

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

FILING DETAILS

Case File No. : 002/19-09-2007-ECCC/TC
Party Filing : Co-Lawyers for the Defence of Mr Khieu Samphan
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Signature:



LIST OF DOCUMENTS

Filed by:

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Before:

The Trial Chamber

Judge NIL Nonn

Judge Silvia CARTWRIGHT

Judge THOU Mony

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

Lawyers for the Civil Parties

PICH Ang

Elisabeth SIMMONNEAU FORT

MAY IT PLEASE THE TRIAL CHAMBER

I. INTRODUCTION

1. In accordance with the Trial Chamber's Rule 80 Order dated 13 January 2011 ("the Order"),¹ Mr KHIEU Samphan hereby submits on this day, **concurrently with the other parties**, the list of documents he intends to present before the Chamber.
2. On 8 February 2011, Mr KHIEU Samphan filed a general application for extension of time for filing evidence.²
3. That same day, the Trial Chamber announced in a Memorandum that it would reject all requests to extend deadlines in relation to the filing of materials in preparation for trial.³
4. On 29 March 2011,⁴ the Chamber denied a new request by Mr KHIEU Samphan in which he requested an extension of the deadlines specifically concerning the filing of his list of documents.⁵

II. ARGUMENT

Infringement of Mr KHIEU Samphan's fundamental rights

5. In his two requests for a stay of the deadlines, Mr KHIEU Samphan has demonstrated that the application of Rule 80 of the Rules infringes his fundamental rights, including his right to the presumption of innocence (a tradition deriving from Article 9 of the 1789 Universal Declaration of the Rights of Man and the Citizen); the principle that the burden of proof lies with the prosecution; his right, in full equality, to have adequate time and facilities for the preparation of his defence; and his right to be tried without undue delay.

¹ Order to File Material in Preparation for Trial, 13 January 2011, E9, para. 15.

² Application for Extension of Time for Filing Evidence, 8 February 2011, E9/6.

³ Trial Chamber Memorandum entitled: Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 8 February 2011, E35.

⁴ Decision on Requests for Extension of Time to File Lists of Documents and Exhibits, 29 March 2011, E9/164.

⁵ Filing of Lists of Documents and Exhibits – Request for Extension of Deadline, 25 March 2011, E9/16/2.

6. Indeed, as regards the lists of witnesses and experts, the Trial Chamber indicated in its Decision of 4 April 2011 that: “*the OCP Lists provide the basis upon which the other parties may request the summoning of the other individuals in relation to the allegations contained in the Indictment*”.⁶

7. There is no plausible justification as to why this reasoning cannot also apply to the lists of documents. In any event, such lists are to be filed **after** the defence has had the opportunity to discover the inculpatory evidence tendered by the other parties, especially the Co-Prosecutors.

8. Mr KHIEU Samphan is now therefore being unlawfully forced to file his list of documents in disregard of both fundamental rights and human rights.

Not all the items are actually available on the case file

9. In justifying its refusal to grant the requests to extend time limits, the Chamber relied upon a mere memorandum, asserting that the parties have had access to the case file since the opening of the proceedings.

10. This is false. In reality, more items were added to the case file over the course of the judicial investigation; moreover, Mr KHIEU Samphan has not had access to the entirety of the case file since the opening of the proceedings, to say nothing of the serious problems regarding translation. To this day, he still receives service of certain documents in English and then later in French. He therefore does not always have adequate time and facilities for the preparation of his defence. In fact, this is why it was physically impossible for him to establish any link between the selected documents and the Closing Order as requested in the template provided by the Chamber.

11. Owing to the large number of documents in Case File 002 and the absence French translations of certain documents or the serious problems therein,⁷ access to the case file is largely **theoretical and illusory**, such that it is now physically impossible to consult all

⁶ Decision on Defence Requests concerning the Filing of Material in Preparation for Trial and Preliminary Objections, 4 April 2011, E35/2, para. 11

⁷ See statistics on the number of documents and the status of translation of Case File 002 (annexed hereto), Email by Mr Charles Muraya, Friday, 11 March 2011.

the items on Case File 002 and, less still, identify any links between those items and other documents.

12. The Appeals Chamber of the International Criminal Tribunal for Rwanda rightly emphasised that it is important for documents to be “**reasonably accessible**” to the accused, where such documents are contained in an electronic database. It pointed out that “just because it [the prosecution] has placed a particular piece of material on the EDS [ICTR equivalent of ZyLab], it has not necessarily made that piece of material ‘reasonably accessible’ to any given accused” but rather, “is the equivalent of the Prosecution seeking to satisfy those obligations by giving the Defence a key to a storage closet containing the same tens of thousands of documents in paper form”.⁸

13. Mr KHIEU Samphan therefore submits that the documents contained in Case File 002 are not “**available**” within the meaning of Rule 87(4) of the Internal Rules.⁹

14. Furthermore, he considers, in accordance with the Cambodian view of the judicial investigation, which derives from French legal tradition and in force at the ECCC, that all the documents contained in Case 002 must be accessible at trial, as was indeed the case in Case 001.

15. In the same vein, Rule 92 of the Internal Rules provides that the parties may, “up until the Closing Order”, make written submissions, while Rule 87(3) provides that “[e]vidence **from the case file** is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court”.

16. In any event, nowhere in the Rules is there a **condition** that evidence must feature on one list or other in order to be considered put before the Chamber. If it were so, the concept of a judicial investigation case file would not make any sense, and that would

⁸ ICTR, *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, Case No. ICTR-98-44-AR73.7, paras. 13-15.

⁹ Rule 87(4) of the Rules: 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. [...]. The requesting party must also satisfy the Chamber that the requested testimony was **not available** before the opening of the trial”.

amount to disregarding thousands of documents collected over the course of years of investigations in search for the truth.

Authenticity of the DC-Cam documents

17. Lastly, Mr KHIEU Samphan wishes to inform the Chamber that he too has very serious misgivings about the authenticity and traceability of the Documentation Center of Cambodia (DC-Cam) documents.

18. The Chamber **ought to** obtain the originals of the DC-Cam documents and satisfy itself of the authenticity of all the ones it intends to consider, including the few DC-Cam documents annexed hereto by Mr KHIEU Samphan.

19. In view of all the foregoing, the list of documents annexed hereto is only an **indication** of the principal elements, among many others on Case File 002, which Mr KHIEU Samphan intends to produce at trial.

20. He therefore reserves the right to subsequently submit – even after the opening of the trial – any documents on Case File 002 that he may not have had the opportunity to consult on account of the huge number of documents on the case file.

21. For reference purposes, Mr KHIEU Samphan hereby submits an indicative list of a selection of books and articles which underpin his thinking and guide his line of defence. All the foregoing submissions have been made in order to ensure certainty of the law with regard the proceedings and for the sake of the **truth** for both the international community and the Cambodian people.

FOR THESE REASONS

22. The Trial Chamber is requested:

- TO FIND that the application of Rule 80 of the Internal Rules infringes Mr KHIEU Samphan's right to the presumption of innocence, the principle that the burden of proof lies with the prosecution, his right to have adequate time and facilities for the preparation of his defence, in full equality with the Co-Prosecutors, his right to be tried without undue delay;
- TO ADMIT Mr KHIEU Samphan's provisional lists of documents;
- TO ALLOW KHIEU Samphan to produce any documents on Case File 002 at trial;
- TO OBTAIN the originals of all DC-Cam documents that it intends to consider at trial, and satisfy itself of their authenticity.

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

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|------|-------------------|------------|-----------|
| | SA Sovan | Phnom Penh | |
| | Jacques VERGÈS | Paris | |
| | Philippe GRÉCIANO | Paris | |
| Date | Name | Place | Signature |