

**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:** Mr Khieu Samphan

**Filed Before:** The Trial Chamber

**Original:** French

**Date of Document:** 8 February 2011

**CLASSIFICATION**

**Classification of document Suggested by the Filing party:** PUBLIC

**Classification by the Trial Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer's Name:**

**Signature:**




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**APPLICATION FOR EXTENSION OF TIME TO FILE EVIDENCE**

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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

**MAY IT PLEASE THE TRIAL CHAMBER**

1. On 13 January 2011, the Pre-Trial Chamber sent Mr KHIEU Samphan to trial before the Trial Chamber.<sup>1</sup>
2. On 17 January 2011, the Trial Chamber set time limits for the parties to file various documents relating to their evidence, under Rule 80, *inter alia*, of the ECCC Internal Rules (the “Rules”). The Defence and the Civil Parties were ordered to file their lists of additional witnesses within 15 days from notification of the Co-Prosecutors’ witness list; all parties are required to file, no later than 23 February 2011, a summary of the facts on which each proposed witness is to testify and, no later than 13 April 2011, a list of documents and exhibits with a brief description of their nature and content.<sup>2</sup>
3. On 31 January 2011, the Defence was notified, in English and Khmer, of the list of witnesses, experts and Civil Parties that the Co-Prosecutors intend to call, that is, 294 names in all.<sup>3</sup> According to the Practice Direction on the Filing of Documents before the ECCC and current practice, the 15-day time limit imposed on Mr KHIEU Samphan, who has chosen French as his official language, starts to run only from the notification in French of the Co-Prosecutors’ list.<sup>4</sup>
4. Mr KHIEU Samphan requests an extension of the time limit imposed on him by the Order, and that it should only start running from the date of notification of the French version of the Trial Chamber’s decision on this application.<sup>5</sup>
5. In fact, Mr KHIEU Samphan submits that the time limits prescribed violate his most basic rights. He recalls that he is presumed innocent until finally proven guilty, that the onus is on the Co-Prosecutors to prove his guilt and, lastly, that the Tribunal has to safeguard his right to a fair and expeditious trial.

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<sup>1</sup> Decision on Khieu Samphan’s Appeal against the Closing Order, 13 January 2011, Doc. D427/4/14.

<sup>2</sup> Order to File Material in Preparation for Trial, 17 January 2011, Doc. E9 (the “Order”).

<sup>3</sup> OCP Expert list, Doc. E9/4.2, 16 names; OCP Witness list, Doc. E9/4.3, 246 names; OCP Civil Party list, Doc. E9/4.4, 32 names.

<sup>4</sup> Articles 2.2 and 8.5 of the Practice Directions on the Filing of Documents before the ECCC, Doc. ECCC/01/2007/Rev.5

<sup>5</sup> Rule 39(4)(a): “The Chambers may, at the request of the concerned party or on their own motion: a) extend any time limits set by them.”

## I - VIOLATION OF THE PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

6. International human rights law and international criminal law recognize that anyone charged with a criminal offence is presumed innocent until proven guilty according to law,<sup>6</sup> thereby establishing the general principle of law that the onus is on the prosecution to prove the guilt of the accused.<sup>7</sup>

7. According to the Constitution of the Kingdom of Cambodia, the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (the “Agreement”), the ECCC Law and the Internal Rules, the presumption of innocence is applicable before the ECCC.<sup>8</sup>

8. According to Rule 21(1)(a) of the Rules, “proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”<sup>9</sup> Furthermore, Rule 87(1) expressly provides that “the onus is on the Co-Prosecutors to prove the guilt of the accused.”

9. However, Rule 80 of the Rules is inconsistent with these provisions. As Mr KHIEU Samphan is presumed innocent until proven otherwise by the Co-Prosecutors, he should be able to file the evidence he intends to adduce in his defence at the end of the presentation of **all** inculpatory evidence.

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<sup>6</sup> Article 11(1) of the Universal Declaration of Human Rights (“UDHR”); Article 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”); Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”); Article 20(3) of Statute of the International Criminal Tribunal for Rwanda (“ICTR”); Article 21(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”); Article 66(1) of the Rome Statute of the International Criminal Court (“ICC”); Article 16(3)(a) of the Statute of the Special Tribunal for Lebanon (“STL”).

<sup>7</sup> ICTR, *Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Appeal Judgement, 16 November 2009, para. 38, footnote 104; ICTR, *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeal Judgement, 7 July 2006, para. 170; ICTR, *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeal Judgement, 26 May 2003, para. 172; ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 834.

<sup>8</sup> Article 31 of the Constitution of the Kingdom of Cambodia, Article 13(1) of the Agreement, Article 35 (new) of the ECCC Law, Rule 21(1)(d) of the Rules.

<sup>9</sup> Relying on this Rule, the ECCC Pre-Trial Chamber considered the development of inquisitorial systems “because of the need to consider the rights of the accused **at every stage in penal proceedings**”: Decision on the Co-Investigating Judges’ Decision Refusing to Accept the Filing of Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 29 September 2010, Doc. D390/1/2/4, para. 17.



10. It is thus in accordance with these fundamental principles that defence evidence is presented before international criminal courts only **after the close of the prosecution case**, that is, only after the appearance of prosecution witnesses.<sup>10</sup>

11. Among international courts, the court whose system is closest to that of the ECCC is the STL, particularly on account of the active role of victims,<sup>11</sup> and the involvement of a pre-trial judge with very broad powers that are sometimes akin to those of an investigating judge in civil law systems.<sup>12</sup>

12. Before the STL, victims file the list of witnesses they intend to call at the same stage as the Prosecutor, that is, at the pre-trial stage.<sup>13</sup> Meanwhile, the Defence files its evidence at trial, that is, after the close of the Prosecutor's case.<sup>14</sup>

13. In the *Lubanga* case, the ICC Trial Chamber ordered the Accused to present his evidence "after the presentation of the evidence of the prosecution is completed".<sup>15</sup> In its analysis, the Chamber defined the proper exercise of its discretion with regard to disclosure of documents by the Defence: "It is of paramount importance that they are deployed only on the basis of their relevance and applicability to the known facts and issues, against the background of the interests of justice and the circumstances of the case. At all times the Chamber has **an absolute duty** to ensure that any discretionary order it makes regarding

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<sup>10</sup> ICTY: Rule 65 *ter* (G) of the Rules of Procedure and Evidence; ICTR: Rule 73 *ter* (B) of the Rules of Procedure and Evidence; STL: Rule 128 of the Rules of Procedure and Evidence.

<sup>11</sup> Although the more active role played by victims participating in proceedings before the STL is justified by the fact that they do not have the status of Civil Parties and cannot claim reparations. See Explanatory Memorandum on the Rules of Procedure and Evidence by the Tribunal's President, dated 25 November 2010, paras. 16-17. Consequently, utmost vigilance to ensure respect for the rights of the Defence is imperative before the ECCC. As the Trial Chamber has already acknowledged in the "Duch" case, equality of arms with regard to Civil Parties is "a matter which can affect the fairness of the proceedings..." The Chamber held that "the Accused's right to a fair trial in criminal proceedings includes the right **to face one prosecuting authority only**". Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case 001, Doc. E72/3, 9 October 2009, para. 26 (emphasis added).

<sup>12</sup> See, in particular, Rules 7(a) and 18 of the Statute, and 92 and 93 of the Rules of Procedure and Evidence of the STL which provide that the judge directing preparations for trial, who is autonomous and independent of the Trial Chamber, may collect evidence or examine witnesses under certain circumstances.

<sup>13</sup> Rule 91(H) of the Rules of Procedure and Evidence of the STL.

<sup>14</sup> Rule 128(i) of the Rules of Procedure and Evidence of the STL.

<sup>15</sup> ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Disclosure by the Defence, 20 March 2008, para. 41.

defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.”<sup>16</sup>

14. The Chamber held that the rights of the Defence were “inviolable”: “[the Accused] is presumed innocent until proven guilty (...), the onus of proof rests with the prosecution (...), he is not to bear a reverse burden of proof or an onus of rebuttal (...), he may not be compelled to testify or to confess guilt, and he is entitled to remain silent without the latter stance having any impact on the court’s determination of his guilt or innocence.”<sup>17</sup>

15. It is in light of the inviolability of these rights, which are recognized by international jurisprudence and before the ECCC,<sup>18</sup> that Mr KHIEU Samphan is entitled to file any evidence he intends to adduce after the presentation of the evidence of the Co-Prosecutors and the Civil Parties is completed.

## II - VIOLATION OF THE RIGHT TO A FAIR AND EXPEDITIOUS TRIAL

### A – Lack of adequate time and facilities for the preparation of the defence

16. Like the ICCPR and the ECHR [European Convention on Human Rights], the Cambodian Constitution, the Agreement and the ECCC Law recognize the right of any person charged with a criminal offence to be granted, in full equality, adequate time and facilities for the preparation of his or her defence.<sup>19</sup> This is the concrete application of the principle of equality of arms,<sup>20</sup> which “goes to the heart of the fair trial guarantee”.<sup>21</sup>

17. The Human Rights Committee (the “HRC”) notes that “adequate time” depends on the circumstances of the case and that “adequate facilities” must include “access to documents

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<sup>16</sup> *Ibid.*, paras. 32-33. In the same case, the ICC Trial Chamber recently recalled the topicality of this reasoning: Redacted Second Decision on Disclosure by the Defence and Decision on Whether the Prosecution May Contact Defence Witnesses, 20 January 2010, para. 57.

<sup>17</sup> *Ibid.*, para. 27 (emphasis added)

<sup>18</sup> See *supra*, paras. 7 and 8; Article 35 (new g) of the ECCC Law: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees... not to be compelled to testify against themselves or to confess guilt.”

<sup>19</sup> Article 14(3)(b) of the ICCPR, Article 6 of the ECHR, Articles 31 and 38 of the Constitution of the Kingdom of Cambodia, Article 13(1) of the Agreement, Article 35 (new) of the ECCC Law.

<sup>20</sup> HRC, Communications No. 282/1988, *Smith v. Jamaica*, 12 May 1993, paras. 10.4; and Nos. 226 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, 11 April 1991, para. 13.6.

<sup>21</sup> ICTY, *Prosecutor v. Tadic*, Case No. IT-94-I-A, Appeal Judgement, 15 July 1999, (“Tadic Appeal Judgement”), para. 44.



and other evidence, all materials that the prosecution intends to offer in court against the accused, or that are exculpatory”.<sup>22</sup>

18. The ICTR Appeals Chamber “agree[d] with the Human Rights Committee that “adequate time” for the preparation of the defence cannot be assessed in the abstract and that it depends on the circumstances of the case. [It] is of the view that the same goes for “adequate facilities”. The Appeals Chamber adds that a Trial Chamber “shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”<sup>23</sup>

19. In the instant case, the recent notification of the final charges against the Accused as well as the impossibility, at this stage, to determine with certainty the evidence on which to base his defence do not afford Mr Khieu Samphan adequate time and facilities to prepare his defence and, in particular, **to gather and file**, within the prescribed time limit, documents relating to such evidence, which are also spread all over the world.<sup>24</sup>

20. The Defence has already denounced the lack of transparency of the investigation, which clearly had an inculpatory agenda.<sup>25</sup> Drafted under such circumstances, the Closing Order, which has now become final, is a document of some 435 pages long,<sup>26</sup> all of which have to be reviewed and their contents challenged by Mr KHIEU Samphan. While the time limit for filing of the Co-Prosecutors’ witness list does not pose a problem since the Closing Order closely matches their Introductory Submission, it is impossible for Mr KHIEU Samphan to know at this stage on what evidence to base his defence, in view of the **high number of Prosecution witnesses** and the **choice** he must make in selecting his expert witnesses.

<sup>22</sup> HRC, General Comment No. 32, 23 August 2007, paras. 32 and 33.

<sup>23</sup> ICTR, *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 220 and footnotes 532 and 533.

<sup>24</sup> It is important to recall that this case involves 4 Co-Accused, who plead not guilty, and 2,123 Civil Parties. **The circumstances of the case are therefore not comparable with those of the previous case** (with 90 Civil Parties (Case 001)) **before the ECCC, in which the sole accused pleaded guilty, thereby waiving his right to the presumption of innocence.**

<sup>25</sup> Appeal Brief against the Closing Order, 18 October 2010, Doc. D427/4/3, paras. 74 to 113. **The Pre-Trial Chamber indeed acknowledged that the Co-Investigating Judges had incorrectly interpreted their obligation to seek exculpatory evidence:** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, Doc. D164/4/13, paras. 37 and 38.

<sup>26</sup> Not including 355 pages of footnotes that are still to be translated into French.

21. During the initial investigation that resulted in the Introductory Submission, the Co-Prosecutors had the opportunity, time and means to meet and interview the witnesses, given the large number **of investigators** at their disposal. Furthermore, the Co-Prosecutors were also authorized to transfer evidence from Case 001 to Case 002, which appears profoundly unfair, since the Defence teams were not involved in Case 001. However, the Defence was not able to gather evidence in support of its case, which it was firmly forbidden to do.<sup>27</sup> As such, the Defence absolutely has neither the same time nor the same facilities as the Co-Prosecutors to prepare its evidence.

22. This situation is contrary to the principle of equality of arms, whose fundamental character is recognized both by the Rules and the ECCC Trial Chamber.<sup>28</sup> According to ECHR jurisprudence, equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case – **including his or her evidence** – under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.<sup>29</sup>

23. In the instant case, not only has the Defence not had the opportunity to gather its own evidence, but it lacks information on the evidence presented by the other parties.

24. In *Öcalan*, the ECHR Grand Chamber held that the **proximity** of the notification of the bill of indictment to the hearings, as well as the difficulties the applicant's lawyers encountered in belatedly gaining access to the case file prevented the applicant from having a fair trial. The Grand Chamber held that: "The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, 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. Various ways are conceivable in which national law may meet this requirement. However, whatever method

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<sup>27</sup> See also: Ieng Sary's motion for the Trial Chamber to conduct the Trial in Case 002 by following a proposed revised procedure & Request for an expedited stay on the order to file materials in preparation for trial, Doc. E9/3, paras. 26 and 27.

<sup>28</sup> See, for example: *Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise*, 3 July 2009, Doc. E90, para. 4.

<sup>29</sup> ECHR, 27 October 1993, No. 14448/88, *Dombo Beheer BV v. The Netherlands*, para. 33.



is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment on them.”<sup>30</sup>

25. In the instant case, the intervals between notification of the final charges, filing of the Co-Prosecutors’ list of 294 witnesses and experts and the time limits prescribed for filing documents relating to its evidence are too short and do not allow the Defence to prepare itself in a proper and fair manner.

26. In fact, in so far as the onus is on **the Prosecution** to prove the guilt of Mr KHIEU Samphan, the content of the documents relating to his evidence depends on a review of the charges against him, the list of Prosecution witnesses, that of the Civil Parties, the summaries enabling him to understand the nature and scope of proposed testimonies, and all inculpatory evidence adduced before the Trial Chamber.

27. In other words, to know what evidence to present before the Trial Chamber, the Accused must be afforded the opportunity to review **all** evidence finally presented by **all** the other parties in order to be able to discuss, assess and place **all of it** in the context of the trial and the defence.

28. In view of the gravity of the charges against him, the complexity of Case 002, and the prescribed time limits, Mr KHIEU Samphan does not therefore have adequate time or facilities to prepare his defence. This situation is all the more regrettable as it concerns a crucial stage of the trial, whose goal is to **ascertain the truth**.

29. According to the Rules, any decision by the Trial Chamber is based only on evidence that has been put before the Chamber by the parties or by the Chamber itself.<sup>31</sup> The Chamber first decides on the appearance of witnesses on the lists submitted by the parties.<sup>32</sup> The filing of documents relating to his evidence is therefore crucial for Mr KHIEU Samphan. However, at this stage, if he cannot properly know on what evidence to rely, due to lack of prior information on Prosecution and Civil Party evidence, he cannot, *a fortiori*, fulfil an impossible obligation, that is, to produce his evidence in such a brief time.

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<sup>30</sup> ECHR, *Öcalan v. Turkey*, Application No. 46221/99, Grand Chamber Judgement, 12 May 2005, para. 146.

<sup>31</sup> Rule 87(2) and (3).

<sup>32</sup> Rule 80 *bis* (2).



30. Indeed, it appears to be very difficult to amend the witness list once it has been filed, whether before the initial hearing or during the course of the trial. In Case 001, the Trial Chamber laid down strict criteria for admissibility of new evidence before the initial hearing, and even went as far as considering whether the delay in filing an application was not intentional and aimed at avoiding the investigation phase.<sup>33</sup>

31. During the trial, Rule 87(4) permits the parties to request the Trial Chamber to hear new evidence “which it deems conducive to ascertaining the truth”. However, in addition to substantiating the application in accordance with the five criteria for admissibility set out in Rule 87(3),<sup>34</sup> the applicant has to satisfy the Chamber that the evidence sought was not available before opening of the trial. In light of what has been said with regard to admissibility of new evidence filed before the initial hearing, it is obvious that all such criteria will also be interpreted very strictly.

#### **B – The right to a fair trial and the right to be tried without undue delay**

32. Like the ICCPR, the ECCC Law provides that any accused shall have the right to be tried without undue delay.<sup>35</sup> According to Rule 21(4), “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.”

33. The extension of time requested by Mr KHIEU Samphan will not delay the opening of the trial and the duration of the trial itself will not be affected – far from it. On the one hand, granting the Accused adequate time and facilities to prepare his witness list will limit risks of delays during the trial: requests for **additional investigative action**, appeals against Trial Chamber decisions, adjournments, etc. On the other hand, it would allow a more coherent presentation of evidence during the trial.

34. Extending the time limit for filing his additional witness list will ensure not only the protection of Mr Khieu Samphan’s basic rights, but also a fair and expeditious trial in the interests of **truth and justice**.

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<sup>33</sup> “*Duch*”, Decision on Admissibility of New Materials and Directions to the Parties, 10 March 2009, Doc. E5/10/2, paras. 6 and 12.

<sup>34</sup> Rule 87(3) of the Rules: “The Chamber may reject a request for evidence where it finds that it is: a) irrelevant or repetitive; 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.”

<sup>35</sup> Article 14(3)(c) of the ICCPR and Article 35 (new c) of the ECCC Law.

**FOR THESE REASONS**

35. Mr Khieu Samphan requests the Trial Chamber:
- TO FIND that the application of Rule 80 of the Rules violates the presumption of innocence of Mr KHIEU Samphan, the principle that the burden of proof is on the prosecution, Mr KHIEU Samphan's right, in full equality with the services and action of the Prosecution, to have adequate time and facilities to prepare his defence as well as his right to be tried without undue delay;
  - TO ALLOW Mr KHIEU Samphan to file his documents relating to his evidence at the end of the presentation of evidence by the Co-Prosecutors and Civil Parties, without prejudice to his right to adduce new evidence during the trial;
  - TO FIND that the time limit for filing his documents relating to his evidence starts to run only from notice of the French version of the Trial Chamber's Decision on this application.

**WITHOUT PREJUDICE  
AND IT WILL BE JUSTICE**

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