BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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Mr KHIEU Samphân's Position Following Trial Chamber Ruling E320/1

Filed by:

Lawyers for Mr KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Assisted by
SENG Socheata
Marie CAPOTORTO
Soumeya MEDJEBEUR
Pierre TOUCHE
OUCH Sreypath
Clément BOSSIS

Before:

The Trial Chamber
NIL Nonn
Jean-Marc LAVERGNE
YOU Ottara
Claudia FENZ
YA Sokhan

The Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

All Civil Party Lawyers

The Defence for Mr NUON Chea

MAY IT PLEASE THE TRIAL CHAMBER

Procedural History

1. By decision dated 19 September 2014, the Chamber rejected Mr KHIEU Samphân's request to postpone the commencement of hearings in Case 002/02 pending final judgement by the Supreme Court Chamber (the "Supreme Court") or, alternatively, the disqualification of the judges.[1] On the same day, the Chamber issued an order scheduling the initial segment of the evidentiary proceedings in Case 002/02 from 17 October 2014 to 18 December 2014 (the "Order")[2].

2. On 3 October 2014, Mr KHIEU Samphân filed a new request for reconsideration of the Order and requested a postponement of the commencement of hearings in Case 002/02 beyond the date of the decision on the application for disqualification and, in any event, beyond the date of the filing of his appeal brief. On 16 October, the Chamber issued a decision rejecting the request.[3]

3. At the opening statements hearing on 17 October 2014, Mr KHIEU Samphân informed the Chamber that the concurrent commencement of hearings in Case 002/02 with the drafting of his appeal brief prevented him and his team from concentrating on his appeal brief. As the time spent in court on Case 002/02 meant less time spent on his appeal brief, he explained that he was compelled to give priority to the proceedings whose time limits and stakes he considered more important at this stage of his trial.[4] In fact, since the bench hearing Case 002/02 is composed of the same judges who rendered the Judgement in Case 002/01, it is in his interest to ensure that the factual and legal reasoning that led to his life sentence is sanctioned.

4. Mr KHIEU Samphân stated his wish to remain at the detention facility in order to work on his appeal brief, as he has been doing since his conviction. However, knowing that he cannot

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[1] Decision on KHIEU Samphân's Request to Postpone the Commencement of Case 002/02, 19 September 2014, **E314/5**.

[2] Scheduling Order for Hearing on the Substance in Case 002/02, 19 September 2014, **E316** and annex **E316.1** (the "Order").

[3] Decision on KHIEU Samphân's Urgent Request for Reconsideration of Scheduling Order on the Substance of Case 002/02, 16 October 2014, **E314/5/3**.

[4] Transcript of Hearing ("T.") of 17 October 2014, **E1/242.1**, p. 74 - 87, between [14.03.54] and [14.38.14].

resist if he is compelled to appear in court, he instructed his counsel to devote all their time and resources to the appeal until the appeal brief is fully drafted in French.

5. Counsel for Mr KHIEU Samphân have pointed out that this difficult choice was consistent with what they also believed to be in the best interests of the Accused. They informed the Chamber that they would comply with Mr KHIEU Samphân's instructions by devoting all the time allotted to them for the defence of Mr KHIEU Samphân to the drafting of the appeal brief against the Judgement of 7 August 2014.[5]

6. On 21 October 2014, the Chamber convened a Trial Management Meeting whose agenda dealt exclusively with Case 002/02. The Defence did not attend the meeting because it was busy working on the appeal brief. At the conclusion of the meeting, the Chamber issued a warning to all defence teams and summoned the parties to another Trial Management Meeting on 28 October. At that meeting, Mr KHIEU Samphân and his counsel again explained their position not to jeopardize work on the appeal brief. The Chamber announced that a ruling would be issued in due course.

7. Mr KHIEU Samphân and his defence (the "Defence") took cognizance of that ruling, referenced as E320/1 (the "Ruling"), issued on 31 October 2014 following the 28 October 2014 Trial Management Meeting.[6]

8. Mr KHIEU Samphân and his Defence hereby reaffirm their position not to participate in the hearings in Case 002/02 until they have completed the drafting of their appeal brief against the Judgement delivered on 7 August 2014 in Case 002/01, that is, until 29 December 2014, since that is the deadline set by the Supreme Court for filing the brief.[7]

9. The Defence totally refutes the remarks and reasoning contained in the Ruling.

[5] T. 17 October 2014, **E1/242.1**, pp. 79-87, between [14.17.31] and [14.38.14].
[6] Ruling following TMM of 28 October 2014, 31 October 2014, **E320/1** (the "Ruling")
[7] Decision on Motion for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, **F9**.

1 "Warning"

10. In its Ruling, the Chamber noted that the Defence for Mr KHIEU Samphân purportedly attended the Trial Management Meeting "*following a warning*".[8]

11. The Defence reminds the Chamber that it is master of how it organizes itself and determines the best interests of its client. The Defence considers that the Chamber is neither the guarantor nor watchdog of the Defence's compliance with the code of ethics and was therefore not in a position to issue any warning to it. It should be recalled that the Defence stated its position at the 17 October hearing informing the Chamber that it would not attend future hearings.

12. It has therefore never been a question of somehow obstructing the proceedings, but of explaining that the Defence would not take part in hearings the preparation for and the conduct of which would be detrimental to appellate proceedings that are crucial to Mr KHIEU Samphân. Such participation was all the more inconceivable as it would have violated Mr KHIEU Samphân's clear instructions. That is why the Defence, which was busy working on the appeal, did not attend the 21 October Trial Management Meeting whose agenda dealt only with Case 002/02.

13. The Defence only attended the 28 October 2014 Trial Management Meeting because it had to clearly restate its position which the Chamber appeared to have misunderstood. In fact, in its warning, the Chamber noted, with regard to the 21 October Trial Management Meeting, that counsel had "*failed to either appear or provide any valid justification for their absence*".[9]

14. At the 28 October Trial Management Meeting, the Defence intended to make the Chamber understand that persistently seeking to impose the commencement of a second trial at the heart of the preparation of the appeal against the first judgement violated Mr KHIEU Samphân's most basic rights. The Defence also intended to recall the basic ethics instruments that prevent counsel from acting contrary to what they consider to be their client's interests.[10]

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[8] Ruling **E320/1**, para. 1.
[9] Warning to counsel for NUON Chea and KHIEU Samphân, 24 October 2014, **E320**, para. 4, 8.
[10] T. 28 October 2014, **E1/244.1**, pp. 51-54, between [11.07.25] and [11.28.48], pp. 57-61, between [11.22.59] and

2 Mr KHIEU Samphân's availability for two concurrent proceedings

15. At paragraph 4 of the Ruling, the Chamber stated that:

> *Legal proceedings against the Accused are currently underway at trial and on appeal. There is no choice to be made between the proceedings because neither is optional, even for a limited period of time.*

16. The Defence respectfully points out to the Chamber that the issue is not whether proceedings are "optional", but whether Mr KHIEU Samphân and his Defence have the time to attend to two proceedings at the same time and whether imposing such a requirement violates Mr KHIEU Samphân's right to have adequate time to prepare his defence.

17. It appears necessary to recall that much like international human rights conventions, the Cambodian Constitution, the ECCC Agreement and the Law on the Establishment of the ECCC recognize that any accused is entitled to have adequate time and facilities for the preparation of his or her defence.[11] This right is recognized by the Supreme Court, much like "*the effective and meaningful exercise of the right to appeal*".[12] The Appeals Chamber of the *ad hoc* tribunals also recognizes this right and "*adds that Trial Chambers 'shall provide every practicable facility it is capable of granting when faced with a request by a party for assistance in presenting its case*'".[13] In fact, according to the long-standing and settled case law of the European Court of Human Rights, judges have a duty to ensure that fundamental rights are respected and to guarantee "*not rights that are theoretical or illusory but rights that are practical and effective*".[14]

18. However, the Ruling totally fails to address these crucial concerns. It feigns reliance on (irrelevant) international jurisprudence whereas, in actual fact, no accused before an international

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[11.30.26].

[11] Article 14 (3) b) of the International Covenant on Civil and Political Rights; Article 6 of the European Convention for the Protection of Fundamental Human Rights and Freedoms; Articles 31 and 38 of the Constitution of the Kingdom of Cambodia (the "Cambodian Constitution"); Article 13 (1) of the Agreement between the United Nations Organization and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (the "ECCC Agreement"); Article 35 (new) of the Law on the Establishment of the ECCC.

[12] For example: Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, **E284/2/1/2**, para. 6 and footnotes 12 and 13.

[13] *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 220 and footnotes 532 and 533.

[14] *Airey v. Ireland*, (Application no. 6289/73), Judgement (Merits), 9 November 1979, para. 24.

tribunal has ever been placed in such a situation which is obviously the result of the disputed Severance Decision issued by the Chamber in this case.

19. That is indeed one of the reasons why international criminal tribunals avoid severing trials of such magnitude.

20. It is manifest that both in its decision rejecting the request for reconsideration of the Order and in the Ruling, the Chamber does not refer to the *Mladić* Decision on which the Defence relies.[15] That decision is the closest to the present situation for it is indeed about severance. Yet, where the Chamber is of the view that conducting concurrent trials is not optional, the *Mladić* Decision considers severance as the source of a real conflict between proceedings:

> 31. The Chamber considers that severance and the conducting of two trials could prejudice the Accused, in particular the ability to personally participate in preparing his defence for the second trial. The Chamber considers that participating in the pre-trial preparations of one case while simultaneously participating in the judgement or appeal stage of the first trial could unfairly overburden the Accused and limit his ability to participate effectively in either. The Chamber considers that the division of time and attention that would be required of the Accused to participate in his defence to both cases could render his participation less effective and also necessitate a slower pace of proceedings for both trials. Finally, the Chamber considers that the practical considerations of two trials, such as a need to potentially retain and coordinate between two Defence teams, would also complicate the Accused's ability to participate in the preparation of his defence in each trial and further slow the severed trial proceedings.
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> 32. While the Chamber acknowledges the Prosecution's submission that the timing of the second trial could be adjusted to protect the right of the Accused to have adequate time to prepare his defence, the Chamber considers that this argument of delaying the second trial based on the events of the first equally risks prejudicing the Accused's right to a trial without undue delay. The Defence has made clear in its submissions that the Accused is prepared to answer to the entirety of the charges he faces now. In the case of a lengthy appeals process, the potential delay of the second trial could be substantial. The rights to have enough time to prepare an adequate defence and to a trial without undue delay are both positive rights of the Accused. The Chamber does not agree that these rights should be placed in conflict with each other if it can be avoided and considers that severance and the conducting of two trials could create such a conflict that does not presently exist.

21. As the Defence has pointed out on several occasions, the analysis carried out by the judges in *Mladić* is even more relevant when the accused is 83 years old, as is Mr KHIEU Samphân.

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[15] KHIEU Samphân's Urgent Request for Reconsideration of Scheduling Order on the Substance of Case 002/02, 3 0ctobre *2014,* **E314/5/1**, para. 13; T. 28 October 2014, **E1/244.1**, p. 14 at approx. [09.33.13] ; *The Prosecutor v. Ratko Mladić*, IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011 (*Mladić* Decision), paras. 31 and 32.

22. It is therefore beyond question that Mr KHIEU Samphân, faced with this double bind, is right in choosing to concentrate his efforts on the appeal of a first trial, especially when it is considered, at least by the Chamber, as the "foundation" for the following trial.[16]

3 The jurisprudence cited by the Chamber in its Ruling is irrelevant.

23. Still at paragraph 4 of its Ruling, the Chamber states that:

> *[...] the submission that the Accused's right to participate fully in his defence is violated because he is unable to spend all his time working on the appeal brief is in direct contradiction to relevant international jurisprudence.*

24. The Chamber mentions two ICTY decisions which supposedly invalidate the Defence's reasoning (*Boškoski,* 2008 and *Popović,* 2010).[17]

25. In order to properly understand these two decisions and their (non-) applicability to the present situation, it is first of all necessary to specify that in those cases, the accused were requesting an extension of appeal periods pending the availability of the translation of the impugned judgement in a language they understood. In both cases, the Appeals Chamber did not grant the requested extended time limits, noting that:

> *on appeal the main burden lies on counsel in preparing the submissions as he has the legal expertise to advise the Appellant whether there exist any potential errors of law and fact.*[18]

26. In its Ruling, the Chamber relies on these decisions to support its view that the burden of preparing the appeal lies mainly on counsel, which makes Mr KHIEU Samphân's participation less necessary, thus allowing him to focus on something else.

27. In reality, these decisions are quite far removed from the current situation which is much more akin to the situation in the above-cited *Mladić* Decision which dealt precisely with severance.

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[16] See, for example, the recent: Clarification on the consequences of the severance of Case 002, **E318**, 13 October 2014, para.1

[17] Ruling **E320/1**, para. 4, footnote 3: *Prosecutor v. Boškoski and Tarculovski*, IT-04-82, *Decision on Johan Tarculovski's Motion for Extension of Time to File Appeal Brief*, 16 October 2008 ("*Boškoski* Decision"); *Prosecutor v. Vujadin Popović et al.*, IT-05-00-A, *Decision on Motions for Extension of Time and For Permission to Exceed Word Limitations*, 20 October 2010 ("*Popović* Decision").

[18] *Boškoski* Decision p. 2; *Popović* Decision, p. 4

28. Moreover, these decisions are quite isolated insofar as the same Chamber (the Appeals Chamber of the *ad hoc* tribunals) has rendered other more numerous decisions, some even more recently, moderating and even contradicting the Chamber's views. We will discuss this in the following sections (4 and 5).

29. Additionally, the two ICTY decisions cited by the Chamber were rendered in a context that is very different from that of the ECCC and a simple reading of these decisions suggests that they were both based on one of these contextual elements.

30. Thus, in the *Boškoski* and *Popović* Decisions, it is specified that pursuant to the applicable instruments, it is possible to amend a notice of appeal and/or an appeal brief after they are filed. It is then expressly recalled that the appellants can thus always seek leave to amend/supplement their submissions on appeal after reading the translation of the judgement in their language and discussing it with their counsel.[19]

31. The Chamber is perfectly aware that this possibility of seeking leave to amend a notice of appeal and/or an appeal brief is not available before the ECCC.

32. Unlike the *Mladić* Decision, these two decisions are thus not relevant and are certainly unlikely to convince Mr KHIEU Samphan and his Defence to work on the crucial task of the appeal while allowing themselves to be distracted by hearings in a second – if not secondary – trial.

4 Additional jurisprudence from the Appeals Chamber of the *ad hoc* tribunals

33. As indicated above, there are other ICTR/Y Appeals Chamber decisions on defence requests for extensions of time for: 1- filing their notice of appeal and 2- filing their appeal brief.

34. What is worth noting is that, in very many cases, the Appeals Chamber accepts to extend time to work on an appeal brief, while refusing to extend the time limit to file the notice of appeal on the ground that the judgement has yet to be translated into a language which the accused understands.

[19] *Boškoski* Decision, p. 2-3; *Popović* Decision, p. 4-5

35. As with the 2008 *Boškoski* Decision and the 2010 *Popović* Decision, these decisions are based on the fact that, under ICTR/Y rules of procedure, it is always possible for counsel who have worked with their clients, to request amendments to the grounds of appeal contained in the notice of appeal.

36. The Appeals Chamber which has granted additional time to draft appeal briefs (and the response to the prosecutor's appeal, if any), recalls, *inter alia,* that the accused must be able to "*consult with*" his or her counsel and "*advise his counsel and give final approval of the Appellant's brief*". This, for example, is the case in the following six decisions: *Gatete, Hategekimana* and *Kanyarukiga* in 2011 and *Nizeyimana, Ndahimana* and *Karemera* in 2012.[20]

37. Mr KHIEU Samphân and his Defence are precisely at the drafting stage of the appeal brief in a particularly complex case. This is in fact an important consideration underlying the Supreme Court's justification for granting an extension of time to file the appeal brief. Indeed:

> *the Supreme Court Chamber finds that the 60 days provided for by Rule 107(4) of the Internal Rules are insufficient for NUON Chea and KHIEU Samphân to meaningfully appeal against a judgment of the length and complexity as in the present case.*[21]

38. Moreover, a reading of these ICTR Appeals Chamber decisions shows that the chamber considers that the client is consulted at all stages of the drafting of the appeal.[22] The appeals judges consider that the client's involvement is more important with respect to the brief, which is logical since it is in the brief that arguments are articulated.

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[20] *Kanyarukiga v. The Prosecutor*, ICTR-02-78, *Decision on Gaspard Kanyarukiga's Motion for Extension of Time for Filing Appellant's Brief and to Expedite Translation of Judgment into Kinyarwanda*, 20 January 2011, p. 3; *Hategekimana v. The Prosecutor*, ICTR-00-55B-A, *Decision on Ildéphonse Hategekimana's Second Motion for an Extension of Time to File his Appellant's Brief,* 20 May 2011, paras. 6 and 7; *Gatete v. The Prosecutor*, ICTR-00-61-A, *Decision on Extension of Time Limits*, 26 May 2011, paras. 6 to 8; *Karemera and al. v. The Prosecutor*, ICTR-98-44-A, *Decision on Motions for Extensions of Time for the Filing of Appeal Submissions*, 17 February 2012, para. 7; *Ndahimana v. The Prosecutor*, ICTR-01-68-A, *Decision on Grégoire Ndahimana's Motion for Extension of Time to File his Appellant's and Respondent's Briefs*, 28 February 2012, p. 2; *Nizeyimana v. The Prosecutor*, ICTR-00-55C-A, *Decision on Ildéphonse Nizeyimana's Motion for Extension of Time for the Filing of the Appellant's Brief,* 19 July 2012, p. 2

[21] *Decision on Motion for Extensions of Time and Page Limits for Appeal Briefs and Responses*, 31 October 2014, **F9**, paras. 13 and 18

[22] See *supra* footnote 20: *Kanyaruikiga* Decision, p. 3; *Hategekimana* Decision, para. 6; *Karemera* Decision, para. 11

39. A review of this jurisprudence shows the extent to which the argument at the end of paragraph 4 of the Ruling, which seeks to draw support from the fact that Mr KHIEU Samphân's notice of appeal has already been filed, is unpersuasive.

5 Jurisprudence of the International Criminal Court (the "ICC")

40. We may also urge the Chamber to review a 2011 *Lubanga* decision pertaining to translation triggering the commencement of appeal periods:

> *Certain minimum safeguards need to be in place to ensure that the accused and his counsel are able adequately to prepare for th(e) next phase if the accused is convicted. (...) If [the accused] is convicted, he will need to prepare for the appellate stage of the case (...). In this trial, whatever the overall conclusion, the judgment will run to many hundreds pages, and it will involve detailed consideration of a large number of complex legal and factual issues. The Chamber is of the view that it would be unfair on the accused (...) to require the accused to prepare for this particular stage of the proceedings when he is effectively unable to read the judgment in English.*[23]

41. It is true that this decision again involves a situation which is different from the situation in this case. However, it must be noted that the ICC makes no distinction between a client and his or her counsel or between a notice of appeal and an appeal brief. There, the focus is mainly on the accused and his or her rights. Unfortunately, it seems necessary to mention this again.

6 "Full participation"

42. Finally, at paragraph 5, the Ruling states that:

> *The Chamber finds that the Accused's right to participate in his defence on appeal is respected through the full participation of his counsel with his support. KHIEU Samphân's involvement in his appeal proceedings is accordingly not a valid legal basis for either the Accused or his counsel to not participate in the ongoing Case 002/02 trial proceedings.*

43. The Defence therefore takes the liberty to remind the Chamber that "*full participation*" of Mr KHIEU Samphân's counsel in the appeal is not possible if they must simultaneously prepare, participate in and attend hearings in Case 002/02.

44. Furthermore, by threatening to sanction Mr KHIEU Samphan and his Defence[24] in an attempt to force them to attend the substantive hearings in Case 002/02, not only does the Chamber prevent Mr KHIEU Samphan's "*full participation*" in his appeal, it is also invalidating

[23] *The Prosecutor v. Thomas Lubanga DYILO,* ICC-01/04-01/06, *Decision on the translation of the Article 74 Decision and related procedural issues,* 15 December 2011, paras. 21 to 24 (referring to a decision issued in the same vein by other judges in the *Bemba* case in 2010, at para. 24).
[24] Ruling **E320/1**, para. 11

the benefits of the extension of time granted by the Supreme Court. The Chamber is thus violating Mr KHIEU Samphân's right to have adequate time to prepare his defence in an appeal which is his last recourse against a life sentence.

45. Prior to the ECCC Trial Chamber's decision, no international or internationalized tribunal had ever taken a decision that is so offensive to the rights of the defence. The Defence cannot partake, by way of an incomplete and forced participation, in the infringement of Mr KHIEU Samphân's most fundamental rights by a tribunal that is meant to serve as a model for the international community.

FOR THESE REASONS

46. Mr KHIEU Samphan informs the Chamber and the parties that his position remains unchanged and that his counsel will not take part in the hearings in Case 002/02 before the completion of the drafting of his appeal brief.

	KONG Sam Onn	Phnom Penh	[signed]
	Anta GUISSE	Paris	[signed]
	Arthur VERCKEN	Paris	[signed]