BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S APPLICATION FOR SUMMARY ACTION AGAINST PRIME MINISTER HUN SEN

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 22 February 2012, the Defence for Nuon Chea ("Defence") filed an *Application for summary action against Hun Sen pursuant to Rule 35* ("Application").[1] The Application requests the Trial Chamber ("Chamber") to find that a certain public statement attributed to the Prime Minister concerning Nuon Chea (the "Accused") violates the presumption of innocence and amounts to an interference with the administration of justice. The Defence requests the Chamber to sanction the Prime Minister for his "injurious remarks"[2] by means of a "public condemnation"[3] (or "censure"[4] or "rebuke"[5]) and "public warning"[6] under Rule 35 of the Internal Rules ("Rules").

2. The present Application follows an identical oral request to the Chamber on Trial Day 12,[7] the substance of which was raised by the Defence twice more over the course of a week, on two successive Trial Days:

> **Trial Day 18 (19 January 2012)**
>
> *19 MR. PESTMAN:*
> *20 Thank you very much. I just wanted to follow-up on a request we*
> *21 made last week after remarks made by the prime minister in public*
> *22 about our client. As you may remember, he called our client a*
> *23 killer and perpetrator of genocide, and he called -- he*
> *24 characterized his statement as deceitful. Following this remarks,*
> *25 we ask the Trial Chamber to take action to condemn the statements*
> *1 made by the prime minister and to ask him to refrain from making*
> *2 further statements in the future.*
> *3 And we were just curious to know when we can expect a decision on*
> *4 this particular request.*
> *5 (Judges deliberate)*
> *6 [14.46.34]*
> *7 MR. PRESIDENT:*
> *8 The Chamber has noted the remarks made by the defence counsel. It*
> *9 seems that the international counsel for Nuon Chea seems to*
> *10 repeat himself, so we prefer not to make any comment to react to*
> *11 what you have stated, and you are reminded you cannot raise this*
> *12 same matter again.*[8]

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1 **E176** *Application for summary action against Hun Sen pursuant to Rule 35* ("Application"), 22 February 2012.
2 **E176** *Ibid.* at para. 23
3 **E176** *Ibid.*
4 **E176** *Ibid.*
5 **E176** *Ibid.* at para. 24.
6 **E176** *Ibid.*
7 **E1/24.1** Transcript, 10 January 2012 at p. 1, ln. 23-25; p. 2, ln. 1-15; p. 3, ln. 1-16.

Trial Day 19 (23 January 2012)

21 MR. PESTMAN:
22 Your Honours, while we are waiting for the witness, maybe I can
23 ask for a clarification of comments you made, Mr. President, on
24 Thursday. There was a short exchange of arguments with regard to
25 the statements made by Prime Minister Hun Sen two weeks ago with
1 regard to my client.
2 [09.04.49]
3 As you know, he called my client a killer and a perpetrator of
4 genocide and, two weeks ago, I asked this Court to condemn the
5 Prime Minister's statement and to instruct him to refrain from
6 such statements in the future. And when I raised this issue last
7 week again, asking when I could expect a decision to this
8 request, Mr. President, you said that you prefer not to make any
9 comment to react to what I had stated -- I'm quoting from the
10 transcripts -- and you reminded me that I was not allowed -- I
11 could not raise this matter again.
12 I'm asking the Court to clarify this. Is this a decision? I hope
13 it is not. Or are you simply telling me that I have to be patient
14 and that a decision will come soon. And if so, could you please
15 tell us when I can expect a decision to this request?
16 Thank you.[9]

3. In this response, the Co-Prosecutors submit that the Application is repetitious, as its substance has already been sufficiently addressed by the Chamber during trial proceedings. The Application amounts to a disguised appeal and is thus inadmissible before the Chamber. In the alternative, the Co-Prosecutors submit that the Application should be dismissed as the remarks of the Prime Minister: (a) do not violate the presumption of innocence; and (b) cannot amount to an interference with the administration of justice in terms of Rule 35.

II. THE APPLICATION IS INADMISSIBLE

4. The Co-Prosecutors submit that the Chamber has already disposed of the substance of the Application, which amounts to a repetitious filing[10] or a disguised appeal. In either case, the Chamber should not admit the Application.

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8 **E1/30.1** Transcript, 19 February 2012, p. 112, ln. 20-25; p. 113, ln 1-12 [emphasis added].
9 **E1/31.1** Transcript, 23 February 2012, p. 1, ln. 21-25; p. 2, ln 1-16 [emphasis added].
10 See paragraph 2, above.

5. As the Defence acknowledges,[11] the Chamber has already heard and disposed of the substance of the Application during proceedings on Trial Day 26 (the "Oral Decision"):

> *5 This is the Trial Chambers decisions on the objection raised by*
> *6 the international defence counsel of Nuon Chea in regards to the*
> *7 public comments on the existence of guilt of his client.*
> *8 [15.54.06]*
> *9 The Chamber has noted the objection by defence counsel that*
> *10 public comments have been made via media indicating his client,*
> *11 Nuon Chea, is guilty of offences for which he's currently being*
> *12 tried.*
> *13 The Chamber emphasizes that Article 38 of the Constitution of the*
> *14 Kingdom of Cambodia, which states: "The accused shall be*
> *15 considered innocent until the court has judged finally on the*
> *16 case." Thus, the determination of guilt or innocence is the sole*
> *17 responsibility of the Trial Chamber, which will consider all*
> *18 relevant facts, evidence, submissions, and law applicable at the*
> *19 ECCC.*
> *20 Therefore, the Court will not take account of any public comment*
> *21 concerning the guilt or innocence of any Accused in reaching its*
> *22 verdict.*[12]

6. The Defence contests the *sufficiency* of this Oral Decision, characterising it as a "non-decision"[13] on the grounds that (1) the name of the Prime Minister is not mentioned; (2) the nature of the alleged human rights violation is not mentioned; (3) the jurisprudence of the European Court of Human Rights ("ECtHR") cited by the Defence is not addressed; and (4) the Oral Decision lacks any content beyond "stating the obvious – that the Chamber is bound by the Constitution" and cannot properly be characterised as a decision on the substance.[14]

7. The sufficiency of a decision of the Chamber is a matter properly raised on appeal to the Supreme Court Chamber under Rule 104, as the Chamber directed during proceedings on Trial Day 28 (8 February 2012), when Co-Counsel attempted to raise the settled issue of the Prime Minister's statements for the fourth time:

> *10 Reluctantly, we have to revisit Hun Sen's remarks made at a*
> *11 press conference -- now some time ago -- in Vietnam.*
> *12 [09.10.22]*
> *13 MR. PRESIDENT:*

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11 **E176** Application, *supra* note 1 at para. 7.
12 **E1/38.1** Transcript, 2 February 2012, p. 113, ln. 5-22.
13 **E176** Application at para. 7
14 **E176** *Ibid.*

> *14 We have already advised counsel already that you cannot really*
> *15 take the advantage of the allocated time to put questions to your*
> *16 client to ask questions which are not relevant or other issues.*
> *17 The Chamber has already addressed this before and that when the*
> *18 Chamber has ruled on it and you are not satisfied with such*
> *19 ruling, you can file an appeal against such decision before the*
> *20 eyes of the law and you are not allowed to make any further*
> *21 statements to the subject matter that has already been ruled.*[15]

8. Thus, the present Application amounts to a disguised appeal in circumstances where Co-Counsel considered that an immediate appeal would be unavailable, as demonstrated by his further intervention before the Chamber during the same hearing:

> *3 MR. PESTMAN:*
> *4 Thank you, Mr. President, I do have questions and we've all*
> *5 certainly appealed the decision or decisions we think should be*
> *6 appealed at the end of this case; we cannot do that before*
> *7 judgement, certainly not this decision.*[16]

9. The Co-Prosecutors consider that Rule 35 would have constituted the sole legal basis for the relief requested by the Defence in its initial request ("to officially condemn these statements […] and ask the Prime Minister to refrain from such remarks in the future").[17] It is axiomatic that the judiciary should not "condemn" any individual without lawful basis. Thus, the Chamber *has already taken a decision* on the substance of the Application – that is, a request for Rule 35 sanctions concerning the Prime Minister's statements.

10. The most reasonable construction of the trial record is that the Chamber heard the Defence's initial request, deliberated for a period of about three weeks, and rendered an Oral Decision summarily disposing of the request, while reiterating that it "would not take into account any public comment concerning the guilt or innocence of any Accused in reaching its verdict."[18] In doing so, it implicitly declined to exercise its judicial discretion to initiate a Rule 35 investigation, from which an immediate appeal would lie to the Supreme Court Chamber in accordance with Rule 104(4)(d). Whether Co-Counsel misapprehended the law when stating to the Chamber that no immediate appeal would lie from this Oral Decision is irrelevant for the purposes of assessing the admissibility of this Application.

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15 **E1/40.1** Transcript, 8 February 2012 (Trial Day 28) at p. 4, ln. 10-21 [emphasis added].
16 **E1/40.1** *Ibid.* at p. 5, ln. 6-10 [emphasis added].
17 **E1/24.1** Transcript, 10 January 2012 at p. 3, ln. 11-14.
18 **E1/38.1** Transcript, 2 February 2012 at p. 113, ln. 2-22.

11. On this basis, the Co-Prosecutors submit that the Application is inadmissible before the Chamber.

II. THE APPLICATION SHOULD BE DISMISSED

12. The Co-Prosecutors submit that the Prime Minister's statement does not amount to interference with the administration of justice before the ECCC under Rule 35.

13. The Defence's claim of a violation of the presumption of innocence punishable under Rule 35 must rest, in part, on the assumption that the judges of the Chamber are incapable of insulating themselves from "undue pressure…to convict"[19] arising from the Prime Minister's statement. The Co-Prosecutors cannot support this assumption in this case. The Chamber, composed of professional judges, appropriately and fully disabused its mind of the Prime Minister's statement by its Oral Decision of 2 February 2012.

14. The Defence's initial oral request, and the present Application, also rests on the assumption that the Prime Minister's statement must have encouraged the public to believe the Accused is guilty.[20] In this, the Defence posits a causal link between the statement of the Prime Minister and the state of public opinion concerning the guilt of the Accused, in order to draw parallels with the case of *Allenet de Ribemont v France* before the ECtHR:

> *Given the logic of* Ribemont, *it must be presumed that large sections of Cambodian society now consider Nuon Chea to be a* deceitful killer *and a* perpetrator of genocide *simply because the Prime Minister has said so publicly.*[21]

15. The Co-Prosecutors cannot agree with this logic of this assertion. The impact of the Prime Minister's statement in the institutional context of the ECCC differs markedly from *Ribemont* for three reasons:

(a) The impugned statements in *Ribemont* were made by senior police officers and the Minister directly accountable for their functions, during the first days of a murder investigation.[22] The Prime Minister's statement were made during trial proceedings concerning a period of history that has been indelibly imprinted on

19 **E1/24.1** Transcript, 10 January 2012, p. 3, ln. 4-5.
20 **E176** Application, *supra* note 1 at paras. 17-18.
21 **E176** *Ibid.* at para. 18 [emphasis in the original].
22 *Allenet de Ribemont v France*, ECtHR Application No 15175/89, Judgment, 10 February 1995 at para. 9-12 (*Ribemont*).

the collective conscience of Cambodian society, and from which many Cambodians bear personal scars. Unlike the French Minister of the Interior, to whom the police are functionally subordinated, the Prime Minister does not enjoy a superior-subordinate relationship with the ECCC. This is further evidenced by his subsequent statement of 18 January 2012, cited by the Defence, that "the Court can do what it wants, but I had the right to condemn Khmer Rouge leaders".[23]

(b) The statements in *Ribemont* were made by the Minister of Interior and senior police officers to the domestic press and widely publicised. The Prime Minister's statement was made in Vietnam on 7 January 2012 and apparently mentioned in one Vietnamese press source.[24] Indeed, the dissemination of this statement in Cambodia has depended largely upon the efforts of the Defence. On 10 January 2012, having raised the matter in a public hearing of the Chamber, the Defence's comments were carried by a Cambodian press source based on an AFP Report.[25] As a direct result of the Defence's chosen strategy, the Prime Minister's statement – which the Defence categorises as "injurious"[26] to the Accused – and for which they seek a remedy in "equity"[27] – was restated in full on three separate instances and broadcast across Cambodia in the print, radio and television media. To seek a remedy for the impact of the statement in these circumstances is disingenuous: "He who comes to equity must come with clean hands" – or, in Roman law terms, *ex turpi causa non oritur actio.*[28]

(c) Unlike the statements in *Ribemont*, the Prime Minister's statements simply cannot be construed as a legitimate effort by a "public authority" to "inform […] the public about criminal investigations in process."[29] However lacking in reserve, the statements amount to mere political rhetoric. The proper attitude of judicial

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23 **E176** Application, *supra* note 1 at para. 6.
24 Thanh Nien Daily, 'Vietnam did not invade, but revived Cambodia: Hun Sen', 7 January 2012' (Annex 1).
25 MySinchew.com, 'Khmer Rouge lawyers slam PM's 'killer' remark', 10 January 2012 (Annex 1).
26 **E176** Application, *supra* note 1 at para. 23.
27 **E176** *Ibid.* at paras. 15, 23.
28 The Chamber may find itself competent to apply principles of equity insofar as these amount to *general principles of law* (see *River Meuse Case* (*Netherlands v Belgium*) PCIJ Reports Series A/B No 70 76 at 76 per Judge Hudson; *Case Concerning the Frontier Dispute* (*Burkina Faso v Republic of Mali*) (Judgment) [1986] ICJ Reports 554 at 567-8; *North Sea Continental Shelf cases*, (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*) [1969] ICJ Reports 4 at 46-50.
29 *Ribemont, supra* note 22 at para. 38.

authorities in such instances was aptly described by Justice Frankfurter of the U.S. Supreme Court:

> *In times of political passion, dishonest or vindictive motives are readily attributed* […] *and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.*[30]

16. Considering the terms of the Oral Decision, the Co-Prosecutors submit that the Prime Minister's statement neither sought to, nor will influence the judges of the Chamber in Case 002/01. Further, the conduct of the Defence in disseminating the Prime Minister's statement factually undermines and legally severs any purported causal link between the statement and Cambodian public opinion concerning the criminal responsibility of the Accused. As such, the Chamber should not impose sanctions under Rule 35.

IV. RELIEF REQUESTED

17. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

(i) find the Application inadmissible; or, in the alternative,

(ii) dismiss the Application in full.

Respectfully submitted,

Date	Name	Place	Signature
5 March 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[30] *Tenney v Brandhove*, 341 U.S. 367 (1951) at 377-378 (Supreme Court of the United States of America).