicial optimism is as subtle as it is strong. Institutional momentum—like executive interference in an authoritarian state—is not easily overcome. Yet so much is at stake: a fair trial for the [...] Accused, the integrity of the Tribunal,’⁹⁵ and, perhaps, the promise of one day establishing the rule of law in Cambodia.

V. CONCLUSION

28. Accordingly, pursuant to Rule 35 and the above-cited jurisprudence, the Defence hereby requests: (i) an acknowledgement of the injurious impact of the Note; (ii) a full investigation, into the effects of RGC interference on the fairness of Case 002; and (iii) a stay of the proceedings pending the outcome of such inquiry. Assuming a rejection by the Chamber, the Defence urges Judges Cartwright and Lavergne to issue a separate opinion, condemning Government interference and dissenting from their colleagues’ failure to act.

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⁹³ Adjournment Request, para 18 (internal citations omitted).

⁹⁴ *Ibid*, para 17.

⁹⁵ Fairness Appeal, para 39.