

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

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**OBJECTIONS TO THE ADMISSIBILITY OF OTHER PARTIES' DOCUMENT
LISTS FOR THE FIRST SESSION OF THE FIRST TRIAL
(28 November – 16 December 2011)**

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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
Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. On 25 October 2011, the Trial Chamber communicated to the parties the list of witnesses called to testify at the first session of the first trial devoted to the hearing of evidence that was scheduled to commence on 28 November 2011 following the conclusion of opening statements. The Chamber directed the parties to indicate which documents and exhibits from their earlier list are relevant to these first testimonies.¹
2. On 2 November 2011, in response to this order, the Civil Parties filed a list identical to their previously filed list for all the first four segments of the trial, comprising **more than 10,000 documents**.² For their part, the IENG Sary and IENG Thirith defence teams filed lists of 31³ and 88 documents respectively.⁴ As for Mr KHIEU Samphan, he submitted a list of 80 documents.⁵
3. On 3 November 2011, Mr KHIEU Samphan was notified of the Co-Prosecutors' List which includes **978 documents**.⁶
4. As it is **impossible** for Mr KHIEU Samphan and his defence team to review more than 11,000 documents within 10 days,⁷ he now submits his objections to the admissibility of these documents by **categories**.

¹ Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5, 25 October 2011, E131/1 (*Memorandum*), p. 1, para. 3: "The Chamber orders the parties to indicate, no later than 1 November 2011, which documents and exhibits from its earlier list they will seek to admit before the Chamber in connection with those witnesses and experts who may be called during the first three weeks of trial".

² Civil parties list of documents relevant to the initial trial session (28 November – 16 December 2011), 28 October 2011 ("Civil Parties' List"), E131/1/2, in which they refer to their Confidential Annexes E109/2.1, E109/2.2 and E109/2.3.

³ Ieng Sary's Document List for the First Trial Segment, 1 November 2011, E131/1/3 and Public Annex, E131/1/3.2.

⁴ Ieng Thirith Indication of Documents Relevant to the First Trial Segment ("Ms IENG Thirith's List"), 1 November 2011, E131/1/5 and Public Annex A, E131/1/5.1.

⁵ *Indications relatives aux témoins et documents des premières phases du premier procès*, 2 November 2011, E131/1/6 and Confidential Annex, E131/1/6.2.

⁶ Co-Prosecutors' Notification of Documents to be put before the Chamber in Connection with Those Witnesses and Experts who may be Called During the First Three Weeks of Trial with Confidential Annex A ("Co-Prosecutors' List"), 1 November 2011, E131/1/4 and Confidential Annex A, E131/1/4.1

⁷ *Memorandum*, p. 1: the parties had ten days from the notification of the list of documents to submit their objection to the documents, exhibits, *categories* of documents or exhibits.

I. IMPOSSIBILITY OF REVIEWING MORE THAN 11,000 DOCUMENTS IN TEN DAYS

5. Pursuant to Rule 87(3) of the ECCC Internal Rules (“the Rules”), the Trial Chamber may reject evidence 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. In the *Duch* case, the Chamber ruled on the admissibility of evidence as follows:

In order to be used as evidence, material on the case file must therefore satisfy **minimum standards of relevance and reliability** necessary for it to be produced before the Chamber. Once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed.⁸

(...) [I]n order to assist the Chamber in its determination concerning the **authenticity of this document**, it is necessary to consider all material which might have a bearing on this issue.⁹

7. Thus, the Trial Chamber considers that in order to be produced before the Chamber and prior to any assessment of its probative value, all evidence must meet three criteria: authenticity, relevance and reliability.

8. In addition, the Chamber pointed out that it would deal with “objections on a case by case basis”.¹⁰

9. In order to be able to conduct the admissibility review, the Chamber requested the parties to provide document lists in connection with those witnesses that it planned to hear as of 28 November 2011.¹¹

10. However, the Co-Prosecutors, who have submitted a list of 978 documents, and the Civil Parties, who chose to file all previously listed documents (or more than 10,000 documents), have deliberately ignored the Chamber’s instructions.

⁸ Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, para. 7 (emphasis added).

⁹ Decision on Admissibility of New Materials and Direction to the Parties, 10 March 2009, E5/10/2, para. 8 (emphasis added).

¹⁰ Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following Trial Management Meeting of 5 April 2011, 8 April 2011, E74, p. 3.

¹¹ *Memorandum*, p. 1.

11. Internal Rule 21(1)(a) provides that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”

12. Yet the current situation constitutes a flagrant violation of Mr KHIEU Samphan’s right to a fair trial, in three respects.

13. Firstly, Mr KHIEU Samphan is now deprived of his right to prepare his defence, as guaranteed by Article 35(b) (new) of the Law on the Establishment of the ECCC¹² that tracks the wording of article 6(3)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹³ Indeed, it is physically impossible for the Accused to review the admissibility of these 11,000 documents within the ten-day time granted by the Chamber.

14. Secondly, Mr KHIEU Samphan is deprived of his right to adversarial proceedings, which requires that “that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”¹⁴

15. Thirdly, Mr KHIEU Samphan is placed at a clear disadvantage vis-à-vis the prosecution, in breach of the principle of equality of arms that is a component of the right to a fair trial.¹⁵

16. In fact, the first witnesses called by the Chamber are only witnesses proposed by the Co-Prosecutors and the Civil Parties, and not by Mr KHIEU Samphan.¹⁶ Yet it is clearly impossible for Mr KHIEU Samphan to review the Co-Prosecutors’ 978 documents and the

¹² Article 35 (new): “(...) In determining charges against the accused, the accused shall be equally entitled (...) b) to have adequate time and facilities for the preparation of their defence.”

¹³ Article 6(3): “Everyone charged with a criminal offence has the following minimum rights (...) b) to have adequate time and the facilities for the preparation of his defence.”

¹⁴ *Öcalan v. Turkey*, Application No. 46221/99, Judgment of the Grand Chamber of the ECHR, 12 May 2005, para. 146.

¹⁵ *Dombo Beheer B.V. v. The Netherlands*, Application No. 14448/88, 27 October 1993, para. 33; *Foucher v. France*, Application No. 22209/93, 18 March 1997, para. 34; *Ben Naceur v. France*, Application No. 63879/00, 3 October 2006, para. 31; *Gacon v. France*, Application No. 1092/04, 22 May 2008, para. 31 “[TRANSLATION]: The principle of equality of arms – a component of the broader concept of a fair trial – requires that each party must be afforded a reasonable possibility to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”

¹⁶ *Memorandum*, Confidential Annex B, E131/1.2.

Civil Parties' 10,000 documents to determine which of these are relevant to the first witnesses for the purpose of preparing himself for questioning.

17. Under the circumstances:

- Mr KHIEU Samphan objects to all documents that are not directly connected with witnesses who may be called before the Trial Chamber as of 28 November 2011;
- Mr KHIEU Samphan has no other choice but to submit broad objections to certain categories of documents that are patently inadmissible.

II. INADMISSIBILITY OF CERTAIN CATEGORIES OF DOCUMENTS

1. Confessions obtained through torture

18. Article 15 of the Convention against torture,¹⁷ article 321 of the Code of Criminal Procedure of Cambodia¹⁸ and Internal Rule 21(3) prohibit the use of material from confessions obtained through torture.¹⁹

19. With this in mind, the Trial Chamber found that “the fact that a confession has been made, and that it was made under torture cannot be accepted as a truthful statement.”²⁰

20. Pursuant to Internal Rule 87(3)(d), which authorizes the Chamber to reject evidence that is not allowed under the law, Mr KHIEU Samphan requests the Trial Chamber to reject all confessions obtained through torture.

21. Moreover, Mr KHIEU Samphan wishes to remind the Trial Chamber that it decided to sever the charges and that “the scope of the first trial ... [does not include] security centres

¹⁷ Pursuant to Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

¹⁸ Article 321: “[A] declaration given under physical or mental duress shall have no evidentiary value.”

¹⁹ Internal Rule 21 (3): “No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers.”

²⁰ “*Duch*” Transcript of Proceedings, 28 May 2009, D288/4.27.1, ERN: 00336854, p. 9.

or execution sites.”²¹ Documents concerning S-21 must therefore also be rejected by the Chamber, on the ground that they are irrelevant, pursuant to Internal Rule 87(3)(a).

2. Written Witness Statements

22. In his observations of 22 July 2011,²² Mr KHIEU Samphan reminded the Trial Chamber that the applicable principle at the ECCC is that witnesses must appear at a trial for adversarial proceedings.

23. In light of the arguments set out above, written witness statements are inadmissible unless subjected to cross-examination. The admission of written statements in lieu of an oral testimony must therefore remain the exception and comply with strict conditions.

3. Non-contemporaneous documents

24. Evidence is that which is used to establish, substantiate, prove and verify.²³ It must enable a judge to be thoroughly convinced and to rule on the charges. Evidence traditionally consists of written records of facts or interviews prepared by judicial police officers, testimonial evidence, documentary evidence, clues, or confessions

25. The Group of Experts for Cambodia identified “two forms of evidence that would be pertinent in legal proceedings against Khmer Rouge leaders: physical evidence and witnesses.”²⁴ The Group included in physical evidence “human remains, structures and mechanical objects and documents.”²⁵ “Documentary evidence consists of internal documents of the regime of Democratic Kampuchea that demonstrate the role of particular individuals in serious human rights abuses.”²⁶

26. Mr KHIEU Samphan objects to the admissibility of non-contemporaneous documents because they are not evidence, but rather documents in the public domain, and do not meet

²¹ Severance Order Pursuant to Internal Rule 89 *ter*, 22 September 2011, E124, para. 9.

²² Observations in Response to Co-Prosecutors’ Submission Regarding the Admission of Written Witness Statements, 22 July 2011, E96/4.

²³ Gérard CORNU, *Vocabulaire juridique*, Presses Universitaires de France, 8th Edition, 2007, “*Preuve*”.

²⁴ Identical letters dated 15 March 1999, addressed to the President of the General Assembly and the President of the Security Council from the Secretary General, Annex: Report by the Group of Experts for Cambodia Created by Resolution 52/135 of the General Assembly, 16 March 1999, S/1999/231, para. 51.

²⁵ *Ibid.*, para. 52.

²⁶ *Ibid.*, para.53.

the standards of authenticity, reliability and relevance required by the Chamber. More specifically, Mr KHIEU Samphan contemplates three types of documents: books, analytical reports and documentary films.²⁷

➤ **Books**

27. Books of a historical nature or fiction dealing with the Khmer Rouge period cannot be considered as evidence. In this respect, the Co-Investigating Judges noted that “books are public documents for which a placement in the Case File is not absolutely necessary.”²⁸

28. First and foremost, when determining the admissibility of a document as evidence, the standard required by a tribunal is much higher than that to which an author of a personal publication holds himself or herself.²⁹

29. Furthermore, an author of a book expresses his or her point of view, his or her own reading of historical events.³⁰ Thus, the content of such documents is undeniably tainted by personal bias.

30. Lastly, to admit all books as evidence would lead to a grotesque situation, as very often, the documents underpinning an authors’ thesis are themselves inadmissible because they are, for instance, confessions extracted through torture or statements made by unidentifiable witnesses.³¹

²⁷ The civil parties seek to introduce documentary films.

²⁸ Order on Co-Prosecutors’ Request to Place Additional Evidentiary Material on the Case File dated 31 December 2009 with the aim of including supplementary evidence in the case file, 13 January 2010, D313/1, para. 2.

²⁹ Steve Heder, *The Cambodia Daily*, 8 January 1999, D312.2.12, ERN 00004350: “The standards of evidence for a trial are much higher than the standards of evidence for a newspaper or a book of history.”

³⁰ There are numerous examples of contradictions between authors who have written about Democratic Kampuchea. For example, Benedict F. Kiernan criticised the NYTimes for having described Philip Short as an “honest researcher”, saying that “the Cambodian may not recognize their country in this book [The History of a Nightmare]”, Ben Kiernan, “The Cambodian genocide and Imperial Culture” in *90 Years of Denial*, a special publication of Aztag Daily (Beirut) and the Armenian Weekly (Boston) in April 2005 in commemoration of the 90th anniversary of the 1915 genocide of Armenians (pp. 20-21). François Ponchaud told the Co-Investigating Judges that “[t]his in fact gave rise to a debate between Steve Heder, Noam Chomsky and myself regarding the interpretation of the [Khmer Rouge] texts in question”, Written Record of Witness Interview, 13 February 2009, D133, p. 3. Gareth Porter stated “In discussing *Cambodia: Starvation and Revolution*, Shawcross repeatedly violates intellectual fairness in ways which raise serious questions about his whole approach to the problem.” in “An Exchange on Cambodia”, in *The New York Review of Books*, 20 July 1978. In chapter 2 of *Cambodia 1975-1982*, D222/1.17, Michael Vickery points out significant problems regarding sources and evidence. He refers to “Ponchaud’s bias” (p. 48) and that “the bias and selectivity are most obvious in Barron and Paul” (p. 46).

³¹ In the *Duch* case, the Chamber decided to exclude statements given by witnesses who had died before they

➤ **Analytical reports**

31. The same objections apply to analytical reports. Indeed, evidence is reviewed by the judges of the Chamber, and not by an “expert”. Mr KHIEU Samphan wishes to recall that in the case of one of the three reports that the Co-Prosecutors wish to enter as evidence (document 70 of the Co-Prosecutors’ Annex), he had diligently requested the Co-Investigating Judges to place it on the Case File, and have all of the author’s references translated.³² The Co-Investigating Judges and the Pre-Trial Chamber denied the request.³³ Without effective access to the sources cited by authors of reports, Mr KHIEU Samphan objects to their production as evidence.

32. Moreover, analytical reports are irrelevant at this stage of the trial and can only be introduced if their authors are called to testify and subjected to an adversarial debate. In the *Lubanga* case, the International Criminal Court rejected the admissibility of an expert report on the grounds that its relevance was slight, and that having not heard the authors, the risk of the prejudicial effect on the parties was greater than the report’s probative value.³⁴

➤ **Documentary films**

33. In addition to all of the drawbacks set out above, documentary films are even more unreliable as they are driven by artistic or cinematic ambition, which compels a filmmaker to shape the content of his or her work to external constraints.

34. Accordingly, Mr KHIEU Samphan requests the Chamber to reject all non-contemporaneous documents as they are not evidence, and cannot be considered reliable.

could be re-interviewed by the Co-Investigating Judges and in connection with which neither the witnesses, nor the interpreters had taken an oath: Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, para. 16. In Case File 002, the Co-Investigating Judges attempted to obtain the recordings and original documents from certain authors. See, for example: Letter from the Co-Investigating Judges: Request for Information Regarding Evidentiary Material, 21 December 2009, D287; Letter from the Co-Investigating Judges: Request for Information Regarding Evidentiary Material, 18 March 2010, D269/9.

³² Request to Place on the Case File All the Documents Relating to Mr Khieu Samphan’s Real Activity During the Period of Democratic Kampuchea, 3 March 2010, D370, para. 7.

³³ Order on the “Request to place on the Case File all the documents relating to Mr Khieu Samphan’s real activity” 18 March 2010, D370/1; Decision on the Appeal Against “Order on the Request to Place on the Case [File] The Documents Relating to Mr. Khieu Samphan’s Real Activity”, 7 July 2010, D370/2/11.

³⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the request [...] for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, para. 34.

4. Press articles

35. At the *ad hoc* tribunals, press articles are not considered a reliable source of evidence. They are usually admitted if they are contemporaneous and corroborate information provided by other evidence and confirm that the facts in question are matters of public record.³⁵ Furthermore, the probative value of press articles is frequently called into question³⁶, and even considered to be outweighed by their prejudicial effect on the fairness of the proceedings.

36. To illustrate, it will be recalled that, when seized of Mr KHIEU Samphan's application to disqualify Judge Lemonde, the ECCC Pre-Trial Chamber held that "the statements of Judge Lemonde as quoted by the press do not amount to reliable evidence".³⁷

37. In the present case, Mr KHIEU Samphan objects to the admissibility of prior statements of the Accused and any other individual, as reported in the media, and for which there is no recording.

38. Adherence to the principle of adversarial proceedings requires that the Accused systematically confront the author of a media article; however, a journalist is under no obligation to reveal his or her sources. As such, the protection of the confidentiality of journalists' sources makes adversarial proceedings impossible. That is why, while certain press articles may be useful at the judicial investigation stage by providing guidance to the judges on the general background of the events, they jeopardize the fairness of proceedings before the Trial Chamber, and cannot therefore be held admissible as evidence.

5. Documents inaccessible to the Defence

39. Mr KHIEU Samphan objects to the Chamber declaring documents to which he still has no access admissible, in violation of the right to prepare his defence and as the substantive hearing is set to begin in one week.

³⁵ *Prosecutor v. Radoslav Brdanin*, IT-99-36-T, Decision on Interlocutory Appeal, 1 September 2004, para. 33.

³⁶ *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, Transcript of Public Hearing, 10 mars 2000, p. 16521.

³⁷ Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 décembre 2009, Doc No. 7, para. 30 (emphasis added).

➤ **Strictly confidential documents**

40. On 3 October 2011, Mr KHIEU Samphan requested the Trial Chamber to grant him access to all strictly confidential documents which the Co-Prosecutors and Civil Parties included in their lists of documents and to which the Defence does not have access and of which only the generic titles are known to the Defence.³⁸

➤ **Documents not on the case file and not disclosed to the Defence**

41. Additionally, the Co-Prosecutors' Annex A,³⁹ lists filed by the Civil Parties,⁴⁰ and the list filed by Ms IENG Thirith's defence team⁴¹ include new documents that are not on the case file and that have not been disclosed to other parties.

➤ **Untranslated documents**

42. Lastly, among the more than 11,000 documents listed in disregard of the Trial Chamber's instructions, a significant number is not available in French and Khmer. This situation, which has been on-going despite numerous requests,⁴² is an infringement of Mr KHIEU Samphan's right to translation and to a fair trial.

43. It is evident that Mr KHIEU Samphan is unable to review the admissibility of documents classified as strictly confidential, that have not been disclosed to the defence, and that have not been translated into his working languages.

44. Mr KHIEU Samphan believes that this triple limitation of access violates his right to a fair trial and, more specifically, his right to have adequate facilities for the preparation of his

³⁸ Observations on Ieng Sary's Request for Access to Strictly Confidential Documents on the Case File, 3 October 2011, E118/3.

³⁹ Co-Prosecutors' List, Confidential Annex A, E131/1/4.1.

⁴⁰ Civil Parties' List, Confidential Annex, E109/2.3

⁴¹ Mrs Ieng Thirith's List, Public Annex A, E131/1/5.1.

⁴² Request for Annulment for Abuse of Process, 27 August 2009, D197; Letter from Mr Khieu Samphan, 20 July 2010, A406; Appeal Against the Closing Order, 18 October 2010, D427/4/3, paras. 69 to 73; Interlocutory Application for an Immediate and Final Stay of Proceedings against Mr Khieu Samphan for abuse of process, 18 October 2010, Case File 002-18-11-2010-ECCC/PTC(16) Doc. No. 1, ERN: 00616944-00616967, paras. 23 to 30; List of documents, 19 April 2011, E9/29, paras. 11 and 12.

defence and to review evidence, both inculpatory and exculpatory,⁴³ as well as the principle of equality of arms.

45. Mr KHIEU Samphan requests the Chamber to reject all documents that were not made available to the Defence timeously.

6. Documents collected by DC-Cam

46. Mr KHIEU Samphan has already expressed to the Chamber his misgivings about the authenticity and chain of custody of documents from the Documentation Center of Cambodia (DC-Cam).⁴⁴

47. Accordingly, he reiterates his request that the Chamber be particularly vigilant when reviewing evidence collected by DC-Cam and, in particular, to obtain the originals of the documents and satisfy itself of their authenticity, and systematically require that the content of documents be corroborated by other evidence.

FOR THESE REASONS

48. Mr KHIEU Samphan requests the Trial Chamber:

- TO DISALLOW the introduction of all documents that are not directly connected with the witnesses called to testify from 28 November to 16 December 2011;
- TO REJECT all confessions obtained through torture;
- TO REJECT written witness statements that were not subjected to cross-examination, barring exceptional cases and in compliance with strict conditions;
- TO REJECT all non-contemporaneous documents;
- TO REJECT all press articles;
- TO REJECT all documents that are not accessible to the Defence;
- TO ENSURE the authenticity of DC-Cam documents and that their content is corroborated by other evidence.

⁴³ Article 35 (new): “(...) In determining charges against the accused, the accused shall be equally entitled to (...): b) to have adequate time and facilities for the preparation of their defence; e) to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.”

⁴⁴ List of documents, 19 April 2011, E9/29, paras. 17 and 18.

**WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE**

| | | | |
|--|----------------|------------|----------|
| | SA Sovan | Phnom Penh | |
| | Jacques VERGÈS | Paris | [signed] |

Date

Name

Place

Signature