

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

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**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S RULE 87(4)
REQUEST TO ADMIT DOCUMENTS IN RESPECT OF CIVIL PARTY OUM
SUPHANY**

Filed by:

Lead Co-Lawyers for Civil Parties

PICH Ang
Marie GUIRAUD

Co-Lawyers for Civil Parties

CHET Vanly
HONG Kim Suon
KIM Mengkhy
LOR Chunthy
MOCH Sovannary
SIN Soworn
SAM Sokong

Before:

Trial Chamber

Judge NIL Nonn, President
Judge YOU Ottara
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge Claudia FENZ

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Michael Y. LIU
Daniel LOSQ
Christine MARTINEAU
Lyma NGUYEN
Mahesh RAI
Nushin SARKARATI

The Accused:

KHIEU Samphan
NUON Chea

Co-Lawyers for the Defence:

SON Arun
Victor KOPPE

KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Civil Party Lawyers:

Olivier BAHOUgne
Patrick BAUDOUIN
Beini YE

I. INTRODUCTION

1. On 28 January 2015, the Co-Lawyers for Mr. Nuon Chea (“the Defence”) filed *Nuon Chea’s Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany* (“the Request”).¹ The Civil Party Lead-Co Lawyers (“Lead Co-Lawyers”) respectfully respond that the Trial Chamber (“the Chamber”) dismiss the Request.

II. APPLICABLE LAW

2. The Internal Rules of the Court grant the Chamber broad discretion to admit documents into evidence,² where the documents meet the criteria of relevance, reliability and authenticity established in Internal Rule 87(3).³ The Chamber has held that evidence considered under Rule 87(3) must meet a *prima facie* standard of relevance, reliability and authenticity.⁴ In making a determination on reliability, the Chamber has indicated that “[a]lthough not required under the ECCC legal framework, indicia of reliability [...] may nonetheless assist the Chamber in its assessment of whether the evidence in question satisfies the criteria contained in Internal Rule 87(3).”⁵
3. Internal Rule 87(4) permits the Trial Chamber to admit new evidence which is conducive to ascertaining the truth and comports with Internal Rule 87(3), if such evidence was either unavailable prior to the opening of the trial or could not have been discovered with the

¹ Nuon Chea’s Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany, **E337**, 28 January 2015.

² Internal Rule 87(1), Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 8, 3 August 2011 (stipulating that “unless provided otherwise in these rules, all evidence is admissible”).

³ Internal Rule 87(3), *Ibid.*, (establishing that “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.”).

⁴ Trial Chamber Memorandum “Trial Chamber Response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158,” **E162**, 31 January 2012, para. 2. *See also* Trial Chamber Memorandum “Response to Internal Rule 87(4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, and E276/1),” **E276/2**, para. 2, 10 April 2013 (hereinafter “New Documents Memo”).

⁵ Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, **E96/7**, para. 29, 20 June 2012. *See also* Co-Prosecutors’ Rule 92 Submission Regarding Indicia of Reliability of the 978 Documents Listed in Connection with Those Witnesses and Experts Who May be Called During the First Three Weeks of Trial, **E158**, para. 3, 23 December 2011 (providing a non-exhaustive list of indicia of reliability, including internal features (e.g., reference code markings, an identified author, internal consistency in the document’s content) and external features (e.g., corroboration, identification, and discovery)).

exercise of due diligence.⁶ The Chamber will consider documents that were not included in a party's initial Rule 80(3) list to be new evidence under Rule 87(4).⁷

4. The Chamber may admit new evidence that does not meet the timeliness and due diligence requirements of Rule 87(4), if the evidence relates closely to material already before it or to the upcoming testimony of a witness, expert or civil party and the interests of justice require that the sources be evaluated together.⁸ Where evidence is sought to be admitted on the basis of its relationship to upcoming testimony, the Rule 87(4) request must be filed before the Chamber at least two weeks prior to such testimony.⁹

III. DISCUSSION

5. As a preliminary matter, the Defence Request is procedurally improper. Any request for the admission of new evidence pursuant to Rule 87(4) must be made in a timely manner, that is, before the testimony of the witness, expert or civil party. It has been the practice of the Chamber to require Rule 87(4) requests to be filed at least two weeks prior to such testimony.¹⁰ The Defence was in possession of Documents 2,¹¹ 4 and 5 in late November 2014.¹² The Defence was further aware in advance of Ms. Suphany's testimony of Document 1, a publicly available book. The remaining document (2 or 3), was "obtained...after conducting additional research in relation to Ms. Suphany."¹³ All documents were therefore available before the opening of Case 002/02.

⁶ New Documents Memo, para. 3.

⁷ *Ibid.*, para. 2.

⁸ *Ibid.* See also Decision Concerning New Documents and Other Related Issues, **E190**, 30 April 2012, para. 21; and Trial Chamber Memorandum "Response to IENG Sary's Second Rule 87(4) request regarding material which may be used during the examination of Expert David Chandler," **E172/24/5**, 16 July 2012.

⁹ Trial Chamber Memorandum "Scheduling of Trial Management Meeting to Enable Planning of the Remaining Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency", **E218**, 3 August 2012, para. 22. See also New Documents Memo, para. 2.

¹⁰ Trial Chamber Memorandum "Scheduling of Trial Management Meeting to Enable Planning of the Remaining Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency", **E218**, 3 August 2012, para. 22. See also New Documents Memo, para. 2.

¹¹ With respect to Document 2, the Request is unclear as to whether it was obtained in late November, as the second sentence of paragraph 8 states, or whether it was obtained after conducting additional research in relation to Ms. Suphany after her 22 January 2015 testimony, as suggested in the fifth sentence of paragraph 8. The confusion may be a result of a typographical error.

¹² Nuon Chea's Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany, **E337**, 28 January 2015 at para. 8.

¹³ Nuon Chea's Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany, **E337**, 28 January 2015 at para. 8.

6. Even if the Chamber excuses the lack of diligence on the part of the Defence, the documents that form the substance of the Request do not fall within the ambit of Internal Rule 87(3), let alone satisfy the requirements of Internal Rule 87(4). It therefore cannot reasonably be asserted that the documents be admitted under the rationale that the interests of justice require the sources to be evaluated together.
7. The Lead Co-Lawyers further submit that Documents 1 and 5, *Under the Drops of Falling Rain* and a related book review, are inappropriate for judicial consideration in this context. Document 1 is a book describing events during the Khmer Rouge regime based on the accounts of others. It is not a book based only on her experiences.¹⁴ Document 5 expresses a description of an anonymous internet reviewer. Neither document contains sufficient indicia of reliability to be admitted under Rule 87(3). For the same reason, neither document is appropriate for admission under Rule 87(4) as they could not assist the Chamber in ascertaining the truth.
8. Finally, the Lead Co-Lawyers emphasize that Ms. Suphany was not admitted as a Civil Party on the grounds of forced marriage and she was not called to testify about her forced marriage.¹⁵ The Defence's suggestion that Ms. Suphany suffered further crimes than what she testified to does not affect her credibility.¹⁶ Therefore, documents purporting to discuss Ms. Suphany and forced marriage could not assist the Chamber in ascertaining the truth of the events that she was called to testify about. On this basis, the five documents requested by

¹⁴ Unlike the book *When we Will Never Meet Again*, which is an elaboration of Oum Suphany's contemporaneous diary, the book *Under the Drops of Falling Rain* is not exclusively a personal narrative of her experiences during the Khmer Rouge regime. Transcript, **E1/251.1**, 23 January 2015, at 01059120 ("My neighbor said to me that Madam Suphany wrote almost every day and there was now a contest and then I chose this book for the committee to see and at the time I was told that novel -- usually we did not include just dates, we need to include actor, characters in the novel. That is why I included some detail concerning the death of my elder sister and some information when I was in the forest. Actually that book was -- is not actually about my real accounts, it was mixing up -- it is mixed up with other accounts. I was asked by the government. Later, I worked in the local area and I also included some detail from my experience during that time. So this book is -- includes my real accounts and also some other information."). See also, Transcript, **E1/251.1**, 23 January 2015, at 01059119 (in referring to *When we Will Never Meet Again*, Ms. Suphany stated "I wrote my book based on my diary...It was about my own account during Pol Pot time. It is from my collection. I wrote my book in 1980.").

¹⁵ See Order on the Admissibility of Civil Party Applicants from Current Residents of Phnom Penh, **D406**, 6 September 2010, declaring the Civil Party was admitted as an immediate victim for the personal harm suffered in the Tram Kok Cooperatives and as an direct and indirect victim for the harm suffered during the Forcible Transfer from Phnom Penh: Phase 1.

¹⁶ It should also be noted that the vast majority of civil parties suffered more than one crime during the three years, eight months and 15 days covered by the temporal jurisdiction of the court. The credibility of a civil party is not affected when he/she is called and questioned with regard to one crime or set of crimes and not others. This is especially true when one of the crimes involves sexual or gender based violence.

the Defence are irrelevant under Internal Rule 87(3) and necessarily fail the requirements of Rule 87(4).

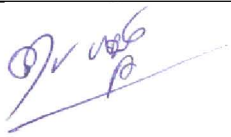
9. The Lead Co-Lawyers note with concern the Defence's disregard for the clear procedure envisioned by the Internal Rules and the practice of the Chamber and respectfully submit that the Request be dismissed.

IV. REQUEST

WHEREFORE, the Lead Co-Lawyers respectfully request that the Trial Chamber:

- (1) **DISMISS** the Request.

Respectfully submitted,

Date	Name	Place	Signature
4 February 2015	PICH ANG Lead Co-Lawyer	Phnom Penh	
	Marie GUIRAUD Lead Co-Lawyer	Phnom Penh	