

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA



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RESPONSE BY CO-PROSECUTORS TO RULE 87 REQUESTS BY IENG SARY AND NUON CHEA TO USE MATERIAL DURING THE EXAMINATION OF PHILIP SHORT

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I. INTRODUCTION

1. The defence teams for IENG Sary and NUON Chea have submitted requests to the Trial Chamber to use certain documents ('the Documents') during the examination of Philip Short, who has been scheduled to give testimony commencing on 1 October 2012.¹ The Co-Prosecutors do not take the position, as a matter of principle, that the defence teams should be precluded from seeking to rely on the Documents because (a) the Documents were available before the trial started and / or (b) the Documents were not included on Rule 80 document lists submitted prior to the start of the trial. The Co-Prosecutors submit that, with sufficient notice having been given to all parties, each document should be reviewed to determine if it contains material which is relevant and upon which Mr Short properly can be examined. Specific submissions in relation to each of the documents are set out below.

II. DOCUMENTS REQUESTED BY IENG SARY DEFENCE

Devil's Advocate : There should be no KR Trial

2. The defence assert that this document "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 related to the Cham, and their connection to S-21". The Co-Prosecutors submit that the issue of intent is for the Trial Chamber to determine having heard all the evidence. It is one of the "ultimate issues" in the case, and not one in respect of which Mr Short's opinions will assist the Court. While it is permissible for the defence teams to ask Philip Short questions about the policies and activities of the Communist Party of Kampuchea (CPK) and the Democratic Kampuchea (DK) regime in relation to the Cham population, it is not permissible for the defence teams to ask Philip Short to express a view as to: (i) whether any accused possessed the necessary genocidal intent in respect of the Cham population; or (ii) whether, in respect of the Cham population, the activities of the regime constituted genocide. To seek to elicit Mr Short's opinion on these issues would be to usurp the function of the Court. Such questions are impermissible because they go not to the facts of the case, but rather to the issue of liability and that is the sole preserve of the court.

¹ E226 "Rule 87 Request to Use Documents During Cross-Examination of Witness Philip Short" (NUON Chea defence); E226/1 "Ieng Sary's Rule 87(4) Request Regarding Material Which May Be Used During the Examination of Expert Philip Short"

3. With regard to S-21 the Co-Prosecutors submit that, like Professor Chandler, Philip Short can be asked questions, based on his research and knowledge of the facts, as to the links between the accused and S-21. In this article, authored in 2000 (prior to the publication of his book on the CPK and DK) Mr Short stated:

No one can reasonably deny that Nuon Chea had overall responsibility for security matters in Democratic Kampuchea, while Son Sen had direct charge of S-21. The other leaders were also aware of what went on there, and, to the extent that they were members of the CPK Standing Committee, shared at least a measure of collective responsibility.

The Co-Prosecutors agree that the defence should be permitted to ask questions of Mr Short to elaborate on this issue.

III. DOCUMENTS REQUESTED BY NUON CHEA DEFENCE

A. Blythe Yee , 'Navigating Darkness', Asian Wall Street Journal, 1 April 2005

4. This article is currently only available in French and appears to be a shortened version of the article listed below under "E." Subject to a full translation being provided, the Co-Prosecutors do not object to its use for the same reasons as stated under "E" below.

B. Charlie Rose (Transcript of Interview with Philip Short), 29 March 2005

5. The Co-Prosecutors do not object to the use of this document and repeat their submissions at paragraph 2 above. In the course of the interview Mr Short comments on the liability of CHEA Sim and states that CHEA Sim has "blood on his hands". In order to forestall any objections that may be raised to questions regarding CHEA Sim, the defence should be directed to indicate whether they intend to examine Mr Short on this topic, and to justify the extent to which any such questions are relevant to the liability of the Accused in this trial.

C. Brendan Brady, 'Cambodia confronts the 'G' Word', Foreign Policy, 8 January 2010

6. For the same reasons as stated in paragraph 2 above, the Co-Prosecutors submit that Mr. Short's opinions on the propriety of genocide charges would usurp the function of the Chamber and are not appropriate and relevant matters for expert opinion. The Co-Prosecutors accordingly object to the use of this document.

D. 'Former Khmer Rouge Chief Charged with Genocide', Press TV, 18 December 2009

7. The only reference to Mr Short is as follows:

The author of the biographical book Pol Pot, Philip Short, has called the charges " misconceived and unhelpful" - " why muddy the waters by bringing in doubtful charges which will only lead the tribunal to bog down further? This is foolishness and muddled thinking of a kind which, alas, has characterized this tribunal from the outset.

8. Mr Short's views as to the charges are entirely irrelevant. In the absence of further justification from the defence as to how Mr Short can be asked questions based on the content of this document, the Co-Prosecutors object to its use on the grounds of lack of relevance. In any event, the Co-Prosecutors repeat their submissions at paragraph 2 above.

E. 'MAO TSE-TUNG didn't prepare Philip Short for Pol Pot'

9. This document contains relevant material as to the investigative methods used by Mr Short in researching his book 'Pol Pot: Anatomy of a Nightmare' and the Co-Prosecutors do not object to it being used in examination.

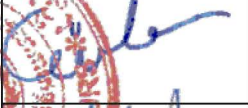
10. The Co-Prosecutors further note that the documents proposed by the Nuon Chea Defence appear to be documents they prepared, rather than copies of original articles. Before any of these documents are used in Court, the Nuon Chea Defence should be required to explain how the documents were prepared, the sources from which the purported articles and transcripts were obtained or other information sufficient to ensure the authenticity and reliability of the documents.

IV. NOTICE OF CO-PROSECUTORS RULE 87(4) REQUEST

11. The Co-Prosecutors give advance notice of their own intention to make a Rule 87(4) request with respect to a video recording of a lecture given by Mr Short on 9 March 2005 at the University of California, Los Angeles, United States of America. This lecture is available on a video library website (www.c-spanvideo.org). It is approximately 91 minutes long and contains a discussion by Mr Short of his detailed research and findings in relation to the history, structure and policies of CPK and DK. The lecture, which the Co-Prosecutors

became aware of only recently, can be viewed, but cannot be downloaded at present. An urgent request has been made to the operators of the website with a view to obtaining a copy of the video recording.

Respectfully submitted,

Date	Name	Place	Signature
5 September 2012	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
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