

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:** 31 August 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 PHILIP SHORT**

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

Judge NIL Nonn

Judge YOU Ottara

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge THOU Mony

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

Andrew CAYLEY

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 an article authored by Philip Short, *Devil’s Advocate: There Should be no KR Trial*, before the Trial Chamber and to be afforded the opportunity to use this article during Mr. Short’s examination. This Request is made necessary because this article is relevant and probative and the Defence considers it necessary to put this article to Mr. Short; however, the article 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 an article authored by Philip Short, *Devil’s Advocate: There Should be no KR Trial*, before the Trial Chamber and to use this article when examining Mr. Short. The article, written in English, has been translated into Khmer and French and placed on the Shared Materials Drive. It has English ERNs 00839943-00839947, Khmer ERNs 00842704-00842714 and French ERNs 00842099-00842105.¹ The article meets the criteria set out in Rule 87(3). It is relevant because it was authored by Mr. Short and expresses his views on issues related to Case 002/01, such as the senior leaders’ intent

¹ For the Trial Chamber’s and parties’ convenience the article is attached as an annex in all three languages.

related to the Cham, and their connection to S-21. It is not repetitious of other material on the Case File and is not intended to prolong the proceedings.

5. This article is admissible pursuant to Rule 87(4). This article was published in the Phnom Penh Post in 2000, but only recently came into the Defence's possession. Although the article was in existence prior to the opening of the trial, it was not known to the Defence at that time. In keeping with its due diligence obligations, the Defence reviews all material it can locate that is relevant to each witness, Civil Party and expert. The Defence had not completed this task in relation to every proposed witness, Civil Party and expert prior to the opening of trial; this would have been impossible and impractical, especially considering that the witness lists had not been finalized at that time. Furthermore, the parties were not informed at the time of preparing their document lists that it was necessary to include new material that was possibly relevant for witnesses, Civil Parties and experts that were proposed by other parties. In fact, the Trial Chamber Senior Legal Officer stated the following: "Scope of obligation to file document/exhibit lists[:] The Chamber confirms that all parties are obliged, on 19 April, to file *only* those documents germane to their witnesses sought and the case against their particular client. *There is no obligation to submit documents assumed to be of relevance to witnesses called by other parties.*"² As such, the article was not "available" to the Defence before the opening of trial within the meaning of Rule 87(4).³
6. Exclusion of the article based on a technicality, such as the fact that the Defence did not put this article on its document list prior to the opening of trial, would be antithetical to the Trial Chamber's search for the truth. This article must not be excluded simply because its existence and relevance was not foreseen over a year ago when the Defence submitted its trial document list, particularly considering that the parties were informed that they need not list documents relevant to witnesses proposed by other parties. No party will be prejudiced by the Defence's use of this article at trial, since there is still

² Email from Trial Chamber Senior Legal Officer to the Parties entitled "Responses to questions posed during the Trial Management Meeting," 8 April 2011 (emphasis added).

³ 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.

sufficient time in advance of Mr. Short's testimony for all parties to review and assess this brief article.⁴

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests to put the article by Philip Short, *Devil's Advocate: There Should be no KR Trial*, before the Trial Chamber and to be afforded the opportunity to use this article during the examination of Mr. Short.

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 31st day of **August, 2012**

⁴ Deputy International Co-Prosecutor William Smith has agreed that material should not be excluded simply because it was not put before the Chamber prior to the start of trial. He stated in court: "Mr. President, we agree that there are -- circumstances can arise where documents become significant at a later time, in relation to the -- testing witnesses credibility. So we're not suggesting that every document has to be placed before the Chamber." Trial Transcript, 5 April 2012, p. 51.