



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

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DECISION ON NUON CHEA DEFENCE COUNSEL MISCONDUCT

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1. INTRODUCTION

1. Following a consistent pattern of misconduct during proceedings in Case 002/01 by the NUON Chea Defence, and in particular by the international members of that team, the Trial Chamber on 21 June 2012 issued a verbal warning to the NUON Chea Defence team pursuant to Internal Rule 38(1). The misconduct in question includes, but has not been limited to, wilful violation of court orders, unauthorized disclosure to the press of confidential or strictly confidential material, and statements in court which are disrespectful or which otherwise do not accord with the recognized standards and ethics of the legal profession. The current decision sets out the reasoning for the oral warning given on 21 June 2012 and the consequences which, under the ECCC legal framework, follow from it.

2. BACKGROUND

2.1. Legal background

2. Article 21(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 (“Agreement”) requires any counsel acting in the defence of an accused before the ECCC to act in accordance with the Cambodian Law on the Statutes of the Bar and with “the recognized standards and ethics of the legal profession”.

3. Internal Rule 38(1) empowers the Chamber to impose sanctions against or refuse audience to a lawyer after giving a warning, if, in its opinion, his conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to the Agreement, Cambodian Law on the Bar, or recognized standards and ethics of the legal profession. Internal Rule 38(2) gives the Chamber an additional power to refer the lawyer’s misconduct to the appropriate professional body.

4. The Chamber has previously issued formal warnings to the NUON Chea Defence generally, in respect of the disclosure of confidential information,¹ and to Mr. Michiel PESTMAN specifically, in respect of failure to observe the duties of counsel² and interference with medical examinations³. The Trial Chamber, on 21 June 2012, issued a further verbal

¹ Decision on NUON Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, E115/3, 16 November 2011, para. 39 and footnote 93.

² T., 19 March 2012, pp. 27-29.

³ T., 20 March 2012, pp. 82-83.

warning to the NUON Chea Defence following more recent instances of misconduct,⁴ and indicated its intention to refer this misconduct to the Bar Associations of Amsterdam and New York, being the professional bodies before which the international members of the NUON Chea Defence practice. The Bar Association of the Kingdom of Cambodia, before which all lawyers are required to register in order to practice before the ECCC, has been copied for its information.

2.2. Factual background and findings

5. The Chamber has observed a consistent pattern of misconduct on the part of counsel for the Accused NUON Chea. This decision principally concerns the conduct of two of the international members of this team currently appearing in court in Case 002/01 (Mr. PESTMAN and Mr. Andrew IANUZZI), but other members of the NUON Chea Defence team (Mr. SON Arun and Mr. Victor KOPPE) are implicated in such misconduct insofar as they are signatories to certain filings.

6. Though too numerous to list individually, the acts constituting this pattern of misconduct may be divided into the following categories: unauthorized disclosure of confidential information; offensive, disrespectful or otherwise unethical in-court behaviour; offensive or disrespectful remarks in written motions; misrepresentations made before the Trial Chamber; and failure to adhere to Trial Chamber orders designed to protect the Accused NUON Chea's rights. The Chamber emphasises that it has not attempted in this decision to list exhaustively all instances of misconduct on the part of the NUON Chea Defence, but merely to provide examples of each of the above categories.

2.2.1. *Unauthorized disclosure of confidential information*

7. Despite admonitions from both the Supreme Court Chamber and Trial Chamber in respect of past disclosures of confidential and strictly confidential material, the NUON Chea Defence continues to preface many of its written applications and submissions with a request that the document be classified as public, and the statement that "in any event, the Defence will treat it as such".⁵ The Chamber is concerned both by the purported right claimed by the

⁴ T., 21 June 2012, pp. 97-98; T., 19 June 2012, pp. 5, 57; *see further* paragraph 11, below.

⁵ Decision on NUON Chea's Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, E115/3, 16 November 2011, para. 39; Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, E116/1/7, 27 April 2012, paras 36-38. *See e.g.* Third Application for Disqualification of Judge Cartwright, E171, 14 February 2012, para. 1; Application for Summary

NUON Chea Defence to override the classification granted to documents by the Chamber, and by this suggestion that the NUON Chea Defence will continue to disregard the Chamber's classification of filings, which may adversely impact the security and safety of victims or witnesses, or otherwise obstruct proceedings.⁶

2.2.2. *Offensive, disrespectful or otherwise unethical in-court behaviour*

8. Counsel appearing before the ECCC are required by Cambodian law to "preserve for the judges, in independence and dignity, the respect due to their position".⁷ Members of the NUON Chea Defence have repeatedly shown disregard for this duty.

9. On 2 May 2012, Mr. IANUZZI falsely claimed to have read Judge CARTWRIGHT's lips during the previous day's trial proceedings and to have seen her mouth the words "blah, blah, blah, blah", accusing her of exhibiting "her usual manifestation of disdain for defence counsel on the NUON Chea team" and of making "open and [...] *de rigueur* expressions of exasperation in response to submissions from this corner of the [courtroom]". Mr. IANUZZI stated that he had been unable to find relevant international jurisprudence and instead quoted song lyrics in support of his argument.⁸

10. On 30 May 2012, the Chamber warned Mr. PESTMAN several times that if he continued to pose irrelevant questions to a witness, the Chamber would assume that he had ceded the floor.⁹ Mr. PESTMAN continued to ask irrelevant questions, and the Chamber ruled that his time for questioning the witness had run out, at which point Mr. PESTMAN removed his headphones, threw them down and exclaimed, "this is a farce". His remarks were audible

Action Against Hun Sen Pursuant to Rule 35, E176, 22 February 2012, para. 1; Application for Immediate Action Pursuant to Rule 35, E189, 25 April 2012, para. 1; Immediate Appeal Against Trial Chamber Decision on Rule 35 Request for Summary Action Against HUN Sen, E176/2/1/1, 11 June 2012, para. 1.

⁶ The Chamber notes with concern local media reports indicating that, approximately 15 minutes after the Chamber issued its verbal warning to the NUON Chea Defence on 21 June 2012, members of the NUON Chea Defence disclosed confidential documents to the press (*see* 'Nuon Chea's defence lawyers given warning for misconduct', *The Cambodia Daily*, 22 June 2012; 'Nuon Chea's lawyers warned over actions', *The Phnom Penh Post*, 22 June 2012).

⁷ Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Article 24 (unofficial translation).

⁸ T., 2 May 2012, pp. 2-5 ("Your Honours, despite a diligent search over the holiday, I wasn't able to find any international jurisprudence precisely on point, but a certain secondary source almost immediately sprang to mind and I suspect the younger players on this stage will be familiar with this and I'm quoting now, "Some musicians cuss at home, but are scared to use profanity when up on the microphone," and that, of course, for the uninitiated is Dr. Dre of N.W.A. from 'Express Yourself, Straight Outta Compton' 1988.")

⁹ T., 30 May 2012, pp. 29-30, 33-35, 41-42.

in the courtroom but not picked up by the microphone and therefore not recorded in the trial transcript.¹⁰

11. On 19 June 2012, Mr. IANUZZI appeared in court with a badge bearing the label “[heart symbol] Dada” affixed to his robe. The Chamber ordered him to remove the badge. Mr. IANUZZI later stated “for the record” that the badge referred to Dadaism, “the early twentieth century movement that rejected logic and reason in favour of nonsense, irrationality and chaos. It is not, as was suggested to me over the break – it does not refer to ‘don’t ask; don’t answer’, although I would say that that seems to encapsulate this Chamber’s approach to our defence team quite well”.¹¹

2.2.3. Offensive or disrespectful remarks in written motions

12. On 24 May 2012, following discussion in court of the use of documentary evidence for the purpose of impeaching a witness, the Chamber issued a memorandum clarifying that new documents must satisfy the requirements of Internal Rule 87(4) in order to be admitted, irrespective of the purpose for which they are intended to be used.¹² Despite extensive discussion in court regarding the rules governing the use of documentary evidence generally and the issuance of decisions in support,¹³ in a motion filed on 29 May 2012, the NUON Chea Defence “reiterate[d] its firm position that Rule 87 [...] has no application with respect to such [impeachment] material” and described the Chamber’s holding as “unreasoned and unreasonable”.¹⁴ In a repetitive motion of 19 June 2012, the NUON Chea Defence attacked the Trial Chamber for its “intransigence on this issue” and asserted that it had been “forced to comply with the bench’s erroneous approach to documents”.¹⁵

2.2.4. Misrepresentations made before the Trial Chamber

13. On another occasion, the NUON Chea Defence was reprimanded for appearing to actively encourage the Accused they represent to mislead the Chamber. On 19 March 2012,

¹⁰ T., 30 May 2012, p. 43.

¹¹ T., 19 June 2012, pp. 5, 57.

¹² Trial Chamber Memorandum entitled Directions Regarding Documents Sought for Impeachment Purposes, E199, 24 May 2012.

¹³ See e.g. Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors’ Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, E185, 9 April 2012; Decision Concerning New Documents and Other Related Issues, E190, 2 May 2012.

¹⁴ Notice of Impeachment Material for TCW-487, E206, 29 May 2012, paras 1 and 3.

¹⁵ Rule 87 Request to Put New Evidence to TCW-321 for Impeachment Purposes, E210, 19 June 2012.

NUON Chea was scheduled to give testimony on the facts relating to the second segment of the trial. At the beginning of the day's proceedings, Mr. PESTMAN sought permission for NUON Chea to read a prepared statement. The President asked whether the statement was relevant to the facts comprising the second segment of the trial. NUON Chea replied: "This statement is relevant to those facts."¹⁶ The statement was, in fact, irrelevant to the second trial segment. The Co-Prosecutors objected and the President ordered NUON Chea to stop reading the statement. After discussing the matter with NUON Chea, Mr. PESTMAN announced that "if he's not allowed to finish reading his statement, [NUON Chea] will not answer any other questions with regards to the structure of the Party or his role in the 1975-1979 period".¹⁷

14. Later that day, Judge LAVERGNE, on behalf of the Trial Chamber, reminded the parties and counsel that the subject of the day's hearing had been advised well in advance, and noted that by allowing his client NUON Chea to assert that his statement was relevant when in fact it was not, Co-Counsel appeared to have encouraged NUON Chea to attempt to mislead the Chamber. The Trial Chamber indicated that Mr. PESTMAN was therefore attempting "to manipulate the Trial Chamber in a manner which appeared to be contrary to his duties as counsel to the court" and that "this conduct on the part of the co-counsel raises serious ethical issues. [The Trial Chamber] will therefore consider what future action in relation to these events it might take".¹⁸

2.2.5. Misconduct that may negatively impact the defence of the Accused NUON Chea, including disregard of the Chamber's Orders

15. On 17 January 2011, the Chamber ordered the parties pursuant to Internal Rule 80 to file lists of documents they intended to put before it in Case 002.¹⁹ All parties except the NUON Chea Defence complied, at least to some extent.²⁰ On 27 June 2011, the parties were ordered to file revised lists.²¹ The NUON Chea Defence declined to provide such a list; all other parties complied.²² The Chamber warned the parties that failure to respect these orders would inevitably restrict a party's ability to put documents before the Chamber during the trial, and ordered the parties to provide revised document lists for the first three weeks of trial by 1

¹⁶ T., 19 March 2012, p. 4.

¹⁷ T., 19 March 2012, p. 17.

¹⁸ T., 19 March 2012, pp. 27-29.

¹⁹ Order to File Material in Preparation for Trial, E9, 17 January 2011.

²⁰ See Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, para. 3.

²¹ T., 27 June 2011, p. 25.

²² See Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, para. 4.

November 2011.²³ Again, all parties except the NUON Chea Defence complied.²⁴ The NUON Chea Defence finally filed a limited list of documents to be put before the Chamber on 31 January 2012.²⁵

16. The NUON Chea Defence's failure to comply with the Chamber's directions may have a significant adverse impact on its ability to rely on documentary evidence throughout the entirety of Case 002. The Chamber has, in consequence of this misconduct, been compelled to exercise its discretion so as to avoid serious prejudice to NUON Chea as a result of the failure of his Defence team.²⁶

17. On 18 October 2011, the Chamber issued an order scheduling opening statements on behalf of the Co-Prosecutors and all Defence teams.²⁷ The Co-Prosecutors were allocated two days for their opening statement, beginning on 21 November 2011. The Defence teams were informed that they would each then be given half a day to respond. Subsequently, all parties were informed that in consequence of the severance from the trial of one Co-Accused, the Co-Prosecutors were likely to require only one and a half days for their opening statements and thus, of the possibility that the opening statements of the remaining parties may be required slightly earlier.²⁸

18. When called upon to present the opening statement on behalf of NUON Chea on 22 November 2011 at approximately 1.30pm (*i.e.* one and a half days after the beginning of the Co-Prosecutors' opening statement), Mr. PESTMAN asked to postpone the NUON Chea Defence counsels' remarks until the following day, citing the Chamber's Scheduling Order of 18 October 2011 as a basis, and claiming that the Co-Prosecutors' "short opening statement has taken us a little bit by surprise".²⁹ As of that date, proceedings against NUON Chea had been ongoing for more than four years, with all members of the NUON Chea Defence

²³ Trial Chamber Memorandum entitled Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E109/5, E131/1, 25 October 2011.

²⁴ See Civil Parties List of Documents Relevant to the Initial Trial Session, E131/1/2, 2 November 2011; IENG Sary's Document List for the First Trial Segment, E131/1/3, 2 November 2011; Co-Prosecutors' Notification of Documents to be put before the Chamber in Connection with those Witnesses and Experts who may be Called During the First Three Weeks of Trial with Confidential Annex A, E131/1/4, 2 November 2011; Indications of Witnesses and Documents Germane to the Initial Phases of Trial, E131/1/6, 2 November 2011.

²⁵ List of Documents to be put before the Chamber During the First Mini-Trial, E131/1/13, 31 January 2012.

²⁶ See *e.g.* Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, paras 35-37.

²⁷ Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, E131, 18 October 2011.

²⁸ T., 21 November 2011, p. 11 (11 (indicating that the Co-Prosecutors had one and a half days to make their opening statement).

²⁹ T., 22 November 2011, p. 72

relevant to this decision having been engaged in the representation of the Accused for most of the pre-trial phase.³⁰ To avoid any possible prejudice to NUON Chea, the Trial Chamber was compelled subsequently to permit the NUON Chea Defence to file a written version of its opening statement, despite the fact that such documents would ordinarily not qualify for placement on the Case File.³¹

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:


INFORMS the relevant NUON Chea Defence lawyers that it has referred their misconduct to the Amsterdam Bar Association and the New York State Bar Association for appropriate action, and has apprised the Bar Association of the Kingdom of Cambodia of this fact;

REQUESTS the Amsterdam Bar Association and the New York State Bar Association to inform the Trial Chamber in due course of the outcome of this referral and of any action taken in consequence of it;

REPEATS its warning to the NUON Chea Defence team against any further misconduct; and

NOTES, in consequence of the present decision, that the Chamber may take action independently of the individual bar associations, including the issuance of sanctions against or refusal of audience to any member of the NUON Chea Defence who fails to heed this warning.

Phnom Penh, 29 June 2012
President of the Trial Chamber



[Handwritten signature]

Nil Nonn

³⁰ Introductory Submission, D3, 18 July 2007; Assignment of SON Arun as NUON Chea's Lawyer by DSS, A28, 2 November 2007; Recognition of Lawyer Michiel PESTMAN as NUON Chea's Lawyer, D51, 26 December 2007.

³¹ See Request to Place Documents on the Case File, E146, 28 November 2011.