

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** Mr KHIEU Samphan**Filed to:** Trial Chamber**Original Language:** French**Date of Document:** 10 April 2013**CLASSIFICATION****Classification of the Document Suggested by the Filing Party:** Public**Classification by the Trial Chamber:****Classification Status:****Review of provisional classification:****Records Officer's Name:**

**Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge
Marcel Lemonde**

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Before:**The Trial Chamber**

Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors:

CHEA Leang
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All Civil Party Lawyers**All Defence Teams**

MAY IT PLEASE THE TRIAL CHAMBER

1. On 29 March 2013, the Defence filed an application for Mr KHIEU Samphan's immediate release on bail.¹² Mr KHIEU Samphan's Defence recalled its burden to substantiate its application in filing it at this stage of the proceedings.
2. Today, Mr KHIEU Samphan's Defence requests that the book recently published by Judge Marcel Lemonde, a former ECCC Co-Investigating Judge³ be placed before the Chamber and admitted into evidence, pursuant to Internal Rule 87(4).⁴
3. As the book was published in January 2013, it was undisputedly not available before commencement of the proceedings, and, no matter how diligent it was, the Defence could not possibly have discovered it before it was published.
4. The chosen extracts are conducive to ascertaining the truth and are in accordance with the criteria set out in Rule 87 (3).⁵ They show evidence that challenges the legality of Mr KHIEU Samphan's continued detention in that they highlight undue procedural delays, and show that the allegedly founded reasons to believe that he may have committed the crimes for which he is being charged are unpersuasive.

I. Excessive duration of the pre-trial detention

5. In his book, Judge Lemonde refers to his investigations "strategy" in Cases 001 and 002. This "strategy" had an adverse impact on the duration of Mr KHIEU Samphan's pre-trial detention.

¹ **E275**, Application for KHIEU Samphan's Immediate Release on Bail, 29 March 2013.

² *Ibid.*, para. 9.

³ *Un juge face aux Khmers rouges, de Marcel LEMONDE, avec la collaboration de Jean REYNAUD Editions du Seuil, janvier 2013* (the "book authored by Judge Lemonde").

⁴ "During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

⁵ "[...] The Chamber may reject a request for evidence where it finds that it is: (a) irrelevant or repetitious; (b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports to prove; (d) not allowed under the law; or (e) intended to prolong proceedings or is frivolous."

6. To begin with, it is now clear why already in July 2007, the former Co-Investigating Judge was keen on dealing with the *Duch* case as a matter of priority. Referring to his review of the Co-Prosecutors' 1,400-page first Introductory Submission concerning five persons (namely, *Duch* and the four former leaders of the regime), he writes:

“[TRANSLATION] From the outset, I was convinced that it would not be possible to deal with the issues in that manner. We had to set priorities otherwise there would not be any headway. I had no difficulty convincing You Bunleng that we had to start with Duch. First, we could not afford to wait, because of the issues surrounding his detention. Arrested in May 1999, he had been in “pre-trial” detention under the authority of a military tribunal. Secondly, his trial was thought to be fairly straightforward, and we had to bring our teams and teamwork up to scratch. Lastly, a severance had the benefit of enabling the Court to commence its first case in a timely manner, as everyone was anxiously waiting to happen. For some odd reason, the Co-Prosecutors were not in favour of that; instead they wanted a “big trial”, something that we did not consider realistic in the short term. We decided to proceed otherwise and went ahead with the severance.”⁶

7. This goes to show that already in July 2007, Judge Lemonde was fully aware that it was unlikely to hold a big trial within a reasonable time and that his giving priority to a first small (and “straightforward”) trial would further delay the commencement and, by implication, the conclusion within reasonable time of a second big trial.

8. So this raises the question as to why the detention of the four former leaders was ordered shortly after the severance, Judge Lemonde's book seems to suggest that this decision was based on political rather than legal grounds.

9. In fact, it emerges that it was after the appointment in August 2007 of his Cambodian counterpart, Judge You Bunleng, to the Court of Appeal (which appointment Judge Lemonde attempted to thwart) that Judge You Bunleng suggested that he was due to carry out arrests soon thereafter.

⁶ Book authored by Judge Lemonde, pp. 42-43.

“[TRANSLATION] *Coming back to [Judge] You Bunleng’s promotion, I was uncertain as to what course of action to take, whether to resign if the government did not go back on its decision. The fact is that I was well aware that resigning was not an option (...). I therefore had to resort to other means and to demonstrate that retaining Judge You Bunleng was crucial. I decided to inform the French ambassador that “quite spectacular investigative acts were about to be taken soon,” with a view to showing everyone that moving forward under such circumstances would amount to sabotage. Of course, what I had in mind was to make arrests within the weeks ahead. (...).*”⁷

10. Even so, the investigation in Case 002 was conducted with due diligence following the arrest of the four suspects. It was the complete opposite:

“[TRANSLATION] *The priority was to complete the Duch case before embarking on Case 002 concerning the four former leaders of Democratic Kampuchea. These two cases could not possibly be conducted successively.*”⁸

11. Yet, while the “[TRANSLATION] *only strategy in Case 001, was to go to trial as soon as possible*”, it was not aimed at embarking on Case 002 as soon as possible. Instead, it was aimed at satisfying a civilian society, which was anxiously awaiting the commencement of the *Duch* trial because “[TRANSLATION] *the public perception was that nothing was being done.*”⁹

12. It was important to accomplish this, as evidenced by the extract of the book where the former Co-Investigating Judge states that he was frustrated on account of the difficulties and delays caused by the Co-Prosecutors.¹⁰

13. According to Judge Lemonde, it was not until after the conclusion of the investigation in Case 001 that he became more keenly aware of the scope of Case 002:

⁷ Book authored by Judge Lemonde, pp. 51-52.

⁸ Book authored By Judge Lemonde, p. 131.

⁹ Book authored by Judge Lemonde, p. 144.

¹⁰ Book authored by Judge Lemonde, pp. 145-149.

“[TRANSLATION] *So long as we were dealing with the Duch case, matters were straightforward, since the strategy was to deal solely with essential issues in order to proceed as quickly. It was not until the investigation was completed that I realized what we had ahead of us was a monster.*”¹¹

14. In reality the “monster” case ahead of them consisted mainly of four accused persons, four accused persons who were elderly and were deprived of their freedom.

15. Despite the fact that the accused persons in Case 002 had already been in pre-trial detention for quite a long time, the “former Co-Investigating Judge switched to a totally different “strategy” as compared to Case 001. The objective was no longer to proceed as quickly as possible, but rather to complete the trial before the expiration of the maximum pre-trial detention period:

“[TRANSLATION] *During that period, we as the Office of Co-Investigating Judges, did our level best to complete the investigation in Case 002 within the prescribed time limits. (...) We finally attained our objective on 15 September 2010. (...) The timing was right because Nuon Chea’s pre-trial detention was due to expire three days thereafter.*”¹²

16. Moreover, the focus was no longer to deal solely with essential issues, but rather to produce a historical record:

“[TRANSLATION] *Regrettably, even at this stage, we cannot totally rule out the possibility that a trial may not take place, because no one knows what the future holds in store given that the Court is fragile and the accused are of advanced age. This is why we deemed it important to prepare the Closing Order on the assumption that no trial of the Khmer Rouge would take place. (...) This is why the Closing Order contains legal, historical and factual arguments which, while not being absolutely indispensable, seemed important in the event that our order would constitute the only record left by the Court concerning what occurred in Cambodia between 17 April 1975 and 6 January 1979.*”¹³

17. It was against this background that Mr KHIEU Samphan was kept in detention for three years. This shows a flagrant failure to exercise “*special diligence*” as required by international standards in in relation to persons who are presumed innocent are deprived of

¹¹ Book authored by Judge Lemonde, p. 132.

¹² Book authored by Judge Lemonde, p. 201.

¹³ Book authored by Judge Lemonde, p. 202.

their liberty.¹⁴

II. Absence of well-founded reasons to believe that Mr KHIEU Samphan may have committed the crimes for which he is being charged

18. In his book, Judge Lemonde states in autumn 2007 he was reluctant to place the four suspects in Case 002 in pre-trial detention or on bail. He adds that the he and his fellow Co-Investigating Judge discussed this issue “*at length*”.

19. It transpires from the book that the he was particularly reluctant to do this with regard to Ms IENG Thirith and Mr KHIEU Samphan.

20. After referring to the situations of Mr NUON Chea and Mr IENG Sary, the former Co-Investigating Judge goes on to describe Mrs IENG Thirith’s situation:

“[TRANSLATION] *In terms of substance, while the charges against IENG Sary already are extremely serious, the evidence available to us concerning IENG Thirith is a lot more flimsy. Dismissing the proceedings after such lengthy pre-trial detention would be embarrassing, to say the least. After discussing the matter at length, You Bunleng and I finally decided to also place her under detention.*” (the footnote concerning the detention order is available on online).

(...)

“*Finally, based on the evidence gathered during the investigation dismissing the proceedings against her was not considered an option when the Closing Order was issued three years on, as there were undoubtedly sufficient charges against her to send her for trial* (footnote concerning paragraphs 1201-1298 of the Closing Order).”¹⁵

21. Further on in the book, in reference to Mr KHIEU Samphan, Judge Lemonde does not go into details, but proceeds in the same manner by referring to the Detention Order and to

¹⁴ See, *inter alia*, the settled case law of the European Court of Human Rights (“ECHR”), for example, in *Labita v. Italy*, Decision, Grand Chamber of the ECHR, 6 April 2000, para. 153; *Velichko v. Russia*, Decision, ECHR, 15 January 2013, para. 84.

¹⁵ Book Authored by Judge Lemonde, pp. 79-80.

paragraphs 1126-1200 of the Closing Order.¹⁶

22. The fact that the former Co-Investigating Judge elected to refer to the Closing Order (which puts an end to the investigation whereas the detention order was issued at the opening of the investigation) only in these two instances shows that the reasons originally advanced for ordering the pre-trial detention of these two suspects were not well-founded.
23. Yet, from a legal standpoint, a decision for pre-trial detention must be firmly established. According to the jurisprudence of the Supreme Court Chamber:

*“According to Internal Rule 63(3) two conditions must be met for a suspect or accused to be placed or kept in pre-trial detention. The first requirement is set out in paragraph (a) of that rule: there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission. This is a general basis that must be **firmly** established even before consideration of the second condition according to which the detention must be justified in light of at least one of the five conditions set out in paragraph (b).”¹⁷*

24. Failure to provide firm, well-founded reasons is further manifested in what the former Co-Investigating Judge had to say concerning Mr KHIEU Samphan after his original decision to place him in pre-trial detention.
25. In fact, it clearly emerges that according to Judge Lemonde, the lawyer in attendance at Mr KHIEU Samphan’s initial appearance “[TRANSLATION] *raised a number of issues and challenged the merits of some of the charges, because among the four, the former head of State did not have the strongest case against him.*”¹⁸

26. Further on in the book, the former Co-Investigating Judge states as follows regarding Mr KHIEU Samphan:

“[TRANSLATION] As for Khieu Samphan, the situation is more complex. He was the public face and, overall, the most respected figure within the Democratic Kampuchea regime. (...) His entire defense consists in saying: “you must prove to me that I knew about what was happening.” Admittedly, he did not leave any leads. There is no evidence whatsoever that he

¹⁶ Book Authored by Judge Lemonde, p. 86.

¹⁷ Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, **E50/3/1/4**, para. 39 (Emphasis added).

¹⁸ Book Authored by Judge Lemonde, p. 89.

took specific decisions relating to arrests or executions. It is also true that he is not listed anywhere in prisoners' confessions as being among the recipients, unlike Ieng Thirith, for example. However, considering the speeches he made and the public stance he took at the time, as well as the fact that he regularly attended standing committee meetings and worked closely with the other leaders, he could not possibly have been aware of the purges and enslavement of people all across the country. Given that he knew what was happening and that he made impassioned speeches in praise of the regime's achievements, he can, at the very least, be regarded as an accomplice. Ultimately, it is safe to say that Khieu Samphan is a coward if, as he claims, his main concern was to bring happiness to his people and that he was unaware of the horrors until long after they had ended, it is perhaps simply because he is reluctant to admit that he was terrified, and his only concern was to find a way out.”¹⁹

27. At the end of the day, whereas he spent months gathering evidence and conducting investigations in the case against Mr KHIEU Samphan the judge is unable to offer anything better than mere assumptions.
28. Furthermore, it is shocking that Judge Lemonde's charges against Mr KHIEU Samphan in the Closing Order go well beyond complicity. The question is, would the rest, all the charges against Mr KHIEU Samphan as a main perpetrator be part of the “[TRANSLATION] *the legal, historical and factual arguments, which, while not being absolutely indispensable*” are nonetheless “*seemed important*” in the event that the Closing Order “*would be turn out to be the only historical record left by the Court?*” This question deserves to be raised in light of what Judge Lemonde has written.
29. Be that as it may, the extracts from the book authored by Judge Lemonde's as cited herein amount to evidence that Mr KHIEU Samphan's continued pre-trial detention is excessive and unjustifiable.
30. **FOR THESE REASONS**, Mr KHIEU Samphan's Defence requests the Trial Chamber to ADMIT INTO EVIDENCE the extracts from book authored by Judge Lemonde, and to TAKE THEM INTO CONSIDERATION in its decision on Mr KHIEU Samphan's application for release on bail.

¹⁹ Book Authored by Judge Lemonde, pp. 158-159.

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