



**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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême



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

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

Before:

- Judge KONG Srim, President
- Judge Chandra Nihal JAYASINGHE
- Judge SOM Sereyvuth
- Judge Agnieszka KLONOWIECKA-MILART
- Judge MONG Monichariya
- Judge Florence Ndepele MWACHANDE-MUMBA
- Judge YA Narin

Date: 29 October 2015

Language(s): Khmer/English

Classification: PUBLIC

DECISION ON NUON CHEA’S REQUEST FOR INVESTIGATIVE ACTIONS AIMED AT ASSESSING THE CREDIBILITY OF WITNESS SÂM SITHY

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for NUON Chea

SON Arun
Victor KOPPE

Accused

KHIEU Samphân
NUON Chea

Co-Lawyers for KHIEU Samphân

KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Civil Party Lead Co-Lawyers

PICH Ang
Marie GUIRAUD

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”);

BEING SEIZED of NUON Chea’s “Request for Investigative Action into Events Described During the Testimony of SÂM Sithy” filed on 7 September 2015 (“Request”);¹

NOTING that, in the Request, NUON Chea asks the Supreme Court Chamber to undertake a number of investigative actions aimed at assessing the credibility of witness SÂM Sithy, who appeared before this Chamber on 3 July 2015 and gave testimony described by NUON Chea as “internally inconsistent”, “uncorroborated” and “implausible”,² and that such investigative actions – including conducting interviews with SÂM Sithy’s cousin as well as with unspecified “local residents” in Chrak Sdech, locating a grave site and obtaining a newspaper article³ – are necessitated by the asserted centrality of the witness to the Trial Judgment’s⁴ findings concerning the alleged Communist Party of Kampuchea (“CPK”)’s policy to execute Khmer Republic soldiers and officials,⁵ and are proposed to be carried out by a court-appointed investigator or the Defence for NUON Chea;⁶

NOTING that the Civil Party Lead Co-Lawyers and the Co-Prosecutors oppose the Request, contending that it would unnecessarily and unfairly prolong the proceedings,⁷ given, *inter alia*, that SÂM Sithy provided an “extremely” credible, consistent and detailed account of the “key portions of the unforgettable events that changed his life in 1975”⁸ – an account that does not require corroboration⁹ – and that NUON Chea overstates the weight placed on SÂM Sithy’s narration by the Trial Chamber,¹⁰ which, in the Civil Party Lead Co-Lawyers’ view, did not enter convictions for the specific massacre described by SÂM Sithy, but merely “discuss[ed]” his evidence without making factual findings based on it, save for a “limited

¹ (Notified on 8 September 2015), F28.

² Request, paras 2-3 and p. 10.

³ Request, para. 31.

⁴ Case 002/01 Judgement, 7 August 2014, E313 (“Trial Judgment”).

⁵ Request, paras 26, 28.

⁶ Request, para. 31.

⁷ Co-Prosecutors’ Response to NUON Chea’s Request for Investigative Action into Events Described During the Testimony of S[Â]M Sithy, 18 September 2015, F28/2 (“Co-Prosecutors Response”), paras 3, 29; Civil Party Lead Co-Lawyers’ Response to NUON Chea’s Investigatory Requests Relating to S[Â]M Sithy, 18 September 2015, F28/1 (“Civil Parties Response”), paras 40-41.

⁸ Co-Prosecutors Response, paras 17-18, 21.

⁹ Co-Prosecutors Response, para. 25.

¹⁰ Civil Parties Response, paras 14, 27; Co-Prosecutors Response, para. 37.

reliance” in relation to the overall CPK policy to execute Khmer Republic soldiers and officials;¹¹

NOTING, further, that the Co-Prosecutors characterise the Request, first, as an “abundantly clear” attempt to prolong the proceedings – fraught with “an astonishing lack of diligence” as to its timing¹² –, causing the Supreme Court Chamber to spend its resources on “superfluous errands [rather] than on reaching a final verdict”,¹³ and, second, as yet another vehicle, along with NUON Chea’s requests for additional evidence, to supplement his appeal submissions, thereby eluding relevant page limits;¹⁴

NOTING that, in reply, NUON Chea maintains that the Co-Prosecutors put forth “generalities” that fail to specifically engage with the substance of the Request, rely on inapposite jurisprudence and seek to tactically exaggerate the laboriousness of the reliefs sought in the Request,¹⁵ whereas the Civil Party Lead Co-Lawyers misinterpret the Trial Chamber’s findings, which indeed resulted in NUON Chea being held criminally responsible for the precise events reported by SÂM Sithy;¹⁶

NOTING, further, that in a previous filing, NUON Chea remarked that the Co-Prosecutors misrepresented his motives by making “constant, unsubstantiated suggestions” that his conduct is “in bad faith” – that is, directed at disrupting and unduly prolonging proceedings to evade the final verdict –,¹⁷ and made inordinate use of “insulting” and “indignant language”;¹⁸ and that NUON Chea therefore asked the Supreme Court Chamber to “censure” the Co-Prosecutors for such alleged misconduct;¹⁹

CONSIDERING that NUON Chea has at times used the Request and other motions to supplement his substantive arguments on appeal,²⁰ thus effectively eluding in particular the

¹¹ Civil Parties Response, paras 25, 28-36.

¹² Co-Prosecutors Response, para. 33.

¹³ Co-Prosecutors Response, para. 33.

¹⁴ Co-Prosecutors Response, para. 30.

¹⁵ Reply to Co-Prosecutors’ Response to Request for Investigative Action into Events Described During the Testimony of SÂM Sithy, 7 October 2015, F28/3 (“NUON Chea Reply”), paras 4, 8-10, 13, 18-20.

¹⁶ NUON Chea Reply, paras 13-17.

¹⁷ NUON Chea’s Reply to the Co-Prosecutors’ Response to His Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01, 19 October 2015, F2/8/6 (“NUON Chea Reply re Sixth Request”), paras 6, 11.

¹⁸ NUON Chea Reply re Sixth Request, para. 7.

¹⁹ NUON Chea Reply re Sixth Request, para. 11.

²⁰ See Request, paras 4-28; NUON Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01, 11 September 2015, F2/8, paras 9-13, 18-69.

time and page limits imposed by this Chamber,²¹ but that those submissions were nevertheless mostly connected with the legitimate object of the motions in which they were embedded, and that, in any event, the Co-Prosecutors have always had at their disposal – and regularly utilised – procedural avenues to respond thereto, including extension of page limits,²² which are meant to assuage their concern that the principle of equality of arms can result in being “thoroughly distort[ed]”;²³

CONSIDERING that, contrary to the Co-Prosecutors’ assertions,²⁴ NUON Chea has so far exercised his right to present a defence during appeal proceedings in a broad yet legitimate manner, with no element to suggest that he has engaged in filing dilatory or frivolous requests, which is evidenced by the fact that this Chamber has granted a number of his requests;²⁵

CONSIDERING, further, that the Co-Prosecutors, in their responses to the present Request and to the Sixth Request, used language that could be perceived as disrespectful of the Defence for NUON Chea or gratuitously insinuating,²⁶ which the Supreme Court Chamber expects they will avoid in future submissions, but that this language neither satisfies the threshold of gravity nor does it build up a consistent pattern of conduct which could warrant a formal censure;

CONSIDERING that a sizeable portion of the litigation triggered by, and including, the Request goes to the credibility of witness SÂM Sithy and the significance of his testimony to a number of the Trial Chamber’s findings, and that the most appropriate forum for addressing those arguments is the forthcoming judgment on the appeals in Case 002/01;

²¹ Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, 11 December 2014, F13/2; Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, F9.

²² Co-Prosecutors’ Request for Additional Pages and to File in One Language in Response to NUON Chea’s Sixth Additional Evidence Request, 30 September 2015, F2/8/2; Decision on the Co-Prosecutors’ Request for Page Extension for their Prospective Response to NUON Chea’s Sixth Request for Additional Evidence, 5 October 2015, F2/8/2/1.

²³ Co-Prosecutors’ Response to NUON Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 14 October 2015, F2/8/5 (“Co-Prosecutors Response to Sixth Request”), para. 35.

²⁴ Co-Prosecutors Response, para. 33. *See also* Co-Prosecutors Response to Sixth Request, paras 4, 7, 41.

²⁵ For the procedural history, *see* Decision on Pending Requests for Additional Evidence on Appeal and Related Matters - Disposition -, 21 October 2015, F2/9.

²⁶ Co-Prosecutors Response to Sixth Request, paras 19 (“paranoid assertions”), 32 (“feverish ruminations”), 35 (“an attempt to disparagingly characterize on appeal the damaging evidence of S[â]m Sithy, thinly disguised as an investigatory request”), 68 (“[i]n his desperation to insinuate such a ‘Northwest Zone’ plot, N[UON] Chea...”), and 4, 7, 41, 61 and Co-Prosecutors Response, para. 33 (repeatedly identifying the main (or only) goal of NUON Chea’s motions as that of unduly prolonging and disrupting the proceedings, in order “to forestall the issuance of the appeal judgment [...] as long as possible”).

CONSIDERING that witnesses regularly testify in open court and on that basis and in the context of the entirety of the material Chambers make findings of credibility without need for further investigative action, as the witness's testimony, extent of corroboration, and demeanour, among other factors, are sufficient indicators in carrying out the necessary assessment;

CONSIDERING that in order to assess the credibility and reliability of SÂM Sithy as well as the relevance of his statements to certain contentious first-instance findings, it is unnecessary, under the present circumstances, to carry out further investigative actions because this Chamber can already draw all the inferences it needs to make such an assessment from the witness's live testimony;

HEREBY:

DISMISSES the Request.

Phnom Penh, 29 October 2015

President of the Supreme Court Chamber



KONG Srim