

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 25 June 2013



CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by the Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' REQUEST FOR RECONSIDERATION OF THE DECISION
REGARDING ADMISSION OF NEWLY AVAILABLE
UNITED STATES DIPLOMATIC CABLES**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Co-Prosecutors respectfully request the Trial Chamber to reconsider its “Decision on the Co-Prosecutors’ and KHIEU Samphan’s Internal Rule 87(4) Requests concerning US Diplomatic Cables” issued on 13 June 2013 (“Rejection Decision”)¹ whereby the Trial Chamber found 26 newly discovered declassified United States diplomatic cables (“the Cables”) inadmissible pursuant to Internal Rules 87(3)(a) and (b). In the Rejection Decision, the Trial Chamber held that it was satisfied that the Co-Prosecutors had “exercised reasonable diligence in discovering and presenting this new evidence once WikiLeaks created a searchable database on 8 April 2013.”² However, the Chamber noted that it was “unable to conclude that material obtained from the WikiLeaks website was authentic,” and held that an attempt to obtain the Cables from official sources would not meet the requirements of Internal Rule 87(3)(b), requiring availability of evidence “within a reasonable time.”³ The Chamber also found the Cables “repetitious” because of their corroborative nature and the fact that they comprise “background evidence...concerning the circumstances that prevailed in Cambodia between 1973 and 1975.”⁴
2. The Co-Prosecutors respectfully request reconsideration of the Rejection Decision in light of:
 - a. Newly available information regarding the source, authenticity and immediate availability of the Cables, which have now been retrieved from an official online database maintained by the United States (“US”) Government; and
 - b. The fact that the non-admission of the now authenticated Cables would be contrary to the interests of justice as it would exclude from consideration probative and relevant evidence on key issues in this case. As further illustrated in Section II below, the Cables provide information that is not repetitive, but rather new and / or additional to the evidence admitted thus far.

¹ E282/2 Decision on the Co-Prosecutors’ and KHIEU Samphan’s Internal Rule 87(4) Requests concerning US Diplomatic Cables (E282 and E282/1; E290 and E290/1), 13 June 2013, paragraphs 7-8 (“Rejection Decision”).

² Rejection Decision, at para 5.

³ Rejection Decision at para. 7.

⁴ Rejection Decision at para. 8.

II. LEGAL TEST AND REQUEST FOR RECONSIDERATION

A. Basis for Reconsideration Request

3. The Pre-Trial Chamber has held that “an application for reconsideration may only succeed if there is a legitimate basis for Pre-Trial Chamber to reconsider its previous decision.”⁵ Furthermore, citing the jurisprudence of international tribunals, the Pre-Trial Chamber found that it has an inherent power to reconsider one of its previous decisions when a change of circumstance permits it, when the court finds its previous decision was erroneous, or when the decision has caused an injustice.⁶
4. The relevant change in circumstances in this instance is the discovery of an official US Government database from which the Cables were downloaded in the same form and content as the documents submitted with the “Co-Prosecutors’ Rule 87(4) Request Regarding Newly Available U.S. State Diplomatic Cables” (“Original Request”). At the time of the Original Request, which was filed on an urgent basis in order to satisfy the requirements of the Internal Rules, the Co-Prosecutors were not aware of the existence of this database. This is further described in Section B below.
5. The Co-Prosecutors also respectfully submit that a rejection of the Cables would cause an injustice. The fact that the Cables corroborate other evidence on key events (such as pre-1975 forcible evacuations, mistreatment of civilian populations and executions of Khmer Republic soldiers and officials) is in itself a reason to admit the new evidence for the purposes of establishing the truth beyond a reasonable doubt. But beyond this, the Co-Prosecutors submit that the information contained in the Cables significantly adds to the available body of evidence by: i) describing additional instances of forced movement and executions; and ii) helping ascertain the truth with respect to the whereabouts of Khieu Samphan during 1974 - an issue on which the Defence has recently sought to admit evidence purporting to exclude Khieu

⁵ C22/I/41 Decision on Admissibility of Civil Party General Observations, 24 June 2008 (Pre Trial Chamber) at paras. 3, 25; C22/I/68 Decision on Application for Reconsideration of Civil Party's Application to Address the Pre-Trial Chamber in Person, 28 August 2008 at para. 25; D99/3/41 Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008 at para 6.

⁶ *Ibid.*; For international jurisprudence, see *Prosecutor v Stanislav Galić*, IT-98-29-A, Decision on Application by Prosecution for Leave to Appeal (ICTY Appeals Chamber), 14 December 2001 at para. 13; *Prosecutor v Fulgence Kayishema*, ICTR-01-67-R11bis, Decision on Prosecutor's Request for Reconsideration and, in the Alternative, for Certification of Interlocutory Appeal (ICTR Trial Chamber), 3 February 2011 at para. 3. *Prosecutor v Stanislav Galić*, IT-98-29-A, Decision on Defence Request for Reconsideration (ICTY Appeals Chamber), 16 July 2004 at p. 2.

Samphan's participation in the decision to forcibly evacuate all urban centers following the Khmer Rouge victory.⁷

6. These arguments are further developed in Sections B and C below.

B. Authenticity and Reliability of the Cables

7. Following the Chamber's indication that it is unable to conclude on the basis of the information provided in the Original Request that the Cables are authentic, the Co-Prosecutors undertook a comprehensive search of publicly available databases in order to ascertain whether authenticity could be established expeditiously. The 26 US Cables were located and retrieved from the website of the United States National Archives and Records Administration ("NARA"), the official record keeper of the US Government.⁸ The Cables are part of a larger batch of documents that were declassified and released to the public by the US Department of State following a systematic review on 30 June 2005. This fact is apparent from the header and footer printed on each page of the newly submitted Cables.⁹ The same information is also noted on the cables submitted with the Original Request (on the 1st page of each cable, under the heading "Markings.")¹⁰
8. The availability and authenticity of the Cables in their original format as released by the US Government can be verified as follows:
- a. At NARA's official website (<http://aad.archives.gov/aad/>), users can select from a number of "Time Spans."
 - b. Within the 1965 - 1975 Time Span, it is possible to search several databases. The specific database that contains the Cables is entitled "Central Foreign Policy Files, created 7/1/1973 - 12/31/1976, documenting the period 7/1/1973 ? - 12/31/1976 - *Record Group 59.*"
 - c. The specific cables submitted by the Co-Prosecutors can then be retrieved by searching for the "Canonical ID" which is listed on the first page of each cable as filed originally. Once a

⁷ E1/204.1 Transcript, So Socheat, 10 June 2013, at time marker 15.14.50 – 15.18.05.

⁸ NARA maintains for an unlimited period of time 1% - 3% of all documents and materials created in the course of business conducted by the United States Federal government," due to the documents' outstanding legal and historical importance; see <http://www.archives.gov/about/>. The Co-Prosecutors could obtain certified copies of the Cables from the U.S. State Department but acknowledge that this process would further delay the proceedings in Case 002/01, as the Trial Chamber noted in its decision to reject the cables.

⁹ See the following words on top and bottom of each page of the Cables: "Declassified/Released US Department of State EO Systematic Review 30 JUN 2005."

¹⁰ See, for example, E282.1.1, Cable dated 14 September 1973, at ERN 00899034.

cable is retrieved, the Canonical ID will be found in the “Message Attributes” section of the official version of the document, under the heading “Document Number.”¹¹

For ease of reference, the Co-Prosecutors attach to this request an Annex which contains the exact NARA web links for each of the Cables. The Cables, as downloaded from this website, are also attached.

9. The Co-Prosecutors also refer to and incorporate their description in the Original Request of additional features of the Cables, which attest to their authenticity and reliability.¹² As noted in that request, the Cables now being submitted are essentially identical in form to other US cables which the Chamber has admitted as authentic and reliable, such as the weekly reports from the US Embassy (usually titled “Khmer Report”) and regular reports sent by the US Secretary of State titled (usually titled “EA Press Summary”).¹³ The Co-Prosecutors also note that the Cables which are the subject of this request, like the cables previously admitted, are part of a batch of files declassified / released by the US Department of State following the 30 June 2005 Systematic Review.
10. Based on the above newly available information, the Co-Prosecutors respectfully submit that the Cables now satisfy the condition for admission in Internal Rule 87(3)(b), namely that they are available “within a reasonable time.”
11. Turning to the issue of availability of this evidence in other languages, the Co-Prosecutors note that the average substantive content is approximately 4 - 5 pages per cable (the rest comprising addresses, internal US State Department markings etc). The total length of the evidence is therefore in the vicinity of 100 pages, that is less than a single transcript of trial proceedings before the Court. Two Cables have already been translated into Khmer.¹⁴ The Co-Prosecutors are prepared to coordinate with the Interpretation and Translation Unit to ensure the timely translation of the remaining Cables into Khmer and French.

¹¹ For example, the Canonical ID of the cable dated 14 September 1973 (previously submitted as document **E282.1.1**) is “1973PHNOM09800_b”. This number is listed on p.6 of the same document when downloaded from the NARA website, next to the words “Document Number.”

¹² **E282** Co-Prosecutors’ Rule 87(4) Request Regarding Newly Available U.S. State Diplomatic Cables, 22 April 2013, at para. 5.

¹³ Examples of the EA Press Summaries that have been admitted by the Trial Chamber are **E3/3312** (D313/1.2.34), **E3/194** (D313/1.2.38), **E3/3551** (D366/7.1.727) and **E3/3343** (D313/1.2.66).

¹⁴ These are documents **E282.1.1** and **E282.1.2**.

C. The Cables Contain Significant New Evidence on Key Facts

12. Internal Rule 87(3)(a) gives the Trial Chamber the discretion to reject evidence proposed for admission when it finds the evidence “irrelevant or repetitious.” The Co-Prosecutors note the Chamber’s concern that the information in the Cables is repetitious of background evidence already on the Case File concerning “circumstances that prevailed in Cambodia between 1973 and 1975.”¹⁵
13. The Co-Prosecutors respectfully request the Chamber to reconsider this conclusion in light of the new information provided below. The Cables provide additional (not identical or repetitive) evidence relevant to critical issues in the case, such as: i) movements of Khieu Samphan in June 1974; ii) Khieu Samphan’s contributions to the Khmer Rouge cause and the war effort; iii) forced movements and inhumane treatment of civilian populations by the Khmer Rouge in areas beyond those already covered; iv) additional instances of execution and disappearance of members of the Khmer Republic regime, as well as other perceived enemies in areas controlled by the Khmer Rouge. The following are examples of such categories of information which is not repetitive but new and/or additional to information already available:
- a. Several of the Cables provide additional information about the movements of Khieu Samphan and Ieng Sary in April, May and June 1974, placing them back in Cambodia in June, at which time the Central Committee made the decision to evacuate urban centres following victory.¹⁶ These Cables describe Khieu Samphan’s movements following the period covered by official FUNK publications which are already on the Case File,¹⁷ and are therefore additional to evidence already available.
- b. Additional information with respect to statements made by Khieu Samphan supporting the war effort and calling for the commission of crimes - including: i) an 8 October 1974 statement calling on people to “raid rice storehouses” and “shoot Khmer Republic Officials;”¹⁸ and ii) a 31 December 1974 statement calling on Khmer Rouge troops to launch “the most vigorous and powerful offensive...on all three strategic battlefields”

¹⁵ Rejection Decision, at para. 8.

¹⁶ Cables dated 21 May 1974, 28 May 1974, 4 June 1974, 19 June 1974, 2 July 1974, 9 July 1974.

¹⁷ See FUNK Publications entitled “Nouvelles du Cambodge” - E3/1238 (2 April 1974), E3/1242 (3 April 1974), E3/113 (4 April 1974), E3/1254 (6 April 1974), E3/114 (7 April 1974), E3/1255 (10 April 1974), E3/167 (11 April 1974), E3/115 (23 April 1974) and E3/792 (24 April 1974).

¹⁸ Cable dated 8 October 1974, entitled “Khmer Report – October 8 1974,” at para.7.

including in Phnom Penh and provincial capitals.¹⁹ This attack, which commenced on 1 January 1975, is the very offensive which resulted in the fall and evacuation of Phnom Penh.²⁰

- c. CPK's mistreatment of civilian populations in parts of the country in relation to which limited evidence has been admitted thus far. For example, one Cable describes a "major exodus" of 27,500 people fleeing areas held by the Khmer Rouge and seeking refuge in areas controlled by the Khmer Republic Government, namely Kampong Thom, Siem Reap, Battambang and Pursat.²¹ It further describes CPK's forced relocations of civilian populations into "hinterlands," its harsh control of civilians, enforced disappearances, and suppression of religious practices.²² This information is both probative and significant because it further describes patterns of conduct by CPK forces in accordance with policies which the Co-Prosecutors allege were in place well before the fall of Phnom Penh.
- d. Further instances of civilian populations fleeing the Khmer Rouge, including from areas surrounding Kampot, Kampong Chhang, Svay Rieng, Battambang and Phnom Penh (Prek Phnou, Ang Snuol and Arei Ksat)²³ as well as CPK's capture and execution of refugees as "spies" in Takeo,²⁴ and around Phnom Penh.²⁵ Again, these are additional instances of conduct by CPK forces which support the ascertainment of the truth with respect to the existence of centrally devised policies. The evidence is therefore not repetitive of the material already available.
- e. The Cables also add new information regarding the systematic killings of Khmer Republic military and officials before the fall of Phnom Penh. This includes evidence of Khmer Rouge atrocities uncovered in July 1974, following the recapture of the city of Oudong,

¹⁹ Cable dated 7 January 1975, entitled "Khmer Report – January 7, 1975," at para 9.

²⁰ **E3/30** Foreign Broadcasts Information Service – see articles: "Phnom Penh Armed Forces Placed on State of Alert," 2 January 1975 at ERN 00166658; "Khmer Rouge Launch New Year's Offensive at ERN 00166658, "Cambodians Urged to Unite in New Year's Offensive," at ERN 00166659; **E3/9** Philip Short, *Pol Pot The History of a Nightmare*, at ERN 00396470; **E3/1815** Ben Kiernan, *How Pol Pot Came to Power*, at ERN 00487532.

²¹ Cable dated 27 February 1974, entitled "Influx of Refugees in Provinces," Summary and paras. 1-4.

²² *Ibid.*, at paras 2 and 5.

²³ Cable dated 2 March 1974, entitled "Critical Military Situation at Kampot," para 3; Cable dated 23 May 1974, entitled "Monthly Refugee Update – April 1974," para 1; Cable dated 15 August 1974, entitled "Refugee Narrative Update – July 1974"; Documents No. 20-24), para 2; Cable dated 3 January 1975, entitled "Refugee Situation in Wake of Recent KC Attacks," para 1.

²⁴ Cable dated 15 August 1974, entitled "Refugee Narrative Update – July 1974," para 2.

²⁵ Cable dated 3 January 1975, entitled "Refugee Situation in Wake of Recent KC Attacks," para 1.

such as “skeletons strewn about that were decapitated or had smashed skulls.”²⁶ This information corroborates and expands on the evidence which the Chamber has heard in relation to the forced evacuation of Oudong and executions of Khmer Republic officials in this town.²⁷ Given the significance of the evacuation of Oudong as a precursor to the events which occurred in Phnom Penh in April 1975, it is submitted that this new and additional information goes to one of the key issues in the case - namely the existence of CPK policies of forced movement and execution of Khmer Republic officials in the period immediately preceding the events at issue in Case 002/01. The information is also particularly relevant to the issue of Khieu Samphan’s knowledge of and support for CPK crimes – in a speech given on 10 April 1974 Khieu Samphan referred to the Khmer Rouge victory in Oudong, boasting that “[o]n 18 March, our People's National Liberation Armed Forces liberated another city, Udong, by annihilating all the puppet soldiers there along with their reinforcements; in other words over 5,000 enemies were eliminated, 1,500 of whom were captured” (emphasis added).

- f. The Cables also claim important additional or novel evidence which sheds light on the Defence’s assertion of CPK’s supposed humanitarian concern for civilian populations, which concern allegedly underpinned the decision to evacuate Phnom Penh. A Cable written only two months before the fall of Phnom Penh reports the consistent pattern of CPK attacks on and burning of villages, with CPK forces concentrating their fire on “villagers instead of soldiers,” and carrying out mass executions, including massacring of captured children.²⁸ The report notes that CPK propaganda has declared villagers refusing to cooperate as their “main enemy,” with Buddhist monks and Khmer Republic forces being in the second and third categories. Significantly, the Cable reports that “this is not an isolated phenomena (sic), but rather seems to be indicative of a new enemy strategy to inflict even more suffering on the civilian population of Cambodia.”²⁹ The significance of this additional information should not be underestimated. Documents which attest to the consistent brutality of CPK attacks on cities and towns up to April 1975 help ascertain the

²⁶ Cabled dated 13 July 1974 report, entitled “July 12 EA Press Summary,” para 3.

²⁷ **E1/97.1** Transcript, Rochoem Ton (Phy Phuon), 26 July 2012, at time markers 09.45.02 - 09.48.52, 10.20.22 - 10.26.50, 11.01.32 - 11.05.36; **E1/190.1** Transcript, Philip Short, 7 May 2013, at time marker 13.34.38 - 13.38.54.

²⁸ Cable dated 8 February 1975, entitled “Update, Refugee Situation Report,” para 1 and 2.

²⁹ *Ibid*, paras 3 and 4.

truth with respect to the Defence's claims of humanitarian intentions in regards to the civilian and refugee population of all areas not under their control, including Phnom Penh. This is especially so given that CPK policies are alleged to have been enforced consistently throughout the territory of Cambodia, both before and after April 1975.

- g. The Cables also add new information regarding the continuation of systematic killings of Khmer Republic military officers and officials after the fall of Phnom Penh. A 9 September 1975 Cable reports the return to Cambodia of 87 FANK³⁰ officers and non-commissioned officers on 29 May 1975, and their subsequent execution by CPK forces.³¹ It also reports a further mass execution of 247 FANK personnel returning from Thailand, near the village of Boeng Pring.³² These are additional instances of organised executions of Khmer Republic soldiers and officers which are significant in that they coincide with other post-17 April 1975 executions described in testimonial evidence heard thus far. They therefore support the existence of a centrally devised policy which was applied countrywide following the evacuations of urban areas in April 1975.
14. Given the complexity of this case and its temporal and geographic scope, the Co-Prosecutors submit that admitting evidence which corroborates and adds to testimonial and documentary evidence already before the Chamber facilitates the ascertainment of the truth and is therefore in the interests of justice. The Chamber has rightly sought to proceed with expedition in this trial. In this context, it has not been possible to adduce extensive testimonial evidence on CPK conduct throughout Cambodia in the period immediately preceding the fall of Phnom Penh. Reliable documentary evidence, such as contemporaneous analytical reports written for internal governmental use, is an important source of credible information on these events. The evidence put forward by the Co-Prosecutors is not voluminous and can be understood and used without delay.
15. The Co-Prosecutors recall that: i) both Accused have challenged the allegation that the evacuation of Phnom Penh was unlawful, arguing instead that the evacuation was motivated by legitimate humanitarian objectives; ii) both Accused challenge the allegation that the CPK had a policy of executing Khmer Republic officials and other enemies in April 1975; and iii) Khieu

³⁰ FANK is the abbreviation of the French title of the Khmer Republic forces - *Force Armée Nationale Khmère*.

³¹ Cable dated 9 September 1975, entitled "Previously Reported Massacre of Cambodian Military Personnel," para 2.

³² Ibid.

Samphan has even denied any knowledge of, or involvement in, the plans to evacuate urban centres following victory in April 1975. In these circumstances, admitting reliable evidence which illustrates with greater accuracy CPK policies and behavior immediately prior to April 1975, as well as Khieu Samphan's movements and statements in this period, is in the interests of justice.


III. CONCLUSION

16. The Co-Prosecutors respectfully submit that:

- a. The Cables have been authenticated and are reliable;
- b. Given that they are relatively brief, the Cables can be translated without delay; and
- c. The Cables are relevant and probative to key issues in this case, and are not repetitive of existing information, but rather add to that information and help the ascertainment of the truth.

17. In light of the new circumstances that have arisen since the filing of the Original Request, the Co-Prosecutors submit that the requirements for reconsideration of the Rejection Decision have been satisfied. The Co-Prosecutors submit that it is in the interests of justice for the Chamber to allow the admission of the Cables, and respectfully request the Chamber to so order.

Respectfully submitted,

Date	Name	Place	Signature
25 June 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		