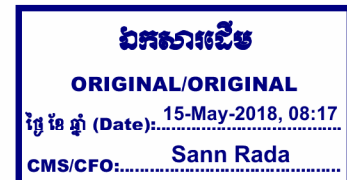


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BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**SUBMISSIONS OF THE INTERNATIONAL CO-LAWYER FOR NUON CHEA
ON HIS STATUS IN CASE 002/02**

Filed By

International Co-Lawyer for Nuon Chea:
Victor KOPPE

Distribution

National Co-Lawyer for Nuon Chea:
SON Arun

Co-Lawyers for Khieu Samphân:
KONG Sam Onn
Anta GUISSÉ

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Civil Parties:
PICH Ang
Marie GUIRAUD

1. I refer to the memorandum of the President of the Trial Chamber of 2 May 2018 (the “Memorandum”) directed to Mr. Isaac Endeley and to me.¹
2. The Memorandum invites me “to immediately seek admission to a recognised association of lawyers in a UN member state *other than Cambodia* by 15 May 2018.”² The Memorandum also invites me “to *regularize [my] situation* with the foreign bar association for the period from 1 January 2016”.³ In the alternative, the Memorandum invites submissions from me on this subject to be filed no later than 15 May 2018.
3. According to the Memorandum, the legal grounds for these invitations seem to be that:

the Trial Chamber considers that there is an existing and mandatory requirement that international co-counsel be a current member in good standing of a recognised association of lawyers in a United Nations Member State other than Cambodia and that [I have] been in breach of this requirement since 1 January 2016.
4. This requirement is, according to the Chamber, reflected in “a *holistic assessment* of the ECCC legal framework governing the eligibility of foreign lawyers to practice before the ECCC”.⁴
5. Although the Memorandum explicitly refers to the memorandum from the Chief of DSS, Mr. Isaac Endeley dated 21 March 2018 (the “DSS Memorandum”),⁵ the Memorandum neglects to address his main point, namely that:

it may also be necessary to first amend all the relevant provisions of the Internal Rules, the DSS Administrative Regulations, and the Legal Services Contract signed by *all* the defense lawyers so that they explicitly require each foreign lawyer at the ECCC to provide periodically proof of membership of a domestic bar association outside of Cambodia.⁶
6. As far as I can see, nothing to this effect has been initiated in respect of the abovementioned rules and regulations, nor have I been in receipt of a draft amended Legal Services Contract now requiring periodic proof of a domestic bar association outside of Cambodia.

¹ E378/8/2, ‘Status of International Co-Counsel for NUON Chea in Case 002/02’, 2 May 2018 (the “Memorandum”), para. 9.

² E378/8/2, Memorandum, para. 9 (emphasis added).

³ E378/8/2, Memorandum, para. 9 (emphasis added).

⁴ E378/8/2, Memorandum, para. 2 (emphasis added).

⁵ E378/8/1, ‘Status of International Co-Counsel in Case 002/02’, 21 Mar 2018 (“DSS Memorandum”).

⁶ E378/8/1, DSS Memorandum, para. 4.

7. It is of course outside the Trial Chamber's competence to unilaterally infringe upon the legal contractual framework that exists between the United Nations and a defense lawyer, especially if both parties to the relevant contract agree about the content and have no legal dispute over it.
8. As indicated in my confidential letter to Mr. Endeley dated 19 March 2018, I was instructed in 2008 by his legal predecessor, and have always understood the legal framework and the relevant rules to be that there is only a foreign bar membership requirement at the time of application of admission to the DSS List of Lawyers and to the Bar Association of the Kingdom of Cambodia ("BAKC"). Mr. Endeley, as the legal successor to my contractual counterpart in 2008, fully agrees with my interpretation of the existing contractual framework, as clearly indicated by him in para. 3 of the DSS Memorandum.⁷
9. I refer the Chamber therefore to Rule 2 of the Internal Rules (Revision 9) that stipulates that:

[w]here in the course of ECCC proceedings, a question arises which is not addressed by these [Internal Rules], the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.
10. As the Chamber is aware, the abovementioned Article 33 new of the ECCC Law requires that trials before the ECCC be "fair", "conducted [...] with full respect for the rights of the accused", and "in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights" (the "ICCPR"). I surely need not remind the Chamber that Article 14 of the ICCPR – not to mention Article 35 new of the ECCC Law – guarantees an accused's right to legal counsel of their own choosing.
11. It might very well be that in a Plenary Session, the Supreme Court Chamber ("SCC") judges and/or other ECCC judges agree with Mr. Endeley and me. The position of the SCC judges in a Plenary Session in this matter is of course specifically relevant since they will start adjudicating Mr. Nuon Chea's inevitable appeal in Case 002/02 hopefully

⁷ E378/8/1, DSS Memorandum, para. 3. See, in particular: "proof of foreign bar membership is only required at the time of application for admission to the DSS list and to the BAKC, but not thereafter".

sometime this year. In any event, however, it is hard to imagine that they will base themselves in their position upon a “*holistic* interpretation” of the existing legal framework.⁸ After all, the ECCC considers itself a legal institution and not a wellness-yoga resort, at least as far as I am aware.

12. The Trial Chamber’s main concern seems to be my accountability in terms of my professional and ethical conduct. Up until now, the Chamber has filed three different complaints with the Amsterdam Bar Association (“ABA”) about alleged professional misconduct by me during the proceedings in case 002/02. As the Chamber knows, the Dean of the ABA was not prepared to accept its complaints and has referred them to the ABA’s Disciplinary Board. What the Chamber may not yet know is that there will be an oral hearing on all three complaints on Monday 4 June 2018 in Amsterdam.
13. The Chamber’s third complaint is about possible misconduct on my part in May 2017. I have argued to the Dean of the ABA that he is competent to address this matter. I will also argue at the hearing of 4 June 2018 that the Disciplinary Board is equally competent to adjudicate the issue. The fact that I am not longer admitted to the ABA since 1 January 2016 does not, in my opinion, prevent the Board from addressing the matter. After consultation with the greffier of the Disciplinary Board, I anticipate a judgement on the three complaints six weeks after 4 June 2018. If the Board agrees with me and I can be held accountable for any professional misconduct in the proceedings before the ECCC after 1 January 2016, then “the situation will be regularized”. I do not see any other route to “regularizing the situation” as the Chamber requires, because it must be clear to anyone that I cannot somehow become a member of the ABA retroactively. If the Chamber thinks that I somehow can, please indicate to me as to how that should be done.
14. In any event, all this does not change the fact that I am still a member in good standing of the BAKC. As the Chamber is aware, the BAKC has also solid rules on what would constitute professional misconduct of its members. The BAKC can hold me accountable for any professional misconduct that I might have committed within the proceedings of the ECCC and also issue disciplinary measures against me. I might recall that the SCC has filed a complaint against my national counterpart for his conduct during the appeal hearing in November 2015. What would have otherwise been the purpose of requiring all international lawyers to become members of the BAKC and subsequently have them take

⁸ E378/8/2, Memorandum, para. 2 (emphasis added).

part in a swearing in ceremony during a formal hearing at the Court of Appeal in Phnom Penh?

15. As a matter of fact, the BAKC might be much better equipped to deal with the Chamber's third complaint, because it involves a matter of breaching confidentiality by me by allegedly providing a copy of the confidential closing brief to the *Cambodian Daily*. As far as I can tell, the journalist involved is still working in Phnom Penh and any fact-finding can therefore be done more effectively in Phnom Penh – unless the Trial Chamber is of the opinion that the BAKC is somehow less qualified to deal with any disciplinary matters of its members. If that is the case, that would be quite an unfortunate view.
16. To conclude my submissions, I would suggest we wait for the decision of the Disciplinary Board as well as for the termination of the process of renewed contract negotiations between the United Nations and me. As for the legally-required proposal for the amendment of the Internal Rules, I expect Mr. Endeley to take the necessary steps to initiate these proceedings.

INTERNATIONAL CO-LAWYER FOR NUON CHEA



Victor KOPPE