

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**APPLICATION FOR SUMMARY ACTION
AGAINST HUN SEN PURSUANT TO RULE 35**

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I. INTRODUCTION

1. Pursuant to Rule 35 of the ECCC Internal Rules (the ‘Rules’),¹ counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this application for summary action against Prime Minister Hun Sen. For the reasons stated below, the Defence submits that: (a) the application is admissible; (b) Hun Sen’s recent remarks to the Vietnamese press—a violation of Nuon Chea’s right to be presumed innocent under the Constitution of the Kingdom of Cambodia (the ‘Constitution’)—amount to an interference with the administration of justice at the ECCC; and (c) the Trial Chamber must provide a practical and effective remedy. As a preliminary matter, the Defence takes the position that the instant submission should be classified as public; in any event, the Defence will treat it as such.

II. RELEVANT FACTS

A. Hun Sen’s Public Remarks Regarding Nuon Chea

2. The facts material to the instant application are straightforward. On 5 January 2012, it was reported in the Vietnamese press that Prime Minister Hun Sen made the following remarks two days earlier at a press conference in Dong Nai Province, Vietnam:

Commenting on accusations by a former Khmer Rouge leader at a trial last month that Vietnam had invaded Cambodia in the 1970s, Hun Sen said it was not necessary to respond to such ‘deceitful’ words.

‘The killer and genocide (perpetrator) is defending himself in an effort to evade the crime. Everybody knows our country used to have a genocidal regime and [now] we and the world have opened a trial against them,’ he said.²

Without a doubt, the Prime Minister was referring to Nuon Chea—the only ‘former Khmer Rouge leader’ who has testified ‘at a trial’ in December 2011 about Vietnam’s invasion of Cambodia in the 1970s.

B. Defence Efforts to Address the Issue in Court

3. At the first opportunity, the Defence objected to the statement in court and requested the Chamber to take appropriate action.³ In particular, counsel sought the following

¹ See ECCC Internal Rules (Rev 8), as revised on 3 August 2011.

² Minh Nam, Tan Tu, and An Dien, ‘Vietnam did not invade, but revived Cambodia: Hun Sen’, *Than Nien News/Vietweek*, 5 January 2012 (reproduced in ECCC Media Clippings: 7–9 January 2012, p 8); available at: <http://www.thanhniennews.com/2010/pages/20120105-vietnam-did-not-invade-but-revived-cambodia-hun-sen.aspx>.

specific relief (the ‘Oral Request’): ‘[W]e request you to officially condemn these statements, which prejudice our client and violate his rights to a fair trial, and ask the Prime Minister to refrain from such remarks in the future.’⁴ Failing to even acknowledge the Oral Request, the President moved on to the next item on his agenda.⁵ The International Deputy Co-Prosecutor briefly noted that his office (the ‘OCP’) was certain the Chamber would not let the Prime Minister’s comments interfere with the judges’ independence.⁶ Again, there was no acknowledgement from the Chamber.⁷

4. Nine days later, after no appreciable action by the Chamber on the Oral Request, the Defence reiterated its call for a condemnation of the remarks and an admonition as to

³ See Document No **E-1/24.1**, ‘Transcript of Trial Proceedings’, 10 January 2012 (Trial Day 12), ERN 00767596–00767710, pp 2:1–3:16 (‘Yesterday, I received the usual press clippings, which are distributed within this Court, and in one of the articles mentioned in these press clippings, Prime Minister Hun Sen was quoted, during a press conference which took place last week, in Vietnam. At this press conference, he allegedly said [...] that Nuon Chea’s statements in court, in December, had been “deceitful”. That’s the word he used, according to the journalist. And moreover he called Nuon Chea, our client, a “killer” and a “perpetrator of genocide”. This is a very clear statement about the guilt of Nuon Chea by a high government official in Cambodia, and as such it constitutes a clear violation of our client’s rights to a fair trial and, more specifically, our client’s right to be presumed innocent until found guilty by a court. It’s not up to the Prime Minister to decide whether my client is guilty; it’s up to you, the Judges in this court. There’s a famous case at the European Court for Human Rights, the case of *Allenet de Ribemont* against France, which has interesting points in common with this particular issue, and I encourage the Court to have a look at that—at that decision of the Court. The Court—the European Court said that the remarks made by a public official in that case about the guilt of the Accused “encouraged the public to believe that the Accused was guilty” and that they pre-judged the assessment of the facts by the judicial authorities, the court that had to decide upon the issue or the guilt of that particular accused. Remarks like this, made by a high public official, put undue pressure on this Court, on any court, to convict, and with it they undermine the independence of the Judges in the Court. And certainly, in this country, which has a notoriously weak judiciary, these remarks—and it is our strong position—require a very strong response by this Court. And we request you to officially condemn these statements, which prejudice our client and violate his rights to a fair trial, and ask the Prime Minister to refrain from such remarks in the future. It’s up to you, and it’s very important that Your Honors defend the integrity of this Court, at least what is left of it. Thank you.’)

⁴ *Ibid*, p 3:11–14.

⁵ See *ibid*, p 3:19 *et seq*.

⁶ See *ibid*, p 7:10–16 (‘And perhaps just one further point, in relation to the counsel for Nuon Chea’s statement in relation to the Prime Minister’s remarks. The prosecution has the utmost faith with this Trial Chamber that no statement made by any member of the public or public official will interfere with your duty as independent judges to make a finding on the evidence, and not on allegations in newspapers or any other place. Thank you.’)

⁷ See *ibid*, p 7:17 *et seq*.

further such statements.⁸ Brusquely, the President informed counsel that the Chamber had no comment and that the Defence was not permitted to raise the issue in court.⁹

5. At the next trial day, the Defence again attempted to elicit a response from the Chamber and to clarify the President's previous remarks: 'Is [this] a decision? [...] Or are you simply telling me that I have to be patient and that a decision will come soon? And if so, could you please tell us when I can expect a decision to this request?'¹⁰ The President then turned over the floor to Judge Cartwright,¹¹ who finally announced something resembling the Chamber's position on the Oral Request: 'The matter will be taken into consideration in due course and when it's appropriate to do so.'¹² Despite her suggestion to the contrary, there had previously been *no* 'clear indication from the Bench' as to the Chamber's handling of the Oral Request.¹³
6. Reacting to Defence efforts to condemn his remarks, the Prime Minister attempted to downplay the impact of his statement at a public forum:

⁸ See Document No E-1/30.1, 'Transcript of Trial Proceedings', 19 January 2012 (Trial Day 18), ERN 00771977-00772091, pp 112:20-113:6 ('Thank you very much. I just wanted to follow-up on a request we made last week after remarks made by the prime minister in public about our client. As you may remember, he called our client a killer and perpetrator of genocide, and he called—he characterized his statement as deceitful. Following this remarks, we ask the Trial Chamber to take action to condemn the statements made by the prime minister and to ask him to refrain from making further statements in the future. And we were just curious to know when we can expect a decision on this particular request.')

⁹ See Document No E-1/30.1, 'Transcript of Trial Proceedings', 19 January 2012 (Trial Day 18), ERN 00771977-00772091, p 113:8-12 ('The Chamber has noted the remarks made by the defence counsel. It seems that the international counsel for Nuon Chea seems to repeat himself, so we prefer not to make any comment to react to what you have stated, and you are reminded you cannot raise this same matter again.')

¹⁰ Document No E-1/31.1, 'Transcript of Trial Proceedings', 23 January 2012 (Trial Day 19), ERN 00772575-00772677, p 2:12-15.

¹¹ See *ibid*, p 2:20-25 ('We would like to hand over to Judge Silvia Cartwright to respond to the remarks made by counsel for Nuon Chea concerning this issue. It has—it is the third time the counsel has raised this, although we already informed the counsel on Thursday. So for clarification, Judge Silvia Cartwright may now proceed to shed light on this.')

¹² *Ibid*, p 3:3-14 ('Thank you, President. I was not present when you raised this matter for the second or third time last week. Please stand when I'm speaking to you. Thank you. I was not present when this matter was raised again last week. I am informed that the President has said clearly that the Trial Chamber has taken note of this matter and that you have been asked not to keep raising it and please do not do so. The matter will be taken into consideration in due course and when it's appropriate to do so. It should not need repeating to counsel who has any experience that these matters should not be repeatedly raised when there has been a clear indication from the Bench.')

¹³ *Ibid*, p 3:3-14 ('Thank you, President. I was not present when you raised this matter for the second or third time last week. Please stand when I'm speaking to you. Thank you. I was not present when this matter was raised again last week. I am informed that the President has said clearly that the Trial Chamber has taken note of this matter and that you have been asked not to keep raising it and please do not do so. The matter will be taken into consideration in due course and when it's appropriate to do so. It should not need repeating to counsel who has any experience that these matters should not be repeatedly raised when there has been a clear indication from the Bench.')

‘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 [sic] Pol Pot, Nuon Chea, Khieu Samphan, and Ieng Sary didn’t influence the current court.’¹⁴

Most telling, however, was his final comment on the issue: ‘The court can do whatever it wants *but I had the right to condemn Khmer Rouge leaders.*’¹⁵ Montesquieu he’s not.

C. The Trial Chamber’s Official Reaction

7. Fourteen days following the Oral Request, and without a single reference to the Prime Minister himself, the Trial Chamber purported to dispose of the application:

[B]efore the adjournment, the Chamber would like to make an announcement on a decision in regards to Nuon Chea’s defence—that is Mr Pestman. Can you please stand? This is the Trial Chamber’s decision on the objection raised by the international defence counsel of Nuon Chea in regards to the public comments on the assistance [*sic*] of 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: ‘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.¹⁶

Notably, in delivering this ‘non-decision’, the President made no mention of the alleged human-rights violation and supporting jurisprudence, which had been clearly set out by counsel in court.¹⁷ Beyond stating the obvious—that the Chamber is bound by the Constitution—the President expressed nothing that could be characterized as a decision. When the Defence attempted to raise this very issue, the President informed counsel—in rough language—that the Chamber has no intention of dealing with the matter further in court, for reasons that remain unclear and unexpressed.¹⁸

¹⁴ *The Cambodia Herald*, ‘Hun Sen calls for government response to accusations by Nuon Chea’s lawyer’, 18 February 2012 (available at www.thecambodiaherald.com).

¹⁵ *Ibid*; see also Vong Sokheng & David Boyle, *The Phnom Penh Post*, ‘KR leadership fair game: PM’, 20 February 2012 (‘During a closed-door meeting with government officials and civil society representatives on Friday, the premier said he would not be prevented from freely expressing himself about Nuon Chea’s alleged crimes under the Khmer Rouge. “Preventing me from speaking to condemn Nuon Chea and Pol Pot regime means that I was wrong to fight to topple the Pol Pot regime,” he was recorded saying. “Look! Together help to defend me and do not allow Nuon Chea’s lawyer to act arrogantly”.’)

¹⁶ Document No E-1/38.1, ‘Transcript of Trial Proceedings’, 2 February 2012 (Trial Day 26), ERN 00777033–00777149, p 113:2–22.

¹⁷ See n 3, *supra*.

¹⁸ See Document No E-1/40.1, ‘Transcript of Trial Proceedings’, 8 February 2012 (Trial Day 28), ERN 00778434–00778489, pp 4:9–8:4.

III. RELEVANT LAW

A. Interference with the Administration of Justice

8. According to Rule 35(1), '[t]he ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice'.¹⁹ Should the Chamber 'have reason to believe that a person *may have committed*' such interference, it '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'.²⁰
9. Relying on the text of Rule 35 and jurisprudence related to an analogous provision applicable at the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY'), the Pre-Trial Chamber (the 'PTC') determined that there are '*three distinct standards of proof*' that require attention when considering an interference with the administration of justice pursuant to Internal Rule 35'.²¹

These standards are (i) reason to believe; (ii) sufficient grounds; and (iii) beyond reasonable doubt. The reason-to-believe standard is expressed in Internal Rule 35(2), which provides three courses of action when the 'Chambers have *reason to believe* that a person may have committed any of the acts' listed in Internal Rule 35(1). The sufficient-grounds standard must be satisfied to instigate proceedings, deal with the matter summarily, or refer the matter to the authorities of Cambodia or the United Nations. The beyond-reasonable-doubt standard of proof must be satisfied before sanctions can be imposed on an individual for a violation of Internal Rule 35(1).²²

According to the PTC, '[t]he reason-to-believe standard is *an extremely low threshold* and merely invokes inquiry by [...] a Chamber'.²³

10. A crucial provision in safeguarding the impartiality and independence of the ECCC and in further ensuring a fair trial for the accused, Rule 35 is of paramount importance:

¹⁹ *N.B.* Rule 35(1) sets out a *non-exhaustive* list of examples of such interference.

²⁰ Rule 35(2) (emphasis added).

²¹ Document No **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses', 9 September 2010, ERN 00600748-00600774, para 36 (emphasis added).

²² *Ibid* (emphasis in original).

²³ *Ibid*, para 37 (emphasis added). *N.B.* 'The broad nature of this threshold is emphasized by the inclusion of *may* in Internal Rule 35(2). A finding that there is reason to believe does not require or involve a determination as to the merits of an allegation or suspicion of interference. The finding that the reason-to-believe standard has been met does, however, require the CIJs or Chamber to have concluded that there exists a material basis or reason that is the foundation of their belief. This material basis or reason shall be established based on an examination of the allegation or suspicion, which examination may be subjective in nature.' *Ibid*; see also *ibid*, paras 38, 39 (regarding the sufficient-grounds and beyond-reasonable-doubt standards).

Rule 35 was incorporated into the Internal Rules as a mechanism to preserve the integrity of the judicial process at both the investigative and trial stages. Integrity of the process is guaranteed through the judicious application of this Rule when [...] a Chamber consider actions taken by an individual threaten the administration of justice. The application of this provision, *even when there has been no immediate impact upon [...] judicial decisions*, acts as a deterrent to others that may consider influencing the process. The Rule also promotes confidence in both individuals who have given statements and those that may consider providing evidence that [...] a Chamber *will act without hesitation* towards those that seek to prevent or influence their involvement with the ECCC. In doing so, the credibility of proceedings before the ECCC, at both an international and domestic level, will be preserved.²⁴

In light of its protective function and general application,²⁵ the PTC has rightly given Rule 35 a liberal interpretation.

B. The Presumption of Innocence

11. Article 38 of the Constitution recognizes the presumption of innocence to be afforded to all persons facing criminal charges: ‘The accused shall be considered innocent until the court has judged finally on the case.’²⁶ This guarantee is substantively identical to the one provided in the various human rights conventions the world over. In particular, Article 6(2) of the European Convention on Human Rights (the ‘ECHR’) provides as follows: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’
12. The European Court of Human Rights (the ‘ECtHR’) long ago confirmed that the presumption of innocence applies to non-judicial actors and can be violated by individuals holding high public office.²⁷ In its seminal case on the issue (*Ribemont v France*), the French Minister of Interior (along with other senior government officials) had made public statements at a press conference indicating that the applicant was conclusively involved in a crime for which he had yet to be charged and tried.²⁸

²⁴ Document No **D-314/2/7**, ‘Decision on Nuon Chea’s and Ieng Sary’s Appeal against OCIJ Order on Requests to Summon Witnesses’, 8 June 2010, ERN 00527392–00527420 (the ‘Witness Decision’), para 38 (emphasis added).

²⁵ *N.B.* Rule 35 falls under the following rubric of the Rules: ‘III. Procedure, A. General Provisions’.

²⁶ See ECCC Legal Compendium, (adopted on 21 September 1993 in Phnom Penh by the Constitutional Assembly at its 2nd Plenary Session).

²⁷ See *Ribemont v France*, ECHR Application No 15175/89, ‘Judgment’, 10 February 1995, para 36 (‘The Court considers that the presumption of innocence may be infringed not only by a judge or court *but also by other public authorities.*’) (emphasis added).

²⁸ See *Ribemont*, paras 10–12.

13. The court held that ‘the remarks made by the Minister of the Interior [...] were incompatible with the presumption of innocence’.²⁹ In particular:

The Court notes that in the instant case some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, *without any qualification or reservation*, as on of the instigators of a murder and thus an accomplice in that murder. *This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.*³⁰

On its face, the minister’s declaration amounted to a breach of Article 6(2) of the ECHR.³¹ Notably, the Court explained that the while authorities are free to ‘inform[...] the public about criminal investigations in progress’, the law ‘requires that they do so *with all the discretion and circumspection necessary* if the presumption of innocence is to be respected’.³² The *Ribemont* rule has been consistently upheld and applied by the ECtHR.³³

14. In this regard, it is useful to recall the public statements attributed to Judge Cartwright in reaction to comments made by Hun Sen in 2009:

As Cambodia’s Prime Minister Hun Sen says he can’t wait for the tribunal hearing cases against Pol Pot’s henchmen to fold, Dame Silvia Cartwright says political interference in any court proceeding is deplorable. [...]

Prime Minister Hun Sen [...] expressed disdain for the court and made it clear he wanted everything wrapped up as soon as possible. [...]

‘I would pray for this court to run out of money and for the foreign judges and prosecutors to walk out,’ Hun Sen said.

‘That would allow for Cambodia to finish the trial by itself.’

The Prime Minister’s speech was also read as confirmation by some that the Cambodian representatives on the court were under his influence.

Dame Silvia would not comment directly, saying it was a political matter, but she was clearly unimpressed by the verbal attack.

‘Countries where the rule of law is respected and where their citizens can be sure of a fair trial are those in which the independence of the courts and judges is guaranteed,’ she said.

‘Comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence are therefore to be deplored.’³⁴

²⁹ *Ribemont*, para 39.

³⁰ *Ribemont*, para 41.

³¹ *Ribemont*, para 41.

³² *Ribemont*, para 38 (emphasis added).

³³ See, e.g., *Fatullayev v Azerbaijan*, ECtHR App No 40984/07, ‘Judgment’, 22 April 2010, paras 157–163; *Butkevicius v Lithuania*, ECtHR App No 48297/99, ‘Judgment’, 26 March 2002, paras 46–54; *Khuzhin and Others v Russia*, ECtHR, App No 13470/02, ‘Judgment’, 23 October 2008, paras 93–97.

³⁴ Maggie Tait, ‘Interference “deplored” by judge’, *Stuff New Zealand (NZPA)*, 5 April 2009 (available at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>) (emphasis added).

As international counsel recently remarked in court with respect to another comment by Judge Cartwright, the Defence could not have put it any better.³⁵

C. Equitable Compensation for Non-Pecuniary Damages

15. In *Ribemont*, in addition to finding a violation of the presumption of innocence, the ECtHR further found that, *inter alia*, ‘the applicant indisputably sustained *non-pecuniary* damage on account of the breach of’ his human rights.³⁶ Given that it was ‘predictable that the media would give extensive coverage to the statements [in question]’, the demonstrable ‘lack of restraint and discretion vis-à-vis the applicant was therefore all the more reprehensible. Moreover, the statements in issue were very widely reported, both in France and abroad.’³⁷ Accordingly, ‘[t]aking into account the various relevant factors and making its assessment on an equitable basis,’ the Court awarded the applicant ‘a total sum of FRF 2,000,000’ as compensation for the damages suffered as a result of the minister’s public comments.³⁸ As with all such assessments, ‘the Convention must be interpreted in such a way as to guarantee rights *which are practical and effective as opposed to theoretical and illusory*’.³⁹

IV. ARGUMENT

A. The Application is Admissible

16. This Chamber has the express authority to sanction ‘any person who knowingly and willfully interferes with the administration of justice’.⁴⁰ Such interference is defined broadly by the Rules and construed liberally by the relevant jurisprudence.⁴¹ Rule 35 clearly includes within its purview the type of behavior exhibited by the Prime Minister. And both appellate bodies of this Tribunal—the PTC and the Supreme Court Chamber—have acknowledged that parties may seek affirmative relief, on their own

³⁵ See Document No E-1/38.1, ‘Transcript of Trial Proceedings’, 2 February 2012 (Trial Day 26), ERN 00777033–00777149, p 77:14–16.

³⁶ *Ribemont*, para 62 (emphasis added). *Cf.* The Court also sustained pecuniary damages based on the applicant’s proven difficulties in ‘pursu[ing] his occupation’ due to ‘diminished [...] trust placed in him by the people he did business with’. *Ibid.*

³⁷ *Ribemont*, para 62.

³⁸ *Ribemont*, para 62.

³⁹ *Ribemont*, para 35 (citing *Artico v Italy*, ECtHR App No 6694/74, ‘Judgment’, 13 May 1980, para 33).

⁴⁰ Rule 35(1).

⁴¹ See paras 9–10, *supra*.

motion, pursuant to Rule 35.⁴² Despite the President's remarks in court on 2 February 2012,⁴³ the Trial Chamber has yet to dispose of the Oral Request. It is therefore restated here in writing, as requested by the President and as previously indicated by the Defence,⁴⁴ along with detailed references to the relevant jurisprudence and an additional request for relief. Accordingly, the application is admissible and this Chamber should address it thoroughly on its merits and issue a fully reasoned decision.

B. Hun Sen's Public Remarks, a Clear Violation of Nuon Chea's Right to a Fair Trial, Amount to an Interference with the Administration of Justice

17. The central question of this application—whether Hun Sen's public remarks violate Nuon Chea's right to a fair trial—must be answered in the affirmative. Like those attributed to the Minister of Interior in *Ribemont*, Hun Sen's public statements are 'incompatible with the presumption of innocence'.⁴⁵ Clearly a declaration of Nuon Chea's guilt, the Prime Minister's remarks—*on their face*—have 'encouraged the public to believe him guilty' and 'prejudged the assessment of the facts by the [Trial Chamber]'.⁴⁶

18. 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.⁴⁷ This unfortunate reality is compounded by the fact that Hun Sen's influence in this country is as strong as his 'popularity' is widespread. He is, quite simply, without peer in shaping the political and social landscape in Cambodia. His portrait is displayed in public and private spaces alike, and his image (along with those of Chea Sim and Heng Samrin) is as ubiquitous, if not more so, as that of the King himself. Demagogue that he is, Hun Sen regularly and enthusiastically addresses the nation on all manner of contemporary issues, including the highly politicized legal cases of the day. Respected by many and feared by even more, the Prime Minister is accustomed to dictating his judicial views to

⁴² See Witness Decision, para 43 (holding that the OCIJ—and, by extension, the Trial Chamber—'has the statutory authority to take discretionary action pursuant to Rule 35 irrespective of the manner in which the relevant information is placed before it'; Document No E-116/1/6, 'Summary of Reasons for the Decision on Immediate Appeal by Nuon Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation', 30 January 2012, ERN 00772881–00772887, para 17 (finding that the Trial Chamber had not improperly barred the Defence from affirmatively requesting discretionary action pursuant to Rule 35(2)).

⁴³ See para 7, *supra*.

⁴⁴ See Draft 'Transcript of Trial Proceedings', 16 February 2012 (Trial Day 33), p 27:10–28:6.

⁴⁵ *Ribemont*, para 39.

⁴⁶ *Ribemont*, para 41.

⁴⁷ See paras 12–13, *supra*.

captive (and at times captivated) audiences. And the public, in turn, is used to accepting the underlying ‘facts’ of his habitual screeds. In short, when Hun Sen speaks, Cambodians listen. And, unfortunately, quite often they believe what he has to say.

19. Equally, any reasonable observer in this country would understand the Prime Minister’s statement as an attempt to influence the Trial Chamber—in particular, its Cambodian membership—to reach a particular outcome in the case against Nuon Chea, namely: a conviction. Once Hun Sen has—to use his own word—*condemned* Nuon Chea,⁴⁸ the latter simply has no chance of receiving a fair trial. The informed observer is well aware that Cambodian jurists are well trained in the (not so subtle) art of taking prime-ministerial hints.
20. As the Defence has pleaded in the municipal courts, Hun Sen’s behavior—including his statements to the media—amounts to criminal offences under the Cambodian Penal Code. But that is another matter. What is alleged here is a clear infringement of one of Nuon Chea’s fundamental rights: the presumption of innocence. While ‘the law requires [officials to speak publicly about pending criminal cases] with all the discretion and circumspection necessary’ to respect the presumption of innocence,⁴⁹ Hun Sen’s rhetoric is typically as indiscreet as it is audacious. And in the instant case, he has been true to form—going so far as to threaten the Defence with legal action for simply raising the issue addressed herein.⁵⁰ If, as in *Ribemont*, the comments of the Minister of Interior (mild in comparison to Hun Sen’s remarks) are sufficient to infringe Article 6(2), then, *a fortiori*, the Prime Minister’s remarks in the instant case must be considered a violation of Nuon Chea’s constitutional right to be presumed innocent until proven otherwise. By perpetrating that violation, Hun Sen has interfered with the administration of justice at the ECCC.

C. The Trial Chamber Must Provide a Practical and Effective Remedy

21. As noted above, and as any reasonable observer would agree, this Chamber has yet to rule on the Defence’s specific application for condemnation and sanctions. Professing to address the Oral Request, but without actually taking up the crucial issue, the President failed to even mention the Prime Minister’s name or position.⁵¹ This

⁴⁸ See para 6, *supra*.

⁴⁹ See para 13, *supra*.

⁵⁰ See n 15, *supra*.

⁵¹ See para 7, *supra*.

omission is telling. By attempting to shift the focus away from Hun Sen's infringement and onto the Trial Chamber's purported ability to remain unmoved by executive interference,⁵² the latter seems eager to minimize what is in fact a very serious breach. Yet such judicial evasion, apart from its unseemliness, will only promote further damaging comments by the Prime Minister.

22. Moreover, the mere reference to the Trial Chamber's obligation to respect Article 38 of the Constitution⁵³—an obvious requirement for judges of this bench—is, albeit a good starting point, insufficient to dispose of the matter raised by the Defence. Simply stating the applicable safeguard is no safeguard at all. Given the clear violation (as discussed in the previous section), what is needed is a *practical and effective* remedy as opposed to a merely *theoretical and illusory* one⁵⁴—as provided to date by this Chamber. Recalling the words of Judge Cartwright, public comments 'which appear to be an attempt to interfere with [the] independence [of the judiciary] are therefore to be deplored'.⁵⁵ Indeed, according to the relevant jurisprudence, such comments are to be condemned, their makers punished, and their victims compensated. Accordingly, the Trial Chamber should act robustly pursuant to Rule 35.

23. In order to prevent further damage, the Defence has already suggested the appropriate remedy to be imposed: a public condemnation of Hun Sen's remarks and a public warning that further comments will be met by even more stringent action. Not only does this Chamber have an affirmative duty to denounce actions that interfere with the administration of justice, it should not hesitate to explain to the Prime Minister and to the public that in functioning democracies the judicial branch does not take orders from the executive. The Trial Chamber must demonstrate its independence, its competence, and its commitment to a fair trial for Nuon Chea. If Cambodia truly is the open society that officials of the Royal Government profess it to be, then the President and his counterparts should have absolutely no reservations regarding the only acceptable course of action in this case: public censure of Hun Sen and his injurious remarks. As in *Ribemont*, equity requires remedial action.⁵⁶ Unless and until such action is taken by

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ See para 15, *supra*.

⁵⁵ See para 14, *supra*.

⁵⁶ See para 15, *supra*.

this Chamber, the Prime Minister will have, once again, exposed the ECCC as the cowed institution that it is.

V. CONCLUSION

24. Accordingly, for the reasons stated herein, this Chamber should:
- a. admit the instant application;
 - b. acknowledge that Hun Sen's remarks are a violation of Nuon Chea's right to be presumed innocent under the Constitution and, as such, an interference with the administration of justice at the ECCC;
 - c. publicly rebuke the Prime Minister and officially warn him against making any further statements of a similar nature.

Oral argument at an open hearing—in advance of any determination—is appropriate, (also) considering the subject matter of this application and the pivotal right to a fair trial that is at stake, and is hereby requested.


CO-LAWYERS FOR NUON CHEA



Michiel PESTMAN



& Victor KOPPE



Andrew IANUZZI & Jasper PAUW