



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour supreme

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 06-Jan-2020, 15:35
CMS/CFO: Sann Rada

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele Mwachande MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

Date: 6 January 2020
Language(s): English
Classification: PUBLIC

DECISION ON KHIEU SAMPHÂN’S REQUEST FOR ADMISSION OF ADDITIONAL EVIDENCE

Co-Prosecutors
CHEA Leang
Brenda HOLLIS

Accused
KHIEU Samphân

Civil Party Lead Co-Lawyers
PICH Ang
Megan HIRST

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber” and “ECCC” respectively) is seised of the KHIEU Samphân’s request for admission of additional evidence (“Admission Request”).¹

I. BACKGROUND

1. On 3 September 2018, the International Co-Prosecutor in light of its disclosure obligations, disclosed several documents from Cases 003 and 004.²
2. On 16 November 2018, the Trial Chamber pronounced the verdict in Case 002/02, convicting NUON Chea and KHIEU Samphân of crimes against humanity, grave breaches of the Geneva Conventions and genocide, and sentenced them to life imprisonment.³ On 28 March 2019, the full judgement was notified to the parties in Khmer, English and French (“Trial Judgement”).⁴
3. On 19 November 2018, KHIEU Samphân filed an urgent appeal against the pronouncement of the Trial Judgement, requesting that the Supreme Court Chamber annul the summary delivered on 16 November 2018 for lack of form and declare the subsequent Trial Judgement invalid.⁵ On 13 February 2019, the Supreme Court Chamber found the urgent appeal to be inadmissible.⁶
4. The Trial Chamber subsequently filed the fully reasoned judgement in Khmer, English and French on 28 March 2019 (“Trial Judgement”).⁷
5. On 3 April 2019, KHIEU Samphân filed a request for extension of time and page limits for filing his notice of appeal against the Trial Judgement.⁸ The Supreme Court Chamber granted the Parties a uniform extension of time and page limits on 26 April 2019.⁹

¹ KHIEU Samphân’s Request for Admission of Additional Evidence, 8 October 2019, F51 (“Admission Request”).

² International Co-Prosecutors’ Proposed Disclosure of Documents from Cases 003 and 004, E319/71 (“Disclosed Documents”), 3 September 2018.

³ Transcript 16 November 2018 (Pronouncement of Judgement in Case 002/02), p.53 (line 21) to p.56 (line 17).

⁴ The Supreme Court Chamber determined that since it was filed outside the ECCC’s official filing hours, the notification was effective from the next working day 29 March 2019.

⁵ KHIEU Samphân’s Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2019, E463/1.

⁶ Decision on KHIEU Samphân’s Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3.

⁷ Decision on NUON Chea and KHIEU Samphân’s Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, F43, para. 12.

6. On 21 June 2019, the Co-Prosecutors filed their notice of appeal, identifying one ground of appeal.¹⁰
7. On 1 July 2019, KHIEU Samphân filed his notice of appeal against the Trial Judgement in Case 002/02 and identified at least 1, 824 errors committed by the Chamber.¹¹
8. On 8 October 2019, KHIEU Samphân filed a motion for admission of additional evidence (“Admission Request”).¹²
9. On 24 October 2019, the Co-Prosecutors filed their response to the Admission Request.¹³
10. On 4 November 2019, KHIEU Samphân filed his reply.¹⁴

II. APPLICABLE LAW

11. Within the ECCC framework, the admission of new evidence on appeal is governed by Internal Rules 104(1) and 108(7). Pursuant to Rule 104(1) the Chamber may itself examine evidence and call new evidence to determine any appeal. Rule 108(7) provides, in relevant part:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable prior to trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed. The other parties affected by the request may respond within 15 (fifteen) days of the receipt of notification of the request.

12. The Chamber has previously exercised its discretion to admit new evidence pursuant to Rule 108(7) in connection with appeals filed against the trial judgement in Case 001.¹⁵

⁸ KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1.

⁹ Decision on NUON Chea and KHIEU Samphân’s Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, F43.

¹⁰ Co-Prosecutors’ Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019, E465/2/1 (“Co-Prosecutors’ notice of appeal”).

¹¹ NUON Chea’s Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1; KHIEU Samphân’s Notice of Appeal (002/02), 1 July 2019, E465/4/1.

¹² KHIEU Samphân’s Request for Admission of Additional Evidence, 8 October 2019, F51 (“Admission Request”).

¹³ Co-Prosecutors’ Response to KHIEU Samphân’s Request to Admit Additional Evidence, 24 October 2019, F51/1 (“Response”).

¹⁴ KHIEU Samphân’s Reply to the Prosecution’s Response to His Request to Admit Additional Evidence 4 December 2019, F51/2, (“Reply”).

III. DEFENCE REQUEST

13. The Defence requests the Supreme Court Chamber to admit into evidence the Written Records of Interview (“WRI”) of Witnesses EK Hen and CHUON Thy which are found in the Case Files 003 and 004. The Defence further requests the disclosure of the corresponding audio recordings of the said WRIs.¹⁶

IV. ADDITIONAL EVIDENCE

14. The additional evidence in question is comprised of two WRIs of Witnesses EK Hen and CHUON Thy, produced by the Office of the Co-Investigating Judges (“OCIJ”) as part of the Case Files in Cases 003 and 004 and disclosed by the International Co-Prosecutor to the Defence and the Trial Chamber upon completion of a review of materials in the aforementioned cases in compliance with all disclosure obligations of the Prosecution.¹⁷

15. In summation, EK Hen a female farmer, worked at several centres during the Khmer Rouge Regime. Her WRI pertains to the working and living conditions and solidarity, study (training) sessions at Borei Keila and the subject of people considered “traitors” such as Pang.¹⁸

16. Whereas witness CHUON Thy also referred to as CHUON Thi or THI Ov was a former West Zone Battalion Commander whose testimony focuses on regulation of marriages.¹⁹

V. SUBMISSIONS

Khieu Samphan

17. The Defence submits that the hearings in Case 002/02 ended on 11 January 2017 and on 3 September 2018, while the Trial Chamber’s deliberations on its judgement had commenced, the International Co-Prosecutor disclosed eight (8) documents from Case

¹⁵ *Prosecutor v. Kaing Guek Eav*, ‘Decision on Group 1 Civil Parties’ Co-Lawyers’ Supplementary Request to Admit Additional Evidence’, 29 March 2011, F2/5/1; *Prosecutor v. Kaing Guek Eav*, ‘Decision on Requests by Co-Lawyers for Accused and Civil Parties Groups 1,2, 3 to Admit Additional Evidence’, 25 March 2011, F2/4.

¹⁶ Admission Request, para. 5.

¹⁷ Disclosed Documents, para. 1.

¹⁸ Admission Request, paras 16, 22, 24-28, *see also* Transcript of 3 July 2013, E1/217. 1, pp. 13, 25-28, 40, 42-45.

¹⁹ Admission Request, paras 55-56, (57-73), *see also* Transcript of 24 April 2013, E1/183.1, pp.10-22.

Files 003 and 004 which contained two WRIs of EK Hen and CHUON Thy dated 28 February and 6 March 2017 respectively.²⁰

18. The Defence argues that the Prosecution failed to fulfil its disclosure obligation pursuant to Rule 53(4) and to exercise due diligence in disclosing potentially exculpatory documents as soon as it was known, particularly as both witnesses had previously appeared before the Chamber in Cases 003 and 004.²¹ The Defence asserts that while the Prosecution allegedly overwhelmed them by introducing new incriminating evidence, it however failed to disclose these WRIs which were relied upon in Prosecution's closing arguments. The Defence further asserts that it would have used the evidence to impugn the credibility of EK Hen or relied on CHUON Thy's evidence to support its case. It notes that had the International Co-Prosecutor disclosed the WRIs prior at the close of the trial proceedings, the Defence would have sought their admission.²²
19. According to the Defence, the Trial Chamber was obliged to reopen the case as these witnesses had testified before it. The Defence further notes that the Chamber has previously underscored the practice that it is in the interest of justice and ascertainment of the truth that the admission of prior and subsequent evidence of such witnesses permitted parties to fully assess the credibility and consistency of their statements.²³
20. To enhance their stance, the Defence adds that the Trial Chamber simply requested OCIJ for leave to disclose documents to enable the Parties to access them, however pursuant to Rule 96(2) parties cannot make submissions when the Chamber is in the course of deliberations unless the Chamber reopens proceedings. It contends that it was therefore prevented from challenging the contents of these WRIs or impugning the credibility of the witnesses.²⁴ The Defence submits that "EK Hen was a key witness used by the Trial Chamber to convict KHIEU Samphan" while "CHUON Thy's exculpatory statements have either been ignored or partly used solely to inculcate the defendant". Accordingly it requests the admission of this evidence at the appellate stage.²⁵

²⁰ Admission Request, para. 9, *see also* E319/71.2.7 and E319/71.2.4.

²¹ Admission Request, para. 10, *see also* E319/71, E319/71.2, E363/3, E421/4.

²² Admission Request, para.11, *see also* E457/6/4, E457/6/1.

²³ Admission Request, para.12, *see also* E319/71/1, E319/68/1, E319/69, E319/67, E363/3.

²⁴ Admission Request, para. 13.

²⁵ Admission Request, para. 14.

21. As regards the WRI of EK Hen, the Defence contends that the additional evidence could have been a decisive factor in reaching the decision at trial. In support of this contention, the Defence reiterates that EK Hen's WRIs lacks credibility whilst the Trial Chamber considered her a credible and important witness, *citing* her at least nine (9) times in the Trial Judgement. It submits that the scope of her evidence covered alleged political training sessions attended and lectured by KHIEU Samphân at Borei Keila, which the Defence states were decisive in KHIEU Samphân's conviction in relation to his criminal responsibility, in his role, design and implementation of a common purpose.²⁶ According to the Defence several discrepancies exist in EK Hen's evidence, such as the timing of the political training at Borei Keila and at what points KHIEU Samphân or NUON Chea were present whilst recalling the many times EK Hen noted her memory problems.²⁷
22. The Defence asserts that the evidence of CHUON Thy which was centred around marriage practices and how people were free to marry was ignored and consequently the Trial Chamber convicted KHIEU Samphân for his participation in joint criminal enterprise and crimes against humanity of other inhumane acts through conduct characterised as forced marriage and rape in the context of forced marriage. The Defence states that the Trial Chamber found that there existed a policy to regulate marriages, whereas the evidence of CHUON Thy contradicts this notion.²⁸

International Co-Prosecutor

23. The International Co-Prosecutor contend that the Defence's Admission Request is untimely and should therefore be dismissed. The Prosecution avers that the Trial Chamber anticipated ongoing disclosures and therefore granted the Parties leave to respond within two (2) weeks of receiving such disclosures.²⁹ The Prosecution stated that that its disclosure obligations must be considered in relation to the "fundamental rights of the Accused to access potentially exculpatory material".³⁰
24. The Prosecution submits that the Defence failed to file their Admission Request after the 3 September 2018 disclosures despite receiving the material two months prior to the

²⁶ Admission Request, paras. 15, 16 and 30-54, *see also* E465 and F17.

²⁷ Admission Request, paras. 18-25.

²⁸ Admission Request, paras. 55-57.

²⁹ Response, para. 17.

³⁰ Response, para. 18, *see also* Decision on Requests Regarding Internal Rule 87(4), 21 September 2016, E421/4, paras. 9, 21.

announcement of the verdict by the Trial Chamber. The Prosecution states that the Defence had discretion to seek admission of the disclosed material pursuant to Internal Rule 87 (4) as the Defence is best placed to determine whether the material is exculpatory. It thus argues that the Defence's contention that the Trial Chamber should have reopened proceedings upon the disclosure does not stand because the onus is on the Defence to act.³¹

25. The Prosecution submits that the proposed evidence could not have been a decisive factor in reaching the Trial Judgement. It argues that the Admission Request does not meet the stringent standards for admissibility of new evidence at the appellate stage. The Prosecution adds that the Defence fails to demonstrate a realistic possibility that had the evidence been before the Trial Chamber, a different verdict would have been entered.³²

26. Regarding the new evidence of EK Hen, the Prosecution avers that the prior witness' statements and testimony before Case 002/01 were admitted in Case 002/02 and therefore the Defence claim that EK Hen lacks credibility is flawed since all discrepancies were resolved by the Trial Chamber in the consideration of the totality of evidence on the trial record.³³ The Prosecution contends that the reasonableness of the Chamber's assessments are matters for the appeal. The Prosecution submits that EK Hen's new evidence simply confirms the Trial Chamber's findings and consequently there is no realistic possibility that a different verdict would have ensued.³⁴ It states that the nine findings the Defence mentions are simply confirmed by EK Hen's new evidence.³⁵

27. The Prosecution submits that conclusions regarding KHIEU Samphân's responsibility is based on the totality of evidence, for instance EK Hen's testimony regarding meetings at Borei Keila or KHIEU Samphân's knowledge of policies and/or patterns of conduct among others as enumerated by the Defence. The Trial Chamber considered various evidence prior to making conclusions that KHIEU Samphân had the requisite knowledge for various modes of responsibility.³⁶ Therefore, the new evidence of EK Hen would not have led to a different verdict.³⁷

³¹ Response, paras. 12-20.

³² Response, para. 21.

³³ Response, para. 23.

³⁴ Response, para. 24.

³⁵ Response, para. 25.

³⁶ Response, para. 27.

³⁷ Response, para. 28.

28. As regards the new evidence of CHUON Thy, the Prosecution submits that it is repetitive and thereby does not meet the admissibility requirements pursuant to Internal Rules 87(3) and 108(7). It contends that the evidence is similar to CHUON Thy's previous trial testimony³⁸ which was corroborated by Witnesses EK Hoeun and SOU Soeun.³⁹ There is thus no realistic possibility that CHUON Thy's repetitive evidence would have led the Trial Chamber to enter a different verdict.⁴⁰
29. The Prosecution expresses its concerns over the "overly emotive and [...] vitriolic language used by the Defence in the Admission Request", particularly in respect to "allegations that the Trial Chamber engaged in professional misconduct in its carriage of this case." In sum, the Prosecution contends that these kinds of allegations have the effect of undermining the integrity of the Trial Chamber proceedings.⁴¹

Defence Reply

30. The Defence submits that it is in the interests of justice to admit the said WRIs, so as to assess the credibility of witnesses. It notes that other Parties have made similar requests before without challenge.⁴² It also notes that the Trial Chamber and the Supreme Court Chamber have admitted similar statements either at the request of a Party or *proprio motu*.⁴³
31. The Defence asserts that the witnesses significantly affect the reliability and credibility of their testimony hence the WRIs should be admitted on appeal.⁴⁴

VI. DELIBERATIONS

32. As a preliminary note, the Chamber observes that the Defence alleges the Prosecution did not exercise due diligence as illustrated by the "untimely" manner in which the International Co-Prosecutor allegedly disclosed the WRIs of EK Hen and CHOUN Thy. The Chamber recalls that the Internal Rules bestow on the Prosecution the obligation to

³⁸ Response paras. 29-34, *see also* E3/10713, E1/183.1, E1/489.1, E1/490.1

³⁹ *See also* E1/299.1, E1/310.1.

⁴⁰ Response, paras. 35-40.

⁴¹ Response, para. 41.

⁴² Reply, paras. 4-5.

⁴³ Reply, para. 6.

⁴⁴ Reply, para. 8.

disclose any other material of evidentiary value including exculpatory material.⁴⁵ Notably, the Prosecution recalled a prior decision of the ICIJ outlining a new procedure for disclosure of material from Cases 003 and 004 into Case 002.⁴⁶ In the ICIJ Disclosure Decision, general permission was granted to the Prosecution to “present any material the disclosure of which it intends to request, together with a draft of the full disclosure request including annexes, to the Trial or Supreme Court Chamber and the Defence in Case 002 under the condition of strict confidentiality [...] to enable the respective Chambers and the Defence to assess whether the requested material compiles with the criteria for new material set out in the Trial Chamber Decision”.⁴⁷ This was not intended to be a blanket permission, as it did not extend to the placement of any material on the Case File [...].⁴⁸ All disclosure requests by the International Co-Prosecutor were subject to certification by the Trial Chamber.⁴⁹

33. In light of the observations above and taking into account the Prosecution’s ongoing disclosure obligations, the Chamber does not fault the International Co-Prosecutor for the timing in which the materials in question were transmitted for disclosure. However, in ensuring equality of arms and in the interest of justice, the Chamber considers that any exculpatory material sought to be admitted ought to be done in a manner permissible, particularly where the Defence makes mention of the weight it may carry. The Chamber concurs with the Trial Chamber ruling that, ‘the Accused have a fundamental right of access to potentially exculpatory material’.⁵⁰

34. The Supreme Court Chamber wishes to be assiduous in avoiding any early consideration of issues that will eventually be determined on the Appeal. It therefore avoids any comment on the weight or otherwise to be attached to the additional evidence of EK Hen or CHUON Thy or on the weight or inferences drawn by the Trial Chamber to these witnesses’ testimony.

35. Although the Prosecution contends that the Defence failed to file their Admission Request after the 3 September 2018 disclosures despite receiving the material two months prior to the announcement of the verdict by the Trial Chamber, it agrees that the Defence has the

⁴⁵ Internal Rule 53.

⁴⁶ Decision on Yim Tith’s Request to Set A Timetable for Disclosure Requests from Case 004 (“ICIJ Disclosure Decision”), 31 October 2016, E319/62, para. 30.

⁴⁷ ICIJ Disclosure Decision, para. 30(a)(i).

⁴⁸ ICIJ Disclosure Decision, paras 30(a)(i) and (ii).

⁴⁹ ICIJ Disclosure Decision, para. 30(a)(v).

⁵⁰ Decision on Requests Regarding Internal Rule 87(4), 21 September 2016, E421/4, para. 9.

discretion to seek admission under Internal Rule 87(4). The Chamber observes that the new evidence sought for admission was disclosed after the end of the trial proceedings and according to the Defence is potentially exculpatory.

36. Having carefully considered the submissions of the Parties, the Chamber notes that there can be little doubt and indeed, this is not disputed that new WRIs from witnesses EK Hen and CHUON Thy were generated after the trial and only a short time before the Trial Chamber delivered the summary of its Judgement. No blame is attached to either party for the delay each alleges against the other.
37. The Chamber notes that EK Hen and CHUON Thy were relatively key witnesses to some findings as there are several references to their evidence in the Trial Judgment. Further and importantly, the KHIEU Samphân Defence attaches considerable weight to the potentially exculpatory nature of that evidence.
38. The Chamber believes that no injustice will ensue if it takes a wide view of its innate discretion to admit the additional evidence which KHIEU Samphân submits is exculpatory and more than that, the Defence submits that had the Trial Chamber considered this evidence, it may have come to different conclusions in attributing guilt against him. The Chamber makes no judgment on that submission but will receive the evidence in the circumstances when it was filed with many other documents so long after the evidence concluded and when the time limits for additional evidence had lapsed. In accordance with the Internal Rules, the additional evidence should be filed within 15 days of the notification of this decision.
39. The Chamber wishes to take this opportunity to note with regret the frequent use of discourteous language and terms in Defence submissions. Those offensive terms are directed at various Chambers and at opposing legal teams. The Chamber wishes to remind Counsel that their duties to their clients and to the Court to act professionally, includes the avoidance of personal attacks and vilification. Whilst judges can be incorrect when opposing views of the evidence are presented, the Chamber remind Counsel that the jurisdiction of the Supreme Court Chamber specifically exists to deal with alleged errors of law and significant errors of fact. It is expected that those errors can be presented by such eminent Counsel as those who appear in this case and who are privileged to represent their respective clients in such important proceedings, to do so without resort to vindictive and

unproductive language. The Chamber cautions the Defence and hopes that such occurrences will rapidly cease and that in all future submissions avoid the attribution of malice to any actions of Counsel or Chambers.

VII. DISPOSITION

40. FOR THE ABOVE REASONS, THE SUPREME COURT CHAMBER:

GRANTS the Defence Request.

DECIDES to admit the following additional evidence and their corresponding **AUDIO** recordings:

ITEM	DOCUMENT NUMBER
Written Records of Interview EK Hen	E.319/71.2.7
Written Records of Interview CHUON Thy	E.319/71.2.4

Phnom Penh, 6 January 2020

President of the Supreme Court Chamber



[Handwritten signature]
KONG Srim