



Supreme Court Chamber Rejects Defense Request for Investigation of Government Interference in Case 002

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The Supreme Court Chamber (SCC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has dismissed accused Nuon Chea’s fourth request for an investigation of the effects of Cambodian Government interference on the fairness of Case 002, allegedly evidenced by public revelations made by reserve international Co-Investigating Judge Laurent Kasper-Ansermet when he resigned nearly a year ago.¹

Although the United Nations insisted that Judge Kasper-Ansermet was entitled to immediately carry out the responsibilities of his office upon the resignation of his predecessor,² his rightful succession was never acknowledged by the Cambodian Government due to controversy surrounding his linking to articles critical of the Court’s handling of controversial Cases 003 and 004 through his account on the social media site Twitter. When Judge Kasper-Ansermet resigned after six turbulent months, he alleged that Cambodian Court officials had obstructed his efforts to investigate these same cases.³ For example, the Director of Administration told a national staff person not to accept a summons from the judge during an internal investigation, and the President of the Pre-Trial Chamber refused to accept the filing of a dispute with his Cambodian counterpart, Judge You BunLeng. On instructions from Judge You, the Case File officer refused to place Judge Kasper-Ansermet’s orders in the Case File and ignored his orders to grant access to the Case 003 Case File to Civil Party applicants. Moreover, Judge Kasper-Ansermet claimed to have been denied his seal of office—the symbol of his authority to file decisions—as well as drivers, transcribers, and interpreters.⁴ He concluded, “[T]here exist within the ECCC, such serious irregularities, dysfunctions and violations of proper procedure that endanger and impede due process of law, and affect, as they have since our arrival into office, the proper conduct of the investigations in Case Files 003 and 004.”⁵

The Nuon Chea Team asserted that Judge Kasper-Ansermet’s resignation and public allegations were “conclusive proof” that the Cambodian Government’s influence at the Court “affects *each*

¹ Decision on Nuon Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35” (Mar. 25, 2013) [hereinafter SCC Decision on Immediate Appeal].

² Statement Attributable to the Spokesperson for the Secretary-General on Cambodia, *International Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia* (Jan 20, 2012).

³ See *Press Release of the Reserve International Co-Investigating Judge* (May 4, 2012).

⁴ See Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, Case No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, ¶¶ 33-54 (Mar. 21, 2012). See also Decision and Referral to the Supreme Council of Magistracy on the Judicial Misconduct of National Co-Investigating Judge You Bunleng, Case No. 003/07-09-2009-ECCC-OCIJ, ¶¶ 40-66 (May 4, 2012); *Press Statement by National Co-Investigating Judge* (Mar. 26, 2012) (acknowledging that he had told national staff not to follow the directions of Judge Kasper-Ansermet due to the disputed status of his appointment).

⁵ Note of the International Reserve Co-Investigating Judge to the Parties, at 13, *supra* note 4.

*and every national staff member [including judges] and infects each and every pending case.”*⁶ As examples of how this alleged lack of independence directly impacts Case 002, the Team noted public statements by government officials assuming the guilt of Nuon Chea and thwarted efforts by former international Co-Investigating Judge Marcel Lemonde to summon (now deceased) King Father Sihanouk and six Government officials to testify as witnesses.

The Trial Chamber dismissed the motion in its entirety. On review, the SCC emphasized:

Judges and Chambers enjoy the discretion to decide what procedural avenue to follow against acts of *prima facie* interference with the administration of justice, and that they are also entitled to decide, within the bounds of their discretion, whether to take any procedural action at all, even where they may believe interference to have occurred.⁷

The SCC agreed with the Trial Chamber both that no *prima facie* showing of interference in Case 002 had been made, and that the only specific allegations were “almost entirely repetitious” of submissions previously adjudicated and rejected by both Chambers.⁸ Moreover:

[A] review of [Kasper-Ansermet’s] Note shows that, contrary to attacking the independence of the ECCC judiciary as a whole, [his] allegations of judicial impropriety at the ECCC are focused on two specific Judges not belonging to the Trial Chamber, and in relation to Cases 003 and 004 only.⁹

Opaquely referencing a recent confidential memorandum from the incumbent Co-Investigating Judges to the SCC regarding “what, if any, formal action was taken in response to the allegations of interference in Cases 003 and 004,”¹⁰ the SCC revealed only that the CIJs had already “taken responsive action” of an unspecified nature regarding these alleged improprieties.¹¹

⁶ Application for Immediate Action Pursuant to Rule 35, ¶ 19 (Apr. 25, 2012) (emphasis in original). *See also* Expert Commentary on Legal Filings: Trial Chamber Rejects Request for Investigation of Government Interference in Case 002 (Nov. 26, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

⁷ SCC Decision on Immediate Appeal, ¶ 21, *supra* note 1 (citing Internal Rules 35[1], [2]).

⁸ *Id.* ¶ 22. *See, e.g.*, Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, ¶ 32 (SCC, April 27, 2012) (“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. This question is to be determined during the ongoing 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.”). The Nuon Chea team says that the Trial Chamber has already dismissed their request to hear two of the requested witnesses. Request to Consider Additional Evidence, ¶ 20 (Mar. 15, 2013). *See also* Expert Commentary on Legal Filings: Status of Defense Efforts to Call Government Witnesses at Trial (Aug. 21, 2012) & Decision on the Cambodian Prime Minister’s Public Statement Regarding the Guilt of Accused Nuon Chea (Sept. 21, 2012) at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

⁹ SCC Decision on Immediate Appeal, ¶ 24, *supra* note 1 (citations omitted).

¹⁰ *See* Interoffice Memorandum from Kong Srim, President of the Supreme Court Chamber to Co-Investigating Judges re request for information in relation to interference in Cases 003 and 004 (Mar. 5, 2013).

¹¹ SCC Decision on Immediate Appeal, ¶ 24, *supra* note 1. This may refer to the Co-Investigating Judges’ disposition of an investigation Kasper-Ansermet opened before his resignation regarding internal obstruction of his efforts to investigate Cases 003 and 004. *See Press Release of the International Reserve Co-Investigative Judge* (Mar. 19, 2012).

Overall, the SCC found that the “indefinite and all encompassing nature” of the request for “a full investigation” of the effects of Government interference on the fairness of Case 002 was “non-conducive to judicial action” under the rules:

In the absence of specificity as to what particular offensive conduct or outcome should be investigated, the Defence essentially seeks to engage in an open-ended inquiry whose only purpose appears to be in creating a premise to halt the proceedings in Case 002, a goal against which the Trial Chamber is right to guard.¹²

The SCC’s only point of disagreement with the Trial Chamber was over a warning issued by the lower court that the Team’s unsupported allegation that no Cambodian judges act independently of government instructions was discriminatory and potentially subject to sanction.¹³ The SCC said that such warnings should “not be issued lightly, and should be reserved for conduct that objectively lends itself to certain qualification as discrimination,” a standard that had not been met in the present situation.¹⁴

The SCC also left the door open for the Nuon Chea Team to submit a fifth motion seeking investigation of government interference in Case 002. In a supplemental request, the Team had asked the SCC to consider revelations in a recent book by former Co-Investigating Judge Lemonde together with the allegations made by Judge Kasper-Ansermet. The book includes disclosures such as:

- “It is clear that behind the Cambodian judges there are people pulling strings from within the government”;
- “Much later I realized that they were one step ahead of us, as they were preparing for the need to obstruct any proceedings that might be considered politically embarrassing”; and
- “[A Cambodian judge] explained, without beating about the bush, that the government was waiting for one thing: for me to leave. [T]he judge added that I had to be wary of all Cambodian magistrates: they either lived in fear of the political establishment or they were closely connected with it, but either way, not one of them was reliable or independent.”¹⁵

Because the request was made only a short time before the ECCC Internal Rules three-month mandatory deadline for the consideration of immediate appeals and without sufficient time for party responses, the SCC found it to be moot, “without prejudice” to the Team’s right to submit a new application based on this information.¹⁶

¹² SCC Decision on Immediate Appeal, ¶ 24, *supra* note 1.

¹³ Decision on Application for Immediate Action Pursuant to Rule 35, ¶ 16 (TC, Nov. 22, 2012).

¹⁴ SCC Decision on Immediate Appeal, ¶ 27, *supra* note 1.

¹⁵ Cited in Request to Consider Additional Evidence ¶ 5, *supra* note 8 (translating from the original French).

¹⁶ SCC Decision on Immediate Appeal, ¶ 11, *supra* note 1.