E176/2/1/4

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

**អង្គជំនុំជម្រះតុលាការកំពូល**
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១៥)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(15)

**Before:** **Judge KONG Srim, President**
**Judge Chandra Nihal JAYASINGHE**
**Judge SOM Sereyvuth**
**Judge Agnieszka KLONOWIECKA-MILART**
**Judge MONG Monichariya**
**Judge Florence Ndepele MUMBA**
**Judge YA Narin**

**Date:** **14 September 2012**
**Language(s):** **English/Khmer**
**Classification:** **PUBLIC**

# DECISION ON NUON CHEA'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON RULE 35 APPLICATIONS FOR SUMMARY ACTION

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**THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of an immediate appeal filed on 11 June 2012 ("Appeal") by the Co-Lawyers for the Accused NUON Chea ("the Defence")[1] against the Trial Chamber's "Decision on Rule 35 Applications for Summary Action" of 11 May 2012 ("Impugned Decision").[2]

## I. PROCEDURAL HISTORY

1. On 10 January 2012, the Defence orally requested the Trial Chamber, first, to officially condemn statements attributed in the press to Prime Minister Hun Sen and second, to ask him to refrain from similar remarks in the future ("First Oral Application").[3] These statements characterised Nuon Chea as a "killer" and "perpetrator of genocide". Recalling the presumption of innocence guaranteed in the Constitution of the Kingdom of Cambodia ("Constitution"), the Trial Chamber orally confirmed in its "decision"[4] of 2 February 2012 that it would not consider any public comment on the guilt of the accused in reaching its final verdict ("Oral Decision").[5]

2. During trial proceedings on 8 February 2012, the Defence attempted[6] to argue that the Oral Decision was not an actual decision on the First Oral Application.[7] The President of the Trial Chamber stated that the matter had already been addressed. In refusing further submissions,[8] the President observed that the Defence was at liberty to appeal the Oral Decision should it be unsatisfied with the ruling.[9] The Defence lamented that the Oral Decision could only be challenged on final appeal against the judgment[10] which the Trial Chamber did not deny.[11]

3. On 22 February 2012, the Defence filed a written motion before the Trial Chamber explicitly referring to Rule 35 and based on the same factual circumstances originally giving rise to the Oral Application ("Written Application").[12] The Defence requested the Trial Chamber to recognise the violation of the Accused's right to be presumed innocent until proven guilty. By way

[1] Immediate Appeal against Trial Chamber Decision on Rule 35 Request for Summary Action against Hun Sen, 11 June 2012, E176/2/1/1.
[2] Decision on Rule 35 Applications for Summary Action, Trial Chamber, 11 May 2012, E176/2.
[3] T. (EN), 10 January 2012, E1/24.1, pp. 1-3.
[4] The Trial Chamber referred to this as its "decision". T. (EN), 2 February 2012, E1/38.1, p. 113.
[5] T. (EN), 2 February 2012, E1/38.1, p. 113.
[6] T. (EN), 8 February 2012, E1/40.1, p. 4 (lines 9-13), p. 5 (lines 22-24), p. 7 (lines 2-7, 19-22).
[7] T. (EN), 8 February 2012, E1/40.1, p. 5 (lines 11-13), p. 7 (lines 5-6).
[8] T. (EN), 8 February 2012, E1/40.1, p. 4 (lines 22-24), p. 5 (line 15), p. 6 (lines 1-2).
[9] T. (EN), 8 February 2012, E1/40.1, p. 4 (lines 16-24), p. 5 (lines 15-19).
[10] T. (EN), 8 February 2012, E1/40.1, p. 5 (lines 7-10).
[11] T. (EN), 8 February 2012, E1/40.1, p. 5 (lines 15-19).
[12] Application for Summary Action against Hun Sen Pursuant to Rule 35, 22 February 2012, E176.

of sanction, the Defence requested the Trial Chamber to publicly condemn Prime Minister Hun Sen's remarks and to issue a warning against further statements of a similar nature.[13]

4. The Trial Chamber delivered the Impugned Decision on 11 May 2012 "with a view to [sic] clarifying its oral decision of 2 February 2011 [sic] elaborat[ing] on the reasons for its original ruling".[14] In the same decision, the Trial Chamber also disposed of an additional Rule 35 request[15] advanced by the Defence during trial proceedings on 12 March 2012 and based on distinct but related facts ("Second Oral Application").[16]

5. On 11 June 2012, the Defence filed the Appeal against the Impugned Decision. On 25 June 2012, the Co-Prosecutors filed their Response[17] which was notified on 26 June 2012. The Defence did not reply to the Response. Given that the case file was received from the Trial Chamber on 14 June 2012, the deadline for the Supreme Court Chamber's decision (or summary of the reasons) falls on 14 September 2012.[18]

## II. FACTUAL BACKGROUND

6. The Written Application, which largely mirrors the First Oral Application, concerns statements reported by the Vietnamese press on 5 January 2012. These statements, attributed to Prime Minister Hun Sen, were made in Vietnam at the inauguration of a monument celebrating the establishment of Unit 125, a group of combatants involved in the early resistance movement against the Pol Pot regime. The interview focused upon the relationship between Vietnam and Cambodia and, in particular, whether the Vietnamese forces were to be seen as invaders or liberators in the events surrounding the defeat of the Khmer Rouge.[19] The Defence's allegations of interference with the administration of justice are based on the following remarks by Prime Minister Hun Sen:

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[13] Written Application, paras. 1-2, 22-24.
[14] Impugned Decision, para. 23.
[15] Impugned Decision, para. 32.
[16] T. (EN), 12 March 2012, E1/46.1, pp. 80-81.
[17] Co-Prosecutors' Response to NUON Chea's Immediate Appeal Concerning "Rule 35 Applications for Summary Action", 25 June 2012, E176/2/1/2 ("Response").
[18] Rules 108(4)(*bis*)(a) and 108(2) (Rev.8); *see* Decision on NUON Chea's Request to Accept Late Filing Pursuant to Rule 39(4), 2 May 2012, Doc. No. 3, p. 4; Decision on Ieng Sary's Appeal against the Trial Chamber's Decision on Its Senior Legal Officer's Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 2; 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, fn. 7.
[19] Chum Sopha, "Vietnam helps revitalize Cambodia: Hun Sen", *TuoiTreNews*, 5 January 2012, <http://tuoitrenews.vn/cmlink/tuoitrenews/politics/vietnam-helps-revitalize-cambodia-hun-sen-1.57467>; Minh Nam, Tan Tu and An Dien, "Vietnam did not invade, but revived Cambodia: Hun Sen", *Thanh Nien Daily*, 5 January 2012, <http://www.thanhniennews.com/index/pages/20120105-vietnam-did-not-invade--but-revived-cambodia--hun-sen.aspx>.

> **Quan Doi Nhan Dan Newspaper**: Recently at the court trial of the Khmer Rouge, Nuon Chea said something that went against history, made false accusations against Vietnamese volunteer forces. What is your opinion?
>
> **Prime Minister**: I have heard of the statement of Nuon Chea, a person of important position in the Pol Pot regime who has been tried in the past weeks. He did not admit to his wrongdoings but gave lies about the Vietnamese volunteer forces. I consider those statements lies from a murderer.
>
> There are always excuses the bad guys resort to so as to dodge their wrongdoings. He said so to lessen his sin so we should not respond but let the court judge. The reality happened in contrary to what Nuon Chea said. The truth is that Vietnamese volunteer forces helped free the Cambodian people from the genocidal Pol Pot regime.
>
> **VnExpress**: You once showed anger when someone said that Vietnamese volunteer forces invaded Cambodia. Why was that?
>
> **Prime Minister**: I have reacted strongly to that kind of statement because the activities of the Vietnamese volunteer forces in Cambodia stem from the request of the Cambodian people. Which countries in the world have helped Cambodian people, especially in freeing them from the genocidal Pol Pot regime and prevent their comeback? The answer is the people and military of Vietnam.[20]

7. Based upon these remarks, the Defence made its First Oral Application. Following the First Oral Application and the Oral Decision, the Prime Minister reportedly "urged government lawyers to respond to charges made by one of the lawyers defending Nuon Chea".[21] It was also reported that:

> [...] Hun Sen asserted at a flood forum Friday that his comments while visiting Vietnam had no influence over the trial. "I want to make a public announcement about Brother Number Two Nuon Chea's lawyer who wants to sue me", he said, calling for a response from Cabinet Minister Sok An.
>
> "I was asked in Vietnam about Pol Pot's crimes in the Khmer Rouge regime, but Nuon Chea's lawyer accuses me of interfering in the Khmer Rouge trial. My speeches over Pol Pot, Nuon Chea, Khieu Samphan and Ieng Sary didn't influence the current court. The court can do whatever it wants but I had the right to condemn Khmer Rouge leaders."[22]

These statements underlie the Second Oral Application.

## III. THE IMPUGNED DECISION

8. The President of the Trial Chamber pronounced the Oral Decision on 2 February 2012:

> This is the Trial Chambers decisions [sic] on the objection raised by the international defence counsel of Nuon Chea in regards to the public comments on the existence of

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[20] Chum Sopha, "Vietnam helps revitalize Cambodia: Hun Sen", *TuoiTreNews*, 5 January 2012, <http://tuoitrenews.vn/cmlink/tuoitrenews/politics/vietnam-helps-revitalize-cambodia-hun-sen-1.57467>.
[21] "Hun Sen calls for government response to accusations by Nuon Chea's lawyer", *The Cambodia Herald*, 18 February 2012,<http://www.thecambodiaherald.com/cambodia/detail/1?page=11&token=MWJlMWYxM2E4MzEyODVlMTI[illegible]NzYzYTRmMWQ2ZWFj>.
[22] *Ibid.*

> guilt of his client. The Chamber has noted the objection by defence counsel that public comments have been made via media indicating his client, Nuon Chea, is guilty of offences for which he's currently being tried.
>
> The Chamber emphasizes that Article 38 of the Constitution of the Kingdom of Cambodia, which states [sic]: "The accused shall be considered innocent until the court has judged finally on the case." Thus, the determination of guilt or innocence is the sole responsibility of the Trial Chamber, which will consider all relevant facts, evidence, submissions, and law applicable at the ECCC. Therefore, the Court will not take account of any public comment concerning the guilt or innocence of any Accused in reaching its verdict.[23]

9. As mentioned above, the Impugned Decision "elaborated" upon the reasoning of the Oral Decision, set out the applicable law concerning the presumption of innocence, and detailed the ECCC legal framework concerning interferences with the administration of justice. The Trial Chamber observed that the right for an accused to be presumed innocent until proven guilty is a fundamental principle of criminal procedure guaranteed under the Constitution and enshrined in a number of international human rights treaties.[24] Relying on international human rights jurisprudence, especially the case-law of the European Court of Human Rights ("ECtHR"), the Trial Chamber held that "any declaration of an accused person's guilt by a public official prior to a verdict being delivered by a court is incompatible with the presumption of innocence".[25]

10. With respect to the applicable ECCC legal framework, the Trial Chamber recalled the discretionary nature of the Court's power to deal with instances of interference under Rule 35.[26] The Chamber also noted that, while a minimal "reason to believe standard" is required for the matter to be considered, an allegation of criminal liability demands a higher threshold to be satisfied in order to trigger judicial intervention.[27] The reasonable belief threshold under Rule 35(2) is satisfied where there is a material basis showing that the allegation is not merely speculative, therefore "giv[ing] rise merely to further inquiry."[28] It does not trigger a duty to proceed with a detailed examination of, or a criminal inquiry on, the alleged facts.[29] Where criminal culpability is alleged under Rule 35(1), the Trial Chamber recalled that Rule 87(1) and relevant international jurisprudence require that (i) specific intent to interfere with justice must be established[30] and (ii)

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[23] T. (EN), 2 February 2012, E1/38.1, p. 113 (lines 5-22).
[24] Impugned Decision, para. 16.
[25] Impugned Decision, para. 18.
[26] Impugned Decision, para. 20.
[27] Impugned Decision, paras. 20, 22, 28.
[28] Impugned Decision, para. 20.
[29] Impugned Decision, paras. 20, 30.
[30] Impugned Decision, para. 22 (in which the Trial Chamber concurred with the interpretation of the *mens rea* relating to contempt of court given by trial chambers of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in two cases).

criminal sanctions may only follow from an assessment that the crime was committed beyond reasonable doubt.[31]

11. The Trial Chamber found that the Prime Minister's remarks concerning the culpability of Nuon Chea, if accurately reported, were incompatible with the Accused's right to be presumed innocent until proven guilty.[32] Nevertheless, it was reiterated that these alleged remarks – as well as any public comments on the guilt or innocence of an accused – would not influence the judges of the bench, who are legally qualified and presumed able to act independently.[33]

12. The Trial Chamber affirmed that improperly influencing judges, or "acting in a way that could be perceived as an attempt to do so", falls within the scope of Rule 35.[34] The Chamber determined that that the reported comments, regardless of the intent with which they were uttered, satisfied the lower reasonable belief standard for intervention under Rule 35(2).[35] Whereas the Trial Chamber declined to initiate a criminal inquiry on the ground that the evidence put forth by the Defence was insufficient, it ostensibly decided to deal with the matter summarily pursuant to Rule 35(2)(a).[36] Hence, the Trial Chamber "reaffirmed for the benefit of all actors the principles of the independence of the judiciary and the presumption of innocence" and "issued an unambiguous public reminder of the right of the Accused to be presumed innocent and of the need for officials to avoid comments incompatible with this presumption".[37]

13. The Written Application, characterised as "a repetitious filing or a disguised appeal", was ruled inadmissible.[38] As for the Second Oral Request, the Trial Chamber rejected it on the merits for lack of evidence and failure to meet the reasonable belief burden of proof.[39]

## IV. SUBMISSIONS

### a. The Accused's Appeal

14. The Defence submits, as a general matter, that the Impugned Decision failed to clearly delineate the Chamber's duty to conduct an investigation pursuant to Rule 35(2).[40] Whilst the Trial

[31] *See* Impugned Decision, para. 30 (making reference to the principles included under Rule 87(1) and the relevant international jurisprudence).
[32] Impugned Decision, para. 26.
[33] Impugned Decision, para. 27.
[34] Impugned Decision, paras. 20-21.
[35] Impugned Decision, paras. 29-30
[36] Impugned Decision, paras. 30-31.
[37] Impugned Decision, paras. 30-31.
[38] Impugned Decision, para. 23.
[39] Impugned Decision, para. 32.

Chamber held, without further explanation, that the reasonable belief that interference with justice may have occurred "gives rise merely to further inquiry", it refused to conduct an investigation on the Defence's allegations.[41] The Defence is unsatisfied that, absent an investigation, the Trial Chamber limited its action to a general reminder deemed to be "at best, an unsustainable platitude".[42] Additionally, the Defence maintains that the Impugned Decision unnecessarily focused on issues of criminal liability and its requisite level of proof although this was not the subject of the Written Application.[43] The Written Application was confined, rather, to alleging a human-rights violation and establishing the lower *prima facie* threshold in order to trigger further inquiry under Rule 35.[44]

15. Under its first ground of appeal, the Defence submits that the Trial Chamber committed an error of law invalidating the decision by failing to provide an appropriate remedy after finding that the Accused's rights were violated.[45] The second ground of appeal alleges a discernible error in the exercise of the Trial Chamber's discretion.[46] In this respect, the Defence contends that the public reminder issued by the Trial Chamber is an "extremely limited action",[47] hence insufficient to deter future violations.[48] The Defence argues that the Trial Chamber should have, instead, directly condemned the Prime Minister, warned him against further statements of a similar nature and conducted an inquiry to reveal his intent.[49] As a third ground of appeal, the Defence submits that the Impugned Decision erred in declaring the Written Application inadmissible.[50] In this respect, it concedes nevertheless that "such error was a harmless one in so far as the Trial Chamber actually addressed the merits of the *entire* [Written Application]".[51]

16. Consequently, the Defence requests the Supreme Court Chamber to admit the Appeal, hold a public hearing, invalidate the Impugned Decision, and exercise its discretion to grant an appropriate remedy and take action pursuant to Rule 35.[52]

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[40] Appeal, paras. 5-6.
[41] Appeal, paras. 5-6.
[42] Appeal, para. 6.
[43] Appeal, para. 7.
[44] Appeal, para. 7.
[45] Appeal, para. 13.
[46] Appeal, para. 14.
[47] Appeal, para. 14.
[48] Appeal, para. 17.
[49] Appeal, paras. 14-18.
[50] Appeal, para. 19.
[51] Appeal, para. 19.
[52] Appeal, paras. 20-21.

b. The Co-Prosecutors' Response

17. The Co-Prosecutors argue that, first, the Appeal, insofar as it addresses matters raised in the Written Application, is inadmissible, in part, as untimely filed.[53] Given that the Oral Decision definitively, albeit summarily, disposed of the First Oral Application, and the Written Application is substantially identical to the First Oral Application, the Co-Prosecutors contend that the 30-day time limit to lodge an immediate appeal pursuant to Rule 107(1) started running on 2 February 2012, that is, the date of issuance of the Oral Decision.[54] Therefore, according to the Co-Prosecutors, the Defence ought to have lodged the Appeal by 2 March 2012, sought an extension of time, or sought an exception for the late filing.[55] Having failed to do so, despite the President of the Trial Chamber's statement that the Oral Decision was open to appeal, the Co-Prosecutors submit that the Defence did not comply with relevant provisions on time limits.

18. In the alternative, the Co-Prosecutors maintain that the entirety of the Appeal should be rejected because it fails to satisfy the applicable standard of appellate review.[56] First, the Impugned Decision is consistent with Rule 35(2) and the jurisprudence of human rights' courts in considering a declaratory remedy alone sufficient redress for the established violation of the presumption of innocence.[57] Thus, the Trial Chamber did not commit an error of law invalidating the decision.[58] Second, the Co-Prosecutors submit that the Defence fails to establish an error of law with respect to the Trial Chamber's declaration of the Written Application inadmissible as a repetitious filing because the factual record clearly reveals the dispositive nature of the Oral Decision.[59] Even if the Trial Chamber erred in law in this respect, such error does not invalidate the decision because, as the Defence concedes, it was harmless error in light of the Trial Chamber's decision to nevertheless address the Written Request on the merits and issue a more fully reasoned decision.[60] Third, the Impugned Decision does not demonstrate a discernible error in the exercise of the Trial Chamber's discretion such as to make it "so unreasonable or plainly unjust", given that courts of first instance are entrusted with a broad margin of discretion in fashioning appropriate measures to safeguard

[53] Response, paras. 7-12.
[54] Response, paras. 4, 7, 10.
[55] Response, paras. 8, 11.
[56] Response, paras. 30, 36.
[57] Response, paras. 23-28.
[58] Response, para. 28.
[59] Response, para. 29.
[60] Response, para. 29.

their independence and integrity.[61] For these reasons, the Co-Prosecutors conclude that the Appeal, including the request for a public hearing contained therein,[62] should be dismissed.

## V. STANDARD OF REVIEW

19. Pursuant to 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.

20. As this Chamber previously 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 or her rights.[63]

## VI. DISCUSSION

### a. Admissibility

#### *i. The Trial Chamber's treatment of the First Oral Application*

21. Concerning the Appeal's admissibility, the procedural history preceding the Impugned Decision is particularly instructive. Before the Oral Decision was issued, and then again until the issuance of the Impugned Decision, the Defence repeatedly raised the matter underlying the First Oral Application.[64] The Trial Chamber later considered this behaviour, in conjunction with other allegations, to constitute evidence of a "consistent pattern of professional misconduct" and referred this misconduct to the competent Bar Associations.[65] Upon review of the relevant Khmer and English transcripts, however, the Supreme Court Chamber is of the view that this persistence was justified given the Trial Chamber's lack of clarity relating to the Defence's applications.

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[61] Response, paras. 31-36.
[62] Response, paras. 6, 37.
[63] Decision on Immediate Appeal by Khieu Samphan on Application for Release, Supreme Court Chamber, 6 June 2011, E50/3/1/4, para. 20.
[64] *See infra*.
[65] Professional Misconduct of Lawyer(s) Admitted to your Bar Association, 29 June 2012, E214/1, pp. 1-10, Section 6.2.

22. Indeed, on 10 January, following the First Oral Application, the Trial Chamber provided no comment or acknowledgement and merely proceeded with the next scheduled item.[66] On 19 January, the Defence sought to follow-up on the First Oral Application.[67] In response, the President affirmed that the Chamber "ha[d] noted the remarks made by the defence counsel", "prefer[red] not to make any comment to react to what [counsel] ha[d] stated", and "remind[ed]" the Defence that it was not allowed to raise this same matter again.[68] On 23 January, the Defence attempted once more to obtain an unambiguous indication as to the treatment, if any, that the First Oral Application would receive. In particular, the Defence queried whether there would be a decision thereupon.[69] In response, the Trial Chamber stated that "[t]he matter will be taken into consideration in due course", while emphasising yet again that counsel should refrain from raising the matter any further.[70]

23. The Supreme Court Chamber accepts that, by "noting" the First Oral Application on 19 January and assuring the Defence on 23 January that "the matter will be taken into consideration in due course," the President of the Trial Chamber possibly implied that the Chamber would revert to this issue at some point. However, assuming the procedural history as recounted is accurate and complete, the First Oral Application was handled ambiguously. The Chamber's pronouncements were neither definite nor specific and did not elucidate the intended course of action. Interpreted in light of the Trial Chamber's repeated reprimands of the Defence, reiterated instructions to not raise the matter again, and the potentially sensitive nature of the issue, these ambiguous pronouncements could have reasonably been interpreted as a sign that the Chamber had set the matter aside. It follows that the Defence's efforts to clarify the status of the First Oral Application do not appear to be reprehensible.[71]

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[66] T. (EN), 10 January 2012, E1/24.1, p. 3; *see also* T. (EN), 10 January 2012, E1/24.1, p. 7 (indicating that the same conduct followed the Co-Prosecutors' statement made in response to the First Oral Application).
[67] T. (EN), 19 January 2012, E1/30.1, pp. 112-113.
[68] T. (EN), 19 January 2012, E1/30.1, p. 113 (lines 8-12).
[69] T. (EN), 23 January 2012, E1/31.1, pp. 1-2.
[70] T. (EN), 23 January 2012, E1/31.1, pp. 2-3.
[71] The Supreme Court Chamber notes moreover that compared to instances in the ICTY and ICTR in which defence counsel have been warned or disciplined for repetitive requests, the Defence's requests for clarification in the present case are not nearly as burdensome in terms of time or number of requests. The sanctions and warnings from the Trial Chamber in the ICTY and ICTR cases have followed the filing of repeated written motions by the defence on issues addressed by the Trial Chamber in prior written decisions. *See, e.g. Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision on Motion for Reconsideration of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlić's Defence", Trial Chamber, 1 February 2010, pp. 4-5 (finding abuse of process by defence counsel for occupying the Trial Chamber with the question of the admissibility of video recordings for more than a year and causing the Trial Chamber to issue a total of eight decisions on the same matter); *Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision on Prlić Defense Request for Certification to Appeal", Trial Chamber, 7 December 2009, pp. 2-3 (cautioning defence counsel that sanctions would be issued for "excessive persistence" on a matter in which the Trial Chamber had issued five prior written decisions); *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T & ICTR-98-42-T, "Decision on Nyiramasuhuko's Motion for

*ii. The legal nature of the Oral Decision and Written Application*

24. The Defence was unsatisfied with the Oral Decision, claiming that it was "in fact not a decision to [their] request".[72] For this reason, the Defence lodged the Written Application, apparently convinced that the Oral Decision was not open to immediate appeal.[73] The Trial Chamber, finding that the Written Application "merely expanded" on earlier oral requests already addressed by the Oral Decision, declared it inadmissible in the Impugned Decision as "a repetitious filing or a disguised appeal".[74] The Co-Prosecutors therefore maintain that the Appeal against this decision as it relates to the issues raised in the Written Application should be dismissed as belated[75] because the time limit for filing the Appeal started running upon issuance of the Oral Decision, of which the Impugned Decision simply represents an "elaboration".[76]

25. The Supreme Court Chamber observes that, in the first place, a court's decision must display *indicia* of an authoritative judicial act. In this respect, it is necessary for a judicial decision to dispose of a legal matter before it in a definite manner.[77] As such, a judicial decision should contain an operative part ("enacting clause" or "disposition") which resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties. Moreover, it is established ECCC practice for decisions open to appeal to be released in written form. This practice, although not required by law, serves legal certainty and transparency of proceedings as required by Rule 21 and enables an effective review process.[78] Further, as held by

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Separate Proceedings, a New Trial, and Stay of Proceedings Rules 82(B) and 72(D), Rules of Procedure and Evidence", Trial Chamber, 7 April 2006, paras. 81-84 (sanctioning the defence for raising in a motion of February 2006 allegations of prejudice which the defence had previously raised and the Trial Chamber had previously addressed in writing in 2000 and again in 2004. Furthermore, in 2004 the Chamber explicitly warned the defence that re-litigation of the issues resolved in 2000 was an "attempt to obstruct proceedings"). The present case is thus distinguishable because the Defence's oral requests do not amount to a re-litigation of the prejudice issue given that the Trial Chamber failed to address the matter in a clear and definite manner during the hearing and because of a far lesser intensity of the repetitive requests.

[72] T. (EN), 8 February 2012, E1/40.1, p. 5 (lines 12-13).

[73] T. (EN), 8 February 2012, E1/40.1, p. 5 (lines 7-10).

[74] Impugned Decision, para. 23.

[75] Response, paras. 7-12.

[76] Impugned Decision, para. 23, Section 5.2.

[77] On the necessary clarity of judicial acts, *see* Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, "Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties", Pre-Trial Chamber, 27 April 2010, D250/3/2/1/5, para. 13 ("A fair hearing or determination of a matter will involved [sic] not only a right to know the case one has to answer and a right to be heard, but also a right to procedural fairness. Procedural fairness in this regard will include a transparent and authorised procedure where the rights and obligations are properly provided, expressed and applied. In this way there is certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner"); *see also* Appeal Judgement, F28, 3 February 2012, paras. 492-493, 501(implicitly asserting the court's obligation to remedy a procedurally confusing situation as a matter of fairness).

[78] Under the ECCC legal framework the lack of the written form for the decision other than the judgment does not result in nullity. The complexity of issues handled by the ECCC has meant, nonetheless, that there has been little oral

the Trial Chamber on a different occasion, all judicial decisions – whether oral or written – must comply with a court's obligation to provide adequate reasons as a corollary of the accused's fundamental fair trial rights.[79] Indeed, the right to receive a reasoned decision forms part of the right to be heard.[80] In conclusion, the fact that a court rendered a decision should be unambiguously borne out of both the form and the content of the act, rather than derived from "the most reasonable construction of the trial record" as to its implicit import, as advanced by the Co-Prosecutors.[81] The Supreme Court Chamber finds that the Trial Chamber's responses to the Defence's applications, including the Oral Decision, were not consistent with this established practice and these underlying principles and may have been confusing as to their legal nature and consequences.

26. Pursuant to Rule 35, the body seised of a request must examine the allegations; assess whether there is, at a minimum, reason to believe that any of the acts encompassed by Rule 35(1) may have been committed; and decide the appropriate action, if any, to be taken pursuant to Rule 35(2). The Supreme Court Chamber notes that the First Oral Application was not explicitly characterised as a request pursuant to Rule 35. For that matter, the Oral Decision also failed to mention the legal basis upon which it was made. Most importantly, though, the Oral Decision did not explain whether the Defence's allegations fell within Rule 35(1), which standard of proof was employed and, ultimately, whether the First Oral Application was granted or denied. Accordingly, the Oral Decision does not appear to be a judicial act disposing of a substantive or procedural issue within the Trial Chamber's cognisance. Rather, the Oral Decision is a non-authoritative declaration, devoid of reasoning. Based on the available records, it is not readily apparent to the Supreme Court

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litigation not accompanied by filing of written briefs. Before the instant case no decision open to appeal had ever been issued exclusively in an oral form. At the ICTY and ICTR, deciding in an oral form is specifically authorised under the RPE. *See* ICTY RPE, Rule 77(K) (contempt decisions may be rendered orally); ICTY RPE, Rule 15*bis*(D),(F) (decisions regarding whether or not to proceed with a substitute judge absent consent from the accused may be rendered orally); ICTY RPE, Rule 54*bis*(C)(ii) (decisions regarding the denial of motions *in limine* and decisions regarding the issuance of a document production order without giving the State notice or an opportunity to be heard may be rendered orally); ICTR RPE, Rule 65(D) (decisions regarding provisional release may be rendered orally). *See*, on the requirements of form, Decision on Admissibility on Appeal against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation, 13 July 2009, D138/1/8, paras. 39, 44 (asserting that a letter from the Co-Investigating Judges does not constitute an order in the meaning of the Rules and Practice Direction on Filing of Documents).

[79] Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, Trial Chamber, 16 February 2011, E50, paras. 23-27 and jurisprudence cited therein.

[80] Stefan Treschel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 104 ("The equality of arms and adversarial character of the proceedings both serve to enable a party to express its views as to fact and law, and to present those arguments which it believes necessary to convince the decision-making body to decide in its favour. This requirement, however, cannot guarantee the attention of the decision-making body. It is of course not possible to verify directly whether somebody has actually listened to or understood what has been said, or whether a document has been given the necessary attention. [...] [T]he effect of Article 6 para.1 is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties").

[81] Response, para. 10.

Chamber whether, prior to the filing of the Written Application, the legal framework provided in Rule 35 was considered with respect to the Prime Minister's speech. Notably, the Trial Chamber was silent in the face of the Defence's statement that the Oral Decision was not subject to immediate appeal, fostering uncertainty as to the Oral Decision's legal characterisation. Therefore, even if the Trial Chamber intended to act pursuant to Rule 35 when announcing its Oral Decision, such intention did not manifest itself as a matter of course.

27. In addition to departure from the written form, the Supreme Court Chamber finds that the Oral Decision, considered alone, did not entirely comport with the Accused's right to a reasoned decision. Only when taken in conjunction with the Impugned Decision can it be considered complete. Consequently, the Impugned Decision remedied this breach and, as conceded by the Defence,[82] no prejudice was suffered by the Accused concerning access to a reasoned decision. Still, the unannounced and seemingly unjustified separation of the decision-making process into two phases could potentially confuse the parties.

28. The Supreme Court Chamber further finds that the Written Application should not have been considered inadmissible in the Impugned Decision. Regardless of its repetitive nature, the Written Application was occasioned by the Trial Chamber's prior ambiguity concerning the First Oral Application. The Trial Chamber also failed to substantiate its qualification of the Written Application as a "disguised appeal".[83] In the event the Trial Chamber had reason to so believe, then the Written Application warranted treatment as such: the Trial Chamber should have forwarded the Written Application to the Supreme Court Chamber for consideration. Finally, the Supreme Court Chamber observes that the Impugned Decision is not a mere "elaboration" of the Oral Decision, but also includes new findings not contained in the latter.[84]

29. In conclusion, the Supreme Court finds that the Defence's third ground correctly identifies an error of law in the Impugned Decision in so far as it found the Written Application inadmissible on *res judicata* grounds whereas the decision-making process was not complete. This error invalidates the decision as it unduly bars the Defence's access to the appellate process.

30. Only a reasoned decision renders an accused's right of appeal meaningful. Given that the only properly reasoned decision on the First Oral Application was the Impugned Decision, the

[82] Appeal, para. 19.
[83] Impugned Decision, para. 23.
[84] *See e.g.* Impugned Decision, para. 31 wherein the Trial Chamber inaccurately stated that it issued, presumably through the Oral Decision, "an unambiguous public reminder of [...] the need for officials to avoid comments incompatible with this presumption". This Chamber is unable to find in or imply from the Oral Decision any such reminder.

Supreme Court Chamber finds that the time limit for lodging an appeal started to run from the date of the Impugned Decision. The Co-Prosecutors' argument that the Appeal was filed out of time is accordingly without merit. The Supreme Court Chamber therefore concludes that the Appeal is admissible under Rules 35(6) and 104(4)(d) as timely filed.

b. Scope and Applicability of Rule 35

31. Given the ambiguity which accompanied the issuance of the Impugned Decision, this Chamber must first address the *prima facie* scope and applicability of Rule 35 before disposing of the merits of the Appeal. Rule 35 provides in relevant part:

> **Rule 35. Interference with the Administration of Justice**
> (Amended on 6 March 2009)
> 1. The ECCC may sanction or r*efer to the* appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:
>
> a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
>
> b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers;
>
> c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;
>
> d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;
>
> e) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or the Chambers;
>
> f) knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC; or
>
> g) incites or attempts to commit any of the acts set out above.
>
> 2. When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may:
>
> a) deal with the matter summarily;
>
> b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or
>
> c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.

[. . .]

4. Cambodian Law shall apply in respect of sanctions imposed on a person found to have committed any act set out in sub-rule 1.

32. At the outset, we note that conduct falling within the scope of Rule 35(1) may, but need not, amount to a criminal act.[85] Further, unlike in international tribunals which operate outside the institutional framework of a state and have to construe their authority to punish contempt of court based on inherent powers,[86] in the hybrid and civil law context of the ECCC, Rule 35 is not an autonomous source of criminalization. Nor does Rule 35 usurp the authority to primarily define

[85] The Impugned Decision, at fn. 28, contains a rather confusing statement: "proceedings under Rule 35 are criminal in nature, and subject therefore to the ordinary principles of criminal liability". The meaning of this sentence is unclear, even in context. To the extent, however, it might be understood that Rule 35 defines crimes or grants the judges the power to define crimes, it would be incorrect.

[86] Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of Judicial Investigation, Supreme Court Chamber, 27 April 2012, E116/1/7, para. 30, fn. 65 referring to the Report of the Committee on Contempt of Court, UK Cmnd. 5794 (1974), (the "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. Tadić*, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin", Appeals Chamber, 31 January 2000 ("Vujin Contempt Judgment"), 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. *See also Prosecutor v. Beqaj*, IT-03-66-T-R77, "Judgement on Contempt Allegations", Trial Chamber, 27 May 2005, paras. 9, 13; *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 Vujin Contempt Judgment, para. 13); *Prosecutor v. Milošević*, IT-02-54-A-R77.4, "Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings", Appeals Chamber, 29 August 2005, para. 21; *Prosecutor v. Blagojević*, IT-02-60-T, "Decision on Independent Counsel for Vidoje Blagojević'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 the proper administration of justice, by considering 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; *New Zealand v. France* (Nuclear Tests Case), 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. Blaškić*, 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); *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, "Decision", 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"); *United States v. Hasting*, United States Supreme Court (1983), 461 U.S. 499, 505-06; *Mesarosh v. United States*, United States Supreme Court (1956), 352 U.S. 1, 14 (wherein the U.S. Supreme Court confirmed its supervisory jurisdiction over the proceedings of the federal courts "to see that the waters of justice are not polluted"); *McNabb v. United States*, United States Supreme Court (1943), 318 U.S. 332, 340-41, 347 (in which the U.S. Supreme Court affirmed "its supervisory authority over the administration of criminal justice" which "implies the duty of establishing and maintaining civilized standards of procedure and evidence", given its function as "the court of ultimate review").

criminal conduct on an *ad hoc* basis when seised of an issue of interference with the administration of justice. Therefore, whilst Rule 35 resembles the provisions dealing with contempt of court punishable at other international criminal tribunals in terms of the proscribed conduct,[87] it is substantively distinct and does not constitute a *sui generis* basis for penal responsibility and sanction.[88] Indeed, Rule 35(4) explicitly foresees the application of Cambodian law with respect to sanctioning acts set out in sub-Rule 35(1). Accordingly, where certain acts outlined under Rule 35 rise to the level of criminal behaviour, the applicable law with respect to proscribed acts and persons liable is Cambodian law.[89] It follows that Cambodian criminal law remains controlling for issues such as modes of responsibility and elements of a crime.

33. Based on these observations, the Supreme Court Chamber must determine the normative import of Rule 35(1). As previously noted at the ECCC,[90] this sub-rule articulates, by way of illustration, an array of conduct which may qualify as an interference with the administration of justice. It does not purport to define proscribed conduct exhaustively, nor is it limited in scope by

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[87] *See e.g.*, ICTY/R RPE, Rule 77(A)-(B).

[88] Even inherent powers to counter interferences with the administration of justice at the ICTY are not universally accepted. Commentators have critically noted that the ICTY's reliance on the doctrine of inherent powers, rather than the Rules of Procedure and Evidence, or what can be implied from them, has expanded the contempt power of the tribunal in violation of the principle of *nullum crimen sine lege*. *See* Michael Bohlander, "International Criminal Tribunals and Their Power to Punish Contempt and False Testimony", *Criminal Law Forum*, Vol. 12 (2001), pp. 111, 117 (finding that other than the ICTY and to some degree, the ICTR, "no other court or tribunal makes reference to such sweeping contempt provisions based on an inherent power principle" and arguing that the ICTY like other international tribunals only have implied and not inherent powers because they are creatures of their statutes and the Rules of Procedure and Evidence. Bohlander concludes that "the *de facto* creation of criminal offenses under the Rules of Procedure and Evidence may be *ultra vires* with regard to the question whether they are necessary under the implied powers doctrine"); Göran Sluiter, "The ICTY and Offences Against the Administration of Justice", *Journal of International Criminal Justice*, Vol. 2 (2004), p. 635 (arguing that from a perspective of legal certainty, the ICTY's expansion of its contempt power to apply to forms of contempt not within the ambit of the applicable version of Rule 77 at the time of commission via an inherent powers doctrine is "not very satisfactory" given that "contrary to the core crimes, [there is] no evidence as to the existence and content of procedural offences under international law, for example in the form of a treaty"). Lack of wide acceptance of the criminal contempt powers of the *ad hoc* Tribunals may be demonstrated by the contempt case against Florence Hartmann before the ICTY. In this regard, the French Ministry of Foreign Affairs refused to comply with an ICTY arrest mandate for journalist Florence Hartmann for contempt of court because contempt is not a core crime. The Ministry spokesperson stated that: "Le ministère de la justice, saisi de la demande, a en l'espèce constaté que les textes qui organisent la coopération entre le Tribunal pénal international pour l'ex-Yougoslavie et la France ne s'appliquent qu'aux crimes graves que ce tribunal a pour mission de juger. L'outrage à la cour pour lequel Mme Hartmann a été condamnée ne faisant pas partie de ces crimes, la France ne dispose d'aucun fondement juridique pour asseoir une éventuelle cooperation", French Foreign Ministry Website, 26 December 2011, <http://www.diplomatie.gouv.fr/fr /enjeux-internationaux/justice-internationale/droit-penal-international/tpi-yougoslavie/actualites-19222/article/tpiy-condamnation-de-florence>.

[89] *See e.g.*, 2009 Criminal Code of Cambodia, Art. 314 and crimes defined under Title 2 "Infringement of Justice" of Book 4.

[90] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, Supreme Court Chamber, 17 April 2012, E137/5/1/3, para. 18 referring to "Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003", 24 October 2011, D14/1/3, para. 27; Decision on Ieng Sary's Request for Investigation under Rule 35 into the actions of [...] relating to [illegible] communication [...], 27 April 2010, Doc. no. 3 (Confidential), para. 21, and Decision on Appeal against the Order on Nuon Chea's Second Request for Investigation (Rule 35), 2 November 2010, D384/5/2, (Confidential), paras 13-14.

reference to the Cambodian Criminal Code.[91] Such open-ended construction demonstrates that the notion of interference under Rule 35 is broad, and acts falling thereunder may or may not be criminal in nature. The Supreme Court Chamber notes with approval the Pre-Trial Chamber's articulation of the functional connection between Rules 21 and 35.[92] This Chamber nonetheless emphasises that Rule 21 – which, as already clarified, expresses a general principle of interpretation[93] – cannot be employed in expanding the realm of criminal liability and thereby infringing the principle of *nullum crimen sine lege*. Rather, Rule 35, in conjunction with Rule 21, contemplates procedures addressing both crimes against the administration of justice (as defined in the criminal statutes of Cambodia) and non-criminal offences against the administration of justice. Absent relevant Cambodian law, it ultimately falls on the ECCC Judges and Chambers to determine those non-criminal offenses that fall within the scope of Rule 35.

*i. Actus Reus*

34. Each of the specific prohibitions set out in Rule 35(1)(a) through (g) entails an effort to frustrate the mandate and functioning of the Court. Sub-paragraphs (a), (b) and (e) concern non-compliance with an order of the Court. Sub-paragraphs (c) and (d) address interference with evidence to be given in proceedings before the Court. Sub-paragraph (f) governs assistance to an accused person for purposes of evading the jurisdiction of the Court. In accordance with the *ejusdem generis* rule of statutory construction, only conduct analogous to these enumerated grounds should be considered to be within the scope of Rule 35.[94]

35. The Supreme Court Chamber further observes that the significance of a particular act's interference with the administration of justice under Rule 35(1) is measured by its abstract as well as by its concrete impact. Actual interference with the course of proceedings is not necessary where the conduct undermines the Court's legitimacy with the parties and the general public.[95]

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[91] We note that the Impugned Decision contemplates the dichotomy of ECCC responses under Rule 35 in paras. 20-22 but focuses instead on differences in the required standard of proof.

[92] Decision on Appeal against the Order on Nuon Chea's Second Request for Investigation (Rule 35), Pre-Trial Chamber, 2 November 2010, D384/5/2 (Confidential), para. 44 (in the context of alleged pressure to withdraw a signature from a letter rogatoire).

[93] Decision on Immediate Appeals by NUON Chea and IENG Thirith on Urgent Applications for Immediate Release, Supreme Court Chamber, 3 June 2011, E50/2/1/4, para. 39.

[94] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, Supreme Court Chamber, 17 April 2012, E137/5/1/3, para. 19.

[95] *See, e.g.*, *Prosecutor v. Jović*, IT-95-14, "Judgement", Appeals Chamber, 15 March 2007, para. 30 ("Any deliberate [illegible] an order *per se* interferes with the administration of justice for the purposes of a conviction for contempt. No additional proof of harm to the International Tribunal's administration of justice is required"). *See also Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2-A, "Judgement", Appeals Chamber, 27 September 2006, para. 44.

36. Specifically, this Chamber held that an erroneous judicial holding is not, by itself, legally sufficient to satisfy the Rule 35 standard.[96] This Chamber further held that, notwithstanding the existence of specific rules dealing with disqualification and discipline, a judge or counsel are, at least in principle, within the ambit of Rule 35, provided that the alleged conduct rises to the level of interference with the administration of justice within the meaning of the Rule.[97] Moreover, the Trial Chamber found in the Impugned Decision that conduct proscribed by Rule 35 includes "improperly influencing the judges in charge of a case"[98] or even "acting in a way that could be perceived as an attempt to do so".[99] Similarly, the Pre-Trial Chamber stated that "Rule 21(1) requires Rule 35(1) to cover the act of external pressure on a judge of the ECCC, including the acts of incitement and attempt".[100] The Supreme Court Chamber concurs that actions undermining the independence and impartiality of ECCC judges, such as exerting pressure, constitute interference prohibited under Rule 35(1). Other prohibited conduct may include causing disorder in the courtroom, harassing Court officials and staff, undermining the logistical functioning of the Court, and otherwise bringing about circumstances that damage the Court's appearance of independence or impartiality. Notably, damaging the Court's appearance of independence and impartiality is interference as such, not merely an "appearance of interference".[101]

*ii. Mens Rea*

37. Under Rule 35(1), proscribed conduct must be "knowing and wilful". Strict liability is not foreseen. In other words, there is no liability under Rule 35 on the basis of an objective fact itself and irrespective of whether the conduct in question stems from direct intent, indifference or the lack of realisation of the nature and/or consequences of the conduct. Indeed, the procedural options available to the Court pursuant to Rule 35(2) refer to "a person [who] may have committed any of the acts set out in sub-rule 1". Rule 35(4), likewise, speaks of "sanctions imposed on a person found to have committed any act set out in sub-rule 1". Thus, pursuant to the plain language of Rule 35, the whole regime is designed to provide a punitive response, that is, sanction or referral to

[96] Decision on IENG Sary's Appeal against Trial Chamber's Order Requiring His Presence in Court, Supreme Court Chamber, 13 January 2012, E130/4/3, p. 2.
[97] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, Supreme Court Chamber, 17 April 2012, E137/5/1/3, para. 14.
[98] Impugned Decision, para. 20.
[99] Impugned Decision, para. 21.
[100] Decision on Appeal against the Order on Nuon Chea's Second Request for Investigation (Rule 35), Pre-Trial Chamber, 2 November 2010, D384/5/2 (Confidential), para. 44 (in the context of alleged pressure to withdraw a signature from a letter rogatoire).
[101] Decision on IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, Supreme Court Chamber, 17 April 2012, E137/5/1/3, para. 21.

appropriate authorities of a person attributed with intent to interfere with the administration of justice.

38. Cambodian law is dispositive for criminal forms of interference. Therefore, the requisite *mens rea* does not have autonomous meaning under Rule 35(1). Conversely, to the extent Rule 35 applies to non-criminal acts, the intent element remains to be defined so as to encompass culpability as is appropriate to effecting the protection that the proscription seeks to establish. In this regard, we consider that the requirement of specific intent construed by ICTY Trial Chambers for criminal contempt of court[102] is too strict for administrative offences. Rather, it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental.[103] However, acts that *prima facie* lack the requisite intent are excluded from the ambit of Rule 35 barring the initiation of proceedings or application of sanctions. For these reasons, the Trial Chamber's finding that "regardless of the intent with which [the Prime Minister's] remarks were made [...] the Chamber may therefore take any of the measures listed in Rule 35(2), irrespective of whether or not criminal responsibility arises from these remarks"[104] goes beyond the plain meaning of Rule 35.

*iii. Procedural avenues under Rule 35*

39. Rule 35(2) delineates procedural avenues open to a Chamber where there are reasons to believe that a person committed interference with the administration of justice. Actions under Rule 35 are discretionary.[105] Considering its limited time and notoriously limited resources, the ECCC

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[102] As adopted in the Impugned Decision, para. 22, fn. 33.

[103] *See Prosecutor v. Aleksovski*, IT-95-14/1-AR77, "Judgment on Appeal by Anto Nobilo against Finding of Contempt", Appeals Chamber, 30 May 2001, para. 54 (the ICTY Appeals Chamber found that it is sufficient that the person charged "acted with reckless indifference" as to the material element of crime). The Supreme Court Chamber notes that the recent ICTY appellate jurisprudence on point also departs from the specific intent requirement; *see Case against Florence Hartmann,* IT-02-54-R77.5-A, "Judgement", Appeals Chamber, 19 July 2011, para. 128. *See also Prosecutor v. Brdjanin,* IT-99-36-R77, "Concerning Allegations against Milka Maglov – Decision on Motion for Acquittal Pursuant to Rule 98 *bis*", 19 March 2004, para. 40 ("Mere negligence in failing to ascertain whether an order had been made does not amount to contempt. Such conduct could be dealt with sufficiently, and more appropriately, by way of disciplinary action").

[104] Impugned Decision, para. 29.

[105] As evidenced by the use of "may" in Rule 35 (1) and (2). Similarly, ICTY, ICTR, SCSL, STL and ICC Judges and Chambers "may" act under the respective rules addressing contempt of court and/or interference with the administration of justice. *See* ICTY RPE, Rule 77; ICTR RPE, Rule 77; SCSL RPE, Rule 77; STL RPE, Rule 60*bis*; ICC RPE, Rule 162. *See also Nzabonimana v. Prosecutor*, ICTR-98-44D-AR77, "Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision Dated 9 July 2010", Appeals Chamber, 28 October 2010, para. 5 ("The decision on a motion requesting the investigation of alleged contempt pursuant to Rule 77 of the Rules is a discretionary one"); *Prosecutor v. Nsengimana*, ICTR-01-69-A, "Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses", Appeals Chamber, 16 December 2010, paras. 22, 39 (noting that the Trial Chamber may decline to initiate contempt proceedings despite the existence of sufficient grounds to proceed and that the Trial Chamber in this case was not required to explain its decision regarding why the initiation of contempt proceedings would not be the most effective and efficient way to proceed, especially since the Trial Chamber has explicitly examined factors such as the lack of harm to the trial and the absence of fear and intimidation); *Ntabakuze v. Prosecutor*, ICTR-2007-91-A, "Judgement", Appeals Chamber, 15 March 2010, para. 57 (noting that certain statements

itself is unlikely to engage in a finding of criminal liability and mete out criminal punishment. Rather, the likely course of action in the event of alleged criminal interference with the administration of justice would be a referral of the matter to the Cambodian authorities. Indeed, having reason to believe that a prohibited interference occurred, Judges or Chambers may decide not to investigate and/or sanction for the sake of efficiency.[106] It is inappropriate, however, for a Chamber to find an interference, especially a criminal interference, based on little or no substantiation in order to justify the failure to apply a sanction, in a sort of "guilty by suspicion" determination. The Supreme Court Chamber agrees in this respect with the Pre-Trial Chamber and the Co-Prosecutors, as recently expressed in another Rule 35 case, that any determination of a person's culpability under Rule 35 would require a standard of proof higher than "reasons to believe".[107] The Supreme Court considers that the burden of proof for non-criminal offenses may vary from a balance of probabilities to beyond a reasonable doubt based on the measure or sanction available.

40. In the Impugned Decision, the Trial Chamber found reason to believe that an interference occurred, but refused further inquiry on the basis that the evidence was insufficient.[108] We consider this approach logically flawed.

41. The Supreme Court Chamber considers, in particular, that dealing with a matter summarily under Rule 35(2) denotes a simplified procedure for making a determination. It does not authorise unfettered determinations based upon a low level of proof. Theoretically, a summary procedure

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by the Trial Chamber that took into account the minimal gravity surrounding the violation of a court order were not to be construed as a finding that the conduct at issue was not contempt but rather "an exercise of the discretion of the Chamber not to initiate proceedings in such circumstances").

[106] *Prosecutor v. Brima et al.*, SCSL-04-16-T-373, "Decision on Joint Defence Appeal Against the Decision on the Report of the Independent Counsel Pursuant to Rule 77(C)(iii) and 77(D)", Appeals Chamber, 17 August 2005, paras. 10-11 adopting and quoting with approval the Separate and Concurring Opinion of Hon. Justice Ayoola in *Prosecutor v. Brima et al.*, SCSL-04-16-AR77, "Decision on Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii)", Appeals Chamber, 23 June 2005 ("In view of Rule 77(J) which provides that: 'Any decision rendered by a single Judge or Trial Chamber under this Rule shall be subject to appeal', it is expedient to consider the nature of the power exercised by a Judge or Trial Chamber under Rule 77(C). In so far as the powers exercised by a Judge or Trial Chamber can be said to be a result of a decision to exercise such powers, it can be said that the exercise of such powers implies a 'decision'. However, it cannot be said that such decisions are judicial decisions. They are decisions of an executive nature and are not decisions, at that stage, that depend on any dispute or on the resolution of any conflicting facts or issues. The choice between options available under 77(c) (ii) or (iii) is determined not by law but by administrative convenience and expediency").

[107] Co-Prosecutors' Response to NUON Chea's "Rule 35 Request Calling for Summary Action against Minister of Foreign Affairs Hor Namhong", 27 August 2012, E219/2, para. 8 ("[T]he Co-Prosecutors submit that when the summary action involves some determination of guilt [...] a higher standard of proof is necessary"). The Supreme Court Chamber notes that the Pre-Trial Chamber position went even further. *See* Second Decision on NUON Chea's and IENG Sary's Appeal against OCIJ Order on Requests to Summons Witnesses, Pre-Trial Chamber, September 2010, D314/1/12, 9, para. 36 ("The *beyond reasonable doubt* standard of proof must be satisfied before sanctions can be imposed on an individual for a violation of Rule 35(1)"). It is, however, not clear from the Pre-Trial Chamber's decision whether it referred to all kinds of sanctions or only penal sanctions.

[108] Impugned Decision, paras. 30-31.

does not exclude establishing facts under a beyond reasonable doubt standard. For example, acts appropriately dealt with summarily include those notorious because of their public nature, recorded on the Court's video, committed through authenticated documents, or admitted.

42. Rule 35 discloses little detail regarding the procedures pursuant to sub-Rule 35(2). The Supreme Court considers that the procedure for establishing liability, whether for a criminal or administrative offence, should comport with the fundamental requirement of fairness. The appropriate standard of proof is one aspect of this requirement. In addition, as noted by the ICTY Appeals Chamber under the procedure laid down by its Rule 77(F), "it is for a Chamber, *proprio motu*, to initiate the proceedings whereby a person is called upon to answer the allegations against him when the Chamber has reason to believe he may be in contempt."[109] "[A] Chamber being both the prosecutor and the judge in relation to a charge of contempt" represents a danger and in such a case, the ordinary procedures and protections for the parties might be overlooked.[110] Therefore, it is "essential that, where a Chamber initiates proceedings for contempt itself, it formulates at an early stage the nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved. It is only in this way that the alleged contemnor can be afforded a fair trial."[111]

*iv. Sanctions and referrals under Rule 35*

43. Rule 35 does not contemplate measures to counter or punish proscribed conduct other than sanctions under Cambodian law or referral to the appropriate authorities. The Impugned Decision contains a "public reminder of the right of the Accused to be presumed innocent and of the need for officials to avoid comments incompatibile with this presumption".[112] The Trial Chamber failed to identify any legal basis for this measure. Further, the Trial Chamber's discussion of the standard of proof relating to these procedural avenues does not elucidate the issue.[113]

44. Sanctions available under Rule 35 must be tailored to the ECCC context. To this end, other than criminal acts covered by Cambodian law, the framework of Rule 35 encompasses the power to "take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect

[109] *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, "Judgment on Appeal by Anto Nobilo against Finding of Contempt", Appeals Chamber, 30 May 2001, para. 55.
[110] *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, "Judgment on Appeal by Anto Nobilo against Finding of Contempt", Appeals Chamber, 30 May 2001, para. 56.
[111] *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, "Judgment on Appeal by Anto Nobilo against Finding of Contempt", Appeals Chamber, 30 May 2001, para. 56.
[112] Impugned Decision, para. 31.
[113] Impugned Decision, para. 20; *see also* Second Decision on NUON Chea's and IENG Sary's Appeal against OCIJ Order on Requests to Summons Witnesses, Pre-Trial Chamber, 9 September 2010, D314/1/12, paras. 36-37.

for justice".[114] This power 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".[115] As such, it is reasonable to interpret Rule 35 as applicable to a wider set of corrective responses that are administrative in nature. These responses include, for example, an admonition; notice to self-regulatory bodies, the superior or contracting authority of the culprit; publication of the outcome of proceedings in the media; or a limited administrative fine. These administrative sanctions still must comport with the basic principles of necessity and proportionality.

45. Rule 35 is primarily designed for the application of punitive measures with the objective of deterrence. The Supreme Court Chamber considers, however, that Rule 35 also serves the overarching goal of ensuring an effective and fair trial. In this respect, the duty of the court is not just to punish the interference with the administration of justice, but also to stop on-going interference and prevent its potential occurrence. These duties are particularly valid in the face of interference that endangers a fundamental right, such as the right to a fair trial. It is therefore reasonable to construe, *a majori ad minus*, that the ECCC may resort to the procedures under Rule 35 to appy not only the *sensu stricto* punitive measures (sanctions) but also undertake other corrective responses that are non-punitive in nature and do not require the finding of culpability (intent), in order to safeguard the right to a fair trial. The Supreme Court believes that this holding also articulates the position implicitly adopted in the Impugned Decision.[116]

46. The Supreme Court will now assess the merits of the case in accordance with the above principles.

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

[115] *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. Tadić*, IT-94-1-A-R77, "Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin", Appeals Chamber, 31 January 2000, para. 13. *See also Prosecutor v. Milošević*, IT-02-54-A-R77.4, "Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings", Appeals Chamber, 29 August 2005, para. 21; *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 André 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.

[116] Impugned Decision, para. 29 ("These remarks, if accurately reported, would constitute statements incompatibile with the presumption of innocence. As NUON Chea's case is currently pending before the Trial Chamber, and regardless of the intent with which these remarks were made, the Chamber considers that they risk being interpreted as an attempt to improperly influence the judges in charge of the case. It folows that the chamber may therefore take any of the measures listed in the Rule 35(2), irrespective of whether or not criminal responsibilty arises from these remarks pursuant to Rule 35(1)").

c. Merits

*i. The issue of criminal liability does not arise*

47. This Chamber agrees with the Trial Chamber that the issue of criminal liability does not arise in this case, but wishes to provide different reasoning. Pursuant to Article 522 of the Criminal Code of Cambodia, criminal responsibility for the "publication of comments intended to unlawfully influence judicial authorities" requires a specific intent "to influence judicial decision". In this Chamber's opinion, the content of the impugned statement as well as its context, as reported, do not give *prima facie* grounds for the attribution of such intent and instigation of proceedings.

48. Whereas the Prime Minister's reported statements are doubtlessly forthright in declaring the guilt of the Accused, they nonetheless do make reference to the fact that a trial is in progress[117] and that one "should not respond but let the court judge".[118] The same was emphasised again on a later occasion by the Prime Minister acknowledging that "the court may do what it wants".[119] Moreover, the impugned utterances were expressed in Vietnam, in the context of an interview regarding the ongoing historical debate on the role of Vietnam in the fall of the Khmer Rouge regime, namely, whether it invaded or helped liberate Cambodia. The Prime Minister's statement supported the latter view.[120] He was responding to a leading question about whether he disagreed with the position of the Accused[121] on the function of Vietnamese forces in the overthrow of Democratic Kampuchea. The Prime Minister reportedly declared that Nuon Chea's statements are "lies from a murderer" who "did not admit to his wrongdoings but gave lies about the Vietnamese volunteer forces" in order "to lessen his sin". These quotations attributed to the Prime Minister appear to be aimed at discrediting the statement of the Accused with regards to the aforementioned historical debate. This reinforces the Prime Minister's opinion that "[t]he reality happened in contrary to what Nuon Chea said".[122] This context demonstrates a purpose to appease the intended audience of the publication.

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[117] *See* para. 6, *supra* ("Nuon Chea, a person of important position in the Pol Pot regime who has been tried in the past weeks").
[118] *See* para. 6, *supra.*
[119] *See* para. 7, *supra* ("My speeches [...] didn't influence the current court. The court can do whatever it wants but I had the right to condemn Khmer Rouge leaders"); *see also* Impugned Decision, para. 30 (in which the statements, read in conjunction with this quoted qualification, are defined as "ambiguous").
[120] *See* para. 6, *supra* ("Vietnamese volunteer forces helped free the Cambodian people from the genocidal Pol Pot regime [and their activities in Cambodia] stem from the request of the Cambodian people").
[121] Impugned Decision, fn. 35 (making reference to the Accused's statements at trial that could be characterised as accusations of a Vietnamese invasion in the 1970s).
[122] *See* para. 6, *supra.*

49. Therefore, the external manifestations of the speaker's intent are 1) acting abroad 2) in the course of a discussion not primarily related to the question of the criminal responsibility of the Accused and 3) using words aimed at a specific audience and for a specific purpose, as described above. The Supreme Court Chamber is not satisfied that the Prime Minister could be attributed with the specific intent to interfere with the administration of justice. This Chamber further considers that it is highly unlikely that evidence of such specific intent, such as an admission, will be adduced through the initiation of criminal proceedings. Taken in combination with the issue of immunity, there is no basis to launch an investigation under Rule 35.

50. Rather than purporting to improperly influence the judges of the ECCC or to encourage the Cambodian public to believe the Accused guilty, the impugned statements appear to be an unfortunate result of circumstance and personal opinion,[123] coupled with a conviction that "[t]he court can do whatever it wants but I had the right to condemn Khmer Rouge leaders".[124] Assuming that the latter refers to the right to freedom of expression, the Supreme Court agrees that the freedom of expression is relevant to this case and generally a valid concern in the context of Cambodia. In this instance, however, the right has been misconstrued: in accordance with the international standards embraced by the Cambodian Constitution[125] and included in the Constitution itself,[126] the freedom of expression is subject to limitations necessary to protect the "rights of others". The right to a fair trial, including the right to be presumed innocent,[127] is one of the rights that justifies limiting free speech, particularly in the case of public officials.

*ii. The Trial Chamber did not err in its choice of remedy for the violation of the Accused's right to be presumed innocent until proven guilty*

51. Below, the Supreme Court Chamber addresses first whether there was a violation of the Accused's right to a fair trial. Second, the Supreme Court Chamber addresses the scope of a criminal court's duty to preserve the integrity of the proceedings. Finally, the Supreme Court

[123] Similar statements have been uttered by public officials, including the incumbent Prime Minister, since the 1980s. *See e.g.* Joe Cochrane, "Hated Leaders Feted As Nation Marks Overthrow of their Regime", *South China Morning Post*, 7 January 1999 (describing the annual January 7 Liberation commemoration in which "Mr. Hun Sen and other leaders denounced Khmer Rouge chiefs Pol Pot, Khieu Samphan and Nuon Chea, and promised Cambodians that the rebels would never return to society"); *see also* Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", 2 August 2011, p. 4 <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>.

[124] *See* para. 7, *supra*.

[125] Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993, Art. 31.

[126] Constitution of the Kingdom of Cambodia, Art. 41.

[127] Guaranteed under the Constitution of the Kingdom of Cambodia, Art. 38.

Chamber considers whether such duty has been properly discharged by the Trial Chamber under the circumstances.

52. Even though the fair trial violation seems to be uncontested in this case, the Supreme Court Chamber still deems it necessary to address the issue, even if only as a matter of general significance. The international human rights standards on the presumption of innocence are applicable to the ECCC pursuant to Articles 12(2) and 13(1) of the Agreement, and Articles 33(new) and 35(new) of the ECCC Law, which make direct reference to Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR"). Given the lack of pertinent Cambodian jurisprudence or practice, guidance was sought on the international level. State interference with a pending criminal case through the public speech of a government official in the course of their official duties is a violation of the presumption of innocence in the jurisprudence of both human rights bodies and national systems.

53. The Human Rights Committee ("HRC") acknowledged that the presumption of innocence, as enshrined in Article 14(2) of the ICCPR, entails "a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused".[128] In determining whether a state violated the presumption of innocence the HRC considers (i) the extent of media coverage of prejudicial statements;[129] (ii) the choice of words used by the public officials;[130] (iii) whether prejudicial statements were repeatedly issued;[131] and

[128] United Nations Human Rights Committee ("HRC"), General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 30; previously, General Comment No. 13, Article 14: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, Art. 14 (13 April 1984).

[129] *Larrañaga v. The Philippines,* HRC, Views, U.N. Doc. CCPR/C/87/D/1421/2005, Communication no. 1421/2005 (14 September 2006), para 7.4 (where there were numerous media reports calling for capital punishment of the author before a judgment was rendered); *Saidova v. Tajikistan*, HRC, Views, U.N. Doc. CCPR/C/81/D/964/2001, Communication no. 964/2001 (20 August 2004), paras. 3.5, 6.6 (State media constantly ran an extensive media campaign that was clearly adverse to the presumption of innocence). *See generally Mwamba v. Zambia,* HRC, Views, U.N. Doc. CCPR/C/98/D/1520/2006, Communication no. 1520/2006 (30 April 2010), paras. 2.4, 6.5 (where the media published numerous declarations which infringed on the presumption of innocence); *Engo v. Cameroon*, HRC, Views, U.N. Doc. CCPR/C/96/D/1397/2005, Communication no. 1397/2005 (17 August 2009), paras. 3.6, 7.6 (where the State media ran a continuous propaganda campaign against the author); HRC, *Gridin v. Russian Federation*, HRC, Views, U.N. Doc. CCPR/C/69/D/770/1997, Communication No. 770/1997 (18 July 2000), para. 3.5 (where radio stations and newspapers reported that the author was a known rapist and murderer).

[130] *Saidova v. Tajikistan*, para. 3.5 (where the state media identified the author's husband and co-accused as "criminals" and "mutineers"); *Larrañaga v. The Philippines,* paras. 3.4, 7.4 (where the Secretary to the President and other high-ranking officials stated that the accused should be sentenced to death).

[131] *Larrañaga v. The Philippines,* paras. 3.4, 7.4; *Engo v. Cameroon*, para. 7.6 (where the State media repeatedly portrayed the author as guilty before trial and published articles to that effect, thereby constituting a violation of the presumption of innocence); *Saidova v. Taijikistan*, para. 6.6 (State media ran a constant, continuous media campaign adverse to the presumption of innocence).

(iv) the status of the declarant.[132] Violation of the right to be presumed innocent is punishable regardless of a government official's station.[133]

54. In *Gridin v. Russian Federation*, the head of the police announced that he "was sure that the [defendant] was the murderer".[134] Additionally, the investigator pronounced the defendant guilty in public meetings before the court hearing. These statements were given widespread media coverage, triggering a highly adverse public perception on the guilt of the accused, which was reflected in the tense atmosphere inside the courtroom.[135] The HRC found a violation of the presumption of innocence in that a high-ranking law enforcement official failed "to exercise the restraint that article 14, paragraph 2, requires of them".[136] Moreover, although the defendant appealed his sentence on the basis that this right was violated, the Supreme Court of the Russian Federation failed to specifically deal with the matter.[137]

55. Similarly, the HRC found a violation of the presumption of innocence in *Larrañaga v. Philippines* where the defendant alleged that powerful social groups, one of which called for the execution of the defendant, influenced both the Trial Court and the Supreme Court.[138] There were also many negative media reports before the verdict influencing the judges.[139] Neither the trial court nor the Supreme Court adequately addressed these issues.[140]

56. In cases not involving statements by public officials, a hostile pre-trial media campaign which implicates State sponsorship or control may also give rise to State responsibility for the violation of fair trial rights where no corrective action was taken. In *Marinich v. Belarus*,[141] the respondent State was found to have violated an accused's right to be presumed innocent when the State-controlled television network aired episodes of the accused's interrogations accompanied with comments suggestive of the accused's guilt.[142] In *Engo v. Cameroon*,[143] the Cameroonian state

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[132] *Larrañaga v. The Philippines,* paras. 3.4, 7.4 (the Presidential Secretary, a senior official); *Ashurov v. Tajikistan*, HRC, Views, U.N. Doc. CCPR/C/89/D/1348/2005, Communication no. 1348/2005 (2 April 2007), para. 3.4 (presiding trial judge); *Gridin v. Russian Federation*, para. 8.3 (high ranking law enforcement officials); *Engo v. Cameroon*, para. 7.6 (State-run media); *Saidova v. Tajikistan*, paras. 3.5, 6.6 (State-run media).
[133] *Larrañaga v. Phillipines*, para. 3.4; *United States v. Koubriti*, 305 F. Supp.2d at 742.
[134] *Gridin v. Russian Federation*, HRC, Views, U.N. Doc. CCPR/C/69/D/770/1997, Communication No. 770/1997(18 July 2000), para. 3.5.
[135] *Gridin v. Russian Federation*, para. 3.5.
[136] *Gridin v. Russian Federation*, para. 8.3.
[137] *Gridin v. Russian Federation*, paras. 3.5, 8.3.
[138] *Larrañaga v. Phillipines*, para. 3.4.
[139] *Larrañaga v. Phillipines*, para. 3.4.
[140] *Larrañaga v. Phillipines*, para. 7.4.
[141] *Marinich v. Belarus*, HRC, Views, U.N. Doc. CCPR/C/99/D/1502/2006, Communication No. 1502/2006 (18 July 2010).
[142] *Marinich v. Belarus*, paras. 2.4, 10.6.

media carried out a propaganda campaign against the accused in newspaper articles, repeatedly portraying him as guilty before trial. Although the complainant wrote letters to the prosecutor, the Minister of Justice and the managing director of Cameroon Radio Television requesting them to stop the publication of such information, these letters were met with no response.[144] Other cases similarly demonstrate that when "extensive and adverse" material broadcast by state-directed national media called the accused "criminals" and "mutineers", the right to be presumed innocent is breached.[145]

57. Pursuant to the European Convention on Human Rights, in accordance with Article 10 which guarantees freedom of expression, public officials are not barred from imparting information to the public concerning the proceedings or encouraging a public debate on a matter of general interest, provided that they do so with such discretion in full respect for the presumption of innocence.[146] The ECtHR likewise held that public officials[147] must refrain from making statements regarding an accused's guilt before the accused is convicted according to law. In balancing these two countervailing interests, the ECtHR progressively specified a wide range of elements to determine whether a declaration by a public official influenced the judges to the extent that the court's appearance of impartiality and the presumption of innocence are called into question. These factors include (i) the choice of words used by public officials in their statements, including whether the statements are allegations of suspicion or declarations of guilt;[148] (ii) the context in which the statements were made;[149] (iii) the status of the declarant;[150] (iv) the public interest

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[143] *Engo v. Cameroon*, HRC, Views, U.N. Doc. CCPR/C/96/D/1397/2005, Communication No. 1397/2005 (22 July 2009).
[144] *Engo v. Cameroon*, paras. 3.6, 7.6.
[145] *Saidova v. Tajikistan* , para. 6.6; *see also Kulov v. Kyrgyzstan*, HRC, Views, U.N. Doc. CCPR/C/99/D/1369/2005, Communication No. 1369/2005, (26 July 2010), para 8.7.
[146] *Konstas v. Greece*, ECtHR, Chamber Judgment, App. No. 53466/07, 24 May 2011, para. 34; *Allenet de Ribemont v. France*, ECtHR, Chamber Judgment, App. No. 15175/89, 10 February 1995, para. 38; *Fatullayev v. Azerbaijan*, ECtHR, Chamber Judgment, App. No. 40984/07, 22 April 2010, para. 159.
[147] This Chamber notes that according to ECtHR jurisprudence the presumption of innocence and the right to a fair trial on the whole may be breached also by private persons' articles or statements in the media which are created with the intent to influence the outcome of the proceedings or to usurp the position of the judges dealing with a case. *See Worm v. Austria*, ECtHR, Chamber Judgment, App. No. 83/1996/702/894, 29 August 1997, paras. 50, 54.
[148] *Mokhov v. Russia*, ECtHR, Chamber Judgment, App. No. 28245/04, 4 March 2010, para. 29; *Shuvalov v. Estonia*, ECtHR, Chamber Judgment, App. No. 39820/08 and 14942/09, 29 May 2012, para. 75; *Konstas v. Greece*, para. 33; *Daktaras v. Lithuania*, ECtHR, Chamber Judgment, App. No. 42095/98, 10 October 2000, para. 41; *Fatullayev v. Azerbaijan*, para. 160.
[149] *Butkevičius v. Lithuania*, ECtHR, Chamber Judgment, App. No. 48297/99, 26 March 2002, para. 50 (where the statement was issued in a context independent of criminal proceedings; however this factor still had to be balanced with the specific choice of words); *Daktaras v. Lithuania*, para. 43.
[150] *See e.g. Konstas v. Greece*, para. 43 (in which the ECtHR took into account the particular function of the Minister of Justice as the political authority which *par excellence* exercises its supervision on the proper organisation and functioning of the courts); *Ergashev v. Russia*, ECtHR, Chamber Judgment, App. No. 12106/09, 20 December 2011, para. 172.

underlying the criminal case;[151] (v) the timing of the statement in relation to the court proceedings;[152] and (vi) whether the trial is being held before a jury or a professional judge.[153]

58. The Inter-American Court of Human Rights ("IACtHR") relied on these ECtHR-established principles in determining that a State party violated the presumption of innocence set out in Article 8(2) of the American Convention on Human Rights ("ACHR") by "exhibit[ing]" the accused before the media as the perpetrator before she was convicted of the charged crime.[154] In the same case, the IACtHR specified that the right at hand "requires that the State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion" prior to a final finding of criminal responsibility according to law.[155] A similar violation was found where state officials "paraded" a defendant before the media dressed in "defamatory clothing" as the perpetrator of treason.[156] Similarly, the African Commission on Human and Peoples' Rights found violations of the presumption of innocence in connection with public declarations of guilt by "highly placed government officers"[157] and State-organised "intense pre-trial publicity".[158]

59. The Supreme Court Chamber notes that the Co-Prosecutors[159] previously drew attention to the United States Supreme Court case *Tenney v. Brandhove* to illustrate the significance of free speech in political issues.[160] The Supreme Court Chamber acknowledges that, in U.S. jurisprudence, the government speech doctrine stands for the principle that a government entity is

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[151] *See e.g. Burzo v. Romania*, ECtHR, Chamber Judgment, App. No. 75109/01 and 12639/02, 30 June 2009, para. 160; *Tourancheau and July v. France*, ECtHR, Chamber Judgment, App. No. 53886/00, 24 November 2005, para. 74.

[152] *See e.g. Butkevičius v. Lithuania*, para. 51 (in which it was considered "particularly important" that at the initial stage of proceedings, statements which could be interpreted as confirming the guilt of the suspect are avoided); *Allenet de Ribemont v. France*, para. 37 (the preliminary stages of investigation were considered prone to violations of the presumption of innocence where the impugned statements were made after the applicant's arrest but before the start of the investigation); *see also Konstas v. Greece*, para. 44 (where a violation was found despite a significant time gap separating the impugned statements and the court's decision). The timing of the statements appears to be a critical factor. However, the presumption of innocence must be respected throughout the entire duration of criminal proceedings.

[153] *Burzo v. Romania*, para. 166; *Craxi v. Italy*, ECtHR, Chamber Judgment, App. No. 34896/97, 5 December 2002, para. 104 (stating that in a bench trial, professional judges have the experience and training to eliminate outside suggestion); *Ensslin, Baader and Raspe v. Federal Republic of Germany*, ECtHR Decision, App. No. 7572/76, 7586/76 & 7587/76, 8 July 1978, para. 15 (stating that a jury is by nature, more likely to be influenced).

[154] *Case of Lori Berenson-Mejias v. Peru*, IACtHR, Judgment (Merits, Reparations and Costs), 25 November 2004, paras. 158-161.

[155] *Case of Lori Berenson-Mejias v. Peru*, para. 160.

[156] *Case of Cantoral Benavides v. Peru*, Series C No. 69, Judgment on the Merits (IACtHR), 18 August 2000, paras. 119, 121.

[157] *Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples' Rights (Communication No. 222/98 and 2229/99), 29 May 2003, paras. 54-56, 67.

[158] *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights (Communication No. 224/98), 6 November 2000, paras. 47, 48.

[159] Co-Prosecutors' Response to Nuon Chea's Application for Summary Action against Prime Minister Hun Sen, 5 March 2012, E176/1, para. 15(c).

[160] *Tenney v. Brandhove*, United States Supreme Court (1951), 341 U.S. 367, p. 371 (concerning an unsuccessful challenge to the lawfulness of legislative-conducted investigation and findings which did not adhere to a number of rights guaranteed by the Federal Constitution).

entitled to say what it wishes.[161] The government is also entitled to "speak for itself"[162] and to select the views it wants to express.[163] Nevertheless, cases more directly on point reveal that these free speech principles do not trump an accused's right to a fair and impartial trial.[164] Indeed, the presumption of innocence prohibits government entities and officials from speaking out against suspects in pending criminal trials.[165] In *Sheppard v. Maxwell*, a case involving extensive media publicity and prejudicial statements by government employees regarding the defendant's guilt, the U.S. Supreme Court held that while "freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court".[166]

60. Finally, we note that secondary sources considered that public characterizations by former President George Bush and former Secretary of Defence Donald Rumsfeld of the Guantanamo Bay detainees as "bad people", "killers", and "hard-core, well-trained terrorists" "resemble comments that have constituted a violation of the presumption of innocence in other contexts".[167] "It is difficult to see how the presumption of innocence can be maintained when the very individuals who established the commission system, appointed the commission personnel, and who will play a role in the review process have made such statements".[168]

61. In light of the jurisprudence discussed above, statements by public officials that pronounce on the guilt of an accused are incompatible with the presumption of innocence.

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[161] *Rust v. Sullivan*, United States Supreme Court (1991), 500 U.S. 173, construed in *Rosenberger v. Rector and Visitors of Univ. of Va.*, United States Supreme Court (1995), 515 U.S. 819, p. 833; *Garcetti v. Ceballos*, United States Supreme Court (1999), 547 U.S. 410, pp. 421-22; *United States v. American Library Ass'n*, United States Supreme Court (2003), 539 U.S. 194; *Nurre v. Whitehead*, United States Supreme Court (2010), 130 S.Ct. 1937.
[162] *Pleasant Grove City v. Summum*, United States Supreme Court (2009), 555 U.S. 460, p. 468.
[163] *Summum*, p. 468.
[164] *See, e.g. United States v. Koubriti*, Federal District Court, Eastern District of Michigan (2003), 305 F. Supp.2d 723, p. 760 (recognising that while it is not the court's place to tell the Attorney General how to organise his office in order to balance his dual roles as both the Nation's chief prosecutor and the head of an Executive department that has a duty to keep the public informed, it is "unquestionably the duty"of the court to "ensure that the defendants who appear before it are accorded their fair trial rights under the Constitution, to enter orders designed to protect these rights, and to see that its orders are obeyed").
[165] *Koubriti,* 305 F. Supp.2d 723, pp. 758 (finding that it "bears repeating" that the Attorney General's comment in the midst of trial that the testimony of a key witness had been of "substantial value" to the Government "would have been inappropriate, if not improper"), 760 ("While we see no objection to statements reflecting departmental policy, nor to statements of fact relating to past proceedings in the nature of reports, when as here, the [Attorney General's] statements relate to prospective or pending criminal or civil proceedings, they should omit any assertions of fact likely to create an adverse attitude in the public mind respecting the alleged actions of the defendants to such proceedings"), quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 199 (1940).
[166] *Sheppard v. Maxwell*, United States Supreme Court (1966), 384 U.S. 333, pp. 350-51.
[167] McCormack, T. and Avril McDonald, *Yearbook of International Humanitarian Law – 2003*, Vol. 6, (2003), pp. 420-421.
[168] *Ibid.*

62. To remedy this violation the Defence requested monetary compensation or sentence reduction, whereas the Co-Prosecutors argue that the Trial Chamber's "declaratory relief" was sufficient.[169] Both based their submissions on remedies provided at the various human rights bodies. The Supreme Court Chamber reiterates that while "[t]he case law of regional human rights bodies on victims' remedies may serve as persuasive authority with regard to the content of the right to reparation for harm suffered by individuals",[170] due to their different mandate, "proceedings before regional human rights bodies differ, in terms of policy, technical legal framework, and rules of interpretation from criminal trials".[171] In considering remedies available for infringements upon the accused's presumption of innocence, human rights bodies have the mandate to engage States in disputes concerning the conduct of public authorities as a whole, and in turn, can recommend measures to be implemented by the state apparatus as a whole. The criminal court, however, is a public authority itself. It responds to the conduct of other public authorities in a manner necessary to hold a fair trial. Measures available to a criminal court are subordinate to this narrower goal. Moreover, due to their *modus operandi* which may require exhaustion of available domestic remedies and compliance with complex supra-national procedures, the human rights bodies are removed in time and distance from a violation. Remedies granted by these bodies may therefore be of a different nature than those available to domestic criminal courts.[172] Thus it is the remedial measures taken by the domestic criminal courts and *reviewed* by the human rights courts, not the remedies *provided* by the human rights courts themselves, that are relevant here.

63. Accordingly, the immediate duty of the criminal court in the pending case is to ensure that the trial is untarnished by any prejudice caused by adverse publicity. The "simple failure" of the court to counter the possible effect of prejudice can be sufficient to trigger responsibility under the European Convention of Human Rights.[173] Similarly, in *Gridin v. Russian Federation* and *Larrañaga v. Philippines*,[174] the HRC found violations of the presumption of innocence when the

[169] Response, paras. 23-28; Appeal, paras. 13, 17 citing Written Application, paras. 15, 21-23.
[170] Appeal Judgement, 3 February 2012, F28, para. 652.
[171] *Ibid.*
[172] The principle of *restitution in integrum*, or full restitution to the original position, is required "whenever possible" for a violation of a human right. Only when restitution is not possible, international courts have assessed what other measures are adequate to remedy the consequences of violations suffered, including award of compensation, sentence commutations and early release and publication of apologies and decisions by the human rights body to prevent future violations. *See e.g.*, *Villagrán Morales et al. v. Guatemala*, IACtHR, Judgment (Reparations and Costs), 26 May 2001, para. 60; *Case of Tibi v. Ecuador,* IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 September 2004, para. 224.
[173] David Harris *et al.*, *Law of The European Convention on Human Rights*, Oxford University Press, 2nd ed., 2009, p. 266 (noting that state involvement in the generation of the publicity is not a necessary element and that the failure of a court, a "state organ", to counter any prejudicial effect of such publicity should be considered sufficient to find a breach under the Convention).
[174] *See* paras. 54-5 *supra*.

domestic appellate courts failed to specifically deal with the issue of public officials uttering statements portraying the applicant as guilty.[175] Conversely, if a domestic appellate body examines and analyses the impact of adverse publicity on a trial, the ECtHR is unlikely to find a breach of the accused's Article 6 protections.[176]

64. Indeed, it is the judiciary's role to prevent the abuse of process by exercising its discretion to intervene when inaction would result in prejudice.[177] Other cases confirm that court intervention can in itself be sufficient to preserve a fair trial against external influence, so long as the defect is not so egregious as to render a fair trial impossible. Regarding the effects of adverse publicity provoked by a media campaign in a jury proceeding, the ECtHR upheld the domestic courts' reasoning that a judge's direction to the jury to disregard external comments was sufficient to protect the presumption of innocence.[178] In *Adolf v. Austria*, the ECtHR found no breach of the fair trial rights, including the presumption of innocence, as the domestic Supreme Court corrected the lower court's defective reasoning.[179] In all such cases, the fairness of the proceedings was evaluated as a whole.

65. Contempt sanctions and admonishments are used against justice system officials violating the presumption of innocence. In a recent case concerning the conduct of the Prosecutor of the International Criminal Court ("ICC"), the ICC Appeals Chamber held that his "clearly inappropriate [behaviour] in light of the presumption of innocence"[180] may require, among other things, the taking of "various remedial measures to address any damage done by [his] statements",[181] including a formal reminder of his obligations or judicial reprimand. In *United States v. Koubriti*, the Attorney General violated a court order aimed at prohibiting the parties from publicly disclosing any information that had a reasonable likelihood of interfering with a fair trial. In deciding the

[175] *Gridin v. Russian Federation*, para. 8.3. *See also Mwamba v. Zambia*, para. 6.5 (in which the violation of the presumption of innocence was found also on the basis of "the State party's failure to dispute" the applicant's grievance that his rights were infringed by the statements of guilt made by public officials in the media).
[176] David Harris *et al.*, *Law of The European Convention on Human Rights*, p. 266; *X v. United Kingdom*, ECtHR, App. No. 3860/68 30 CD 70, 1969 ("whereas in this respect the Court of Appeal had, in fact, special regard to the applicant's complaint that there had been prejudicial publicity concerning his case and found that there was no real risk that the jury was influenced by the publicity").
[177] *See e.g. R. v. Horseferry Road Magistrates Court*, [1993] 1 A.C. 42, p. 12 (Lord Griffiths'opinion calls for the Court to accept its responsibility "for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law").
[178] *Noye v. United Kingdom*, ECtHR, Chamber Decision, App. No. 4491/02, 21 January 2003, p. 11.
[179] *Adolf v. Austria*, ECtHR, Chamber Judgment, App. No. 8269/78, 26 March 1982, para. 40; *see also Fedorenko v. Russia*, ECtHR, Chamber Judgment, App. No. 39602/05, 20 September 2011, paras. 91-92 (observing, in finding a violation of the presumption of innocence, that the appellate court made no attempt to properly amend the inferior court's defective decision).
[180] *Situation in the Libyan Arab Jamahiriya, Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 3, "Decision on the Request for Disqualification of the Prosecutor", Appeals Chamber, 12 June 2012, para. 33.
[181] *Ibid.*, para. 35.

proper course of action, the Court observed that even though the high-ranking position of the declarant would make criminal contempt proceedings "considerably more complex" due to constitutional concerns about separation of powers, "the [c]ourt's duties and inquiries remain the same, and necessarily cannot vary with the station of the individual involved".[182] Far from being deliberate or intended, the violation was found to be "inadvertent", considering the high official's apology to the court and counsel, the statements themselves and the surrounding circumstances.[183] Notably, it appeared that the Attorney General's statements were legitimately aimed at keeping the public informed about the "latest developments in the war on terror"[184] and were neither blatantly inflammatory nor designed to attract attention.[185] Considering that the "potential for prejudice" was "undeniable under the circumstances" the court "formally and publicly admonished" the Attorney General for his conduct.[186]

66. The most radical remedies available for a violation of the presumption of innocence are a stay of proceedings or the remand of a case for re-trial. The Supreme Court notes that such measures are exceptionally applied in trials involving a jury.[187] In the United Kingdom, although "unremitting, extensive, sensational, inaccurate and misleading" publicity may render a guilty verdict "unsafe" in a jury trial,[188] the Privy Council determined that in making such determination all circumstances must first be considered[189] including the timing and circulation of the publicity;[190] the "public interest that justice should be done and should be seen to be done";[191] and the

[182] *Koubriti*, 305 F. Supp. 2d, p. 742 (emphasis added).
[183] *Koubriti*, 305 F. Supp. 2d, p. 748.
[184] *Koubriti*, 305 F. Supp. 2d, p. 748.
[185] *Koubriti*, 305 F. Supp. 2d, p. 752.
[186] *Koubriti*, 305 F. Supp. 2d, pp. 764-765.
[187] *Jespers v. Belgium*, no. 8403/78, Commission Decision of 15 October 1980, Decisions and Reports (DR) 22, p. 100 (confirming that in the event of exposure of jurors to adverse publicity an application for a re-trial before a different bench was the remedy that needed to be exhausted); *Marshall v. United States*, United States Supreme Court (1959), 360 U.S. 310 (where the U.S. Supreme Court granted the defendant a new trial after finding that the exposure jurors had to news accounts of the defendant's prior convictions – evidence inadmissible at trial – was prejudicial); *Boodram v. Attorney-General of Trinidad and Tobago,* [1996] A.C. 842, p. 855 (where the Board noted that the "proper forum for a complaint about publicity is the trial court", as this was where the judge would evaluate "whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution").
[188] *R v. Hamza*, [2006] EWCA Crim 2918, para. 89, quoting *R v. Taylor and Taylor*, [1994] 98 Cr App R, p. 361, and referring to *R v. McCann*, [1991] 92 Cr App R 239 (the appeal court determined a stay warranted after public officials equated an accused's exercise of the right of silence with guilt in radio and television broadcasts during closing arguments).
[189] *Montgomery & Ors v. Her Majesty's Advocate and The Advocate General for Scotland*, [2000] UKHL D1, p. 38. In this case, the Privy Council considered a persistent media campaign endorsing the opinion expressed by a trial judge that the appellants should be indicted and concerning the same crime for which the appellants were later indicted. This opinion was expressed in a trial resulting in the acquittal of another man indicted for the same murder the appellants would later be indicted for. *Ibid.*, pp. 2, 10.
[190] *Montgomery*, p. 40.
[191] *Montgomery*, p. 38.

safeguards of the trial process itself.[192] Ultimately, "it is the effect of the publication [...] on the mind of the notional juror at the time of the trial that has to be considered."[193] "[T]he focusing effect of listening over a prolonged period to evidence in a case"[194] and adequate warnings and directions given by an experienced and impartial trial judge[195] ensure that a jury, except in the most exceptional cases, will "disabuse itself of information that it is not entitled to consider".[196] Such confidence that juries properly instructed and "in accordance with their oath" will deliver a "true verdict",[197] certainly attaches to an even greater degree to a trial court composed of professional judges. Thus, as determined by the ECtHR, professional judges are usually presumed insusceptible to adverse publicity, especially absent any indication of such influence in the overall evaluation of the fairness of the proceedings.[198]

67. Lastly, the Supreme Court notes that in *United States v. Bakker*,[199] the Fourth Circuit Court of Appeals considered the source of pre-trial publicity. The defendant, a television evangelist indicted for fraud, appealed the trial court's denial of his motions to change venue, alleging that these denials violated his right to an impartial jury given the "venomous", "recent, pervasive and widespread" coverage of his legal proceedings.[200] The Fourth Circuit found that the accused was the source of much of the publicity, having "engaged in a calculated media campaign,"[201] both before and after his indictment to support his claim of innocence and to raise publicity for his restructured television ministry. The court determined that an accused should not be allowed to manipulate the criminal justice system by generating publicity which is then used to support a claim that the publicity should give rise to a presumption of prejudice.[202]

68. This Chamber observes that the declarant holds one of the most influential positions in the country and his statements were concomitant with the proceedings. It follows that the conduct had the *potential* to prejudice the Accused's fair trial rights and compromise the Court's appearance of

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[192] *Montgomery*, p. 40.
[193] *Montgomery*, p. 31.
[194] *Montgomery*, p. 38, referring to *Attorney General v. MGN Ltd* [1997] 1 All E.R. 456, p. 461B.
[195] *Montgomery*, p. 40 ("The likely effect of any warnings or directions given to the jury by the trial judge, in the light of the other circumstances of the trial, will in most cases be the critical issue").
[196] *Montgomery*, p. 41, citing with approval the Supreme Court of Canada case *R. v. Vermette*, (1988) 50 D.L.R. (4th) 385, p. 392.
[197] *Montgomery*, p. 41, citing with approval the High Court of Australia case *The Queen v. Glennon*, (1992) 173 C.L.R. 592, p. 603 and the High Court of Ireland case *Z. v. Director of Public Prosecutions*, [1994] 2 I.R. 476, p. 496.
[198] *See* fn. 153 *supra*; *see also Priebke v. Italy*, ECtHR, Chamber Decision, App. No. 48799/99, 5 April 2001, p. 15 ("Contrairement aux membres d'un jury, ces derniers disposent normalement d'une expérience et d'une formation leur permettant d'écarter toute suggestion extérieure au procès").
[199] *United States v. Bakker*, United States Court of Appeals, Fourth Circuit (1991), 925 F. 2d 728.
[200] *Bakker*, 925 F. 2d, p. 732.
[201] *Bakker*, 925 F. 2d, p. 733.
[202] *Bakker*, 925 F. 2d, p. 733.

independence. Statements of this kind should be avoided altogether. That being said, contrary to what the Defence seems to purport,[203] the gist of the corrective action by the ECCC is not to sanction or otherwise embarrass the Prime Minister but to ascertain that no prejudice is caused to the trial proceedings. The trial is being conducted before professional judges only, who are less likely than jurors and lay assessors to be influenced. The evidentiary proceedings are also on-going leaving open the possibility to prove or disprove relevant facts. Furthermore, regarding the source of the publicity, the Supreme Court Chamber observes that the first statement attributed to the Prime Minister was made to the Vietnamese press. It was neither blatantly inflammatory nor designed to attract attention. The subsequent publicity was not a virulent press campaign aimed at hampering the fairness of the trial. Rather, the subsequent widespread coverage and reaction in Cambodia are mainly attributable to the Defence's efforts to give prominence to their grievance.[204]

69. For the foregoing reasons, this Chamber finds appropriate the public affirmation of the presumption of innocence and confirmation that the Trial Chamber will not take into account any public comments concerning the guilt or innocence of any Accused. By refusing (implicitly) to apply the measure requested by the Defence, that is, an admonition, the Trial Chamber did not err in law such as to invalidate the decision nor did it err in the exercise of its discretion resulting in prejudice to the Appellant. Considering that the passage contained in paragraph 31 of the Impugned Decision was not announced in a public hearing, the Supreme Court emphasises the right of the Accused to be presumed innocent. Public officials must avoid comments incompatible with this presumption, as such comments, if repeated, could undermine the Accused's right to a fair trial.

[203] Appeal, paras. 15-17.
[204] This Chamber notes that the Defence has likely once again breached the ECCC regulations on the confidentiality of documents given that on 13 June 2012 the *Phnom Penh Post* quoted part of the present Appeal verbatim despite the fact that the Appeal had not been made public prior to 13 June 2012. Bridget Di Certo, "Khmer Rouge court judges called on to reproach Hun Sen", *Phnom Penh Post*, 13 June 2012, <http://www.phnompenhpost.com/index.php/KRTalk/krt-judges-called-on-to-reproach-hun-sen.html>. Without the journalists having been provided with the Appeal in advance of the date of publication, the *Post* article could not have directly quoted sections of the Appeal. *See also* Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of Judicial Investigation, Supreme Court Chamber, 27 April 2012, E116/1/7, para. 37 and Disposition (in which this Chamber issued a warning to the Defence against further unauthorised disclosure of classified information).

## VII. DISPOSITION

**FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:**

**DECLARES** the Appeal admissible;

**DISMISSES** the Appeal on the merits.

**Phnom Penh, 14 September 2012**

**The President of the Supreme Court Chamber**

**Kong Srim**