

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 Samphan**Filed to:** The Trial Chamber**Original Language:** French**Date of document:** 4 March 2013**CLASSIFICATION****Classification of the document by the filing party:** Confidential**Classification by the Trial Chamber:** Public**Classification Status:****Review of Interim Classification:****Records Officer's Name:****Signature:**

Response to the “Co-Prosecutors’ Request to Put Before the Chamber Two Letters by Amnesty International Addressed to KHIEU Samphan and IENG Sary”

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To:**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 Defense Teams**

MAY IT PLEASE THE TRIAL CHAMBER

Introduction

1. On 20 February 2013, the parties received notification of the Co-Prosecutor's request, pursuant to Rule 87 of the Internal Rules ("The Rules"), to enter into the proceedings two letters purportedly sent by *Amnesty International* in 1976 to Mr KHIEU Samphan and Mr IENG Sary.¹
2. The Co-Prosecutors submit their application in two parts. They begin by asserting that the documents they seek to introduce into the proceedings are relevant; they then go on to claim that their request is admissible.
3. In so doing, the Co-Prosecutors have reversed the order of legal reasoning. It is for the Trial Chamber ("the Chamber") to rule first and foremost on the admissibility of the request in accordance with Rule 87(4); and then as the case may be, on the relevance of the admitted documents pursuant to Rule 87(3).

I. Inadmissibility of the Co-Prosecutors' request

4. The Co-Prosecutors seek leave to put before the Chamber two new documents that are not on their document list, but that are on the case file.
5. The view of the Co-Prosecutors is that as soon as a document is on the case file, it is not subject to the terms of Rule 87(4). As such, the Co-Prosecutors believe they are dispensed from the requirement to demonstrate that despite due diligence, they were not able to convey these documents to the parties before the start of the trial.² The Co-Prosecutors consider the parties' document lists requested by the Chamber before the start of trial to be indicative and non-exhaustive.³
6. The Co-Prosecutors' interpretation runs counter to the Chamber's directives and is at variance with their previous position. Objecting to a document list proposed by Mr

¹ *Co-Prosecutors' Request to Put Before the Chamber Two Letters by Amnesty International Addressed to KHIEU Samphan and IENG Sary*, 15 February 2013, **E265**.

² *Ibidem*, para. 9.

³ *Ibid.*, para. 10.

NUON Chea's Defence, the Co-Prosecutors recalled that the Trial Chamber had issued a memorandum dated 18 October 2011 ruling that documents which had not been identified in accordance with previous deadlines would only be admitted at trial where the moving party could demonstrate that they could not have been disclosed earlier with the exercise of due diligence, and that it was in the interests of justice for them to be admitted.⁴

7. In the same memorandum cited by the Co-Prosecutors, the Chamber notes that "*most belated requests to admit documents are unlikely to be successful.*"⁵
8. Equally, in its decision concerning new documents, the Chamber announced that, "*in relation to all documents not included in the parties' lists filed in accordance with the Chamber's earlier orders, the parties are not, however, precluded from making future applications to tender them pursuant to Internal Rule 87(4) where they consider the interests of justice to so require.*"⁶
9. Therefore, Rule 87(4) is fully applicable to the instant case:

"4. During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

10. However, the Co-Prosecutors fail to demonstrate how despite the exercise of due diligence, they were unable to convey these documents prior to the start of trial. In fact, they were simply unable to do so. The two letters in question were placed on the investigative case file in 2009, subsequent to their request. On 17 April 2008, the Co-Prosecutors had requested that the three letters from Amnesty International be placed on

⁴ *Co-Prosecutors' Response to NUON Chea's List of Documents to be Put Before the Chamber During the First Mini-Trial*, 13 February 2012, **E131/1/14**, para. 4 and 6 (unofficial French translation, document filed in English and Khmer only).

⁵ Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5, 25 October 2011, **E131/1**, p. 4.

⁶ Decision Concerning New Documents and Other Related Issues, 30 April 2012, **E190**, para. 21.

the case file.⁷ Only one of the three letters figures on the Co-Prosecutors' document lists.

11. The Co-Prosecutors recall that in some cases, the Chamber has admitted documents which are not, strictly speaking, new, including in instances where the proper administration of justice requires such documents to be evaluated together with other sources of information already on the case file to which they are closely related.⁸ The Co-Prosecutors believe that the fact that the third Amnesty International letter, document D84/2.5, was on their initial list, militates in favour of the acceptance of their request to admit the two letters in question.⁹ The Defence will establish in what follows that none of the three documents are relevant and they should all be dismissed pursuant to Internal Rule 87(3).
12. The Defence agrees with the Co-Prosecutors that the Chamber has shown flexibility regarding the admission of documents not previously listed by the parties. Nevertheless, an overview of the procedural background suggests that the rules have been applied differently, according to whether a request originated from the Defence or the Co-Prosecutors.
13. It will be recalled that a very strict criterion was laid down by the Chamber in response to a request by the Co-Prosecutors, whereby they moved the Trial Chamber to "*preclude the Noun Chea Defence from introducing at trial documents that were not identified pursuant to the Trial Preparation Orders.*"¹⁰ The Chamber had advised parties that, "*documents not filed in accordance with previous deadlines must satisfy, in accordance with Internal Rule 87(3), the extremely high threshold of showing that they could not have been disclosed within the applicable deadlines with the exercise of due diligence, and that their late admission is vital in the interests of justice. It follows that most belated requests to*

⁷ Co-Prosecutors' Request to Admit Three Documents to the Case File Relevant to Khieu Samphan and to Conduct Specific Investigative Action, 17 April 2008, **D84**.

⁸ *Ibid.*, **E265**, para. 16.

⁹ *Ibid.*, paras. 7 and 17.

¹⁰ *Co-Prosecutors' Request Regarding NUON Chea's Second Failure to Comply with the Trial Chamber's Orders to Provide their List of Documents and Exhibits Which They Intend to Put Before the Trial Chamber*, 5 August 2011, **E109/5**, para. 32.

admit documents are unlikely to be successful”¹¹

14. Nevertheless, such criteria do not appear to apply to the Co-Prosecutors.
15. Whilst acknowledging that the Co-Prosecutors had failed to “*exercise due diligence*,” the Chamber authorised the Co-Prosecutors to admit a book on the ground that it “*closely related to*” a documentary that the civil parties had placed on their document list, and that it was “*in the interests of justice to evaluate these sources together*.”¹²
16. The Co-Prosecutors have also been able to enter into proceedings a document that was on the investigative case file, but that was not on their document list.
17. For example, on 31 May 2012, the Co-Prosecutors stated that they had “*discovered in Zylab*” a document appearing to be the biography of TCW-64¹³, whom they had requested be summoned to the stand one year earlier.¹⁴ Yet, the document had been on the investigative case file since 2009. Nevertheless, at the trial hearing of 5 June 2012, the President announced that, “*the subject of this document is relevant, so the Chamber grants leave for the Prosecution to put this document before the Chamber to examine*.”¹⁵ The Chamber had not required the Co-Prosecutors to prove that “[*the documents*] could not have been disclosed within the applicable deadlines with the exercise of due diligence and that their late admission is vital in the interests of justice.”¹⁶
18. In a similar scenario, the Chamber took a different approach. During the examination of witness Al ROCKOFF, Mr Khieu Samphan’s Defence had requested to use a document that had been on the case file since April 2010. Even though the Defence had explained the relevance of the document¹⁷, and none of the parties had objected to its use¹⁸, the President replied, “*The document requested by counsel for Mr Khieu Samphan is not listed in the list of documents proposed by the counsel and any party to the proceeding*,

¹¹ *Ibid.*, E131/1, p. 4.

¹² *Ibid.*, E190, para. 32.

¹³ Co-Prosecutors’ Rule 87(4) Request Regarding Biography of TCW-64, 31 May 2012, E203, para. 3.

¹⁴ Annex 3: OCP Witness List, E9/4.3, p. 27.

¹⁵ Transcript of Hearing of 5 June 2012, E1/81.1, p. 72 L. 16-18.

¹⁶ *Ibid.*, E131/1, p. 4.

¹⁷ Transcript of Hearing of 29 January 2013, E1/166.1, p. 53 L. 9-21 (FRE).

¹⁸ *Ibid.*, p. 53 L. 4-5 (FRE); The Defence had placed the document in the Interface in accordance with the Chamber’s instructions.

and as has already been advised, [the] party is not allowed to put such document for examination before any witness, including Mr. Rockoff.”¹⁹

19. It must be recalled that during the filing of the initial document lists, the Chamber had instructed the parties only to list documents that were relevant to the witnesses it sought to hear.²⁰ The Co-Prosecutors had requested the testimony of TCW-64.²¹ Mr KHIEU Samphan’s Defence had not requested the hearing of Mr Al ROCKOFF.
20. Paradoxically, the Co-Prosecutors were authorised to use a series of photographs they obtained from DC-Cam on the very same day as the examination of Mr ROCKOFF. The photographs were not on the case file, and obviously not on their list²² (Judge Lavergne was able to use the photos retrieved through a search engine).
21. This disparity in treatment between the Co-Prosecutors and the Defence is not justified and should not continue. In the present case, the Chamber is therefore requested to find that the criteria set out in Internal Rule 87(4) have not been satisfied.

II. The criteria set out in Internal Rule 87(3) are not satisfied

22. If the Chamber rules that the criteria set out in Rule 87(4) are met, it can only admit documents into the proceedings if the criteria under Rule 87(3) are also met.
23. Pursuant to Internal Rule 87(3), the Chamber may dismiss certain types of evidence:

“3. The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court. 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;*

¹⁹ *Ibid.*, p. 50 L. 19-23.

²⁰ Email from Ms Susan Lamb addressed to parties, dated 8 April 2011 at 3:34 pm entitled, “*Response to questions posed during the Trial Management Meeting*”, E9/25.1.1, p. 3 “*Scope of the obligation to file documents/exhibits list*”.

²¹ Annex 3: OCP Witness List, E9/4.3, p. 27.

²² Transcript of Hearing of 28 January 2013, E1/165.1, p. 36 L. 13-23 et p. 80 L. 21-25, p. 81 L. 1-5 (FRE).

- c) *unsuitable to prove the facts it purports to prove;*
- d) *not allowed under the law; or*
- e) *intended to prolong proceedings or is frivolous.*”

24. The view of the Co-Prosecutors is that the two letters it seeks to tender are highly relevant because they establish the roles played by Mr KHIEU Samphan and Mr IENG Sary, and their knowledge of the mass atrocities and the grave breaches of human rights committed during the Democratic Kampuchea period.²³ The Co-Prosecutors also state that two similar documents are already on the case file.²⁴
25. Mr KHIEU Samphan’s Defence submits that the letters have no relevance and are unlikely to demonstrate what the Prosecution contends.
26. The first letter is addressed to Mr PENN Nouth (and copied to Mr KHIEU Samphan, among others) *via* the GRUNK mission in Paris, dated 18 February 1976.²⁵ The second letter is addressed to Mr KHIEU Samphan *via* the mission of the Government of Democratic Kampuchea in Paris and dated 11 May 1976.²⁶ Mr KHIEU Samphan was not living in Paris on either date. In fact, during the entire Democratic Kampuchea period, Mr KHIEU Samphan never went to France. In the absence of one or several witness(es) who could confirm having collected the said letters in Paris and handed them over to Mr KHIEU Samphan, there is nothing to prove that Mr KHIEU Samphan ever received this mail. These documents only demonstrate that Amnesty International sent the letters. They therefore lack the relevance ascribed to them.
27. The Co-Prosecutors cite a third document to corroborate their theory, namely a third letter from Amnesty International addressed to Mr KHIEU Samphan, at the following address: “*Mr KHIEU Samphan, President of the State Presidium, Phnom Penh, Democratic Kampuchea*”.²⁷ The letter is dated 28 February 1977. Once again, unless the Co-Prosecutors manage to establish the existence of an operational postal service during the Democratic Kampuchea regime, one that would have enabled the letter to be delivered to

²³ *Ibid.*, E265, para. 6.

²⁴ *Ibid.*, para. 7.

²⁵ Letter from Amnesty International dated 18 February 1976, D84/2.3, p. 1.

²⁶ Letter from Amnesty International dated 11 May 1976, D84/2.4, p. 1.

²⁷ Letter from Amnesty International dated 28 February 1977, D84/2.5, p. 1.

Mr KHIEU Samphan, the document does not in any way prove his knowledge of the crimes. In the absence of a witness who can testify that Mr KHIEU Samphan received this letter, the document fails to substantiate what it is intended to. Moreover, in the Closing Order, the Co-Investigating Judges allege: “*According to Suong Sikoeun, external communication was channelled through the embassy in Beijing and communication could either come from the party or the government or directly from Pol Pot to the party cell in Beijing.*”²⁸ Yet, SUONG Sikoeun came to testify before the Chamber, and the Co-Prosecutors did not question him on this topic, nor on whether Amnesty International could send letters directly to Democratic Kampuchea.

28. Consequently, contrary to the Co-Prosecutors’ submission, these documents have no relevance and do not substantiate the allegations they make.

²⁸ Closing Order, 15 September 2010, **D427**, par. 86.

29. **FOR THESE REASONS**, Mr KHIEU Samphan's Defence requests the Trial Chamber to:




- **DISMISS** the Co-Prosecutors' Request.

Or, **alternatively**:

- **RULE** that documents D84/2.3, D84/2.4 and D84/2.5 are inadmissible.

and **in any event**:

- **ESTABLISH** clear and fair rules regarding the admission of new documents that would apply to all parties in a uniform manner.

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