BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' REQUEST TO ASSIGN *AMICI CURIAE* COUNSEL AND ADVANCE THE TRIAL PROCEEDINGS

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 17 October 2014, in the midst of trial proceedings, counsel for Nuon Chea and Khieu Samphan – Son Arun, Victor Koppe, Kong Sam Onn and Anta Guissé – withdrew from the main courtroom of the ECCC without leave of the Chamber. Prior to their departure, they indicated they would not participate further in the trial proceedings unless the Trial Chamber postponed the schedule of trial proceedings to meet their demands.[1]

2. Nuon Chea and Khieu Samphan each made it clear in oral remarks prior to their counsel leaving the courtroom that they had instructed their lawyers not to participate in trial proceedings as long as their demands for postponement were not met. Counsel for Khieu Samphan also indicated that they were leaving on the instructions of their client.[2]

3. The demands of Khieu Samphan and those of Nuon Chea are disparate. Nuon Chea seeks a decision on his motion to disqualify four members of the Trial Chamber before resuming participation in trial. He complains that these judges have chosen, as expressly permitted under Internal Rule 34(5), to continue to participate in the trial proceedings pending a determination of the motion to disqualify. Khieu Samphan seeks conclusion of appellate briefing in Case 002/01 before resuming participation at trial.[3]

4. The current situation is that both Nuon Chea and Khieu Samphan have competent counsel of their choosing but have instructed their counsel to defy court orders and not to participate in the trial. These counsel, who are assigned to the Accused by the ECCC, have indicated that they will follow their clients' instructions, defy court orders and obstruct the proceedings until their demands are satisfied. Accordingly,

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1 Draft Transcript, 17 October 2014, immediately prior to 14:38:14.

2 *Ibid.* at 13:59:33 [Nuon Chea: I will instruct my lawyers to…boycott for [sic] the hearings in this second trial until the disqualification decision is issued]; 14:10:16 [Khieu Samphan: "My counsel has advised me that they cannot on the one hand participate in the proceeding and on the other hand preparing comprehensive appeal before the Supreme Court Chamber. For this reason, what is choice left for me?"] [emphasis added].

3 *Ibid.* at 14:11:53-14:17:31 [Khieu Samphan: "I would like to respectfully inform the Chamber that whenever my defence council [*sic*] or I have completed our appeal, we have fully prepared our appeal and submitted to the Supreme Court Chamber within the time limit, we will be happy to return and cooperate with this proceeding."].

on 21 October 2014, counsel failed to comply with an express direction of the Chamber to attend a Trial Management Meeting.[4]

5. Defence counsel's last-minute announcement of a boycott of the trial, if not remedied, will obstruct the trial currently scheduled to begin hearing testimonial evidence on Monday, 27 October.[5] Their actions pose a serious risk of delaying the proceedings, thus further delaying justice, and adding significant additional costs to the court. In view of the importance of the issue, and the real possibility that the current situation could repeat itself at any point during Case 002/02 if a precedent is set that rewards such tactics, the Co-Prosecutors submit that a remedy that allows the trial to proceed uninterrupted must be identified. Counsel's duty is to vigorously defend their clients' interests within the bounds of the rules of the court. There are no procedural or ethical rules that permit counsel to simply defy court orders on their clients' instructions. No criminal court can function effectively if it is left to Accused to decide which court orders their counsel will or will not obey.

6. In the current situation, the Co-Prosecutors submit that the assignment of *amici curiae* by the Chamber, as counsel to assist in safeguarding fundamental fair trial rights, is one solution that will allow trial to proceed and that is well-established in international procedural practice.

7. Due to the urgency of the matter, and the impending start of evidentiary hearings, the Co-Prosecutors submit this request in English only in the first instance, with the Khmer version to follow as soon as possible.[6]

II. APPLICABLE LAW

8. Internal Rule 22(4) provides:

> *In the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognised standards and ethics of the legal profession. They have an obligation to promote justice and the fair and effective conduct of proceedings.*

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4 Email from the Trial Chamber Senior Legal Officer to the Parties, "TMM 21 October 2014", 20 October 2014 ["All parties are directed to attend the TMM"].

5 Email from the Trial Chamber Senior Legal Officer to the Parties, "Schedule for next week", 16 October 2014.

6 Practice Direction ECCC/2007/1/Rev. 8 Filing of Documents before the ECCC, 7 March 2012, Art. 8.3.

9. The Administrative Regulations of the Defence Support Section ("DSS Regulations"), Article 7 provides:

> *7.1 Subject to any order of the ECCC, Co-Lawyers shall conduct the case to finality. Failure to do so, absent just cause approved by the ECCC, may result in forfeiture of fees in whole or in part, as determined by the ECCC.*

10. The Code of Conduct of the Bar Association of the Kingdom of Cambodia ("BAKC Code"), revised in 2013, provides in Articles 37 and 39, in part:

> *37. The lawyer shall strictly maintain the independence and the dignity in the profession before the court. The lawyer shall abide by the procedural provisions and regulations of the court. The lawyer shall not use any unfaithful approaches and shall abide by the confrontation approach. The lawyer has the rights to present any matters that he/she perceives that may bring about benefits for his/her client.*
>
> *39. A lawyer shall not cause delay in any court proceeding through recklessness or unreasonable ground, which may affect the just interests.*

11. The *Code de déontologie des Avocats européens*, incorporated into the *Règlement* Intérieur *National de la Profession d'Avocat* (France), Article 21.4, provides:

> *21.4.1 Déontologie de l'activité judiciaire: L'avocat qui comparaît devant les cours et tribunaux ou participe à une procédure doit observer les règles déontologiques applicables devant cette juridiction.*
>
> *21.4.2 Caractère contradictoire des débats: L'avocat doit en toute circonstance observer le caractère contradictoire des débats.*
>
> *21.4.3 Respect du juge: Tout en faisant preuve de respect et de loyauté envers l'office du juge, l'avocat défend son client avec conscience et sans crainte, sans tenir compte de ses propres intérêts ni de quelque conséquence que ce soit pour lui-même ou toute autre personne.*

12. Finally, the *Rules of Conduct of Advocates* (Netherlands) provide:

> [1.2 Task and functions of advocates] *…advocates should realise that the manner in which they behave, helps determine the way they (and their professional performance) are judged. They shall refrain from acts which harm the trust placed in them as advocates. The aim for individual advocates and thus advocates in general, should be to be regarded as true professionals whose opinions are authoritative. They should not, for example, resort to improper means, such as*

announcing or taking steps that are not in keeping with the goal they have in mind.

[Rule 1] *Advocates shall behave in such a way that confidence in the profession and in their own exercise of the profession is not harmed.*

[Rule 4] *Advocates must exercise due care in handling the matters entrusted to them.*

[Rule 9(1)] *Advocates shall assume full responsibility for the handling of a case. Advocates may not evade this responsibility by invoking the instruction received from their client. They shall not, however, perform any acts against the apparent wishes of the client.*

III. ARGUMENT

a. A client's instruction to counsel not to participate in hearings requires remedial action to ensure efficient and adversarial proceedings

13. Counsel before the ECCC not only have duties to their client but also have obligations to the Trial Chamber, "to promote justice and the fair and effective conduct of proceedings", in accordance with Internal Rule 22(4). This reflects an established international procedural rule among international criminal tribunals. In *Barayagwiza,* Defence counsel sought to withdraw from an ongoing case based on express instructions of the client "not to represent him in the courtroom."[7] The ICTR Trial Chamber denied the request noting that assigned counsel at the ICTR have obligations not only towards their client but also a duty to the Tribunal to ensure that the Accused receives a fair trial.[8]

14. Counsel for Nuon Chea and Khieu Samphan are obligated to "conduct the case to finality". By their present conduct they are not only in contempt of this Chamber's orders, which in itself is sufficient for sanction, but also in violation of the BAKC Code, to which they are all answerable, and which requires them to "abide by the procedural provisions and regulations of the court", "abide by the confrontation approach", and "not cause delay in any court proceeding through recklessness or unreasonable ground, which may affect the just interests." The international lawyers also appear to be in violation of their respective country's codes of conduct for advocates.

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7 *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw (Trial Chamber I), 2 November 2000 at para. 17.

8 *Ibid.* at para. 21.

15. As in *Barayagwiza*, Nuon Chea and Khieu Samphan have counsel of their choice and are not complaining about their representation. Judge Gunawardana, concurring in *Barayagwiza*, called Barayagwiza's instruction to his counsel not to participate "a form of protest" and noted that "he is not dissatisfied with the conduct or competence of his counsel and, in fact, has full confidence in them".[9] The same applies here as the oral remarks by Nuon Chea and Khieu Samphan on 17 October 2014 make it clear they are not dissatisfied with their counsel. In these circumstances, Judge Gunawardana would have assigned standby counsel to act as *amicus curiae* and represent the interests of the Accused in court when needed. He noted the statutory power of the Trial Chamber to assign counsel "where the interests of justice so require" and its inherent power to "control its own proceedings".[10] The solution-oriented approach of Judge Gunawardana is a well-recognised practice before international criminal tribunals[11] as well as in Cambodia[12] and other domestic jurisdictions,[13] and is fully consistent with the Chamber's duty to ensure both efficient and expeditious proceedings.

b. The assignment of *amicus curiae* counsel is warranted in the interests of justice to secure fundamental fair trial rights

16. Where a client instructs his counsel to absent themselves from court proceedings in violation of their obligations to the Chamber – even for a limited duration – while still retaining them as assigned counsel, he is causing disruption to the trial proceedings. In these circumstances, the Chamber is empowered by the fundamental principles of Internal Rule 21 to secure a trial that is "fair and adversarial", efficient, expeditious and "brought to a conclusion within a reasonable time". Cambodian law deems the "assistance of a lawyer" at trial "compulsory", where the case involves a felony,[14] as in the present case. The Chamber is also empowered to seek guidance in the consistent body of international jurisprudence

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9 *Ibid. Concurring and Separate Opinion of Judge Gunawardana* [pages and paragraphs unnumbered].

10 *Ibid. Concurring and Separate Opinion of Judge Gunawardana* [pages and paragraphs unnumbered].

11 *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (Trial Chamber II), 9 May 2003 ("*Šešelj* Decision").

12 Cambodian Code of Criminal Procedure, Art. 301.

13 *McKaskle v Wiggins* 465 US 168 (1984) (United States Supreme Court); Code de Procédure Pénale (France), Arts. 274, 317; *Strafprozeßordnung* (Germany), s. 140; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Reasons for decision on the prosecution motion concerning assignment of counsel (Trial Chamber II), 4 April 2003 at para. 49 ("*Milošević* Decision").

14 Cambodian Criminal Procedural Code, Article 301 (1).

concerned with remedying obstructions, disruptions and delays occasioned by self-representation of accused.[15] A client's right to instruct counsel and run his defence as he wishes is no less fundamental than his right to defend himself. However, neither right is absolute. In *Stanković*, the Trial Chamber observed:

> […] *this Tribunal as well as other international courts have consistently held that there may be circumstances where it is appropriate and the Chamber is competent to insist that the defence is represented by counsel ... in order to ensure that the exercise of the right of self-representation does not in effect obstruct the conduct of a fair trial.*[16]

17. In *Norman*, where the accused sought to represent himself, the Trial Chamber ordered that his "qualified right" to self-representation "could only be exercised with the assistance of counsel to be assigned to the trial".[17] The SCSL Trial Chamber based its decision on a number of "critical issues" equally applicable to the proceedings in Case 002/02:

> […] *(ii) The right to counsel relieves trial Judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings; (iii) Given the complexity of the trial in the present case, it cannot be denied that a joint trial of such magnitude, having regard to the gravity of the offences charged, and considering the number of witnesses to be called by the Prosecution and the Defence, make for a trial fraught with a high potential of complexities and intricacies typical of evolving international criminal law; (iv) There is also the public interest, national and international, in the expeditious completion of the trial; (v) Furthermore, there is the high potential for further disruption to the Court's timetable and calendar which we are already witnessing in this case.*[18]

18. The Co-Prosecutors submit that in the current situation it is in the interests of justice and a fair and expeditious trial for the Trial Chamber to assign counsel to act as

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15 *Prosecutor v. Goran Janković and Radovan Stanković*, Case No. IT-96-23/2-PT, Decision following Registrar's notification of Radovan Stanković's request for self-representation (Trial Chamber I), 19 August 2005 ("*Stanković* Decision"); *Prosecutor v. Sam Hinga Norman et al.*, Case No. SCSL-2004-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court (Trial Chamber), 8 June 2004 ("*Norman* Decision"); *Milošević* Decision, *supra* note 13; *Šešelj* Decision, *supra* note 11.

16 *Ibid. Stanković* Decision at para. 10.

17 *Norman* Decision, *supra* note 15 at para. 32.

18 *Ibid.* at para. 26 [emphasis added].

amici curiae to Khieu Samphan and Nuon Chea for as long as counsel fail to diligently represent their interests in the current trial. Any disadvantage occasioned by this replacement cannot be considered unfair to the Accused, or a violation of the right to counsel, given that the situation was created by the Accused themselves. The court has respected the right to counsel and provided and paid for defence teams chosen by Nuon Chea and Khieu Samphan but the Accused have instructed their counsel to boycott proceedings.

19. The Co-Prosecutors further note that the assignment of *amici curiae*, including those acting as assisting counsel, would fall within the inherent powers of the Trial Chamber itself to regulate its own process and ensure a fair and expeditious trial. The role of the Defence Support Section should be to provide a list of qualified and available counsel to the Chamber. As the ICTY Appeals Chamber clarified in *Karadžić*:

> *[...] the appointment of standby counsel is not subject to more formalized procedures designed to regularize the assignment of counsel to indigent suspects and accused who do not choose to self-represent. In assigning standby counsel, the Registrar or a Chamber may, but are not required to, make reference to procedures used in the assignment of counsel in other contexts.*[19]

20. As the *Milošević* Trial Chamber held when making an identical order, *amici curiae* counsel would not "represent the accused but [...] assist in the proper determination of the case"[20] by assisting the Chamber to safeguard the fairness and integrity of the proceedings while assigned Defence counsel continue to refuse to participate in the trial. As such, the Chamber could appoint such *amici curiae* counsel immediately, without the need for delay to the proceedings in order to prepare for their function (as would a lawyer appointed to permanently replace existing Defence counsel). The Co-Prosecutors submit that there is no reason that initial communications from DSS and a submission of a list of available and qualified counsel from DSS to the Chamber should take more than a matter of days. Past experience in this and other international tribunals also shows that it is not difficult to find counsel available locally, or prepared to travel to the court on very short notice.

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19 *Prosecutor v. Radovan Karadžić,* Case No.IT-95-5/18-AR73.6, Decision on Radovan Karadžić's appeal from decision on motion to vacate appointment of Richard Harvey (Appeals Chamber), 12 February 2010 at para. 35 [emphasis added].

20 *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order inviting designation of *Amicus Curiae* (Trial Chamber II), 30 August 2001.

21. The Co-Prosecutors emphasise that Defence counsel usurp the functions of the Chamber and prejudice the rights of other Parties if they determine when a trial starts and stops. The appointment of *amici curiae* counsel is an interim measure that allows the trial to continue without disruption, and it is therefore essential that such counsel be appointed immediately.

22. The Co-Prosecutors therefore request that the Trial Chamber instruct the Defence Support Section to immediately contact all those on the list of national and international counsel – not currently engaged in other matters before the ECCC or otherwise facing potential conflicts of interest – to ascertain which lawyers would be willing and available to act as *amici curiae* through the next few months and report those names confidentially to the Trial Chamber.

IV. REQUESTED RELIEF

23. For these reasons, the Co-Prosecutors respectfully recommend that the Trial Chamber:

a. **order** counsel for Nuon Chea and Khieu Samphan to continue to represent their clients in all trial proceedings and attend all trial hearings and trial management meetings;

b. **warn** counsel for Nuon Chea and Khieu Samphan that any further failure to attend court hearings, leaving court hearings without permission, or failure to represent their clients to the utmost of their professional ability in all trial proceedings shall be considered an obstruction of the proceedings under Internal Rule 38 for which the Chamber will impose appropriate sanctions;

c. **order** the Head of the Defence Support Section to report confidentially, to the Chamber only, on the availability of two counsel (one per Accused), national or international, to act as *amici curiae* to the Chamber to safeguard fundamental fair trial rights in Case 002/02 for the remainder of 2014;

d. **advise** both Accused and their counsel that if counsel fail to attend any hearing, the Chamber will designate counsel as *amici curiae* with the responsibility to protect the fundamental fair trial rights of the Accused until such time as the

Accused' counsel return to participate in the proceedings, or until counsel are barred from appearing for the Accused on grounds of continuing misconduct.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
22 October 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		