

Michiel Pestman, Nuon Chea Defence Team Response to Opening Statement by the Prosecutor

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Elephants in the Room

I am here to say and do those things, on behalf of my client, that most people in Cambodia cannot. I will not censor my words or impose invisible boundaries upon myself. And I hope the trial chamber will not do so either, although the temptation to do so may become irresistible. In Cambodia and at the ECCC those boundaries are usually, but regrettably, much better observed than the official ones, those drawn by Cambodian law.

The English have an expression: the elephant in the room. The issue which overshadows all others, but which no one dares to mention. I am here to speak about the elephant, or rather elephants, in this court room.

This case, this court, suffers from at least four major flaws—flaws most people involved know exist—but prefer to ignore, although the Prosecutor did note, with typical English understatement in his opening address, that this court was ‘by no means a perfect institution’. These flaws seriously undermine this case and the ECCC as a whole, as an institution capable of administering justice, not in the usual Cambodian way, but in an ‘international’ manner, according to widely accepted fair trial standards.

A fair trial is all Nuon Chea desires, and no less than he deserves.

1: Mini-Nuremberg

Once this was called an historic trial, no less than the biggest since Nuremberg. But the decision to split this trial into smaller parts has seriously undermined the ambitions of this court. And with it Nuon Chea’s right to present his defence in full.

After this mini-trial on the evacuation of Phnom Penh, Nuon Chea will be convicted and sentenced, no doubt, to a hefty prison sentence. Nuon Chea knows that he will be convicted, despite the lack of evidence against him. There will be no political necessity, and there will be very little appetite, for a second, let alone third, mini-trial. I sincerely doubt the international community will be willing to spend another 150 million dollars on a follow-up. And the Cambodian government will be more than happy to see the end of this institution, which continuously threatens to compromise that very government.

For the Cambodian government, the other charges—the internal purges, the killings in the Eastern Zone, the crimes committed in the border conflict with Vietnam—are dangerous territory, as a serious investigation into these

allegations would inevitably draw important government officials into the picture. Hun Sen, Chea Sim, Heng Samrin: they all carry their share of responsibility for the Khmer Rouge years.

In their opening statement, the Co-Prosecutors listed many charges, mentioned all crimes allegedly committed by Nuon Chea and the other Accused. But most of these crimes are not on the indictment, and the prosecution, the judges, and we know that the full range of events will never be examined in this court. Nuon Chea will not have the chance to respond to the majority of the charges against him.

Many others will be disappointed. This trial will be historic in name only. This will not be a trial about the history of the Khmer Rouge, but a trial about the first few days after the liberation of Phnom Penh. At best, this will be the biggest mini-trial since Nuremberg.

2: Partial Account

This trial will never reconstruct the history of the Khmer Rouge, let alone reveal the truth about what happened in recent Cambodian history. This mini-trial will not even give an accurate account of the capture of Phnom Penh and the evacuations that followed that capture. This will be a mini-trial in more than one sense. This trial will be like a play—or a film—with an incomplete cast, a minicast. Some of the major actors will be conspicuously absent. And the result will be a *partial* account.

Where is Henry Kissinger? Kissinger played a lead role in the Cambodian tragedy and should also do so in this mini-trial. Kissinger was possibly the main architect of the bombing campaign of Cambodia in the late 1960s and 70s. Most historians agree that without this American intervention, the Khmer Rouge would not have been able to seize power, to capture Phnom Penh, let alone evacuate all those people who were in the city because of that American bombing. Without Kissinger we would not be here today. The indiscriminate American bombing of Cambodia is without a doubt a war crime, for which Kissinger should be tried. The limited jurisdiction of this Court, unfortunately, does not allow him to be judged here. But as a witness he could and should have played an important role.

Up to 500,000 people were killed by the American bombing. Why are those deaths always attributed to the Khmer Rouge, as the Co-Prosecutors did in the opening statement?

So far the court has not allowed us to raise, let alone discuss, the role played by other actors in this drama. Why are there no 'insiders' on the list of witnesses? Where are, for example, Heng Samrin, Chea Sim, Hun Sen and the other government officials with a Khmer Rouge history? It is not because we did not ask for them (we did, and our request was rejected). Or because they have nothing of importance to say. On the contrary, we think their testimony is essential to understand the history of the Khmer Rouge and the evacuation of

Phnom Penh in April 1975. Heng Samrin, Chea Sim, Hun Sen: they were all there and played an important role. Their testimony is, or would have been, crucial to establish whether Nuon Chea bears any criminal responsibility for the charges listed in the mini-indictment.

So the cast is incomplete, even for this mini-trial. And I would like to emphasise that this is not the result of restrictions imposed on the judges by the rules of this court. This is the result of self-imposed restrictions; the result of unfortunate, politically motivated self-censorship by the judges themselves. The Trial Chamber has so far consistently shown a reluctance to confront the political forces in this country, even when this was necessary to fulfil its judicial function.

Nuon Chea deserves more than a partial account of history.

3: Two Fifths of a Court

And then there is the issue of the continuing interference of the Cambodian government in the work of this court. This interference is, however, only part of the problem. The real problem is not that the Government is interfering with the work of the judges, although this interference of course constitutes a gross violation of Nuon Chea's right to a fair trial. The underlying, more fundamental problem in this case is that this is *not* an independent court.

This court was blighted when the international community decided to capitulate to the Cambodian government and accept a majority of Cambodian judges in all the chambers. As a result, this court cannot guarantee a fair trial to Nuon Chea, not even with the system of super-majority. (The super-majority mechanism is a malfunctioning, legal monstrosity, as the recent split decisions of the Pre-Trial Chamber clearly illustrate.) All Cambodian judges at the ECCC are or were members of the CPP. They were not elected because of their proven independence, or because of their willingness to oppose and resist the interests of the Cambodian government whenever asked to do so. On the contrary, I am afraid, the Cambodian judges were chosen for their loyalty. It is for exactly that reason that Hun Sen personally approved their appointment.

This is the third fundamental flaw of this court we all like to overlook: its structural lack of independence. Government interference is a mere side-issue. Independent judges in a properly functioning judicial environment would know how to deal with such illegal interference. But that is unfortunately not the reality of this court. The truth is that the Cambodian government as a rule does not need to interfere in this court or even in this trial, because this court *is* the government. This is at best 2/5 of an independent court.

In this country, a proper separation of powers and a truly independent judiciary is an illusion, at least with the current CPP government. The Cambodian people are still waiting for their Montesquieu.

4: The Silent Minority

That brings me to the last elephant: the silent minority in this court. The international judges in this Trial Chamber appear too timid to use the little power they have, and their silence constitutes the biggest threat to justice. I understand their position in this court is not to be envied. Their options are limited. In the past we only half-jokingly remarked that the international Judges in this court have only two possible means of protest against the multiple fair trial violations in these proceedings: they can either *quit*, as others have done before them, or *acquit*, at the end of the trial. These are two extremes, but I am afraid the only honourable way out. Everything in between those extremes is and will be a compromise, at the expense of the very international standards they are supposed to implement and protect.

As we have argued before, this court will fail to show Cambodia how to run a fair and just trial. Instead of helping the Cambodian legal system to rise to international standards, to implement the rule of law, this court is slowly sinking into the all too familiar Cambodian morass, where the rule of law only applies when it suits the government.

Nuon Chea is afraid that the desire of the international community to save this institution from imploding will eventually prevail over their duty to guarantee his right to be judged fairly. He fears, and so do we, that the international judges will choose a trial that is partially fair over no trial at all. After all, as the Co-Prosecutor has admitted, there is 'no alternative'.

The recent discovery that one of these judges was holding regular ex-parte meetings with the Co-Prosecutor did not help to restore Nuon Chea's confidence in the international element of this court. Nuon Chea is left with the impression that during those meetings substantive issues were discussed, issues directly affecting his right to a fair trial, such as the crucial question of a UN investigation into the interference by the Cambodian government. Nuon Chea is left with the impression that the international judges in this chamber, at least one of them, decided in a private rendezvous with the Co-Prosecutor that such an investigation was maybe not such a good idea, as it could threaten not only Cases 3 and 4, but also Case 2.

The least the international judges should do, or should have done, is speak out. Speak out on behalf of justice. Not only in backrooms, but also in public. Where were they when we all challenged Judge Nil Nonn's fitness to preside over this trial? Do they really think their colleague's admitted willingness to accept bribes is no impediment to presiding over this historic mini-trial? I find it hard to believe. But why then, did they not dissent? Is it because such dissent would have exposed the inherent weakness of the system? But aren't the international judges there to compensate for this weakness?

Where were they when we raised the issue of corruption? And the issue of political interference in the court? And where were they when Ieng Thirith challenged the independence of Judge You Ottara, because of his involvement in

the Mu Sochua defamation trial? Do they really think a judge with such a dubious track record deserves to be in this court? Or do they simply think dissenting would not have made any difference? Or only made their life in this chamber more difficult, further disturbing already tenuous working relationships?

If so, we think they are wrong. And that they have missed their chance to show their presence in this court is not completely futile. This international silence is deafening.

It is exactly this failure of the international community, which the 'internationals' in this court epitomize, which forced Theary Seng to withdraw her victim's claim last week. When civil parties and defence find common ground, there is serious reason for concern. The failure of the international judges in this court to do what they are supposed to do is the last elephant in this room. So far, only the international judges in the Pre-Trial Chamber have shown the necessary grit, regrettably to very little avail. We can only hope that the international Judges in this court will follow their example, before it is too late.

Court Jester

I think this court needs a jester. Maybe that is why I am still here despite the serious flaws in this process. It is an unusual role, one I am not accustomed to, but somebody has to hold up a mirror and show the fundamental flaws of this court.

The role of court jester is, of course, an ambiguous one. With his presence the jester also legitimises and eventually perpetuates the very system he ridicules. I realise my presence here will be used by others—the international community, the United Nations—to argue that this is a properly functioning court, which it is not.

But I am no Hope Stevens. And I certainly do not want to be. Hope Stevens was the fig leaf for the 1979 show trial against the 'Pol Pot-Ieng Sary clique', which was set up by the same people responsible for the establishment of this court. Hope Stevens was the lawyer appointed to represent the clique, which was tried in absentia. In a passionate closing argument Hope Stevens asked not for the acquittal, but for the conviction of Pol Pot and Ieng Sary, the very persons whose interests he was supposed to represent. His presence at and his behavior during that trial was an embarrassment to my profession.

I will not be the fig leaf of this court's injustice. Everyday I wake up in the months and years to come, I will look in the mirror and ask myself this all important question: has the Court Jester run out of jokes? Has this trial turned into a mere re-run of the 1979 show trial, as Theary Seng so passionately believes?

If this happens, I will take off my gown. And join Nuon Chea in his holding cell, where I will follow and probably intensely enjoy this drama on 'telly'.