



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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):19...../.....12...../.....2014.....
ម៉ោង (Time/Heure) :.....14:40.....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier..... <u>SAN N. RADA</u>

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

Date: 19 December 2014
Original language(s): Khmer/English/French
Classification: PUBLIC

ORDER TO REFER CONDUCT OF COUNSEL FOR KHIEU SAMPHAN TO APPROPRIATE PROFESSIONAL BODIES

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 has been confronted with actions of counsel for KHIEU Samphan which have delayed the proceedings in Case 002/02.

2. On 19 September 2014, the Chamber scheduled the evidentiary proceedings in Case 002/02 to begin on 17 October 2014. In an effort to accommodate the Accused, the Trial Chamber scheduled the commencement of evidentiary proceedings after the (already extended) deadline of 29 September 2014 for the filing of notices of appeal in relation to Case 002/01. Further considering the parties' commitments drafting their respective appeal briefs, the Chamber scheduled a reduced sitting schedule of three days per week, which included a total of 25 hearing days from October to December 2014.¹ On 17 October 2014, the Trial Chamber declared the substantive hearings in Case 002/02 open. Following the Co-Prosecutors' opening statement, counsel for KHIEU Samphan indicated they were unwilling to participate in the proceedings in Case 002/02 until they had filed the appeal brief against the Case 002/01 Judgement because they had insufficient resources.² Counsel then abandoned the court room following which the Chamber adjourned the proceedings.

3. On 21 October 2014, the Trial Chamber held a Trial Management Meeting (TMM) to discuss, *inter alia*, some of the reasons put forward by Defence counsel as justification for their conduct. In violation of the Trial Chamber's order, and despite their insistence that the lack of resources was the legal basis for their actions, neither international nor national counsel for KHIEU Samphan attended the TMM.

4. On 24 October 2014, the Trial Chamber found that the failure of counsel to attend the 21 October 2014 TMM constituted misconduct and warned Defence counsel pursuant to Internal Rule 38. In order to provide counsel a further opportunity to explain their claim of insufficient resources, the Chamber scheduled a TMM for 28 October 2014 and ordered counsel to appear.³ Counsel for KHIEU Samphan attended the TMM of 28 October and made submissions, *inter alia*, on the reasons for their previous conduct and stated unwillingness to participate in further hearings on the substance in Case 002/02.

¹ See Scheduling Order for Hearing on Substance in Case 002/02, E316, 19 September 2014 ("September 2014 Scheduling Order"); Hearing Schedule for Case 002/02 in 2014, E316.1, 19 September 2014 ("Hearing Schedule issued in September 2014").

² T. 17 October 2014, pp. 83, 85-87.

³ Trial Chamber Memorandum entitled "Warning to Counsel for NUON Chea and KHIEU Samphan", E320, 24 October 2014 ("Trial Chamber Warning"), paras 6, 8.

5. 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 further put the KHIEU Samphan Defence on notice that it would take firm action should they fail to abide by the order to appear in court.⁴ Nonetheless, in order to further accommodate KHIEU Samphan and his counsel, and in consideration of the rights of the other parties to expeditious proceedings, the Chamber further reduced the hearing schedule to two days per week, which involved a total number of 10 scheduled hearing days until the end of 2014.⁵

6. Counsel for KHIEU Samphan failed to appear at the scheduled hearings on 17 November 2014, in direct violation of the Chamber's order. The Accused KHIEU Samphan, who was present, confirmed that his international counsel were in Paris and that he had instructed his counsel to concentrate on drafting the appeal brief 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 counsel did not have sufficient resources to work on the appeal of Case 002/01 and the trial of Case 002/02 at the same time.⁶

7. The Chamber further put KHIEU Samphan on notice that it may appoint Court Appointed Counsel should he now, or at any time in future, instruct counsel to not participate in proceedings in Case 002/02.⁷ It then directed the Accused to inform the Chamber by the next day whether he was withdrawing his instruction to counsel not to participate in Case 002/02. Finally, the Chamber noted that the misconduct of counsel would be the subject of a separate order. On 18 November 2014, the Accused informed the Chamber that his instructions to counsel remained unchanged.⁸

8. On 21 November 2014, the Chamber therefore re-appointed counsel for KHIEU Samphan as Court Appointed Counsel. This new designation required that counsel effectively participate in Case 002/02 including by attending all court hearings. If KHIEU Samphan's instructions lead, or were meant to lead, to an obstruction of the proceedings or were against

⁴ Trial Chamber Memorandum entitled "Ruling following TMM of 28 October 2014", E320/1, 31 October 2014 ("Ruling following TMM of 28 October 2014").

⁵ See Scheduling Order for Evidentiary Proceedings, E322, 3 November 2014 ("November 2014 Scheduling Order").

⁶ T. 17 November 2014, pp. 5, 8-9.

⁷ T. 17 November 2014 (draft), pp. 10-12, 14-15.

⁸ DSS Report on Consultation with Mr. KHIEU Samphan, E320/1/2, 19 November 2014, para. 2.

the interests of justice, counsel were obliged to disregard them.⁹ The Chamber further ordered the now Court Appointed Counsel to appear at the hearing on substance scheduled for 24 November 2014.

9. On 23 November 2014, counsel for KHIEU Samphan informed the Chamber by letter that they would not accept appointment as Court Appointed Counsel as this would violate their independence, improperly modify the employment contracts they had signed with the United Nations, and force them to violate their professional and ethical duties by acting contrary to the interests of their client. They further stated that they would not participate in the proceedings until they had filed the appeal brief in Case 002/01, due on 29 December 2014, alleging that this was necessary in order to effectively preserve the Accused's right to have adequate time and facilities for the preparation of his defence.¹⁰ As presaged by this letter, Court Appointed Counsel failed to appear at the 24 November 2014 hearing. The Trial Chamber noted that it would consider referring the misconduct of counsel to the appropriate professional bodies pursuant to Internal Rule 38.¹¹ Based on the requirement in Cambodian law that an accused be represented by counsel¹² and the lack of available counsel with sufficient knowledge of the Case File, the Chamber was left with no alternative but to adjourn proceedings until January 2015.

10. On 5 December 2014, the Chamber noted that the loss of more than two months of trial hearings was particularly significant in a case where the Accused, witnesses, victims and Civil Parties are elderly and any delay might result in their unavailability for the trial. To avoid a repeat of this situation in future, the Chamber ordered the appointment of one international and one national Court Appointed Standby Counsel for KHIEU Samphan.¹³

2. APPLICABLE LAW

11. Article 21(3) of the ECCC Agreement provides:

⁹ Decision on the Appointment of Court Appointed Counsel for KHIEU Samphan, E320/2, 21 November 2014 (“Decision on Court Appointed Counsel”), para. 18.

¹⁰ *Lettre à l'attention de la Chambre de première instance*, E320/2/1, 23 November 2014 (“Letter from Counsel for KHIEU Samphan”). See also, *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”).

¹¹ T. 24 October 2014, p. 4.

¹² See Code of Criminal Procedure of the Kingdom of Cambodia, Art. 300 and 301 (“the assistance of a lawyer is compulsory if (1) the case involves a felony [...]”).

¹³ Decision on the Appointment of Court Appointed Standby Counsel For KHIEU Samphan, E321/2, 5 December 2014.

Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

12. Internal Rule 35 provides:

1. The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:

[...]

(b) without just excuse, fails to comply with an order to attend, or produces documents or other evidence before the Co-Investigating Judges or the Chambers.

[...]

5. If a lawyer is found to have committed any act set out in sub-rule 1, the Co-Investigating Judges or the Chamber making such finding may also determine that such conduct amounts to misconduct of a lawyer pursuant to Rule 38.

13. Internal Rule 38 provides:

1. The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.
2. The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body.

14. The ECCC Pre-Trial Chamber has held that “Internal Rule 38 is meant to ensure that proceedings are not disrupted by offensive and/or obstructive behaviour, or by any conduct which amounts to an abuse of process as it may endanger the administration of justice.”¹⁴ Internal Rules 35(5) and 38 seek to preclude disruptions and unnecessary delays caused by lawyers, including counsel for the Accused.¹⁵ In two specific instances during Case 002, the Pre-Trial Chamber held that the refusal of former counsel for KHIEU Samphan to appear at scheduled hearings constituted an abuse of process and an obstruction of the proceedings

¹⁴ Warning to International Co-Lawyer (PTC), C26/5/22, 19 May 2009, para. 25.

¹⁵ *See also*, Internal Rule 85 (“The President of the Chamber shall preside over the proceedings, and facilitate interventions by other judges. He or she shall guarantee the free exercise of defence rights. In consultation with the other judges, the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.”).

within the meaning of Internal Rule 38.¹⁶ These decisions are consistent with the relevant practice of international tribunals which have found that the failure of counsel to attend scheduled hearings merits the imposition of sanctions.¹⁷

15. The Cambodian Law on the Bar, like the ECCC Internal Rules and provisions within French law, further foresee the possibility of imposing sanctions against counsel who violate their ethical or professional obligations.¹⁸ The Cambodian Bar Association Code of Ethics provides *inter alia* that counsel must abide by the procedural rules and regulations of the court and shall not cause any delay through negligence or on any other unreasonable ground which may affect justice.¹⁹ Any professional misconduct by counsel who are registered with the Bar Association of the Kingdom of Cambodia (BAKC) may be subject to sanction imposed by the Council of the BAKC.²⁰ Further, when the misconduct concerns proceedings before the ECCC, disciplinary matters may be dealt with by the ECCC and/or referred to the BAKC and/or the national bar where the foreign lawyer has been admitted.

3. FINDINGS

16. The Chamber finds that the conduct of counsel for KHIEU Samphan, namely KONG Sam Onn, Arthur VERCKEN and Anta GUISSÉ, in violating court orders to attend and to assist their client at scheduled hearings, amounts to a serious and deliberate obstruction of proceedings. The Chamber notes that counsel for KHIEU Samphan have previously been

¹⁶ Decision on Application to Adjourn Hearing on Provisional Detention Appeal (PTC), C26/I/25, 23 April 2008, para. 15; Warning to International Co-Lawyer (PTC), C26/5/22, 19 May 2009, para. 31.

¹⁷ *Prosecutor v. Nahimana*, ICTR Appeals Chamber, ICTR-96-11-A, Appeals Judgement, 28 November 2007, para. 139; *Prosecutor v. Musema*, ICTR Trial Chamber, ICTR-96-13-I, Decision to Withdraw Assigned Counsel and to Allow the Prosecutor Temporarily to Redact Identifying Information of Her Witness, 18 November 1997, para. 8.

¹⁸ Cambodian Law on the Statutes of the Bar, 23 June 1995, Art. 59 (“Any lawyer who abuses the Rules of the Profession or commits any act affecting the ethics or honor of lawyers shall be subjected to disciplinary sanction, even if such act was committed outside the performance of his or her profession.”); On the French law see Articles 1.3 and 1.4 of *Règlement Intérieur National de la profession d’avocat*: “*Les principes essentiels de la profession guident le comportement de l’avocat en toutes circonstances. L’avocat exerce ses fonctions avec dignité, conscience, indépendance, probité et humanité, dans le respect des termes de son serment. Il respecte en outre, dans cet exercice, les principes d’honneur, de loyauté, de désintéressement, de confraternité, de délicatesse, de modération et de courtoisie. Il fait preuve, à l’égard de ses clients, de compétence, de dévouement, de diligence et de prudence. La méconnaissance d’un seul de ces principes, règles et devoirs, constitue [...] une faute pouvant entraîner une sanction disciplinaire.*”

¹⁹ Code of Ethics for Lawyers of the Bar Association of the Kingdom of Cambodia (“Cambodian Code of Ethics”), Art. 37, 39.

²⁰ Cambodian Law on the Bar, Art. 19, (“The Bar Council shall examine and resolve all problems concerning the conduct of the legal profession. The Bar Council shall assure the fulfilment of duty and protection of the rights of lawyers. The Bar Council shall have as functions, *inter alia*: [...] to assure observance of discipline and the imposition of disciplinary sanctions...”); See also, Letter from the BAKC Concerning Lawyer Sanction for Professional Misconduct, E320/3, 3 December 2014 (dated 26 November 2014).

warned by the Chamber pursuant to Internal Rule 38 and have persisted in this conduct,²¹ refusing to attend the court hearings of 17 November, and 24 November 2014.²² As a consequence of counsel's conduct since 17 October 2014, 25 trial days over the course of 10 trial weeks have been cancelled.²³ This is particularly significant considering the age of the witnesses, Civil Parties, and the Accused in this case and where it is imperative that the ECCC utilise every available day to ensure a final determination of the remaining charges as expeditiously as possible.²⁴ As previously noted by the Chamber, counsel's actions have created hardships for witnesses and Civil Parties, inconvenience for the Parties and significant additional costs for the ECCC.²⁵

17. Counsel for KHIEU Samphan insist that they only need postponement until their appeal brief in Case 002/02 is filed on 29 December 2014.²⁶ This is a significant delay considering it is imperative that the ECCC utilise every available day to ensure a final determination of the remaining charges.²⁷ Moreover, there is no legal basis for the arguments put forward by counsel to justify their conduct which, though evolving, have included a claimed lack of adequate resources, KHIEU Samphan's unavailability to fully participate in the appeal against Case 002/01, and counsel's duty of loyalty to their client which prevents them from acting contrary to his interests. To be completely clear, the Chamber addresses these assertions below.

3.1. Adequate Resources for Defence Counsel

18. In a motion of 3 October 2014 and during the hearing of 17 October 2014, counsel for KHIEU Samphan submitted that available resources were insufficient to effectively defend their client by simultaneously participating in the trial of Case 002/02 and finalising an appeal brief against the Judgement in Case 002/01.²⁸ Accordingly, on the instruction of KHIEU

²¹ Trial Chamber Warning.

²² T. 17 November 2014, p. 2; T. 24 November 2014, p. 1.

²³ See September 2014 Scheduling Order; Hearing Schedule issued in September 2014.

²⁴ Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (SCC), E163/5/1/13, 8 February 2013 ("SCC Scope of Case 002/01 Decision"), para. 51; Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 (SCC), E284/4/8, 25 November 2013 ("SCC Second Severance Decision"), para. 72.

²⁵ Decision on Court Appointed Counsel, para. 16. Such costs relate to the nearly three-month delay of proceedings as well as the long-term costs associated with the appointment of Standby Counsel.

²⁶ T. 28 October 2014, pp. 24-25.

²⁷ SCC Scope of Case 002/01 Decision, para. 51; SCC Second Severance Decision, paras 72, 76.

²⁸ *Demande urgente de réexamen de l'Ordonnance concernant le calendrier des audiences au fond du procès 002/02*, E314/5/1, 3 October 2014, paras 2, 7-9, 14; T. 17 October 2014, pp. 81-83, 85-86; See also, T. 28

Samphan, they chose to prepare the appeal brief in Case 002/01 and not to attend the proceedings in Case 002/02.

19. The record does not support counsel's argument that they have been accorded insufficient resources. The Chamber notes that the total expenditure on each Defence team at the ECCC is approximately \$600,000 per year.²⁹ Counsel for KHIEU Samphan were fully compensated during a period of ten months whilst the Chamber drafted the judgement in Case 002/01, during which time there were only four court days in preparation for Case 002/02.³⁰ Counsel for KHIEU Samphan were informed that Case 002/02 would start imminently and indeed all other similarly placed parties were prepared to proceed with the trial of Case 002/02 on 17 October 2014.³¹

20. Prior to this date, counsel for KHIEU Samphan failed to alert the Chamber as to any need for additional resources.³² After counsel raised the issue of resources for the first time, the Chamber scheduled a TMM to discuss the issue.³³ Counsel for KHIEU Samphan did not attend the hearing and provided no explanation for their absence.³⁴ Although in October 2014 the Defence Support Section, on counsel's behalf, made a request to the Administration for additional pay of 16% to work on the appeal of Case 002/01 and the trial of Case 002/02,³⁵ counsel failed to alert the Chamber to this request prior to walking out of the 17 October 2014 hearing. Even if this additional compensation were granted, however, counsel state that they would not change their stance regarding their attendance at substantive hearings in Case

October 2014, p. 17 (“[W]hat is less important is working on the second case [Case 002/02]. What is most important is working on his Appeal.”); Letter from Counsel for KHIEU Samphan, p. 1.

²⁹ T. 21 October 2014, p. 25 (Public).

³⁰ T. 21 October 2014, p. 14 (Public).

³¹ Trial Chamber memorandum entitled “Trial Chamber Workplan for Case 002/02 and Schedule for Upcoming Filings”, E301/5, 24 December 2013; Case 002/02 — Trial Chamber Workplan (detailed), E301/5.1, 25 December 2013 (indicating the final step prior to substantive hearings would be an initial hearing); Scheduling Order for Further Initial Hearing, E311, 11 June 2014. *See also*, T. 28 October 2014, p. 36 (Counsel for NUON Chea was prepared for substantive hearings in March 2014).

³² Counsel objected to the start of trial as a matter of law until the Judgement in Case 002/01 became *res judicata* but made no mention of financial or human resource constraints.

³³ Email from Trial Chamber Senior Legal Officer to Case 002 Parties, E320.1, 20 October 2014; Counsel indicate that the Defence Support Section discouraged them from filing requests for additional resources early in 2014. T. 28 October 2014, pp. 36-37. Nonetheless, the administration and the Chamber were not made aware of any concerns regarding resources. Likewise, the first filing indicating any sort of resource issue made by the KHIEU Samphan Defence to the Supreme Court Chamber appears to be in October 2014. *Demande Tendante à Enjoindre à l'Administration de Renforcer en Urgence les Capacités de l'Unité de Traduction*, F8, 8 October 2014.

³⁴ T. 21 October 2014, p. 1 (Confidential).

³⁵ T. 28 October 2014, p. 20.

002/02.³⁶ The Chamber later informed counsel that it would look favourably upon requests for additional resources.³⁷ Counsel for KHIEU Samphan have not acted on this basis to request those resources that they consider necessary to allow for their participation in the trial proceedings. Instead, counsel for KHIEU Samphan made filings in Case 002/02 which were either not urgent or did not seek any relief.³⁸

21. Counsel for KHIEU Samphan have asserted before the Trial Chamber that their work on the appeal brief in Case 002/01 prevents them from preparing for Case 002/02 hearings. However, when seeking extensions of time for their appellate filings since 13 August 2014, and while it was publicly known that Case 002/02 proceedings were scheduled to start, they have made no reference to their simultaneous preparations for trial hearings. Moreover, they did not inform the Supreme Court Chamber of their intention to refuse to participate in Case 002/02 proceedings until the filing of their appeal brief in Case 002/01.³⁹ If counsel required more time to draft their appeal brief because of their concurrent obligation to participate in Case 002/02 proceedings, they should have informed the Supreme Court Chamber of this. Instead, counsel waited until the first trial day in Case 002/02, when all preparations had been made by the Trial Chamber and all other parties, to inform this Chamber that they would not participate. This raises questions as to counsel's representations to both the Trial and Supreme Court Chambers.⁴⁰

22. Based on the foregoing, the Chamber finds that counsel's submission that a lack of resources provides legal justification for their violation of court orders and the obstruction of proceedings has no merit.

³⁶ T. 28 October 2014, p. 7 (Anta GUISSÉ: "the Khieu Samphan team did not sign any document to the effect that they would participate fully in the proceedings of 002/02 and the Appeal.").

³⁷ Ruling following TMM of 28 October 2014, para. 7.

³⁸ One request involved a document related to the topic of forced marriage which shall be considered as the final trial topic in Case 002/02. See *Demande de M. KHIEU Samphân visant à faire verser aux débats un nouveau document (lettre de 2-TCE-81)*, E324, 11 November 2014; Two other requests do not request any relief, but merely contest decisions made by the Chamber. See KHIEU Samphan Position, para. 46; Letter from Counsel for KHIEU Samphan.

³⁹ This is in contrast to counsel for NUON Chea who have recognised their obligation to participate in Case 002/02 proceedings concurrently with the Case 002/01 appeal. Cf. Second Request for Extension of Time and Page Limits for Filing Appeals Against the Trial Judgment in Case 002/01, F6, 2 October 2014, par. 13 ("The [NUON Chea] defence is therefore presently expected to be occupied with the Case 002/01 appeal and the Case 002/02 trial simultaneously.").

⁴⁰ *Règlement Intérieur National de la profession d'avocat* (France), Art. 21.4.3 ("Tout en faisant preuve de respect et de loyauté envers l'office du juge, l'avocat défend son client avec conscience et sans crainte, sans tenir compte de ses propres intérêts ni de quelque conséquence que ce soit pour lui-même ou toute autre personne."); Cambodian Code of Ethics, Art. 37 ("The lawyer shall not use any dishonest approaches and shall abide by the confrontational approach.").

3.2. Availability of KHIEU Samphan

23. At the hearing of 28 October 2014, counsel indicated that resources were, in fact, not the main reason for their refusing to participate, relying instead on the inability of KHIEU Samphan to participate in both proceedings simultaneously.⁴¹ The Chamber rejected this assertion, noting consistent international legal precedent that the drafting of an appeal brief is a technical exercise incumbent primarily on assigned counsel and not the Accused.⁴²

24. In face of this court order, counsel filed a document contesting the reasoning in the Trial Chamber's decision, relying in particular on a decision in the *Mladic* case before the ICTY.⁴³ The Trial Chamber in *Mladic* denied a motion to sever the proceedings against the Accused in part because, "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."⁴⁴ The ICTY Trial Chamber acknowledged, however, 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". On the facts, however, it considered that this would unduly delay the second trial.⁴⁵

25. Counsel for KHIEU Samphan fail to acknowledge the significant differences between the circumstances in *Mladic* and those relating to their client. Counsel for KHIEU Samphan have already had abundant time to engage in both trial preparations and drafting of their appeal under instructions from the Accused. The Accused and his counsel had 10 months of time between the closing arguments and the delivery of the Judgement in Case 002/01 to make trial preparations for Case 002/02.⁴⁶ In addition, the Accused and his counsel had full

⁴¹ T. 28 October 2014, p. 7 ("First of all, to respond to your questions, let me point out that, all that we have said so far doesn't stem from the issue of resources. The requests that were made were meant to enable Mr. Khieu Samphan to fully participate in his defence regarding the memorandum."); p. 13 ("[KHIEU Samphan] has told you that he cannot do both things at the same time at this very crucial time in his defence. This is a very important matter. I don't know why, what he said, seems to have fallen through the cracks. I think it is very essential and it is at the very centre of Mr. Khieu Samphan's application.").

⁴² Ruling following TMM of 28 October 2014, para. 4 citing *Prosecutor v. Boskoski and Tarculovski*, ICTY Pre-Appeal Judge, IT-04-82-A, Decision on Johan Tarculovski's Motion for Extension of Time to File Appeal Brief, 16 October 2008, p. 2; *Prosecutor v. Popovic et al.*, ICTY Appeals Chamber, IT-05-88-A, Decision on Motions for Extension of Time and For Permission to Exceed Word Limitations, 20 October 2010, p. 4.

⁴³ KHIEU Samphan Position, para. 20.

⁴⁴ *Prosecutor v. Mladic*, ICTY Trial Chamber, 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 ("*Mladic* Severance Decision"), para. 31.

⁴⁵ *Mladic* Severance Decision, para. 32.

⁴⁶ Counsel also rely on an assertion regarding the need to coordinate between two defence teams, a concern that is inapplicable here. Even when Standby Counsel is present in this case, they will not be assisting in the Defence, but instead will take over permanently from the current counsel should the latter choose not to appear.

access to the Case File during the over two-year long investigative phase (which is not a feature of ICTY proceedings) and significant time to engage in trial preparation prior to the first hearing in this case in 2011. Evidentiary proceedings in Case 002/02 were scheduled a significant period of time after the delivery of the Case 002/01 Trial Judgement on 7 August 2014, and after the filing of notices of appeal on 29 September 2014. The Trial Chamber initially scheduled proceedings for only three days per week, later reducing the schedule further to two days per week to permit the Accused further time to work on his appeal brief in conjunction with his counsel.⁴⁷ The Supreme Court Chamber granted counsel for KHIEU Samphan's request for additional time to prepare their appeal, including 21 additional days for their notice of appeal and 30 additional days for their appeal brief.⁴⁸ Therefore, significant accommodation has been made to permit the Accused adequate time to be engaged in both trial and appellate procedures in Case 002 and to instruct his counsel accordingly. While contesting the Chamber's decision, counsel for KHIEU Samphan fail to identify any jurisprudence or factual basis that would justify their suggestion that the Accused or his counsel are incapable of participating in Case 002/01 and Case 002/02 at the same time, especially considering the significant adjustments that have already been made.

26. The present case therefore has a very different procedural posture than the *Mladic* case. The ECCC Supreme Court Chamber has affirmed the Trial Chamber's decision to sever Case 002 and has mandated that the proceedings in Case 002/02 commence as soon as possible. This necessitates that the Case 002/02 proceedings move forward concurrently with the Case 002/01 appeal. Therefore, the Chamber finds counsel's argument that they may ignore court orders to participate in the second part of the severed case based on this jurisprudence is without a legal or factual basis.

3.3. Employment Contract and Counsel's Duties to their Client

27. Finally, in a letter to the Chamber on 23 November 2014, counsel for KHIEU Samphan submit that they must continue to adhere to their client's instructions not to participate in Case 002/02 despite the Chamber's decision of 21 November 2014 which orders them to disregard such instructions. Counsel submit that this order is in violation of the terms of their employment contracts with the United Nations. This, counsel assert, provides justification for

⁴⁷ See November 2014 Scheduling Order.

⁴⁸ Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs (SCC), F3/3, 29 August 2014; Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses (SCC), F9, 31 October 2014.

violating the Chamber's order to attend the proceedings. In the absence of any reference to specific contractual provisions, the Chamber is unable to fully evaluate this argument. It notes however that this contract requires counsel to abide by the ECCC Legal Framework, including the Internal Rules, and to be present at the ECCC where necessary for the effective representation of the Accused and whenever given reasonable notice to do so.⁴⁹

28. Counsel's duty of loyalty and duty to serve the best interests of their client equally do not justify the repeated violation of court orders and the continued obstruction of proceedings. The Chamber recognizes that these duties generally form an integral part of the counsel-client relationship.⁵⁰ Counsel remain, however, under a duty to adhere to Court orders and to act in the interests of justice.⁵¹ Counsel's claim that their motivation is to best serve the interests of their client is brought into question by the fact that they were in Paris rather than Cambodia during most of the period of time at issue. Further no court or justice system can tolerate behaviour that allows one party to unilaterally impose its own timetable upon the court and

⁴⁹ Template for Legal Service Contract, E320/2/2/1.1, 4 December 2014; Interoffice Memorandum of Office of Administration concerning "Request for Legal Services Contract between the United Nations and Co-Counsel for KHIEU Samphan", E320/2/2/1, 4 December 2014, paras 2-3 (noting counsel for KHIEU Samphan have signed contracts with the UN with terms identical to those contained in the Template).

⁵⁰ *Règlement Intérieur National de la profession d'avocat* (France), Art. 1.3 ("[l'avocat] respecte en outre, dans cet exercice, les principes d'honneur, de loyauté, de désintéressement, de confraternité, de délicatesse, de modération et de courtoisie."); International Criminal Court, Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1, December 2005 ("ICC Code of Conduct"), Art. 14 ("The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client."); International Criminal Tribunal For The Former Yugoslavia ("ICTY"), The Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, IT/125 REV. 3, August 2009 ("ICTY Code of Conduct"), Art. 3(iv) ("Counsel have a duty of loyalty to their clients consistent with their duty to the Tribunal to act with independence in the administration of justice"); cf. Cambodian Code of Ethics, Art. 18 ("The relationship between a lawyer and a client is contractual, and it derives from customary practices and mutual agreement. The lawyer shall be the one who defends and represents the client.").

⁵¹ Internal Rule 22(4); Cambodian Code of Ethics, Art. 37 ("The lawyer shall abide by the procedural rules and regulations of the court. The lawyer shall not use any dishonest approaches and shall abide by the confrontational approach. The lawyer has the rights to present any matters that he/she perceives may bring about benefits for his/her client."), Art. 39 ("A lawyer shall not cause any delay in any court proceeding through negligence or on unreasonable ground, which may affect the justice."); *Règlement Intérieur National de la profession d'avocat* (France), Art. 21.4.1 ("*L'avocat qui comparait devant les cours et tribunaux ou participe à une procédure doit observer les règles déontologiques applicables devant cette juridiction.*"), Art. 21.4.3 ("*Tout en faisant preuve de respect et de loyauté envers l'office du juge, l'avocat défend son client avec conscience et sans crainte, sans tenir compte de ses propres intérêts ni de quelque conséquence que ce soit pour lui-même ou toute autre personne.*"); ICC Code of Conduct, Art. 14(2) ("When representing a client, counsel shall (a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code" (emphasis added), Art. 24(1) ("Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute."); ICTY Code of Conduct, Art. 3(iv), Art. 8(C) ("Counsel shall not advise or assist a client to engage in conduct which counsel knows is criminal or fraudulent, in breach of the Statute, the Rules, this Code or any other applicable law and, where counsel has been assigned to the client, the Directive."); *Prosecutor v. Barayagwiza*, ICTR Trial Chamber, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, paras 20, 21, 24.

other parties. With respect to the claim that the Chamber cannot act in a way which would infringe upon counsel's independence, the Chamber finds that counsel's independence can only be exercised within the limits of the legal framework applicable before the court and without undue prejudice to the rights of the parties. The Chamber therefore finds that an assertion that counsel is following the instructions of their client provides no defence.

3.4. Conclusion

29. The Chamber has approached counsel's failure to attend the proceedings in Case 002/02 with a good deal of caution. It has given counsel for KHIEU Samphan every opportunity to comply with court orders, offering to provide additional resources and to limit the number of court hearings. The Chamber has given counsel explicit warnings as to the potential consequences of their actions. Yet counsel for KHIEU Samphan have continued in their conduct which is unjustified by law or by the circumstances of this case, and which is contrasted by the ability of counsel for NUON Chea to participate in the trial proceedings. The result of their refusal to attend court hearings is, to date, the loss of 25 trial days over the course of 10 weeks. Counsel have filed repetitious motions and sought additional pay while their lack of diligence has prevented the hearing of evidence on an important aspect of the Khmer Rouge era, the treatment of ordinary Cambodians in cooperatives such as Tram Kok.

30. Counsel have admitted to this conduct, though they have attempted to justify their actions in two filings before the Chamber.⁵² The submissions in these filings are repetitious, frivolous and in support of a defence strategy that is legally groundless, inconsistent with counsel's duties and fashioned to obstruct the proceedings in Case 002/02. To permit counsel to be financially compensated for such actions would be to countenance this behaviour. The Chamber therefore considers it necessary to recommend to the Defence Support Section to refuse payment for any work requested by counsel for KHIEU Samphan on these two documents.

31. Pursuant to Internal Rule 38(2), the Chamber may also refer to the "appropriate professional body" conduct by counsel that has obstructed proceedings. The Chamber notes that the wording of this provision is broader than that found in the equivalent provisions of

⁵² As discussed above, the first such document aims at contesting a decision and order of the Trial Chamber, which rejected one rationale put forward by the KHIEU Samphan Defence for refusing to appear at court hearings. *See* KHIEU Samphan Position. The second filing is a letter which supplements the reasons put forward in the first document. *See* Letter from Counsel for KHIEU Samphan.

other international courts, and may allow the Chamber to refer such conduct to the appropriate professional bodies of international courts and tribunals, including those which are responsible for maintaining the lists of Defence counsel.⁵³ At this time, the Chamber considers it appropriate to inform the relevant national bar associations of the conduct of their respective members which may be considered unethical or unprofessional as outlined in the present decision.⁵⁴ Consequently, the appropriate professional body to which to refer the misconduct of counsel KONG Sam Onn is the Cambodian Bar Association and the appropriate professional body to which to refer the misconduct of counsel Arthur VERCKEN and Anta GUISSÉ is, in the first instance, the Disciplinary Board of the Paris Bar Association. If necessary, the Chamber may also refer the conduct of international counsel to the Cambodian Bar Association.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

FINDS that the violation of court orders to attend scheduled hearings by KONG Sam Onn, Arthur VERCKEN and Anta GUISSÉ (counsel for KHIEU Samphan) amounts to an obstruction of the proceedings, pursuant to Internal Rule 38(1);

DECIDES to refer the misconduct of counsel Arthur VERCKEN and Anta GUISSÉ to the President of the Paris Bar Association and the Prosecutor General of the Paris Appeal Court and the misconduct of counsel KONG Sam Onn to the President of the Cambodian Bar Association, pursuant to Internal Rule 38(2) with a view to seising their respective disciplinary boards;

REQUESTS the President of the Paris Bar Association, the Prosecutor General of the Paris Appeal Court, and the President of the Cambodian Bar Association to inform the Chamber of any decisions made as a result of this referral as soon as such are made, and in the event a

⁵³ See e.g. ICTY Rule 46(B), ICTR Rule 46(B), both of which refer to the professional body regulating the conduct of counsel in the counsel's "State of admission".

⁵⁴ See Internal Rule 11(4)(c)(i)(A foreign applicant for inclusion in a list of counsel authorized to represent Accused at the ECCC must be a member in good standing of a recognized association of lawyers⁵ in a United Nations Member State); See also, (French law) *Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*; Art. 22 ("Un conseil de discipline institué dans le ressort de chaque cour d'appel connaît des infractions et fautes commises par les avocats relevant des barreaux qui s'y trouvent établis. Toutefois, le Conseil de l'ordre du barreau de Paris siégeant comme conseil de discipline connaît des infractions et fautes commises par les avocats qui y sont inscrits[...]"); Art. 23 ("L'instance disciplinaire compétente en application de l'article 22 est saisie par le procureur général près la cour d'appel dans le ressort de laquelle elle est instituée ou le bâtonnier dont relève l'avocat mis en cause."); Art. 25 ("Toute juridiction qui estime qu'un avocat a commis à l'audience un manquement aux obligations que lui impose son serment, peut saisir le procureur général en vue de poursuivre cet avocat devant l'instance disciplinaire dont il relève.").

decision is not made by 30 June 2015, to inform the Chamber of the status of the referrals at that time;

RECALLS Internal Rule 11(2)(h), pursuant to which the Defence Support Section (DSS) has the responsibility to "monitor and assess the fulfilment of all contracts [...] and authorise corresponding remuneration in accordance with Defence Support Section administrative regulations";

RECOMMENDS that DSS refuse any request by counsel for KHIEU Samphan to be paid for work claimed on E320/1/1 and E320/2/1 and **DIRECTS** DSS to report back to the Chamber by 8 January 2015 on steps it has taken to implement this recommendation. *EW-18*

Phnom Penh, 19 December 2014
President of the Trial Chamber

