

ក្រុមមេធាវីការពារក្តី អៀង សារី
IENG SARY DEFENCE TEAM
EQUIPE DE DEFENSE DE IENG SARY

ANG Udom and Michael G. KARNAVAS

Co-Lawyers for IENG Sary

6 February 2013

To: **Susan Lamb**
 Trial Chamber Senior Legal Officer

Copy: **Defence Teams**

Office of the Co-Prosecutors

Civil Party Lead Co-Lawyers

Re: Request for clarification concerning objections to new documents

Dear Ms. Lamb,

We respectfully request clarification as to whether the Defence may still object to any of the documents contained in the OCP's Annex A21 (and the other parties' new documents filed pursuant to Rule 80(3)(d)), and, if so, when such objections must be filed.

We consider this clarification necessary because we objected to the documents contained in Annex A21 in writing on 5 January 2012 and then again during oral arguments on 16-19 January 2012 and 12-15 March 2012. The Trial Chamber, however, appears to have only considered Defence objections in relation to some of these documents (the documents also contained in OCP Annexes A1-A5). The Trial Chamber has not accorded E3 numbers to any of the new documents in Annex A21 which were also contained in Annexes A6-A20. Instead, it has at least twice notified the parties that a hearing would be scheduled to address the admissibility of these documents.¹

We have set out a background below that we believe accurately reflects the proceedings concerning these documents. We apologize for its length and complexity.

Background

1. In the first half of 2011, the parties filed lists of documents they proposed to put

¹ See Decision Concerning New Documents and Other Related Matters, 30 April 2012, E190, para. 29; Trial Chamber Memorandum entitled "Forthcoming Document Hearings and Response to Lead Co-Lawyers' Memorandum Concerning the Trial Chamber's Request to Identify Civil Party Applications for use at Trial (E208/4) and KHIEU Samphan Defence Request to Revise Corroborative Evidence Lists (E223)," 19 October 2012, E223/2, para. 5.

before the Trial Chamber, including new documents that were filed pursuant to Rule 80(3)(d). The OCP divided its proposed documents into 21 annexes, numbered from A1 to A21. A21 contained a list of new documents. All of these new documents were also included in the OCP's other lists (A1-A20). In the second half of 2011, the parties revised their document lists to include only those documents they considered relevant to certain segments of Case 002/01.

2. On 5 January 2012, the Defence filed written objections to the documents contained in OCP Annexes A1-A6 and A8-A20.² The Defence explained that it had already objected to the documents contained in A7 and that the documents contained in A21 were already included in the other OCP annexes and need not be addressed again separately.
3. On 16-19 January 2012, document objections hearings were held in relation to, *inter alia*, documents contained in OCP Annexes A1-A5.³
4. On 12-15 March 2012, document objections hearings were held in relation to, *inter alia*, OCP Annexes A6-20.⁴
5. On 9 April 2012, the Trial Chamber issued its Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in the Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01.⁵ The Trial Chamber appears to have considered and decided upon the admissibility of all documents contained in Annexes A1-A5, including new documents which were also listed in A21. The Decision stated: "*The Chamber has reviewed the new documents appearing in Annexes 1-5 and, as explained in the [forthcoming] New Documents Decision, has found all except four documents to satisfy the requirements of the Internal Rules for placement on the Case File and putting before the Chamber. One of these four documents was rejected as irrelevant, whereas the other three are to date unavailable for review on the Shared Materials Drive*"⁶ and "*The Chamber has, in addition, deferred its decision on 3 documents currently unavailable on the Shared Materials Drive in consequence of the New Documents Decision.*"⁷
6. On 30 April 2012, the Trial Chamber issued Decision Concerning New Documents

² IENG Sary's Objections to the Admission of Certain OCP Documents for the First Four Trial Segments, 5 January 2012, E131/1/10.

³ See Scheduling of Oral Hearings on Documents (16-19 January 2012), 11 January 2012, E159. On 16 February 2012, the Trial Chamber heard objections to those documents cited in the sections of the Closing Order that relate to communications and administrative structure. See Transcript, 16 February 2012, E1/45.1; Scheduling of Oral Hearing on Documents (13-16 February 2012), 9 February 2012, E170.

⁴ See Updated Memorandum for Next Document Hearing (12-19 March 2012), 2 March 2012, E172/5.

⁵ Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in the Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, E185.

⁶ *Id.*, note 56.

⁷ *Id.*, para. 35.

and Other Related Matters (E190) (“New Document Decision”). In this Decision, the Trial Chamber considered whether to place on the Case File documents which were not previously on the Case File but which were included in the parties’ document lists filed pursuant to Rule 80(3)(d) prior to the start of trial, such as the documents contained in OCP Annex A21 (see E190, paras. 26-29). The Trial Chamber specifically stated in paragraph 29: *“All documents in this category [of documents not on the Case File but proposed by the parties prior to the start of trial] ultimately placed on the Case File will, however, receive an E3 classification only after the Trial Chamber has heard and ruled on specific objections to them, if any, pursuant to Rule 87(3)(a)-(e) and the modalities described above (Section 4.1.1). A later hearing for this purpose will be scheduled in due course.”*

7. On 19 October 2012, through Memorandum E223/2, the Trial Chamber announced its intention to *“hold hearings in relation to all remaining documents and categories of documents sought by the parties in Case 002/01 but not yet subject to adversarial argument, namely: ... Documents now admissible in consequence of the Trial Chamber’s new document decision (E190, as identified in E190.1 and E190/2.1)...”*⁸
8. On 3 December 2012, the Trial Chamber issued its Decision on Objections to Documents Proposed to be put before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-A20 and by Other Parties.⁹ The Trial Chamber made two statements in this Decision that seem to be contradictory:
 - a. *“The Chamber has reviewed each document included in Annexes A6-A11 and A14-A20 and has considered all objections to them raised by the parties in light of the criteria contained in Internal Rule 87(3) and the Trial Chamber’s jurisprudence.”*¹⁰
 - b. *“The Chamber has deferred its decision on more than 400 documents listed in the Co-Prosecutors’ Annex 21 in consequence of the New Documents Decision. Adversarial argument in relation to these documents will shortly be scheduled and a decision in relation to them rendered in due course.”*¹¹
9. On 15 January 2013, you emailed the parties to inform them that the Trial Chamber would shortly be issuing a memorandum *“informing the parties that document hearings (foreshadowed late last year and currently scheduled for mid-February) will instead commence on Monday 21 January 2013 should the Chamber remain unable to sit during that week.”*

⁸ Trial Chamber Memorandum entitled “Forthcoming Document Hearings and Response to Lead Co-Lawyers’ Memorandum Concerning the Trial Chamber’s Request to Identify Civil Party Applications for use at Trial (E208/4) and KHIEU Samphan Defence Request to Revise Corroborative Evidence Lists (E223),” 19 October 2012, E223/2.

⁹ Decision on Objections to Documents Proposed to be put before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-A20 and by Other Parties, 3 December 2012, E185/1.

¹⁰ *Id.*, para. 11.

¹¹ *Id.*, para. 22.

10. On 17 January 2013, this memorandum was issued. It stated that “[t]he first phase of the document hearings will concern all remaining documents and categories of documents sought by the parties in Case 002/01, but not yet subject to adversarial argument. The document hearings will commence with adversarial argument in relation to those documents cited in the Closing order paragraphs relevant to Tuol Po Chrey and population movements.... These hearings will also permit adversarial argument in relation to remaining documents (unrelated to the population movements or Tuol Po Chrey) summarized for the benefit of the parties in paragraph 5 of E223/2, which according to the Co-Prosecutors comprise 48 documents (E223/2/1.1)....”¹²
11. On 17 January 2013, we emailed you to inform the Trial Chamber that we were preparing objections to four categories of documents including “New documents identified in E190.1 and E190/2.1 and documents subsequently put before the Chamber through Rule 87(4) requests....” We indicated that our objections to three categories of documents would be ready to present during the following week’s document objections hearing, but that, as for the new documents, “we are currently calculating how many documents are in this category and preparing our objections, but we are unlikely to be in a position to present objections to this category next week.”
12. On 17 January 2013, Deputy Co-Prosecutor Bill Smith responded by email that the documents contained in E190.1 and E190/2.1 “have already been debated upon during public hearings on 16-19 January 2012, 16 February and 12-15 March 2012 document hearings.” He stated, *inter alia*, that the Defence had already objected to the OCP’s new documents set out in Annex 21 because these documents were also listed in the OCP’s other annexes A1-A20. He requested that the Trial Chamber “take a decision on those documents.”
13. On 18 January 2013, you responded by email, *inter alia*:
- The essence of the OCP email appears to be that there may be some duplication between documents listed as ‘new’ documents for which adversarial argument may still be required (the E190 annexes) and those which appear on other annexes A1-20 and which may therefore have already been subjected to adversarial argument. The Chamber agrees that the purpose of the remaining admissibility hearings is to allow adversarial argument only in relation to those for which no opportunity has yet been afforded. Written statements tendered for admission are also not envisaged for consideration next week, as the Chamber is dealing with these through separate modalities, as previously communicated to the parties.*
- The vast majority of all documents in Annexes 1-20 have by now been evaluated by the Chamber and either admitted or rejected in consequence of our prior decisions E185 and E185/1. Save for those very few documents - identified in our prior decisions as having been (exceptionally) granted an E-*

¹² Revised Schedule for Forthcoming Document Hearings (commencing Monday 21 January 2013), 17 January 2013, E223/3, para. 3.



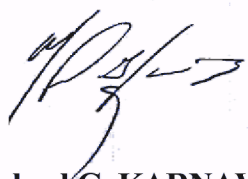
number in advance of adversarial argument - those remaining for consideration will in general terms be those documents proposed for admission which have yet to be afforded an E- number.

There are no indications at this stage that any party will seek to contest the admissibility of large numbers of new documents, or that this will pose significant trial management challenges next week. Should the Co-Prosecutors be concerned by a risk of duplication, it may circulate to the Chamber and all parties their list of documents that they consider to be new documents upon which adversarial argument has not occurred. In this event, the Chamber will consider deferring consideration of any remaining 'new' documents to later document hearings, should this be thought to be necessary by any party in the interests of adequate preparation.

14. On 21 and 22 January 2013,¹³ the Defence objected to documents proposed by the OCP related to population movement and Tuol Po Chrey, as well as documents identified by the OCP in paragraph 5 of E223/2 (E223/2/1.1).

We would appreciate it if the Trial Chamber could correct our understanding should we be in error. We trust the OCP will not hesitate to provide any input it too deems necessary and appropriate in ensuring clarity and accuracy.

Respectfully requested,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

¹³See Transcript, 21 January 2013, E1/161.1; Transcript, 22 January 2013, E1/162.1.