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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S IMMEDIATE APPEAL CONCERNING "RULE 35 APPLICATIONS FOR SUMMARY ACTION"

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 11 June 2012, the Defence for Nuon Chea ("Defence") filed its *Immediate Appeal against Trial Chamber Decision on Rule 35 Request for Summary Action against Hun Sen* (the "Appeal").[1] This submission follows the dismissal, by unanimous decision of the Trial Chamber, of two related but separate requests for summary action against Prime Minister Samdech Hun Sen (the "Prime Minister") under Rule 35 of the Internal Rules[2] (the "Impugned Decision").[3]

2. The "First Application," filed on 22 February 2012, requested the Trial Chamber to find that a public statement attributed to the Prime Minister describing Nuon Chea (the "Accused") as a "deceitful killer and perpetrator of genocide" violated the presumption of innocence and amounted to an interference with the administration of justice.[4] The Defence requested the Chamber to sanction the Prime Minister for his "injurious remarks"[5] by means of a "public condemnation"[6] (or "censure"[7] or "rebuke"[8]) and "public warning"[9] under Rule 35.

3. The "Second Application," submitted orally on 12 March 2012, requested the Trial Chamber to "condemn" the Prime Minister for his "escalation" with respect to the First Application, on the basis of an alleged statement of the Prime Minister threatening legal action against an "arrogant member of the Nuon Chea defence team."[10]

4. In the Impugned Decision, the Trial Chamber held the First Application inadmissible as a "repetitive filing or disguised appeal."[11] In doing so, the Trial Chamber fully accepted the submission of the Co-Prosecutors that the First Application followed an identical oral request to the Chamber on Trial Day 12 ("First Oral Request"),[12] the substance of which was raised by the Defence twice more over the course of a week,

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1 **E176/2/1/1** Immediate Appeal against Trial Chamber Decision on Rule 35 request for summary action against Hun Sen, 11 June 2012.
2 Internal Rules (Rev. 8), 3 August 2011 ("Rules").
3 **E176/2** Decision on Rule 35 requests for summary action, 11 May 2012.
4 **E176** Application for summary action against Hun Sen, 22 February 2012.
5 **E176** *Ibid.* at para. 23
6 **E176** *Ibid.*
7 **E176** *Ibid.*
8 **E176** *Ibid.* at para. 24.
9 **E176** *Ibid.*
10 **E1/46.1**, Transcript, 12 March 2012 at p. 80, ln. 20- p. 81, ln. 11.
11 **E176** at paras. 23, 32.
12 **E1/24.1** Transcript, 10 January 2012 at p. 1, ln. 23-25; p. 2, ln. 1-15; p. 3, ln. 1-16.

on Trial Days 18 and 19, and then disposed of by the Trial Chamber during proceedings on Trial Day 26 (the "Oral Decision"):

> *5 This is the Trial Chamber's decision 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.*[13]

5. In the same Impugned Decision, the Trial Chamber dismissed the Second Application on the merits, finding that the Defence had failed to adduce evidence to substantiate its allegations, and that "by their nature" the Prime Minister's remarks "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."[14]

6. The Co-Prosecutors hereby respond to the Appeal. The Co-Prosecutors make two principal submissions: (i) the Appeal of the disposal of the First Application is inadmissible before the Chamber as out of time [see Section II(A), below]; and (ii) the Appeal fails to satisfy the applicable standard of review on grounds of either *error of law* [see Sections II(B)(ii), below] or *discernible abuse of discretion* [see Section II(B)(iii), below]. The Co-Prosecutors further submit that the public, oral hearing sought by the Defence[15] is not required in this instance and request the Chamber to decide the appeal on written submissions alone.

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13 **E1/38.1** Transcript, 2 February 2012, p. 113, ln. 5-22.
14 **E176/2** Impugned Decision, supra note 3 at para. 32.
15 **E176/2/1/1** Appeal, supra note 1 at para. 21.

II. ARGUMENT

A. The disposal of the First Application is inadmissible on immediate appeal

7. The Co-Prosecutors submit that the Appeal is inadmissible in part before the Chamber as the Defence failed to appeal the Trial Chamber's formal disposal of the First Application within the applicable time limits, and no leave has been granted to exceed such time limits. Rule 107(1) sets a time limit of 30 days from the date of decision for immediate appeals on the basis of Rule 35 decisions. The Trial Chamber's Oral Decision of 2 February 2012 constitutes its definitive disposal of the First Oral Request, which itself constitutes the substance of the First Application. The character of the Oral Decision as the definitive disposal of the issued raised is affirmed at three distinct points in the factual record:

> **first**, on Trial Day 26, the unequivocal statement of the President to all parties, introducing the 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";[16]
>
> **second**, on Trial Day 28, the President's reminder to the Defence that the Trial Chamber had "already addressed" its request, in response to Defence attempts to revisit the remarks attributed to the Prime Minister;[17] and
>
> **third**, in the Impugned Decision itself, where the Trial Chamber "considers that the First Application merely expanded on the [...] Defence's earlier requests, upon which the Chamber ruled on 2 February 2012."[18]

8. Thus, the "date of decision" on the substance of the First Application in terms of Rule 107(1) was 2 February 2012, and any appeal would have fallen due by 2 March 2012. Co-Counsel for the Accused were further advised of the potential recourse to appeal by the President in his oral statement of 8 March 2012:

> *19 The Chamber has already addressed this before.*
> *20 And that when the Chamber has ruled on it and you are not*
> *21 satisfied with such ruling, you can file an appeal against such*
> *22 decision before the eyes of the law, and you are not allowed to*
> *23 make any further statements to the subject matter that has*
> *24 already been ruled.*[19]

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16 **E1/38.1** Transcript, 2 February 2012, p. 113, ln. 5-7 [emphasis added].
17 **E1/40.1** Transcript, 8 February 2012, p. 4, ln. 19.
18 **E176/2** Impugned Decision, supra note 3 at para. 23 [emphasis added].

9. In the circumstances, it appears Co-Counsel for the Accused considered that an immediate appeal of the disposal of the First Oral Request would be unavailable, as demonstrated by his subsequent 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.*[20]

10. Thus, 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 the 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."[21] In doing so, it declined to exercise its judicial discretion to initiate a Rule 35 investigation, a decision from which an immediate appeal would lie to the Supreme Court Chamber in accordance with Rule 104(4)(d).

11. Co-Counsel's apparent misapprehension of the law on the availability of immediate appeals cannot itself circumvent the time limits for filing such appeals. Transparent procedures concerning time limits, extensions and late filing exist to safeguard fairness to all parties and ensure the conclusion of proceedings within a reasonable time, as an expression of the fundamental principles enshrined in Rule 21. In this instance, Co-Counsel properly should have sought either extension of time[22] or condonation of late filing[23] in connection with the filing of the Appeal. The Co-Prosecutors observe from the record that no such action was taken. Indeed, the passage of over four months since the Oral Decision subverts the very rationale of immediate appeals to provide for expedient settlement of interlocutory issues without occasioning delay.

12. On this basis, the Co-Prosecutors respectfully submit that the Chamber should find the Appeal of the First Application inadmissible as out of time.

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19 **E1/40.1** Transcript, 8 February 2012, p. 4, ln. 19-24.
20 **E1/40.1** *Ibid.* at p. 5, ln. 6-10 [emphasis added].
21 **E1/38.1** Transcript, 2 February 2012 at p. 113, ln. 2-22.
22 Practice Direction ECCC/2007/1/Rev.8, Article 8.5.
23 Practice Direction ECCC/2007/1/Rev.8, Article 9.

13. An *immediate* appeal is available only for four specific categories of decisions of the Trial Chamber: (i) decisions that have the effect of terminating proceedings; (ii) decisions on detention and bail under Rule 82; (iii) decisions on protective measures under Rule 29(4)(c); and (iv) decisions on interference with the administration of justice under Rule 35(6).[24] All other Trial Chamber decisions "may be appealed only at the same time as an appeal against the judgment on the merits."[25] Also, an immediate appeal "does not stay the proceedings before the Trial Chamber."[26] The Co-Prosecutors fully concur with the Trial Chamber's finding that the Second Application is a factually distinct and discrete Rule 35 request.[27] The Co-Prosecutors consider that the disposal of the Second Application is a decision from which recourse to immediate appeal is available under Rule 104(4)(d).

B. The Appeal fails to meet the applicable standard of review

i. The applicable standard of review

14. Rule 104(1) sets out the general appellate jurisdiction of the Chamber, which is limited to: (i) an error on a question of law which invalidates the decision of the Trial Chamber; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) for immediate appeals only, a discernable error in the exercise of discretion by the Trial Chamber which results in prejudice to the appellant.[28] These three legal standards are mirrored *verbatim* in Rule 105(2), which sets out the requirements for admissibility of an appeal and, by implication, the applicable standard of review. Thus, the Chamber may grant this Appeal only insofar as it finds, on the balance of probabilities: (i) an error on a question of law which invalidates the Impugned Decision; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) a discernible error in the exercise of discretion by the Trial Chamber which results in prejudice to the Appellant.

15. This Chamber has clarified the scope of Rule 104(1), noting that a discernible error in the Trial Chamber's exercise of discretion "does not…create an exclusive ground for

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24 Rule 104(4).
25 Rule 104(4).
26 Rule 104(4).
27 **E176/2** Impugned Decision, supra note 3 at para. 24
28 Rule 104(1).

immediate appeals."[29] This Chamber has also reiterated its limited power of review on appeal, as distinguished from the somewhat more expansive powers of other Chambers.[30] Furthermore, when determining the narrow scope of appropriate appellate review, "the Supreme Court Chamber, being the final court of appeal, reviews the Impugned Decision within the grounds of appeal and consistent with the direction of the appeal."[31] That is, the scope of appellate review is defined by the appeal itself. This does not preclude the Chamber from engaging in its own reasoning, but the issue being considered by the Chamber on appeal must have been the subject of the appeal and there must be factual findings that would permit the correction sought by the appellant.[32]

16. The *ad hoc* Tribunals have adopted a similarly restrained approach when engaging in appellate level review, which supports the view that the primary function of appellate jurisdiction is corrective. The Statutes of the ICTY and ICTR outline very limited standards of review, which have been emphasised in Appeals Chamber jurisprudence: "…while the Chambers *may* find it necessary to address issues, [they] *may also* decline to do so." [33] Further, Appeals Chambers "will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand."[34]

17. In the practice of the *ad hoc* Tribunals, the specific standard of review for errors of law mirrors the standard in Rule 105 set out above. Appeals Chambers have jurisdiction solely over "errors of law which invalidate the decision of the Trial Chamber."[35] By necessary implication, not all errors of law will meet the standard of review. A range of errors of law will not, by their nature or consequences, invalidate the decision of a Trial Chamber.

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29 **E50/3/1/4**, Decision on immediate appeal by Khieu Samphan on application for immediate release, 6 June 2011.

30 *Ibid.* at para. 53.

31 *Ibid.* at para. 52.

32 *Ibid.*

33 ICTY Statute; ICTR Statute; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgment (ICTR Appeals Chamber), 1 June 2001 at para. 24 [emphasis added]; quoted with approval in *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgment (ICTY Appeals Chamber), 17 September 2003 at para. 8.

34 *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgment (ICTR Appeals Chamber), 1 June 2001 at para. 24; quoted with approval in *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgment (ICTY Appeals Chamber), 17 September 2003 at para. 8.

35 *François Karera v. Prosecutor*, ICTR-01-74-A, Judgment (ICTR Appeals Chamber), 2 February 2009 at para. 7.

18. For example, the ICTR Appeals Chamber has acknowledged that the Trial Chamber "committed a discernible error of law," but because the error did not effectively "invalidate [...] the Trial Judgement" the particular point of appeal was rejected.[36] In this case, the Appellant Siméon Nchamihigo submitted that the Trial Chamber had erred by commencing his trial before resolving all outstanding matters related to defects in the form of the indictment – an issue especially central to defence rights given the predominantly adversarial character of pre-trial proceedings at the *ad hoc* Tribunals. In response, the Prosecution asserted that the Appellant failed to demonstrate the prejudice to the Appellant's ability to effectively prepare a defence. The Appeals Chamber ruled that the Trial Chamber did indeed violate the express and mandatory provision of Rule 72(A) regarding the disposal of preliminary motions before the commencement of trial, but was not convinced that the error invalidated the Trial Judgement and thus rejected the Appellant's arguments.[37] Thus, to meet the standard of review applicable to errors of law, the Co-Prosecutors submit that the Appellant must not only specify the alleged error but also demonstrate, on the balance of probabilities, how that error invalidates the Impugned Decision.

19. The ICTY Appeals Chamber has assessed the factors that will be relevant to the appellate review of the exercise of judicial discretion at that Tribunal:

> *Accordingly, an appellant must show that the Trial Chamber*['s] [...] *decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.*[38]

20. The standard of review by the Pre-Trial Chamber at the ECCC is higher, requiring the Appellant to demonstrate an "abuse" of judicial discretion on grounds of unfairness or unreasonableness.[39] The Co-Prosecutors submit that the standard adopted by the

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36 *Siméon Nchamihigo v. Prosecutor*, ICTR-2001-63-A, Judgment (ICTR Appeals Chamber), 18 March 2010 at paras. 31-32.

37 *Ibid.*

38 *Prosecutor v. Zdravko Tolimir* et al., Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release (ICTY Appeal Chamber), 19 October 2005 at para. 4.

39 **D164/4/13** Decision on the Appeal from the Order on the Request to seek exculpatory evidence in the shared materials drive, 18 November 2009at paras. 22-27 (citing *Slobodan Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Defense Counsel, (ICTY Appeals Chamber), I November 2004 at paras. 9-10); **D140/9/5** Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order denying his Request for appointment of an additional expert to re-examine the subject matter of the expert report submitted by Ms Ewa Tabeau and Mr Theay Kheam, 28 June 2010 at paras. 15-17; **D356/2/9** Decision on Nuon Chea's Appeal

ICTY Appeals Chamber, which requires that the Trial Chamber "failed to exercise its discretion properly," is substantially similar to the "discernible error in the exercise of the Trial Chamber's discretion" required by Rule 105 and applicable before this Chamber. The standard applied by the ICTY Appeals Chamber in *Tolimir* will be satisfied only where the impugned decision is "so unreasonable and plainly unjust" as to allow an inference that the Trial Chamber failed to exercise its discretion properly. This qualifying language can be characterised as requiring both *gross unreasonableness* and *plain (or manifest) injustice* before the exercise of judicial discretion by a Trial Chamber is set aside on appeal. The Co-Prosecutors submit that the Chamber should apply a similar standard in these proceedings.

ii. The Trial Chamber did not err in law such as to invalidate the Impugned Decision

21. Should the Chamber uphold the admissibility of the Appeal with respect to the First Application, the Co-Prosecutors submit that the Impugned Decision does not disclose the errors of law alleged by the Defence in: (i) "crafting an appropriate judicial remedy" for the stated violation of the presumption of innocence; [40] or (ii) declaring the First Application inadmissible as a "repetitive filing or disguised appeal."[41]

22. As discussed in section II(B)(i), above, in order to satisfy the standard of review for errors of law, the appellant must not only identify the alleged error but also prove, on a balance of probabilities, that the error in question *invalidates* the Trial Chamber's decision. These two requirements are cumulative. In this instance, the Trial Chamber took note of Co-Counsel's objections to the Prime Minister's statements and examined whether the remarks amounted to interference with the administration of justice. Under Rule 35(1), the ECCC is empowered to "sanction or refer to the appropriate authorities any person who knowingly or wilfully interferes with the administrative of justice."[42] If, as per Rule 35(2), an action discloses "reason to believe" that such interference occurred, the Chamber may, at its discretion, pursue one of three routes: deal with the matter summarily, conduct further investigations to

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against the Co-Investigating Judges' Order rejecting Request for a second expert opinion, 1 July 2010 at paras. 16-18.

40 **E176/2/1/1** Appeal, *supra* note 1 at para. 13.

41 **E176/2/1/1** *Ibid.* at para. 19.

42 Rule 35(1).

determine whether there are sufficient grounds to instigate proceedings, or refer the matter to UN or Cambodian authorities.[43]

23. Firstly, concerning the error of law alleged by the Defence relevant to the choice of remedy, the Trial Chamber, having acknowledged that the remarks attributed to the Prime Minister met the threshold requirement of Rule 35(2),[44] exercised its discretion to deal with the matter summarily – a remedy expressly envisaged by the Defence in styling the First Application as a request for "Summary Action…under Rule 35." The Trial Chamber declared that the Prime Minister's alleged remarks violated the presumption of innocence, confirming all defendants' right to this presumption, warning officials to refrain from comments incompatible with this presumption, and stressing that the statements would in no way interfere with the Chamber's decision-making process.[45] In addition to the relief granted to the Accused in the form of an "unambiguous public reminder,"[46] this form of declaratory relief alone follows a line of human rights jurisprudence in which declaratory judgments have been granted as the sole remedy for violations of human rights by organs of State. In particular, both the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights ("IACtHR") have repeatedly held that declaratory relief alone can serve as a sufficient remedy of just satisfaction for an individual whose human rights have been violated.

24. Under Article 41 of the European Convention on Human Rights ("ECHR"):

> [I]*f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*[47]

This Article differs from Rule 35 in that it applies not only to remedies for interference with the administration of justice but to the potential spectrum of violations of human rights protected by the ECHR. While Rule 35 specifies three remedies appropriate for cases of interference, Article 41 refers to "just satisfaction,"

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43 Rule 35(2).
44 **E176/2** Impugned Decision, supra note 3 at para. 29.
45 *Ibid.* at paras. 27, 29 and 31.
46 **E176/2** Impugned Decision, supra note 3 at para. 31.
47 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Art. 41.

which affords the ECtHR a level of discretion comparable to the provision in Rule 35 that the OCIJ or Chambers may "deal with the matter summarily." Under Article 41, the ECtHR has employed declaratory relief to address violations arguably more severe than the Prime Minister's alleged statements.

25. In *Nikolova v. Bulgaria*, for example, the ECtHR concluded that judicial review of the applicant's detention as well as the detention's attendant procedure failed to meet the standards detailed in Article 5(4) of the Convention,[48] which provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[49] Despite the Court's unambiguous determination that a violation had occurred, it declined to speculate as to "whether or not the applicant would have been detained if there had been no violation of the Convention,"[50] instead holding that the "finding of a violation" constituted a commensurate remedy.[51] In *Nikolova*, the Court's "finding of a violation" was deemed "just satisfaction" even though it did not also include a public warning such as that issued by the Trial Chamber in disposing of the First Application.

26. In *Ocalan v Turkey*, the ECtHR again held that its findings of a violation of Articles 3, 5, and 6 of the Convention (which deal, respectively, with the prohibition of ill-treatment, the right to liberty and security of person, and the right to a hearing by an independent tribunal) comprised "in themselves sufficient just satisfaction for any damage sustained by the applicant."[52] The ECtHR has further established the suitability of such declaratory relief in inter alia, *Golder v. United Kingdom*[53] and *Marckx v. Belgium*.[54]

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48 *Nikolova v. Bulgaria*, Application No. 31195/96, Judgment: Merits and Just Satisfaction (ECHR Grand Chamber), 25 March 1999 at para. 65.
49 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 47 at Art. 5(4).
50 Nikolova, *supra* note 48 at para. 76.
51 Ibid.
52 *Ocalan v. Turkey*, Application No. 46221/99, Judgment: Merits and Just Satisfaction (ECHR Grand Chamber), 12 May 2005 at Holdings, para. 15.
53 *Golder v. United Kingdom*, Application No. 4451/70, Judgment: Merits and Just Satisfaction (ECHR Plenary Session), 21 February 1975 at para. 46.
54 *Marckx v. Belgium*, Application No. 6833/74, Judgment: Merits and Just Satisfaction (ECHR Plenary Session), 13 June 1979 at Holdings, para.17.

27. In keeping with this line of ECtHR cases, jurisprudence of the IACtHR also supports the Trial Chamber's decision to grant declaratory relief in response to the statements attributed to the Prime Minister. In *Villagrán Morales et al. vs. Guatemala*, for example, the IACtHR stated, "this Court, as other international tribunals, has repeatedly indicated that a judgment of condemnation may be, per se, a form of compensation for nonpecuniary damage."[55] Awarding financial compensation to the injured parties because of the particularly "grave circumstances" at hand,[56] the Court distinguished *Villagrán Morales* from other cases in which declaratory relief would have been appropriate: *Villagrán Morales* dealt with the murders of five children. In *Bronstein v. Peru*, the IAtCHR similarly noted that, "in accordance with extensive international jurisprudence, the Court considers that obtaining a judgment that protects the victims' claims is, in itself, a form of satisfaction."[57]

28. Given the spectrum of cases in which both the IACtHR and the ECtHR have affirmed that declaratory judgments constitute sufficient remedies for human rights violations – even in cases of serious violations such as unlawful detention – the Trial Chamber committed no error of law in its choice of relief: namely, in affirming the presumption of innocence, warning those who would violate this presumption, and reiterating the tribunal's independence. The Co-Prosecutors submit that the Defence has thus failed to satisfy the threshold requirement of the standard of review for errors of law invalidating the Impugned Decision. No error of law is disclosed in the Trial Chamber's conformity to the "extensive international jurisprudence"[58] that has established the legitimacy of declaratory remedies. Likewise, the Defence has failed to demonstrate that the Trial Chamber's adoption of declaratory relief and public warning to address the Prime Minister's statements is so unsatisfactory as to invalidate the decision in its entirety.

29. Secondly, concerning the error of law alleged by the Defence relevant to the inadmissibility of the First Application, the Co-Prosecutors consider that a review of the factual record, set out in Section II(A) above, establishes clearly that dispositive

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55 *Villagrán Morales et al. vs. Guatemala*, Series C No. 77, Judgment: Reparations and Costs (IACHR), 26 May 2001 at para. 88.

56 *Ibid.*

57 *Bronstein v. Peru,* Series C No. 74, Judgment: Merits, Reparations, and Costs (IACHR), 6 February 2001 at para. 183.

58 *Ibid.*

character of the Oral Decision, and the consequent inadmissibility of the First Application. Should the Chamber find that the Trial Chamber erred in law in this regard, the Co-Prosecutors submit that any such error would not invalidate the decision. As the Defence "readily concedes", the alleged error "was a harmless one."[59] The ICTY Appeals Chamber has consistently held that without proof of prejudice, even a patent error of law will not be held to "invalidate" an impugned decision.[60] As set out in Section II(A), above, the requirement of invalidation in *ad hoc* Tribunal jurisprudence mirrors the standard in Rule 105. The Co-Prosecutors submit that any claim of harmless error must necessarily fail to meet the standard of appellate review.

30. On this basis, the Co-Prosecutors respectfully submit that the Appeal must fail to meet the standard for review applicable to errors of law.

iii. The Trial Chamber did not discernibly err in the exercise of its discretion resulting in prejudice to the Appellant

31. The Co-Prosecutors submit that the Impugned Decision does not disclose a "discernible error in the exercise of discretion which resulted in prejudice to the appellant,"[61] as alleged by the Defence, in the Chamber's decision to grant declaratory relief and a public warning instead of issuing a "strong" warning specifically addressed to the Prime Minister[62] and conducting further investigations.[63]

32. As discussed in section II(B)(i), above, the ICTY Appeals Chamber has described the standard applicable to the appellate review of a trial chamber's discretion:

> *an appellant must show that the Trial Chamber['s] [...] decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.*[64]

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59 **E176/2/1/1** Appeal, *supra* note 1 at para. 19.
60 *See Prosecutor v. Galic,* Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006 at para. 21; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (ICTY Appeals Chamber), 29 July 2004 at para. 299; *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment (ICTY Appeals Chamber), 17 December 2004 at para. 143; *Prosecutor v. Haradinaj*, Case No. IT-04-84-A, Judgment (ICTY Appeals Chamber), 19 July 2010 at para. 17.
61 Rule 104(1).
62 **E176/2/1/1** Appeal *supra* note 1 at paras. 15-17.
63 **E176/2/1/1** *Ibid.* at para. 18.
64 *Tolimir*, *supra* note 38 [emphasis added].

33. Comparative jurisprudence drawn from both national and international tribunals affords a trial chamber broad discretion in implementing appropriate remedies in the face of potential interference with the administration of justice. In addition to the general discretion that courts exercise in choosing to grant declaratory relief for human rights violations, described in the preceding section, relevant jurisprudence indicates that courts at first instance are afforded particular flexibility in determining how best to protect their judicial independence.

34. In *Valente v. The Queen*, the Supreme Court of Canada stressed that the effort to prevent interference with the administration of justice does not necessitate any "particular legislative or constitutional formula."[65] Instead, *Valente* stands for the proposition that, whatever the measures taken, of utmost importance is that "the essence of the security afforded by the essential conditions of judicial independence" be guaranteed."[66]

35. The South African Constitutional Court has since affirmed the latitude provided by *Valente's* findings on judicial independence. In *De Lange v. Smuts NO and Others*, the Court repeatedly cites *Valente's* assessment of judicial discretion[67] and, in *S and Others v. Van Rooyen and Others*, the Court emphasises that, as noted in *Valente*, judicial independence is an "evolving concept."[68] The Special Court for Sierra Leone has further elaborated the variety of factors that can be taken into consideration when evaluating breaches of judicial independence, *inter alia* the "importance of efficient and expeditious prosecution of international crimes."[69] Thus, the Trial Chamber's determination that restating the presumption of innocence, reminding officials to adhere to this presumption, and stressing the Chamber's own independence were, in conjunction, sufficient to safeguard the "essence of the security afforded by the essential conditions of judicial independence" is an appropriate exercise of discretion, fully supported in international jurisprudence. The Trial Chamber's reasoned decision

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65 *Valente v. The Queen,* Case No. 17583, Judgment (Supreme Court of Canada), 19 December 1985 at para. 25.

66 *Ibid.*

67 *De Lange v. Smuts NO and Others,* CCT 26/97, Judgment (South African Constitutional Court), 28 May 1998 at paras. 71-72.

68 *S and Others v. Van Rooyen and Others,* CCT 21/01, Judgment (South African Constitutional Court), 11 June 2002 at para. 75.

69 *The Prosecutor v. Sam Hinga Norman,* SCSL-04-14-PT-034-II, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence) (SCSL Appeals Chamber: Separate Opinion of Justice Geoffrey Robertson),13 March 2004 at para. 18.

to deal with the action summarily through declaratory relief, one of the options presented in Rule 35(2),[70] thus falls far short of the gross unreasonableness and plain injustice required to overturn a judgment on abuse of discretion grounds.

36. On this basis, the Co-Prosecutors submit that the Trial Chamber's declaratory judgment and public warning do not satisfy the standard that the Impugned Decision be "so unreasonable and plainly unjust" as to require reversal.[71]

III. CONCLUSION

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

a. declare the Appeal of the disposition of the First Application inadmissible as out of time;

b. dismiss the Appeal in its entirety as failing to meet the standard of review; and

c. to determine this appeal based on written submissions alone.

Respectfully submitted,

Date	Name	Place	Signature
25 June 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

70 Rule 35(2).
71 *Ibid.*