

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

FILING DETAILS

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

Party Filing: Mr KHIEU Samphan

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**RESPONSE TO CO-PROSECUTORS' SUBMISSION ON STATUTE OF
LIMITATIONS FOR NATIONAL CRIMES**

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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
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MAY IT PLEASE THE TRIAL CHAMBER

1. On 5 April 2011, the Trial Chamber invited the Co-Prosecutors to indicate the basis of their contention that national crimes are not statute-barred in relation to all the accused in Case 002, after having recalled its decision in Case 001 on this same preliminary objection.¹

2. However, as happened in Case 001, the Co-Prosecutors failed to discharge their duty to demonstrate this.² Mr KHIEU Samphan therefore has further cause to maintain his position that the statute of limitations for national crimes was tolled on 17 July 2007, i.e. when the Co-Prosecutors' Introductory Submission, the first investigative action against him was filed.³

I- The 1956 Penal Code does not provide for suspension of prosecution

3. According to the 1956 Penal Code of Cambodia, prosecution may only be **interrupted** by an investigative or prosecutorial step.⁴ Cambodian law does not provide for suspension of prosecution.⁵ Nowhere in their filings do the Co-Prosecutors contend that an investigative or prosecutorial step interrupted the statute of limitations in relation to Mr KHIEU Samphan. Therefore, prosecution became barred ten years after the crimes were allegedly committed.

¹ Directions to parties concerning Preliminary Objections and related issues, 5 April 2011, E51/7, pp. 1 and 2.

² Co-Prosecutors' Submission on the Statute of Limitations for National Crimes, 27 May 2011, E51/7/1 ("Co-Prosecutors' Submission").

³ Preliminary Objections Concerning Termination of Prosecution (Domestic Crimes), 14 February 2011, E47 ("Defence Preliminary Objection").

⁴ Article 112 of the 1956 Penal Code of Cambodia. The Co-Prosecutors fail to show the existence of an internationally recognised rule which is consistently applicable without a dedicated law. They cite the example of US courts as having consistently suspended the statute of limitations during periods of war, regardless of whether such suspension was provided for by statute (Co-Prosecutors' Submission, para. 27). Unlike common law, civil law is couched in a system of codified and written laws. In the French jurisprudence cited by the Co-Prosecutors, it is stated [TRANSLATION] "moreover, it must be noted that in and of itself, a period of war cannot form the sole basis for suspension of the statute of limitations." (E51/7/1.1.28). The ECCC Law was not enacted for the purpose of suspending prosecution.

⁵ The current Code of Criminal Procedure of Cambodia contains no such provision either.

II- The Co-Prosecutors failed to objectively show that it was impossible to open an investigation or commence proceedings against Mr KHIEU Samphan between 1979 and 2007

4. Whether it is an interruption or a suspension of the statute of limitations, the Co-Prosecutors failed to discharge their duty to satisfy the requisite test⁶ that the Cambodian legal system was **objectively** incapable of opening investigations or commencing proceedings after the collapse of Democratic Kampuchea. Indeed, in their 16-page submission, they merely state the obvious or make unsubstantiated assertions.

5. First, the evidence adduced only reinforces the assumption that the operation of the judicial system was severely weakened and compromised due, *inter alia*, to the destruction of public institutions, the lack of qualified personnel and to the then ongoing civil war in the country.⁷ However, the evidence still does not prove that it was objectively impossible to open any investigations or commence any proceedings whatsoever during that period. Moreover, it is even less persuasive as to ruling out the existence of evidence to the contrary, such as that noted by the international judges in the Duch Decision.⁸

6. In the same decision, the Cambodian judges acknowledged that trials were conducted during the 1979-1993 period (“increasing from 1982 onwards”).⁹ Moreover, the Court’s Cambodian judges all started their judicial careers in Cambodia during that period: Judge PRAK Kimsan was a prosecutor from 1987 to 1994; Judge NEY Thol has been the president of the military court since 1987; Judge YA Sokhan has been a judge since 1992; Judge THOU Mony has been a judge on the Court of Appeals since 1991, and Judge SOM Sereyvuth has been a judge of the Supreme Court since 1988.¹⁰

⁶ Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 (“Duch Decision”), para. 31.

⁷ Co-Prosecutors’ Submission, paras. 6-18.

⁸ Duch Decision, para. 32 and footnotes 53-56 (laws and decrees progressively enacted from 1979 onwards).

⁹ *Ibid.*, para. 19.

¹⁰ See ECCC website: biographical sketches of the judges.

7. Second, the Co-Prosecutors merely state that Mr KHIEU Samphan remained in the resistance and did not surrender until 1998,¹¹ but fail to show whether this may have impeded opening investigations against him. On the one hand, the fact that the Revolutionary Tribunal was established in 1979 to try IENG Sary and Pol Pot is proof that it was possible to take judicial proceedings against the Khmer Rouge, even *in absentia*. Further, the Khmer Rouge no longer exercised effective control over all parts of the country as of 6 January 1979, and trials were not impeded throughout the country.¹² Finally, the Co-Prosecutors state that in 1996, “the Cambodian government and military was able to develop a plan and provide instructions for the arrest of the remaining DK leaders”,¹³ but fail to explain why such action was not taken in relation to Mr KHIEU Samphan.

8. Third, the Co-Prosecutors attempt to invoke fault or fraud of the defendant to justify the suspension of the statute of limitations.¹⁴ However, the direct, personal responsibility of Mr KHIEU Samphan (who is presumed innocent) in regard to the alleged lack of a functional judicial system and to the ongoing civil war is unsubstantiated and remains unproven.

9. Ultimately, the national authorities did not avail themselves of the opportunity to open an investigation against Mr KHIEU Samphan between 1979 and 2007; this cannot be held against him.

III. Article 3 of the ECCC Law is not applicable

10. According to the Co-Prosecutors, a retroactive change in the statute of limitations is a procedural act that does not violate the principle of legality, and the Cambodian

¹¹ Co-Prosecutors’ Submission, para. 18.

¹² Duch Decision, para. 33.

¹³ Co-Prosecutors’ Submission, para. 16.

¹⁴ *Ibid.*, paras. 32-33.

Constitutional Council determination of 12 February 2001 “may not be reviewed by this Court”.¹⁵

11. Mr KHIEU Samphan wishes to recall his submission – without repeating them – that application of Article 3 of the ECCC Law should be disallowed by the Chamber, pursuant to the principles of legality and equality before the law. He maintains that by disallowing the application of this Article, which extends the statute of limitations, the Chamber would not be reviewing the Constitutional Council determination, but would only be reviewing its conventionality while taking into account the concerns of the Constitutional Council.¹⁶

FOR THESE REASONS

12. The Trial Chamber is requested to:

- DISMISS the Co-Prosecutors’ Submission;
- DECLARE that the prosecution of the crimes against the 1956 Cambodian Penal Code is barred.

¹⁵ *Ibid.*, para. 4.

¹⁶ Defence Preliminary Objections, *inter alia*, paras. 9, 10 and 23; Duch Decision, para. 37.

**WITHOUT PREJUDICE,
AND JUSTICE WILL BE DONE**

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Date	Name	Place	Signature