



**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: ០០២/១៩កញ្ញា២០០៧/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:** 5 December 2014  
**Original language(s):** Khmer/English/French  
**Classification:** PUBLIC

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

**Co-Prosecutors**  
CHEA Leang  
Nicholas 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 Trial Chamber has been confronted with the refusal of Court Appointed Counsel for KHIEU Samphan to participate in the proceedings in Case 002/02 whilst they are drafting their appeal brief in Case 002/01. Additionally, the Chamber is seized of the Co-Prosecutors' motion to appoint *amicus curiae* counsel.<sup>1</sup>
2. During the Case 002 proceedings, KHIEU Samphan has been represented by national counsel, KONG Sam Onn, and international co-counsel Arthur VERCKEN and Anta GUISSÉ. On multiple occasions, the KHIEU Samphan Defence team has 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>2</sup> The Trial Chamber has rejected this position.<sup>3</sup>
3. 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. The KHIEU Samphan Defence advanced a number of reasons, including lack of resources, for the decision not to participate in the proceedings. Counsel subsequently abandoned the courtroom.
4. The Chamber scheduled a Trial Management Meeting (TMM) for 21 October 2014 and informed the parties it would address resource issues and related matters.<sup>4</sup> 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 22 October 2014, the Co-Prosecutors filed their request to appoint *amicus curiae* as counsel to assist in

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<sup>1</sup> Co-Prosecutors' Request to Assign *Amicus Curiae* Counsel and Advance the Trial Proceedings, E321, 22 October 2014.

<sup>2</sup> T. 11 December 2013, p. 107; T. 12 December 2013, pp. 85-86; 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; 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; *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").

<sup>3</sup> 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; 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; 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.

<sup>4</sup> Email from Trial Chamber Senior Legal Officer to Case 002 Parties, E320.1, 20 October 2014.

safeguarding fundamental fair trial rights, submitting that this well-established international procedural practice would allow trial to proceed.<sup>5</sup> The Lead Co-Lawyers for the Civil Parties filed a submission in support of the appointment of *amicus curiae* counsel on 28 October 2014.<sup>6</sup>

5. 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>7</sup> at which the parties were given the opportunity to comment on the Co-Prosecutors' proposal to appoint *amicus curiae*. The Lead Co-Lawyers for the Civil Parties supported the Co-Prosecutors' request,<sup>8</sup> while the Defence Teams submitted that the proposal was not envisaged in the Internal Rules<sup>9</sup> or in accordance with either Cambodian law or the Accused's right to counsel of his choosing.<sup>10</sup> The Co-Prosecutors responded that as *amicus curiae* would not be lawyers for the Accused, there is no requirement that they be selected by the Accused.<sup>11</sup> The KHIEU Samphan Defence team also made further submissions in relation to the reason for its conduct, reiterating its unwillingness to participate in further hearings on the substance in Case 002/02.<sup>12</sup> On 31 October 2014, the Trial Chamber rejected these submissions and ordered all parties to appear at hearings on the substance in Case 002/02, commencing on 17 November 2014. The Chamber put the KHIEU Samphan Defence on notice that it would take firm action should it fail to abide by the order to appear in court.<sup>13</sup>

6. On 14 November 2014, the KHIEU Samphan Defence filed a "position brief" on the Chamber's 31 October 2014 ruling, wherein it noted its disagreement with the Chamber's reasoning and conclusions, and confirmed that KHIEU Samphan's position remained

<sup>5</sup> Co-Prosecutors' Request to Assign *Amicus Curiae* Counsel and Advance the Trial Proceedings, E321, 22 October 2014, para. 6.

<sup>6</sup> Civil Party Lead Co-Lawyers' Support to the Co-Prosecutors' Request to Assign *Amici Curiae* Counsel and Advance the Trial Proceedings, E321/1, 27 October 2014.

<sup>7</sup> Trial Chamber Memorandum entitled "Warning to Counsel for NUON Chea and KHIEU Samphan", E320, 24 October 2014, paras 6, 8.

<sup>8</sup> T. 28 October 2014, p. 46.

<sup>9</sup> T. 28 October 2014, p. 51.

<sup>10</sup> T. 28 October 2014, p. 52.

<sup>11</sup> T. 28 October, 2014, pp. 77-78

<sup>12</sup> T. 28 October, 2014, pp. 7-18, 30-35.

<sup>13</sup> Trial Chamber Memorandum entitled "Ruling following TMM of 28 October 2014", E320/1, 31 October 2014, para. 11.

unchanged and that counsel would not participate to the substantive hearings in Case 002/02 until the filing of their appeal brief.<sup>14</sup>

7. 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>15</sup>

8. The Chamber advised KHIEU Samphan that the 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 of whether he was withdrawing his instruction to counsel to not participate in the proceedings by 4:30pm on 18 November 2014. It further put KHIEU Samphan on notice that the Chamber may appoint Court Appointed Counsel should he now, or at any time in future, instruct counsel to not participate in proceedings in Case 002/02.<sup>16</sup>

9. Regarding the requested appointment of *amicus curiae* counsel, the Co-Prosecutors clarified that its proposal was not to replace the Defence teams but to ensure that the Accused do not have control over the courtroom.<sup>17</sup> The Lead Co-Lawyers for the Civil Parties responded that the Civil Parties continue to support the Co-Prosecutors in their request, while KHIEU Samphan reiterated his position that his intention in instructing his counsel not to attend the hearings is not to obstruct the proceedings.<sup>18</sup>

10. On 18 November 2014, KHIEU Samphan 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

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<sup>14</sup> *Position de M. KHIEU Samphân à la suite de la décision de la Chambre E320/1, E320/1/1, 13 November 2014, para. 46.*

<sup>15</sup> T. 17 November 2014, pp. 8-9.

<sup>16</sup> T. 17 November 2014, pp. 10-12, 14-15.

<sup>17</sup> T. 17 November 2014, p. 6.

<sup>18</sup> T. 17 November 2014, pp. 7-9.

of 29 December 2014 and to start participating in the trial proceedings in Case 002/02 immediately thereafter.”<sup>19</sup>

11. On 21 November 2014, the Trial Chamber appointed national and international counsel for KHIEU Samphan, KONG Sam Onn, Arthur VERCKEN and Anta GUISSÉ, as Court Appointed Counsel. The Chamber ordered that Court Appointed Counsel appear at the hearing on the substance of Case 002/02 on 24 November 2014 and reaffirmed its intention to proceed as announced by the President on 17 November 2014 should counsel fail to appear without a valid reason.<sup>20</sup>

12. On 23 November 2014, Court Appointed Counsel for KHIEU Samphan informed the Chamber by letter that they would not participate in the proceedings until they filed KHIEU Samphan’s appeal brief, which is due on 29 December 2014.<sup>21</sup> Counsel claimed that this new appointment was aimed at preventing them from following their client’s instruction which in turn would force them to violate their ethical duty as this would force them to act against what they deem to be the interests of their client.<sup>22</sup> Court Appointed Counsel failed to appear at the 24 November 2014 hearing and the Chamber was forced to adjourn the proceedings until 8 January 2015.<sup>23</sup>

### **3. FINDINGS**

13. The Chamber finds that the conduct of KHIEU Samphan and his Defense counsel over the last two months has obstructed proceedings. Even following their appointment as Court Appointed Counsel, Defence counsel failed to assist the Accused in court proceedings in Case 002/02. The Chamber is compelled to take action to prevent such obstruction from occurring again.

14. The Chamber has an obligation to ensure a fair and expeditious trial, taking into account the interests of justice, including the interests of all the parties.<sup>24</sup> The Chamber notes that the

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

<sup>20</sup> Decision on the Appointment of Court Appointed Counsel for KHIEU Samphan, E320/2, 21 November 2014.

<sup>21</sup> *Lettre à l’Attention de la Chambre de Première Instance*, E320/2/1, 24 November 2014, pp. 1-2.

<sup>22</sup> *Lettre à l’Attention de la Chambre de Première Instance*, E320/2/1, 24 November 2014, p. 2.

<sup>23</sup> T. 24 November 2014, pp. 1, 3-4.

<sup>24</sup> Decision on the Appointment of Court Appointed Counsel for KHIEU Samphan, E320/2, 21 November 2014, para. 12.

impact of further delays would be particularly significant in view of the age of the witnesses, Civil Parties and Accused in this case. It is accordingly imperative that the ECCC utilise every available day to ensure a final determination of the remaining charges as expeditiously as possible.<sup>25</sup> Ceding control of proceedings to KHIEU Samphan and his Defence counsel is contrary to this obligation.

15. Neither the Internal Rules nor Cambodian procedural rules directly address the current situation. The Chamber therefore makes reference to procedural rules established at the international level.<sup>26</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>27</sup>

16. The Chamber has considered the possibility of ordering the immediate replacement of Defence counsel for KHIEU Samphan. It finds that such action would cause significant delay at this stage, as no counsel with knowledge of the extensive Case File is immediately available to undertake this representation. Such delay would not be in the interests of justice.

17. The Co-Prosecutors have requested the immediate appointment of *amici curiae* counsel "with the responsibility to protect the fundamental fair trial rights of the Accused until such time as the Accused' (*sic*) counsel return to participate in the proceedings, or until counsel are barred from appearing for the Accused on grounds of continuing misconduct".<sup>28</sup> Such *amici curiae* would have a limited role as assistants to the court and not necessarily to represent the

<sup>25</sup> Decision on the Co-Prosecutors' Immediate Appeal on the Trial Chamber's Decision Concerning the Scope of Case 002/01 (SCC), E163/5/1/13, 8 February 2013, para. 51; Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 (SCC), E284/4/8, 25 November 2013, para. 72.

<sup>26</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 33 new.

<sup>27</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; *Prosecutor v. Milošević*, ICTY Trial Chamber, IT-02-54-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*, SCSL Trial Chamber, SCSL-04-14-T, Consequential Order on Assignment and Role of Standby Counsel, 14 June 2004; Regulation 76 of the Regulations of the International Criminal Court (on the Appointment of Defence Counsel by a Chamber). See also, *Croissant v. Germany*, Judgement, ECtHR, Application No. 13611/88, 25 September 1992; *X v. Finland*, Judgement (Merits and Just Satisfaction), ECtHR Application No. 34806/04, 3 July 2012 (the right of the Accused to choose his own counsel is not absolute).

<sup>28</sup> Co-Prosecutors' Request to Assign *Amici Curiae* Counsel and Advance the Trial Proceedings, E321, 22 October 2014, para. 23.

Accused.<sup>29</sup> The Chamber considers that to effectively perform even this limited role for an interim period of time, *amici curiae* counsel would require time to become functionally familiar with the voluminous Case File, which would entail delays. Further, appointing *amici curiae* counsel for only an interim period until counsel for KHIEU Samphan cease obstructing proceedings would not adequately protect the proceedings against possible obstruction in future. Accordingly, the Chamber rejects the Co-Prosecutors' request as inappropriate in the present circumstances and prefers a formula which will better serve to ensure that proceedings can proceed.

18. The Chamber therefore considers it to be necessary, appropriate and in the interests of justice to appoint Court Appointed Standby Counsel in order to ensure that proceedings in this case can move forward fairly and expeditiously.

19. The role of Standby Counsel shall be to prepare and maintain the capacity to take over the defence of KHIEU Samphan at any time should the Chamber determine it necessary to replace current Counsel. Standby Counsel shall be independent of the present Defence Team. They will immediately familiarise themselves with the Case File and pleadings of the parties in Case 002. They will not consult with or take direction from the Accused KHIEU Samphan unless and until ordered to do so by the Trial Chamber. Standby Counsel shall attend all proceedings in Case 002/02 as of their appointment. At such time as the Trial Chamber may deem it necessary to order Standby Counsel to replace current counsel for KHIEU Samphan, the former shall, in the course of exercising their duties:

- a) represent the Accused by preparing for the testimony of witnesses, Civil Parties and experts and examining them in court;
- b) make all submissions on fact and law that they deem appropriate to make in the form of oral and written motions before the Chamber;
- c) seek from the Trial Chamber such orders as they consider necessary to enable them to present the Accused's case properly;

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<sup>29</sup> *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, para. 13. *See also, Prosecutor v. Milošević*, ICTY Appeals Chamber, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case – Separate Opinion of Judge Shahabuddeen, 20 January 2004, para. 15 (“an *amicus curiae* is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused”); Decision on Request for leave to file *amicus curiae* brief, E306/3/1, 4 June 2014, para. 5 (“an *amicus curiae* is traditionally an independent and impartial adviser to the court whose role is simply to inform and not to advocate”).

- d) discuss with the Accused the conduct of the case, endeavour to obtain his instructions thereon and take account of views expressed by the Accused, while retaining the right to determine what course to follow; and
- e) adhere to court orders and comply with the legal framework of the ECCC, including the ECCC Law, ECCC Agreement, the Internal Rules, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognised standards of ethics of the legal profession.

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

**DENIES** the Co-Prosecutors' request to assign *amicus curiae* counsel;

**ORDERS** the appointment by the Defence Support Section of one international and one national Court Appointed Standby Counsel for KHIEU Samphan, effective as soon as possible and for the duration of Case 002/02;

**DIRECTS** the Defence Support Section to take any and all steps necessary to fill the new positions as expeditiously as possible;

**FURTHER DIRECTS** the Defence Support Section to report to the Chamber on a weekly basis the steps it has taken to retain and secure the presence of Court Appointed Standby Counsel in Phnom Penh with its first report falling on Friday 12 December 2014;

**REQUESTS** the Office of Administration to provide all necessary support to facilitate the orders in this decision.

*SR RC*

**Phnom Penh, 5 December 2014  
President of the Trial Chamber**



*[Signature]*  
**Nil Nonn**