

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 Samphân**Filed to:** The Trial Chamber**Original Language:** French**Date of document:** 13 November 2012**CLASSIFICATION****Classification of the document suggested by the filing party:** Public**Classification by the Trial Chamber:** Public**Classification Status:****Review of Interim Classification:****Records Officer's Name:****Signature:**

**REQUEST TO RECONSIDER THE TERMS OF MEMORANDUM E163/5 PURSUANT TO WHICH THE
PARTIES ARE TO FILE WRITTEN SUBMISSIONS CONCERNING THE APPLICABLE LAW BY 21
DECEMBER 2012**

Filed by:

Lawyers for Mr KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

Assisted by

SENG Socheata
Marie CAPOTORTO
Shéhérazade BOUARFA
Mathilde CHIFFERT
OUCH Sreyphat
CHUN Sotheary

To:

The Trial Chamber
Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

The Co-Prosecutors
CHEA Leang
Andrew CAYLEY

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

MAY IT PLEASE THE TRIAL CHAMBER

1. On 8 October 2012, Judge NIL Nonn, President of the Trial Chamber, issued Memorandum E163/5 requesting the parties to, *inter alia*, submit no later than 21 December 2012 the portions of their Closing Briefs concerning the applicable law.¹
2. According to the Memorandum, the aim is for the “*remaining portions of the [...] Closing Briefs (...) [to] focus exclusively or mainly on the factual allegations at issue in the trial*”.²
3. The Co-Lawyers for Mr KHIEU Samphân are concerned about this directive, because it comes in the midst of the trial and is aimed at splitting up their Closing Brief (which is supposed to be submitted after the close of the hearing of evidence), reduce its overall length, as well as the amount of time to be allocated to preparing it.

I – The proposal of Mr IENG Sary’s international Co-Lawyer has been misrepresented

4. It would appear that the requirement laid down in Memorandum E163/5 is based on a *minima* acceptance of a proposal made by Mr IENG Sary’s lawyer at the Trial Management Meeting on 27 August 2012.
5. During a discussion at the Trial Management Meeting about the length of the parties’ Closing Briefs, Mr KARNAVAS proposed that the question of the applicable law in the present trial be addressed by means of submissions to be filed before the end of the trial. Mr KARNAVAS indicated that his proposal was aimed at enabling the Trial Chamber to define the applicable law before the close of the trial.³ His idea was to enable the parties “[TRANSLATION] *to submit [in advance] what they consider as ‘the’ applicable law, the Chamber would rule on that*”. According to him, the parties would thus “[TRANSLATION] *have a clearer understanding of the applicable law, and hence be a lot more judicious in*

¹ Notification of Decision on Co-Prosecutors’ Request to Additional Crime Sites within the Scope of Trial in Case 002/01 and deadline for submission of applicable law portion of Closing Briefs, 8 October 2012, **E163/5** (“Memorandum E163/5”).

² *Idem*, para. 4.

³ Transcript of Proceedings – Closed Sessions, 27 August 2012, **E1/114.2**, p. 22.

[their] closing brief[s]”.⁴

6. To begin with, it is important to note that implementing this proposal necessarily means that the Trial Chamber would have to render an interlocutory ruling on the applicable law prior to the close of the hearing of evidence. However, no such ruling is envisaged or even suggested in Memorandum E163/5. The Memorandum only talks about filing advance submissions.

II. Inappropriateness of filing advance submissions of Closing Briefs on the applicable law

7. Mr KHIEU Samphân’s Defence submits that the requirement to file submissions prior to the close of the hearing of evidence cannot have the effect that in the “*remaining portions of the [parties’] Closing Briefs*”, the parties, “[*will*] focus exclusively or mainly on the *factual allegations at issue in the trial*”.⁵

8. This observation of the requesting party also includes the scenario where the Chamber would issue an interlocutory ruling (as initially proposed by Mr IENG Sary’s lawyer).

9. In reality, the submissions concerning the applicable law being requested in the midst of the trial means that they can only consist in theoretical legal representations with limited impact on any substantive matters to be covered in the Closing Briefs.

10. In the view of the Defence, a Closing Brief is aimed at, *inter alia*, enabling the Defence to present its own legal characterisation of the facts, and checking the facts against the law. However, this exercise cannot be undertaken until the evidence to be considered has been determined. Any attempt at pre-empting this will only produce academic submissions.

11. For instance, in order to characterise the legal elements of joint criminal enterprise, the parties must rely on the law, as well as the facts and the evidence adduced at trial. Still in relation to this example, the question arises as to the purpose of the requirement imposed, considering that in this trial, the Chamber has already ruled on the modes of participation in

⁴ *Ibid.*

⁵ See Memorandum E163/5, para. 4.

joint criminal enterprise which it intends to apply in its deliberations,⁶ and has thereby made any further discussion of doctrine on this issue a moot point.

12. Yet, Memorandum E163/5 of 8 October 2012 requires the filing of such advance submission and even very clearly envisages using it to reduce the length of the Closing Briefs and the time accorded to the parties for preparing them.

13. That is an unacceptable decision, and Mr KHIEU Samphân's Defence is hereby requesting that the Chamber reconsider it.

14. Mr KHIEU Samphân's Defence submits that the Trial Chamber's decision on this issue stems from lack of trust in the parties, who are suspected of seeking to unnecessarily prolong the trial by requesting to be allowed excessive amounts of time for preparing their Closing Briefs, and an excessive number of pages for the related submissions.

15. This is an assumption about dilatoriness and bears no relation to reality.

16. The reality is that the lawyers forming part of the Civil Parties, Prosecution and Defence teams are legal professionals and all strive to discharge their duties in the most efficient manner possible. They are all acutely aware that a needlessly lengthy and confused written submission will have a lesser impact on the judges' reflection than concise and clear submissions.

17. This is why the overly restrictive decisions about the number of words and pages to be contained in the Closing Briefs and the number of hours, days, weeks and months to be allocated for preparing them may seem insulting.

18. Further, it is not reasonable to require that the parties prepare and submit "portions" of their Closing Briefs prior to the close of the trial, because this impinges on the seriousness of their mission and is not consistent with the objectives of a trial. The Defence considers that this is a violation of its basic rights. A trial is a gradual process, and the hearing of evidence must be completed before the parties start reflecting upon the question of the applicable law and then proceed to make submissions thereupon.

⁶ Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, **E100/6**.

19. Added to this (even though to date no final decision has been reached on this question) is the fact that in an international trial of this magnitude, and given the sheer number of witnesses, Civil Parties, experts and documents, it will be virtually impossible to adequately address the issues in Closing Briefs of 50 or 100 pages in length.

20. On this point, Mr KHIEU Samphân's international lawyers, who have represented several accused before the ICTR and the ICC, wish to point out that they do not think that they can adequately address the issues at hand in less than 300 pages. It goes without saying that the Prosecution, which has to make submissions concerning several accused, will be allowed to file more pages.

21. Still on this subject, the Defence wishes to point out that the estimation of 300 pages is in itself premature and purely indicative since as of now, the parties are still in the dark as to how many witnesses will be called to testify in this trial, and as to how many documents are to be marked E3. On this issue, it is worth noting that the Chamber has already assigned E3 classification to more than 1,750 documents whose probative value is yet to be discussed, notably by means of the Closing Briefs. It can be seen therefore that the task relating to the Closing Briefs is already quite significant and that the number of pages discussed at the Trial Management Meeting is too low.

22. Against this background, Mr KHIEU Samphân's Defence which has no other recourse against a memorandum whose procedural status remains unclear, hereby requests that the Chamber delay the scheduling of the proceedings on the length of the Closing Briefs and on the amount of time to be allocated to the parties for preparing them. Those proceedings should be scheduled once the parties have a clear picture of the final number of witnesses who would be testifying, the final number of documents to be assigned an E3 classification and have a fairly clear idea about the timing of the close of the hearing of evidence.

23. The present request is all the more justified given that we are dealing with an ever-changing trial, a trend that is likely to continue. Memorandum E163/5 concerning advance submissions on the applicable law also extended the scope of the trial. It turns out that the

Prosecution recently filed an immediate appeal seeking a further extension of the scope of the trial.⁷

FOR THESE REASONS

24. Mr KHIEU Samphân requests that the Trial Chamber:

- RECONSIDER the terms of Memorandum E163/5,
- HOLD that the parties shall not be required to submit advance submissions on the applicable law prior to 21 December 2012,
- HOLD that the length of the Closing Briefs and the time to be allocated for preparing them shall be discussed at the appropriate time, that is, once the judges and the parties have a clear picture of the timing of the close of the hearing of evidence and of the amount of evidence adduced.

	KONG Sam Omn	Phnom Penh	[Signed]
	Anta GUISSÉ	Phnom Penh	[Signed]
	Arthur VERCKEN	Paris	[Signed]
	Jacques VERGÈS	Paris	[Signed]
Date	Name	Place	Signature

⁷ Co-Prosecutors' Immediate Appeal of Decision concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1; notified on 8 November 2012.