

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAIL

Case no: 002/19-09-2007-ECCC-TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 26 October 2011



CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Supreme Court Chamber: សម្ងាត់/Confidential
Classification status:
Review of interim classification:
Records officer name:
Signature:

REQUEST FOR ADJOURNMENT OF OPENING
STATEMENTS AND SUBSTANTIVE HEARING

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I. INTRODUCTION

1. Pursuant to Rule 104(4) of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this request for an adjournment of the opening statements and substantive hearing in Case 002¹ until: (i) the Supreme Court Chamber (the ‘SCC’) has disposed of the Defence’s Immediate Appeal Against the Trial Chamber Decision Regarding the Fairness of the Judicial Investigation (the ‘Rule 35 Appeal’)²; (ii) the Office of the Royal Prosecutor (the ‘ORP’) attached to the Phnom Penh Municipal Court has acted on the Defence’s recently filed Criminal Complaint (the ‘Complaint’)³; and/or (iii) the allegations contained in the Rule 35 Appeal and the Complaint have been credibly investigated by an independent body established for such express purposes.⁴ Unless and until the ‘toxic atmosphere’⁵ that has engulfed the entire premises of the ECCC as a result of political interference by the Royal Government of Cambodia (the ‘RGC’) is cleansed, no substantive decision of the Tribunal can be considered a legitimate one. As a preliminary matter, the Defence takes the position that the instant submission should be classified as public.⁶

II. RELEVANT FACTS

2. The Defence hereby adopts by reference the submissions contained in the Rule 35 Appeal⁷ and the Complaint.⁸ In particular, the following incidents bear repetition here:
 - a. In July 2009, RGC Minister to the Royal Palace Kong Sam Ol actively prevented letters from the Office of the Co-Investigating Judges (the ‘OCIJ’) inviting

¹ See Document No **E-131**, ‘Scheduling Order for Opening Statement and Hearing on the Substance in Case 002’, 18 October 2011, ERN 00747479–00747481 (in which the Trial Chamber officially notified the parties that the opening statements would be held on 21 November 2011 with the substantive hearing to commence one week later).

² 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.

³ Case No 2770, 24 October 2011 (attached hereto).

⁴ See, e.g., para 3(b), *infra*.

⁵ Mike Eckel, *Associated Press*, ‘Cambodia’s Khmer Rouge Tribunal in Crisis’, 23 June 2011 (quoting former OCIJ analyst Steve Heder).

⁶ *N.B.* This request 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. Accordingly, this document should be classified as a public one. In any event, the Defence will treat it as such.

⁷ See Rule 35 Appeal, in particular, paras 2–14, 24–40.

⁸ See Complaint, in particular, paras 2, 6.

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Norodom Sihanouk to testify at the ECCC in Case 002 from reaching the King Father.⁹ His singularly relevant testimony has yet to be heard.

- b. In September 2009, in a public speech delivered in Takeo, RGC Prime Minister Hun Sen admitted to personally vetoing certain ECCC witnesses.¹⁰
- c. Duly summoned by the OCIJ on 25 September 2009,¹¹ six former Khmer Rouge cadres and current members of the Royal Government of Cambodia (the ‘RGC’)—Senate President Chea Sim, National Assembly President Heng Samrin, RGC Minister of Foreign Affairs Hor Namhong, RGC Minister of Economy and Finance Keat Chhon, and Senators Ouk Bunchhoeun and Sim Ka (collectively, the ‘Six Insiders’)—failed to appear at the ECCC to provide testimony as ordered. No valid reasons for the refusals were ever provided.
- d. In October 2009, RGC Minister of Information Khieu Kanharith publicly stated that, although the Six Insiders ‘could appear in court voluntarily, the government’s position was that they should not give testimony. He said that foreign officials involved in the court could “pack their clothes and return home” if they were not satisfied with the decision’.¹² To date, not one of the Six Insiders has voluntarily provided any testimony with respect to Case 002 to any ECCC judicial official.
- e. In June 2010, the spokesman for the RGC Ministry of the Interior, Khieu Sopheak, ‘repeated the [Government’s] opposition to the [Case-003-and-004] investigations [...], citing Hun Sen’s continued warnings of unrest: “Just only the

⁹ See Document No **D-122/5**, Letter from the OCIJ to Kong Sam Ol, 15 July 2009, ERN 00350280; Document No **D-122/5/1**, Letter from Kong Sam Ol to the OCIJ, 17 July 2009, ERN 00351389–00351392; Document No **D-122/5/3**, Letter from Kong Sam Ol to the OCIJ, 22 July 2009, ERN 00355672–00355674. *N.B.* Judge You Bunleng refused to sign the letters.

¹⁰ According to a translation provided by the ECCC Public Affairs Section, the Prime Minister made the following remarks: ‘They are not getting along with each other in [the ECCC]. [...] They want to put pressure on us that we have to sign in order to get money. I said no. If you don’t give, that is fine. When you run out of money, you can walk out. It is very complicated. Now they are frightened. *Once, they wanted to call some people to testify. I said no and don’t be [such an] annoyance.*’ (emphasis added).

¹¹ See Document No **D-136/2/1**, ‘Witness Summons’, 25 September 2009, ERN 00387202–00387203; Document No **D-136/3/1**, ‘Witness Summons’, 25 September 2009, ERN 00401699–00401700; Document No **A-299/1**, ‘Witness Summons’, 25 September 2009, ERN 00387141–00387142; Document No **A-296/1**, ‘Witness Summons’, 25 September 2009, ERN 00387137–00387138; Document No **A-298/1**, ‘Witness Summons’, 25 September 2009, ERN 00387139–00387140; Document No **A-297/1**, ‘Witness Summons’, 25 September 2009, ERN 00380693–00380694.

¹² Sebastian Strangio & Cheang Sokha, *Phnom Penh Post*, ‘Gov’t Testimony Could Bias KRT: PM’, 9 October 2009.

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five top leaders [are] to be tried,” Lt Gen Sopheap said. “Not six. Just five. The court must secure the stability and the peace of the nation,” he said. “The conflict and internal instability we don’t want”.¹³

- f. In October 2010, Hun Sen bluntly told visiting UN Secretary General Ban Ki-moon that Cases 003 and 004 were ‘not allowed’.¹⁴
- g. In May 2011, Khieu Kanharith stated that foreign nationals looking to investigate Cases 003 & 004 should ‘pack their bags and return home’.¹⁵
- h. In October 2011, Hor Namhong was quoted as saying: ‘only Cambodia can decide how many additional suspects the Khmer Rouge Trial will prosecute’.¹⁶
- i. Reacting to Judge Blunk’s departure from the ECCC, the spokesman for the RGC Council of Ministers, Phay Siphon, ‘said [it] showed that he had misunderstood the principles of a mixed court. “He [Judge Blunk] failed to understand the wisdom of setting up the ECCC, which is the partnership between the government and the UN,” he said. “We will stand on our ground regarding the ECCC. There will be no case 003 or 004. *The government doesn’t want failure; that is why it only allows Case 002 to take place*”’.¹⁷

¹³ Douglas Gillison, ‘KRT Begins Investigation of Five New Regime Suspects’, *The Cambodia Daily*, 8 June 2010. *N.B.* This announcement came on the heels of Judge You Bunleng’s removal of his name from previously signed rogatory letters in Cases 003 & 004. See OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, re ‘Dossiers 003 et 004’ (unofficial translation from the original French); Douglas Gillison, ‘Khmer Rouge Tribunal Judge Backs Out of New Inquiries’, *Cambodia Daily*, 10 June 2010; Douglas Gillison, ‘KR Judge Does Not Sign On To New Investigations’, *Cambodia Daily*, 9 June 2010.

¹⁴ See AFP Report, ‘Cambodian PM Says No Third Khmer Rouge Trial’, 27 October 2010 (‘Cambodian Prime Minister Hun Sen told visiting UN Secretary General Ban Ki-moon on Wednesday that a second Khmer Rouge war crimes trial due to start early next year would be the last. Hun Sen “clearly affirmed that case three is not allowed”, Foreign Minister Hor Namhong told reporters after Ban met with the premier. “We have to think about peace in Cambodia,” he said.’)

¹⁵ James O’Toole, *Phnom Penh Post*, ‘Wrangling Ahead in Case 003’, 17 May 2011 (‘However these matters are resolved, the larger issue of whether the Cambodian government will reverse its long-standing opposition to Cases 003 and the still-pending 004 remains. In response to Cayley’s statement last week, Information Minister Khieu Kanharith repeated a warning to the court’s international staff about these cases, saying those interested in investigating them should “pack their bags and return home”.’)

¹⁶ Julia Wallace & Neou Vannarin, *Cambodia Daily*, ‘Additional KR Arrests in Cambodia’s Hand, Hor Namhong Says’, 5 October 2011.

¹⁷ Alice Foster & Phorn Bopha, *Cambodia Daily*, ‘Judge Resigns KR Court Over Gov’t Pressure’, 11 October 2011 (emphasis added); see also Julia Wallace, *Cambodia Daily* ‘No Pressure on Tribunal, Gov’t Insists’, 13 October 2011 (‘Most recently, on Monday, Council of Ministers spokesman Phay Siphon said: “We will stand on our ground regarding the ECCC. There will be no case 003 or 004”.’)

These events—including Judge Blunk’s resignation¹⁸—objectively demonstrate that political interference is a fact of life at the ECCC.¹⁹ The key principle of a mixed court in Cambodia, it seems, is the subjugation of international standards of justice to considerations of domestic executive fiat.

3. A new spate of independent criticism surfaced in the wake of Judge Blunk’s departure. According to commentators:
 - a. Recent attempts by the Government at re-characterizing its entrenched position are disingenuous.²⁰
 - b. The UN must take concrete action without delay;²¹ further ‘bland declarations’²² are insufficient,²³ and the organization’s dithering to date—described as ‘business as usual’²⁴—is clearly part of the problem.²⁵

¹⁸ See para 3(c), *infra*.

¹⁹ See James Goldston, *Wall Street Journal*, Op-Ed, ‘Cambodia’s Court at a Crossroads’, 1 March 2010 (‘How can we say that the court is a model of independent justice if the government *does not let us do our job?*’ (quoting one of the Tribunal’s Cambodian judges) (emphasis added)).

²⁰ See Bridget di Certo & Mary Kozlovski, *Phnom Penh Post*, ‘KRT Judge “Bowed to” NGO Pressure, Say Government’, 14 October 2011; Julia Wallace, *Cambodia Daily*, ‘Gov’t Accuses Blunk of Bowing to Pressures’, 14 October 2011 (both quoting OSJI trial monitor Clair Duffy: ‘We’re not talking here about the Cambodian government only expressing concern about peace and stability in Cambodia. We’re talking about clear directives that cases 001 and 002 are enough and that there will be no cases 003 and 004. To me that is clear evidence of executive interference with judicial independence. [The Government’s statement] ignores the fact that a number of qualified professional legal staff walked out of Judge Blunk’s office because the Case 003 investigation in their opinion had been deliberately botched.’)

²¹ See Bridget di Certo, *Phnom Penh Post*, ‘UN Official to Visit the KRT’, 17 October 2011 (‘Following Judge Blunk’s resignation, Amnesty International Asia-Pacific director Sam Zarifi said it was “vital that the UN acts to safeguard the tribunal’s future”.’)

²² See James Goldston, *New York Times*, Op-Ed, ‘Justice Delayed and Denied for Victims of Khmer Rouge’, 13 October 2011 (‘Going forward, bland declarations of support for the process will not cut it. The UN must change course.’)

²³ See Julia Wallace, *Cambodia Daily*, ‘UN Lawyer to Visit Cambodia to Address Alleged Interference’, 17 October 2011 (quoting OSJI trial monitor Clair Duffy on UN Under Secretary-General for Legal Affairs Patricia O’Brien’s visit to address ongoing concerns about government interference in the court’s work: “This is a sign, but it is not enough. We need to see results. The public need to know how the tribunal is operating”, Duffy said.’); see also Bridget di Certo, *Phnom Penh Post*, ‘UN Official to Visit the KRT’, 17 October 2011.

²⁴ See James Goldston, *New York Times*, Op-Ed, ‘Justice Delayed and Denied for Victims of Khmer Rouge’, 13 October 2011 (‘But business as usual[—UN inaction—]has led to this impasse. [...] When, in the 1990s, Prime Minister Hun Sen balked at a court with a majority of international judges, the UN gave in, and so insured that the political taint that compromised ordinary Cambodian courts would infect the ECCC. A decade later, when reports emerged that Cambodian court staff had to kick back part of their salaries to political sponsors, the UN resisted a full-blown inquiry and then accepted the appointment of a watchdog who, by all accounts, has done little to stem corruption. In recent months, when Judge Blunk and his Cambodian counterpart seemed determined to shut down an investigation without carrying out any field investigation, interviewing the prime suspects, or allowing victims any say, UN officials again refused to act, claiming, wrongly, that “judicial independence” precluded them from addressing any judicial misconduct short of an express bribe.’); see also Irwin Loy, *Inter Press Service*, ‘Resignation Raises Doubts Over Khmer Rouge Tribunal’, 12 October 2011 (‘Critics say the high-profile departure shows significant moves must be

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- c. Blunk's departure, among other things, confirms the court's lack of independence.²⁶ And 'simply replacing' him with a new international Co-Investigating Judge will do nothing to remedy that problem.²⁷
- d. Even alleged victims and their lawyers are displeased.²⁸ Cambodians—unlike the UN and the ECCC's donors—are unwilling to accept second-rate justice.²⁹

taken to ensure the integrity of the tribunal [...]. "This should not be a case of business as usual", James Goldston, executive director of the New York-based Open Society Justice Initiative, said in a statement. Goldston and other critics say the UN must secure public guarantees from senior Cambodian officials that they will fully cooperate with the four cases currently before the ECCC. "If those guarantees are not forthcoming", Goldston said, "the UN should reassess its commitment to the court."")

²⁵ See Julia Wallace, *Cambodia Daily*, 'UN Lawyer to visit Cambodia to address alleged interference', 17 October 2011 ('But Clair Duffy, a court monitor for the Open Society Justice Initiative said such statements did not go far enough. "It's partly because of these general statements about the importance of the courts independence that the crisis facing the court has worsened", she wrote in an e-mail. "What we need to see is these statements followed up by real engagement at the political level by donors, the UN and the government; unequivocal commitment in real terms, by the government, to see genuine investigations in cases 003/004. The US government (and other donors) have not so far obtained this commitment in real terms through these kinds of statements."'); see also Irwin Loy, *Inter Press Service*, 'Resignation Raises Doubts Over Khmer Rouge Tribunal', 12 October 2011 ("Unfortunately, by letting this situation fester, I do think it's worsened the situation for all branches of the court", Duffy, the OSJI monitor, told IPS.)

²⁶ See James Goldston, *New York Times*, Op-Ed, 'Justice Delayed and Denied for Victims of Khmer Rouge', 13 October 2011 ('For months, civil society organizations, including my own, have warned that the Cambodian government's public opposition to [Cases 003 & 004] threatened the very independence of the court. Judge Blunk has now, sadly, confirmed our greatest fears.'). *ibid* (Blunk's resignation in the face of pressure by Government officials, among other things, 'renders wholly inadequate the UN's continued uncritical support for a court whose lack of independence has been so openly, definitively exposed'.); see also Ou Virak, 'Open Letter to Patricia O'Brien, United Nations Under Secretary-General for Legal Affairs, calling for an investigation into political interference at the Khmer Rouge Tribunal', 20 October 2011 (the 'Ou Virak Letter') ('[Judge Blunk's] resignation provides the clearest evidence to date that the operations of the ECCC [...] are subject to government interference.')

²⁷ See James Goldston, *New York Times*, Op-Ed, 'Justice Delayed and Denied for Victims of Khmer Rouge', 13 October 2011 ('Simply replacing Judge Blunk does nothing to address [...] Hun Sen's adamant refusal to "allow" only those prosecutions, charges, and witnesses that he decrees [...].'); see also Irwin Loy, *Inter Press Service*, 'Resignation Raises Doubts Over Khmer Rouge Tribunal', 12 October 2011 ("They can't just appoint another judge and expect that person will suddenly have the power to investigate massive atrocities without Cambodian cooperation", [the OSJI's Clair] Duffy said. "The UN must demand that the Cambodian government absolutely butts out of all judicial and prosecutorial decision-making in the court and let it perform independently, but not just through empty statements about the importance of independence. There need to be substantive guarantees by the government."')

²⁸ See Irwin Loy, *Inter Press Service*, 'Resignation Raises Doubts Over Khmer Rouge Tribunal', 12 October 2011 ('But the court is tainted by "widespread perceptions of corruption" within Blunk's office, critics say. "The court is already seen as compromised", said Youk Chhang, the executive director of the Documentation Center of Cambodia, which has provided thousands of documents used as evidence in court investigations. He's calling for a full investigation into the entire office of the investigating judges. "The public is losing hope", Chhang said. "Without a proper investigation, the UN undermines the public support and shows disrespect to those who have died and those who survived the Khmer Rouge. The UN must fix this immediately".')

²⁹ See Anthony Kuhn, National Public Radio, 'Judge Resigns, Casting Doubt over Khmer Rouge Trials', 17 October 2011 ('Theary Seng, the US-trained lawyer, says that the Cambodian government has deftly outmaneuvered the UN and thereby put its authority in question. But she says it doesn't have to be that way. "The international community has a lot of weight that it is not using out of, really, apathy, out of arrogance, out of just lack of concern," she laments.'). ('German lawyer Silke Studzinsky, who also represents Khmer Rouge victims, says that political interference in the tribunal is undermining efforts to establish the rule of

The consensus among well-informed and well-respected commentators appears to be that the system is broken and nothing—short of a major about-face on the part of the UN in the form of an independent investigation followed by remediation of past and ongoing violations, as well as the implementation of concrete safeguards going forward—could restore credibility.

4. After ‘travel[ing] to Phnom Penh [...] to discuss the issue of political interference as a matter of urgency’³⁰ and meeting with RGC Deputy Prime Minister Sok An for that purpose, UN Under Secretary-General for Legal Affairs Patricia O’Brien (the ‘Legal Counsel’)—in linguistic allegiance with her overseer in New York³¹—issued a toothless rebuke to the RGC. Referring ‘to the Secretary-General’s strong support for the work of the ECCC’, the Legal Counsel: (i) ‘expressed concern regarding recent developments at the ECCC’; (ii) ‘reiterated the [UN]’s consistent call upon all persons to respect and support the integrity and independence of the ECCC judicial process’; (iii) ‘strongly urged the [RGC] to refrain from statements opposing the progress of Cases 003 and 004 and to refrain from interfering in any way whatsoever with the judicial process’; and (iv) ‘emphasized the obligation of the [RGC] to cooperate fully with the ECCC’.³²
5. Immediate reactions to Ms O’Brien’s efforts at shuttle diplomacy were tepid, at best:

Court monitor Randle DeFalco, a legal advisor to the Documentation Centre of Cambodia which researches Khmer Rouge atrocities, cautiously welcomed O’Brien’s comments, the UN’s strongest reaction yet to the court controversy. ‘It’s a step in the right direction,’ he said. ‘But an inquiry still appears necessary to restore public confidence in the court,’ he added, noting that Blunk’s resignation raised questions over whether the court’s investigating office has been properly carrying out its duties.³³

To be sure, the Legal Counsel’s statement fell short of expectations—in particular, those of Ou Virak, director of the Cambodian Center for Human Rights (the ‘CCHR’),

law in Cambodia. “How can this be a model for national courts, when a prime minister has the right to order a court?” she asks. “That is a very bad example for Cambodia and also for the legacy of this court.”)

³⁰ Patricia O’Brien, *The New York Times*, Op-Ed, ‘The UN and the Khmer Rouge Trials’, 18 October 2011.

³¹ See Rule 35 Appeal, para 7.

³² Patricia O’Brien, ‘Press Statement’, 20 October 2011. Hardly encouraging (and restrained perhaps by considerations of donor realpolitik), the strong urgings of the Legal Counsel put one in mind of a classic routine by American comedian Robin Williams regarding law enforcement in the United Kingdom: ‘In England, if you commit a crime, the police don’t have a gun and you don’t have a gun. If you commit a crime, the police will say, “Stop, or I’ll say stop again”.’ Robin Williams, Metropolitan Opera House, New York, Live Performance, 1986 (emphasis in original). In Cambodia, the UN can continue saying ‘stop’; but without anything of substance to back up its words, who among the extremely well-armed members of the RGC is actually going to listen? *N.B.* Ms O’Brien did not reply to a Defence invitation to meet in Phnom Penh to discuss the various issues raised herein.

³³ Agence France-Presse, ‘UN urges Cambodia not to meddle with K Rouge court’, 20 October 2011.

who (like the Defence) has called for robust public action: ‘With the integrity of the ECCC at stake, public confidence in the court can only be assured by a full investigation into allegations of political interference and the publication of findings.’³⁴

6. Far more telling were the Legal Counsel’s off-the-record comments to members of Cambodian civil society. In a meeting with NGOs the day following her closed-door session with the RGC, Ms O’Brien was asked by Mr Virak of the CCHR ‘whether the UN would launch an independent investigation into political interference at the court.’

Her response to me was, basically, ‘Look: We do take this issue very seriously, we are considering all options very carefully,’ but she did also say the investigation into interference could open the door for the defence [in Case 002],’ Mr Virak said. ‘It could really be used to raise a lot of questions for their [defence teams’] own purposes, and because of that, they [the UN] made a preliminary decision that an investigation is probably not something they will undertake [...]. She said we have to be very careful in asking for that, because it could really undermine Case 002, [and] the defence might have a field day with that.’

One would imagine that the UN’s top lawyer—and presumably its worldwide advocate for the rule of law—would welcome the opening of such doors and the raising of such questions. Indeed, someone in her position would be expected to be an enthusiastic booster at any such field day.

7. Government assessments of the current situation have, unsurprisingly, ranged from the disingenuous³⁵ to the mendacious³⁶ to the outright absurd.³⁷
8. In a shocking turn of events, it was revealed on 25 October 2011 that the ECCC office responsible for the judicial investigation in Case 002 ‘had committed major procedural

³⁴ Ou Virak Letter, n 26 *supra*.

³⁵ See Agence France-Presse, ‘UN urges Cambodia not to meddle with K Rouge court’, 20 October 2011 (‘Sok An also urged both sides not “to be distracted by intense speculation, pressure and interference from the media and other outside parties,” it said.’) *N.B.* Only in the dadaistic climate of Cambodian politics, can press ‘interference’ be presented as a putative foil to the Government’s own meddling.

³⁶ See Julia Wallace, *Cambodia Daily*, ‘Don’t Interfere in Khmer Rouge Tribunal, UN Tells Government’, 21 October 2011 (‘Counsel of Ministers spokesman Phay Siphon claimed that the government had never opposed any of the court’s decisions to begin with. “We never state any position against any ECCC decision at all, so in past experience you cannot find any single case that we oppose any ECCC activities at all, even though Judge Blunk’s resignation put the blame on the government,” he said.’)

³⁷ See Neou Vannarin & Julia Wallace, *Cambodia Daily*, ‘Council of Ministers’ Press Unit Puts Own Spin on O’Brien Visit’, 25 October 2011 (Keo Remy, deputy chief of the RGC Council of Ministers’ Press and Quick Reaction Unit ‘insisted that [UN Under Secretary-General Patricia] O’Brien had only complimented the Khmer Rouge tribunal on its “good work” during her encounter with Mr Sok An. “Regarding The Cambodia Daily newspaper today, I saw this edition, it is hilarious, written by a foreign journalist named Julia Wallace. She wrote that Ms O’Brien told [Mr] Sok An to stop making public statements that affect the progress of the Khmer Rouge tribunal. What she wrote was all wrong [...]. She [Ms O’Brien] has never told the government to stop making statements as [reported] in The Cambodia Daily”, Mr Remy said.’); *but see* para 4, *supra*.

irregularities, including backdating documents, secretly altering documents, and failing to send proper notifications to lawyers’ in Case 003.³⁸ According to Anne Heindel, legal advisor to the Documentation Center of Cambodia, the exposure of such judicial delinquency within the OCIJ ‘buttresses calls for an immediate and thorough UN investigation of the work in that office’.³⁹ Clair Duffy of the Open Society Justice Initiative characterized the revelation as ‘prima facie evidence of serious misconduct’.⁴⁰

III. RELEVANT LAW

9. Pursuant to Rule 104(4), the Trial Chamber has the discretionary authority to stay the proceedings pending the outcome of an immediate appeal.⁴¹ As the Rules provide no further indication as to how the Chamber is meant to exercise such discretion, it must be reasonably assumed that it should always do so when the interests of justice so require. As recently held by a trial chamber of the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’): ‘It is undoubtedly the case that a Chamber has the power to stay the proceedings in a case where the circumstances are such that a fair trial for the accused is impossible. The right to a fair trial is a fundamental one and it is the duty of the Trial Chamber to ensure that it is protected.’⁴² Such course of action is appropriate in cases where ‘a serious violation of human rights justifi[es] such an extreme measure’.⁴³ In other words, the fair-trial breach must be of an ‘egregious nature’.⁴⁴ Exceptionally, ‘certain human-rights violations are of such a serious nature that they require that the exercise of

³⁸ Julia Wallace, *Cambodia Daily*, ‘KRT Judges List Failings of Blunk, Bunleng’, 26 October 2011 (referring to a recent decision of the Pre-Trial Chamber—Document No **D-11/2/4/4**, ‘Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill’, 24 October 2011, ERN 00748542–00748564).

³⁹ Julia Wallace, *Cambodia Daily*, ‘KRT Judges List Failings of Blunk, Bunleng’, 26 October 2011.

⁴⁰ Mary Kozlovski, *Phnom Penh Post*, ‘Judges Decry KRT Missteps’, 26 October 2011.

⁴¹ See Rule 104(4) (‘Unless otherwise provided in the [Rules] or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber.’) (emphasis added). *N.B.* An immediate appeal filed pursuant to Rule 104(4)(d)—as was the Rule 35 Appeal—must be decided by the Supreme Court Chamber ‘within three months [of] receipt of [the case file together with certified copies of the decision and each immediate appeal]’. Rule 108(4)*bis*(a).

⁴² *Prosecutor v Karadžić*, Case No IT-95-5/18-T, ‘Decision on Motion for Stay of Proceedings’, 8 April 2010 (the ‘Karadžić Stay Decision’), para 4; see also Silvia D’Ascoli, ‘Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties’, *Journal of International Criminal Justice* (Oxford 2007), p 738 (‘international courts and tribunals [...] possess by definition the inherent power to deal with conduct interfering with their administration of justice’).

⁴³ Karadžić Stay Decision, para 4 (citing *Prosecutor v Karadžić*, Case No IT-95-5/18-T, ‘Decision on Karadžić’s Appeal of Trial Chamber Decision on Alleged Holbrooke Agreement’, 12 October 2009, paras 45–47; *Prosecutor v Nikolić*, Case No IT-94–2–AR73, ‘Decision on Interlocutory Appeal Concerning Legality of Arrest’, 5 June 2003, paras 28–33).

⁴⁴ Karadžić Stay Decision, para 4.

jurisdiction be declined'.⁴⁵ Surely, if a court has the inherent power to decline jurisdiction, it has a similar authority to issue a temporary stay of the proceedings. This conforms with previous case law of the Tribunal⁴⁶ as well as other relevant international jurisprudence.⁴⁷

IV. ARGUMENT

A. The Request is Timely

10. In light of the Trial Chamber's recent scheduling order, it is highly unlikely that the issues raised in the Rule 35 Appeal and the Complaint will be resolved in advance of opening statements and the substantive hearing.⁴⁸ This request has been filed at the first available instance in order to allow the Chamber to issue the desired stay of proceedings well in advance of presently-scheduled matters in Case 002. There was no particular need to seek such a stay at the time of the filing of the Rule 35 Appeal, as trial had not yet been slated for commencement and official ECCC estimates suggested a start-date sometime in 2012. Accordingly, the Defence considers that it has moved with the necessary expedition.

B. The Trial Chamber Has Both the Statutory and Inherent Power to Grant the Request

11. Without a doubt, the Trial Chamber *can* act pursuant to Rule 104(4).⁴⁹ Moreover, given its inherent powers,⁵⁰ it *should* do so for the reasons provided in the following section.⁵¹ Like any court-of-law worthy of that designation, the ECCC must act to protect the integrity of its proceedings. Failure to do so in the face of incontrovertible evidence of political interference would amount to an abuse of discretion of the highest order.

⁴⁵ *Prosecutor v Nikolić*, Case No IT-94-2-AR73, 'Decision on Interlocutory Appeal Concerning Legality of Arrest', 5 June 2003, para 30 ('Apart from such exceptional cases the remedy of setting aside jurisdiction will usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.')

⁴⁶ *See, e.g.*, Document No E-66, 'Request to Trial Chamber to Order Resumption of Detention Interviews', 17 March 2011, ERN 00654969-00654976, para 9.

⁴⁷ *See, e.g., Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06, 'Public 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.

⁴⁸ *See* n 41, *supra*.

⁴⁹ *See* para 9, *supra*.

⁵⁰ *Ibid.*

⁵¹ *See* paras 12-18, *infra*.

**C. Lack of Institutional Independence Amounts to a Serious Violation
of Nuon Chea's Human Rights Which Justifies the Requested Stay**

A. RGC Interference at the ECCC is an Established Fact

12. The episodes summarized above⁵² (and described in greater detail in the Rule 35 Appeal and the Complaint⁵³) are 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.⁵⁴ That Government interference at the ECCC is a fact of life cannot be credibly denied. Damning international reports by respected scholars, Siegfried Blunk's parting remarks, the Legal Counsel's public (albeit restrained) reprimand, 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.'⁵⁵

B. Such Fact Has Infected Case 002 and Affected Nuon Chea

13. 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 Judge Blunk's departure, among other things, must be seen as a vote of no confidence in his Cambodian counterpart, one of the men principally responsible for shaping the judicial investigation in Case 002. Most troubling, perhaps, is the recent revelation that the very office responsible for that inquiry has been engaged in delinquent, not to say criminal, behavior.⁵⁶ Accordingly, the integrity of the Case 002 file—the foundation of the upcoming trial—is highly suspect. Nothing sound can arise from such unstable groundwork.

⁵² See para 2, *supra*.

⁵³ See nn 7–8, *supra*.

⁵⁴ See para 3, *supra*; Rule 35 Appeal, paras 6, 8.

⁵⁵ See para 2(i), *supra*.

⁵⁶ See para 8, *supra*. *N.B.* According to Article 133 of the Constitution of the Kingdom of Cambodia, '[t]he Supreme Council of the Magistracy shall take disciplinary actions against any delinquent judges. And, for example, Article 629 of the Cambodian Penal Code criminalizes the offence of 'Forgery of Public Documents' ('Any forgery committed in an authentic document or in any document issued by a public administration to confirm a right, an identity or a status, or to grant an authorization is punishable by an imprisonment from 5 (five) to 10 (ten) years.')

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14. Moreover, the official RGC view on Case 002 is preordained. As noted by Phay Siphon: ‘failure’ will not be tolerated.⁵⁷ 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 in the Rule 35 Appeal, overt RGC support for Case 002—like the Government’s blatant resistance to further trials—is, in effect, a judicial call to arms.⁵⁸
15. From Hun Sen’s initial statements of condemnation to the increasingly brazen and, at times, unintelligible comments of his spokesmen, the trajectory of this Court has been towards something akin to a badly-managed stage play. We 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,⁵⁹ no party should be forced to start 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.

***C. Remedial (and Possibly Punitive) Action
Must Be Taken Before the Trial Begins***

16. Ou Virak has neatly summarized the major conundrum now facing the Tribunal: ‘To date, fundamental concerns [...] have been brushed aside [...], with the goal of a trial of the alleged leaders of the Khmer Rouge apparently more important than the integrity of the institution that undertakes that trial.’⁶⁰ 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. Shackled by judicial voting rules that will always favor the RGC position and left without any reasonable means of securing the

⁵⁷ See para 2(i), *supra*.

⁵⁸ See Rule 35 Appeal, para 37.

⁵⁹ See Rule 35 Appeal, n 105.

⁶⁰ Ou Virak Letter, n 26 *supra*.

day-to-day procedural victories that are the building blocks of a fair trial, the Defence is hard-pressed to imagine a more dubious professional environment.

17. 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.⁶¹ *A fortiori*, it must also justify the much more limited relief requested herein—a *temporary* stay of the proceedings pending a resolution of outstanding Defence filings regarding political interference (namely, the Rule 35 Appeal and the Complaint) and/or completion of an independent assessment of the Tribunal's ability to deliver justice in accordance with international standards.
18. If, as may be expected, the Supreme Court Chamber and the Royal Prosecutor fail to act, and if no independent investigation is undertaken, then there will remain only two legitimate options open to the international judges of the Trial Chamber: to quit or acquit—on the basis that a fair trial is simply not possible at this Court. What is at stake 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'.⁶²

V. CONCLUSION

19. For the reasons stated above, the Trial Chamber should grant a temporary stay of the proceedings along the specific lines suggested in paragraphs one and seventeen of the instant request. For the limited purposes of the instant request, Nuon Chea hereby waives his right to an expeditious trial.

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⁶¹ See para 9, *supra*.

⁶² *Padovani v Italy*, ECHR App No 13396/87, 'Judgment', 26 February 1993, para 27; see also *Ferrantelli and Santangelo v Italy*, (1996) 23 EHRR 288, para 58; see also *Incal v Turkey*, (1998) 29 EHRR 449, para 71; *Fey v Austria*, (1993) 16 EHRR 387, para 30.