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

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I. INTRODUCTION

1. Counsel for the Accused Nuon Chea (the 'Defence') hereby submits this reply to the 'Co-Prosecutors' Response to Nuon Chea's Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation' (the 'Response').[1] As a preliminary matter, the Defence takes the position that the instant submission should be classified as public.[2] In any event, the Defence will treat it as such.

II. SUBMISSIONS IN REPLY

A. The Co-Prosecutors' Argument Regarding the Trial Chamber's Failure to Consider Relevant Facts in Disposing of the Rule 35 Request is Disingenuous

2. On multiple occasions in the Response, the Office of the Co-Prosecutors (the 'OCP') suggests that, because the Trial Chamber found factual submissions related to political interference inadmissible with respect to one of the Defence's preliminary objections filed pursuant to Rule 89, the Chamber should not have then 'reconsidered' those same factual submissions vis-à-vis the 'Request for Investigation Pursuant to Rule 35' (the 'Rule 35 Request').[3] This repeated position[4]—the Response's major flaw—seems designed to obscure a basic fact: Rule 89 and Rule 35 are manifestly different provisions. The two Rules deal with altogether separate issues, articulate discrete tests, and authorize distinct forms of relief. Simply because the Trial Chamber chose (perhaps unwisely) to dispose of multiple Defence applications in a single document

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1 Document No **E-116/1/4**, 2 November 2011, ERN 00750799–00750816.

2 *N.B.* This document—as well as the appeal (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 'Appeal'))—contains no material that has not already been the subject of extensive media coverage. And, given the public and institutional importance of the issues raised herein, imposing confidentiality in this case would only serve as an obstacle to fair and transparent proceedings. Indeed, open publication would likely discourage further improper political interference.

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

4 *See* Response, para 11 ('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. 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.'); para 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, where the same claims are repeated.'); and para 38 ('The Impugned Decision demonstrates that the Trial Chamber properly took cognizance of the contents 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 summarizes the content of the First Request and considers the allegations in the First Request to reflect those in the Defence's Preliminary Objections.')

does not permit the judges to ignore relevant facts as they apply to the diverse legal issues raised—which, as demonstrated in the Appeal, is precisely what the Trial Chamber has done.[5] Far from 'properly exercising its discretion in the interests of economy and efficiency not to re-dispose of the same claims in assessing the [Rule 35] Request',[6] the Chamber flatly, and one can only assume deliberately, ignored the facts presented in order to arrive at a predetermined outcome.[7] Such short shrift neither 'meets' nor 'surpasses, the legal threshold for a properly reasoned decision'.[8]

B. The OCP Strains But Ultimately Fails to Undermine the Core Argument of the Appeal

3. Essentially a collection of minor, unduly technical, and at times rather tortured grievances, the Response appears designed to fell the Appeal with a series of glancing blows—none of which sufficiently strikes at the heart of the matter. The following three examples are illustrative of the Co-Prosecutors' general approach:

   a. The Response suggests that the Appeal 'fails to meet any threshold of specificity'[9] because, among other things, it adopts previously pleaded factual submissions by reference.[10] Yet only those willfully blind to political interference at the ECCC—of which there seem to be many these days—could fail to perceive the specifics of the case at hand, which were clearly set out at paragraphs 2–10 of the Appeal. Moreover, as noted and substantiated in the Appeal, each of the technical requirements of Rules 104, 105, and 107 have been met.[11] Accordingly, the Appeal is admissible *in full*.

   b. Contrary to the OCP's assertion, the Defence indeed 'purport[s] to rely on the Chamber's power to itself examine evidence' pursuant to Rule 104(1).[12] The Appeal clearly cites this rule.[13] Additionally, as the Response well notes, much *new evidence*

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5 *See* Appeal, paras 12, 24.
6 Response, para 28.
7 *See, e.g.*, Appeal, para 28.
8 Response, para 28.
9 Response, para 16.
10 *See* Response, para 10.
11 *See* Appeal, para 23.
12 Response, para 39.
13 *See* Appeal, para 20 ('For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.')

is referenced in 'five paragraphs of factual assertions at the outset of the Appeal'.[14] Whether or not such material has been listed in a table or annex[15] is of no moment to those unconcerned with *de minimis* infractions of 'Practice Direction 6.5'.[16] The evidence cited in the Appeal's footnotes is readily available and easily accessible to anyone with the inclination to review and analyze it—as the Defence has plainly asked this Chamber to do. And while the Trial Chamber, of course, cannot be faulted for failing to consider facts not actually placed before it (due to the fact that such events had not yet occurred),[17] *this* Chamber should obviously rely on such new material in determining whether or not to undertake affirmative steps pursuant to Rule 35—a course of action the OCP cannot bring itself to support.

c. By suggesting that this Chamber lacks the power to grant the ultimate relief requested by the Defence—that is, to *order* an independent investigation[18]—the OCP appears bent on emasculating this crippled institution even further. According to the Co-Prosecutors, a flaw worthy of a full paragraph of text is the Defence's use of the word 'order' as opposed to Rule 35's precise statutory language, which vests this Chamber with the power to '*refer* [instances of interference with the administration of justice] to the appropriate authorities of the Kingdom of Cambodia or the United Nations'.[19] Plainly, what has been sought by the Defence is a judicial directive (commonly referred to in legal circles as an order) referring the matter to an investigative body of proven independence. There is no doubt that such a remedy is within this Chamber's competence.

Such carping in the face of serious and sustained allegations of political interference at the ECCC is inexplicable and ultimately misses the point of the Appeal.

4. Like the Trial Chamber before it, the OCP has now firmly joined the ranks of those willing to accept the 'weakened brand' of justice this Tribunal cannot seem to avoid

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[14] Response, para 39.
[15] Response, para 39.
[16] Response, para 39.
[17] *See* Response, para 39 (suggesting that 'the Chamber should disregard factual assertions concerning events subsequent to the date of the Impugned Decision when exercising its power of appellate review'.)
[18] *See* Response, para 40 (noting that 'there is no basis under Rule 35 for the [Supreme Court] Chamber to "order" any external judicial body to conduct a Rule 35 investigation'.)
[19] Rule 35(2)(c) (emphasis added).

dispensing.[20] Rather than support the reasonable and reasoned call for a long overdue investigation, the OCP prefers to tarry with trivialities. Yet not a single one of the hyper-technical arguments advanced in the Response prevents this Chamber from granting the core relief requested in the Appeal: an independent inquiry. In eighteen pages of submissions, no principled reason for discarding this option is offered.

C. The Defence is Prepared to Cooperate in Any Action this Chamber May Deem Fit to Take Pursuant to Rule 35

5. The Defence agrees with the OCP that, '[o]nce seised of this Appeal, […] the [Supreme Court] Chamber has the necessary ancillary competence to take a range of appropriate actions to promote and uphold the integrity of judicial proceedings'.[21] In this regard, the 'Co-Prosecutors observe that the Appeal and its contents appear to have been disclosed […] to unauthorized recipients'[22] and, accordingly, this Chamber should 'take any action [it] may find appropriate to uphold the integrity of the judicial proceedings'.[23]

6. While it was clearly stated in the introductory paragraph of the Appeal that the Defence intended to treat that document as a public one,[24] for the sake of clarity—and to avoid any doubt—the Defence hereby informs the Chamber that it has, in fact, done so. Copies of the Appeal were openly distributed to various members of the local and international press after the Appeal was filed with the ECCC Court Management Section. In order to assist this Chamber, should it decide to take up the OCP's suggestion, copies of the email communications between the Defence and those members of the press could be made available.

7. Moreover, if required, the Defence is prepared to demonstrate to the Supreme Court Chamber that, not only are its actions in conformity with applicable Cambodian law and procedure—of which ECCC practice directions form no appreciable part—such actions are designed to promote the interests of justice at this Tribunal and protect the fundamental rights of the Accused. Putative assertions of professional confidentiality

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[20] *See, e.g.*, Appeal, para 6 (quoting Mark Ellis, *International Bar Association*, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future', September 2011).
[21] Response, para 41.
[22] Response, para 43.
[23] Response, para 44(c).
[24] *See* Appeal, para 1, n 4.

are being misused to mask embarrassing truths and unpleasant realities about this Court. Much more than an abuse of discretion, such judicial 'fig-leafing' amounts to an abuse of power. Accordingly, the Defence will continue to publish its own submissions where it deems such course of action to be consistent with applicable Cambodian law and Nuon Chea's interests.

III. CONCLUSION

8. For the reasons advanced in the Appeal as well as those set out herein, this Chamber should grant the relief requested in the Appeal as a matter of urgency. As previously noted,[25] oral argument at an open hearing—in advance of any determination—would be appropriate.

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[25] *See* Appeal, para 40.