



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

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

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 July 2020
Language(s): Khmer/English
Classification: PUBLIC

**DECISION ON CIVIL PARTY LEAD CO-LAWYERS' REQUESTS CONCERNING
KHIEU SAMPHÂN'S NON-COMPLIANCE WITH ARTICLE 6 OF THE PRACTICE
DIRECTION ON THE FILING OF DOCUMENTS**

Co-Prosecutors
CHEA Leang
Brenda HOLLIS

Accused
KHIEU Samphân

Civil Party Lead Co-Lawyers
PICH Ang
Megan HIRST

Co-Lawyers for NUON Chea
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 (respectively “Chamber” and “ECCC”) is seised of the Civil Party Lead Co-Lawyers’ Requests concerning KHIEU Samphân’s Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents filed on 26 May 2020.¹

1 PROCEDURAL HISTORY

1. On 27 February 2020, KHIEU Samphân (or “the Defence”) filed his appeal brief in French.² On 11 May 2020, the English translation was notified.
2. On 26 May 2020, the Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) filed the present Requests.
3. On 1 and 4 June 2020, the Co-Prosecutors and the Defence respectively filed their responses.³
4. On 9 June 2020, the Lead Co-Lawyers filed their reply to the Defence’s Response.⁴
5. The Defence’s corrections on the form of the Appeal Brief were filed on 11 June 2020.⁵
6. On 12 June 2020, the Khmer translation of the Appeal Brief was notified.

2 SUBMISSIONS

Requests

7. The Lead Co-Lawyers submit that the table of authorities filed with the Appeal Brief (“TOA”) does not comply with article 6 of the Practice Direction on the Filing of Documents before the ECCC (“Article 6”) on the basis that (i) some authorities are not listed in the TOA, (ii) some appear on the Case File but are not properly identified, and (iii) some do not appear on the

¹ Requests Concerning KHIEU Samphân’s Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents, **F56**, 26 May 2020 (“Requests”).

² KHIEU Samphân’s Appeal Brief (002/02), **F54**, 27 February 2020 (“Appeal Brief”).

³ Co-Prosecutors’ Response to the Civil Party Lead Co-Lawyers’ requests concerning KHIEU Samphân’s Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents, **F56/1**, 1 June 2020 (“Co-Prosecutors’ Response”); Response from KHIEU Samphân’s Defence to the Civil Parties’ Request regarding the Table of Authorities, **F56/2**, 4 June 2020 (“Defence’s Response”).

⁴ Reply to KHIEU Samphân concerning non-compliance with Article 6 of the Practice Direction on the filing of documents, (“Reply”), **F56/2/1**, 9 June 2020.

⁵ Demande de rectificatif du document F54, **F54/Corr-1**, filed 11 June 2020 and notified 25 June 2020.

Case File and have not been attached.⁶ Thus, they request the Chamber to (i) direct the Defence to re-file a complete TOA including all required attachments pursuant to Article 6 at the earliest opportunity and (ii) allow them to file their own table and copies of authorities within 28 days of filing their response to the Appeal Brief (“Response Brief”), to compensate for time lost and to benefit from the same advantage obtained by the Defence.⁷

Co-Prosecutors’ Response

8. The Co-Prosecutors support the Requests.⁸

Defence’s Response

9. The Defence opposes both Requests and asks the Chamber to dismiss them.⁹ While acknowledging that its TOA needs corrections, the Defence submits that it had planned to file a corrected version of its TOA “at the earliest possibility” once the corrected version on the form of its Appeal Brief was filed, adding that it is currently in the process of correcting the form of its Appeal Brief.¹⁰ It argues that this renders the first request moot.¹¹ Regarding the part of the request seeking the TOA to be re-filed “together with all attachments not found in the ECCC legal compendium or Case File”, the Defence responds that in accordance with the Chamber’s memorandum amending the requirement to file copies of authorities, Case 002 parties are no longer required to append the documents cited that are already in the public domain.¹² The Defence thus argues that this part of the request is unfounded.¹³ The Defence further submits that the second request is unjustified, arguing that it did not benefit from any advantage and that there is no lost time to compensate for responding parties.¹⁴ Lastly, the Defence states that it is hard to comprehend how the Lead Co-Lawyers’ ability to respond in a timely manner can be affected given that, pending the Khmer translation, their filing time limit has not commenced and that they have ample time to file their Response Brief.¹⁵

⁶ Requests, paras 5-7.

⁷ Requests, paras 2, 7, 9.

⁸ Co-Prosecutors’ Response, para. 2.

⁹ Defence’s Response, paras 3, 10, 17-19.

¹⁰ Defence’s Response, paras 6, 9.

¹¹ Defence’s Response, para. 9.

¹² Defence’s Response, paras 7-8 citing Memorandum of the Supreme Court Chamber entitled “Amendment of requirement to file copies of authorities”, **EI16/1/3**, 28 October 2011 (“2011 Memorandum”).

¹³ Defence’s Response, paras 7, 10-11, 19.

¹⁴ Defence’s Response, paras 13-14, 17-18.

¹⁵ Defence’s Response, paras 15-16.

Lead Co-Lawyers' Reply

10. The Lead Co-Lawyers request the Chamber to set a deadline for filing the corrected versions of both the Appeal Brief and the TOA “at the earliest opportunity”, arguing that parties should not be required to respond on the basis of deficient documents.¹⁶ They further request the Chamber to clarify that no substantive corrections to the Appeal Brief will be permitted.¹⁷ While the Lead Co-Lawyers agree that the 2011 Memorandum exempts parties from attaching authorities “easily accessible to the Chamber and all parties”, they highlight that attachment of copies of authorities that are not easily accessible is still required.¹⁸ Regarding the 28 days sought, the Lead Co-Lawyers elaborate that when setting the time limit for their own Response Brief, the Chamber already accounted for the time necessary for the Khmer translation of the Appeal Brief; however no one foresaw that corrections on the TOA (and perhaps on the Appeal Brief) could be received more than three months after the filing deadline.¹⁹ To them, these three months amount to an advantage for the Defence that should not result in prejudicing responding parties.²⁰

3 APPLICABLE LAW

11. Internal Rule 39(6) provides that documents filed before the ECCC “shall be submitted to the Greffier of the [Chamber] in accordance with the applicable laws, these IRs, the applicable Practice Directions and, where appropriate, any decision by the judges”.

12. Article 3.17 of the Practice Direction on the Filing of Documents (“Practice Direction”) explains that:

Corrections to records in the case file shall be filed using the form in Appendix G. Corrections to original records shall be approved by the greffier while corrections to a translation shall be approved by the Interpretation and Translations Unit. If the text of a filed document is updated, the new document shall be filed together with tracked changes of pages that have changed.

¹⁶ Reply, paras 3-4, 12.

¹⁷ Reply, paras 4-5, 12.

¹⁸ Reply, paras 6-8.

¹⁹ Reply, paras 9-10.

²⁰ Reply, para. 11.

13. Article 6 regulating the list of authorities provides:

6.1 Documents shall be filed with a list of the authorities referred to therein. Such list shall include the name, date and full citation for each authority, specifying which provisions, paragraphs or pages are relied upon, together with any explanatory note required under this paragraph. Where an authority exceeds 10 pages in English or French [...], a copy of the first page of the authority and the relevant section of the text shall be filed along with a note in the List of Authorities specifying that the authority exceeds 10 in English or French [...], as appropriate.

[...]

6.3 Documents shall be filed with copies of all authorities listed therein, with the exception of those documents listed in ECCC Law Compendium hosted in the ECCC's official website.

6.4 Where an authority has previously been filed in the same case or proceeding it shall not be re-filed, but the person filing the later document shall indicate in the list of authorities the title, the court record document number and the ERN number of the document with which the authority was previously filed. [...]

14. In its 2011 Memorandum, referencing the above-mentioned article 6.3 of the Practice Direction, the Chamber informed the parties in Case 002 that:

[...] like the Trial Chamber, it exempts them from the need to file copies of authorities, such as *ad hoc* Tribunal jurisprudence and well-known international instruments, that are already in the public domain and easily accessible by the Chamber and all parties. Authorities that are not easily accessible must still be filed with the Table of Authorities in accordance with the Practice Direction on Filing. All authorities must be listed in the Table of Authorities for ease of reference.

4 DISCUSSION

Preliminary remark

15. In its Response, the Defence notified the Chamber and the responding parties that it was currently in the process of correcting the form of its Appeal Brief.²¹ The Defence's corrections were filed on 11 June 2020.²² The Lead Co-Lawyers' request which states that corrections to the Appeal Brief must be filed within a specified period and limited to no substantive corrections²³ is therefore moot.

First relief sought

16. The Lead Co-Lawyers request the Chamber to instruct the Defence to re-file its TOA to (i) include all authorities cited in the Appeal Brief and, amongst these, that the Defence (ii)

²¹ Defence's Response, para. 6.

²² Demande de rectificatif du document F54, **F54/Corr-1**, filed 11 June 2020 and notified 25 June 2020.

²³ Reply, para. 12 (2).

“properly identif[ies]” the authorities already on the Case File and (iii) attach copies of all the authorities that are not already on the Case File.²⁴

17. With regard to the first two points, the Defence recognizes that its TOA contains mistakes and states that it had already planned to file a corrected version of its TOA once the corrected version of the form of its Appeal Brief has been filed.²⁵ Although the Defence points out that its resources have significantly been reduced since the filing of its Appeal Brief,²⁶ the Chamber notes that it already benefited from more than three months to review its TOA. Taking into consideration that corrections will trigger additional translations and that the Khmer translation of the Appeal Brief was filed on 12 June 2020 thereby starting the time for responses to the Appeal Brief, the Chamber directs the Defence to file the corrected version of its TOA within 28 days of this decision. Such corrected TOA shall exhaustively list the authorities referred to in the Appeal Brief and identify with precision the authorities already on the Case File as provided by articles 6.1 and 6.4 of the Practice Direction.

18. Noting that the 2011 Memorandum was issued in the course of Case 002/01, the Chamber considers that its content shall stand for Case 002/02 and that, therefore, the amended and corrected TOA shall contain copies of all authorities referenced in the Appeal Brief that are not already on the Case File and not easily accessible.

19. Considering all of the above, the Chamber grants the first relief sought.

Second relief sought

20. The Chamber agrees with the Lead Co-Lawyers that they should not suffer prejudice from the fact that the complete and accurate version of the TOA will be filed more than three months after the initial deadline.²⁷ Considering that such filing inevitably causes delay to the responding parties, the second relief is therefore granted.

²⁴ Requests, paras 6-7.

²⁵ Defence’s Response, paras 6-7.

²⁶ Defence’s Response, para. 9.

²⁷ Reply, paras 10-11.

5 DISPOSITION

21. For the foregoing reasons, the Supreme Court Chamber:

DECLARE the Lead Co-Lawyers' request concerning the corrections on the form of the Appeal Brief moot;

GRANTS the other reliefs sought by the Lead Co-Lawyers;

DIRECTS the Defence to file the corrected version of its TOA within 28 days of this decision, including copies of all authorities referenced in the Appeal Brief that are not already on the Case File and not easily accessible, in accordance with articles 3.17, 6.1, 6.3, and 6.4 of the Practice Direction as amended by the 2011 Memorandum;

GRANTS the Lead Co-Lawyers 28 days for the filing of their table of authorities to run from the date on which their Response Brief is filed in one language.

Phnom Penh, 6 July 2020

President of the Supreme Court Chamber



KONG Srim