

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case n°: 002/19-09-2007-ECCC/TC

Party Filing: Mr KHIEU Samphân

Filed to: The Trial Chamber

Original language: French

Date of document: 25 August 2014

CLASSIFICATION

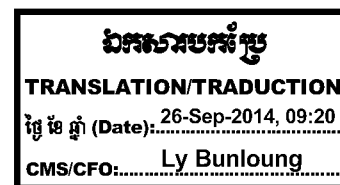
Classification of the Document Suggested by the Filing Party: Public

Classification by the Trial Chamber: Public

Classification Status:

Record Officer's Name:

Signature:



**MR KHIEU SAMPHAN'S REQUEST FOR RECONSIDERATION OF THE NEED
TO AWAIT FINAL JUDGEMENT IN CASE 002/01 BEFORE COMMENCING CASE 002/02
AND THE APPOINTMENT OF A NEW PANEL OF TRIAL JUDGES**

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Before:

The Trial Chamber

Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

The Co-Prosecutors

CHEA Leang
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NUON Chea's Defence

MAY IT PLEASE THE TRIAL CHAMBER

1. On 30 July 2014, the Trial Chamber (“the Chamber”) held its initial hearing in Case 002/02 (E1/240.1).
2. On that occasion, the President expressed his wish to have the second trial commence as soon as possible and perhaps as of September 2014.
3. The Co-Prosecutors, the Civil Parties and even the Nuon Chea Defence appeared to welcome this plan which they supported verbally.
4. During that same hearing of 30 July 2014, the Defence for Mr KHIEU Samphân (“the Defence”), for its part, voiced concerns about the manner in which the trial in Case 002/02 would be conducted if the Chamber’s decision in Case 002/01 were to make findings challenged by the Parties and, in particular, by the Defence.
5. This position had already prompted discussion when the Defence objected in February 2014 to the commencement of the trial in Case 002/02 before final adjudication of Case 002/01 by the Supreme Court Chamber (“the Supreme Court”) (E301/5/5). This first request to postpone the commencement of Case 002/02 was denied by the Chamber in a decision dated 21 March 2014 (E301/5/5/1).
6. Since the pronouncement of the judgement in Case 002/01 (E313) on 7 August 2014, the fears of the Defence, sometimes labelled as “potential”, have materialized. Indeed, as shall be herein demonstrated, it is clear that in its judgement your Chamber went beyond the scope of the trial that it had set in its foundational decision on this matter. This issue is all the more evident now following the Supreme Court’s decision of 29 July 2014 on Mr KHIEU Samphân immediate appeal against the severance order setting out the scope of Case 002/02 (E301/9/1/1/3) and because in that decision the Supreme Court invalidated the arguments hitherto used by your Chamber to dismiss the complaints that had been pre-emptively raised before it.

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MR KHIEU Samphan’s Request for Reconsideration of the Need
to Await a Final Judgement in Case 002/01 Before Commencing Case 002/02
and the Appointment of a New Panel of Trial Judges

7. The Supreme Court's decision of 29 July 2014 and your judgement of 7 August 2014 thus constitute new facts which now provide the basis for a new motion primarily requesting that the trial in Case 002/02 not commence before final adjudication by the Supreme Court of all appeals that will be taken against the said judgement.

8. The Defence requests the Trial Chamber to acknowledge that the issues raised are legally crucial, that these issues are based on demonstrable submissions and that the Supreme Court's resolution of these objections is liable to have such repercussions on Case 002/02 that it is necessary and in the interest of justice to wait for the determination of the appeal before commencing this trial.

9. By way of introduction, the Defence wishes to quote an excerpt that it considers particularly relevant from the Supreme Court's very recent Decision on Mr Khieu Sampân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02 (E301/9/1/1/3, paragraph 85):

In the event that the verdict in Case 002/01 leads to a conviction, there is a risk of an overlap of findings that determine individual criminal responsibility with the question of individual criminal responsibility in subsequent trials. In abstract terms, this risk increases with a further fragmentation of the case, but the problem is valid for Case 002/02, irrespective of severance. Given the dismissal of the motions to wait for the finality of Case 002/01 and, at the same time, a refusal to create a second panel within the Trial Chamber, two propositions, either one of which would serve to alleviate this concern, the Supreme Court Chamber can only assume that the Trial Chamber will not make findings in Case 002/01 which would evince attributing criminal responsibility to the Co-Accused in relation to charges to be adjudicated in subsequent cases. At this stage, however, without a verdict in hand, the question of overlap posed by the Appeal does not yet arise as a concrete prejudice.

10. It is clear that this request submits that the harm mentioned by the Supreme Court has now materialized and that the second trial should be stayed, pending a decision by the Court on the inferences that should be drawn from such a situation.

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Reminder of the scope of Case 002/01 determined by the Chamber

11. In order to properly understand the reasoning of the Defence, it is first of all necessary to define the nature of the decision which sets out the scope of Case 002/01. Such a question may seem absurd; however, the succession and multiplicity of decisions in the current hybrid proceedings make it relevant.

12. As the Supreme Court pointed out in its decision of 29 July 2014 (E301/9/1/1/3, paragraph18): *“In the context of the ECCC, however, the limits of criminal action that seizes the court are determined by the factual allegations set out in an indictment rather than by their legal characterisation, which is not binding.”*

13. As the scope of the first trial was set by a severance of the Indictment, it is therefore your latest Decision on Severance dated 23 April 2013 (E284), which became final following the Supreme Court’s decision of 23 July 2013 (E284/4/7), which determines the scope of the trial.

14. Internal Rule 89ter confirms, if need be, that the authoritative document with respect to severance is simply the severance order:

When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

15. It should also be recalled that in the appeals against the severances ordered in these proceedings, it is precisely your Chamber’s severance orders and their relevant annexes that were exclusively at issue.

16. In the DISPOSITION of your Decision on Severance dated 26 April 2013 (E284), you indicated that the Chamber:

DECIDES that the scope of Case 002/01 crime base shall comprise the portions of the Closing Order pertaining to forced movement phases one and two, executions committed

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at Toul Po Chrey in the aftermath of the evacuation of Phnom Penh and associated crimes against humanity, comprising all Case 002 Closing Order paragraphs previously communicated to the parties in E124/7.3;

17. In the same disposition, you also specified that the Chamber:

***FURTHER DECLARES** in the interests of certainty, that no further extensions to the scope of Case 002/01 trial shall be entertained; and*

***NOTES** that in accordance with Internal Rule 104(4), immediate appeal of the present decision does not stay the proceedings before the Trial Chamber.*

18. In the terms of the decision of 26 April 2013, which became final with the Supreme Court's decision dated 23 July 2013 (E284/4/7), it is E124/7.3 that set out the scope of Case 002/01 and which gave Mr KHIEU Samphân notice of the facts and charges in the Closing Order on which he was going to be tried.

19. It follows from E124/7.3 that the only paragraphs selected to define the scope of Case 002/01 which pertain to a historical background concern the history of the CPK (rather than the policies it developed) and the history of the only two policies that were the subject of the trial in Case 002/01, that is to say the policies on population movement and the targeting of former officials of the Khmer Republic.

20. For example, E124/7.3 does not include paragraphs 168 and 170 of the Closing Order which are, in fact, the only ones which deal with the fact that “[c]ooperatives and worksites were set up throughout Cambodia before 1975, from the early stages of the CPK control over certain parts of the territory” or that “[t]he establishment of collective agricultural production by the CPK began around 1970, expanding as the CPK strengthened its control over Cambodian territory.”

21. With regard to security centres and execution sites, E124/7.3 does not include paragraph 182 of the Closing Order which is the only one (together with paragraph 194, also not included in E124/7.3) which deals with the fact that this policy “[...] evolved before and throughout the regime. By the 1970s, security centres and execution sites had

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been established in “liberated” zones and were re-educating bad elements and killing enemies.”

22. The same is true for the regulation of marriage: E124/7.3 does not include paragraph 216 of the Closing Order which, in fact, is the only one which describes the history of the development of this policy by explaining that “[t]he CPK forced couples to marry as it took control progressively over parts of Cambodian territory before 1975 [...]”

Violation of the scope of Case 002/01 and advance determination of Mr KHIEU Samphân’s individual criminal responsibility in Case 002/02

23. Yet, and despite this severance order and its annex which were upheld by the Supreme Court, what do we find in your judgement of 7 August 2014? Very precisely facts that do not fall within the scope of Case 002/01 that you set. Here are a few examples.

24. Under heading “3.3.2 *Establishment of Cooperatives and Worksites pre-April 1975*”, at paragraph 116 of your judgement, it is stated: “[t]he Chamber is satisfied that prior to 1975 there existed a CPK policy to create cooperatives, which imposed difficult working conditions on cooperative members including those who had been forcibly moved there.”

25. Under heading “3.3.3 *Re-education of bad elements and killing of enemies*”, at paragraph 117 of your judgement, it is stated: “[t]here is evidence to suggest that the CPK established a further policy of re-education of ‘bad elements’ and ‘smashing’ those who had been found to be enemies.” Then, after referring to the existence of camps between 1970 and 1975, paragraph 118 adds: “[t]he policy to smash enemies continued throughout the DK era though the policy evolved. From 1970, spies, including CIA, KGB and Vietnamese (“Yuon”), were regarded as the key enemies.”

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26. Under heading “3.3.5 *The Regulation of Marriage*”, at paragraph 128 of your judgement, it is stated: “[t]he Closing Order states (here appears footnote 370 which refers to paragraph 1147 of the Closing Order) that prior to 1975, and thereafter, the CPK arranged marriages and encouraged procreation in order to increase the population of Democratic Kampuchea.” Further, paragraph 130 of your judgement thus concludes that “[t]here is however, some evidence of arranged and involuntary marriages. The Chamber is therefore able to find that regulation of marriage was a CPK policy.” We must naturally stress that paragraph 1147 of the Closing Order, to which footnote 370 refers, is not among the paragraphs selected by E124/7.3.

27. With these three examples, we see that, in its judgement in Case 002/01, your Chamber not only clearly exceeded the formal scope of this first trial, which it had set in its latest decision on severance that was upheld on appeal by the Supreme Court, but also did not even take into account the so-called distinction between the “development” and the “implementation” of these policies, which the Chamber had relied on for some time in an attempt to justify its errors with which the Defence was already taking issue.

28. It may also be noted that the paragraphs we have just referred to are found in a section of your judgement bearing the title: “3. **HISTORICAL BACKGROUND**” to which is appended a footnote which states very clearly:

*The evidence discussed in this section is for the purpose of establishing the historical and factual context of events within the temporal jurisdiction of the ECCC. Such may include: clarifying a given context, **establishing by inference the elements of criminal conduct** within the temporal jurisdiction of the ECCC, or demonstrating a deliberate pattern of conduct.”*

29. This very clear acknowledgment that your Chamber has established Mr KHIEU Samphan’s guilt by relying on facts falling outside the scope of the trial (which the Chamber had in fact determined and therefore limited in its Decision on Severance of 26 April 2013 which expressly refers to E124/7.3) is even used in paragraph 46 as a preventive attempt to defend its position:

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*Throughout the proceedings, the Chamber admitted evidence of facts **outside the scope of Case 002/01** where it was demonstrably relevant to proof of, inter alia, the Democratic Kampuchea policies alleged in the Closing Order, the contextual elements of crimes against humanity or the impact of crimes on victims.*

30. This claim is false in that the reference to “*Democratic Kampuchea policies alleged in the Closing Order*” necessarily refers a reader acting in good faith to the only two policies your Chamber had selected and declared as constituting the framework of Case 002/01.

31. Neither may this claim be justified by the surprising logic that precedes it (again in paragraph 46), where it is stated via footnote 123 that at times you allegedly admitted facts falling outside the scope of Case 002 in its entirety under the pretext that these facts were relevant, which would therefore also justify the instances when you supposedly admitted facts falling outside the scope of 002/01, but part of 002 in its entirety. Not only is this logic impossible to understand, but the decision to which footnote 123 refers concerns precisely a memorandum in which you refused to accept facts falling outside the overall scope of Case 002.

32. Similarly, it should be noted that as regards specific groups other than the group of former officials of the Khmer Republic, (the Cham, the Buddhists and the Vietnamese), your Chamber surprisingly refrains from considering their “development” or “background” or “existence” so as to refer the reader (see footnote 342) to the strict application of its last severance order and its annex. The Defence is surprised by the sudden propensity to respect your severance order and regrets that the Chamber did not act in the same manner concerning facts also falling outside the scope determined by its last severance order and its annex.

33. The Defence has been protesting for several months against an underlying practice which it suspected and which has now clearly materialized in the 7 August 2014 judgement. It is clear in the judgement that your Chamber exceeded the scope of the case before it. The question whether the Closing Order was divisible or not does not directly concern Mr KHIEU Samphân. In fact, the problem is not how your Chamber could have tried Mr KHIEU Samphân, but how it tried him and it is quite obvious that the manner in which your Chamber tried him is

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questionable in that it relied on practical considerations (such as conducting the trial as expeditiously as possible, satisfying the donor countries and civil parties by offering them an overall guilty verdict before the death of the accused, passing judgement—even if it is questionable—so long as the ECCC is funded and the accused are still alive) over and above the most basic legal considerations which have already been reiterated in previous applications.

34. Facts falling outside the scope of the trial that were nevertheless taken into account by the Chamber in its judgement were not confined to the historical background section of the judgement. Such facts have clearly been used to characterize ordinary law crimes as crimes against humanity and to characterize the common purpose of the Joint Criminal Enterprise. This appears in the passages cited above as well as in the part of the judgement entitled “**14. JOINT CRIMINAL ENTERPRISE**” where it is stated at paragraph 725, for example: “*the policies and plans to implement the common purpose during this period originated prior to the temporal jurisdiction of the court. Further, the most significant participants joined the common purpose before 17 April 1975. Therefore, in order to have a clear understanding of the JCE’s origin, the Chamber considers it necessary to address the evolution of the various policies and plans, as well as the stage at which various participants were introduced.*” This is followed by a long analysis **of the 5** policies of the CPK, three of which (the establishment and running of cooperatives and worksites, re-education of bad elements, internal and external enemies, the regulation of marriage) fell, expressly and legally, outside the scope of Case 002/01.

35. The effect of the alleged violation of the scope of the trial is the obvious prejudice caused to both accused. We cannot help thinking of the 4 pages of the judgement devoted to NUON Chea’s supervision of S-21 (pp. 222-225), but it is also important to note the extremely general nature of that part of your judgement entitled: “**16. THE CRIMINAL RESPONSIBILITY OF KHIEU SAMPHAN**”, which is ostensibly based on the 5 policies. In spite of the few drafting precautions and professions of good intentions, it is obvious that this part, as the Chamber has, in fact, clearly acknowledged in the portions of the judgement mentioned above, is based not on an analysis limited to aspects of the two policies which are within the scope of Case 002/01, but on an overall analysis of the Khmer Rouge movement and the Democratic Kampuchea regime

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through the history, the development and implementation of all the policies ascribed to the regime in the Closing Order.

36. In law, no practical consideration can justify a trial based on evidence falling outside the scope of a case and no law applicable before the ECCC allows the court to use evidence falling outside the scope of the case to determine the guilt of the accused, even if he or she were charged with the most serious crimes.

37. On 29 July 2014, the Supreme Court rendered its decision on Mr KHIEU Samphân's Defence appeal against the new severance decision. In the decision, the Supreme Court confirmed that the severance "*has the procedural consequence of creating separate and distinct trials*" (E301/9/1/1/3, §70). In so doing, the Supreme Court invalidates the Trial Chamber's theory that the trials in Cases 002/01 or 002/02 were only internal and successive phases of one and the same general trial.

38. Since that Supreme Court decision of 29 July 2014, it is no longer possible for the Chamber to argue that the inclusion of Case 002/01 in Case 002 as a whole would correct the Chamber's errors stemming from a difficult or impossible severance.

39. It is henceforth confirmed and indisputable that it is the severance order of 26 April 2013 (E124/7.3) which became final with the Supreme Court decision of 23 July 2013 that establishes the scope of Case 002/01 and specifically determines the matters that the Chamber could consider in finding Mr KHIEU Samphân guilty. By relying on evidence falling outside the scope of Case 002/01 to make characterization findings on Joint Criminal Enterprise, crimes against humanity and to determine Mr KHIEU Samphân's criminal responsibility, the Chamber exceeded the scope of Case 002/01.

40. Not only does this flow from a reading of the 7 August 2014 judgement in its entirety, but you have clearly acknowledged that this is the approach you adopted in some of the portions of the judgement cited above.

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41. The Chamber cannot seriously contend that it is not aware of the extremely serious objections resulting from the facts denounced here as regards Mr KHIEU Samphân's right to a fair trial, to be informed of the charges against him, to prepare his defence...

42. Furthermore, the Chamber, by ruling in advance on facts of which it was not seised, has violated Mr KHIEU Samphân's right to the presumption of innocence as well as his right to be tried by an impartial tribunal.

43. Under these circumstances, before commencing proceedings in Case 002/02, the Chamber must logically accept to wait for the Supreme Court's ruling on the matter.

44. In the event that the Trial Chamber refuses to grant this perfectly logical and proportionate request, the Defence hereby requests that a new panel of judges be appointed.

Stay of proceedings and recusal: the only means of upholding the accused's fair trial rights

45. The Defence requests the Chamber to acknowledge that the violations alleged against it are serious and have far-reaching consequences for the conduct of Case 002/02 and such a situation justifies an interim stay of proceedings in Case 002/02.

46. As regards temporary or final solutions to this problem, the Defence has always expressed a preference for a stay of proceedings in Case 002/02.

47. This solution has the advantage of giving the Chamber the benefit of the doubt which it has refused to give to Mr KHIEU Samphân. Moreover, it also addresses a more general criticism which can be made against the 7 August 2014 judgement regarding the overlapping of findings that determine criminal responsibility. In fact, as stated above, not only has your Chamber exceeded the scope of the trial which it had determined in its severance decision, but, as the Supreme Court notes in paragraph 85 of its above-mentioned decision of 29 July 2014 and regardless of the severance, a problem of overlap arises in relation to the Chamber's consideration of the historical background, administrative structures, communication structure and the accused's roles and functions in the 7 August 2014 judgement. Insofar as these matters provide the Chamber with a basis for ascribing criminal responsibility to the accused—which is

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indeed the case—the Chamber’s findings in the 7 August 2014 judgement cannot be carried over as such to the second trial so long as there is no finality in Case 002/01. This additional submission also justifies waiting for final judgement.

48. Alternatively and in any event, if the Chamber were to decide not to grant the stay, the Defence requests that all the judges of the Trial Chamber (including Reserve Judge FENZ, since she sat on the bench on several occasions during Case 002/01 and participated in some deliberations) should be disqualified, so that if Case 002/02 were to start immediately, it would be conducted by a panel of judges who would not yet have ruled on Mr KHIEU Samphân’s criminal responsibility for matters supposedly falling within the scope of Case 002/02 and subsequent trials.

49. It is noted that in its previous decision on the same subject dated 21 March 2014 (E301/5/5/1), your Chamber rejected the Defence’s application, noting firstly that the principle of *res judicata* cannot be invoked insofar as a final decision has not been rendered and secondly that the Supreme Court would probably render its judgement on appeal in the first trial before the second trial is completed at first instance (which would allow the Defence to request the Chamber to draw the necessary inferences in the second trial). The Chamber noted further that the judgement in the second trial would also be subject to appeal.

50. This argument which consisted in putting off to a later date the resolution of problems is, in any case, no longer valid today since the criticisms made against the Chamber seriously call into question its ability to conduct the trial. In fact, if the Supreme Court endorses these Defence submissions, it would thereby confirm that the Chamber has exceeded the scope of the case before it by adjudicating facts of which it was not seised. It would therefore be just as inappropriate to carry on pretending you are conducting proceedings relating to facts and criminal responsibility on which you have already ruled, as trying to remedy a problem you deliberately created. As the Supreme Court noted in its decision of 29 July 2014 (E301/9/1/1/3, §45), the issue of the divisibility of the case was posed to you *ex officio* the moment you envisaged severing complex criminal acts. It is imperative to deal with the harmful consequences of this severance immediately and stop postponing a ruling indefinitely.

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51. The main thrust of the criticisms levelled against the Chamber today and on which the Supreme Court will have to rule on appeal is that you have already ruled on Mr KHIEU Samphân's criminal responsibility, an issue of which you were not seised. It should be noted here that in its decision of 29 July 2014 (E301/9/1/1/3, §83), the Supreme Court finds that such a situation has the effect of lifting the presumption of impartiality which professional judges enjoy.

52. Lastly, it is noted that one of the reasons why the Chamber decided to sever the charges set out in the Closing Order was the frail health of the accused. This frail health has, for the time being, only been used to justify decisions that are unfavourable to Mr KHIEU Samphân. Today, he is entitled to demand that justice be done here and now.

53. The gravity and importance of the issues raised in this application justify, in any event, a stay of proceedings in Case 002/02, so long as all the requests made herein have not been finally adjudicated.

FOR THESE REASONS

54. The Defence requests the Chamber to:

In the main,

- **RULE** that Case 002/02 will not commence before judgement in Case 002/01 becomes final;
- **RULE** that Case 002/02 will not commence before the Supreme Court has ruled on all decisions appealed at the same time as the substantive judgement in Case 002/01.

In the alternative, in the event the Chamber does not grant the main request, to:

- **NOTE** the Defence's request that Judges NIL Nonn, Sylvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE, YOU Ottara and Claudia FENZ be replaced, pursuant to Internal Rule 34, by a new panel of judges that will be tasked with adjudicating Case 002/02 impartially.

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- **FORWARD** the present application to the panel of judges who will soon be appointed pursuant to Memorandum E314 dated 15 August 2014.

In any event, to

- **STAY** the proceedings in Case 002/02 so long as this request has not been fully adjudicated.

	Mr KONG Sam Onn	Phnom Penh	[Signed]
	Ms Anta GUISSÉ	Paris	[Signed]
	Mr Arthur VERCKEN	Paris	[Signed]

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MR KHIEU Samphan's Request for Reconsideration of the Need to Await a Final Judgement in Case 002/01 Before Commencing Case 002/02 and the Appointment of a New Panel of Trial Judges