E176/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
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Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Date: **11 May 2012**
Original language(s): **Khmer/English/French**
Classification: **PUBLIC**

DECISION ON RULE 35 APPLICATIONS FOR SUMMARY ACTION

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1. INTRODUCTION

1. The Trial Chamber is seised of NUON Chea's applications of 22 February and 12 March 2012 for summary action against Prime Minister Samdech HUN Sen pursuant to Rule 35.[1]

2. PROCEDURAL HISTORY

2. During trial proceedings on 10 January 2012, the NUON Chea Defence made reference to remarks attributed to the Prime Minister in the Vietnamese press and requested the Trial Chamber "to officially condemn these statements [...] and ask the Prime Minister to refrain from [making] such remarks in the future".[2] In response, the International Deputy Co-Prosecutor stated that the Prosecution had "the utmost faith" that the Trial Chamber would not let such remarks interfere with its duty to make a finding on the evidence.[3]

3. During trial proceedings on 19 January 2012, the NUON Chea Defence again referred to the alleged remarks and repeated its request that the Trial Chamber "take action to condemn the statements made by the Prime Minister" and "ask [the Prime Minister] to refrain from making further statements".[4] The President informed the NUON Chea Defence that the Chamber had noted its request and asked it to desist from continually raising the same matter.[5]

4. On 23 January 2012, the NUON Chea Defence raised the alleged remarks for a third time during trial proceedings and asked the President to clarify his response of 19 January 2012.[6] Judge CARTWRIGHT reiterated that the Chamber had taken note of the NUON Chea Defence's request and stated that it would be dealt with in due course.[7]

5. On 2 February, the Chamber issued the following oral decision:

> 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 existence 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 is currently being tried. The Chamber emphasizes that Article 38 of the

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1 Application for Summary Action Against HUN Sen Pursuant to Rule 35, E176, 22 February 2012 ("First Application"); T., 12 March 2012, pp. 80-81 ("Second Application").
2 T., 10 January 2012, pp. 1-3.
3 T., 10 January 2012, p. 7.
4 T., 19 January 2012, pp. 112-113.
5 T., 19 January 2012, p. 113.
6 T., 23 January 2012, pp. 1-2.
7 T., 23 January 2012, p. 3.

> 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.[8]

6. The NUON Chea Defence sought to revisit the alleged remarks once more during trial proceedings on 8 February 2012.[9] The President reminded the NUON Chea Defence that the Chamber had already ruled on its request.[10]

7. Finally, the NUON Chea Defence seised the Chamber with two further requests, one filed on 22 February 2012, to which the Co-Prosecutors responded on 5 March 2012[11], and another made during trial proceedings on 12 March 2012.[12]

3. SUBMISSIONS

8. In support of the First Application, the NUON Chea Defence presents extracts from two press reports. The first contains the alleged remarks:

> 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.[13]

9. The second contains a purported response from the Prime Minister:

> '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.
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> [...]
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> 'The court can do whatever it wants but I had the right to condemn Khmer Rouge leaders.'[14]

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8 T., 2 February 2012, p. 113 (English corrected version).
9 T., 8 February 2012, p. 4.
10 T., 8 February 2012, p. 4.
11 Co-Prosecutors' Response to NUON Chea's Application for Summary Action Against Prime Minister Hun Sen, E176/1, 5 March 2012 ("Response").
12 T., 12 March 2010, pp. 80-81.
13 First Application, para. 2, citing "Minh Nam, Tan Tu and An Dien, 'Vietnam did not invade, but revived Cambodia: Hun Sen', Than Nien News/Vietweek, 5 January 2012".

10. The NUON Chea Defence submits that the Trial Chamber has yet to dispose of its requests made orally during trial proceedings, despite the decision of 2 February 2012.[15] It argues that the alleged remarks constitute an attempt by the Prime Minister to influence the Trial Chamber in reaching an outcome in the case against NUON Chea.[16] It therefore submits that, according to the jurisprudence of the European Court of Human Rights ("ECtHR"), the alleged remarks are incompatible with the presumption of innocence to which NUON Chea is entitled and violate his right to a fair trial.[17]

11. The NUON Chea Defence contends that this violation requires a practical and effective remedy, and suggests that the appropriate remedy would be for the Trial Chamber to publicly condemn the Prime Minister's remarks and issue "a public warning that further comments will be met by even more stringent action."[18]

12. The NUON Chea Defence requests the Trial Chamber to admit the application, acknowledge that the Prime Minister's remarks violated the Accused right to be presumed innocent and, as such, interfered with the administration of justice at the ECCC, publicly rebuke the Prime Minister and officially remind him not to make any further statements of a similar nature.[19]

13. In response, the Co-Prosecutors submit that the Chamber has already disposed of the substance of the First Application by its oral decision of 2 February 2012, and that the First Application amounts to a repetitious filing or a disguised appeal.[20] They contend that the sufficiency of an oral decision is a matter properly raised on appeal to the Supreme Court Chamber under Rule 104, and that the First Application is consequently inadmissible.[21]

14. Alternatively, the Co-Prosecutors argue that the alleged remarks do not amount to an interference with the administration of justice, as the Chamber is capable of insulating itself from outside pressure and has already "disabused its mind of the Prime Minister's statement."[22] Moreover, they submit that the impact of the alleged remarks on public opinion

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[14] First Application, para. 6, citing "'Hun Sen calls for government response to accusation by Nuon Chea's lawyer', The Cambodia Herald, 18 February 2012".
[15] First Application, paras 16 and 21.
[16] First Application, para. 19.
[17] First Application, paras 17 and 20.
[18] First Application, paras 22-23.
[19] First Application, para. 24.
[20] Response, paras 4-5.
[21] Response, paras 7, 10-11.
[22] Response, para. 13.

is limited, as the Prime Minister was discussing historical events and does not have authority over the ECCC, that the behaviour of the NUON Chea Defence in publicising the alleged remarks severs the causal link between the alleged remarks themselves and any effect on public opinion, and that the alleged remarks are "mere political rhetoric."[23] The Co-Prosecutors therefore request that the Chamber find the First Application to be inadmissible or, alternatively, dismiss it in full.[24]

15. With regard to the Second Application, the NUON Chea Defence alleges that "it was reported that Hun Sen was considering retaliatory legal action against an individual he'd described as 'an arrogant member of the NUON Chea Defence team'", and requests that the Chamber condemn the Prime Minister's behaviour.[25]

4. APPLICABLE LAW

4.1. The presumption of innocence

16. It is a fundamental principle of criminal proceedings that accused persons are presumed innocent until proven guilty. This presumption is an essential component of an accused's right to a fair trial. It is reflected in Internal Rule 21(d) and enshrined in Article 38 of the Constitution of Cambodia, Article 14(2) of the International Convention on Civil and Political Rights ("ICCPR"), Article 6(2) of the European Convention of Human Rights ("ECHR") and Article 7(1)(b) of the African Charter on Human and Peoples' Rights ("ACHPR").

17. The ECtHR has repeatedly found violations of Article 6(2) of the ECHR in circumstances where officials have made public statements concerning a person charged with a criminal offence which reflect an opinion that he is guilty before he has been proved so according to law.[26] It has held:

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[23] Response, paras 15-16.
[24] Response, para. 17.
[25] T., 12 March 2010, p. 81.
[26] *Allenet de Ribemont v. France*, Judgement, ECtHR (15175/89), 10 February 1995, para. 41; *Butkevičius v. Lithuania*, Judgement, ECtHR (48297/99), 26 March 2002, para. 49; *Mokhov v. Russia*, Judgement, ECtHR (28245/04), 4 March 2010, para. 29; *see also Gridin v. Russian Federation*, UN Human Rights Committee (Communication No. 770/1997), 20 July 2000 (finding that statements made by public officials prejudging the outcome of a pending criminal trial violate Article 14(2) of the ICCPR) and *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisations) v. Nigeria*, African Commission on Human and Peoples' Rights (Communications Nos. 137/94, 139/94, 154/96 and 161/97), 31 October 1998 (taking account of public pronouncements of an accused person's guilt by government representatives in finding a violation of Article 7(1)(b) of the ACHPR).

> [T]he principle of the presumption of innocence [...] is not limited to a mere procedural guarantee in criminal matters. Its scope is wider, and requires that no representative of the State or a public authority declare a person to be guilty of an offence before his guilt has been established by a tribunal.[27]

18. It is therefore clear from the international jurisprudence 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.

4.2. Internal Rule 35

19. Internal Rule 35 provides, in relevant part:

> 1. The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:
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> 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.
>
> [...]

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[27] *Viorel Burzo v. Romania*, Judgement, ECtHR (75109/01 and 12649/02), 30 June 2009, para. 156: "[L]e principe de la présomption d'innocence [...] ne se limite pas à une simple garantie procédurale en matière pénale. Sa portée est plus étendue et exige qu'aucun représentant de l'État ou d'une autorité publique ne déclare qu'une personne est coupable d'une infraction avant que sa culpabilité n'ait été établie par un tribunal."

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.

20. According to Internal Rule 35(2), a Chamber seized with allegations of interference with the administration of justice may only act under this rule where it has a reason to believe that a person may have interfered with the administration of justice, for example by improperly influencing the judges in charge of a case.[28] This is a minimum, threshold condition for inquiry, triggered by a 'reasonable belief' that conduct with the potential to threaten the administration of justice may have occurred. It gives rise merely to further inquiry and does not require the Chamber to engage in a detailed examination of the merits of an allegation or suspicion of interference, or to assess questions of individual criminal responsibility. This threshold will be satisfied where the material basis for the allegation reasonably leads a Chamber to believe that the allegation is not merely speculative.[29] Where there is a reasonable belief that a person may have interfered with the administration of justice, the Chambers or Co-Investigating Judges may – but need not – take one or more of the courses of action set out in Rule 35(2), which includes dealing with a matter summarily.

21. As the ICTY Appeals Chamber has held, the purpose of prohibiting conduct which tends to prejudice the administration of justice is to ensure that the exercise of a court's jurisdiction is not frustrated and that its basic judicial functions are safeguarded.[30] This clearly requires that outside actors refrain from seeking to influence a court's judges or from acting in a way

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[28] Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, D314/1/8 and D314/2/7 (Confidential), 8 June 2010, para. 40 (noting that Internal Rule 35 resembles Rule 77 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and that the jurisprudence of the ICTY is therefore helpful in clarifying the purpose and scope of Rule 35). As with ICTY Rule 77, proceedings under Internal Rule 35 are criminal in nature, and subject therefore to the ordinary principles of criminal liability.

[29] Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, D314/1/12, 9 September 2010, paras 36 and 37 (explaining that Internal Rule 35 invokes three distinct standards of proof in relation to an interference with the administration of justice: (i) the 'reason to believe' standard (acknowledged to be an extremely low threshold); (ii) the 'sufficient grounds' standard; and (iii) the 'beyond reasonable doubt' standard. The 'sufficient grounds' standard, expressed in Rule 35(2)(b), is a precondition for instigating proceedings against a person suspected of interfering with the administration of justice. The 'beyond reasonable doubt' test, though not explicitly stated in Rule 35, is the standard of proof that must be satisfied in order to impose sanctions on a person who has knowingly and wilfully interfered with the administration of justice, in conformity with Rule 87(1) and the international jurisprudence; *see e.g. Prosecutor v. Simić*, Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel, ICTY Trial Chamber (IT-95-9-R77), 30 June 2000, para. 100); *see also* Decision on Appeal Against the Order on NUON Chea's Second Request for Investigation (Rule 35), D384/5/2 (Confidential), 2 November 2010 ("Decision on Appeal of NUON Chea Second Request"), paras 48, 49.

[30] *Prosecutor v. Aleksovski*, Judgement on Appeal by Anto Nobilo Against Finding of Contempt (IT-95-14/1-AR77), 30 May 2001, ("Nobilo Appeal Judgement"), para. 36.

that could be perceived as an attempt to do so.[31] Given the significance of these principles to the proper functioning of the judiciary, courts have usually sought to reaffirm them whenever comments are made that appear to contravene the presumption of innocence, even where no issues of criminal responsibility arise.

22. Where criminal culpability is alleged, the threshold for intervention by a Chamber is higher. In this regard, a person may be found liable for interference with the administration of justice and sanctions imposed only where it is shown that the individual in question has "knowingly and wilfully" interfered or attempted to interfere with the administration of justice.[32] ICTY Rule 77(A) contains an equivalent provision, which ICTY Trial Chambers have interpreted to require proof of "specific intent to interfere with the Tribunal's administration of justice."[33] The Chamber agrees with this interpretation and adopts it in respect of Internal Rule 35(1). For the reasons that follow, no issue of criminal culpability arises in this case pursuant to this sub-rule. The Chamber has, however, issued a reminder to all actors of the need to respect the norms safeguarding the independence of the judiciary and the presumption of innocence pursuant to Internal Rule 35(2).

5. FINDINGS

5.1. Admissibility

23. While none of the NUON Chea Defence's oral requests during trial proceedings prior to 22 February 2012 were explicitly characterised as applications under Internal Rule 35, the Chamber considers that the First Application merely expanded on the NUON Chea Defence's earlier oral requests, upon which the Chamber ruled on 2 February 2012. The Chamber therefore agrees with the Co-Prosecutors that the First Application amounts to a repetitious filing or a disguised appeal and declares it inadmissible.[34] Nonetheless, the Chamber with a view to clarifying its oral decision of 2 February 2011 elaborates on the reasons for its original ruling and sets forth the applicable law regarding the presumption of innocence in relation to statements by public officials.

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[31] Decision on Appeal of NUON Chea Second Request, para. 44 (noting that "the act of [exerting] external pressure on a judge of the ECCC", or acts that could be perceived as doing so, may constitute an interference with the administration of justice within the meaning of Rule 35).

[32] Internal Rule 35(1).

[33] *Prosecutor v. Beqaj*, Judgement on Contempt Allegations, ICTY Trial Chamber (IT-03-66-T-R77), 27 May 2005, para. 22; *Prosecutor v. Brđanin*, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, ICTY Trial Chamber (IT-99-36-R77), 19 March 2004, para. 16.

[34] Response, para. 4.

24. The Chamber considers the Second Application to be admissible as a discrete request under Internal Rule 35, as it is based on factual allegations and information not provided to the Chamber prior to the oral decision of 2 February 2012 or in the First Application.

5.2. Elaboration of the 2 February 2012 Decision

25. According to the press article in which they were reported, the alleged remarks were comments on "accusations by a former Khmer Rouge leader at a trial [in December 2011] that Vietnam had invaded Cambodia in the 1970s." During trial proceedings in December 2011, both NUON Chea and KHIEU Samphan made references to Vietnam; however, only NUON Chea made remarks that could clearly be characterised as accusations of an invasion in the 1970s.[35] Thus, the alleged remarks would seem to refer specifically to NUON Chea.

26. Irrespective of whether or not the alleged remarks have been accurately reported in the press (addressed below), such remarks are incompatible with the presumption of innocence to which NUON Chea is entitled. In particular, the use of the words "killer and genocide (perpetrator)" would appear to reflect an opinion that NUON Chea is guilty even though he has not been proved so according to law. If made, this would amount to the prejudgement by a senior public official of a criminal case pending before the ECCC and may have an impact on the public perception of NUON Chea's culpability.

27. The Trial Chamber emphasises once again that any such remarks will not influence it or any of its individual judges in the exercise of their duties. As the Chamber has repeatedly held, the ECCC judges are presumed to be able to perform their judicial functions with integrity, independence and impartiality by virtue of their oath of office, training and experience.[36] They are legally qualified and are not influenced by public commentary as lay members of the public might be. The Chamber will consider all relevant facts, evidence,

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[35] T., 13 December 2011, pp. 44, 46 (NUON Chea); T., 13 December 2011, pp. 75, 90, 91, 93 (KHIEU Samphan). Although IENG Sary made an opening statement on 23 November 2011 and gave evidence on 13 December 2011, he made no reference to Vietnam, except to specify his birthplace as Tra Vinh Province: T., 23 November 2011, pp. 3-6 and T., 13 December 2011, pp. 55-57 (IENG Sary). Thereafter he exercised his right to remain silent: T., 13 December 2011, p. 59 (IENG Sary).

[36] *See e.g.* Decision on IENG Thirith, NUON Chea and IENG Sary's Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony, E55/4, 23 March 2011, para. 12 (citing *Prosecutor v. Furundžija*, Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000, para. 196).

submissions and law applicable under its legal framework, and will not take into account any public comments on the guilt or innocence of any of the Accused in reaching its verdict.[37]

28. As indicated above, and in accordance with the legal framework established in Internal Rule 35(2), a threshold consideration for considering the present matter is whether or not there is "reason to believe" that an interference with the administration of justice pursuant to Rule 35(1) may have occurred.

29. The Chamber considers that the alleged public statements on the guilt of NUON Chea made to the press by the Prime Minister give rise to such a reasonable belief and thus satisfy this threshold condition. These remarks, if accurately reported, would constitute statements incompatible 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 follows that the Chamber may therefore take any of the measures listed in Internal Rule 35(2), irrespective of whether or not criminal responsibility arises from these remarks pursuant to Internal Rule 35(1).

30. In relation to alleged criminal responsibility under Internal Rule 35(1), the Chamber does not consider the standard of proof required for criminal liability to have been satisfied in the present case. The principles contained in Internal Rule 87(1) and the relevant international jurisprudence establish that criminal sanctions may only be imposed against an individual where it is shown that he or she knowingly and wilfully interfered with the administration of justice. The Chamber has examined the material presented by the NUON Chea Defence in support of its request for sanctions against the Prime Minister. Whilst any commentary on an Accused's guilt or innocence prior to a verdict is inevitably a source of concern in view of the applicable legal framework (Section 4.1), the Chamber notes, however, that the context in which these remarks were uttered is unknown and the alleged remarks (which simultaneously acknowledge that 'the court can do what it likes' (paragraph 9)), are ambiguous. Therefore, the Chamber finds that the evidence presented by the NUON Chea Defence in support of its request for sanctions is insufficient to warrant a criminal enquiry and is speculative insofar as it alleges wilful interference with the administration of justice pursuant to Rule 35(1). Although issues of criminal culpability do not arise in this case, the Prime Minister's statements do nonetheless satisfy the lower standard for intervention under

[37] T., 2 February 2012, p. 113.

Internal Rule 35(2). Pursuant to this sub-rule, the Chamber has therefore reaffirmed for the benefit of all actors the principles of the independence of the judiciary and the presumption of innocence, outlining their significance for the proper functioning and credibility of the ECCC.

31. The Chamber considers, however, that it is unnecessary to conduct an investigation in order to establish the authenticity of these alleged remarks. Under the ECCC legal framework, the Chamber may opt to take any or none of the discretionary steps set out in Rule 35(2). The Chamber has 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, on grounds that such comments, if repeated, could undermine the credibility of the ECCC's protection of the rights of the Accused to a fair trial. In the circumstances, and independently of any issue related to the immunity granted by law to the Prime Minister, the Chamber considers that this reminder is sufficient at this stage and that no further action is required.

5.3. Merits of the Second Application

32. The Chamber finds that the Second Application, which is based instead on alleged remarks by the Prime Minister concerning 'an arrogant member of the NUON Chea Defence team', is without merit as no evidence of the allegations made has been provided. By their nature, these remarks also do not give rise to a reasonable belief that an interference with the administration of justice, or a violation of the presumption of innocence, may have occurred.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DECLARES the NUON Chea Defence's First Application inadmissible; and

REJECTS the NUON Chea Defence's Second Application on its merits.

Phnom Penh, 11 May 2012
President of the Trial Chamber

Nil Nonn