

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

FILING DETAIL

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RULE 87(4) REQUEST TO USE A DOCUMENT DURING CROSS-EXAMINATION

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Pursuant to ECCC Internal Rule (the ‘Rules’) 87(4), the Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit this request (‘Request’) to use a document during its examination of TCW-110 and TCW-326.

1. On 8 January 2013, the Chamber issued a memorandum notifying the parties of the hearing and witness schedule through the first three months of 2013.¹ The memorandum indicated, *inter alia*, that witness TCW-110 would testify during the week of 28 January 2013. That indication was subsequently confirmed by an email from the Chamber’s Legal Officer. As far as the Defence is aware, the January 8 memorandum constituted the first indication of a firm date for the appearance of this witness, although the Chamber had previously indicated its general intention to call him in connection with specific segments of the Case 002/01 trial.²
2. In the course of preparation for the examination of TCW-110, the importance of one document not listed on any party’s April 2011 document list has become apparent. That document, numbered A71, purports to be a letter, in part from TCW-110 and in part from TCW-326, about the ECCC and Nuon Chea in particular (‘Letter’). Both witnesses are currently held in Prey Sar prison for their joint role in a kidnapping and murder committed in the early 1990s.
3. This Chamber’s jurisprudence holds that use of a document during witness examination which was not included on any party’s April 2011 document list must satisfy Rule 87(4).³ Pursuant to Rule 87(4), ‘new evidence’ is admissible at trial if it was ‘unavailable’ prior to trial, is conducive to ascertaining the truth and satisfies the five conditions for admissibility set out in Rule 87(3)(a) through (e). The jurisprudence of the Chamber has proven flexible with regard to the unavailability requirement, admitting documentary evidence relevant to the examination of a witness where adequate notice is provided.⁴ The Chamber has also held that, in general, where a party seeks the admission of a document pursuant to Rule 87(4) due to its relevance to the

¹ Document No. **E-236/4**, Memorandum from Trial Chamber to the Parties, 8 January 2013, ERN 00876270-00876271, para. 6.

² Document No. **E-172**, Memorandum from Trial Chamber to the Parties, 17 February 2011, ERN 00780654-00780657. p. 3; Document No. **E-233**, Memorandum from Trial Chamber to the Parties, 24 September 2012, ERN 00848380-00848381, para. 5.

³ Document No. **E-260**, Memorandum from Trial Chamber to the Parties, 18 January 2013, ERN 00879330-00879331 (‘TC 87(4) Decision’).

⁴ See *e.g.*, TC 87(4) Decision; Document No. **E-172/24/4**, Memorandum from Trial Chamber to the Parties, 21 June 2012, ERN 00818308-00818309, para. 8.

examination of a particular witness, that party should move for admission at least two weeks prior to the appearance of the witness.⁵

4. As a letter purporting to be written by these two witnesses, and directly concerning these proceedings, it is for that reason alone (and assuming it is what it claims to be) *prima facie* relevant. The Letter furthermore betrays the hostility of the witness to Nuon Chea and is therefore of substantial importance to the credibility of his testimony. This is especially so in light of the inculpatory testimony given by TCW-110 as to Nuon Chea in his interviews with the CIJs and (the Defence maintains) the uncertainty concerning the basis of his knowledge for those claims.⁶
5. The authenticity of the Letter can be easily confirmed (or denied) by the witness in the course of testimony. The other conditions in Rule 87(3) are also satisfied: the Letter is not repetitious, intended to prolong proceedings or otherwise disallowed under the law. There is no prejudice at all to any party in its admission into evidence.
6. The Defence recognizes that, as to TCW-110, the present Request does not comply with the two week notice requirement.⁷ In that regard, the Defence notes firstly that parties were notified of the date of TCW-110's appearance 20 days ahead of time, with six other witnesses scheduled to appear in the interim. Preparing for TCW-110 on two weeks' notice from that juncture was therefore almost impossible. The Defence furthermore notes that, as this Chamber is aware, it has recently undergone a nearly full turnover of its international side and is subject to severe staffing pressures. Nuon Chea is moreover in hospital and not readily available to consult and participate in his Defence. In light of these considerations, the importance of the Letter to ascertaining the truth and the absence of any prejudice to any party, the Defence respectfully requests that the Chamber admit it into evidence.

⁵ Document No. **E-218**, Memorandum from Trial Chamber to the Parties, 3 August 2012, ERN 00831321-00831326, para. 22.

⁶ The portion of the Letter written by TCW-326 is especially overt in its hostility to Nuon Chea. The reason for that hostility concerns events affecting TCW-110 as well, and about which he may well share similar feelings. TCW-110 is well acquainted with TCW-326 (*see* Document No. **E3/361**, Chhuok Rin Written Record of Interview, 9 April 2008, ERN 00766447-00766459, p. 9) and may properly be questioned on the basis of that portion of the statement as well.

⁷ As the Chamber is aware, Nuon Chea is currently in hospital and unable to attend or participate in proceedings. It may well be that TCW-110's testimony will be delayed such that two weeks' notice will ultimately have been provided. In any event, this Request should be in no way construed as acquiescence or consent to TCW-110's appearance during the week of 28 January 2013 in the event Nuon Chea remains unable to attend.

CO-LAWYERS FOR NUON CHEA

A handwritten signature in black ink, appearing to read 'Arun' in a cursive style, with a horizontal line underneath.

SON Arun

A handwritten signature in black ink, appearing to read 'KOPPE' in a stylized, blocky cursive style.

Victor KOPPE