

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

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21 June 2012



To: **Susan LAMB**
Senior Legal Officer, ECCC Trial Chamber

Copy: **Defence Teams**

Office of the Co-Prosecutors

Civil Party Lead Co-Lawyers

Re: Trial Chamber's Decision on IENG Sary's Rule 87(4) Request Regarding Material to be used During the Examination of Expert David Chandler (E172/24/4)

Dear Ms. Lamb,

Today we were notified of the Trial Chamber's Decision on our Request concerning certain material to be used during the examination of Expert David Chandler. Paragraph 6 of this Decision states:

The Chamber notes that documents (A)-(C) as detailed in motion E172/24/3 are not presently on the Case File. Although translations of them have been sought by the IENG Sary Defence, to date copies of these articles have not been made available to either the Chamber or the other parties. Further, this material has been in the public domain since 1989, 1994 and 2000, respectively. Although these sources do not meet the criteria contained in Internal Rule 87(4) and therefore cannot be admitted as new documents, the Chamber nonetheless has no objection to the IENG Sary Defence utilizing their contents, where relevant, when formulating questions to the expert, provided that timely advance courtesy copies of these articles are provided to the Chamber and the other parties.

It is correct that these three documents are not available on the Case File as they are new documents. It is incorrect, however, that the documents were not made available to the Chamber or the parties. We had each of these documents placed on the Shared Materials Drive on 8 June 2012,¹ prior to making our request of 13 June 2012 to place the documents before the Trial Chamber.² In the Request, we provided the ERNs of each of these documents and notified the Chamber and the parties that the documents were available on the

¹ Emailed confirmation of their placement on the Shared Materials Drive from CMS to the IENG Sary Defence team is available upon request.

² IENG Sary's Rule 87(4) Request Regarding Material Which May be used During the Examination of Expert David Chandler, 13 June 2012, E172/24/3.

Shared Materials Drive. This is what the OCP did when it submitted its Annex of new documents. It did not hand-deliver copies of the documents to all parties, but placed these documents on the Shared Materials Drive and provided the ERN numbers in its Annex.³ In fact, the OCP has “suggested that the other parties take the initiative to place their own new documents in similar folders on the Shared Material Drive.”⁴

The Trial Chamber has noted that our requested documents “do not meet the criteria contained in Internal Rule 87(4)” but failed to provide any reasoning for this finding. With respect, it would greatly assist us, and all parties, if the Trial Chamber could explain why it *does not* consider these documents to meet the requirements of Rule 87(4), particularly when Rule 87(4) simply requires that: **a.** the evidence meet the criteria of Rule 87(3) and **b.** the tendering party demonstrate that the requested evidence was not available before the opening of trial. In this instance, scrutiny reveals that the IENG Sary Defence has met both prongs of Rule 87(4), hence this request for further clarification and guidance.

The Trial Chamber has held that “the notion of ‘availability’ of evidence is linked to the exercise of due diligence.”⁵ Our Request explained that Professor Chandler has been writing about Cambodian history since at least the early 1970s and has authored a large quantity of such material, including books, articles, speeches, his PhD thesis, and website content. It has taken considerable time to find and gather these documents – many of which were written prior to the widespread use of computer technology and still exists, to our knowledge, in hardcopy only. We were then required to review it for relevance. Many times the relevance of a particular document is only apparent after it has been viewed in context with other documents. Although these documents were in existence prior to the opening of the trial, they were not known to us at that time and were not in our possession, despite due diligence. As such, we respectfully submit that these documents were not “available” within the meaning of Rule 87(4).

We would appreciate this clarification, which we hope would additionally dispel any notion that the Trial Chamber is adopting such rigid standards concerning the use of documents as to amount to an abuse of its discretion. We must also highlight – for the sake of consistency and equality – that the Trial Chamber recently admitted a book tendered by the OCP even though the Co-Prosecutors “failed to explain why they could not have obtained it through the exercise of due diligence prior to its acquisition by the ECCC Library and before the opening of the trial.”⁶ Obviously, disparate treatment of the parties does lend to an unavoidable perception of asymmetry – as exquisitely put by the Supreme Court Chamber, albeit in a different context.⁷

³ See, e.g., OCP Document List E9/31.21.

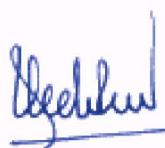
⁴ Co-Prosecutors’ Notice to the Trial Chamber and Parties Regarding Access to New Documents Listed on OCP Trial Document Lists E9/31.21, E109/4.1, E131/1/4.1, 5 December 2011, E151.


⁵ Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, para. 23.


⁶ *Id.*, para. 32.

⁷ See Decision on IENG Sary’s Appeal against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3, para. 24.

Respectfully requested,


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