

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 13 June 2012**CLASSIFICATION****Classification of the document
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**IENG SARY'S RULE 87(4) REQUEST REGARDING MATERIAL WHICH MAY BE
USED DURING THE EXAMINATION OF EXPERT DAVID CHANDLER**

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Distribution to:**The Trial Chamber Judges:**

Judge NIL Nonn

Judge YOU Ottara

Judge YA Sokhan

Judge Silvia CARTWRIGHT

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Reserve Judge THOU Mony

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rule 87(4) of the ECCC Internal Rules (“Rules”), hereby requests to put certain material before the Trial Chamber and to be afforded the opportunity to use such material during the examination of Expert David Chandler. This Request is made necessary because there is relevant and probative material which the Defence may consider necessary to put to Professor Chandler and which has not yet been put before the Chamber or accorded an E3 number.

I. LAW

1. Rule 87(1) states that “[u]nless provided otherwise in these IRs, all evidence is admissible.”

2. Rule 87(3) states in relevant part:

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.

3. Rule 87(4) states:

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.

II. ARGUMENT

4. The Defence seeks to put the following material before the Trial Chamber for possible use with Professor Chandler:

A. Chandler, *Will There Be a Trial for the Khmer Rouge?*, 14 ETHICS & INT’L AFFAIRS (2000);¹

B. Chandler, *Epitaph for the Khmer Rouge?*, 205 *New Left Review* 87 (May-June 1994);²

¹ English ERNs: 00813904-00813914.

- C. Chandler, *Red Khmers and Domestic Politics in Cambodia*, prepared for IISS-ISIS conference, Chiang Mai, July 1989;³
- D. Chandler, *Requiem for the 1970s: Elizabeth Becker's When the War Was Over*, INDO-CHINA ISSUES, 1986;⁴
- E. D22/3649b (also IS3.8), Pin Yathay, Stay Alive My Son (only a portion of the Foreword by Professor Chandler);⁵
- F. D172.6, Chandler, *Transformation in Cambodia*;
- G. D108/50/1.4.6 (D108/39/2 in French), Chandler, Voices from S-21 (only selected ERNs);⁶
- H. D366/7.1.69, Chandler, A History of Cambodia (3rd ed) (only selected ERNs);⁷
- I. D108/50/1.75, Chandler, The Tragedy of Cambodian History (only selected ERNs);⁸
- J. D222/1.12, Henri Locard, Pol Pot's Little Red Book (only a portion of the Foreword by Professor Chandler);⁹ and
- K. D22/2052.1, Gillison, *177 Released from S-21, DC-Cam Records Show*, Cambodia Daily, 28 August 2008;

5. The first three documents listed above (A-C) are new documents which are not available on the Case File. They have only recently come into the possession of the Defence. The Defence has requested that they be assigned ERNs and placed on the Shared Materials

² English ERNs: 00813915-00813921.

³ English ERNs: 00813884-00813903.

⁴ Note that the Defence is still seeking to obtain this document and has been informed that the name of the journal listed above may be incorrect.

⁵ English ERN: 00587528. This document is also on the OCP's Document List.

⁶ English ERNs: 00192667-69, 00192672-73, 00192778, 00192845, 00192899. This document is also on the OCP's Document List.

⁷ English ERNs: 00422621-22, 00422635, 00422822, 00422840. This document is also on the OCP's Document List.

⁸ English ERNs: 00193067-71, 00193077, 00193084, 00193319, 00193354-55. This document is also on the OCP's Document List.

⁹ English ERNs: 00394616-17, 00394629. This document is also on the OCP's Document List.

Drive. It has also requested their immediate translation into Khmer and French. These three documents are relevant because each of them was authored by Professor Chandler and expresses his views on issues related to Case 002. They are not repetitious of other material on the Case File and are not intended to prolong the proceedings.

6. These three documents are admissible pursuant to Rule 87(4). Professor Chandler has been writing about Cambodian history since at least the early 1970s. He has authored a large quantity of such material, including books, articles, speeches, his PhD thesis, and website material. It has taken considerable time to find and gather such material – much of which was written prior to the widespread use of computer technology and still exists, to the knowledge of the Defence, in hardcopy only. After finding and gathering this material, the Defence was then required to review it for relevance. Many times the relevance of a particular document is only available after it is viewed in context with other documents. Although these documents were in existence prior to the opening of the trial, they were not known at that time to the Defence and were not in its possession, despite due diligence. As such, they were not “available” to the Defence within the meaning of Rule 87(4).¹⁰ No party will be prejudiced by the Defence’s use of these documents at trial, since there is still sufficient time in advance of Professor Chandler’s testimony for all parties to review and assess this material.
7. The fourth document listed above (D) is a new document authored by Professor Chandler which has not yet been located by the Defence. Should the Defence (or any other party) be able to locate this document in a timely manner, it should be considered admissible for all of the same reasons as documents A through C.
8. The final seven documents listed above (E-K) are available on the Case File. They were not added to the Defence’s document lists because the significance of certain statements made by Professor Chandler in these documents was not apparent to the Defence at the time of preparing its lists. As mentioned above, it is sometimes only through viewing certain documents in context with other documents that their relevance becomes apparent. Such is the case for these documents. No party will be prejudiced by the Defence’s use of

¹⁰ The Trial Chamber, considering ICTY and ICTR jurisprudence, has held that “the notion of ‘availability’ of evidence is linked to the exercise of due diligence.” Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, para. 23.

these documents at trial, as they exist on the Case File and, as such, have been available to all parties for quite some time.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests to place the above requested material before the Trial Chamber and to be afforded the opportunity to use this material during the examination of Professor Chandler.

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 13th day of **June, 2012**