DECISION ON NUON CHEA DEFENCE COUNSEL MISCONDUCT

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The Trial Chamber has referred the "misconduct" of two international Nuon Chea defense counsel to their respective bar associations, and warned that it may issue sanctions against or refuse to hear any member of the team who fails to desist from further objectionable behavior. The cited misconduct includes "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." [Decision on Nuon Chea Defence Counsel Misconduct, E214, June 29, 2012] This is the first time the Trial Chamber has filed a Rule 38 decision against counsel; however, all three Case 002 defense teams have now had members referred to their bar associations for unethical behavior. Thus far, neither the home bar associations nor the Cambodian Bar have taken action, nor have court warnings been followed by additional ECCC repercussions. Because the Nuon Chea team's trial strategy is premised on exposing government interference in the work of the Court — and proving its existence by being repeatedly forbidden to raise the topic — it will no doubt continue to test the Chamber's patience, making future sanctions likely.

In 2009, the Co-Investigating Judges (CIJs) warned Ieng Sary's defense counsel for publicly releasing confidential documents — their own motions related to their client's health and strictly legal issues — on a public website. [Order on Breach of Confidentiality, D138, March 3, 2009] The team had questioned the Court's selective publication of documents, suggesting that the CIJs were "suppressing Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges" under the "fig leaf" of confidentiality. [Letter from Ieng Sary Defense, Dec. 18, 2008, *available at* https://sites.google.com/site/iengsarydefence/] Both civil parties and the Co-Prosecutors supported the team's underlying request for greater transparency. Nevertheless, to date there is a lack of clarity and, in the view of some parties, a lack of consistent reasoning as to why some

motions and decisions are made public (with redactions if necessary) and others remain confidential.

The Ieng Sary team has continued to host a website [https://sites.google.com/site/iengsarydefence/], but rather than publish its full motions, it publishes summaries, and has not yet run afoul of the Court for doing so. The Nuon Chea team has taken things a step further, not merely distributing its own filings to the press, but flaunting its disregard of the confidentiality rules in motions to the Chambers. In one case, the team flippantly requested the Trial Chamber to investigate it for unauthorized release of its client's health information to an independent medical consultant. [Request for Investigation Pursuant to Rule 35, E147, Dec. 1, 2011] Of greater concern, hours before the team was orally informed of the Chamber's misconduct decision, members for the first time distributed a confidential judicial order, as they believe it bolsters their claim that high-level government officials must be called as witnesses. Although this release did not form part of the Chamber's list of infractions, it is the most egregious breach by counsel of the rules of confidentiality to date.

Also in 2009, the Pre-Trial Chamber warned Khieu Samphan counsel Jacques Vergès to desist from offensive and abusive conduct, or conduct intended to obstruct the proceedings. This arose in part from his deviation from discussion of the issue on appeal — pre-trial detention — to corruption allegations. When he was not permitted to speak on this topic, he called the Judges "moral squatters" and suggested they were "obsessed only by money," among other disparagements. The Pre-Trial Chamber cited jurisprudence from the *ad hoc* tribunals and the European Court of Human Rights in deciding that personally abusive and insulting behavior against judges may be sanctioned. [Warning to International Co-Lawyer, C26/5/22, May 19, 2009].

The Nuon Chea lawyers have not acted as brazenly, instead drawing the Judge's ire — and having their microphones regularly cut off — for making repeated trial motions related to alleged instances of bias or governmental interference, and for taking every opportunity to interject the names of high-level government officials who held positions in the Khmer Rouges. Although their efforts to link these officials to witness testimony frequently appear to stretch the bounds of relevance, in some instances the Trial Chamber has appeared to cut them off prematurely and unnecessarily. These interactions have resulted in expressions of frustration by the Nuon Chea team and annoyance by the Judges, generating mutual antagonism that has bled

into other aspects of the proceedings.

The Trial Chamber noticeably cites no jurisprudence in support of its finding that the team's behavior exceeds the bounds of ethical advocacy. Recalcitrant defense strategies are commonly employed in trials of political leaders at mass crimes courts. Although some of the team's actions have been no doubt intentionally disrespectful of the proceedings, and members have questioned the Judges' wisdom by belaboring arguments after the Chamber has ruled, unlike Vergès, they have not insulted the Judges, nor have their efforts significantly delayed or obstructed proceedings, nor is it clear that they aim to do so. For this reason, a future Trial Chamber sanction barring them from proceedings would be an overreaction, playing into the team's core argument that they are not being afforded the opportunity to put forth their client's chosen defense strategy — whether or not the Judges believe the arguments to have merit or to be in his best interest. Going forward, the Trial Chamber has the unenviable task of upholding Nuon Chea's right to attack the legitimacy of the proceedings while maintaining the trial's decorum and expeditiousness. One option would be to schedule time for the team to raise interference arguments, thereby undercutting its enduring need to prove that the government will never allow it.