

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

FILING DETAILS

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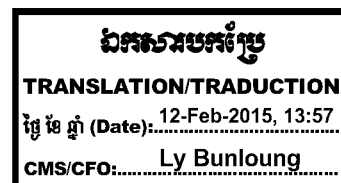
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**Objections to the Admissibility of Certain Documents Proposed for Case 002/02 and
Request for A Genuine Adversarial Debate on Probative Value**

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Before:

The Trial Chamber
Judge NIL Nonn
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ
Judge YA Sokhan

The Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

All Civil Party Lawyers

Mr NUON Chea's Defence

MAY IT PLEASE THE TRIAL CHAMBER

1. On 11 December 2014, the Trial Chamber (the “Chamber”) issued a “Scheduling of Objections to Documents Relevant to Case 002/02” (E327). It stated that the parties had up to 2 February 2015 to raise objections to the admissibility of documents proposed by the other parties and documents cited in the parts of the Closing Order that are relevant to Case 002/02.
2. In setting such a short deadline,¹ the Chamber recalled the decisions it had issued in Case 002/01 on the admissibility of documentary evidence (E327, para. 2). It is therefore obvious that the Chamber does not intend to depart from this jurisprudence in Case 002/02, and will again set a minimum threshold for admissibility (the lowest in the entire history of international criminal law). It will admit everything while postponing the assessment of the probative value of documents proposed.
3. The Defence for Mr KHIEU Samphân (the “Defence”) continues to consider that, pursuant to Internal Rule 87(3), the threshold for admissibility should be higher and include a first level of assessment of the probative value.² In view of the little time it had and the Chamber’s recall of its jurisprudence, all that the Defence can do today is therefore

¹ The Defence prepared its appeal brief in Case 002/01 from 7 August to 29 December 2014, while the lists of documents proposed for Case 002/02 were filed as from mid-June 2014.

² See, in particular, Rule 87(3)(d), which provides that a document is inadmissible if it is “*unsuitable to prove the facts it purports to prove*”.

to set out its non-exhaustive objections to admissibility based mainly on the ground of relevance and to hereby request that a genuine adversarial debate on the probative value be held at the end of Case 002/02.

1. Documents Cited in the Closing Order

4. The Chamber recalled a decision in Case 002/01 in which it “*accorded a presumption of relevance and reliability to documents cited in the Closing Order*”, before it granted the parties “*the opportunity to rebut this presumption*”, in relation to any document mentioned in the parts of the Closing Order that are relevant to Case 002/02, as circumscribed in E301/9/1.1 (E327, para. 5).

5. The Defence recalls that according to Internal Rule 87(1), “*the onus is on the Co-Prosecutors to prove the guilt of the accused.*” That is why the Defence continues to object to any presumption of admissibility of any evidence that would then be up to the Defence to rebut. For the same reason, documents mentioned in those parts of the Closing Order that have not been proposed by the Co-Prosecutors in support of their case in Case 002/02³ should be considered irrelevant and inadmissible pursuant to Internal Rule 87(3)(a).

³ The Defence did not have adequate time to identify them.

2. Documents Proposed by the Parties

a) Procedural Background

6. On 8 April 2014, the Chamber set 30 May 2014 as the deadline for filing lists of documents proposed for Case 002/02 (E305, paras. 11-14), which it subsequently extended to 13 June 2014 (E305/2).

7. On 30 April 2014, the parties jointly requested the Chamber to confirm their common interpretation according to which the justifications required pursuant to Rule 87(4) (documents proposed during the trial) would only apply after the initial hearing in Case 002/02 (E307).

8. On 11 June 2014, the Chamber rejected this interpretation and invited the parties to file, pursuant to Rule 87(4), requests relating to material which was not initially proposed in 2011 (E307/1).

9. On 13 June 2014, the Defence filed its list of proposed documents based, *inter alia*, on Rule 87(4) (E305/12). The Co-Prosecutors and the Civil Parties simply filed their own lists (respectively E305/13 and E305/14).

10. On 24 and 29 July 2014, that is, just before the Initial Hearing of 30 July, the NUON Chea Defence and the Civil Parties proposed documents pursuant to Rule 87(4) (respectively E307/5 and E307/6). The Co-Prosecutors did not propose any such documents.

11. On 15 August 2014, the Co-Prosecutors and the Civil Parties requested the Chamber to reconsider its 11 June decision (E307/1), arguing that Rule 87(4) was only applicable after the 30 July Initial Hearing (E307/1/1).

12. On 5 September 2014, in the absence of a response by the Chamber, the Co-Prosecutors proposed new document lists without providing any justifications under Rule 87(4) which, in their view, was nevertheless applicable from the preceding 30 July (E305/13/1).

13. On 21 October 2014, the Chamber maintained its position regarding Rule 87(4), but held that the lists filed in 2014 pursuant to Order E305 would exceptionally constitute permissible revisions to the 2011 lists to which Rule 87(4) does not apply (E307/1/2, para. 12).

14. The documents proposed on 5 September 2014 by the Co-Prosecutors were not filed pursuant to the Chamber's instructions (Order E305 supplemented by E307/1). Rule 87(4) should therefore apply to these documents.

15. The reason the Co-Prosecutors did not provide the justifications required by the Rule was to avoid having to justify their lack of diligence in belatedly proposing about a hundred documents that had been on the case file or in DC-Cam archives for several years. The Co-Prosecutors' lack of diligence is all the more unacceptable as they are the only ones

who have been able to conduct investigations and who have been clamouring that they were ready for the commencement of Case 002/02 since February 2014.

16. The admission of these documents would unduly favour the Co-Prosecutors to the detriment of the Defence. Their September 2014 request should be summarily rejected. In the alternative, the proposed documents should be declared inadmissible pursuant to Rules 87(4) and 87(3)(e).⁴

b) Documents (validly) Proposed by the Co-Prosecutors and the Civil Parties

17. The Chamber has reminded the parties of their duty to make sure that proposed documents are made available in a timely manner in the ECCC's three languages (E327, para. 7). The Defence has already requested the translation of all of its proposed documents. This is perhaps also true of the Co-Prosecutors and the Civil Parties. Yet, to date, a large number of the proposed documents are still available only in Khmer, which explains why the Defence has not been able to review them.⁵

18. Moreover, the Defence has generally been unable to review all the documents (validly) proposed by the Co-Prosecutors (E305/13) and the

⁴ Rule 87(3)(e): "*The Chamber may reject a request for evidence where it finds that it is intended to prolong proceedings or is frivolous.*"

⁵ The Cambodian members of the team have been fully focused on the Case 002/02 hearings since the filing of the appeal brief in Case 002/01. For example, of the 459 documents proposed by the Co-Prosecutors in E305/13.23 (not including the 14 photographs), to date, 329 are available only in Khmer, that is, approximately 72%.

Civil Parties (E305/14 and E307/6). It has relied on the summaries provided on some of the proposed lists.

19. On this limited basis, the Defence has identified a large number of documents relating to facts falling outside the scope of Case 002/02, as defined in E301/9/1.1. Furthermore, the Defence has identified several documents, the majority of which deal with facts that fall outside the scope of Case 002/02 and of which the minute fraction which appear to be relevant are repetitive, in light of the numerous other documents proposed on the same subject. All these documents are therefore inadmissible, pursuant to Internal Rule 87(3)(a) (see annexes A and B).

20. The Defence emphasizes that even if it has not been able to raise exhaustive objections to admissibility, the Chamber is under a duty to consider the admissibility of each proposed document even if it has not been challenged by a party.⁶

3. Need for a Genuine Adversarial Debate Concerning the Probative Value of Documents

21. Given that the Chamber will admit in bulk the documents proposed for Case 002/02 (which is being conducted 40 years after the events) and

⁶ See for example: *Prosecutor v. Milan Martić*, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, para. 11 (“The Trial Chamber emphasises what it considers to be an over-riding principle in matters of admissibility of evidence. **The Trial Chamber is, pursuant to the Statute of the Tribunal, the guardian and guarantor of the procedural and substantive rights of the accused.** In addition, it has the obligation to strike a balance in seeking to protect the rights of victims and witnesses. As a trial is an often complex journey in search for the truth in relation to the alleged criminal responsibility of the Accused, bearing in mind that the truth can never be fully satisfied, to the Trial Chamber considers that **questions of admissibility of evidence do not arise only when one of the parties raises an objection** to a piece of evidence sought to be brought forward by the other party. **This Trial Chamber has an inherent right and duty to ensure that only evidence which qualifies for admission under the Rules will be admitted.**”)

that the probative value of the majority of the documents is questionable, the Defence insists on the need for a genuine adversarial debate concerning the probative value of documentary evidence.

22. Such an adversarial debate should be conducted throughout the trial and, in particular, at the end following the presentation of testimonial and documentary evidence.

23. The Chamber recently noted that it intended to proceed in Case 002/02 with the practice of conducting “key-documents” hearings instituted in Case 002/01. Although the Chamber’s description of these hearings appears to be more open to discussion than it was in Case 002/01 (E315/1, paras. 2-6), the Defence requests the Chamber to clearly specify whether or not the parties shall be allowed to discuss the probative value of documents presented at the said hearings.

24. In any event, it is only at the end of the trial that the probative value of evidence has to be considered in light of all the evidence adduced. The Defence stresses that the Chamber should already envisage a broad oral and/or written debate on the probative value of documentary evidence.

25. **FOR THESE REASONS**, the Defence requests the Trial Chamber to:

- RULE that the documents mentioned in the Closing Order which have not been proposed by the Co-Prosecutors are inadmissible;
- SUMMARILY REJECT the Co-Prosecutors' 5 September 2014 Request E305/13/1 or RULE that the proposed documents are inadmissible;
- RULE that the documents listed in the present annexes A and B inadmissible, otherwise, PROVIDE REASONS for its decision to admit the said documents;
- CONSIDER the admissibility of each of the proposed documents;
- ALLOW the parties to discuss the probative value of the documents presented at the "key documents" hearing;
- ENVISAGE a broad adversarial debate concerning the probative value of documents at the end of Case 002/02.

	Mr KONG Sam Onn	Phnom Penh	[signed]
	Ms Anta GUISSÉ	Paris	[signed]
	Mr Arthur VERCKEN	Paris	[signed]