

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

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**CO-PROSECUTORS' RESPONSE TO THE DEFENCE FOR KHIEU SAMPHAN'S
REQUEST TO ADMIT EVIDENCE PURSUANT TO RULE 87(4) (E290)**

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I. INTRODUCTION

1. The Defence for Khieu Samphan (“Defence”) have submitted a request for the admission of 14 diplomatic cables from the United States Government pursuant to Rule 87(4)¹ (“Request”). The Co-Prosecutors object to the admission of two of them on the basis that they are not conducive to ascertaining the truth and are excluded under the terms of Rule 87(3).

II. PROCEDURAL HISTORY

2. On 8 April 2013, Wikileaks released an on-line searchable database of US Government diplomatic communications.² A portion of this database, named “The Kissinger Cables” by Wikileaks, consists of cables from 1 January 1973 to 31 December 1976 that have been declassified by the US Government but were not formerly available in an on-line, searchable format. A second portion of this database contains documents obtained from other sources, named “Cablegate” by Wikileaks, which, according to Wikileaks, are mostly from the 2003 to 2010 period. Many of the “Cablegate” documents have not been formally declassified.
3. On 22 April 2013, the Co-Prosecutors submitted a request for the admission of 26 cables located using the Wikileaks searchable database, all of which were from the declassified documents in “The Kissinger Cables.”³
4. On 6 May 2013, the Defence responded, opposing admission of all 26 cables, claiming that they were biased and were unsuitable to prove the facts they purport to prove pursuant to Rule 87(3)(c), and/or were irrelevant pursuant to Rule 87(3)(a). The Defence further argued that the rights of the defence would be prejudiced by admitting the evidence at this stage of the trial.⁴
5. On 30 May 2013, the Defence filed the instant Request, seeking admission of 14 US diplomatic cables obtained from the Wikileaks searchable database. Twelve of these

¹ **E290** Demande visant à faire verser aux débats des câbles diplomatiques américains en vertu de la règle 87-4 du Règlement intérieur, 30 May 2013 (“Request”).

² Available at: <http://search.wikileaks.org/plusd/>.

³ **E282** Co-Prosecutors’ Rule 87(4) Request Regarding Newly Available U.S. State Diplomatic Cables, 22 April 2013.

⁴ **E282/1** Annex A.

cables are from “The Kissinger Cables” database and two are from the “Cablegate” database. The latter are from 2006 and 2007.

6. The Defence allege that the cables are admissible on the following basis: four of the cables are relevant to Khieu Samphan’s reputation;⁵ four of the cables are relevant to demonstrating Khieu Samphan’s power before and after 1975;⁶ seven of the cables are relevant to demonstrating that King Father Norodom Sihanouk had a personal vendetta against the leadership of the Khmer Republic;⁷ and two of the cables relate to alleged political interference and corruption at the ECCC⁸.
7. The Co-Prosecutors hereby respond. Without conceding any evidentiary value, the Co-Prosecutors do not object to the admission of the 12 cables from the 1973-1976 period. The Co-Prosecutors object to the admission of the two cables from 2006 and 2007 as irrelevant, repetitious, unsuitable to prove the facts they intend to prove, and/or frivolous.

III. ARGUMENT

8. Pursuant to Rule 87(4), the Trial Chamber may admit new evidence “which it deems conducive to ascertaining the truth, subject to the general criteria for the admissibility of evidence set out in Rule 87(3).”⁹ To be clear, “[a]ll evidence must fulfil the general criteria for admission contained in Internal Rule 87(3) (a)-(e).”¹⁰
9. Rule 87(3) states that 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. not allowed under the law; or
 - e. intended to prolong proceedings or is frivolous.

⁵ E290 Request paras. 11-16.

⁶ E290 Request paras. 17-21.

⁷ E290 Request paras. 22-25.

⁸ E290 Request paras. 26-34.

⁹ E217/1 Trial Chamber Memorandum: Response to Rule 87(4) Request to Place a New Document on the Case File (E217), 7 August 2012, para. 2.

¹⁰ E190 Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 18.

A. The 1973-1976 Cables

10. As stated, the Co-Prosecutors do not object to the admission of the 12 cables from the 1973-1976 period,¹¹ but do not concede any evidentiary value to them. Furthermore, the Co-Prosecutors do not concede the accuracy of the Defence's characterizations of the content or significance of the cables.¹²

B. The 2006-2007 Cables

11. The Co-Prosecutors object to the admissibility of the two cables from 2006¹³ and 2007¹⁴ as unconvincing to ascertaining the truth, irrelevant, repetitious, unsuitable to prove what the Defence intend them to prove, and/or frivolous. The Defence claim that these cables are relevant to demonstrating interference and corruption at the ECCC. As an initial matter, therefore, the Co-Prosecutors note that this Chamber has previously held that outside opinions "regarding the fairness of proceedings at the ECCC ... have no evidential value, and are unsuitable to prove the facts they purport to prove."¹⁵

i. 27 July 2006: "Khmer Rouge Tribunal Building Momentum" -- Cable no. 14

12. The Defence allege that this cable demonstrates political interference at the ECCC because it reports that two hires in the Office of the Co-Prosecutors are "considered politically biased and easily influenced by the government."¹⁶ First, this statement is inadmissible because, as the untested opinion of a third party (as told to an intern)¹⁷ against unnamed individuals, it is unsuitable to prove what the Defence intend it to prove, *i.e.*, interference. Furthermore, it does not show that these two unnamed individuals ever took any action, adverse to the Accused or otherwise, based on their alleged political bias, or that the government, which purportedly selected them, ever actually tried to influence them. Second, this statement is inadmissible because it is irrelevant. Even if the document actually demonstrated interference with staff members (which it emphatically does not) the Office of the Co-Prosecutors, as a party to these proceedings, is subject to the

¹¹ Attachments E290.1.1-E290.1.12.

¹² E290 Request, at paras. 11-25.

¹³ E290.1.14 2006 Cable.

¹⁴ E290.1.13 2007 Cable.

¹⁵ E217/1 Trial Chamber Memorandum: Response to Rule 87(4) Request to Place a New Document on the Case File (E217), 7 August 2012, para. 3.

¹⁶ E290 Request, at para. 27.

¹⁷ E290.1.14 2006 Cable, at para. 2.

supervision of the Court's judicial chambers and has never been found to have engaged in any conduct that would adversely affect the Accused's fair trial rights. The Office of the Co-Prosecutors states emphatically that it has always acted with integrity and diligence and facilitated the fairness of the proceedings before this Court, in all cases and at all stages – including in this trial, which has been demonstrably fair to the Accused.

13. The Defence also allege that this cable demonstrates bad faith on behalf of DC-CAM and is therefore relevant to the documents obtained from them.¹⁸ This document is unsuitable to prove what the Defence intend because the content of the cable does not show bad faith on behalf of DC-Cam. It merely alleges that DC-CAM was “reluctant to turn over documents to the ECCC” for unstated reasons, and describes the terms of a *draft* memorandum of understanding.¹⁹ Furthermore, the document is unsuitable to prove the facts the Defence purports it to prove because the inference is clearly false. In seven years of proceedings before the ECCC, no evidence of any reluctance on the part of DC-CAM to cooperate with the Court has been presented. In fact, as demonstrated by the testimonies of the Director²⁰ and Deputy Director of DC-CAM²¹ before this Chamber, DC-CAM has provided open and uninhibited access to its archives to all the parties, including the Defence, who have availed themselves of DC-CAM's services. Evidence of this assistance to the Defence was not challenged by Defence Counsel when DC-CAM's two most senior officers testified before the Trial Chamber.

14. The Defence additionally argue that this cable is relevant because it states that Steve Heder worked for the Office of the Co-Prosecutors, and because Steve Heder will be summoned as a witness.²² However, this information is irrelevant and/or repetitious because there is no dispute that Steve Heder at one point worked for the Office of the Co-Prosecutors, and the Defence fail to substantiate how this fact shows interference or corruption.

¹⁸ E290 Request, at para. 30.

¹⁹ E290.1.14 at para. 7.

²⁰ E1/37.1 Transcript 1 February 2012; E1/38.1 Transcript 2 February 2012; E1/39.1 Transcript 6 February 2012.

²¹ E1/31.1 Transcript 23 January 2012; E1/32.1 Transcript 24 January 2012; E1/33.1 Transcript 25 January 2012.

²² E290 Request, at para. 33.

ii. 19 September 2007: “*Khmer Rouge Tribunal Achieves Benchmark of Credibility*” –
Cable no. 13

15. The Defence allege that this cable should be admitted because it provides evidence of alleged political interference and corruption at the ECCC. The Co-Prosecutors submit that this cable should not be admitted because it is not relevant and/or because it is not suitable to prove what the Defence intend it to prove.
16. Oddly, in support of their claims, the Defence first note that the cable actually states that the US Government “believe[s] the political environment in Cambodia will permit ... a trial without significant interference.”²³ It therefore states the exact opposite of the claim they allege it to support, and is thus unsuitable to prove interference.
17. The Defence next claim that a passage from the cable describing a UN letter sent to the Royal Palace which purportedly stated “that the ECCC would adhere to its principles and not engage in theatrics”²⁴ demonstrates corruption and/or interference. Again, however, this statement, if anything, demonstrates the ECCC’s independence, not interference.
18. The Defence next reference the cable’s description of a UNDP audit that “outlines allegations of corruption in the hiring of Cambodian national staff to the ECCC.”²⁵ But the Defence do not show how this allegation is relevant to the rights of the Accused in Case 002/01.²⁶
19. Finally, the Defence allege that the cable shows that strictly confidential information was provided to the US Embassy in Phnom Penh.²⁷ Again, however, they fail to substantiate how the allegations, even if true, would be relevant to the interests of their client in Case 002/01.

²³ E290 Request, at para. 27.

²⁴ E290.1.13 2007 Cable at para. 8.

²⁵ E290 Request, at para. 29 (the Defence erroneously reference cable number 10 in their filing, but cite cable 13); E290.1.13 2007 Cable, at para. 9.

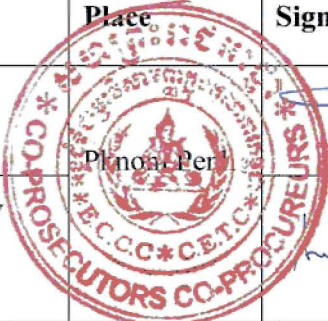

²⁶ See D158/5/3/15 Decision on the Charged Person’s Appeal Against the Co-Investigating Judges’ Order on Nuon Chea’s Eleventh Request for Investigative Action, 25 August 2009, para. 49.

²⁷ E290 Request, at para. 32.

IV. REQUEST

20. For the foregoing reasons, the Co-Prosecutors request the Trial Chamber to reject admission of documents E290.1.13 and E290.1.14.

Respectfully submitted,

Date	Name	Place	Signature
7 June 2013	CHEA Leang Co-Prosecutor	 Phnom Penh	
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