

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

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**Mr. KHIEU Samphân's Submissions Regarding the Admissibility of the Documents
Submitted by the Trial Chamber (E327/4/5)**

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MAY IT PLEASE THE TRIAL CHAMBER

1. On 24 July, 2014, NUON Chea's Defence requested that the Trial Chamber ("the Chamber") declare admissible the excerpt of minutes from the meeting of the Standing Committee of the Communist Party of Kampuchea held on 11 April, 1977 ("the Minutes") contained in the book *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*.¹
2. On 2 February, 2015, the Co-Prosecutors joined this request and also asked the Chamber to contact the authors of the book² to try to obtain a copy of the document in its entirety.³
3. On 24 August, 2016, the Chamber notified the parties of a memorandum, indicating that it was working to obtain a full copy of the Minutes and that, as part of its research, it had approached Professor Christopher GOSCHA ("Professor GOSCHA") who had provided him with a list of documents donated to the Vietnam Virtual Archives of the Texas Tech University ("Texas Tech"). The Chamber added that it had reviewed this list, that all the documents in it were only available in Vietnamese, and that it had *"selected fifteen of these Copies, which appear by their titles to have sufficient relevance for translation into English."* It stated that these fifteen copies, as well as nine translations already available in English and two French translations obtained by Philippe SHORT, had been placed in the Shared Material Drive ("the SMD"). It then set the deadline for filing submissions under Rule 87 of the Internal Rules ("the IRs") by the parties to 30 August, 2016 (four business days after the notification of the memorandum) for the nine documents available in English, and set the deadline for the filing of any Internal Rule 87 submissions for the six remaining documents whose English translations were expected by 8 September, 2016, to 15 September, 2016.⁴

¹ *Initial Document List For Case 002/02*, 24 July 2014, **E307/5** ; *Excerpts from minutes of the April 11, 1977, Meeting of the Standing Committee of the party Central Committee*, **E307/5.2.12** ; *Annex A/Initial Document List for Case 002/02*, 24 July 2014, **E307/5.2**, line 12.

² In this case, DE NIKE, QUIGLEY And ROBINSON.

³ Objections and reservations expressed by the Co-Prosecutors regarding the lists of documents proposed by the parties in response to Trial Chamber Memorandum E327 and request for a document, 2 February, 2015, **E327/4**, par. 9.

⁴ Translation of copies of Vietnamese documents obtained from the Vietnam Virtual Archives at Texas Tech University, donated by Professor Christopher GOSCHA on 24 August, 2016, **E327/4/5**.

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4. On 25 August, 2016, after hearing the parties following the Defence's request to make oral submissions on the imposed deadlines,⁵ the Chamber postponed the filing date for the parties' submissions on all fifteen documents to 15 September, 2016.⁶
5. On 2 September, 2016, the Chamber informed the parties that all translations were now available in the SMD. It added that two of the copies were in fact identical. As a result, there were only fourteen documents to comment on.⁷
6. Mr. KHIEU Samphân's Defence ("the Defence") analysed the attachments following the Memorandum of 24 August, 2016 in order to understand the chronology of events which led the Chamber to obtain documents that had not been requested by any of the parties to the trial from Professor GOSCHA. Thus, it appears that:
 - On 6 May 2013, during the hearings of Case 002/01, Philippe SHORT indicated that Professor GOSCHA had sent him documents obtained from the Vietnamese archives.⁸
 - On 24 January, 2016, the Chamber contacted Professor GOSCHA to ask him if he would agree to sharing these documents with it, and also if he was in possession of the Minutes.⁹
 - On 25 January, 2016, as mentioned above, Professor GOSCHA explained that he had donated his documents to Texas Tech in 2002. Furthermore, he made no specific mention of the Minutes, but pointed out that the bequeathed documents were only his handwritten copies of those consulted at the People Army Library in Hanoi because he had not been allowed to make photocopies there. Finally, he provided information on which Internet address to use in order to obtain the list of donated documents.¹⁰

⁵ E-mail from Anta GUISSÉ sent on 8 August, 2016 at 8:35 a.m., entitled "*Deux demandes suite au mémo E327/4/5 et à la dernière 87-4 des co-Procureurs.*"

⁶ Transcript of hearing of 25 August, 2015, unrevised version, between [10.10.22] and [10.36.57].

⁷ E-mail from Matteo CRIPPA sent on 2 September, 2016 at 10:28 a.m., entitled "Request for correction on document number E327/4/5.1."

⁸ Transcript for hearing of 6 May, 2013, **E1/189.1**, between [16.05.20] and [16.07.24].

⁹ E-mail from Matthew McCarthy sent on 24 January, 2016, **E327/4/3.7**.

¹⁰ E-mail from Professor GOSCHA of 25 January, 2016 at 8:22 a.m., entitled "Re: Democratic Kampuchea standing committee meeting minutes", **E327/4/3.7**. Note that the Minutes are missing from this list.

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7. In these submissions, the Defence asks the Trial Chamber to justify its *proprio motu* and implicit decision taken in January 2016 to conduct a search for the documents referred to by Philippe SHORT on 6 May 2013 (I).
8. The Defence also indicates to the Chamber that none of these documents meet the legal standards of admissibility. They cannot be admitted into evidence (II).

I- Lack of motivation and lack of transparency

9. The Chamber, seised of a request to search for the Minutes, contacted Professor GOSCHA in January 2016 for the purpose of obtaining documents that Philippe SHORT had referenced in May 2013, documents that no party had requested.¹¹
10. Pursuant to Internal Rule 93, the Chamber may at any time request additional information. The same rule also specifies that in the event the Chamber decided to initiate an investigation *ex officio*, the judgment must designate the judge responsible for conducting it.
11. In the present case, however, it must be noted that this rule has not been applied. Indeed, the Chamber decided to obtain the documents from Professor GOSCHA without ordering additional information, so that the parties are completely unaware of the reasons for this decision and were not informed until August 2016¹² of the steps taken eight months earlier¹³ by the Chamber! Moreover, since no judgment had been rendered, no judge could be appointed. On the contrary, this mission was delegated to the lawyers of the Chamber who implemented its implicit decision.
12. The breaches of Internal Rule 93 are symptomatic of the procedure's total lack of, even though it is outlined in Internal Rule 21 which was itself violated by the Chamber.
13. Furthermore, with regard to Professor GOSCHA's documents, the Chamber stated without further comment that fifteen of them appeared to be relevant.¹⁴ However, in light of all the documents on

¹¹ See paras. 1 to 4 of the current document.

¹² Translation of copies of Vietnamese documents obtained from Texas Tech University Archive originating from Christopher GOSCHA, August 24, 2016, E327/4/5.

¹³ E-mail from Matthew McCarthy sent on 24 January, 2016, E327/4/3.7.

¹⁴ See para. 3 of the current document.

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the list provided by Professor GOSCHA¹⁵, the Defence questions the criteria of relevance used by the Chamber. Once again, the Chamber's choice is flawed due to its lack of transparency. Reaching a reasoned decision prior to searching for these documents would certainly have helped avoid such pitfalls.

14. Similarly, the Chamber granted the Co-Prosecutors' February 2015 request to search for the Minutes without reaching a reasoned decision.¹⁶ Indeed, the parties only learned that the Chamber had granted this request when the Chamber reported to them on the investigations which had been undertaken (far beyond the scope of the request).¹⁷
15. Finally, the Defence notes that the list of documents in E324/4/5.1 provided by the Chamber is incorrect. Indeed, one of the documents¹⁸ was not transmitted by Professor GOSCHA, but by Philippe SHORT, once again after a *proprio motu* investigation by the Chamber without the parties' knowledge.¹⁹
16. The Defence strongly regrets these numerous breaches of the basic rules of procedure and asks the Chamber to render explicit and reasoned decisions on each of the investigations it has decided to conduct and which it will conduct in the future. It is the fundamental right of the accused to be informed of the reasons for a decision, and especially the existence of such a decision.

II- Inadmissibility of documents

17. The Chamber asks the parties to submit their observations on the documents pursuant to Internal Rule 87 on the rules of evidence applicable to the ECCC, which amounts to questioning them about the possibility of declaring this evidence admissible during the trial, a matter governed by Rule 87(4) of the Internal Rules. According to the latter, the requesting party must justify its

¹⁵ See paras. 3 and 4 of the current document.

¹⁶ See para. 3 of the current document

¹⁷ Decision on Co-Prosecutors' Request to Obtain a Copy of 11 April 1977 Standing Committee Minutes, 17 March, 2016, E327/4/3.

¹⁸ See E327/4/5.1, document number 14.

¹⁹ E-mail from Roger PHILLIPS of 11 May, 2016 at 3:19 p.m., entitled "Inquiry regarding two documents - follow-up" and e-mail reply from Philippe SHORT of 11 May 2016, entitled "Re: Inquiry regarding two documents - follow-up", E327/4/5.3. In essence, after comparing the foot notes in Philippe SHORT's book "Pol Pot: Anatomy of a Nightmare" with the list provided by Professor GOSCHA, the Lawyer from the Chamber contacted Philippe SHORT requesting that he provide the Chamber with two sources of the work, which did not appear on Professor GOSCHA's list. Only one of the two was actually missing from this list.

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request in order to satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial and that it is necessary to establish the facts. Furthermore, the proposed evidence must comply with Rule 87(3).²⁰

18. While, still according to Rule 87(4), the Chamber may, on its own motion, declare evidence admissible, a prerogative that was repeatedly implemented in Case 002/02, the request addressed to the parties²¹ appears to express its reservations about the documents in this case.

19. And for good reason: the documents obtained do not meet the admissibility requirements of Rule 87(4) for several reasons. Their unreliability makes them unsuitable to prove the facts (1). They are also irrelevant or repetitious (2).

1. Unreliability of the documents making them unsuitable to prove the facts

20. The analysis of the copies presented to the parties by the Chamber reveals a number of problems, particularly in terms of authentication, which are a serious impediment to their admission.

21. First, as Professor GOSCHA indicates to the Chamber, all the documents he worked on at the People's Army Library in Hanoi are Vietnamese versions of supposed Khmer originals that he never saw and that he presumed to be held by the Vietnamese army.²² As for Philippe SHORT, he only worked on the documents provided by Professor GOSCHA.²³ Thus, neither of the only two people who worked on these documents has seen the original versions, if they in fact exist, or any possible Khmer copies.

²⁰ Rule 87(3) of the Internal Rules, "(...). The Chamber may reject a request for evidence where it finds that it is: (a) irrelevant or repetitious; b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports to prove; (d) prohibited by law, or (e) intended to prolong proceedings or is frivolous."

²¹ The Chamber notably recalled this option at the hearing on 25 August, 2016, at approximately 10:10 a.m., just before it decided to extend the deadline for filing the parties' observations regarding the documents in this case. See the following non-exhaustive examples: "The Trial Chamber places a new Document on Case File on its own Motion" 9 January, 2015, **E333**; "Documents related to Elizabeth BECKER and Richard DUDMAN placed on the Case File by the Trial Chamber on its own initiative," February 6, 2015 **E338**; "Decision admitting new OCIJ Prisoner List," 5 April 2016, **E393**.

²² E-mail from Professor GOSCHA of 10 May, 2016 at 6:11 p.m., entitled "Re: Follow-up Question on Texas Tech Archive", **E327/4/5.4**.

²³ E-mail from Wendy LOBSTEIN of 6 February, 2016 at 1:09 p.m., entitled "Re: Inquiry to be sent to Case 002/01 witness Philip Short", **E327/4/3.6**; E-mail from Philippe Short of 11 May, 2016 at 1:12 p.m., entitled "Re: Inquiry regarding two documents - follow-up", **E327/4/5.3**.

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22. Similarly, for almost all of the documents, there is no mention of the person or persons who translated the documents Professor GOSCHA consulted, or when (date) these translations might have been carried out.²⁴ Yet, especially in light of the difficulties encountered with existing translations within the ECCC, an international and independent judicial body, one can legitimately doubt the reliability of translations carried out (and we must point out here - in an alphabet different from the Khmer alphabet,) by the unknown government bodies of a State that has not shown a great eagerness to collaborate with the Tribunal in the search for the truth.
23. This remark is even more true since many of the documents Professor GOSCHA worked on appear to be publications from two journals from 1980, Communist Journal and Communist Magazine, which, given their names and the dates of publications, can only be viewed as tools to conduct propaganda on behalf of the Republic of Vietnam in order to legitimize the January 1979 invasion.²⁵
24. The authentication problems are also compounded by unanswered questions relating to Professor GOSCHA's mastery of Vietnamese, the source of the documents, and how they were obtained by the Vietnamese authorities. Even though evidence in criminal cases is free, it still needs to have been obtained in accordance with the law. However, nothing in this case points in that direction. Indeed, there is no information available on the chain of custody of these documents, nor on the existence of originals since Professor GOSCHA could only make assumptions on this second point.²⁶
25. Finally, the Defence notes that there are problems with the legibility of documents. On the one hand, the English version of document number 7 on the list reveals translation issues. On the other hand, the Vietnamese copy of document number 1 on the list is largely illegible.²⁷ Since the

²⁴ See E327/4/5.1. Only documents 11 and 13 contain information relating to the translation work. The words "Translated by Le Dinh Thao and sent to you" can be seen in document 11, and document 13 contains the statement "This document was translated by the General Political Office on 26 January 1978". The second document is the only one indicating the date when the translation would have been carried out.

²⁵ See E327/4/5.1, documents 5, 6, 7, 8 and 9 published in 'Communist Magazine' and document numbers 4 and 12 published in 'Communist Newspaper'.

²⁶ E-mail from Professor GOSCHA of 10 May, 2016 at 6:11 p.m., entitled "Re: Follow-up Question on Texas Tech Archive", E327/4/5.4.

²⁷ Transcript of hearing of 25 August, 2015, unrevised version, between [09.14.57] and [09.16.39] (where the Deputy Prosecutor raises the discrepancy between the date mentioned on the list and that of the English version); see list

Chamber did not indicate that the translation services had succeeded in deciphering this document, the Defence can only conclude that the English translation of the SMD is partial. However, understanding the meaning of a text that has been amputated from part of its substance cannot allow an accurate understanding of its content.

26. The unreliability of these documents is an obstacle to their admissibility, especially at such a late stage. It necessarily means that this evidence is of little or no probative value which makes it unsuitable to establish the truth and, in the interest of justice, prevents its admission.
27. The Defence recently recalled the problems of the massive admission of new evidence during the trial, especially at such an advanced stage of the proceedings.²⁸ The same remarks apply here. With a few weeks to go until the end of the hearings on the merits, it is crucial for the outcome of the trial that one stop bringing in evidence that fails to help establish the truth. Even if the Chamber were to decide that these documents could be useful in establishing the truth, the impact on the fairness of the trial would be too great for these documents to be admitted.²⁹
28. Nevertheless, if this were the case, and the parties would have to assess each piece of evidence in light of all the evidence presented, the accused would have to be given sufficient time to do so and thus be able to respond to any allegations brought against them.
29. Finally, the continued and massive admission of new documents throughout the trial in Case 002/02 (documents from the investigations of cases 003 and 004, whole sections of books available before the start of the trial...) illustrates the Defence's ever-increasing fear that the investigation of KHIEU Samphân will never come to an end but instead continue infinitely, at the expense of any respect for the rights of the accused. If the Chamber continues along this path, it will have to draw the appropriate conclusions, namely that, despite the fact that the investigation has lasted more than three years, it is still not complete, and that consequently the

E327/4/5.1: the date of the meeting referred to in the list was corrected based on the English translation of the document. However, on reading the information contained in this document, the date originally mentioned on this list seems to be the correct one.

²⁸ *Réponse de la Défense de M. KHIEU Samphân à la demande du co-Procureur international d'admettre 35 documents du dossier 004* (E319/52), 29 August 2016 **E319/52/3**, paras. 19 to 25.

²⁹ Decision on international Co-Prosecutor's requests to admit written records of interview pursuant to rules 87(3) and 87(4), **E319/47/3**, par. 23.

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case is in no condition to be tried, and thus needs to be referred back to an investigating magistrate for further information.³⁰

2. Lack of relevance or repetitive nature

30. The documents submitted also do not meet the criteria of Rule 87(3). The subjects covered in these documents are all already widely discussed in the thousands of records presented as evidence in the case. For example, regardless of whether they mention the purges within the regime (documents 2 and 13), the implementation of internal policies (document 6), or the fight against Vietnam and its hegemonic policies (documents 3 and 14), none of the documents provide any new evidence. On the contrary, their content is repetitive.

31. Moreover, despite the Chamber's corrections,³¹ two documents on the corrected list remain identical. Document 4 is in fact only a reprint of excerpts contained in Document 1. It is also repetitive.

32. As it stands, all this evidence is unsuitable to establish the truth, and the only solution is to not admit it as evidence in the case at such a late stage of the proceedings.

33. **FOR THESE REASONS**, the Defence respectfully requests that the Chamber:

- RENDER explicit, reasoned decisions on the various investigations it has decided to conduct and will decide to conduct in the future.
- ACKNOWLEDGE the inadmissibility of the 14 documents on the list E327/4/5.1.

	Ms KONG Sam Onn	Phnom Penh	
	Ms Anta GUISSÉ	Phnom Penh	

³⁰ Rules 93 and 95 of the RI; Articles 339 and 340 of the Cambodian Code of Criminal Procedure (“CCCP”); Articles 283, 287 and 343 of the French Code of Criminal Procedure.

³¹ Email from Matteo CRIPPA sent on 2 September, 2016 at 10:28 a.m., entitled “*Request for correction on document number E327/4/5.1*”.

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