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ព្រះរាជាណាចក្រកម្ពុជា
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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Kingdom of Cambodia
Nation Religion King
Extraordinary Chambers in the Courts of Cambodia
Royaume du Cambodge
Nation Religion Roi
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

TRIAL CHAMBER

Date: 29 June 2012

TO: The Dean, Amsterdam Bar Association
Departmental Disciplinary Committee for the First Judicial Department
Appellate Division, New York State Supreme Court

FROM: President NIL Nonn, Trial Chamber

CC: President, Bar Association of the Kingdom of Cambodia
Executive Director, New York State Bar Association
All Trial Chamber Judges
Trial Chamber Senior Legal Officer
All parties, Case 002

Signature



SUBJECT: Professional misconduct of lawyer[s] admitted to your Bar Association

The Trial Chamber of the Extraordinary Chambers of the Courts of Cambodia ("ECCC") is concerned by a consistent pattern of professional misconduct it has observed on the part of two defence lawyers appearing before it. These two lawyers, and the bar associations to which they belong, are:

- Mr. Michiel PESTMAN Amsterdam Bar Association
- Mr. Andrew IANUZZI New York State Bar Association

These two individuals are part of a team of five lawyers representing the accused Mr. NUON Chea. NUON Chea has been charged with crimes against humanity, grave breaches of the Geneva Convention and genocide. The seriousness of these alleged offences, and the importance of mounting an adequately prepared and properly presented defence, makes the misconduct of these lawyers all the more troubling.

The Chamber has addressed, and will continue to address, this misconduct under its own Internal Rules, and attaches for your information its recent Decision on this matter. However, the behaviour of the international members of the NUON Chea Defence counsel in Cambodia may also raise issues with regard to professional competence and compliance with ethical

duties under the rules of the jurisdictions in which they are admitted to practise. I am therefore presenting you with a list of some of the more egregious examples of misconduct on the part of the NUON Chea Defence. Most of these examples of misconduct pertain only to the above individuals. However, other members of the NUON Chea Defence (Mr. Victor KOPPE, also of the Amsterdam Bar, and Mr. SON Arun, of the Cambodian Bar) may also be implicated to the extent that they are co-signatories to the NUON Chea Defence's written submissions. I would be grateful if you would consider the information supplied herein and take whatever action you deem to be appropriate in the circumstances. I would also appreciate it if you would inform the Trial Chamber in due course of the outcome of this referral and of any action taken in consequence of it, through its Senior Legal Officer.

If you have further questions, or require additional information from the Chamber, please address your enquiries to:

Susan Lamb (lamb@un.org)
Senior Legal Officer, Trial Chamber
Extraordinary Chambers in the Courts of Cambodia
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1. Unauthorised disclosure of confidential information

1.1. Distribution of confidential appeal to members of the press

Normally, upon filing a document before the ECCC, the filing party proposes a classification ('Public', 'Confidential' or 'Strictly Confidential'). The filing party must not propose 'Public' classification for a document that contains confidential or strictly confidential information. The relevant Chamber determines whether the proposed classification is appropriate.¹

On 10 October 2011, the NUON Chea Defence filed an immediate appeal with the ECCC Supreme Court Chamber ("SCC"), proposing the classification 'Public'. As with many other written submissions from the NUON Chea Defence, this Appeal contained the following statement:

As a preliminary matter, the Defence takes the position that the instant submission should be classified as public. In any event, the Defence will treat it as such.

The SCC disagreed with the proposed classification and classified the Appeal as confidential. Despite this fact, the NUON Chea Defence (by its own admission) distributed the Appeal to members of the national and international press. Moreover, in a Reply filed with the SCC, the NUON Chea Defence suggested that it was not bound by the ECCC's Practice Directions:

While it was clearly stated in the introductory paragraph of the Appeal that the Defence intended to treat that document as a public one, for the sake of clarity – and to avoid any doubt – the Defence hereby informs the Chamber that it has, in fact, done so.

[...]

¹ Practice Direction on Filing of Documents Before the ECCC, Art. 3.13.

Moreover, if required, the Defence is prepared to demonstrate to the Supreme Court Chamber that, not only are its actions in conformity with applicable Cambodian law and procedure – of which ECCC practice directions form no appreciable part – such actions are designed to promote the interests of justice at this Tribunal and protect the fundamental rights of the Accused. Putative assertions of professional confidentiality are being misused to mask embarrassing truths and unpleasant realities about this Court. Much more than an abuse of discretion, such judicial ‘fig-leaving’ amounts to an abuse of power. Accordingly, the Defence will continue to publish its own submissions where it deems such course of action to be consistent with applicable Cambodian law and Nuon Chea’s interests.²

The SCC found that there had been a breach of confidentiality in respect of the appeal, noted its concern at the NUON Chea Defence’s suggestion that it would disregard future orders in respect of confidentiality, and warned against further unauthorised disclosure of confidential information.³ Despite these warnings, the practice of the NUON Chea Defence in circulating, sometimes in advance of filing, material classified as confidential to the press and other public arenas continues. The NUON Chea Defence continues to preface many of its written applications and submissions with a request that the document be classified ‘Public’, and the statement that “in any event, the Defence will treat it as such”.⁴ This suggests that the NUON Chea Defence, despite the admonitions of both the Trial Chamber and SCC, will continue to disregard the Chambers’ classification of its filings.⁵ The Trial Chamber considers this practice may jeopardize the rights of victims, witnesses or others with a protected right against disclosure.

1.2. Naming of witnesses in open court

Parties to ECCC proceedings must refer to witnesses by pseudonym rather than name in public hearings prior to their testimony.⁶ This practice has proven necessary in order to avoid witnesses being overwhelmed by press scrutiny in advance of their testimony. Mr. IANUZZI and Mr. PESTMAN have repeatedly violated this direction.⁷ In the specific Cambodian context, the NUON Chea Defence’s misconduct threatens to have a direct and immediate impact on the willingness of witnesses to testify, as well as on their security. Other parties, as well as judges, have made accidental disclosures on occasion, but only the NUON Chea Defence does so routinely and deliberately.

² Reply to Co-Prosecutors’ Response to NUON Chea’s Immediate Appeal Against the Trial Chamber’s Decision Regarding the Fairness of the Judicial Investigation, E116/1/5, 8 November 2011, paras 6-7 (emphasis added).

³ 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.

⁴ Emphasis added; see e.g. Third Application for Disqualification of Judge Cartwright, E171, 14 February 2012, para. 1; Application for Summary 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.

⁵ 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).

⁶ Practice Direction on Classification and Management of Case-Related Information, Art. 7

⁷ See e.g. T., 15 December 2011, p. 4; T., 16 February 2012, pp. 25-27, 89; T., 12 March 2012, pp. 79-80; T., 15 March 2012, pp. 7-8; T., 26 March 2012, pp. 61-62; T., 30 April 2012, pp. 97-100.

2. Written applications

2.1. Broad and discriminatory allegations against all Cambodian staff

In a recent application, the NUON Chea Defence described the purported political contamination of the ECCC, making broad and discriminatory allegations against all Cambodian staff members at the ECCC. It claims that “the Government’s influence at this tribunal affects *each and every* national staff member” and that “[t]he inability of Cambodians at the ECCC (however principled and/or well-intentioned) to act independently in any professional sense is now irrefutable”. It also suggests that it would be “the height of naiveté, willful blindness, or worse” to say that the Cambodian judges of the Chamber are “capable of supporting any decision that contradicts the stated or implicit positions of the RGC”.⁸

2.2. Reference to Trial Chamber “intransigence”

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 repeating and clarifying its previous rulings that new documents must satisfy the requirements of ECCC Internal Rule 87(4) in order to be admitted as evidence, irrespective of the purpose for which they are intended to be used.⁹ Despite extensive discussion in court regarding the rules governing the use of documentary evidence generally and the issuance of decisions in support,¹⁰ 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”.¹¹ 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”.¹²

3. Offensive, disrespectful or otherwise unethical in-court behavior

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”.¹³ Members of the NUON Chea Defence have repeatedly shown disregard for this duty.

⁸ Application for Immediate Action Pursuant to Rule 35, E189, 25 April 2012, para. 19 (emphasis in original).

⁹ Trial Chamber Memorandum entitled Directions Regarding Documents Sought for Impeachment Purposes, E199, 24 May 2012.

¹⁰ 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.

¹¹ Notice of Impeachment Material for TCW-487, E206, 29 May 2012, paras 1 and 3.

¹² Rule 87 Request to Put New Evidence to TCW-321 for Impeachment Purposes, E210, 19 June 2012.

¹³ 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, Art. 21(3); Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Art. 24 (unofficial translation).

3.1. Allegations against a Chamber judge and reference to song lyrics in lieu of legal authority

MR. IANUZZI: On Monday afternoon, as my colleague, Michiel Pestman, was discussing our teams consistent position with respect to the effective political interference at the Tribunal, Judge Cartwright visibly -- and I was looking directly at her -- shook her head from side to side and mouthed the words, "blah, blah, blah, blah", as if to indicate -- I don't quite know.

That -- that is the application that we have today, Your Honours. Given the obvious problems associated with such unrecorded gesticulations, we now seek some clarification from the Chamber or from Judge Cartwright, herself, if she's so inclined; was that episode that I just described -- was that simply her usual manifestation of disdain for defence counsel on the Nuon Chea team or was it, in fact -- was it, in fact, an expression of her position on a matter that, according to the Supreme Court Chamber, is still sub judice with this Chamber and that is, of course, the effects of RGC interference, if any -- if any, on these proceedings? What precisely was Judge Cartwright attempting to convey through her now open and, I would say, almost de rigueur expressions of exasperation in response to submissions from this corner of the stage? What is it exactly that Judge Cartwright finds so objectionable about the Nuon Chea defence team?

It is, of course -- it is, of course, presumed that the Judges of this Bench are impartial. However, we submit -- we submit that such obvious expressions of disapproval are problematic, at best, and potentially far more troubling. We do obviously, as a starting point, expect to plead before a dispassionate Bench. So if we can't be assured of that -- of that basic foundation, at a minimum, it makes our position, our client's position, on this stage, precarious, to say the least.

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.

3.2. Question about design of courtroom and comparison to a "show trial"

MR. IANUZZI: [A]re you aware, Mr. Witness, that at that same location, the Chaktomuk Theatre, the PRK orchestrated a trial, in absentia, of Pol Pot and Ieng Sary? [...] [A]re you aware that this building -- that is, the building that we are standing in today, the one that houses the ECCC courtroom -- are you aware that this building is a copy -- a reproduction, albeit not a very faithful one -- but that this building is a copy of the Chaktomuk theatre, where that circus and political show-trial were held. Are you aware of that fact?

MR. PRESIDENT: The witness is instructed not to answer to this question because the question is irrelevant.

MR. IANUZZI: Your Honour, I'll just note for the record that we have raised the issue before about show-trials and the fairness of the proceedings, so this

should come as a surprise. This is certainly not the first time that this issue was raised.¹⁴

3.3. "This is a farce"

On 30 May 2012, Mr. PESTMAN attempted to question a witness on various subjects which the Chamber ruled to be irrelevant or impermissible. Mr. PESTMAN repeatedly disregarded these rulings. The Chamber warned Mr. PESTMAN several times that if he continued to pose irrelevant questions to the witness, the Chamber would assume that he had ceded the floor. Mr. PESTMAN then attempted impermissibly to put a document into evidence, in contravention of the Chamber's previous order on the use of documents.¹⁵ The Chamber therefore did not allow counsel to rely on the document. Mr. PESTMAN objected to this ruling. The Chamber informed him that the proper procedure for making such objections was to file an appeal. Mr. PESTMAN continued to object. The Chamber held that Mr. PESTMAN's time for questioning the witness had run out. Mr. PESTMAN removed his headphones, threw them down and exclaimed, "this is a farce". His remarks were audible in the courtroom but not picked up by the microphone and therefore not recorded in the trial transcript.¹⁶

3.4. "I [heart symbol] Dada"

On 19 June 2012, Mr. IANUZZI appeared in court with a badge bearing the label "I [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".¹⁷

4. Misrepresentations made before the Trial Chamber

4.1. Encouragement of NUON Chea to mislead the Chamber by members of his Defence team

On 19 March 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."¹⁸ 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

¹⁴ T., 17 May 2012, pp. 63-64 (emphasis added).

¹⁵ Trial Chamber Memorandum entitled 'Directions Regarding Documents Sought for Impeachment Purposes', E199, 24 May 2012.

¹⁶ T., 30 May 2012, pp. 26-43.

¹⁷ T., 19 June 2012, pp. 5, 57.

¹⁸ T., 19 March 2012, p. 4.

in the 1975-1979 period”.¹⁹ Later in the day, Judge LAVERGNE delivered the Chamber’s response:

The Trial Chamber reminds the parties and counsels that the subject of today’s hearing was advised well in advance of today’s hearing and repeated at the beginning of the hearing this morning.

[...]

It is for this reason that, when counsel for the Accused, Mr. Pestman, asked permission for the accused Nuon Chea to make a brief statement before the examination began, the President asked him to confirm whether the statement related to the subject matter was immediately under consideration. By allowing his client, the accused Nuon Chea to state -- and I quote -- “this statement is relevant to those facts” -- end quote -- when the entire statement was devoted to facts that have been examined earlier in the Trial, co-counsel for Nuon Chea in fact encouraged Nuon Chea to attempt to mislead the Trial Chamber. The Trial Chamber President interrupted the reading of the statement when it became clear that the statement had nothing to do with the facts to be examined.

The co-counsel for Nuon Chea submitted that Nuon Chea should be allowed to continue making his oral statement, and going even further on to state that - - and I quote -- “if he’s not allowed to finish reading his statement, he will not answer any other questions with regards to the structure of the Communist Party of Kampuchea or his role during the 1975-1979 period” -- end quote. In an effort to allow him maximum opportunity to speak to the facts currently under consideration, the Trial Chamber then allowed Nuon Chea to conclude his statement. However, the Accused continued to make statements that were irrelevant to this part of the trial.

The Trial Chamber considers that the co-counsel for Nuon Chea is attempting to force the Trial Chamber to change its conduct of the proceedings or to manipulate the Trial Chamber in some inappropriate way. This appears to be contrary to his duties as counsel to the Court. As a consequence, the Trial Chamber states that this conduct on the part of the co-counsel raises serious ethical issues. It will therefore consider what future action in relation to these events it might take.²⁰

4.2. Misrepresentation of Trial Chamber filing practice

On 20 April 2012, in correspondence addressed to the SCC Greffiers and copied to Trial Chamber Greffiers, Mr. IANUZZI told the SCC Greffiers that the advance circulation of a “courtesy copy” of a filing was, according to Trial Chamber practice, sufficient to meet a filing deadline in certain circumstances.²¹ This was untrue, and a Trial Chamber Greffier clarified the matter for the benefit of the SCC Greffiers.²² The NUON Chea Defence’s filing was ultimately rejected as being filed out of time by the SCC.²³

¹⁹ T., 19 March 2012, p. 17.

²⁰ T., 19 March 2012, pp. 27-29 (emphasis added).

²¹ E-mail from Andrew IANUZZI to Paolo LOBBA and others, 20 April 2012.

²² E-mail from Matteo CRIPPA to Andrew IANUZZI, Paolo LOBBA and others, 20 April 2012.

²³ Decision on NUON Chea’s Request to Accept Late Filing Pursuant to Rule 39(4), Doc. No. 3, 2 May 2012.

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

5.1. Failure to file document lists

On 17 January 2011, the Chamber ordered the parties to file lists of documents they intended to put before the Chamber in Case 002.²⁴ All parties except the NUON Chea Defence complied, at least to some extent.²⁵ On 27 June 2011, the parties were ordered to file revised lists.²⁶ The NUON Chea Defence declined to provide such a list; all other parties complied.²⁷ 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 November 2011.²⁸ Again, all parties except the NUON Chea Defence complied.²⁹ The NUON Chea Defence finally filed a limited list of documents to be put before the Chamber on 31 January 2012.³⁰

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 002/01. As the NUON Chea Defence did not indicate prior to the start of the trial the documents on which it intended to rely, the Internal Rules compel the Chamber to apply a more rigorous and exacting standard to the documents later produced or proposed by the NUON Chea Defence. The Chamber has, as far as possible, exercised its discretion so as to avoid serious prejudice to NUON Chea as a result of the NUON Chea Defence's failure.³¹

5.2. Failure to provide an opening statement on behalf of NUON Chea

On 18 October 2011, the Chamber issued an order scheduling opening statements on behalf of the Co-Prosecutors and all Defence teams.³² 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.³³

²⁴ Order to File Material in Preparation for Trial, E9, 17 January 2011.

²⁵ See Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, para. 3.

²⁶ T., 27 June 2011, p. 25.

²⁷ See Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, para. 4.

²⁸ 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.

²⁹ 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.

³⁰ List of Documents to be put before the Chamber During the First Mini-Trial, E131/1/13, 31 January 2012.

³¹ Decision Concerning New Documents and Other Related Issues, E190, 30 April 2012, paras 35-37.

³² Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, E131, 18 October 2011.

³³ T., 21 November 2011, p. 11 (indicating that the Co-Prosecutors had one and a half days to make their opening statement).

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".³⁴

As of 22 November 2011, the proceedings against NUON Chea had been ongoing for more than four years.³⁵ All members of the NUON Chea Defence relevant to this submission had been representing NUON Chea for the entire, or at least the significant duration, of the pre-trial phase.³⁶ 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.³⁷

6. Other unethical or unprofessional behaviour

6.1. Interference with medical examination

On 20 March 2012, following an application by the NUON Chea Defence, the Chamber ordered the ECCC medical doctor to independently examine NUON Chea in order to assess his ability to participate in proceedings. When this order was made, Mr. PESTMAN immediately left the courtroom without permission. In Mr. PESTMAN's absence, the President made the following statement:

MR. PRESIDENT: Counsel Pestman, if you interfere the work of the medical doctor who will examine the accused person independently and if the result of the medical report tainted by your interference, then you will be in trouble.

[...]

(Counsel Pestman enters courtroom)

The Chamber has note that - has noted that international counsel, Mr. Pestman, for Nuon Chea, has left the courtroom and reached the room where the doctor examined the medical condition of the Accused. The Chamber treats that as an interference into the work of the medical doctor.

So, in light of that, the Chamber will not base the argument of counsel as the reason for having the Accused to be excused – or to adjourn the hearing. However, the Chamber has taken note of this interference; we could not do anything but to adjourn the meeting.³⁸

In court the following day, Mr. PESTMAN denied that he had attempted to interfere with the medical examination, and complained that the Chamber had reached a conclusion that was "hasty and harmful" without proper investigation and without giving him the opportunity to respond. Based on what he observed during the medical examination, while acknowledging

³⁴ T., 22 November 2011, p. 72

³⁵ See *e.g.* Introductory Submission, D3, 18 July 2007.

³⁶ 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.

³⁷ See Request to Place Documents on the Case File, E146, 28 November 2011.

³⁸ T., 20 March 2012, pp. 82-83.

his lack of medical qualifications, Mr. PESTMAN nonetheless argued that the doctor's assessment was inadequate.³⁹

6.2. Repetitive and duplicative applications

The NUON Chea Defence has attempted to raise the same issues (*e.g.* regarding alleged political interference) time and time again. For example, having made a Rule 35 application on 10 January 2012 in respect of a speech delivered by the Prime Minister,⁴⁰ the NUON Chea Defence made substantially the same application again on 19 January 2012.⁴¹ On 23 January 2012 it raised the same issue again and asked the President to clarify his earlier response.⁴² Although the Chamber issued an oral decision on 2 February 2012,⁴³ the NUON Chea Defence tried to "revisit" the issue on 8 February 2012 and eventually filed the same application in writing on 22 February 2012.⁴⁴ The Chamber clarified the oral ruling of 2 February 2012 in a subsequent written decision.⁴⁵

The NUON Chea Defence appears to have adopted a related strategy of 'naming and shaming' public figures as often as possible, and seems to be trying to provoke high-profile members of the Cambodian government by linking them to the activities of the Democratic Kampuchea or People's Republic of Kampuchea regimes. The naming of public figures, and attempts to elicit details of their activities from witnesses, is usually of questionable relevance to the trial proceedings in Case 002.⁴⁶ Sometimes it is egregiously irrelevant, as in the following example:

MR. PESTMAN: My last question, Mr. Witness is -- It may be obvious that we think that Keat Chhon and Hor Namhong are very important witnesses, and we think that they should be heard in Court. Do you know whether Hor Namhong and Keat Chhon are willing to testify in this Court?⁴⁷

In a press release filed approximately 15 minutes after the verbal warning given to them on 21 June 2012 (above, footnote 5), international counsel for NUON Chea Defence again called upon the ECCC Trial Chamber to immediately schedule the testimony of various Cambodian parliamentary and government officials. It is worth emphasizing that the Trial Chamber has been requested to hear a cumulative total of 1054 witnesses in Case 002/01, more than 500 of which have been requested by the NUON Chea Defence.⁴⁸ The Chamber has repeatedly emphasized that in order to ensure a fair and expeditious trial, significantly fewer than this total can expect to be heard in Case 002/01. The Chamber has further indicated, *via* a prioritized list of approximately 60 initial witnesses, those individuals it deems most relevant

³⁹ T., 21 March 2012, pp. 1-3.

⁴⁰ T., 10 January 2012, pp. 1-3.

⁴¹ T., 19 January 2012, pp. 112-113.

⁴² T., 23 January 2012, pp. 1-2.

⁴³ T., 2 February 2012, p. 113.

⁴⁴ T., 8 February 2012, p. 4; Application for Summary Action Against HUN Sen Pursuant to Rule 35, E176, 22 February 2012.

⁴⁵ Decision on Rule 35 Applications for Summary Action, E176/2, 11 May 2012.

⁴⁶ See *e.g.* T., 15 December 2011, pp. 2-3; T., 6 February 2012, pp. 72-76; T., 9 February 2012, pp. 44-50; T., 30 April 2012, pp. 97-100; T., 17 May 2012, p. 63.

⁴⁷ T., 30 April 2012, p. 100. The witness was a retired soldier who lived in Banteay Meanchey Province, Cambodia, and was not alleged to have any present-day connection with the government officials named by the NUON Chea Defence.

⁴⁸ Annex A: Proposed Witness List (where no protective measures are sought) – NUON Chea Defence Team, E9/4.4.4, 15 February 2011, proposing 527 witnesses (excluding experts and civil parties, listed separately).

to the subject-matter of Case 002/01 and which will accordingly be heard first.⁴⁹ It has further indicated that other witnesses for hearing before the Chamber, relevant instead to later trial segments, will be identified at a later date, and that decisions on all witnesses sought by the parties will ultimately be issued in due course.⁵⁰ Despite this, the NUON Chea Defence continue to misleadingly mischaracterize the above press release and related disruptive in-court interventions as necessary in order to ensure that relevant witnesses are heard at trial, or to suggest that requests to present relevant evidence on behalf of their client have been unreasonably disregarded by the Trial Chamber.

⁴⁹ Confidential Annex A: Partial List of Witnesses, Experts, and Civil Parties for First Trial in Case 002, E131/1.1, 25 October 2011.

⁵⁰ See e.g. Trial Chamber Memorandum entitled Witness Lists for Early Trial Segments, Deadline for Filing Admissibility Challenges to Documents and Exhibits, and Response to Motion E109/5, E131/1, 25 October 2011; Trial Chamber Memorandum entitled Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, E172, 21 February 2012.