

**Accused Khieu Samphan Alleges Lack of Opportunity
for Adversarial Debate on Documentary Evidence**

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In a February filing made public last week, accused Khieu Samphan challenges the consistency and fairness of the Trial Chamber’s approach to documentary evidence during proceedings against surviving Khmer Rouge leaders at the Extraordinary Chambers in the Courts of Cambodia. The Defense argues that the procedures and purposes for holding three special “key document” hearings have violated the accused’s “fundamental right to a fair and adversarial trial” and that the parties require more time at the close of hearings in Case 002/01 to adequately address the thousands of documents admitted into evidence.¹

In advance of the first key documents hearing in February 2012, the Trial Chamber outlined the hearing’s intended purpose and the scope of allowable party submissions:

[T]he Chamber intends to grant to the parties an opportunity to present before it a limited number of documents considered to be particularly relevant to the [first] segment of Case 002/01. The purpose of this hearing is to ensure a greater measure of public accessibility to the documentary aspect of the trial, and to provide an opportunity (to those parties who seek it) to highlight for the Chamber key documents considered to be particularly important to [this] segment of Case 002/01 from their perspective. Whenever a document is presented by any party as part of this hearing, the Accused will also be permitted to comment on this document, if they so choose.

The Chamber described the hearing as being “distinct from the ongoing process of putting documents before the Chamber” and emphasized: “*As this hearing does not concern the admissibility of any documents proposed to be put before the Chamber, time has not been allocated for responses by the other parties to these presentations.*”²

The Khieu Samphan Team, as well as at least two other parties, understood from this and other Trial Chamber correspondence that, although the accused could personally comment on the documents presented, their lawyers would not be afforded the same opportunity. In other words, the Prosecution — which has presented a majority of the documents — would not be allowed to “plead,” and the other party lawyers would not be allowed to “react.”³

¹ Mr KHIEU Samphan's Motion Reasserting His Right to a Fair and Adversarial Criminal Trial (Feb. 11, 2013) [hereinafter Khieu Motion].

² Memorandum from Trial Chamber President NIL Nonn, *Scheduling of oral hearing on documents (13-16 February 2012)*, ¶¶ 2-4 (Feb. 9, 2013) (emphasis added).

³ Khieu Motion, *supra* note 1, ¶¶ 5, 7. Cf. Trial Transcript—Case 002, at 19-20 (Oct. 19, 2012) (quoting Civil Party Co-Lead Lawyer Elisabeth Simonneau Fort at the second “key documents” hearing: “May I also point out that Mr. Khieu Samphan may, as an accused person, comment on these documents. But if I read the instructions of the Chamber correctly, counsel for Khieu Samphan is not allowed to make comments at this point[.]”); *id.* at 22 (quoting Nuon Chea defense counsel Andrew Ianuzzi expressing the same understanding).

Following the first key documents hearing, some documents that had been presented by Prosecution were re-categorized as “E3” documents⁴, designating them as having been put before the Chamber, subject to prior examination by the parties, and available to the Chamber as a basis for judgment.⁵ In response to a Khieu Samphan query on this change of status, the Trial Chamber pointed out that the parties had the opportunity to challenge the documents in question on occasions other than the key documents hearing.⁶ The Khieu Samphan Team argues that this reply “acknowledged that the documents in question had not been subjected to examination” at the key documents hearing.⁷

According to the Khieu Defense Team, prior to the second key documents hearing in October 2012, it told the Chamber “it would not participate in hearings where no adversarial argument was allowed.”⁸ In the midst of the hearing, in response to party objections and confusion about the scope of allowable interventions, the Trial Chamber orally stated that at the completion of each party’s document presentation, opposing counsel *would* be allowed to make comments. The Trial Chamber President then clarified that parties could make “observations” on documents presented but “the parties were not to assess the probative value or weight of the evidence because this is not ... the closing stage of the proceedings.”⁹

During the third document hearing in January 2013, Judge Cartwright emphasized:

While no discussion on the admissibility of documents presented during this stage is to be allowed unless the issue of admissibility has not previously been discussed or ruled upon, it’s clear that the Chamber has never prevented the Accused or their lawyers from discussing the relevance or the probative value of the documents.¹⁰

Finally, at a trial management meeting last week, Judge Cartwright was paraphrased saying that “[t]he key document hearing was an opportunity given for each party to present such documents, and for other parties to comment on any point except for admissibility, which had already been covered.”¹¹

The Khieu Samphan Team says that the rules governing the key documents proceedings are

⁴ See Request by the Defence for Mr KHIEU Samphan for Clarifications on the Status of *Certain Documents* Identified as “E3” Documents, ¶ 5 (Mar. 5, 2012).

⁵ See Memorandum from Trial Chamber President NIL Nonn, *Requests by the KHIEU Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and its Motion E167*, at 2 (Apr. 11, 2012) [hereinafter April 11 Memo]. See also ECCC Internal Rules, r. 87(2) (“Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.”).

⁶ See April 11 Memo, *supra* note 5, at 2.

⁷ See Khieu Motion, *supra* note 1, ¶ 17.

⁸ See *id.*, ¶ 18.

⁹ See Trial Transcript—Case 002, at 55-66 (Oct. 19, 2012).

¹⁰ See Trial Transcript—Case 002, at 70-71 (Jan. 22, 2012).

¹¹ Simon Crowther, *Sim Hao’s Testimony Ends as the Tribunal Tends to Scheduling*, Cambodia Tribunal Monitor (June 13, 2013), at <http://www.cambodiatribunal.org/blog/2013/06/sim-hao%E2%80%99s-testimony-ends-tribunal-tends-scheduling> [hereinafter June 13 CTM Blog].

unclear and have changed during the course of trial.¹² Substantively, they argue that the probative value of documents can only be assessed at the end of the trial, and the key documents hearings are not a substitute for that opportunity:

It is only after the entirety of the evidence has been adduced that the parties will be in a position to vet those documents and check them against both the testimonies and other documents presented before any conclusions can be drawn that may be useful for the Chamber in its deliberations.¹³

For this reason, they object to Trial Chamber’s imposition of a 100-page limit on final briefs, which they say will violate the right of the accused to debate the probative value of all the evidence, including that presented at the key documents hearings. The Team asks that no additional key documents hearings be held and that the opportunity for “genuine adversarial debate” on the thousands of documents admitted into evidence be guaranteed at the end of trial by permitting Khieu Samphan (if he chooses) to comment on all key documents that have been presented, by allowing a longer page limit for closing briefs, and by providing sufficient time for closing arguments.¹⁴

No Trial Chamber decision on the motion has yet been issued; however, last week the Chamber scheduled one final key documents hearing and said it would “not entertain claims for ... a more lenient page limit” for final briefs.¹⁵

¹² See Khieu Motion, *supra* note 1, ¶¶ 25-32.

¹³ See *id.* ¶¶ 36, 39.

¹⁴ See *id.* ¶¶ 41, 46-56.

¹⁵ See June 13 CTM Blog, *supra* note 11.