

**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:** 5 July 2013**CLASSIFICATION****Classification of the Document Suggested by the Filing Party:** Public**Classification by the Trial Chamber:** សាធារណៈ/Public**Classification Status:****Review of provisional classification:****Records Officer's Name:****Submissions by Mr Khieu Samphan's Defence Regarding the Questioning of the Accused****Filed by:****Lawyers for Mr KHIEU Samphan**

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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:**

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**All Civil Party Lawyers****All Defence Teams**

**MAY IT PLEASE THE TRIAL CHAMBER**

1. On 5 June 2013, Mr Khieu Samphan's Defence sent the parties its observations in view of the "last" Trial Management Meeting scheduled for 13 June 2013. In the submissions, it included applications regarding the conditions for questioning Mr Khieu Samphan and the closing of the present trial.<sup>1</sup>
2. On 13 June 2013, during the Trial Management Meeting, the Chamber started by ruling on certain issues, after which the Defence reiterated and clarified its requests orally. For some of the requests, the Chamber gave a direct ruling in the course of proceedings.<sup>2</sup>
3. Then, on 21 June 2013, the parties were notified of a Trial Chamber memorandum ruling on the conditions for questioning Mr Khieu Samphan and modalities for closing the proceedings.<sup>3</sup>
4. By and large, the Chamber has rejected requests made by Mr Khieu Samphan's Defence even though they were legitimate and reasonable. Furthermore, although the Chamber had initially asked the parties to indicate how much time they would need for questioning Mr Khieu Samphan (a request the Civil Parties and the Co-Prosecutors had responded to by indicating a number of days needed for each of the Accused<sup>4</sup>), during the Trial Management Meeting, the President suddenly announced that there would be no time limit for questioning of the Accused, and that the parties and judges could put questions to the Accused to the extent that the Chamber deemed them relevant.<sup>5</sup>
5. Mr Khieu Samphan's Defence is of the view that the rejection of its requests seriously violates its client's fundamental rights. For this reason, Mr Khieu Samphan is compelled to invoke the

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<sup>1</sup> *Observations de la Défense de M. KHIEU Samphân en vue de la réunion de mise en état du 13 juin 2013*, 5 juin 2013, **E288/2**.

<sup>2</sup> Transcript of hearing ("T.") of 13 June 2013, **E1/207.1**.

<sup>3</sup> *Schedule for the final document and other hearings in Case 002/01, for the questioning of the Accused and response to motions E263 and E288/1*, 17 June 2013, **E288/1/1** ("Memorandum **E288/1/1**"); notified in English and in Khmer on 21 June 2013 [the Defence worked with a courtesy copy of the French version provided by the Interpretation and Translation Unit].

<sup>4</sup> Co-Prosecutors' Notification of the Time Required to Question the Accused, 6 June 2013, **E288/1** ; email from Ms SIMONNEAU-FORT titled "Information Re Planning of upcoming hearings" sent to Ms Susan LAMB on 7 June 2013 at 14h49.

<sup>5</sup> T. of 13 June 2013, **E1/207.1**, p. 29 L. 19-25 and p. 30 L. 1-4.

last right he appears to be entitled to: the right to remain silent until the closure of the “proceedings” and to make a final statement after the closing arguments.

### **I – Consideration of the requests made by Mr Khieu Samphan**

6. Since the beginning of his trial, Mr Khieu Samphan has always stated by virtue of the presumption of innocence and the fact that the burden of proof is on the Co-Prosecutors, that he would, where appropriate, only answer questions put to him by the Chamber and the parties at the end of the presentation of all the evidence.

7. As the end of the first trial approached, Mr Khieu Samphan announced his willingness to be questioned by the Chamber and the parties. In view of his advanced age, the long time lapse since the events and the huge volume of documents in the present case, his Defence nevertheless made some requests which are clearly in conformity with current practices before all international criminal courts and are particularly reasonable in the present case. Accordingly, Mr Khieu Samphan requested that:

- the parties and the Chamber provide him with lists of questions for each of the topics they wish to broach;<sup>6</sup>
- the parties and the Chamber provide him with lists of documents on which they wish to question him, and since it was specified that the purpose of the lists was to enable Mr Khieu Samphan to read the said documents ahead of the hearings, they should not cover the length and breadth of the trial but be reasonably proportionate;<sup>7</sup>
- he be allowed to use a three-week interval between the end of the presentation of evidence and his questioning to prepare for the questioning; the interval would run from the date of reception of the aforementioned lists;<sup>8</sup>
- his counsel be granted access to the detention facility during weekends;<sup>9</sup>
- his questioning be scheduled for half days and in the morning, when he is best able to concentrate.<sup>10</sup>

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<sup>6</sup> *Observations de la Défense de M. KHIEU Samphân en vue de la réunion de mise en état du 13 juin 2013*, 5 juin 2013, **E288/2**, para. 6.

<sup>7</sup> *Idem*.

<sup>8</sup> *Ibidem*, para. 7; T. of 13 June 2013, **E1/207.1**, p. 38, L. 10-14.

<sup>9</sup> T. of 13 June 2013, **E1/207.1**, p. 38, L. 14-16.

8. In making these requests, Mr Khieu Samphan's Defence also reminded the Chamber that there were unresolved legal issues constituting areas of uncertainty that alter Mr Khieu Samphan's rights as he prepares to answer questions. Such difficulties are related, *inter alia*, to the manner in which the evidence gathered in the present trial may be used in future trials (including the statements of the Accused at trial).<sup>11</sup> This problem is grave cause for concern to Mr Khieu Samphan who, even though he is experiencing difficulties owing to his age (such as the rapid onset of fatigue and difficulties in concentrating), he is not suffering from pathologies that would suggest that he is unlikely to survive the present trial and the following ones.

9. It is hard to understand why the Chamber rejected all these requests. Although it is directing the parties "[TRANSLATION] to notify the other parties and the Chamber, in a timely manner, of the documents they intend to use in questioning the Accused during the hearing" while pointing out that it "will do the same",<sup>12</sup> it neither indicates the time-limit for such notification nor the quantity of such documents. At no time has the Chamber responded to the request for notification of lists of questions according to the topics to be discussed, nor to the request for scheduling of the questioning for the morning, nor to the request that counsel be granted access to the detention facility over the weekend. It rejects the request that the three-week break be allowed for preparation of the questioning because the proceedings in Case 002 have been on-going for more than four years and the present trial segment for 18 months. For this reason, according to the Chamber, the proceedings have been on-going, thus "ensuring ample time for the Accused and his counsel to be fully aware of the nature of the allegations against him".<sup>13</sup>

10. It is obvious that the Defence's requests were nevertheless legitimate, completely non-dilatory and reasonable.

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<sup>10</sup> *Observations de la Défense de M. KHIEU Samphân en vue de la réunion de mise en état du 13 juin 2013*, 5 juin 2013, **E288/2**, para. 6.

<sup>11</sup> *Ibid.*, para. 10 ; T. of 13 June 2013, **E1/207.1**, p. 42, L. 12-17.

<sup>12</sup> T. of 13 June 2013, **E1/207.1**, p. 30 L. 10-16.

<sup>13</sup> Memorandum **E288/1/1**, para. 9.

## **1. Justification for the requests**

11. Mr Khieu Samphan is aged 82 and, like a number of elderly witnesses who have testified, his physical condition, memory and ability to concentrate are no longer those of a man in his prime. Yet, he has to defend himself against very serious and complex crimes and in respect of events that occurred 40 years ago.

12. However, it is worth recalling here that the situation of the Accused is different from that of other witnesses, experts and Civil Parties testifying at trial (who are, incidentally, provided with documents in advance “to refresh their memory” and/or, in the case of experts, lists of topics likely to be broached during their testimony). In fact, as the Co-Prosecutors acknowledge, “the Accused are central to the allegations,” which they deny, and they “are in a unique position to answer those allegations”, which calls for much longer and “extensive” questioning.<sup>14</sup>

13. At his age, Mr Khieu Samphan does not have the capacity to endure a volley of questions, the more so as such questions could be aggressive in nature, given that the Chamber recently stood by and allowed the Co-Prosecutors and Civil Parties to maltreat a Defence witness.<sup>15</sup>

14. The measures requested by the Defence were particularly justified in that the questions that will be put to Mr Khieu Samphan are very likely to stray outside the scope of the first trial under the pretext that they are related to joint criminal enterprise or administrative structures, matters which the Co-Prosecutors had said they wished to consider through “close” and “extensive” questioning.<sup>16</sup>

15. Furthermore, it is important to emphasize here that the current counsel for Mr Khieu Samphan joined the case after its commencement and they therefore did not have the time to

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<sup>14</sup> Co-Prosecutors’s Notification of the Time Required to Question the Accused, 6 June 2013, **E288/1** , paras. 10 and 11.

<sup>15</sup> See *inter alia*: T. of 11 June 2013, **E1/205.1**, pp. 101-106 ; T. of 12 June 2013, **E1/206.1**, p. 33 L. 7-12, p. 44 L.11-15 ; T. of 20 June 2013, **E1/210.1**, p. 11 L. 1-10.

<sup>16</sup> Co-Prosecutors’s Notification of the Time Required to Question the Accused, 6 June 2013, **E288/1**, 6 June 2013, **E288/1**, paras. 4 and 5.

prepare their client since they had to familiarize themselves with the trial and manage the proceedings.<sup>17</sup>

16. In fact, since they took up the case, the work of the counsel, which is done in consultation with their client, has focused exclusively on the preparation of hearings and the study of various procedural and legal issues, such as the definition of the scope of the trial (whereas it had already commenced) or the obligation to file part of their closing brief when the trial was still on-going.

17. Furthermore, the Chamber having proved unable to provide a schedule of appearances extending beyond two weeks and having amended, without prior notice, the order of appearances and even the identity of witnesses summoned, Mr Khieu Samphan's Defence counsel have been unable to organize work sessions with their client other than by adapting to the ever-changing scheduling of witnesses. This state of affairs has not allowed for adequate preparation.

18. Moreover, regarding the working hours and days of access to the detention facility, which is not open on weekends,<sup>18</sup> meetings between Mr Khieu Samphan and his counsel have, for the most part, been limited to three hours on Friday morning (whenever it is not a public holiday).

19. As of August 2012, Mr Khieu Samphan's Defence had reported this difficulty and requested the Chamber to grant it greater access to the detention facility. The Chamber, while acknowledging that "[w]e have to find ways in order to ensure that they have times to consult with their clients accordingly," had promised to inform the parties of its decision on the request "in due course".<sup>19</sup> It has never done so.

20. To conclude, the requests made by Mr Khieu Samphan's Defence were fully justified. It will be clearly established that they were not at all dilatory.

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<sup>17</sup> Mr KONG Sam Onn on 18 November 2011, Mr Arthur VERCKEN on 21 November 2011, Ms Anta GUISSÉ on 19 January 2012. It will have escaped nobody's notice that Mr Jacques VERGÈS, who is even older than the Accused, has not attended the hearings since January 2012.

<sup>18</sup> From Monday to Friday from 8h30 to 11h30 and from 14h00 to 17h00, except for public holidays.

<sup>19</sup> T. of 27 August 2012, **E1/114.2**, p. 49 L. 23-24 and p. 49 L. 14

## **2. The non-dilatory nature of the requests**

21. At the start of the trial, Mr Khieu Samphan's Defence could have requested an adjournment of the proceedings or a postponement of the commencement of the trial on the merits to enable the new lawyers to acquaint themselves with the case file. It did not do so. In the course of and towards the end of the first trial, it could have followed the path chosen by the Co-Prosecutors by appealing the severance decisions.<sup>20</sup> It did not do so. It could have requested the summoning of additional witnesses.<sup>21</sup> It did not do so either.

22. Mr Khieu Samphan's Defence has always called for an expeditious trial. All it has asked for is to be granted the practicalities necessary prepare the last stages of the first trial without causing any delays.<sup>22</sup>

23. The final stages of a trial are the most crucial. They are the highpoint in the judicial debate, when the parties should be able to argue their respective cases in light of all the evidence adduced in the course of proceedings.

24. And yet, not only has the Chamber refused to give the Defence an opportunity to prepare for a worthy, fair and composed question session, but it has, furthermore, stretched to the maximum the time for questioning of the Accused.

## **3. The reasonableness of the requests**

25. The requests regarding conditions for preparing the questioning were very reasonable in view of the unique circumstances of this complex trial, in which the accused are aged over 80 and the acts charged were carried out 40 years ago.

26. The Defence's requests were far from exorbitant in light of the practice at the international criminal tribunals (where the accused are much younger and the acts charged are recent). To cite only the example of ICTR (see *The Prosecutor v. MBAMPARA* or *The Prosecutor v.*

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<sup>20</sup> Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 7 November 2012, **E163/5/1/1**; Co-Prosecutor's Immediate Appeal of Second Decision Severance of Case 002, 10 May 2013, **E284/2/1**.

<sup>21</sup> Co-Prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide information Prior to the Trial Management Meeting, 10 June 2013, **E288/3**.

<sup>22</sup> T. of 13 June 2013, **E1/207.1**, p. 10, L. 23-25 and p. 11, L. 1-5.

*KALIMANZIRA*), the accused who decide to respond to questions asked by parties and judges are still granted a one- to two-week break to prepare for questioning of the accused with the possibility of meeting their counsel, including over weekends. Yet, in the above-mentioned cases, the trial on the merits only lasted about two months and the documents tendered into evidence were only about a hundred pages long.

27. The requests by Mr Khieu Samphan's Defence were entirely reasonable in view of the time required by the Co-Prosecutors and Civil Parties for questioning Mr Khieu Samphan. In fact, the three-week break (that is, 15 to 21 morning sessions, depending on whether access to the detention facility is extended or not), are a minimum period for preparing for a testimony that would last at least four weeks and probably double that time, if we add the time for questions by the judges and the Defence teams themselves.<sup>23</sup>

28. However, now that the Chamber has decided that there will be no time-limit to the questioning of both Accused,<sup>24</sup> the initial requests by Mr Khieu Samphan's Defence appear to be insufficient and even ridiculously moderate.

29. In fact, the time requested should even be increased to ensure a fair trial. Indeed, the rejection of the request to use the three-week break for preparation on the ground that the proceedings in Case 002 have been on-going for four years and the trial for 18 months, thereby "ensuring ample time for the Accused and his counsel to be fully aware of the nature of the allegations against him"<sup>25</sup> is totally unfounded.

30. Mr Khieu Samphan's Defence strongly objects to such terse reasoning. In fact, since the beginning of the trial (and the arrival of counsel for Mr Khieu Samphan), the right of the Accused to be informed of the charges against them in the first trial segment has been largely violated. Not only has the scope of the first trial been a source of uncertainties, variations and confusion from the very outset, but it is still so today. Thus, a few weeks before the end of the trial on the merits, with the severance decision under appeal,<sup>26</sup> the Defence is still not sure of the scope of the

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<sup>23</sup> A minimum 12 morning sessions for the Co-Prosecutors (**E288/3**) and a minimum two morning sessions for the Civil Parties (**E1/207.1**, p. 35 L. 1-4) spread over four weeks of hearings with four morning sessions a week.

<sup>24</sup> T. of 13 June 2013, **E1/207.1**, p. 26 L. 22-25 and p. 27 L. 1-3; Memorandum **E288/1/1**, para. 8.

<sup>25</sup> Memorandum **E288/1/1**, para. 9.

<sup>26</sup> Co-Prosecutor's Immediate Appeal of Second Decision Severance of Case 002, 10 May 2013, **E284/2/1** ;



present trial. Neither is it sure of the scope of the form of responsibility (participation in a Joint Criminal Enterprise) beyond the first trial.<sup>27</sup> The Defence is not any more enlightened as to how the first trial will provide “a general foundation for all the charges, including those which will be examined in later trials”,<sup>28</sup> nor on the question of the use of the evidence and conclusions drawn from the first trial in subsequent trials.

## **II – A voiceless Accused forced to remain silent**

31. While it was issuing the decisions considered above, the Chamber was setting completely absurd limits to the closing briefs and closing arguments.<sup>29</sup> It did not respond either to other requests made by Mr Khieu Samphan’s Defence regarding translations and clarifications on E3 documents.

32. Hence all the Chamber’s decisions regarding the organisation of the end of this trial must be viewed as a ban imposed on the Defence from discussing the entirety of the evidence presented in the course of the trial.

33. In fact, quite apart from the legal issues still to be addressed, discussing approximately 6,300 documents assigned an E3<sup>30</sup> reference number and 93 statements by witnesses, experts and Civil Parties (not including those of the Accused, the length of which is unrestricted)<sup>31</sup> within a 100-page closing brief and in two days of closing arguments is inconceivable and senseless.

34. Despite the Defence’s numerous requests to increase the number of pages of the closing brief, which should logically have increased proportionately to the increase in the number of witnesses who have testified before the Chamber and the number of documents placed before it,

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Immediate Appeal against Trial Chamber’s Second Decision on Severance and Response to Co-Prosecutor’s Second Severance Appeal, 27 May 2013, **E284/4/1**; Decision on Co-Prosecutor’s Request for Clarification, Supreme Court Chamber, 26 June 2013, **E284/2/1/2**, para. 9.

<sup>27</sup> T. of 26 June 2013, unrevised version, pp. 32-48.

<sup>28</sup> Scheduling Order for Opening statements and Hearing on the Substance in Case 002, 18 October 2011, **E131**, para. 3, pp. 2-3.

<sup>29</sup> *Ibid.*, paras. 10 and 11.

<sup>30</sup> T. of 13 June 2013, **E1/207.1**, p. 26 L. 10-16 (4000 + 1500 and 800).

<sup>31</sup> 87 who testified before 20 June 2013 + 5 additional witnesses (*Email from Susan to the Parties: Advance notification of additional witnesses to be summoned in Case 002/01 in response to the parties' requests at the Final TMM*, 19 June 2013, **E292**) + Steven Heder (email from Mr CRIPPA titled “*Updated Schedule for upcoming weeks (1-11 July 2013)*” sent to the parties on 27 June 2013 at 10h46.

and following the death of one of the Accused, the Chamber insisted on adhering to the limits initially set. It is important to emphasize that in so doing, the Chamber has favoured the Co-Prosecutors who retain their initial 200 pages in spite of the reduction in the number of Accused.

35. Indeed, it is obvious that the “proceedings” are already closed and the Chamber is not interested in what the Defence has to say.

36. In issuing these decisions and rejecting the Defence requests, the Chamber is brushing aside the rights of Mr Khieu Samphan, which should, on the contrary, be guaranteed pursuant to the legal principles applicable before the ECCC.

37. According to the so-called “fundamental”<sup>32</sup> principles, Mr Khieu Samphan should be entitled to time for the preparation of his defence with the assistance of his counsel, and to a fair and adversarial trial that would allow his counsel to challenge opposing arguments and to discuss the evidence placed before the judges.

38. However, it is obvious that Mr Khieu Samphan is being prevented from preparing for his questioning with his counsel, who, in turn, are prevented from discussing all the evidence against him. Instead of being afforded an effective defence, all he has is a cosmetic one.

39. In these conditions, it appears to be established that before the Chamber, Defence lawyers are tolerated as a showcase, to play to the gallery (that is, when their microphones are not cut off by the President...) solely with a view to legitimizing a mockery of a criminal trial.

40. In these conditions and despite his initial willingness to take questions, Mr Khieu Samphan will not submit to questioning by the Chamber and the parties. He will limit himself to making a statement at the end of the trial.<sup>33</sup>

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<sup>32</sup> Internal Rule 21; see also, *inter alia*: Article 14 (3) of the International Covenant of Civil and Political Rights, Articles 31 and 38 of the Constitution of the Kingdom of Cambodia, Article 13 (1) of the Agreement between the United Nations and the Cambodian Government (A/RES/57/228B), Article 35 (new) of the Law on the Establishment of the ECCC.

<sup>33</sup> Internal Rule 94 (1) and (3); Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meetings for 13 June 2013, **E288**, para. 6.

**FOR THESE REASONS**

41. Mr Khieu Samphan's Defence requests the Trial Chamber to NOTE that Mr Khieu Samphan will not respond to questions by the Judges and the parties and that he will limit himself to making a statement at the end of the trial.

	Mr KONG Sam Onn	Phnom Penh	<i>[Signed]</i>
	Ms Anta GUISSÉ	Paris	<i>[Signed]</i>
	Mr Arthur VERCKEN	Phnom Penh	<i>[Signed]</i>