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E320/1

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

សាធារណៈ / Public

TRIAL CHAMBER

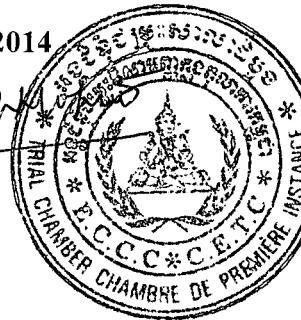
TO: All Parties, Case 002

Date: 31 October 2014

FROM: NIL Nonn, President of the Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer

SUBJECT: Ruling following TMM of 28 October 2014



1. The Chamber notes that both Defence teams, following a warning, attended the Trial Management Meeting (TMM) of 28 October 2014, during which they made submissions in relation to their respective reasons for their previous conduct and their stated unwillingness to attend future substantive hearings prior to the occurrence of certain specific events. The Chamber has heard these submissions and considers them below.

2. The NUON Chea Defence submits that the Code of Criminal Procedure of Cambodia ("CPC") requires a judge that is the subject of a disqualification motion to immediately cease to participate in the proceedings (T. 28 October 2014, p. 67). In this context, the Chamber refers to its previous ruling (E320, para. 2) in which it has confirmed its ability to continue sitting pending resolution of the disqualification applications, pursuant to Internal Rule 34(5). The NUON Chea Defence's reliance on one aspect of the CPC in this context is misplaced. Under the CPC, judicial disqualification is governed by Article 556 which provides for seven specific grounds for disqualification. By contrast, the ECCC gives effect to the broader grounds for disqualification contained in the Internal Rules.¹ Further aspects of the CPC differ from the procedure applicable before the ECCC in relation to disqualification. For example, under the CPC, in the event that an application for disqualification is rejected, the applicant may be fined and be liable in damages to the challenged judge (Article 561). There is no such provision at the ECCC.

¹ See Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, E55/4, 23 March 2011, para. 10.

3. The KHIEU Samphan Defence submits that the Accused has a right to fully participate in his own defence and that he is unable to do so while participating simultaneously in trial proceedings in Case 002/02 and drafting the appeal brief against the judgement in Case 002/01 (T. 28 October 2014 (French Draft), pp. 8, 13-17, *see also*, E314/5/1). It is submitted that the Accused is accordingly faced with a choice between devoting himself to either the preparation of an appeal brief or participation in the trial hearings (T. 28 October 2014 (French Draft), p. 25). On this basis, the Accused has chosen to dedicate himself fully to preparing his appeal brief and has instructed counsel to do the same (T. 17 October 2014, pp 75-77; T. 28 October 2014 (French Draft), p. 7). The KHIEU Samphan Defence states that, following the Accused's instructions (which they agree with: T. 28 October 2014 (French Draft), p. 19), counsel will not participate in the proceedings in Case 002/02 at this time (p. 20) as this would affect its ability to fully work on the appeal brief (T. 28 October 2014 (French Draft), p. 18-19). This situation is expected to continue until the KHIEU Samphan Defence has finished with its appeal brief (*see* T. 28 October 2014, (French Draft), pp. 22, 30, 34-35).²

4. The Chamber notes that the primary concern expressed by the KHIEU Samphan Defence is the availability of their client for preparation of the appeal brief. Legal proceedings against the Accused are currently underway at trial and on appeal. There is no choice to be made between the proceedings because neither is optional, even for a limited period of time. Similarly, the submission that the Accused's right to participate fully in his defence is violated because he is unable to spend all his time working on the appeal brief is in direct contradiction to relevant international jurisprudence. This jurisprudence states that participation in the briefing stage of appeal proceedings is a technical exercise involving the identification of potential errors of law or fact in the trial judgement, tasks recognised as the primary responsibility of assigned counsel.³ Thus, applications for delays in briefing schedules have been denied even where the judgement being appealed was not yet available in the language of the accused. Moreover, the KHIEU Samphan Defence has already filed its notice of appeal.

5. The Chamber finds that the Accused's right to participate in his defence on appeal is respected through the full participation of his counsel with his support. KHIEU Samphan's involvement in his appeal proceedings is accordingly not a valid legal basis for either the Accused or his counsel to not participate in the ongoing Case 002/02 trial proceedings.

6. In an attempt to balance the needs outlined by the KHIEU Samphan Defence with the rights of other parties to an expeditious trial the Chamber is prepared to decrease the number of sitting days to two per week during the months of November and December. The Chamber notes that this means that there will be a total of four sitting days in November and six sitting days in December.

² Depending on the Supreme Court Chamber's decision on the request for the extension of time, that date would be 29 December 2014, as the delay of 174 days referred to in the motion, relates to the finalisation of the English translation. However, Co-counsel for KHIEU Samphan stated that the Defence would be ready to resume participation in Case 002/02 in mid-January (T. 28 October 2014 (French Draft), p. 31).

³ *Prosecutor v. Boskoski and Tarculovski*, 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.*, IT-05-00-A, Decision on Motions for Extension of Time and For Permission to Exceed Word Limitations, 20 October 2010, p. 4.

7. Having dismissed the KHIEU Samphan Defence's primary submission, the issue of adequate resources becomes relevant. While the Defence did not appear to maintain this objection during the TMM, some discussion of this issue is appropriate. The Chamber is aware that the KHIEU Samphan Defence has requested further resources from the Office of Administration and would look favourably on this and any other reasonable requests for additional resources advanced by the team to enable it to participate simultaneously on appeal and in the current proceedings.

8. With respect to the issue of limited access to the Accused, while noting that KHIEU Samphan indicated that he has almost daily contact with his Defence team (*see* T. 28 October 2014 (French Draft), pp. 7, 35-36, 39) the Chamber is willing to support any reasonable request for access that may be raised. It expects however, that the Defence will first attempt to make any necessary arrangements directly with the Detention Facility authorities.

9. The Chamber remains seised of the Co-Prosecutor's motion to assign *amici curiae* (E321) and reserves its position on this request.

10. The Parties are hereby ordered to appear at the hearings on the substance in Case 002/02, starting on Monday 17 November 2014. The Chamber will provide the parties in due course with further information regarding any possible change in the previously issued order of witnesses.

11. Based on prior conduct and statements that have been made (*see e.g.*, for NUON Chea, T. 28 October 2014, p. 71; for KHIEU Samphan, T. 28 October 2014 (French Draft), pp. 21, 34-35), the Chamber puts the KHIEU Samphan and NUON Chea Defence on notice that it will take firm action should either fail to abide by the order to appear in court.