



## **Constraining the Use of Impeachment Materials**

Anne Heindel, Legal Advisor – Documentation Center of Cambodia

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In recent months there have been a slew of filings and decisions in Case 002 on when documents may be presented to a witness, in particular for impeachment purposes. The issue reignited as parties prepared to question prominent Cambodia historian and expert witness David Chandler.

Before the start of the Case 002 trial, the Trial Chamber ordered all parties to file a list of documents they intended to put before the Chamber as evidence.<sup>1</sup> It sought to expedite proceedings by identifying all evidence potentially at issue and limiting discussion to contested evidence. This practice was considered a necessary deviation from the Cambodian Code of Criminal Procedure's liberal standards of admissibility due to the volume of documents at issue in a mass crimes trial. For that reason, the Chamber rejected defense teams' arguments that they were not required to file advance lists under Cambodian procedure, as well as their attempts to list all documents in the case file or the Shared Materials Drive. The Nuon Chea defense complained:

While the imposition of flexible deadlines for the early identification of documentary evidence to be tendered by the parties may be a useful case-management tool, ... the Defence is unaware of any jurisdiction in the world that requires an accused person to submit a definitive list of documents to be used at trial (on pain of subsequent exclusion) several months in advance of the proceedings. Such approach—neither (Cambodian) fish nor (international) fowl—is, in practice, unworkable and unfair.<sup>2</sup>

In May 2012, the Trial Chamber made clear that any documents used to impeach a witness must meet the same admissibility criteria as documentary evidence to be relied on for the truth of its contents, including prior mention on one of the parties' lists.<sup>3</sup> While it is true that in civil law practice both substantive evidence and impeachment materials are treated the same, the threshold for admitting both is extremely low.

All parties have said that liberal allowance of impeachment material is appropriate, as long as 24-hours' notice is provided. For example, the prosecutors "agree that ... circumstances can arise where documents become significant at a later time, in relation to the—testing witnesses credibility" and do not believe "that every document has to be placed before the Chamber."<sup>4</sup> Instead, the Trial Chamber decided that the only way a party can use documents that are not on one of the parties' document lists for impeachment purposes is by meeting the high threshold for

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<sup>1</sup> Order to File Material in Preparation for Trial (Jan. 17, 2011); Internal Rule r. 80(3)(d).

<sup>2</sup> Reply to OCP Response to List of Documents to Be Put Before the Chamber During the First Mini-Trial (Feb. 27, 2012).

<sup>3</sup> Memorandum from President Nil Nonn to all Parties, Re Directions Regarding Documents Sought for Impeachment Purposes (May 24, 2012).

<sup>4</sup> Transcript of Trial Proceedings—Case 002 (Apr. 5, 2012).

admission of “new evidence” – including the obligation to “satisfy the Chamber that the requested testimony or evidence was not available before the opening of trial.”<sup>5</sup>

As a consequence, documents may not be used to impeach a witness if, with “due diligence,” they could have been identified on a party’s list prior to trial, unless “they are considered by the Chamber to be exculpatory and to require evaluation in order to avoid a miscarriage of justice.”<sup>6</sup> Yet eight months into trial proceedings, the parties still do not know the identities of all witnesses. As argued by the Nuon Chea team, “preparation for cross-examination is an ongoing and time consuming process which obviously cannot be finalized (or, arguably, even commenced) unless and until it is known for certain that a particular witness will testify in court.”<sup>7</sup>

The Chamber’s approach would appear to prevent the parties from using most unforeseen – and thus unlisted – documents for impeachment purposes. Indeed, the Trial Chamber has said “most belated requests to admit documents are unlikely to be successful.”<sup>8</sup> The Ieng Sary team recently intimated that the “Trial Chamber is adopting such rigid standards concerning the use of documents as to amount to an abuse of its discretion.”<sup>9</sup> This was in response to a finding by the Chamber that certain scholarly articles by David Chandler did not meet the “new document” criteria because they have “been in the public domain since 1989, 1994 and 2000.”<sup>10</sup>

The Ieng Sary team argued that the Trial Chamber did not explain why the documents fail to meet the “new evidence” criteria. They emphasized, “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.” The team also highlighted the Chamber’s alleged inconsistent treatment of the parties, as it had previously allowed a book published in 2010 to come in as new evidence “in the interests of justice” despite finding the Prosecutors had “failed to explain why they could not have obtained it through the exercise of due diligence.”

In response to a second request by the Ieng Sary team, the Chamber decided to allow the rejected materials after noting that they were merely different editions of books already on other parties’ lists and finding “it is in the interests of justice to allow the various editions of these books to be evaluated together.”<sup>11</sup> It pointed out that this decision was entirely consistent with the Chamber’s

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<sup>5</sup> ECCC Internal Rules, r. 87(4); Decision Concerning New Documents and Other Related Issues (April 30, 2012).

<sup>6</sup> Decision Concerning New Documents and Other Related Issues (Apr. 30, 2012).

<sup>7</sup> Notice of Impeachment Material for TCW-487 (May 28, 2012).

<sup>8</sup> Memorandum from President Nil Nonn to all Parties, Re: Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E109/5 (Oct. 25, 2011).

<sup>9</sup> Memorandum from Ieng Sary Team to Senior Legal Officer Susan Lamb, 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) (June 21, 2012).

<sup>10</sup> Memorandum from President Nil Nonn to all Parties, Response to Co-Prosecutors’ Request to Provide Case File 002 Documents to Experts and IENG Sary’s Rule 87(4) Request Regarding Material to Be Used During the Examination of Expert David CHANDLER (E172/24/2 and E172/24/3 (June 21, 2012).

<sup>11</sup> Memorandum from President Nil Nonn to all Parties, Response to IENG Sary’s Second Rule 87(4) Request Regarding Material Which May Be Used During the Examination of Expert David Chandler (E172/24/S) (July 16, 2012).

reasoning when it allowed the Prosecution to place the book published in 2010 on the case file, as the book was closely related to a previously admitted document.

With regard to documents not on any parties' list, and not accepted as new evidence, the Chamber said that their contents may be referenced – but not quoted – when formulating questions for David Chandler if courtesy copies are provided to the Court in advance.<sup>12</sup> This ruling suggests the Trial Chamber's recognition that increased flexibility is warranted. Nevertheless, it adds one more layer of complexity to the issue. Thus far, the application of the new evidence rule to impeachment materials does not appear to have encouraged efficiency, but instead has promoted prolonged debate and made the Chamber vulnerable to accusations of inconsistency in its determinations of which “new” documents to allow “in the interests of justice.”

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<sup>12</sup> June 21, 2012 Memorandum from President Nil Nonn to all Parties.