

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**REPLY TO KHIEU SAMPHÂN CONCERNING NON-COMPLIANCE WITH
ARTICLE 6 OF THE PRACTICE DIRECTION ON THE FILING OF DOCUMENTS**

Filed by:

Lead Co-Lawyers for Civil Parties

PICH Ang
Megan HIRST

Co-Lawyers for Civil Parties

CHET Vanly
HONG Kim Suon
KIM Mengkhy
LOR Chunthy
MOCH Sovannary
SIN Soworn
SAM Sokong
VEN Pov

Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-
MUMBA
Judge MONG Monichariya
Judge Maureen HARDING CLARK
Judge YA Narin

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Daniel LOSQ
Christine MARTINEAU
Lyma NGUYEN
Nushin SARKARATI
Mahesh RAI

CHEA Leang
Brenda J. HOLLIS

The Accused:

KHIEU Samphân

Co-Lawyers for the Defence:

KONG Sam Onn
Anta GUISSÉ

I. INTRODUCTION

1. This reply is filed by the Civil Party Lead Co-Lawyers (“LCL”) pursuant to Article 8.4 of the Practice Direction on Filing of Documents before the ECCC, in order to address new matters raised in the *Réponse de la Défense de KHIEU Samphân aux demandes des Parties Civiles concernant la table des sources* (“Defence Response”).¹

II. THE FILING OF CORRECTED DOCUMENTS

2. The LCL appreciate the recognition by the Defence that there is a need for its Table of Authorities to be corrected, and its undertaking that one will be filed in due course.²
3. Nonetheless, the LCL maintain their view that it is necessary for the Supreme Court Chamber (“Chamber”) to set a deadline. More than three months have passed since the filing of the Defence Appeal Brief,³ and both the LCL and the Office of the Co-Prosecutor (“OCP”) are operating with limited time-frames to respond. They should not be required to do so on the basis of a document which even the Defence recognises is deficient.
4. The Defence Response also indicates that the Appeal Brief itself may become the subject of corrections which are yet to be filed.⁴ Considerations of fairness and expedition dictate that these be made at the earliest opportunity, particularly where response times are limited. There is a particular danger that if corrections of a quasi-substantive nature⁵ (for example, changing authorities referred to in footnotes) are permitted to be made very late in the process, the effective result is that the Defence have appropriated additional time for working on their brief beyond the deadline provided, while reducing the time that other parties have to meaningfully respond. There is a real risk that changes to subsequent

¹ **F56/2** *Réponse de la Défense de KHIEU Samphân aux demandes des Parties Civiles concernant la tables des sources*, 4 June 2020 (“Defence Response”).

² Defence Response, para.6.

³ **F54** KHIEU Samphân’s Appeal Brief (Case 002/02), 27 February 2020 (“Appeal Brief”) (notified on 28 February 2020).

⁴ Defence Response, para. 6.

⁵ The Defence Response does not detail what corrections will be made, however it is unclear why purely non-substantive edits would require more than 3 months to make. For example, even minor substantive additions have been disallowed at the International Criminal Court. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, ICC-01/05-01/08-631-Red, 2 December 2009, paras 37-38 (*excerpt attached*).

deadlines may become necessary. Corrections may need to be made to the English and Khmer versions of the Appeal Brief, potentially adding to delays. Accordingly, the LCL further request the Chamber to set a deadline by which any corrections to the Appeal Brief must be submitted and clarify that no substantive corrections will be permitted.

5. The LCL also consider it necessary to respond to the suggestion from the Defence that delays in the filing of corrected documents are somehow justified by resource limitations. All parties, including the LCL team, are working with limited resources. These cannot justify months of delay beyond judicial deadlines. If the Defence believed that they were being denied sufficient resources to meet their obligations, this matter should have been raised before the Chamber. Because the Defence has allowed these limitations to cause months of delay before filing corrected versions, during which time the matter has never been officially brought to the attention of the other parties or the Chamber, it is in fact the responding parties who are at risk of prejudice.

III. THE REQUIREMENT FOR ATTACHMENTS

6. The Defence Response claims that the Chamber's memorandum of 28 October 2011 ("the SCC Memorandum") justifies the Defence's failure to attach a large number of authorities referred to in its Appeal Brief. However, the SCC Memorandum only excused parties from providing attachments for "authorities, such as *ad hoc* Tribunal jurisprudence and well-known international instruments, that are already in the public domain and **easily accessible to the Chamber and all parties.**" [emphasis added] The Chamber made clear that "[a]uthorities that are not easily accessible must still be filed with the Table of Authorities in accordance with the Practice Direction on Filing."
7. No reasonable interpretation of the SCC Memorandum could extend this exemption to authorities of the kind referred to in footnote 11 of the LCL's Request.⁶ The LCL team has searched for some of the documents referenced in the Appeal Brief without success, demonstrating that they are not "easily accessible". The difficulty is compounded because of the number of apparent errors and omissions in the Table of Authorities and the Appeal

⁶ The LCL maintain their position that the fact that the ECCC Library possesses the book does not make that document readily accessible to the Chamber and parties. Such resources can be accessed only by one user or borrower at a time and requires physical presence at the ECCC.

Brief references itself: in some cases it appears that incorrect citations are given and no attachment is provided.⁷ In light of these errors the LCL are surprised by the Defence claim that “*toutes les sources sont précisément référencées dans le mémoire*”.⁸

8. The LCL certainly have no objection to the Defence omitting from the attachments any accessible international instruments or *ad hoc* Tribunal jurisprudence, pursuant to the SCC Memorandum. Likewise, similarly accessible documents (for example, jurisprudence of the International Criminal Court) need not be provided.⁹ However all other authorities should be required. Where the Defence claims that a source is readily available in a way equivalent to international instruments or *ad hoc* Tribunal jurisprudence, it could easily demonstrate this by consistently including a URL for the online version of the document.

IV. ADDITIONAL TIME FOR THE LCL TOA

9. The Defence Response argues that the LCL do not require additional time for filing their Table of Authorities, claiming that (i) the LCL have abundant time and that time limits have not begun to run; and that (ii) no advantage was granted to the Defence.
10. On the first point it suffices to note that time limits set by the Chamber already took into account the fact that there would be a period of time between the notification of the French Appeal Brief and its Khmer translation. All time limits – and indeed sparse resource allocations to the LCL team – have been made on the assumption that the Defence would comply with its filing deadline of 27 February 2020. No one foresaw that corrections would be received more than three months later.
11. Finally, the Defence Response states that “*Aucun avantage n’a été accordé à la Défense.*” Indeed, the Defence has had an advantage of more than three extra months for filing a correct and complete Table of Authorities (and perhaps a corrected Appeal Brief itself). The Chamber should ensure that the other parties do not suffer prejudice as a result.

⁷ For example, there appear to be errors in F54 Appeal Brief, para. 71 fn. 364 (citing to Cass. Crim. 08.11.1934, Bull. Crim. n°179; Cass. Crim. 14.011951, Bull. Crim n° 28; Cass. Crim. 26.03.1957, Bull. Crim n° 285).

⁸ Defence Response, para. 9.



⁹ The LCLs note that parties often comply with the Practice Direction and include attachments of these authorities as well, thereby making them more readily accessible to the other parties, the Chamber, and the public.

V. REQUEST

12. The Lead Co-Lawyers respectfully request the Chamber to:

- (1) **GRANT** the relief requested in the Lead Co-Lawyers' Requests Concerning KHIEU Samphân's Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents;¹⁰
- (2) **DIRECT** the Defence that any corrections to other parts of the Appeal Brief must be filed within a specified period and clarify that no substantive corrections will be permitted.

Respectfully submitted,

Date	Name	Place	Signature
9 June 2020	PICH ANG Lead Co-Lawyer	Phnom Penh	
	Megan HIRST Lead Co-Lawyer	London	

¹⁰ **F56** *Requests Concerning KHIEU Samphân's Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents*, 26 May 2020.