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ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
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 YOU Ottara, Presiding**
Judge Claudia FENZ
Judge MONG Monichariya
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: **23 March 2011**
Original language(s): **Khmer/English**
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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

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I. INTRODUCTION

1. On 1 February 2011, the defence team for IENG Thirith filed an application pursuant to Internal Rule 34 for the disqualification of all five Judges of the Trial Chamber from Case 002.[1] The application alleges that the participation of those Judges in certain findings in the Duch Judgment[2] raises a reasonable apprehension of bias in their future disposition of similar issues in Case 002. On 24 February 2011, the NUON Chea and IENG Sary defence teams filed similar applications.[3] The IENG Sary Application additionally seeks a stay pending the determination of the application and a public hearing.[4] On 23 February 2011, the Office of the Co-Prosecutors ("OCP") submitted a consolidated response opposing all three Applications.[5] On 1 and 2 March 2011, all three Defence teams filed replies.[6]

II. SUBMISSIONS

2. Each Defence team contends that certain findings in the Duch Judgment on issues likely to recur in the present case would cause a reasonable observer to doubt the ability of the same panel of Judges to fairly re-evaluate those issues in the context of Case 002. In each case, the Applications allege only the existence of a reasonable apprehension of bias. None of the Accused contends that the Trial Chamber Judges are actually biased.[7]

3. The IENG Thirith Application notes that the Duch Judgment concluded that an international armed conflict existed in Cambodia between 17 April 1975 and 6 January 1979, and that the same question is a live issue in Case 002.[8] According to the IENG Thirith Defence, it is "self-evident that it would prove difficult and embarrassing for the Trial

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1 Ieng Thirith Defence Application for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, E28, 1 February 2011 ("IENG Thirith Application").

2 Judgement, Case No. 001/18-07-2007/ECCC, E188, 26 July 2010 ("Duch Judgment").

3 Urgent Application for Disqualification of the Trial Chamber Judges, E54, 24 February 2011 ("NUON Chea Application"); Ieng Sary's Motion to Support Ieng Thirith and Nuon Chea's Applications for Disqualification of the Trial Chamber Judges & Ieng Sary's Motion to Join Ieng Thirith's Application for the Trial Chamber to be Replaced – for the Purpose of Adjudicating the Applications – By Reserve Judges of the Trial Chamber of Additional Judges Chosen by the Judicial Administration Committee, E53, 24 February 2011 ("IENG Sary Application").

4 IENG Sary Application, paras 15-16.

5 Co-Prosecutors' Joint Response to Ieng Thirith, Ieng Sary and Nuon Chea's Applications for Disqualification of the Judges, E55, 23 February 2011 ("Response").

6 Ieng Thirith Reply to 'Co-Prosecutor's Joint Response to Ieng Thirith, Ieng Sary and Nuon Chea's Applications for Disqualification of the Judges', E55/1, 1 March 2011 ("IENG Thirith Reply"); Ieng Sary's Reply to the Co-Prosecutors' Joint Response to Ieng Thirith, Ieng Sary, and Nuon Chea's Applications for Disqualification of the Judges, E55/2, 1 March 20111 ("IENG Sary Reply"); Reply to the Co-Prosecutors' Joint Response to Ieng Thirith, Ieng Sary, and Nuon Chea's Applications for Disqualification of the Judges, E55/3, 2 March 2011 ("NUON Chea Reply").

7 IENG Thirith Application, paras 26, 39; NUON Chea Application, para. 26; IENG Sary Application, para. 7.

8 IENG Thirith Application, paras 10, 22-24.

Chamber to decide in Case 002 that there was no international armed conflict."[9] The IENG Thirith Application also identifies, without further elaboration, several other issues alleged to be common to the Duch Judgment and the trial in Case 002.[10] Although acknowledging that other international tribunals have dismissed applications for disqualification based on prior judicial holdings,[11] the IENG Thirith Defence submits that this case is different because the existence of an international armed conflict in Cambodia during the DK period was not disputed during the Duch trial.[12] The IENG Thirith Application furthermore notes that in this case, the application is filed against not just one judge, but the entire Chamber.[13]

4. The IENG Sary Application advances substantially the same argument, but adds that findings in one of the Chamber's decisions in Case 002 have already given rise to an objective appearance of bias because they are "in line with" certain findings in the Duch Judgment.[14]

5. The NUON Chea Application raises a more specific variant of this argument, alleging that as a consequence of certain findings in the Duch Judgment, the Trial Chamber Judges "appear to have prejudged NUON Chea's guilt."[15] In support, the Application identifies three categories of findings which it claims in the aggregate satisfy most of the elements of several offences charged in Case 002: "the (i) broad contextual, or chapeaux, elements which form the threshold of international criminal liability; (ii) the existence of actual prohibited activity on the ground, at the so-called 'crime-bases'; and (iii) most importantly, evidence somehow linking [NUON Chea] to such violations."[16] The NUON Chea Defence bases its submissions on two cases from the European Court of Human Rights ("ECHR").[17] In those cases, the ECHR held that findings in a prior opinion specific to the accused which tended to show his criminality gave rise to a reasonable apprehension of bias.[18]

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9 IENG Thirith Application, para. 24.
10 IENG Thirith Application, para. 11.
11 IENG Thirith Application, paras 28-30, 33.
12 IENG Thirith Application, para. 32.
13 IENG Thirith Application, para. 34.
14 IENG Sary Application, para. 9.
15 NUON Chea Application, para. 33.
16 NUON Chea Application, paras 27, 3-11.
17 NUON Chea Application, para. 16.
18 *Ferrantelli and Santangelo v. Italy*, Judgment, ECtHR (48/155 & 554/640), 7 August 1996 ("Ferrantelli"), paras 54-60; *Rojas-Morales v. Italy*, Judgment, ECtHR (39676/98), 16 November 2000 ("Rojas-Morales"), paras 33-35.

6. The Trial Chamber Judges have expressed that they do not want to exercise their right to make submissions pursuant to Rule 34(7).[19]

III. DELIBERATIONS

7. Internal Rule 34(4)(c) provides that an application for disqualification of a judge of the Trial Chamber must be submitted, "concerning matters arising before the trial, at the initial hearing". By contrast, Internal Rule 34(3) mandates the filing of disqualification applications as soon as the moving party becomes aware of the grounds in question.[20] The Chamber agrees with the IENG Thirith and NUON Chea Defence that the Applications should be determined expeditiously.[21] The Chamber finds the Applications to be timely.[22]

a. Request for a public hearing and stay of proceedings

8. The procedure prescribed in Internal Rule 34(7) foresees a written decision by the Chamber, based on the application for disqualification and, where provided, submissions by the Judge. It does not expressly envisage a hearing, which is also not a requirement under Cambodian law.[23] Both the ECCC and other international tribunals routinely decide similar applications on the basis of written pleadings alone.[24] The Chamber considers it to be in the interests of justice to proceed expeditiously. Transparency of proceedings will be ensured by the re-classification of all filings in relation to the Application and Request as public.

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[19] Memorandum from Judge NIL Nonn to the Judicial Administration Committee, E28/1, 2 February 2011; Memorandum from Trial Chamber Judges to President of the Judicial Administration Committee, E53/1, 24 February 2011; Memorandum from Trial Chamber Judges to President of the Judicial Administration Committee, E54/1, 24 February 2011.

[20] This has since been clarified in Revision 7 of the Internal Rules, released 23 February 2011, which now state, in Rule 34(4)(c), that an application for disqualification of a Trial Chamber judge concerning matters arising before the trial should be filed "at the latest at the initial hearing."

[21] IENG Thirith Application, para. 4; NUON Chea Application, para. 23.

[22] Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests (public), E5/3, 28 January 2011, para. 2.

[23] *See* Code of Criminal Procedure of the Kingdom of Cambodia, § 561 ("No hearing of the parties or the relevant judge is necessary").

[24] *See e.g.,* Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the Case of Nuon Chea, C11/29, 4 February 2008 ("*Ney Thol* Decision"), para. 8; Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests (public), E5/3, 28 January 2011, para. 3; *Prosecutor v. Karemera et al.,* Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, ICTR Bureau (ICTR-98-44-T), 7 March 2008; *Prosecutor v. Brđanin and Talić,* Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber (IT-99-36-PT), 18 May 2000.

9. Pursuant to Internal Rule 34(5), a pending disqualification application does not stay proceedings.[25]

b. Legal Framework

10. Internal Rule 34(2) provides that "[a]ny party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias." In accordance with Internal Rule 34(3), such applications "shall clearly indicate the grounds and shall provide supporting evidence."[26]

11. The jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated not only where a Judge is actually biased, but also where there is an appearance of bias.[27] An appearance of bias is established if (a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of the case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[28]

12. The reasonable observer in this test must be "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold".[29] As has been noted in previous ECCC jurisprudence, the starting point for any determination of an allegation of partiality is a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their

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[25] Internal Rule 34(5) ("The Judge in question may continue to participate in the judicial proceedings pending a decision"); Decision on Ieng Sary's Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing (public), 002/20-10-2009-ECCC/OCIJ (PTC03), Doc No. 5, 30 November 2009, para. 3 (denying request for a stay); *Prosecutor v. Galic*, Judgement, ICTY Appeals Chamber (IT-98-29-A), 30 November 2006, para. 33 (stay not required to protect right to a fair trial).

[26] Under Cambodian law, judicial disqualification is governed by Article 556 of the Code of Criminal Procedure of the Kingdom of Cambodia, which establishes seven specific grounds for disqualification. The Chamber will give effect to the broader standard contained in the Internal Rules.

[27] *Prosecutor v. Furundžija*, Judgment, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 ("*Furundžija* Appeal Chamber Judgment"), paras 181-88.

[28] *Furundžija* Appeal Chamber Judgment, para. 189.

[29] *Furundžija* Appeal Chamber Judgment, para. 190.

appointment.[30] The moving party bears the burden of displacing that presumption, which imposes a high threshold.[31]

13. Where allegations of bias are made on the basis of a Judge's decisions, it is insufficient merely to allege error, if any, on a point of law. What must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.[32] A disagreement with the substance of a decision is a matter for appeal, not an application for disqualification.[33]

c. Merits

14. The Applications raise two related, but distinct issues: (i) findings in prior judicial opinions on issues likely to arise in the present case; and (ii) findings specific to the accused which are alleged to constitute a *de facto* determination of guilt.

i. Previous Findings on Common Issues (all three Applications)

15. As other courts have consistently held, a judge is not prohibited from presiding over two separate criminal prosecutions arising from the same set of facts,[34] even if the cases involve overlapping questions of fact or law. In such a case, "[t]he question is *not* whether there is a reasonable apprehension that [the judge] will decide these issues in the same way", but whether the judge will "bring an impartial and unprejudiced mind to the issues in the present case."[35] A pre-disposition toward a certain resolution, when it is revealed through a judicial opinion, does not amount to bias.[36]

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[30] *Ney Thol* Decision, paras 15-17, citing *Furundžija* Appeal Chamber Judgment, para. 196, as well as Article 3.3 of the Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea and Article 10 new of the ECCC Law.

[31] *Ney Thol* Decision, para. 15.

[32] Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde (public), Case No. 002/13-10-2009-ECCC/PTC(02), Doc No. 7, 14 December 2009, para. 34; *Prosecutor v. Blagojević et al.*, Decision on Blagojević's Application Pursuant to Rule 15(B), ICTY Bureau (IT-02-60), 19 March 2003, para. 14.

[33] Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde (public), Case No. 002/13-10-2009-ECCC/PTC(02), Doc No. 7, 14 December 2009, para. 35.

[34] *Prosecutor v. Sesay et al.*, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, SCSL Trial Chamber I (SCSL-04-15-T), 6 December 2007, para. 55 ("fact that a judge hears two criminal trials that arise out of the same series of events is not enough to merit disqualification"); *Prosecutor v. Kordić and Čerkez*, ICTY Bureau (IT-95-14/2-PT), 4 May 1998, p. 2 (same); *accord*, *Nahimana et al. v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 78.

[35] *Prosecutor v. Brđanin and Talić*, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, ICTY Trial Chamber II (IT-99-36-PT), 18 May 2000 ("Brđanin"), paras 18-19

16. The only relevant consideration in this analysis is the Judges' ability to assess the evidence that is presented in *this* case. These principles will apply notwithstanding the absence of dispute surrounding many aspects of the trial in Case 001. The IENG Thirith Application furthermore fails to demonstrate the relevance of the fact that the present Applications are filed against the entire panel, or to provide any authority for its assertion that these Applications are distinguishable from the jurisprudence on that basis.[37]

17. In order to succeed, the Applications must substantiate a reasonable apprehension that the Judges would fail to bring an impartial mind to their evaluation of the issues in Case 002. A mere assertion that the Judges would find it "difficult and embarrassing" to arrive at conclusions inconsistent with the Duch Judgment is insufficient to meet that standard.[38] Judges at the ECCC are highly qualified and experienced jurists with expertise in the substantive law at issue.[39] The reasonable observer apprised of all the relevant circumstances would not lightly assume that the Judges would be "embarrassed" by a faithful exercise of their judicial function.

18. Similarly, the fact that the Trial Chamber made a finding in a decision on an application filed in Case 002 that was "in line with" aspects of the Duch Judgment does not suggest bias.[40] The Duch Judgment made a general finding that during the DK regime, "there was no functioning judicial system."[41] In the decision in Case 002 the Chamber found that the Cambodian judicial system has had "various systemic weaknesses dating from the Democratic Kampuchea period", in order to provide context for allegations of a lack of independence lodged against a judge of the Trial Chamber.[42] Although they generally concern the same subject, those findings are distinct and arose in different contexts. Furthermore, in the decision

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(dismissing application for disqualification based on judge's prior finding of an international armed conflict, exactly the issue raised by the IENG Thirith Application); *Re Polites ex p. Hoyts Corporation Pty Ltd*, 65 AJLR 444, 448 (1991) ("there may be many situations in which previous decisions of a judicial officer on issues of fact or law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean...that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind.").

[36] *Prosecutor v. Karemera et al.*, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, ICTR Bureau (ICTR-98-44-T), 14 June 2007, para. 15 ("The possibility that, having previously decided the relevant issues on the merits, Judges Byron and Kam are pre-disposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality").

[37] IENG Thirith Application, para. 34.

[38] IENG Thirith Application, para. 24.

[39] *See* footnote 31, *supra*; *Nahimana et al. v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 78 ("It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.").

[40] IENG Sary Application, para. 9.

[41] Duch Judgement, para. 94.

[42] Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests (public), E5/3, 28 January 2011, para. 13.

in Case 002 no reference was made to the Duch Judgment and the finding was based on an independent review of the evidence.

19. Having adduced no concrete evidence, the Applications fail to establish a reasonable apprehension of bias based on common issues in Case 002 and the Duch Judgment.

ii. Pre-Determinations of Guilt (NUON Chea Application)

20. The ICTR Appeals Chamber has recently acknowledged the possibility that a prior "ruling on the ultimate issue of an individual's culpability" could establish a reasonable apprehension of bias.[43] It is clear, however, that benches of the same composition have heard successive cases before the *ad hoc* Tribunals and that this alone is not a basis for disqualification. The nature of the jurisdiction exercised by specialized international criminal tribunals is such that multiple trials are likely to arise out of a common set of facts.[44] Being aware of that circumstance, the reasonable observer would expect that a judge at such a tribunal might be called upon to make findings in one case that bear upon the background and context of a different case, and would not, for that reason, doubt the impartiality of the court.

21. The ECHR, whose caselaw is cited by the NUON Chea Defence, has similarly held that judges are permitted to preside over two criminal cases arising from the same set of facts[45] unless in a prior decision the court has "actually prejudged" the guilt of the accused.[46] Such a conclusion would involve a determination in the prior opinion "of all the relevant criteria necessary to constitute a criminal offence and ... whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence."[47] Thus, in the cases relied upon by the NUON Chea Application, the prior decision made findings about the active role of the

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[43] *Ntawukulilyayo v. Prosecutor*, Decision on Motion for Disqualification of Judges, ICTR Appeals Chamber (ICTR-05-82-A), 8 February 2011, para. 14; *Prosecutor v. Karadzic*, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), ICTY (IT-95-05/18-PT), 22 July 2009, para. 22 (prior opinion did not "expressly or by inference constitute findings on the individual criminal responsibility" of the accused).

[44] *Nahimana et al. v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 78; *Karera v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-01-74-A), 2 February 2009, para. 378 ("Judges of this Tribunal are sometimes involved in trials which, by their very nature, cover overlapping issues"); *Prosecutor v. Kordić and Čerkez*, ICTY Bureau (IT-95-14/2-PT), 4 May 1998, pp. 2-3 ("The nature of the Tribunal's jurisdiction is such that the cases before it inevitably overlap. On the one hand, the same issues and the same evidence are often involved. On the other hand, the Tribunal possesses a finite number of judges. On a view opposite to that reached in this case, the work of the Tribunal would soon grind to a halt.").

[45] *Poppe v. The Netherlands*, Judgment, ECHR (32271/04), 24 March 2009 ("Poppe"), para. 26; *Schwarzenberger v. Germany*, Judgment, ECHR (75737/01), 10 August 2006 ("Schwarzenberger"), para. 42. Both *Poppe* and *Schwarzenberger* considered, and rejected the application of, *Ferrantelli* and *Rojas-Morales*, the caselaw cited by the NUON Chea Defence.

[46] *Poppe*, para. 26.

[47] *Poppe*, para. 28.

applicants in the crime of which they were later convicted.[48] The ECHR jurisprudence also indicates that where the court understands that it is not pronouncing on the guilt of the accused, an appearance of bias is not established.[49]

22. The NUON Chea Application identifies three paragraphs in the Duch Judgment which make findings specific to NUON Chea that, in combination with other aspects of the Judgment, are alleged to constitute a prejudgment of guilt. The NUON Chea Application first claims that the Duch Judgment "describe[s] how Duch…'received instructions from his superior, Son Sen and later Nuon Chea.'"[50] In fact, the relevant sentence begins with the phrase "According to [Duch's] testimony", and makes no finding of fact.[51] Several other paragraphs referred to in the footnotes of the Application similarly contain no findings by the Chamber.[52] Such statements cannot form the basis of a judgment of guilt, and are therefore incapable of substantiating allegations of a reasonable apprehension of bias.

23. The remaining two paragraphs of the Duch Judgment referred to by the NUON Chea Application make limited findings specific to NUON Chea. Paragraph 85 finds that NUON Chea was POL Pot's deputy secretary, a fact conceded by the NUON Chea defence,[53] and that he was a member of the CPK Standing Committee. Paragraph 95 finds that NUON Chea was a member of the CPK Military Committee and, at some point, Duch's superior. According to NUON Chea, those findings establish his individual criminal responsibility for numerous crimes for which Duch has already been convicted, via three different modes of liability: joint criminal enterprise ("JCE"), ordering crimes and command responsibility.[54]

24. The Chamber notes that the findings in paragraphs 85 and 95 of the Duch Judgment concern only NUON Chea's formal position within the CPK hierarchy, and finds that alone does not establish the *actus reus*, or objective elements, of any of the three modes of liability.[55] Furthermore, each of JCE, ordering crimes and command responsibility additionally require proof of a mental element. The Duch Judgment contains no judgment of NUON Chea's criminal intent and therefore could not reasonably be perceived to reflect a judgment of guilt against NUON Chea.

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48 *Ferrantelli*, para. 59; *Rojas-Morales*, para. 33.
49 *Schwarzenberger*, para. 43.
50 NUON Chea Application, para. 10(b).
51 Duch Judgment, para. 90.
52 *See* NUON Chea Application, footnote 44, citing Duch Judgment, paras 109, 131, 166 and 170.
53 NUON Chea Application, para. 11.
54 NUON Chea Application, paras 30-32.
55 Duch Judgment, paras 508, 527, 538.

25. That finding is supported by the jurisprudence of the international criminal tribunals, which have rejected similar arguments based on background findings about the accused's organizational role.[56] The structure of the CPK was at issue in the Duch trial,[57] and all findings were based on, and supported by reference to, evidence before the Chamber. None of those findings constitute a determination of guilt or remove the presumption of innocence, which continues to apply to all Accused persons before the Trial Chamber at the ECCC.[58]

FOR THE FOREGOING REASONS, THE CHAMBER:

REJECTS the requests for a public hearing; and

DENIES the Applications.

Pursuant to Internal Rule 34(8), this decision is not open to appeal.

YOU Ottara

Claudia FENZ

MONG Monichariya

Katinka LAHUIS

HUOT Vuthy

[56] *Prosecutor v. Karadzic*, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), ICTY (IT-95-05/18-PT), 22 July 2009, para. 21 (defendant's role as head of a government whose agents had been held criminally responsible did not automatically imply finding of guilt with respect to defendant, because command responsibility requires evidence of knowledge); *Nahimana et al. v. Prosecutor*, Judgment, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, paras 83-84 (prior findings that accused was the head of an organization which had incited genocide did not displace presumption of impartiality).

[57] *Schwarzenberger*, para. 44 (noting that the impugned statements were "relevant to D's conviction").

[58] Internal Rule 21(1)(d); ECCC Law, Article 33 new.