



**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គជំនុំជម្រះសាលាដំបូង**  
Trial Chamber  
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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**Before:** Judge NIL Nonn, President  
Judge Jean-Marc LAVERGNE  
Judge YA Sokhan  
Judge Claudia FENZ  
Judge YOU Ottara

**Date:** 21 November 2014  
**Original language(s):** Khmer/English/French  
**Classification:** PUBLIC

**DECISION ON THE APPOINTMENT OF COURT APPOINTED COUNSEL FOR KHIEU SAMPHAN**

**Co-Prosecutors**  
CHEA Leang  
Nicolas KOUMJIAN

**Accused**  
NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
PICH Ang  
Marie GUIRAUD

**Lawyers for the Defence**  
SON Arun  
Victor KOPPE  
KONG Sam Onn  
Arthur VERCKEN  
Anta GUISSÉ

## 1. INTRODUCTION AND PROCEDURAL HISTORY

1. The Chamber is confronted with the refusal of the KHIEU Samphan Defence to participate in the proceedings in Case 002/02, pursuant to instructions of the Accused, whilst they are drafting their appeal brief in Case 002/01.

2. During the Trial Management Meeting (TMM) on 11 and 12 December 2013, the KHIEU Samphan Defence expressed its view that the evidentiary hearings in Case 002/02 should not commence until Case 002/01 is finally adjudicated, including the appeal process.<sup>1</sup> On 5 February 2014, it filed a motion to that effect, which was denied on 21 March 2014.<sup>2</sup>

3. On 25 August 2014, following the delivery of the Judgement in Case 002/01, KHIEU Samphan filed a further motion requesting the delay of the proceedings in Case 002/02 until the Appeal Judgement and any other appeal related to Case 002/01 are delivered.<sup>3</sup> The Chamber denied this request on 19 September 2014 and scheduled the start of the hearing in the substance of Case 002/02 on 17 October 2014.<sup>4</sup> On 3 October 2014, KHIEU Samphan filed a request for reconsideration of the Chamber's scheduling order, which was denied on 16 October 2014.<sup>5</sup>

4. During the course of Opening Statements in Case 002/02 on 17 October 2014, KHIEU Samphan informed the Chamber that he had instructed his Defence counsel not to participate in the proceedings in Case 002/02. Counsel subsequently abandoned the courtroom. The KHIEU Samphan Defence advanced a number of reasons, including resources, for their decision not to participate in the proceedings. The Chamber scheduled a TMM for 21 October 2014 during which it informed the parties it would also address resource issues and related matters.

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<sup>1</sup> T. 11 December 2013, p. 107; T. 12 December 2013, p. 85.

<sup>2</sup> Mr. KHIEU Samphan's Submissions on the Need to Wait for a Final Judgment in Case 002/01 Before Commencing Case 002/02, E301/5/5, 5 February 2014; Decision on KHIEU Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgment is Handed Down in Case 002/1, E301/5/5/1, 21 March 2014.

<sup>3</sup> 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, E314/1, 25 August 2014 ("Motion to Stay Case 002/02 or Disqualify Judges").

<sup>4</sup> Decision on KHIEU Samphan's Request to Postpone the Commencement of Case 002/02, E314/5, 19 September 2014 ("Decision on Request to Postpone"); Scheduling Order for Hearing on the Substance in Case 002/02, E316, 19 September 2014.

<sup>5</sup> *Demande urgente de réexamen de l'Ordonnance concernant le calendrier des audiences au fond du procès 002/02*, E314/5/1, 3 October 2014 ("KHIEU Samphan Motion Concerning Trial Calendar"); Trial Chamber Memorandum entitled "Decision on KHIEU Samphan's Urgent Request for Reconsideration of Scheduling Order on the Substance of Case 002/02", E314/5/3, 16 October 2014.

5. Despite being directed to attend the TMM, national and international counsel for KHIEU Samphan failed to either appear or provide any valid justification for their absence. On 24 October 2014, the Trial Chamber officially warned defence counsel for KHIEU Samphan for misconduct pursuant to Internal Rule 38, and ordered the parties to appear at a further TMM on 28 October 2014.<sup>6</sup>

6. The KHIEU Samphan Defence appeared at this TMM and made further submissions in relation to the reasons for their conduct and stated unwillingness to participate in further hearings on the substance in Case 002/02. On 31 October 2014, the Trial Chamber rejected the submissions put forward as a justification for their refusal to participate to the proceedings, and ordered all parties to appear at hearings on the substance in Case 002/02, starting on Monday 17 November 2014. The Chamber further put the KHIEU Samphan Defence on notice that it would take firm action should counsel fail to abide by the order to appear in court.<sup>7</sup>

7. On 14 November 2014, the KHIEU Samphan Defence filed a ‘position brief’ on the Chamber’s 31 October 2014 ruling, wherein it stated its disagreement with the Chamber’s reasoning and conclusions, and confirmed that KHIEU Samphan’s position remained unchanged and that counsel would not participate to the substantive hearings in Case 002/02 until the filing of the appeal brief in Case 002/01.<sup>8</sup>

8. At the hearing of 17 November 2014, national and international co-counsel for KHIEU Samphan failed to appear in court. The Accused KHIEU Samphan, who was present, confirmed that he had instructed his defence counsel to concentrate on the appeal against the judgement in Case 002/01, and to not appear in the hearings on the substance of Case 002/02. He further asserted that both he and his defence counsel did not have sufficient resources to work on both cases at the same time.<sup>9</sup>

9. The Chamber advised KHIEU Samphan that his right to counsel of his own choosing was not absolute and that a Chamber may appoint counsel against the wishes of the Accused if the interests of justice so require. The Chamber directed him to inform the Chamber by 4:30

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<sup>6</sup> Trial Chamber Memorandum entitled “Warning to counsel for NUON Chea and KHIEU Samphan”, E320, 24 October 2014, paras 6, 8.

<sup>7</sup> Trial Chamber Memorandum entitled “Ruling following TMM of 28 October 2014”, E320/1, 31 October 2014 (“Ruling following TMM of 28 October 2014”).

<sup>8</sup> *Position de M. KHIEU Samphân à la suite de la décision de la Chambre E320/1*, E320/1/1, 13 November 2014 (“KHIEU Samphan Position”), para. 46.

<sup>9</sup> T. 17 November 2014 (Draft), p. 8.

p.m. on Tuesday 18 November 2014 whether he was withdrawing his instruction to counsel not to participate in proceedings. It further put him on notice that the Chamber may appoint Court Appointed Counsel should he now, or any time in the future, instruct counsel not to participate in proceedings in Case 002/02.<sup>10</sup>

10. On 18 November 2014, the Accused informed the Chamber, through the Defence Support Section, that “he continues to instruct his assigned Defence Counsel to concentrate all their time and efforts on preparing his appeal brief in Case 002/01 until the filing deadline of 29 December 2014 and to start participating in the trial proceedings in Case 002/02 immediately thereafter.”<sup>11</sup>

## 2. FINDINGS

11. The Chamber notes that while the focus of KHIEU Samphan’s arguments has shifted, the core of his argument remains that he lacks sufficient time and resources to participate personally and/or through his defence counsel in both the trial proceedings Case 002/02 and the appeal proceedings in Case 002/01 simultaneously.<sup>12</sup>

12. In order to ensure a fair and expeditious trial, the Chamber is obliged to take into account the interests of justice, including the interests of all the parties.<sup>13</sup> The Chamber has broadly discussed and taken into account the means at the disposal of each defence team and the limits of the Accused’s involvement in the preparation of the Appeal brief, taking due note of the extension of briefing deadlines granted by the Supreme Court Chamber.<sup>14</sup> While KHIEU Samphan’s instruction to his counsel may reflect his defence strategy, it fails to take into account the broader interests of justice and ignores measures taken by the Chamber to accommodate his concerns, including a reduction in the number of hearing days per week and a request that the Administration provide additional support to increase the work capacity of the defence team.<sup>15</sup>

13. Furthermore, despite claims of insufficient time to work on the trial and the asserted prioritisation of the appeals proceedings, the KHIEU Samphan Defence filed two motions in

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<sup>10</sup> T. 17 November 2014 (Draft), pp. 10-12, 14.

<sup>11</sup> DSS Report on Consultation with Mr. KHIEU Samphan, E320/1/2, 19 November 2014.

<sup>12</sup> KHIEU Samphan Position, para. 16; T. 17 November 2014 (Draft), p. 8; KHIEU Samphan Motion Concerning Trial Calendar; T. 28 October 2014 (French Draft), pp. 8, 13-14, 16-17.

<sup>13</sup> Decision on Request to Postpone.

<sup>14</sup> Ruling following TMM of 28 October 2014.

<sup>15</sup> Ruling following TMM of 28 October 2014, para. 7.

Case 002/02 on 11 and 14 November 2014 which were neither urgent nor necessary at this stage of the proceedings.<sup>16</sup> These filings do not lend credence to the justifications advanced for non-participation in Case 002/02. The NUON Chea Defence team, which is in a comparable situation, has declared that they were ready to start with the second trial “already in March of [2014]”.<sup>17</sup> Confronted with this fact, the KHIEU Samphan Defence points to “different strategies” of the Defence teams.<sup>18</sup> In the Chamber’s view, this raises a question as to the declared priorities adopted by the Accused and consequently his instructions to his defence counsel.

14. The Chamber notes that counsel are justifying their conduct, which includes disrespecting Chamber decisions and violating court orders, on the basis of client instructions. Such a justification cannot be used by lawyers who are appointed by the court and instructed, in the interests of justice, to attend proceedings in order to assist the Accused.

15. Cambodian procedural rules do not directly address the present situation. The Chamber therefore makes reference to procedural rules established at the international level.<sup>19</sup> The practice of international criminal tribunals illustrates that where an accused’s choice on the manner in which he exercises his right to representation obstructs the proceedings, the Chamber has discretion to appoint counsel to assist the Accused.<sup>20</sup> In so doing, the Chamber must balance the right of the Accused to choose and instruct his own counsel with the interests of justice in fair and expeditious proceedings.<sup>21</sup>

16. The failure of counsel to participate in Case 002/02 on the instructions of KHIEU Samphan is substantially obstructing the proper and expeditious conduct of this trial. Trial has already been delayed since 17 October 2014. The KHIEU Samphan Defence now demands a further delay until January 2015, creating hardships for witnesses and Civil Parties,

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<sup>16</sup> *Demande de M. KHIEU Samphân visant à faire verser aux débats un nouveau document (lettre de 2-TCE-81)*, E324, 11 November 2014; KHIEU Samphan Position.

<sup>17</sup> T. 28 October 2014 (Public), p. 36.

<sup>18</sup> T. 28 October 2014 (Public), p. 19.

<sup>19</sup> ECCC Law, Article 33 new.

<sup>20</sup> See e.g., *Milošević v. Prosecutor*, ICTY Appeals Chamber, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004 (“*Milošević Interlocutory Appeal Decision*”); *Prosecutor v. Milošević*, ICTY Trial Chamber, IT-01-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004; *Prosecutor v. Šešelj*, ICTY Trial Chamber, IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003; *Prosecutor v. Karadžić*, ICTY Trial Chamber, IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009; *Prosecutor v. Norman et al*, Trial Chamber, SCSL-04-14-T, Consequential Order on Assignment and Role of Standby Counsel, 14 June 2004.

<sup>21</sup> *Milošević Interlocutory Appeal Decision*, paras 13, 17.

inconvenience and additional costs for the Parties and the ECCC. Based on prior conduct and statements, the Chamber considers that it is more than likely that without any concrete measure, present counsel will continue to rely on instructions from KHIEU Samphan to further obstruct the proceedings in future.

17. The Chamber considers that maintaining the present counsel, but preventing them, as Court Appointed Counsel, from adhering to the Accused's instructions not to attend the proceedings is the least intrusive restriction of the Accused's right to choose counsel that is available. The Chamber further considers that it is proportionate to the purpose of achieving a fair and expeditious proceeding.

18. Court Appointed Counsel, as any counsel, have an “obligation to promote justice and the fair and effective conduct of proceedings” and shall act in the best interest of the accused.<sup>22</sup> Court Appointed Counsel may not follow their client’s instructions where these lead or are meant to lead to an obstruction of the proceedings or are against the interests of justice.<sup>23</sup> They must effectively participate in Case 002/02, including by attending all court hearings, and may not accept their client’s instruction not to appear in court.

19. Given their familiarity with the case, the appointment of present counsel as Court Appointed Counsel is the most obvious choice for the time being.

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<sup>22</sup> Internal Rule 22 (4).

<sup>23</sup> *Prosecutor v. Barayagwiza*, Trial Chamber, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, ICTR-97-19-T, 2 November 2000, para. 24 (Where an Accused instructs his counsel not to represent him during a trial, “[counsel] cannot simply abide with his ‘instruction’ not to defend him. Such instructions, in the opinion of the Chamber, should rather be seen as an attempt to obstruct judicial proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that not to do so would constitute grounds for withdrawal.”)

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER**

**APPOINTS** KONG Sam Onn, Arthur VERCKEN and Anta GUISSÉ as Court Appointed Counsel for KHIEU Samphan, effective immediately;

**ORDERS** said counsel to appear at the hearing on the substance of Case 002/02 on Monday 24 November 2014 at 9:00 am; and

**REAFFIRMS** its intention to proceed as announced by the President on 17 November 2014 should counsel fail to appear without a valid reason.

Phnom Penh, 21 November 2014  
For the President of the Trial Chamber



*[Handwritten signature]*  
Judge Ya SOKHAN