

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S OBSERVATIONS
FOLLOWING HIS TRANSFER TO KANDAL PROVINCIAL PRISON**

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Distributed to:

Supreme Court Chamber
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KHIEU Samphan

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I. INTRODUCTION

1. On 20 March 2023, Khieu Samphan’s defence team (the “Defence”) filed observations expressing concerns about (1) his difficulty in reviewing the Case 002/02 Appeal Judgment¹ without use of his laptop, which it appears he is not permitted to access in the Kandal Provincial Prison and (2) his inability to communicate with his international lawyer.² The Defence assert that these two issues prevent Khieu Samphan from receiving appropriate advice and providing observations related to the preparation of a possible application for revision of final judgment under Rule 112 of the Internal Rules.³ The Defence also cite an ethical obligation to assist Khieu Samphan in understanding the reasoning behind the Appeal Judgment.⁴
2. The Defence additionally express doubt about the appropriate body for resolving these concerns, questioning whether, in light of the Office of Administration’s Observations of 23 February 2023,⁵ the Supreme Court Chamber continues to exist in its current form and whether it retains jurisdiction over issues related to Khieu Samphan’s rights.⁶
3. The Co-Prosecutors do not dispute the right of Khieu Samphan to read and understand the Appeal Judgment, but observe that a Rule 112 application for revision is an extraordinary remedy that is not primarily related to a detailed analysis of a judgment in the way that, for example, an ordinary appeal from judgment is. The Co-Prosecutors further observe that it is clear that the Supreme Court Chamber remains constituted and is actively engaged in its functions set out in the Addendum to the UN-RGC Agreement; accordingly there is no reason to doubt that it is the proper forum for addressing any alleged violations of Khieu Samphan’s rights.

II. Applicable Law

4. Internal Rule 112(1) provides in relevant part:

¹ F76 Appeal Judgment, 23 December 2022 (“Appeal Judgment”).

² F83 Observations après le transfert de KHIEU Samphân en détention la prison provinciale de KANDAL et la réponse de l’administration en date du 23 février 2023, 20 March 2023 (notified 21 March 2023) (“Defence Observations”), paras 6-9.

³ F83 Defence Observations, para. 9; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 10) as revised on 27 October 2022 (“Internal Rules”), Rule 112.

⁴ F83 Defence Observations, para. 10.

⁵ F77/1/2 Office of Administration’s Response to the Supreme Court Chamber’s Request for Information Regarding the Supervision of Khieu Samphan’s Sentence, 23 February 2023 (“OoA Observations”).

⁶ F83 Defence Observations, paras 13-16.

The convicted person [...] may apply to the Chamber to revise the final judgment on the grounds that:

- a) new evidence has been discovered that:
 - i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and
 - ii) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
- b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; or
- c) one or more of the judges who participated in a judicial investigation or a conviction, committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under these IRs.⁷

III. SUBMISSIONS

(i) Access to laptop and to meet with national lawyer

5. The Co-Prosecutors make the following observations concerning Khieu Samphan's arguments concerning (a) access to a laptop and (b) putting in place a procedure permitting his national lawyer, Mr Kong Sam Onn, to visit Khieu Samphan in optimal conditions.
6. As the Office of Administration has correctly noted, "the convicted person Khieu Samphan is under full jurisdiction of the General Department of Prisons of the Ministry of Interior".⁸ Khieu Samphan, like any other prisoner under the jurisdiction of the General Department of Prisons, is obliged to comply with prison regulations concerning access to a laptop or other electronic devices. The Co-Prosecutors note that Khieu Samphan has not identified a general right in international human rights law for a prisoner to have access to a laptop, nor has he established that there would be a real risk of prejudicing legal proceedings if access is not given to him. The Co-Prosecutors note that Khieu Samphan has access to the Appeal Judgment, which is available to him in Khmer, French and English. There appears to be no reason why the judgement cannot be printed out in, for example, A3 format, to facilitate legibility. Khieu Samphan's national lawyer is able to meet with him in the Kandal Provincial Prison, provide him with documents, and discuss the Appeal Judgment with him.⁹ Khieu Samphan's national lawyer speaks Khmer, Khieu Samphan's native language, and one of the languages in which the Appeal Judgment is available. Khieu Samphan's national lawyer also has access to all evidentiary materials

⁷ Internal Rule 112(1)

⁸ F77/1/2 OoA Observations, para. 2.

⁹ F83 Defence Observations, para. 11.

cited in the Appeal Judgment. Khieu Samphan therefore has access to counsel who can communicate with him in a language he understands and who has access to all materials required to understand and explain the Appeal Judgment.

7. In this context, the Co-Prosecutors note that at the time they visited the Kandal Provincial Prison in December 2022 prior to Khieu Samphan's transfer, they were assured that Khieu Samphan would be permitted to receive visitors from 8:00-11:00 am and 2:00-5:00 pm six days per week, and that his lawyers would be permitted to visit him, hold discussions with him, and show documents to him during those hours.¹⁰ Furthermore, Khieu Samphan's custom-built cell is large and provides ample room for him to hold confidential discussions when meeting with his national lawyer. A shaded area outside his cell, exclusively for Khieu Samphan's use, allows further ample room for meetings with his national lawyer.
8. The Co-Prosecutors also note that the Office of Administration has designated two individuals to whom the Defence may turn for assistance. First, "one liaison officer to facilitated timely and regular contact with the national authorities on matters relating to the convicted person's sentence, including reporting on enforcement and treatment. Further, the Office of Administration has designated a separate desk officer as a contact point for all judicial stakeholders including the chambers and parties for any matter pertaining to the convicted person's detention."¹¹ Khieu Samphan's defence team has not clarified in the Defence Observations whether they have attempted to reach a solution to the problems they identify with these two officers, who are expressly mandated to deal with issues relating to Khieu Samphan's detention, and, if so, what their response has been.

(ii) Revision of a final judgment under Rule 112 is an extraordinary remedy based on circumstances external to the Appeal Judgment; it is not a second level of appeal

9. Khieu Samphan's arguments that he requires a laptop and assistance to read and understand the Appeal Judgment are explicitly linked to the notion that such review is being undertaken for the purposes of considering an application for revision under Rule 112.¹² The Co-Prosecutors accept that Khieu Samphan has the right to read the judgment against him. However, there is no further appeal, and there are therefore no ongoing

¹⁰ F81 Co-Prosecutors' Observations on Conditions of Service of Sentence, 12 January 2023, para. 23.

¹¹ F77/1/2 OoA Observations, para. 4.

¹² F83 Defence Observations, para. 9.

proceedings requiring Khieu Samphan to analyse evidence admitted at trial and on appeal. The only remedy available to Khieu Samphan to secure a different verdict is revision of final judgment under Internal Rule 112. This is an extraordinary remedy that will be applied only under very limited circumstances. It is emphatically not an appeal from the Appeal Judgment.

10. In particular, an application for revision under Internal Rule 112 will only be appropriate when: new evidence is discovered that was unavailable at the time of trial *and* that likely would have resulted in a different verdict; when it is newly discovered that decisive evidence was false, forged or falsified; or when a judge committed serious misconduct or serious breach of duty in the relevant case.¹³ The International Law Commission has expressed the view that revision should “not extend [...] to alleged errors in the assessment of facts presented at the trial or to errors of law or procedure, which are a matter for the appeals process”.¹⁴ The *ad hoc* tribunals apply a more lenient standard of revision (called “review” at the *ad hoc* tribunals) than that applicable before the ECCC and the ICC. But even under that lower standard, a judge has held that “it is not [...] possible to challenge the previous holdings of the [...] Chamber as incorrect on the basis on which they were made”; rather, an application for review will only be successful when “it can be seen that those findings would themselves have been different had certain new facts been available to the [...] Chamber when the original decision was made”.¹⁵ Thus, while it may be appropriate for Khieu Samphan to have the assistance of counsel in understanding the judgment against him for other reasons, an understanding of the Appeal Judgment is only required for Rule 112 purposes once one of the prerequisite circumstances in Rule 112(1) has been identified. The Co-Prosecutors emphasise that all three prerequisites in Rule 112(1) depend on the emergence of new evidence or other information which, by definition, will not be contained in the Appeal Judgement itself.

¹³ Internal Rule 112(1).

¹⁴ International Law Commission, Draft Statute of the International Criminal Court, with commentaries, 1994, A/49/10, art. 50. The International Law Commission expressed this view with respect to the remedy of revision at the International Criminal Court in its Draft Statute. The ECCC provision for revision is clearly modelled on that of the ICC—Rule 112(1) copies Article 84(1) of the Rome Statute closely—so this conclusion should be considered applicable to an application for revision of final judgment at the ECCC as well.

¹⁵ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabudeen, para. 2.

(iii) ***The Supreme Court Chamber remains constituted and is the proper forum for Khieu Samphan to address alleged violations of his rights***

11. Although Khieu Samphan expresses uncertainty as to whether the Supreme Court Chamber continues to exist in its current form or retains jurisdiction over his conditions of detention,¹⁶ the Addendum to the UN-RGC Agreement makes it clear that the Extraordinary Chambers remain constituted as required to carry out the functions outlined in the Addendum.¹⁷ The Addendum states that “the Extraordinary Chambers shall *continue to carry out* the following functions”, demonstrating the continuous nature of the constitution and duties of the Chambers.¹⁸ The Addendum indicates that Judges will, from time to time, be “required to perform the functions identified in [article 2(1)]”.¹⁹ It also provides for the appointment of additional international judges “to ensure that there are a sufficient number of international judges available to carry out the functions under [article 2(1)]”.²⁰ These provisions make it clear that the Judges and Chambers of the ECCC (along with other organs of the court) are intended to carry out the residual functions set out in article 2(1), which include both Rule 112 applications for revision of final judgment and monitoring the treatment of convicted prisoners.²¹ The reference to “the Chamber” in Rule 112(1) refers to the Chamber which issued the final judgement, which in the present case is the Supreme Court Chamber.
12. The Supreme Court Chamber’s recent Decision on Guidelines for Reclassification of Documents on Case File 002 makes it clear that the Supreme Court Chamber remains constituted and that it is currently and will continue to be actively engaged in carrying out the functions outlined in the Addendum.²² The Co-Prosecutors are therefore of the view that it is clear that the Supreme Court Chamber is the proper forum for the determination of Khieu Samphan’s rights on matters related to his detention (provided that Khieu Samphan’s defence team has first exhausted consultations with the national authorities and

¹⁶ F83 Defence Observations, paras 13-16.

¹⁷ Addendum to the Agreement between the Royal Government of Cambodia and the United Nations concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers, 11 Aug 2021 and 26 Aug 2021 (“Addendum”).

¹⁸ Addendum, art. 2(1).

¹⁹ Addendum, art. 2(5).

²⁰ Addendum, art. 2(6).

²¹ Addendum, art. 2(1).

²² F71/1/1/8 Decision on Guidelines for Reclassification of Documents on Case File 002, 20 March 2023.

the two officers nominated by the Office of Administration to deal with matters relating to his detention) or Rule 112 proceedings.

Respectfully submitted,

Date	Name	Place	Signature
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