

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

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**REQUEST TO ADMIT NEW EVIDENCE, SUMMONS [REDACTED] AND
INITIATE AN INVESTIGATION**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby submit this request pursuant to Rules 87(4) and 93 of the Internal Rules (the 'Rules') that the Trial Chamber admit new evidence, initiate an investigation and summons [REDACTED] to appear as a witness:

1. On 9 July 2013, the Defence received an unsolicited email from [REDACTED], [REDACTED].
[REDACTED].
On the morning of 10 July 2013, the Defence made a three-pronged oral application. It sought: (i) admission of the email as evidence pursuant to Rule 87(4); (ii) the summoning of [REDACTED] and/or an investigation pursuant to Rule 93 into material of which [REDACTED] may have possession; and (iii) adjournment of the testimony of Stephen Heder, scheduled for that day. Both the Co-Prosecutors and the Civil Parties opposed the application. The Chamber rejected the request to adjourn the testimony of Mr. Heder and ruled that it was not yet persuaded that Rule 87(4) was satisfied. The Chamber added that the Defence was entitled to file a written request pursuant to Rule 87(4) to admit that evidence. It did not expressly address the second request, to summons [REDACTED] and/or initiate an investigation. Accordingly, these written submissions concern the first two requests made before the Chamber on 10 July 2013.
2. For the benefit of the Chamber, the email from [REDACTED] ('Email') reads as follows (emphasis in original):

Dear Victor,

From reading the Phnom Penh Post's account of the trial proceedings yesterday, it seems there may have been a misunderstanding about what Nuon Chea said in our DVD.

He did NOT agree that top Lon Nol officers had been killed. What he said was that half a dozen Lon Nol cabinet and top officials had been put through revolutionary due process and condemned to death by a military tribunal (which from memory Nuon Chea was not part of).

It should be added that Radio Phnom Penh the official state radio station broadcast announcements of these executions at the time and gave the same rationale as Nuon Chea does in our DVD.

Nuon Chea does not admit direct responsibility for executing the Lon Nol cabinet members. Rather he asserts that the rationale was correct.

Of course, that rationale is no different from US killing Bin Laden etc.

I hope that the evidence to the court makes it clear that there really is little prosecutorial value in what is reported to have been used of our film in this instance.

By the way, regarding Po Chrey, this was a massacre ordered by Ruos Nhim, not central command. We have amassed a wealth of evidence about Nhim's agenda but have been so far unable to complete our second film due to [REDACTED] being in US for personal reasons.

Yours sincerely

[REDACTED]

3. Concerning the first request, the Defence seeks admission of the entirety of the Email. Preliminarily, the Defence notes that the Email was 'not available prior to the opening of the trial', satisfying the one condition stated explicitly in Rule 87(4). The conditions in Rule 87(3)(b) through (e) are clearly satisfied. The Chamber is already in possession of the Email; admitting the Email would not delay the proceedings at all; the Email is not disallowed for any reason; and the Email is suitable to prove the facts it purports to prove. The Co-Prosecutors' and Lead Co-Lawyers' objections appear to concern primarily relevance pursuant to Rule 87(3)(a).
4. There is no doubt that the Email is relevant. Indeed, it is relevant for two different purposes. The information in the first six paragraphs (until the phrase 'our film in this instance') is exculpatory in relation to the prosecution's allegation that Nuon Chea is criminally responsible for executing top officials of the Lon Nol regime shortly after 17 April 1975. It indicates that, according to Nuon Chea, senior members of the Lon Nol government were tried by a military tribunal, that Nuon Chea had no role at all in the death penalty pronounced against them, and that Nuon Chea denies responsibility for any such executions. The last paragraph is, for reasons that need no elaboration, directly exculpatory in relation to the alleged events at Tuol Po Chrey.
5. In relation to the first part of the Email, the Co-Prosecutors' principal objection was that this Chamber is not in need of an opinion to interpret the films already in evidence before it.¹ The Chamber should see easily through this obvious smokescreen. Both [REDACTED] and [REDACTED] have indicated that the film is only a tiny portion of the total footage collected. Indeed, the 93 minutes of [REDACTED] and the 29 minutes of [REDACTED] [REDACTED] are cut from *ten years* of video and audio taped interviews with Nuon Chea. None of the exculpatory facts described in the Email are found anywhere in the excerpt on the case file. The prosecution's claim that [REDACTED] adds nothing to the

¹ Draft Transcript (EN), 11 July 2013 ('July 11 Transcript'), pp. 10:12-19, 11:20-25.

Chamber’s deliberations because the Chamber can review the 122 minutes which do exist on the case file should accordingly be rejected.

- 6. The Co-Prosecutors note that [REDACTED] was not present at the interviews conducted for the making of the film.² First, that claim is only partially true. According to the [REDACTED] website, in 2007 ‘[REDACTED] and [REDACTED] start[ed] filming with former Khmer Rouge from Nuon Chea to foot soldiers like Suon and Khoun’.³ Nuon Chea’s wife recalls meeting [REDACTED] during at least one of her husband’s interviews with [REDACTED].
- 7. Furthermore, [REDACTED] has worked with [REDACTED] for seven years on at least three films based on those interviews. [REDACTED] and [REDACTED] are both identified as ‘[REDACTED]’ on the [REDACTED] website.⁴ In an interview with American public television, [REDACTED] explains that after meeting [REDACTED] in 2006, they ‘collaborate[d] and made the film 50/50 together for the next three or four years.’⁵ He adds that ‘we made the film together, we own the film together, we are 50/50 co-everything together.’⁶ The [REDACTED] website includes numerous blog posts authored by [REDACTED] on the basis of non-public information obtained by [REDACTED] and [REDACTED] from Nuon Chea.⁷ Some of these were expressly ‘cut from the film’.⁸ In one post, [REDACTED] explains that ‘we are reviewing hundreds of hours of taped conversations with Nuon Chea (and other Khmer Rouge sources) in preparation for our follow-up film, [REDACTED].’⁹ There is no serious question that [REDACTED] is intimately familiar with the interviews themselves and with the use to which they were put in crafting the narrative presented in [REDACTED] and subsequently placed before this Chamber.

² July 11 Transcript, 11:25-12:5.

³ [REDACTED]
⁴ [REDACTED]
⁵ [REDACTED]

⁶ PBS Interview, 8:27-8:35.

⁷ [REDACTED]
⁸ [REDACTED]
⁹ [REDACTED]

Prosecutors' submissions on 10 July 2013 that it supports the request to initiate an investigation. The Co-Prosecutors indicated that if material concerning Ruos Nhim's role at Tuol Po Chrey exists, it should be introduced into evidence.¹² The Co-Prosecutors are well aware that the Defence is prohibited by the rules of the Tribunal from engaging in its own investigation or from contacting [REDACTED]. It follows that it is for the Chamber to investigate the evidence which the prosecution agrees should be before the Chamber. The Defence notes that the Co-Prosecutors requested and obtained an investigation into the whereabouts of Nou Mouk merely because Ben Kiernan recounted in a book that Mouk had once, years ago, told him something of relevance.¹³ In this case, [REDACTED] himself volunteered this week that he is in possession of highly relevant (and exculpatory) information. The Defence assumes that the Co-Prosecutors intend for the same standards to apply to the search for exculpatory and inculpatory evidence.

12. The investigation sought by the Defence is neither burdensome nor complicated. The Defence merely requests that the Trial Chamber contact [REDACTED] and endeavor to determine the nature of his evidence that Tuol Po Chrey 'was a massacre ordered by Ruos Nhim, not central command'. [REDACTED] is a public figure and his contact information is readily available online. The Chamber should conduct an interview, remotely if necessary, and seek to obtain copies of any documentary evidence in [REDACTED]'s possession.¹⁴ That portion of the investigation could be complete in a matter of days. The need for further investigation, if any, could then be assessed.
13. The request to summons [REDACTED] should be granted for the all of the same reasons. [REDACTED] would be able to testify to Nuon Chea's statements concerning the treatment accorded to top members of the Lon Nol government and to his (exculpatory) findings in relation to Tuol Po Chrey. In that regard, there is no difference between [REDACTED] and Philip Short: both are journalists who performed extensive primary and secondary research beginning many years after Democratic Kampuchea ended. [REDACTED] could be heard either as an expert in relation to Tuol Po Chrey or as a fact witness to describe the evidence he collected and the witnesses he interviewed, in a manner similar to the Chamber's treatment of Francois Ponchaud or Stephen Heder. In either case, Mr.

¹² July 11 Transcript, pp. 12:21-13:2.

¹³ Document No. E-266, 'Co-Prosecutors' Rule 93 Request to Open an Investigation into the Whereabouts of Potential Witness Nou Mouk', 19 February 2013.

¹⁴ See Rule 93(2)(b),(d).

█'s testimony is an appropriate avenue through which to place this evidence before the Chamber and indispensable to Nuon Chea's right to present a defence.

14. The Defence notes finally that the civil parties doubt the authenticity of the Email and vaguely suggest the possibility of foul play.¹⁵ It would have been an odd request indeed for the Chamber to investigate the circumstances of the Email had there been anything questionable surrounding it. Certainly, the Defence invites the Chamber to investigate the Email and make its own determination. The Co-Prosecutors similarly seek to distract from the relevant and exculpatory nature of the information in the Email by dredging up old and unrelated controversies and resorting to bluster and insults.¹⁶ All of these 'arguments' are irrelevant, baseless and defamatory and should be identified and rejected as such.

15. The Defence respectfully requests that the Chamber:

- a. ADMIT the Email into evidence;
- b. INITIATE an investigation pursuant to Rule 93 under the terms described in paragraph 12, *supra*; and
- c. SUMMONS █ to testify before the Chamber.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

¹⁵ July 11 Transcript, p. 15:5-10.

¹⁶ July 11 Transcript, pp. 10:6-9, 12:12-13.