

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

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**MOTION IN RESPONSE TO THE NUMEROUS DIFFICULTIES RAISED BY
MS LAMB'S E-MAIL DATED 2 FEBRUARY 2012**

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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

CHEA Leang
Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. On Thursday, 2 February 2012, at 10:48 a.m., Ms Susan Lamb, Senior Legal Officer of the Trial Chamber, sent a 2-page e-mail to all parties entitled, "*Message to the parties in advance of tomorrow morning's informal TMM.*"
2. The e-mail was drafted in English, and neither a Khmer nor French translation was provided. From what it can make of it, the Defence for Mr KHIEU Samphan hereby responds to the said e-mail as follows.
3. First of all, the Defence for Mr KHIEU Samphan takes exception generally to the failure to hold public hearings on issues pertaining not only to the technical organization of the trial, but which have a decisive impact on the protection of the rights of the Defence.
4. The Defence considers and requests that henceforth, matters of this nature be conducted in public, and should no longer be dealt with by e-mail or memoranda, which are not judicial decisions. In addition, the Defence notes that an e-mail or a memorandum issued in a single language may lead to the exclusion of one or the other of the national or international co-lawyers.
5. In her e-mail of 2 February 2012, Ms Lamb announces the Chamber's intention to schedule two evidence-related hearings during the week of 13-16 February 2012.
6. It is stated that the first of these hearings will conclude the historical context segment of the first mini-trial. It appears that the Chamber, through Ms Lamb, is requesting that each party make a selection of documents it deems critical from the documents that have already been put before the Chamber (which as of 31 January 2012, refer to the 135 documents classified under E3).
7. In passing, the Defence for Mr KHIEU Samphan points out to the Chamber that the steps it undertook to retrieve the list of the 135 E3 documents are unacceptable. To

obtain the list, the Defence was obliged to go through the Records and Archives Unit, although it would have been significantly more efficient for the list of E3 documents to be updated and provided to the parties on a daily basis.

8. That said, Ms Lamb states in her e-mail that the hearing is justified by the large volume of documents at issue and the opportunity given to each party to indicate “key documents”, which would have the benefit of informing the public about the trial.

9. The Defence recalls that only 135 documents were put to the Chamber during this first segment.

10. As such, the Defence is of the view that the three benefits cited by Ms Lamb merely serve as a pretext to justify the final stage of the hearing, namely the so-called opportunity for the Accused to comment on “key documents” that will be put to them.

11. This point is all the more relevant since the “historical context” segment has not been completed, as certain witnesses and experts such as TCW-797 and TCE-038 are yet to testify in this regard.

12. It is obvious that when these individuals testify, which will not be prior to the week of 13-16 February 2012, new documents may be put to them by the parties and the judges, and therefore be put to the Chamber. That being the case, it is difficult to imagine that hearings on this segment have been concluded. What will the Chamber do after that? Will it schedule a similar second hearing on the historical context? This seems absurd.

13. The proposal made by Ms Lamb on behalf of the Chamber would simply have the effect of compelling Mr KHIEU Samphan to answer questions that may be asked by other parties and the judges, even though he has made it clear since the start of the trial that he wished to wait for the Co-Prosecutors to produce the entirety of their evidence before possibly answering any questions from parties and the Chamber.

14. Mr KHIEU Samphan's position is consistent with his right to remain silent, and has thus been accepted by the Chamber. Yet, Ms Lamb's proposal amounts to compelling the Accused to respond immediately to questions, and forestalling the possibility for him to do so at a later stage. Such a scheme violates the rights of the Defence, and does not meet the fair trial standards set by the law applicable before the ECCC.

15. In conclusion, it appears hazardous to consider that the first trial segment is completed when the trial has just begun.

16. **Secondly**, Ms Lamb announces in her e-mail the Chamber's intention to allocate the second half of the week of 13-16 February 2012 to adversarial argument between the parties regarding the 163 documents that are cited in the footnotes to the paragraphs of the Closing Order selected by the bench as delineating the next trial segment: "*administrative and communications structures*".

17. Although 43 of these 163 documents feature already in the footnotes to paragraphs pertaining to the historical context, those footnotes refer to specific pages of the documents in question, and therefore only those excerpts are deemed to have been admitted and classified under E3.

18. In addition, the Defence notes that to this day, the paragraphs of the Closing Order pertaining to "*administrative and communications structures*" have not even been read out in court. Accordingly and aside from the fact that the Defence is opposed to this method of producing documents, it is difficult to conceive how, based on the Chamber's logic, a hearing on documents related to those paragraphs may already have taken place.

19. Moreover and regardless of the number, be it high or low, of documents that will be examined during the second part of the hearings from 13-16 February 2012, the Defence notes that the process being instituted by the Chamber may be interpreted as the first step in reversing the burden of proof that is normally borne by the Co-Prosecutors. On this point, the following comment by Ms Lamb is instructive: "*This hearing therefore grants the parties the opportunity to rebut this presumption by providing reasoned*

Motion in response to the numerous difficulties raised by Ms Lamb's e-mail dated 2 February 2012

argument in relation to specified documents alleged not to meet the criteria contained in Internal Rule 87 3)".

20. Mr KHIEU Samphan's Defence emphasizes at this stage that the practice of simply "identifying" documents pursuant to Internal Rule 87(3) can only be used under exceptional circumstances in a fair trial. Mr KHIEU Samphan's Defence expects to be able to present arguments it considers appropriate in making its case, and to reference all relevant documents having regard to the witnesses who will testify and the matters that will be raised during the proceedings.

21. Once again, the seriousness of the decisions being made through e-mails and memoranda compels Mr KHIEU Samphan's Defence to object and demand that such decisions be henceforth made in public hearings.

FOR THESE REASONS

22. The Defence for Mr KHIEU Samphan requests the Trial Chamber to:

- DECLARE AND RULE that all decisions pertaining to the trial and content of the hearings will henceforth be subject to public debate,
- DECLARE AND RULE that e-mails and memoranda shall be restricted to strictly organizational matters that have no bearing on the rights of the defence and the right to a fair trial,
- PROVIDE translation of previous and future Chamber e-mails and memoranda in the official languages of the Defence,
- DECLARE AND RULE that hearings on the historical context have not been completed, nor will they be completed by 16 February 2012,
- POSTPONE the announced hearings to a date to be determined after all witnesses and experts dealing with this trial segment have been heard,

Motion in response to the numerous difficulties raised by Ms Lamb's e-mail dated 2 February 2012

- DECLARE AND RULE that opportunity shall be given for adversarial argument when each document is introduced during trial, and that at the end of trial, a general debate shall be scheduled to allow parties to introduce documents that could not have been submitted during the proceedings,
- INSTRUCT the Greffier to update the list of E3 documents on a daily basis and communicate it to the parties on each sitting day.

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Date	Name	Place	Signature