

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

FILING DETAILS

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OBJECTIONS TO ADMISSIBILITY OF NEW DOCUMENTS

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MAY IT PLEASE THE TRIAL CHAMBER

I. Procedural history

1. On 13 January 2011, the Trial Chamber (the “Chamber”) issued an order pursuant to Internal Rule 80 enjoining the parties to file material in preparation for trial.¹
2. On 19 April 2011, the Co-Prosecutors filed their list of documents in the form of 21 annexes.² Annex 21 is titled “new documents” and consists of 481 documents that are not on the case file. Oral hearings on the admissibility of the Co-Prosecutor’s documents were held³ but they did not focus on these “*new documents*”. In fact, the Chamber informed the parties that “*other instructions would be given in due course for review of all new documents*”.⁴
3. At the hearing of 13 March 2012, Mr KONG Sam Onn had pointed out that Annex 21 was a compendium of all the new documents listed as such in the Co-Prosecutors’ annexes 1 to 20. He had nevertheless pointed out that he would not discuss these new documents at the hearing, but at a subsequent date, in accordance with the Chamber’s directives.⁵
4. It was only on 8 February 2013, that the Chamber, by an email sent to the Senior Legal Officer, authorized the parties to file their objections to the Co-Prosecutors’ Annex 21, and to other new documents filed by the other parties.⁶ The Chamber does not identify these “*other new documents filed by the other parties*”.
5. However, Mr KHIEU Samphan’s Defence team observes and deplores the fact that although there have not been any adversarial proceedings regarding the new documents, some of them have already been assigned the E3 reference number.

¹ Order to File Material in Preparation for the Trial Proceedings, 17 January 2011, **E9**.

² Co-Prosecutors’ Rule 80 (3) Trial Document List, 19 April 2011, **E9/31**, para. 1.

³ Transcript of hearing, 17 January 2012, **E1/28.1**; Transcript of hearing, 18 January 2012, **E1/29.1**; Transcript of hearing, 20 January 2012, **E1/30.1**; Transcript of hearing, 12 March 2012, **E1/46.1**; Transcript of hearing, 13 March 2012, **E1/47.1**; Transcript of hearing, 14 March 2012, **E1/48.1**; Transcript of hearing, 15 March 2012, **E1/49.1**.

⁴ Updated memorandum for next document hearing (12-19 March, 2012), 2 March 2012, **E172/5**, par. 7.

⁵ Transcript of hearing, 13 March 2012, **E1/47.1**, p. 4, line 25 and p. 5, lines 1 to 15.

⁶ Mrs Susan Lamb’s email sent to the parties on 8 February 2013 at 3:23 p.m., titled (“Advance courtesy copy, Trial Chamber memorandum regarding sundry document issues”; Response to Applications E246 and E185/1/1 and to other applications regarding material and prescribed time limits, 13 February 2013, Memorandum, **E246/1**, para. 4 (Memorandum notified in Khmer on 13 February 2013 and in French on 18 February 2013).

II. Preliminary remarks

6. Since 8 February 2013, many changes in the schedule of hearings have profoundly affected the ability of Mr Khieu Samphan's Defence team to discuss the admissibility of the Co-Prosecutors' 481 new documents and "*other new documents filed by the other parties*".
7. On 8 January 2013, the Chamber had announced that the week of 18 February 2013 would be devoted to hearing the testimony of Expert Witness Elizabeth Becker (TCE-80).⁷
8. On Friday 8 February 2013, at 8:45 p.m., the parties were notified of the Supreme Court Chamber decision cancelling the Severance Order issued by the Trial Chamber ("Decision on Severance").⁸
9. Following that decision, on 11 February, a representative of the Civil Parties sent an email to the Senior Legal Officer enquiring about the consequences of that decision on Elizabeth BECKER's testimony.⁹ On the same day, the Senior Legal Officer pointed out that the Chamber would send a memorandum to the parties the following morning.¹⁰
10. On 12 February 2013, the Chamber announced that hearings on the Decision on severance were scheduled to take place on 14 and 15 February 2013 and invited the parties to respond to a series of questions.¹¹ The Chamber also informed the parties that the hearings could continue up to the week of 18 February 2013, should the health of the accused prevent Elizabeth BECKER's testimony from proceeding uninterrupted.¹²
11. On the same day, the Senior Legal Officer informed the parties that the hearings

⁷ Consolidated schedule of witnesses and experts for early 2013, 8 January 2013, Memorandum, **E236/4**, para.1.

⁸ Case File 002/19-09-2007-ECCC-TC/SC (18), Decision on the Co-Prosecutors' immediate appeal of the Trial Chamber's decision concerning the scope of Case 002/01, 8 February 2013, **E163/5/1/13**.

⁹ Ms Fernandez' email sent to Ms Susan Lamb on 11 February 2013 at 3:30 p.m. titled "*TCE-80*".

¹⁰ Ms Susan Lamb's email sent to Ms Fernandez on 11 February 2013 at 4:06 p.m. titled "*Re: TCE-80*".

¹¹ Ms Susan Lamb's email sent to the parties on 12 February 2013 at 11:34 a.m. titled "Directions to the parties in advance of hearing in relation to SCC Decision on Scope of Trial in Case 002/01 (Thursday 14 and Friday 15 February 2013)", with a courtesy copy of the Memorandum "Directions to the parties in consequence of the Supreme Court Chamber's Decision on Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01 (E163/5/1/13)".

¹² *Ibid.*, para. 4.

regarding the consequences of the Decision on Severance would be postponed to Monday 18 February and Tuesday 19 February 2013.¹³ The Chamber pointed out that based on the available information, it was very unlikely that NUON Chea would be physically able to attend the hearings in the week of 18 February and that given the uncertainties as to the continuation of the schedule, it had decided not to summon Elizabeth BECKER to appear in Phnom Penh.

12. Approximately two hours later, on the same day, the Legal Officer of the Chamber informed the parties that Witnesses TCW-665 and TCW-673 would be called to testify on 20 February 2013 following the hearing on the consequences of the Decision on severance.
13. On 15 February 2013, Mr IENG Sary's Defence requested the Chamber to extend the 22 February deadline initially imposed on the parties for document objections. Mr Ieng Sary's Defence argued that it was not in a position to raise informed objections to the documents on account of the uncertainty as to the scope of the trial.¹⁴
14. On the same day, the Senior Legal Officer responded that the Chamber was aware of the consequences of the Decision on severance but did not intend to extend the announced deadline on any account.¹⁵ A similar response had been given in the morning by the Co-Prosecutors who were requesting an extension of the deadline for filing their list of written witness statements which they were seeking leave to tender into evidence in lieu of oral testimonies, two weeks after the Chamber had handed down its final ruling on the scope of the ongoing trial segment.¹⁶
15. During the hearing of 18 February 2013, the Chamber decided to postpone the testimonies of Witnesses TCW-665 and TCW-673 to a later date and informed the parties that it would not sit the next day, as initially envisaged, but the day after.

¹³ Ms Susan Lamb's email sent to the parties on 12 February 2013 at 2:49 p.m. titled "Postponement and further information concerning the modalities of the severance hearing and related matters".

¹⁴ Ms Pettay's email sent to Ms Susan Lamb on 15 February 2013 at 10:31 a.m. titled "Request for extension of deadline for document objections".

¹⁵ Ms Susan Lamb's email sent to Ms Pettay on 15 February 2013 at 1:40 p.m. titled "Re: Request for extension of deadline for document objections".

¹⁶ Ms Susan Lamb's email sent to Mr Smith on 15 February 2013 at 10:04 a.m. titled "Re: OCP Witness Statements Proposed for Admission".

16. On 19 February 2013, the Chamber communicated to the parties, through the Senior Legal Officer, some additional questions to which they would have to respond at the hearing of 20 February 2013.¹⁷
17. On 20 February 2013, Mr Ieng Sary's Defence reiterated its request for extension of the time-limit for filing its objections to the Co-Prosecutors' new documents barring a clear and precise definition of the scope of the trial.¹⁸ The Co-Prosecutors responded that the Defence teams had already had the opportunity to make their objections to all their documents, including their new documents.¹⁹ As is evident in paragraphs 2 to 4, the Co-Prosecutors have side-stepped the Chamber's instructions and egregiously acted in bad faith. The Chamber had clearly postponed the hearings for a very simple reason: most of the new documents were not accessible to the other parties at the time of the hearing on the other Co-Prosecutors' documents. Three questions therefore arise: Why did the Co-Prosecutors not react immediately after 13 March 2012 when Mr KONG Sam Onn pointed out that he had heard the Chamber's instructions and that Mr Khieu Samphan's Defence would only present its objections to the new documents after the Chamber would have set a date for the new documents hearing? And how could we have discussed the new documents even before we were granted access to them? Why did the Chamber impose on the parties the date of 22 February 2013 for presentation of their objections to the Co-Prosecutors' Annex 21 if hearings had already been held to that effect?
18. All these changes and uncertainties have had a profound impact on the organisation of the work of Mr Khieu Samphan's Defence team which has devoted its time to the cumulative tasks of preparing for the testimonies of Expert Witness Elizabeth BECKER, Expert Witness TCE-65 scheduled for 4, 5 and 6 March 2013, Expert Witness TCE-33 scheduled for 25, 26, 27 and 28 March 2013, Witnesses TCW-665 and TCW-673 initially slated for 20 February and preparation of hearings on the consequences of the Decision on severance. At the same time, Mr Khieu Samphan's Defence team was preparing its objections to all the new documents filed by the parties. These documents, most of which

¹⁷ Ms Susan Lamb's email sent to the parties on 19 February 2013 at 1:57 p.m. titled "Supplementary questions for the parties in advance of tomorrow's severance hearing".

¹⁸ Ms Pettay's email sent to Ms Susan Lamb on 20 February 2013 at 1:17p.m. titled "Re: Request for extension of deadline for document objections".

¹⁹ Mr Smith's email sent to Ms Susan Lamb on 20 February 2013 at 1:34 p.m. titled "Correct Title of Previous Email Should Be: Re: Request for extension of deadline for document objections".

are only available in English, are of varying length in terms of number of pages and some are even videos. Mr KHIEU Samphan's Defence team has in the past deplored the very short time-limits set for the presentation of objections to thousands of documents which definitely make any opportunity for adversarial hearings on such documents merely virtual.²⁰ The Defence has been forced to raise its objections per category of documents. The Chamber has rejected this approach and admitted the documents barring very specific objections by the Defence.²¹

19. Under these circumstances, Mr KHIEU Samphan's Defence has done its level best to present its remarks on Annex 21, but has not been able to do so for all the documents. Neither has it been in a position to identify the "*other new documents filed by the other parties*". Mr KHIEU Samphan's Defence again deplores the absence of a real opportunity for adversarial hearings regarding admissibility of the documents.

20. Mr Khieu Samphan's Defence has indicated in the annex the documents whose admissibility it has not had the time to consider and on which there has therefore been no adversarial hearing.

III. Applicable Law

21. The admissibility of new documents should be considered as meticulously as possible to the extent that the documents are in the public domain and were already available at the investigative stage, but the Co-Investigating Judges had not deemed them sufficiently relevant to be placed on the case file. In such a context, the rules of admissibility are as follows:

22. First, the documents must be available in the ECCC's three official languages. The Chamber has pointed out that "*all documents sought to be put before the Chamber*" must be provided in all three official languages by 4 March 2013. "*Unless material submitted into evidence can be so provided in a timely manner, it cannot be considered as having*

²⁰ Objections to the admissibility of other parties' document lists for the first session of the first trial, 14 November 2011, **E131/6**; Objections to the admissibility of other parties' remaining document lists for the first four segments of the first trial, 5 January 2012, **E131/1/11** ; Transcript of hearing, 17 January 2012, **E1/28.1**, p. 46, lines 8 to 25.

²¹ Decision on objections to documents proposed to be put before the Chamber on the Co-Prosecutors' annexes A1-A5 and to documents cited in paragraphs of the closing order relevant to the first two trial segments of Case 002/01, 9 April 2012, **E185**, para. 23.

been put before the Chamber pursuant to Internal Rule 87.”²²

23. Furthermore, the Chamber may, pursuant to Internal Rule 87(3), rule that evidence is inadmissible 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.*”
24. In this regard, the Chamber has recalled that “[*a*] *document that clearly lacks reliability (including authenticity) may be considered by the Chamber to be “unsuitable to prove the facts it purports to prove”.*²³
25. Lastly, as the Co-Prosecutors point out in their objections to the appearance of Defence witnesses under Internal Rules 87(3) and 98:

“9. Rule 98 (2) and (3) sets out the scope of the judgment; (2) The judgment shall be limited to the facts set out in the Indictment...(3) The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC and whether the Accused has committed those acts.

10. A material fact is defined as one upon which the verdict is critically dependent. Evidence which does not speak to a material fact and does not have probative value is inadmissible. Evidence is probative if it has a tendency to establish the fact in question.

11. Consequently, in evaluating the relevance of the testimony of a particular witness or expert the Trial Chamber must determine whether or not the proposed testimony tends to prove or disprove the occurrence of a crime charged or the accused’s participation in those crimes.”²⁴

IV. Argument

26. Most of the Co-Prosecutors’ new documents are completely at variance with the Closing Order and some of them are on facts that fall outside of the ECCC’s temporal jurisdiction.

²² *Ibid.*, E246/1, para. 3.

²³ Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, 31 January 2012, Memorandum, E162, para. 2.

²⁴ Co-Prosecutors’ objections to the witnesses and experts proposed by the other parties with 11 confidential annexes, 7 March 2011, E9/14/1/1, para. 6.

They neither go to prove or to refute the commission of an alleged crime or the participation of an Accused in the said crime (for example, documents **E3/705** and **E3/717**).

27. As regards the documents that are irrelevant, the Defence notes that several documents that are unlikely to establish what they are supposed to substantiate insofar as their contents are not ascertainable. Such documents include, for example, documents whose Khmer originals are not available; documents containing statements that are completely out of context; photographs that bear no date and/or whose author is not identified or documents whose provenance is unknown.
28. Other documents are not authentic and have given rise to erroneous comments, for example, the *Washington Post* article (**E190.1.327** document No. 97 in Annex 21) published on 8 April 1977, which carries the following comment: “[p]hotographs believed to be the first of actual forced labour conditions in the countryside of Cambodia have reached the West.”²⁵ In fact, as Noam Chomsky points out,²⁶ those photographs were most probably not taken in Democratic Kampuchea but somewhere else and during another period. Mr Khieu Samphan’s Defence relies on Noam Chomsky’s account to challenge the admissibility of the document. It is important to note that Mr Khieu Samphan’s Defence has asked that the author of the photograph be summoned to appear before the Chamber.²⁷ The Co-Prosecutors have objected to his appearance.²⁸
29. The onus is not on the Defence to establish that the Co-Prosecutors’ documents are not authentic; the burden is on the Co-Prosecutors to establish the reliability of the documents they wish to use in their case against the Accused instead of inundating the Chamber in a plethora of documents whose relevance and reliability are questionable. In this regard, it is not enough to show that the newspaper article is an authentic article published in the newspaper. However, if the Co-Prosecutors’ intention is not to use the newspaper article

²⁵ *Forced Cambodia Labor Depicted* Article by Ann Mariano for Washington Post, **E190.1.327**, p. 1.

²⁶ *After the Cataclysm : Postwar IndoChina and the reconstruction of imperial ideology*, The political economy of Human Rights, Vol. II, Noam Chomsky and Edward S. Herman, 1979, pp. 169 to 171, available at: « <http://books.google.fr/books?id=EH00v6lNzb4C&printsec=frontcover&dq=chomsky+after+the+cataclysm&hl=fr&sa=X&ei=NoElUfvKBJOEHQfbyICABw&ved=0CDQQ6AEwAA#v=onepage&q=chomsky%20after%20the%20cataclysm&f=false>. »

²⁷ Proposed Witness List, 21 February 2011, **E9/4/6.2**, p. 1.

²⁸ Annex B to the Co-Prosecutors’ Objections to the Other Parties’ Proposed Witnesses, 7 March 2011, **E9/14/1.12**, p. 16.




for its contents but to show the anti-Khmer Rouge atmosphere depicted in Western newspapers as well as the prevailing anti-communist context during that post-Cold War era, Mr Khieu Samphan's Defence does not object to its admissibility.

30. Lastly, other documents should be rejected because they are illegal. Such documents include, for example, records of investigations conducted outside of any judicial framework; if they had been conducted under the same circumstances by the Co-Investigating Judges, they would have been declared null and void; documents inferring that the Accused are guilty based on documents that cannot serve as a legal basis for a finding of guilt before the ECCC (for example, torture-tainted documents or documents that are not on the OCIJ case file, such as **E190.1.402**).
31. In the annex to the present application, the Defence develops in greater detail specific argument on each of the documents in the annex to the present application.
32. Mr Khieu Samphan's Defence is compelled to submit the present application in French for the time being, as it is informed that the reviser in charge of translations from French to Khmer is on annual leave and the translators are overwhelmed by translation requests from other parties.²⁹

²⁹ Mr KORM's email sent to Mr KHIEU Samphan's Defence team on 21 February 2013 at 11:39 a.m. titled "Re: Request for translation"; Email of "Translation Admin" sent to Mr KHIEU Samphan on 21 February 2013 at 3:16 p.m. titled "ITU assigned new ITU Indicative Date".

FOR THESE REASONS, Mr KHIEU Samphan requests the Trial Chamber to:

- **RULE** that Mr KHIEU Samphan has not had the opportunity to participate in adversarial proceedings on all the new documents filed by the parties;
- **RULE** that the documents listed in the annex to this application are inadmissible;
- **EXPUNGE** the E3 reference from irrelevant documents such as documents E3/717, E3/705.

Mr KONG Sam Onn	Phnom Penh	
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