



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

ឯកសារដើម
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Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before:

Judge KONG Srim, President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge MONG Monichariya

Judge Florence Ndepele MWACHANDE-MUMBA

Judge YA Narin

Date:

27 January 2016

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Khmer/English

Classification:

PUBLIC

**DECISION ON THE CONDUCT OF THE CO-LAWYERS FOR NUON CHEA
DURING THE APPEAL HEARING OF 17 NOVEMBER 2015**

Co-Prosecutors

CHEA Leang

Nicholas KOUMJIAN

Co-Lawyers for NUON Chea

SON Arun

Victor KOPPE

Accused

KHIEU Samphân

NUON Chea

Co-Lawyers for KHIEU Samphân

KONG Sam Onn

Anta GUISSÉ

Arthur VERCKEN

Civil Party Lead Co-Lawyers

PICH Ang

Marie GUIRAUD

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) hereby renders its decision addressing the compliance of the conduct by the Co-Lawyers for NUON Chea (“Defence for NUON Chea”) during the appeal hearing of 17 November 2015 with the applicable legal framework, and the legal consequences stemming from a potential violation thereof.

A. BACKGROUND

2. The Supreme Court Chamber scheduled an appeal hearing in Case File No. 002/19-09-2007-ECCC/SC for 17-19 November 2015 (“Appeal Hearing”).¹

3. On 17 November 2015, the first day of the Appeal Hearing, the International Co-Lawyer for NUON Chea, Mr Victor KOPPE (“International Co-Lawyer”), did not appear in the courtroom before the Supreme Court Chamber. The National Co-Lawyer for NUON Chea, Mr SON Arun (“National Co-Lawyer”), was present.²

4. At the beginning of the Appeal Hearing, the Supreme Court Chamber granted NUON Chea’s request to make a personal address.³ In the course of his address, NUON Chea declared, *inter alia*, that after discussing the matter with him, his International Co-Lawyer would not participate in the hearing.⁴ He then instructed his National Co-Lawyer “not to participate in these proceedings any further, and not to respond to any kind of questions by the Judges or the other Parties”.⁵ NUON Chea indicated, however, that he “stopped short of withdrawing [his] appeal” against the Trial Chamber’s judgment against him in Case 002/01.⁶

5. In response to the National Co-Lawyer’s announcement that he would leave the courtroom shortly thereafter, as instructed by his client, the Supreme Court Chamber ruled that, NUON Chea’s instructions notwithstanding, the National Co-Lawyer was under an obligation to remain in the courtroom to ensure that his client was legally represented at the

¹ Order Setting the Final Timetable for the Appeal Hearing and Informing the Parties of the Issues to Be Addressed, 5 November 2015, F30/4; Order Scheduling the Appeal Hearing, 9 October 2015, F30.

² T. (EN), 17 November 2015, F1/4.1, p. 1.

³ T. (EN), 17 November 2015, F1/4.1, pp. 3, 8.

⁴ T. (EN), 17 November 2015, F1/4.1, p. 17.

⁵ *Ibid.*

⁶ T. (EN), 17 November 2015, F1/4.1, p. 18.

Appeal Hearing, as required under the relevant legal framework.⁷ The National Co-Lawyer rebutted that he must observe “all existing laws” and did “respect this Chamber”, but was compelled to follow his client’s instructions lest he be dismissed.⁸ The Supreme Court Chamber recalled yet again the National Co-Lawyer’s obligation to remain in the courtroom, warned that should he leave the courtroom he would be “in contempt of Court”, and found that his actions appeared to be “tactics aimed at obstructing the proceedings”.⁹ The National Co-Lawyer responded that, in light of Article 58 of the Statute of the Bar Association of the Kingdom of Cambodia (“Cambodian Law on the Bar”), he must not only “respect the Chamber” but also act in accordance with his client’s instructions.¹⁰ After having heard the other parties’ submissions on the issue, the Supreme Court Chamber reiterated its holding that, even though the National Co-Lawyer is at liberty to refrain from making oral arguments or responding to questions during the Appeal Hearing, he must remain present in the courtroom.¹¹

6. When the Appeal Hearing resumed following the morning recess, the National Co-Lawyer was not present in the courtroom¹². Having heard the other parties’ submissions as to the long-term consequences of the absence of the counsel for the defence, the Supreme Court Chamber retired to deliberate on the further conduct of the proceedings.

7. In light of the National Co-Lawyer’s departure from the hearing in violation of a clear court order, which occasioned a lack of proper legal representation for NUON Chea, combined with his expressed intention to maintain this position, the Supreme Court Chamber ordered the appointment of standby counsel for NUON Chea and adjourned the Appeal Hearing, indicating that “the conduct of International and National Counsel for NUON Chea may well constitute misconduct that could give rise to disciplinary sanctions” and that a decision in this regard would be taken in due course.¹³ The National Co-Lawyer was present in the courtroom during the afternoon session of the Appeal Hearing, when the Supreme Court Chamber pronounced its decision.

⁷ T. (EN), 17 November 2015, F1/4.1, pp. 19 (lines 7-10), 20 (lines 3-8), 20 (line 25)- 21 (line 3).

⁸ T. (EN), 17 November 2015, F1/4.1, p. 20.

⁹ T. (EN), 17 November 2015, F1/4.1, p. 21 (lines 11-21).

¹⁰ T. (EN), 17 November 2015, F1/4.1, pp. 21-22.

¹¹ T. (EN) 17 November 2015, F1/4.1, p. 27 (line 19)-p. 28 (line 8).

¹² T. (EN), 17 November 2015, F1/4.1, pp. 32-33.

¹³ T. (EN), 17 November 2015, F1/4.1, p. 39.

8. On 18 November 2015, the National Co-Lawyer filed a document aimed at setting out the reasons and legal framework for his conduct during the Appeal Hearing (“National Co-Lawyer Submission”).¹⁴ He recalled Article 58 of the Cambodian Law on the Bar and a previous decision of the Bar Association of the Kingdom of Cambodia (“BAKC Decision” and “BAKC”, respectively), according to which, he contended, lawyers are bound by their “own conscience” and by their clients’ instructions in deciding the defence strategy that better serves the clients’ interests, and thus lawyers are “independent and free to serve the judicial sector [...] in accordance with their professional rules and the applicable provisions”, being “judicial assistant[s] to society, not to [the] court”.¹⁵ The National Co-Lawyer recognised that he had to “follow the court’s order”, but maintained that his client’s instructions were not “against the law, [his] conscience or ethics”, and, as a result, he was bound to obey them.¹⁶ He noted that he returned to the courtroom in the afternoon session of the Appeal Hearing and regretted that “the Chamber ignored [his] presence and did not give [him] an opportunity to speak despite [him] having requested to do so”.¹⁷ Finally, he clarified that, in light of the Chamber’s order, he would sit in the courtroom in future appeal hearings in Case 002/01, while continuing to adhere to his client’s instruction not to respond to questions of any kind.¹⁸

9. On 23 November 2015, the International Co-Lawyer, upon request by the Supreme Court Chamber,¹⁹ filed a document aimed at providing explanations for his absence from the Appeal Hearing (“International Co-Lawyer Submission”).²⁰ He maintained that his client “indicated at the hearing that he had instructed [him] not to be present during the hearing”, given that the Supreme Court Chamber’s decision on NUON Chea’s pending requests for additional evidence made “the outcome of the appeal [...] irrelevant” to NUON Chea.²¹ He also recalled his intention to withdraw as NUON Chea’s International Co-Lawyer, but stated

¹⁴ Response of Mr SON Arun to the Oral Decision by the Supreme Court Chamber Regarding the Events of 17 November 2015, 18 November 2015, F30/13.

¹⁵ National Co-Lawyer Submission, para. 4 (quoting Letter from BAKC to President of TC Concerning the Conduct of Counsel KONG Sam Onn in the Proceedings of Case 002/02, 16 July 2015, E330/1/1, para. 1 of section “c. Findings”).

¹⁶ National Co-Lawyer Submission, para. 7.

¹⁷ National Co-Lawyer Submission, para. 8.

¹⁸ National Co-Lawyer Submission, para. 9.

¹⁹ Decision Requesting Submissions from Mr Victor KOPPE Regarding His Failure to Attend the Appeal Hearing, 19 November 2015, F30/14 (“International Co-Lawyer Response”).

²⁰ Victor KOPPE’s Response to the Supreme Court Chamber’s Request for Explanations for his Absence from the Appeal Hearing, 23 November 2015, F30/14/1.

²¹ International Co-Lawyer Submission, paras 7, 8.

that, even though the ECCC “is indeed, and always will be, a complete farce”, he would not do so.²²

B. APPLICABLE LAW

1. The Lawyers’ Duty to Ensure the Proper Legal Representation of an Accused Person in Cases Involving a Felony

10. According to Article 301 of the Cambodian Code of Criminal Procedure (“CCCP”), it is mandatory that an accused person be assisted by a lawyer at, *inter alia*, proceedings which involve a felony. Consistent with this provision, Internal Rule 81(7) provides that “[w]here no lawyer is present without justification during the hearing, the Chamber may either adjourn the hearing or, if the Accused requests assistance of a lawyer, request the Defence Support Section to temporarily assign him or her a lawyer”.

11. Meaningful application of Article 301 CCCP requires that a lawyer for an accused before the ECCC must be present in the courtroom throughout the hearing, independent of any instructions by an accused person to the contrary.²³

2. Legal Framework Concerning the Conduct of Lawyers

12. Internal Rule 22(4) specifies the legal framework for the conduct of lawyers practising before the ECCC; it reads as follows:

In the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement,²⁴ the ECCC Law, these [Internal Rules], 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.

13. The Agreement similarly provides at Article 21(3) that:

Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

²² International Co-Lawyer Submission, paras 3, 5, 6, 10.

²³ See T. (EN), 17 November 2015, F1/4.1, p. 39; President of the Supreme Court Chamber’s Memorandum entitled “Follow-up to Supreme Court Chamber’s Instruction to Appoint Standby Counsel for NUON Chea”, 19 November 2015, F30/15, p. 3.

²⁴ 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, signed 6 June 2003 (entered into force 29 April 2005) (“Agreement”) (footnote not in original).

14. Article 34 of the Cambodian Law on the Bar sets out the oath that lawyers must take before the “Appeal Court” as follows:

“I swear that I shall implement my profession with dignity, conscientiousness, honesty, humanity, and with an independent mind, and in observance of the Constitution and Laws of the Kingdom of Cambodia”.

Observance of the principles underpinning the oath is ensured by the Rules of the lawyers’ profession, as specified in the Internal Rules of the BAKC.²⁵

15. Article 58 of the Cambodian Law on the Bar stipulates, in relevant part, that “[l]awyers shall determine by their own conscience and with the consent of the client what issues to raise in order to defend the interests of the client”, providing further that any violations of Article 58 shall be subject to punishment under the criminal law.²⁶

16. The Code of Ethics for Lawyers of the BAKC (“Code of Ethics”)²⁷ outlines its fundamental principles under Article 3:

In all circumstances, lawyers shall abide by their oath of allegiance and shall conform to the principle of conscience, humanity, and dignity of the profession.

Lawyers shall not engage in any activities contradictory to laws, professional rules, and their conscience.

17. The Code of Ethics further specifies that a lawyer shall: (i) “strictly maintain the independence and the dignity of the legal profession before the court”;²⁸ (ii) “abide by the procedural rules and regulations of the court”;²⁹ (iii) be relieved from any criminal charges or civil liabilities for any statements of facts or defence made in good faith for the defence before judicial or other authorities;³⁰ (iv) demand and make efforts for a true fair trial, law compliance and due process;³¹ and (v) not cause any delay in any court proceedings through negligence or on unreasonable grounds, which may affect the justice process.³²

18. The relationship between a lawyer’s duty to follow his conscience and his client’s instructions and the duty to respect statutory regulations and courts’ orders has been analysed in the BAKC Decision, which reads as follows, in relevant part:

²⁵ Cambodian Law on the Bar, Article 56.

²⁶ Cambodian Law on the Bar, Article 78.

²⁷ Adopted by the Bar Council of the BAKC on 21 September 2012.

²⁸ Code of Ethics, Article 37.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Code of Ethics, Article 38.

³² Code of Ethics, Article 39.

A professional lawyer is independent and free to serve the judicial sector. This means that in the practice of his/her legal profession, a lawyer is independent in the performance of his technical work in accordance with the code of conduct and regulations applicable to the provision of legal service for his/her client, without being subject to the pressure or interference from any individual or institution. To protect the interest of his/her client, the lawyer shall consult, accept and listen to his client's instructions. The lawyer is a judicial assistant to society, not to court. Although the lawyer performs his/her duties in the interest of his/her client, he cannot act against law or intends [*sic*] to delay proceedings on unspecified grounds.³³

19. A lawyer appearing before the ECCC is also subject to Internal Rule 35, as clarified by the Supreme Court Chamber in its Decision of 14 September 2012 (“IR 35 Decision”)³⁴ and expressly envisaged under Internal Rule 35(5). Internal Rule 35(1) sets out, by way of illustration, an array of conduct which, if carried out knowingly and wilfully, may qualify as interference with the administration of justice. The IR 35 Decision held that Internal Rule 35(1) contemplates criminal as well as administrative offences, with the former being governed by Cambodian criminal law and the latter being identified by the “ECCC Judges and Chambers”.³⁵ Of particular note under the present circumstances is that, on the one hand, Article 523, second sentence, of the Cambodian Criminal Code attaches criminal liability to “[f]ailure to enforce a judicial decision”, and on the other hand, Internal Rule 35(1)(b) sanctions whoever “without just excuse, fails to comply with an order to attend” before the Chambers. This Chamber has already ruled that “[o]ther prohibited conduct [under Internal Rule 35] may include causing disorder in the courtroom” and “undermining the logistical functioning of the Court”.³⁶

20. Internal Rule 38 specifically addresses misconduct of a lawyer and may apply either in conjunction with or independent of Internal Rule 35. Misconduct of a lawyer is defined thereby as conduct which, in the opinion of the Co-Investigating Judges or the Chambers, is “considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement”.³⁷ At the ECCC, conduct considered as falling under Internal Rule 38(1) has included disclosure of confidential documents,³⁸ refusal – without prior notice – to continue participating in a hearing due to alleged

³³ BAKC Decision, para. 1 of section “c. Findings”.

³⁴ Decision on NUON Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Actions, 14 September 2012, E176/2/1/4, para. 36.

³⁵ IR 35 Decision, paras 32-33.

³⁶ IR 35 Decision, para. 36.

³⁷ Internal Rule 38(1).

³⁸ Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138, paras 19-20. *See also* Decision on NUON Chea Defence Counsel Misconduct, 29 June 2012, E214 (“TC Decision”), para. 7.

procedural defects,³⁹ use of abusive and insulting language towards judges,⁴⁰ continued irrelevant or inappropriate questioning of a witness in disregard of repeated orders and warnings by the court,⁴¹ unexpected absence from a hearing causing the hearing to be postponed coupled with the failure to participate meaningfully in the rescheduled hearing,⁴² and other offensive, abusive or unethical behaviour.⁴³

3. Legal Framework Concerning Procedure and Sanctions in Case of Misconduct of Lawyers

21. The procedural avenues available to the ECCC to address a lawyer's misconduct depend on whether such conduct is considered to fall under Internal Rule 38(1), which is specifically tailored to address misconduct by a lawyer, or also under Internal Rule 35(1), which concerns interference with the administration of justice.

22. The Supreme Court Chamber recalls that actions under Internal Rule 35 may be taken when there is reason to believe that a person has interfered with the administration of justice,⁴⁴ and that "the procedure for establishing liability, whether for a criminal or administrative offence, should comport with the fundamental requirement of fairness".⁴⁵ The simplified procedure for determining liability envisaged under Internal Rule 35(2)(a) is particularly suited for acts that are "notorious because of their public nature, recorded on the Court's video".⁴⁶ The person subject to proceedings under Internal Rule 35 is entitled to legal assistance.⁴⁷ Decisions under Internal Rule 35 are open to appeal.⁴⁸

23. Internal Rule 35 empowers the ECCC to "sanction or refer to the appropriate authorities" those who interfere with the administration of justice. The Supreme Court Chamber construed this provision as permitting any response "necessary to ensure the integrity of proceedings", whether of punitive or non-punitive nature, in addition to the

³⁹ Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, C26/I/25 ("First PTC Decision"), paras 4, 11, 15.

⁴⁰ Warning to International Co-Lawyer, 19 May 2009, C26/5/22 ("Second PTC Decision"), para. 30; Second Addendum - Continuing Professional Misconduct of Lawyer Admitted to your Bar Association - Matter of Andrew IANUZZI, Docket No: 2012.1596, 14 January 2013, E214/5.

⁴¹ T. (EN), 13 December 2012, E1/153.1, pp. 49, 56, 60-65.

⁴² Second PTC Decision, para. 31.

⁴³ See TC Decision.

⁴⁴ IR 35 Decision, para. 39.

⁴⁵ IR 35 Decision, para. 42.

⁴⁶ IR 35 Decision, para. 41.

⁴⁷ Internal Rule 35(3).

⁴⁸ Internal Rule 35(6).

criminal sanctions provided for by Cambodian law when a crime is committed.⁴⁹ The Chamber accordingly enumerated a range of possible administrative sanctions, such as “an admonition”, a “notice to self-regulatory bodies”, the “publication of the outcome of proceedings” and “a limited administrative fine”.⁵⁰ All such sanctions must comport with the principles of necessity and proportionality.⁵¹

24. Internal Rule 38 is designed to address a lawyer’s misconduct regardless of whether it qualifies as interference with the administration of justice. It provides for a simpler and less formalised procedural avenue compared with Internal Rule 35, neither affording legal representation nor the right of appeal. A finding of misconduct may lead, after a warning, to “sanctions”, “refus[al] of audience” or referral to the appropriate professional body.⁵² While the exact range of “sanctions” under Internal Rule 38(1) has not yet been defined, warnings have frequently been issued as both a punitive and preventative measure for misconduct,⁵³ while in one case, after repeated warnings, a lawyer was expelled from the courtroom.⁵⁴ The Supreme Court Chamber finds that the permissible scope of sanctions under Internal Rule 38 also includes the formal issuance of a private or public *reprimand*, namely a “mild form of lawyer discipline” that “declares the lawyer’s conduct improper but does not limit his or her right to practice law”.⁵⁵ Fundamental principles of fairness require that penalties resulting in serious consequences, such as permanent or long-lasting refusal of a right of audience or pecuniary sanctions, may only be imposed in observance of procedural safeguards; in this regard, the procedural rules enumerated in Internal Rule 35 apply by analogy.⁵⁶

⁴⁹ IR 35 Decision, para. 44-45.

⁵⁰ IR 35 Decision, para. 44.

⁵¹ *Ibid.*

⁵² Internal Rule 38(1)-(2).

⁵³ *See e.g.* Decision on Immediate Appeal by NUON Chea Against the Trial Chamber’s Decision on Fairness of Judicial Investigation, 27 April 2012, E116/1/7, para. 37 and Disposition; TC Decision, p. 8; Second PTC Decision, p. 10; First PTC Decision, p. 4.

⁵⁴ T. (EN), 13 December 2012, E1/153.1, pp. 64-65.

⁵⁵ Black’s Law Dictionary, 9th ed., Thomson Reuters, 2009, p. 1417. *See also* Cambodian Law on the Bar, Article 63; Special Court for Sierra Leone, “Code of Conduct Hearing, Decision [re Yada Williams]”, 10 November 2005 (imposing a public reprimand and a fine for violation of a counsel’s duty to act courteously and respectfully towards all persons, including staff members of the court).

⁵⁶ *Cf. Nshogoza v. Prosecutor*, ICTR-2007-91-A, “Decision on Appeal Concerning Sanctions”, Appeals Chamber, 26 June 2009, para. 29 (excluding the possibility that the scope of permissible sanctions that may be applied under Rule 46 of the Rules of Procedure and Evidence (“RPE”) – the language of which closely resembles that of Internal Rule 38(1) – includes pecuniary sanctions, because these kinds of penalties are not expressly mentioned therein, in contrast to other provisions of the RPE). At the ECCC, the Supreme Court Chamber has already ruled that the language of Internal Rule 35(1) (“The ECCC may sanction [...]”) – which is similar to Internal Rule 38(1) in that it does not specify the precise range of permissible sanctions – allows for the imposition of limited administrative fines (IR 35 Decision, para. 44). Therefore, the systematic and linguistic

C. DISCUSSION

25. The applicable legal framework, including the Cambodian Law on the Bar and the Code of Ethics, makes abundantly clear that lawyers, though guided by their conscience and clients' directions, have to respect the law and other applicable regulations, including court orders.

26. Article 58 of the Cambodian Law on the Bar, on which the National Co-Lawyer relies to justify his conduct at the Appeal Hearing, stipulates that the "consent of the client" should steer a lawyer in the decision concerning "what issues to raise in order to defend the interests of the client". It follows that a lawyer is under an obligation to not act against the wishes of the client in the design and implementation of the defence strategy, including the legal actions to bring to court, the issues to raise before a judge, and the tactics to assume during a hearing. Under no such circumstances, however, may a lawyer "act against [the] law", as recognised by the BAKC⁵⁷ and admitted by the National Co-Lawyer.⁵⁸ No client instructions may justify acting against the law. Contrary to the misconception put forward in the National Co-Lawyer Submission, lawyers owe a duty to the court as well as to their client.⁵⁹ Therefore, when a conflict arises between a client's directives and the applicable regulations, including court orders, a lawyer must act in compliance with the latter.

27. The Supreme Court Chamber turns to the application of these rules to the conduct of the International Co-Lawyer and the National Co-Lawyer.

arguments relied upon by the Appeals Chamber of the ICTR in *Nshogoza* are inapposite in the context of the ECCC.

⁵⁷ BAKC Decision, para. 1 of section "c. Findings". See also Code of Ethics, Article 37.

⁵⁸ National Co-Lawyer Submission, para. 7.

⁵⁹ See *Prosecutor v. Barayagwiza*, ICTR-97-19-T, "Decision on Defence Counsel Motion to Withdraw", Trial Chamber, 2 November 2000, paras 21-22. See also *Rondel v. Worsley*, House of Lords (1969), 1 AC 191, 227 (Lord Reid: "[A]s an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests"); *In re Griffiths*, United States Supreme Court (1973), 413 U.S. 717, 732 (Burger, C.J., dissenting: "The role of a lawyer [...] included the obligation of first duty to client. But that duty never was and is not today an absolute or unqualified duty. It is a first loyalty to serve the client's interest but always within – never outside – the law"); *In re Integration of Nebraska State Bar Association*, Nebraska Supreme Court (1937), 275 N.W. 265, 268 ("An attorney owes his first duty to the court"); *Giannarelli v. Wraith*, High Court of Australia (1988), 165 CLR 543, 556 (Mason CJ: "The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court"; "[t]he duty to the court is paramount [...] even if the client gives instructions to the contrary").

28. The International Co-Lawyer did not appear at the Appeal Hearing – a possibility foreshadowed in his e-mail to the Supreme Court Chamber’s Greffiers of 28 October 2015.⁶⁰ Although NUON Chea declared that the outcome of the present appeal proceedings has now become irrelevant to him,⁶¹ it is unclear whether the absence of the International Co-Lawyer was a consequence of his specific instruction to this effect or was merely “discussed” between them.⁶² The non-appearance of the International Co-Lawyer did not in itself result in the lack of NUON Chea’s proper legal representation and the subsequent adjournment of the Appeal Hearing, but contributed to it in conjunction with the absence of the National Co-Lawyer. Since the conduct of the International Co-Lawyer did not violate any specific law or court order, the Supreme Court Chamber finds that he did not interfere with the administration of justice pursuant to Internal Rule 35 or engage in misconduct pursuant to Internal Rule 38.

29. The National Co-Lawyer was present at the beginning of the Appeal Hearing. He was clearly instructed by his client to leave the courtroom and expressed his intention to heed such instruction.⁶³ He heard the Supreme Court Chamber recalling that he was under an obligation to remain in the courtroom; rejecting his argument that he had to follow his conscience and client’s instruction; qualifying his conduct as obstructive; and, finally, warning that the violation of his obligation to continue to provide legal representation to NUON Chea in the courtroom would lead to sanctions against him.⁶⁴ In spite of the Chamber’s instructions and warning, the National Co-Lawyer disobeyed and did not return to the courtroom at the resumption of the Appeal Hearing following the morning recess.⁶⁵ His action led to a three-month adjournment and to considerable, yet entirely avoidable, additional resources being drawn from the ECCC.⁶⁶

30. The Supreme Court Chamber finds that the National Co-Lawyer acted against his duty to ensure a proper legal representation of his client throughout the proceedings and wilfully violated a clear, direct and repeated judicial order, thus obstructing the proceedings. Moreover, the National Co-Lawyer violated the Cambodian Law on the Bar, which requires

⁶⁰ International Co-Lawyer Response, para. 3.

⁶¹ T. (EN), 17 November 2015, F1/4.1, p. 17 (lines 8-9).

⁶² T. (EN), 17 November 2015, F1/4.1, p. 17 (lines 18-20).

⁶³ See paras 4-7, *supra*.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Order Scheduling the Resumption of the Appeal Hearing, 23 December 2015, F30/17.

that lawyers' duties must be fulfilled in "observance" of Cambodian law⁶⁷ and the Code of Ethics, which dictates that lawyers shall abide by the procedural rules and regulations of the court and must avoid causing any delay in court proceedings on unreasonable grounds.⁶⁸

31. The fact that the National Co-Lawyer was again present in the courtroom in the afternoon when the Appeal Hearing resumed following the Chamber's deliberation does not alleviate the fact that a violation had been committed. Moreover, the overall tenor of the representations made by the Defence for NUON Chea indicated an intention to boycott the proceedings, which, insofar as this involved the absence of counsel, meant obstructing them. The Chamber notes that, in his subsequent written submissions, the National Co-Lawyer recognised that he is under an obligation to sit in the courtroom in future appeal hearings in Case 002/01 and undertook to do so, while continuing to adhere to his client's instruction not to make submissions or respond to questions.⁶⁹

32. In conclusion, the Supreme Court Chamber has reason to believe that, by failing to return to the Appeal Hearing after the morning recess, the National Co-Lawyer committed interference with the administration of justice under Internal Rule 35.⁷⁰ It nevertheless decides to refrain from resorting to Internal Rule 35 "for the sake of efficiency", considering that such course of action would absorb further time and resources,⁷¹ and in consideration of the National Co-Lawyer's belated, yet not wholly futile, commitment to observe the Chamber's order in the future.

33. However, the Supreme Court Chamber considers it appropriate to resort to sanctions under Internal Rule 38. Given that the National Co-Lawyer was warned at the Appeal Hearing against violations of his obligations, the Chamber believes that a necessary and proportionate sanction in this case is a public reprimand.

34. Considering, further, that it is in the interests of justice that NUON Chea be represented at the Appeal Hearing by counsel of his own choosing, and who have followed the proceedings from the beginning, the Supreme Court Chamber issues a notice to both the International and National Co-Lawyers, requiring them to coordinate so as to ensure that, at all times, legal representation for NUON Chea is provided during the hearings in Case

⁶⁷ Cambodian Law on the Bar, Article 34.

⁶⁸ Code of Ethics, Articles 37, 39.

⁶⁹ National Co-Lawyer Submission, para. 9.

⁷⁰ See para. 19, *supra*.

⁷¹ IR 35 Decision, para. 39.

002/01. Failure to ensure such representation will be considered obstruction of the proceedings.

35. Finally, the Supreme Court Chamber informs the Defence Support Section of the recent decision of the Defence for NUON Chea not to actively engage in the appeal proceedings any longer,⁷² including the International Co-Lawyer's failure to attend the Appeal Hearing, and requests that it be accounted for in the determination of the fees owed by the ECCC for the International Co-Lawyer's and National Co-Lawyer's legal services relating to Case 002/01.⁷³

⁷² The Supreme Court Chamber recalls that the Defence for NUON Chea did not submit the observations requested by the Order Scheduling the Appeal Hearing, 9 October 2015, F30, pp. 4-5 (on the tentative timetable and on the potential change to the "legal characterisation of the crime"). Moreover, it appears reasonable to assume that no substantive preparation for the Appeal Hearing has been thus far undertaken, in view of the decision not to make oral submissions nor respond to the Chamber's questions.

⁷³ Defence Support Section Administrative Regulations, Section 7.1.

D. DISPOSITION

36. For the foregoing reasons, the Supreme Court Chamber:

DETERMINES that the National Co-Lawyer engaged in misconduct pursuant to Internal Rule 38 by failing to return to the Appeal Hearing after the morning recess, thereby wilfully violating his duty to ensure the proper legal representation of NUON Chea and the attendant Supreme Court Chamber's clear, direct and repeated order to remain in the courtroom, thus obstructing the proceedings;

REPRIMANDS the National Co-Lawyer for his misconduct under Internal Rule 38, emphasising that such misconduct resulted in the Appeal Hearing being delayed by three months and in considerable, yet entirely avoidable, additional resources being drawn from the ECCC;

NOTIFIES the International Co-Lawyer and the National Co-Lawyer that future instances of conduct resulting in a lack of proper legal representation of NUON Chea or any other obstruction of the appeal proceedings shall lead this Chamber to consider imposing sanctions more punitive than a public reprimand;

INSTRUCTS the Case File Officer to notify the Defence Support Section and the BAKC of the present Decision.

Phnom Penh, 27 January 2016

President of the Supreme Court Chamber



KONG Srim