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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

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Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(08)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agniezska KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Date: **27 April 2012**
Language(s): **English/Khmer**
Classification: **PUBLIC**

DECISION ON IMMEDIATE APPEAL BY NUON CHEA AGAINST THE TRIAL CHAMBER'S DECISION ON FAIRNESS OF JUDICIAL INVESTIGATION

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NUON Chea

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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of an immediate appeal by the Accused, NUON Chea,[1] against the Trial Chamber's "Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92)",[2] to the extent it disposed of the Accused's Rule 35 Request;[3]

I. PROCEDURAL HISTORY

1. On 9 September 2011, the Trial Chamber issued the Impugned Decision in which, *inter alia*, it rejected the Accused's Preliminary Objections[4] and his Rule 35 Request. The Trial Chamber rendered a joint decision on these motions "in view of the substantial overlap between them."[5]

2. On 10 October 2011, the Accused lodged his Appeal against the Impugned Decision pursuant to Rule 35(6) in English only. The Khmer translation was notified on 18 October 2011.[6]

3. On 2 November 2011, the Co-Prosecutors submitted their Response.[7]

4. On 8 November 2011, the Accused submitted his Reply.[8]

5. Pursuant to Rule 108(4)(*bis*)(a) and 108(2), the Supreme Court Chamber shall decide on this Appeal within three months after receipt of "the case file together with certified copies of the decision and each immediate appeal." The "case file" includes confidential documents relevant to the present Appeal. As these confidential documents were received by 28 October 2011,[9] the

[1] Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 10 October 2011, E116/1/1 ("Appeal").
[2] 9 September 2011, E116 ("Impugned Decision").
[3] Request for Investigation Pursuant to Rule 35, 28 April 2011, E82 ("Rule 35 Request").
[4] Consolidated Preliminary Objections, 25 February 2011, E51/3 ("Preliminary Objections").
[5] Impugned Decision, para. 4.
[6] Pursuant to Article 7.2 of the Practice Direction on Filing (Rev.7), the Supreme Court Chamber granted permission to file the Khmer version of the Appeal "at the first opportunity".
[7] Co-Prosecutors' Response to Nuon Chea's Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 2 November 2011, E116/1/4 ("Response"). The Supreme Court Chamber had granted the Co-Prosecutors an extension of time to respond (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, E116/1/2/1).
[8] Reply to Co-Prosecutors' Response to Nuon Chea's Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation, 8 November 2011, E116/1/5 ("Reply").
[9] Rule 108(2) mandates that the Trial Chamber forward the case file to the Supreme Court Chamber "within 10 days of the filing of the appeal…". Day 1 of this time limit was 19 October 2011, being "the first calendar day following the day of service of the Notification of the document in Khmer and one other official language of the ECCC" (Practice Direction on Filing, Article 8.5).

decision on the Appeal was due by Monday, 30 January 2012.[10] As permitted by Rule 108(4)(*bis*), the Supreme Court Chamber issued "a summary of the reasons" for its decision on the Appeal on 30 January 2012.[11]

6. The Supreme Court Chamber hereby renders the full reasons for its decision on the Appeal.

II. THE IMPUGNED DECISION

7. The Impugned Decision addressed a number of separate but related requests and objections, including the Accused's Preliminary Objections and Rule 35 Request. The Trial Chamber found "the portions of the Accused's *preliminary objections* challenging the validity of the judicial investigation on grounds of procedural defects, bias or interference with the administration of justice to be inadmissible"[12] because Rule 89(1)(b), interpreted in light of Article 7 of the Code of Criminal Procedure of the Kingdom of Cambodia ("CCP"), does not list "validity of the judicial investigation" as a ground for extinguishing charges in a criminal proceeding.[13] Additionally, the internationally-established threshold necessary for granting a stay or termination of proceedings is "extremely high" and the Accused has already availed himself of the ample opportunities to dispute the judicial investigation before the Co-Investigating Judges and the Pre-Trial Chamber.[14] As a result, the Trial Chamber rejected the Accused's request to stay or terminate the proceedings included in his Preliminary Objections.

8. The Impugned Decision also dismissed the Rule 35 Request in its entirety. Among the factual allegations contained in the Rule 35 Request – largely similar to the allegations in the aforementioned portions of the Preliminay Objections – a distinction may be drawn between (i) claims directly related to Case 002 and (ii) claims directly related to Cases 003 and 004. The latter were presented by the Accused either to substantiate that they directly affect the fairness of Cases 003 and 004, or indirectly affect the fairness of Case 002. With respect to the claims directly relating to Cases 003 and 004, the Trial Chamber, on the one hand, did not rule upon their alleged impact on Cases 003 and 004 because these cases are in the investigation stage and recourse should therefore be made to the Co-Investigating Judges and, on appeal, to the Pre-Trial Chamber.[15] On the

[10] Pursuant to Rule 39(3), when time limits, like in the present case, "expire on a Saturday, Sunday or Cambodian public holiday," they shall be automatically extended to the next working day.
[11] 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, E116/1/6 ("Summary").
[12] Impugned Decision, para. 17 (emphasis added).
[13] Impugned Decision, paras 16-17.
[14] Impugned Decision, para. 18.
[15] Impugned Decision, para. 21.

other hand, the Trial Chamber held that these same allegations directly related to Cases 003 and 004 have "no tangible impact [...] on the fairness of the trial proceedings in Case 002."[16] The Trial Chamber dismissed the Accused's Rule 35 Request in its entirety, but fell short of explicitly addressing the factual allegations directly related to Case 002.

III. SUBMISSIONS

a. Accused's Appeal

9. The Appeal reiterates the alleged longstanding and ongoing political interference with the ECCC that has formed the basis of the Accused's requests, applications, and appeals filed since March 2009.[17] The Accused's factual allegations of interference with justice may be summarised as follows:

a. The ECCC is suspected of widespread and ongoing corruption, as emerged with respect to the kick-back scheme which came to light over four years ago;[18]
b. In July 2009, Kong Sam Ol, the Royal Government of Cambodia's ("RGC" or "Government") Minister to the Royal Palace refused to receive the letter sent by the Office of the Co-Investigating Judges to the King Father, Norodom Sihanouk, which purported to invite him as a witness in relation to Case 002 investigations;[19]
c. In September 2009, Prime Minister Hun Sen made a public statement in Takeo allegedly interfering with the summons of six high-ranking RGC officials (the "Six Officials") in the course of Case 002 investigations;[20]
d. In October 2009, two weeks after the Co-Investigating Judges had filed summons for the Six Officials during Case 002 investigations, press outlets reported that the RGC's spokesman, Khieu Kanharith, stated that even though the Six Officials could appear in court voluntarily, the RGC's position was that they should not testify. He further added that foreign officials involved in the Court could "pack their clothes and return home" should they not be satisfied with the decision. The Accused maintains that the RGC's position led, directly or indirectly, to the failure of the Six Officials to appear;[21]

[16] Impugned Decision, para. 21.
[17] Appeal, para. 2.
[18] Appeal, para. 3(a).
[19] Appeal, para. 3(b).
[20] Appeal, para. 3(c).
[21] Appeal, para. 3(c). *See also* Appeal para. 4 (quoting the Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, appended to the Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12 ("PTC Minority"), paras 6, 8).

e. Regarding Cases 003 and 004, several members of the RGC have repeatedly voiced the Government's opposition thereto; it is also argued that ECCC officials would be accomplices "in executing this politically motivated judicial agenda";[22]

f. The Accused also notes that: the Open Society Justice Initiative has questioned the Co-Investigating Judges' judicial independence and twice called for the United Nations to conduct an independent investigation into allegations concerning the obstruction of Cases 003 and 004; external observers have repeatedly criticised the "tribunal's continuing support for the RGC's agenda";[23] the Executive Director of the International Bar Association has affirmed that the credibility of the ECCC is undermined by reports and allegations of government interference and consequently "fails to meet international standards of due process";[24] Human Rights Watch has called for the resignation of both Co-Investigating Judges on the ground of violation of their legal and judicial duties; the RGC's Minister of Foreign Affairs was reported to state that "only Cambodia can decide how many additional suspects the Khmer Rouge Trial will prosecute";[25] and, Judge Blunk's resignation of 8 October 2011, which can only "be understood as a capitulation to pressure from international observers."[26]

10. The Appeal puts forth four grounds of appeal to request that the Supreme Court Chamber vacate the Impugned Decision and use its broad authority under Rule 35(2) to order an independent judicial body to conduct a public investigation to be completed in advance of the substantive hearing in Case 002. It further requests a public hearing.[27]

11. As a first ground of appeal, the Accused alleges that the Trial Chamber committed an error of law by failing to provide reasoned grounds for rejecting the Accused's claims relating directly to Case 002, despite their inclusion in the Rule 35 Request. Therefore the Impugned Decision violates the principle that orders and decisions must be sufficiently reasoned.[28]

[22] Appeal, para. 3(d).
[23] Appeal, para. 5.
[24] 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, p. 46).
[25] Appeal, para. 9.
[26] Appeal, para. 10.
[27] Appeal, para. 41.
[28] Appeal, paras 12, 24.

12. Secondly, the allegations concerning Cases 003 and 004 were rejected on the basis of the incorrect assumption that the Trial Chamber may only act pursuant to Rule 35 in relation to matters with which it is seised. This "overly legalistic" and "formalistic" interpretation contradicts Rule 35's broad language and mandate, which is aimed at safeguarding the integrity of the process and deterring potential interference.[29] The Appeal further contends that the Trial Chamber is not barred from addressing instances of interference that occurred during the judicial investigation "should such meddling either: (a) come to light for the first time during the trial phase or (b) as in the instant case, have been improperly ignored by the OCIJ and/or the PTC."[30] According to the Appeal, the Trial Chamber's contention that the allegations at issue are more properly dealt with by the Co-Investigating Judges and/or the Pre-Trial Chamber is "patently irrational" and "would amount to an exercise in futility", owing to the Co-Investigating Judges's previous stance thereupon, their suspected involvement in the allegations of governmental interference and their already noted professional unsuitability.[31] Moreover, Rule 35 does not envisage any requirement of "actual harm" to an accused person nor of "tangible impact" on the proceedings, since interference with justice violates in and of itself the integrity of the court and therefore ought to be sanctioned regardless of any effect on the Accused or the proceedings.[32] Therefore the Accused submits that these failings amount to an error on a question of law invalidating the Impugned Decision.[33]

13. Thirdly, the Accused avers that the Trial Chamber failed to evaluate the material relating to Cases 003 and 004 in conjunction with the claims concerning Case 002 as relevant evidence clarifying "the prevailing context" and demonstrating the "deliberate pattern" of RGC interference.[34] The Trial Chamber therefore committed a discernable error in the exercise of its discretion which resulted in prejudice to the Accused.[35]

14. Fourthly, the Trial Chamber erred in law by its suggestion, based on a subsequently revised decision of the Pre-Trial Chamber, that parties cannot, on their own motion, initiate Rule 35 proceedings.[36] The Appeal admits that the Impugned Decision did not reject the Rule 35 Request on

[29] Appeal, paras 25-28 (quoting Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, D314/2/7).
[30] Appeal, para. 29.
[31] Appeal, para. 29.
[32] Appeal, para. 30.
[33] Appeal, para. 31.
[34] Appeal, paras 33-34.
[35] Appeal, para. 32.
[36] Appeal, para. 35.

this basis, but it requests that the Supreme Court Chamber address this question of law to promote the proper interpretation of Rule 35.[37]

b. Co-Prosecutors' Response

15. The Co-Prosecutors argue that the first and fourth grounds of appeal are inadmissible since they are devoid of any factual basis in the Impugned Decision. Additionally, the fourth ground of appeal "appears to wilfully misrepresent" the Trial Chamber's reasoning.[38] The Co-Prosecutors further submit that all grounds of appeal are unfounded and request the Supreme Court Chamber to make a determination based on written submissions alone.[39]

16. Regarding the first ground of appeal, it is submitted that the the Trial Chamber gave proper consideration to Case 002 allegations. These claims were summarised and then dismissed as inadmissible by the Trial Chamber, which decided in the interest of economy and efficiency not to reconsider allegations that it had already evaluated in disposing of those sections of the Accused's Preliminary Objections concerning interference with justice.[40]

17. As to the second ground, the Co-Prosecutors' position is that the Trial Chamber did not commit an error of law invalidating the Impugned Decision in determining that Rule 35 requests must (a) relate to the matter of which the Chamber is seised and (b) show a tangible impact on the fairness of proceedings. This articulation of the standard of proof envisaged under Rule 35 is consistent with the wording and purpose of such disposition.[41]

18. With reference to the third ground of appeal, the Response contends that the Trial Chamber "took cognisance" of all allegations included in the Rule 35 Request, as revealed by the fact that they were first summarised and then considered to mirror those already contained in the Preliminary Objections, and finally addressed by way of reasoned legal findings.[42] Therefore, the Accused failed to demonstrate an abuse of discretion or prejudice to his rights.[43]

[37] Appeal, para. 35.
[38] Response, para. 10.
[39] Response, paras 4, 44.
[40] Response, paras 11-13.
[41] Response, para. 31.
[42] Response, para. 38.
[43] Response, paras 35, 38.

19. The Co-Prosecutors submit that the fourth ground of appeal is inadmissible, since it lacks any factual basis in the Impugned Decision, which "cannot reasonably be read as prohibiting a party from requesting a given judicial authority from initiating a Rule 35 investigation."[44] If found admissible, this ground of appeal should be dismissed as unfounded, since it has "no rational connection to the point of law upheld in the Impugned Decision."[45] Despite the Trial Chamber's erroneous reference to a subsequently revised decision, the Accused failed to demonstrate that this error invalidates the Impugned Decision.[46]

20. The Response also contends that the Appeal relies on events, statements and documents unavailable to the Trial Chamber when it rendered its Impugned Decision, which the Supreme Court Chamber should accordingly disregard.[47] Finally, the requested relief – an investigation conducted by an *external* judicial body – is beyond the scope of Rule 35.[48]

c. Accused's Reply

21. In reply, the Accused submits that the Trial Chamber was obliged to consider its Rule 35 Request independently of his Preliminary Objections because they were made pursuant to different provisions that raise distinct legal issues.[49] The Reply also maintains that the Supreme Court Chamber is not prevented from considering new evidence, even if it was unavailable to the Trial Chamber when it rendered the Impugned Decision, and that the relief sought in the Appeal – that is, an "independent inquiry"[50] – is within the scope of Rule 35(2)(c).[51]

d. The question of breach of confidentiality

22. The Co-Lawyers for the Accused ("Defence") take the position that their pleadings in this Appeal ought to be classified as public and that "[i]n any event, the Defence will treat [them] as such."[52] They note, in this respect, that these filings do not disclose any portions of the Impugned Decision that the Trial Chamber decided to redact, nor any material which has not already been

[44] Response, para. 14.
[45] Response, para. 33.
[46] Response, para. 33.
[47] Response, para. 39.
[48] Response, para. 40.
[49] Reply, para. 2.
[50] Reply, para. 4.
[51] Reply, para. 3(b) and (c).
[52] Appeal, para. 1 and footnote 4; Reply, para. 1.

extensively covered by media. Moreover, imposing confidentiality over issues of public and institutional importance would interfere with fair and transparent proceedings.[53]

23. The Response notes that the Appeal appears to have been disclosed in violation of the Supreme Court Chamber's classification of the document as confidential and therefore requests this Chamber to use its ancillary jurisdiction under Rule 35 to investigate interference *ex proprio motu*, taking "any action [it] may find appropriate to uphold the integrity of the judicial proceedings."[54] The Defence confirms it has distributed the Appeal to "various members of the local and international press,"[55] since this is in conformity with Cambodian law, the interests of justice, and protects the Accused's rights.[56]

IV. STANDARD OF REVIEW FOR IMMEDIATE APPEALS

24. Pursuant to Internal Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:

- An error on a question of law invalidating the decision;
- An error of fact which has occasioned a miscarriage of justice; and
- A discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant.

25. As this Chamber has already clarified, these three grounds of appeal "are to be read as disjunctive," meaning that for the first two grounds to be satisfied, an appellant is not required to demonstrate that the alleged error also resulted in prejudice to his/her rights.[57]

V. FINDINGS

a. Admissibility

26. The Appeal is admissible under Rules 35(6) and 104(4)(d) and has been timely filed. The Supreme Court Chamber rejects the request for an oral hearing.

[53] Appeal, para. 1 and footnote 4; Reply, para. 1.
[54] Response, paras 41-44.
[55] Reply, para. 6.
[56] Reply, paras 6-7.
[57] Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 20.

b. First Ground of Appeal

27. Rule 35 – dealing with interference with the administration of justice – and Rule 89 – regulating preliminary objections – are distinct provisions that differ in various respects, such as the situations they aim to address, the procedural mechanisms to be followed, the judicial organ entrusted with adjudication, and, most notably, the applicable legal standard and the available forms of relief.[58] Whereas the concerned portions of the Preliminary Objections and the Rule 35 Request were largely based on the same factual allegations, they were submitted pursuant to these two different provisions. In the Preliminary Objections, the Accused was required to demonstrate that the factual allegations were so egregious that they warranted a termination of proceedings.[59] In his Rule 35 Request, the Accused sought to demonstrate that these same factual allegations gave rise to a "reason to believe" that a person may have interfered with the administration of justice. Moreover, unlike the Preliminary Objections,[60] the Rule 35 Request required the Trial Chamber to initiate investigations into alleged instances of interference to safeguard the integrity of proceedings and, as appropriate, take necessary measures to restore a fair trial.[61]

28. The Supreme Court Chamber accordingly finds that the Co-Prosecutors' argument[62] that the Trial Chamber properly disposed of the factual allegations directly concerning Case 002 by declaring those same allegations in the Preliminary Objections to be inadmissible[63] is misplaced. The Trial Chamber committed an error of law by failing to provide stand-alone reasons for its rejection of the Rule 35 Request insofar as it relates to the factual allegations directly concerning Case 002. For the reasons set out below, however, this error does not invalidate the Impugned Decision.

c. Second and Third Grounds of Appeal

29. Judicial competence over a case at the ECCC is divided according to the stage of the case. The Co-Investigating Judges and 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, however, if rigidly applied to Rule 35 applications,

[58] *See* Co-Prosecutors' Response to Nuon Chea Request for Investigation Pursuant to Rule 35, 10 May 2011, E82/1, para. 2 (affirming that the Rule 35 Request filed before the Trial Chamber "does not raise any new allegations, but simply *seeks different relief* from that sought in [the Accused's] preliminary objections" (emphasis added)).
[59] *See* Impugned Decision, paras 16-18.
[60] Preliminary Objections, para. 73(b) (requesting "the termination of the prosecution or, in the alternative, a stay of the proceedings against Nuon Chea").
[61] Rule 35 Request, para. 32.
[62] Response, paras 12, 28.
[63] Impugned Decision, para. 17.

would undermine the Court's inherent responsibility to guarantee the integrity of proceedings and the Accused's right to a fair trial.[64]

30. As internationally firmly established, the power to deal with contempt – that is, with interference with the administration of justice[65] – accrues to any court by virtue of its judicial role, and "is necessary to ensure that the Tribunal's exercise of jurisdiction is not frustrated and its basic judicial functions are safeguarded."[66] It is therefore of utmost importance that throughout the entire course of proceedings judges retain the power to "take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice."[67] Were any of the ECCC judicial organs not entrusted with this fundamental preorgative, the Court would be unable to guarantee a fair trial to an accused and thus properly fulfil its mission.[68]

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[64] *See* Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, paras 10-12.

[65] *See* Report of the Committee on Contempt of Court, UK Cmnd. 5794 (1974) (so-called "Phillimore Committee Report"), p. 2, para. 1 ("The law relating to contempt of court has developed over the centuries as a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally"); p. 7, para. 14 (dividing the instances of contempt into "contempts in court" and "contempts out of court"; the latter includes conduct liable to interfere with justice, reprisals against witnesses or parties, scandalising the court and disobedience to court orders); *Johnson v. Grant* [1923] S.C. 789, p. 790 ("The offence [of contempt of court] consists in interfering with the administration of the law; in impeding and perverting the course of justice [...] It is not the dignity of the Court which is offended ... it is the fundamental supremacy of the law which is challenged"); *Prosecutor v. Tadic*, IT-94-1-A-R77, "Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin", Appeals Chamber, 31 January 2000, paras 15, 17 (finding that even though the concept of contempt of court developed as a common-law creation, many civil law systems achieve a similar result by way of narrowly-defined statutory offences against the administration of justice), fn. 16 (demonstrating that the Phillimore Committee Report has been widely accepted as a correct assessment of the purpose and scope of the law of contempt).

[66] *Prosecutor v. Beqaj*, IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, para. 9; *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, "Judgment on Appeal by Anto Nobilo Against Finding of Contempt", Appeals Chamber, 30 May 2001, para. 30 (*citing Prosecutor v. Tadic*, "Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin", para. 13). *See also Prosecutor v. Milosevic*, IT-02-54-A-R77.4, "Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings", Appeals Chamber, 29 August 2005, para. 21; *Prosecutor v. Blagojevic,* IT-02-60-T, "Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel", Trial Chamber, 3 July 2003, para. 112 (affirming that it is the chamber's inherent duty to ensure a fair trial and a proper administration of justice, by considering taking any steps to guarantee that "justice is not only done but justice is seen to be done"); *Prosecutor v. Rwamakuba,* ICTR-98-44C-T, "Decision on Appropriate Remedy", Trial Chamber, 31 January 2007, para. 47; *Prosecutor v. Karemera et. al.,* ICTR-98-44-PT, "Decision on Severance of Andre Rwamakuba and Amendments of the Indictment Article 20(4) of the Statute, Rule 82(B) of the Rules of Procedure and Evidence", Trial Chamber, 7 December 2004, para. 22.

[67] *Prosecutor v. Beqaj*, IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, para. 13.

[68] *See Nuclear Tests Case (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 463, para. 23 ("the Court possesses an inherent jurisdiction enabling it to take such action as may be required [...] to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and [...] that its basic judicial functions may be safeguarded"); *Prosecutor v. Blaskic*, IT-95-14, "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", Appeals Chamber, 29 October 1997, paras 33, 55 (suggesting that inherent powers are closely related to the mission entrusted to the tribunal and aim to ensure that its fundamental functions are fully discharged). *See also Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, "Decision", ICTR Appeals Chamber, 3 November 1999, para. 76 ("It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice [...] The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process"); *U.S. v. Hasting*, 461 U.S. 499 [1983], pp. 505-506; *Mesarosh v. U.S.*, 352 U.S. 1 [1956] (wherein the U.S.

31. The question to be addressed by the Supreme Court Chamber here is in which manner these broad powers conferred upon the Co-Investigating Judges and the Chambers to preserve the integrity of proceedings are to be adapted to the ECCC's procedural scheme. In this regard, the Supreme Court Chamber generally agrees that an investigation pursuant to Rule 35 "can only be meaningfully [...] conducted by the judicial body seised of the case."[69] It further holds that, normally, whereas the instances of interference emerging during the pre-trial phase are more properly dealt with by the ECCC's organs presiding over the investigation – namely the Co-Investigating Judges and Pre-Trial Chamber –, those arising at the trial or final appeal stages fall within the competence of the Trial and Supreme Court Chambers. There are limited circumstances, however, in which the demand for efficacy and impartiality in examining allegations of interference with justice may prevail over the general allocation of competence among the ECCC's judicial organs. It follows that any judicial organ seised of a case – presently the Trial Chamber in Case 002 – cannot but withhold a residual power to guarantee that the proceedings comport with the international standards of justice, regardless of when the alleged instances of interference occurred.

32. The circumstances of the present Appeal, however, do not warrant a departure from the general allocation of judicial competence within the ECCC. The factual allegations directly concerning Case 002,[70] albeit overlooked in the Impugned Decision, have undergone extensive litigation and consideration before the Co-Investigating Judges and the Pre-Trial Chamber.[71] It was not for the Trial Chamber, therefore, to adjudicate the allegations over again by acting as a court of appeal over these judicial offices. In particular, the Supreme Court Chamber sees no reason to disturb the Trial Chamber's implicit rejection of the submission that the aforementioned press-reported circumstances have an actual bearing on the proceedings before it. The question that remains relevant to the Accused's rights concerns the availability of certain Defence witnesses who were not heard in the investigative stage.[72] This question is to be determined during the ongoing

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Supreme Court confirmed its supervisory jurisdiction over the proceedings of the federal courts "to see that the waters of justice are not polluted" (*ibid.*, p. 14)); *McNabb et al. v. U.S.*, 318 U.S. 332 [1943] (in which the U.S. Supreme Court affirmed "its supervisory authority over the administration of criminal justice" (*ibid.*, p. 341) which "implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*ibid.*, p. 340), given its function as "the court of ultimate review" (*ibid.*, p. 347)).

[69] Impugned Decision, para. 21.

[70] Appeal, paras 3(b), (c), (d), and 4. The Supreme Court Chamber notes, however, that, contrary to the Accused's submissions, the statements by Prime Minister Hun Sen referred to in the Appeal, para. 3(c), did not refer to any potential witness in particular, as correctly pleaded by the Accused himself in his previous requests (Rule 35 Request, para. 3(b); Request for Investigation, 30 November 2009, D254, para. 6).

[71] Rule 35 Request, fn. 2; Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, paras 1-17.

[72] *See, e.g.* Note by the Co-Investigating Judge, 11 January 2010, D301, p. 1 (considering that it is conducive to ascertaining the truth to interview the King Father and the Six Officials) and pp. 3, 4 (deciding that, in light of

trial in Case 002, in which a broad range of options is still open to address the concerns that exculpatory evidence might be improperly prevented from entering the trial. This depends, for example, on whether the Defence persists in its requests for evidence, whether such requests are admissible under Rule 87, whether the facts for which the testimonies are proposed are disputed, whether the called witnesses appear and, if they fail to do so, whether the facts upon which they had been called to testify may be established otherwise.

33. As for the factual allegations primarily concerning Cases 003 and 004, but alleged to indirectly impair the fairness of Case 002,[73] the Supreme Court Chamber notes that the Appeal advances a syllogism according to which government interference against prosecution in Cases 003 and 004 would necessarily imply interference against the Accused in Case 002.[74] The Supreme Court Chamber defers to the wide discretion vested with the Trial Chamber, which is better placed to evaluate the impact of these factual allegations on the proceedings before it. Since the Defence offers no compelling support in favour of its argument, it has failed to demonstrate any error of fact or law or discernible error of discretion in the Trial Chamber's conclusion that the claims related to Cases 003 and 004 are devoid of "tangible impact"[75] on the fairness of Case 002.[76]

34. The Supreme Court Chamber also takes note of the Accused's allegations regarding events, statements, and documents unavailable to the Trial Chamber when it rendered the Impugned Decision. The Supreme Court Chamber observes that these allegations are currently being adjudicated by national courts,[77] before which the Defence has requested the initiation of criminal proceedings, and that several disagreement proceedings have been brought before the Pre-Trial Chamber. Moreover, these allegations are the focus of a diplomatic process between the Royal Government of Cambodia and the United Nations.[78] The third-party reports referred to in the

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"significant practical difficulties" that "in the best-case scenario, would unduly delay the conclusion of the judicial investigation, ... it is preferable to defer to the Trial Chamber ... for it to decide whether employing such coercive measures is warranted"); International Co-Prosecutor's Observations on Ieng Sary and Nuon Chea's Appeals on the Summoning of Additional Witnesses, 29 March 2010, D314/1/5, para. 5 (concurring with the international Co-Investigating Judge that the testimony of the King Father and the Six Officials "would be conducive to ascertaining the truth regarding the facts alleged in the introductory submission").

[73] Appeal, paras 3(d), 5-6, 9-10.

[74] Appeal, para. 37.

[75] Impugned Decision, para. 21.

[76] This is not to say, however, that, for the requirements under Rule 35 to be satisfied, conduct of interference with witnesses or potential witnesses must produce a tangible result, as clearly established by international tribunals (*Prosecutor v. Beqaj*, IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, para. 21; *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, "Judgement on Allegations of Contempt", Trial Chamber, para. 18; Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summon Witnesses, 8 June 2010, D314/2/7, para. 38).

[77] Abby Seiff and Kuch Naren, "Nuon Chea lawyers challenge court's interference decision", *The Cambodia Daily*, 2 February 2012, p. 24.

[78] "Statement attributable to the Spokesperson for the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia", 30 March 2012, <http://www.un.org/sg/statements/index.asp?nid=5961> (declaring that, as an

Appeal, further, are mostly of a general nature and do not concern any specific circumstance capable of disturbing the Accused's rights in Case 002. The Supreme Court Chamber therefore does not consider that the Accused's submissions in hand justify drawing automatic inferences about a lack of fairness in Case 002. Insofar as these claims relate instead directly to the fairness of Cases 003 and 004, this Chamber reiterates that the Trial and Supreme Court Chambers, being not seised of these cases, have no competence to make any pronouncement thereupon.

d. Fourth ground of appeal

35. The Supreme Court Chamber finds that this ground of appeal lacks any factual basis in the Impugned Decision, which cannot be reasonably interpreted as barring a party from requesting the Co-Investigating Judges or a Chamber to take discretionary action pursuant to Rule 35(2).

e. The question of breach of confidentiality

36. The disclosure of classified documents, if established beyond reasonable doubt, is an offence under Rule 35(1)(a), possibly leading to a sanction in accordance with Cambodian law[79] and/or a finding of misconduct against a lawyer.[80] Taking cognisance of the facts of the present case, as confirmed by the Defence,[81] the Supreme Court Chamber recalls that the proper course of action would have been for the Defence to request the relevant Chamber to release a public version of the concerned filings.[82]

37. The Supreme Court Chamber is concerned that the Defence states, suggesting that it is prepared to wilfully disregard future binding orders, that it "will continue to publish its own submissions" if considered to be consistent with Cambodian law and NUON Chea's interests.[83]

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opportunity to move forward beyond recent events, the UN Secretary-General has decided to initiate a process for the selection of a new Co-Investigating Judge and stating that full cooperation and assistance on the part of the Royal Government of Cambodia is essential and that in this respect the UN will remain vigilant"); "UN voices concern as second judge resigns from Cambodia genocide court", 19 March 2012, <http://www.un.org/apps/news/story.asp?NewsID=41578&Cr= Cambodia&Cr1> (stating that the situation at the ECCC following the resignation of Judge Laurent Kasper-Ansermet is of "serious concern and the United Nations is examining it closely"); "ECCC: Cambodia-UN Joint Statement", 24 January 2012, <http://www.cambodiaun.org/news/54-jan-2012/257-eccc-cambodia-un-joint-statement.html> (stating that Deputy Prime Minister Sok An and Ambassador David Scheffer, Special Expert to the Secretary-General of the United Nations, "intend to continue their close discussions"); "In Cambodia, UN legal chief warns on interference in work of genocide tribunal", *UN News Centre,* 20 October 2011, <http://www.un.org/apps/news/story.asp?NewsID=40124&Cr=cambodia&Cr1=> (stating that the UN Legal Counsel Patricia O'Brien met with Deputy Prime Minister Sok An and urged everyone to "respect the integrity and independence of the tribunal's judicial process").

[79] Rule 35(4).

[80] Rules 35(5), 38.

[81] Reply, para. 6.

[82] Practice Direction 004/2009: Classification and Management of Case-Related Information, 5 June 2009, Article 9.3.

[83] Reply, para. 7.

This Chamber emphasises that it is for the relevant Chamber alone to determine whether certain documents on the case file are to be classified, and therefore treated, as confidential or public and to amend such classification.[84] Therefore, this Chamber reminds the Defence of its duty to respect judicial orders and classification of filings[85] and warns it against further unauthorised disclosure of confidential or strictly confidential information. Such unauthorised disclosure will be dealt with in accordance with Rules 35(2) and 38.[86]

38. In relation to the breach of confidentiality in the present Appeal, the Supreme Court Chamber decides not to initiate proceedings under Rule 35.[87] It further decides to declassify the documents included under this immediate appeal: E116/1/1 and its attachments, E116/1/2, E116/1/2/1, E116/1/4 and its attachments and E116/1/5.

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:

REJECTS the Appeal;

WARNS the Defence against further unauthorised disclosure of classified information;

DECIDES to re-classify as public the documents referred to above.[88]

Phnom Penh, 27 April 2012

President of the Supreme Court Chamber

[84] *See Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, "Judgement", Trial Chamber, 30 August 2006, para. 22.
[85] Rule 22(4) (obliging lawyers before the ECCC to respect, *inter alia*, the ECCC Practice Directions).
[86] *See* Decision on Nuon Chea's Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, 15 November 2011, E115/3, para. 39 and third dispositive paragraph; Warning for Unauthorised Disclosure of Confidential Information, 9 July 2010, D314/1/11, Disposition.
[87] Rule 35 vests the Co-Investigating Judges and the Chambers with a discretionary power to deal with interference with the administration of justice, as indicated by its first and second paragraphs, which use the verb "may". *See Prosecutor v. Nsengimana*, ICTR-01-69-A/ICTR-2010-92, "Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses", Appeals Chamber, 16 December 2010, paras. 17, 22 (finding that contempt proceedings are discretionary and therefore a trial chamber "may decline to initiate [them] despite the fact that sufficient grounds exist to proceed against a person for contempt").
[88] *See supra*, para. 38.