

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S FOURTH
REQUEST RE APPEAL AGAINST TRIAL JUDGEMENT IN CASE 002/01**

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge A. KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge C.N. JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MWACHANDE-
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I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) hereby respond to the Nuon Chea Defence’s fourth request to consider additional evidence in connection with its appeal against the Trial Judgement in Case 002/01 (“Fourth Request”).¹ The Lead Co-Lawyers limit their response to the degree that the Fourth Request concerns Civil Parties and their rights.

2. The Lead Co-Lawyers submit that the Fourth Request be rejected on grounds that it does not fulfil the requirements of Internal Rules 108(7) and 104(1) and would not be conducive to the ascertainment of the truth on appeal.

II. PROCEDURAL BACKGROUND

3. The Nuon Chea Defence filed its appeal brief against the Trial Judgement² in Case 002/01 on 29 December 2011,³ in which they challenge, *inter alia*, the Trial Chamber findings on the policy of the CPK to target former Khmer Republic soldiers and officials.⁴ On 16 June 2015, Nuon Chea Defence filed the Fourth Request seeking admission of Pech Chim’s testimony in Case 002/02 dated 23-24 April 2015. The witness Pech Chim previously testified in Case 002/01 on 1 July 2013.⁵

4. The Trial Chamber has held that it will not “import any attribution of criminal responsibility from Case 002/01 into Case 002/02.”⁶ Therefore, the Trial Chamber in Case 002/02 is obliged to make factual and legal findings concerning the policy of targeting Khmer Republic officials specific to the charges in Case 002/02, albeit limited to its “implementation at the Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre.”⁷

¹ Nuon Chea’s Fourth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01, **F2/6**, 15 June 2015.

² Case 002/01 Judgment, **E313**, 7 August 2014, (“Trial Judgment”).

³ Nuon Chea’s Appeal against the Judgement in Case 002/01, **F16**, 29 December 2014 (“Nuon Chea Appeal Brief”).

⁴ Nuon Chea Appeal Brief, paras 526-599.

⁵ See **E1/215.1** (1 July 2013).

⁶ Clarification on the consequences of the severance of Case 002, **E318**, 13 October 2014, p. 2 *citing* Decision on Khieu Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, **E301/9/1/1/3**, 29 July 2014, para. 85.

⁷ Decision on Additional Severance of Case 002 and Scope of Case 002/02, **E301/9/1**, 4 April 2014, para. 44 (“Decision on Additional Severance”).

5. The Trial Chamber acknowledged the need to avoid inconsistencies between the separate trials, noting in relation to evidentiary proceedings that “any risks of inconsistencies between separate trial phases will be minimal”.⁸

6. The Trial Chamber in Case 002/02 is seized specifically with crimes of political persecution linked to the policy “concerning targeting of former Khmer Republic officials, limited to implementation at the Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre”.⁹ In Case 002/01, the Co-Accused was not charged for having committed through a JCE the crime of persecution on political grounds in connection with executions of former Khmer Republic officials at Toul Po Chrey.¹⁰

7. The Trial Chamber in Case 002/01 limited its consideration of the policy to target former Khmer Republic officials to the crimes charged in connection with the executions of former Khmer Republic officials at Toul Po Chrey.¹¹ In findings relating to the Joint Criminal Enterprise, it identified the common purpose emanating from “both the Targeting Policy and the third policy” which was “either to ‘eliminate enemies’ or ‘the killing of enemies’”.¹² In this respect, the Trial Judgement relied on Pech Chim’s testimony from Case 002/01 concerning “a month-long study session in December 1975 [...] where Nuon Chea instructed around 800 people on the topic of enemies” and stated that “without Nuon Chea’s instructions ‘people would never know how to identify enemies from friends’”.¹³

III. APPLICABLE LAW

8. Internal Rule 108(7) allows for parties to submit a request to the Supreme Court Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial. It applies to “both newly discovered facts and

⁸ Decision on Additional Severance, para. 29.

⁹ *Ibid*, para. 44.

¹⁰ See Trial Judgement, para. 812.

¹¹ *Ibid*, para. 813.

¹² *Id.*

¹³ *Ibid*, para. 818.

new means of evidence”.¹⁴ The proffered evidence requested as additional evidence on appeal therefore must fulfil the following criteria:

- a. the admissibility test under Internal Rule 87(3);
- b. was unavailable at trial despite the exercise of due diligence;¹⁵
- c. could have been a decisive factor in reaching the trial decision under appeal; and
- d. pertains to specific findings of fact by the Trial Chamber.

9. Internal Rule 87(3) provides that the Chamber may reject a proposed piece of evidence if it is: irrelevant or repetitious; impossible to obtain within a reasonable time; unsuitable to prove the facts it purports to prove; not allowed under the law; or intended to prolong proceedings or is frivolous.

10. Under Internal Rule 104(1), the Supreme Court Chamber may “call new evidence” to decide the appeal *proprio motu* where the interests of justice so require, taking into account the specific circumstances of the case.¹⁶ By virtue of Internal Rule 104 *bis*,¹⁷ the Supreme Court Chamber has considered this power to call “new evidence” to be subject to the requirements of Internal Rule 87(4). Therefore, in exercising this discretion, the Chamber will consider whether the evidence is “conducive to ascertaining the truth”.¹⁸

11. Evidence proposed to be admitted through Internal Rule 108(7) must be demonstrated to have been not available *at trial*. Under this rule, the requesting party must show that the additional evidence could have been a decisive factor in reaching the decision at trial and the

¹⁴ Decision on Part of Nuon Chea’s Requests to Call Witnesses on Appeal, **F2/5**, 29 May 2015, para. 15 (“Decision to Call Witnesses on Appeal”); Interim Decision on Part of Nuon Chea’s First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, **F2/4/3**, 1 April 2015, para. 15.

¹⁵ The requirement of “exercise of due diligence” was imported from the jurisprudence at the international level in order to avoid disruptive and inefficient litigation strategies. See further Decision to Call Witnesses on Appeal, footnotes 49-50 citing *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, 1 December 2014 (“*Lubanga Appeal Judgement*”), para. 50 (summarizing the case law of ICTY and ICTR on the point); *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 4; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 3.

¹⁶ Decision to Call Witnesses on Appeal, para. 17.

¹⁷ Internal Rule 104 *bis*: “In the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.”

¹⁸ Decision to Call Witnesses on Appeal, para. 17.

request must identify the specific findings of fact made by the Trial Chamber to which additional evidence is directed. Whereas evidence proposed to be admitted through Internal Rule 104(1) must not have been available *before the opening of trial*. Both procedural avenues for the admission of new or additional evidence on appeal are subject to the requirements of Internal Rule 87(3).

IV. DISCUSSION

12. Participatory rights of Civil Parties have been previously recognised by the Supreme Court Chamber.¹⁹ In line with that jurisprudence, the Lead Co-Lawyers hereby respond to the request to the extent that it affects the rights of Civil Parties. Lead Co-Lawyers argue in Section D below that the Fourth Request is in conflict with the need for an expeditious trial and the balance of rights of all parties, including those of Civil Parties.

A. Trial Chamber findings in Case 002/01 on targeting former Khmer Republic Officials

13. The Lead Co-Lawyers do not respond specifically to the Nuon Chea Defence arguments on the merits relating to the value of Pech Chim's evidence concerning the CPK policy to target Khmer Republic officials and the manner of its reading with other evidence on the record.²⁰ The Lead Co-Lawyers submit that these averments amount to additional pleadings supplanting the grounds of appeal already raised in the Nuon Chea Appeal Brief. Therefore, the current response is limited to the request to seek admission of Pech Chim's Case 002/02 transcripts.

B. Fourth Request does not fulfil the Requirements of Internal Rule 108(7)

¹⁹ Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, F10, 26 December 2014, paras 15-16. *See further*, Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2958, 21 December 2012, para. 10. *See also* Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2951, 13 December 2012, para. 5: "Pursuant to rule 91 (1) of the Rules of Procedure and Evidence, and having regard to rules 91 (2), 92 (5) and (6) of the Rules of Procedure and Evidence, the Appeals Chamber determines that the victims may participate in the present appeals in the following manner: the Legal Representatives of Victims VOI and V02 may present the victims' views and concerns with respect to their personal interests in the issues on appeal by filing consolidated observations on the three Documents in Support of the Appeals."

²⁰ Fourth Request, paras 12-18.

14. The Lead Co-Lawyers submit that the Fourth Request does not fulfil the standard under Internal Rule 108(7) as the requirement of “due diligence” in ascertaining whether the piece of evidence was unavailable at trial has not been satisfied.²¹

15. In principle, the Lead Co-Lawyers do not oppose the seeking admission of additional evidence on appeal arising from the ongoing investigations in Cases 003 and 004 at the ECCC and any other evidence that was unavailable and for which the opportunity to examine such evidence did not exist during Case 002/01.

16. However, the Lead Co-Lawyers submit that the opportunity to examine Pech Chim existed in Case 002. Well before Pech Chim’s testimony, the Deputy Co-Prosecutor stated in open court that an upcoming witness was “the secretary of Tram Kok district [...] This witness was interviewed five times by the Co-Investigating Judges and [would] provide[...] very significant information both – related to the evacuation of Phnom Penh [*sic*]. This witness [would] describe[...] receiving instructions form the sector offices on evacuees, he [would] describe[...] how, when evacuees were on their way from Phnom Penh to Tram Kak that Lon Nol soldiers were removed and that the only people who arrived were the wives of them who told them that their husbands – that the soldiers had been removed.”²²

17. During his examination in Case 002/01, the witness was subjected to the lines of questioning concerning the definition of “enemies”,²³ “smashing”,²⁴ the role of Ta Mok,²⁵ and the study session with Nuon Chea in Phnom Penh.²⁶ The Nuon Chea Defence examined him at length and used the opportunity to explore aspects of his testimony concerning “external enemies”, “disappearance” of soldiers from Lon Nol military, and Nuon Chea’s study session.²⁷ Further, the potential lines of questioning surrounding the logical semantics of the term “komchat” were also known to the Nuon Chea Defence well before the

²¹ See *supra*, fn. 14.

²² E1/114.1 (17 August 2012), pp. 19-20.

²³ See E1/215.1 (1 July 2013), pp. 10-11, 19-20, 36-37, 49-50, 61-63.

²⁴ See *ibid*, p. 37-38.

²⁵ See *ibid*, p. 19-20, 35-36, 46.

²⁶ See *ibid*, p. 38-41.

²⁷ See *ibid*, p. 55-80. See in particular, *ibid*, pp. 62-67, 70-75.

examination of Pech Chim.²⁸ These lines of questioning were also employed for the examination of Stephen Heder.²⁹

18. Furthermore, Pech Chim was proposed by the Nuon Chea Defence in its updated list of witnesses, experts and civil parties stating that he could “offer insight into the state of affairs in the DK, in particular the command structure of the CPK and alternative command structures in the Khmer Rouge”.³⁰ However, during his testimony in July 2013, the Nuon Chea Defence did not fully examine him on these accounts, which were specifically within the scope of Case 002/01. The Lead Co-Lawyers submit that the Nuon Chea Defence’s decision not to explore in detail the evidence concerning the circumstances and the contents of the study session conducted by Nuon Chea does not serve to make it unavailable at trial for the purposes of Internal Rule 108(7).³¹

19. Further, the Lead Co-Lawyers submit that the Fourth Request argues that this piece of additional evidence would have “corroborated important arguments of the Defence rejected by the Trial Chamber in the Judgement and central to its assessment of Nuon Chea’s criminal liability”³² but fails to show how it refutes any of the evidence *relied upon by the Trial Chamber* in the Trial Judgement in Case 002/01.³³ It also fails to show how the exclusion of this piece of additional evidence would “lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict”.³⁴

²⁸ See **E1/135.1** (19 October 2012), pp. 46-47.

²⁹ See **E1/224.1** (16 July 2013), pp. 103-105.

³⁰ Updated Summaries of Proposed Witnesses, Experts, and Civil Parties, Annex “Witnesses”, **E93/4.3**, p. 41 entry no. 446.

³¹ See further, *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998, para. 47.

³² Fourth Request, para. 21.

³³ See *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, para. 39 relied upon in *Lubanga* Appeal Judgement, para. 50 and in *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Appellant Momčilo Krajišnik’s Motion to Present Additional Evidence, 20 August 2008, para. 5 (emphasis added).

³⁴ *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011, para. 10. See also *Lubanga* Appeal Judgement, para. 59. Whilst Regulation 62 of the Regulations of the International Criminal Court (“ICC”) does not require the applicant to demonstrate the impact of the additional evidence, beyond showing its relevance to a ground of appeal, the ICC Appeals Chamber has observed that it is necessary to introduce a criterion that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part.

20. For these reasons, the Lead Co-Lawyers submit that the Fourth Request does not fulfil the standard set out in Internal Rule 108(7) and should be dismissed accordingly.

C. Fourth Request does not fulfil the Requirements of Internal Rule 104(1)

21. The Fourth Request makes an alternative request to admit Pech Chim's transcripts pursuant to Internal Rule 104(1).³⁵ The Lead Co-Lawyers submit that the Fourth Request does not satisfy the standard for the Supreme Court Chamber to exercise its discretion to invoke Internal Rule 104(1).

22. The Fourth Request pleads that "even if part or all of Pech Chim's testimony is deemed not to meet the requirements of Internals Rule 108(7) and 87(3), it should nevertheless be admitted under Rule 104(1) in the interests of justice" and that it offers "significant corroboration for exculpatory evidence cited by the Defence" and is therefore "essential" on appeal.³⁶

23. Noting the fact that the Supreme Court Chamber has previously exercised its discretion under Internal Rule 104(1) only on a *proprio motu* basis,³⁷ the Lead Co-Lawyers submit that the Fourth Request merely makes a reference to this provision but does not contain reasoned submissions showing how the express requirements under Internal Rules 87(3)-(4) have been satisfied in this particular instance pursuant to Internal Rule 104 *bis*.

24. The Nuon Chea Defence seeks support from the Supreme Court Chamber decision to call witnesses on appeal citing with approval the *Lubanga* Appeal Judgement in contending that an appellate chamber may admit evidence on appeal despite a negative finding on one or more of the criteria governing the admissibility of evidence on appeal.³⁸

25. The Lead Co-Lawyers respond that the Fourth Request ignores that the holding in the *Lubanga* Appeal Judgment was taken in the context of the overriding concern that the

³⁵ Fourth Request, paras 22-23.

³⁶ *Ibid*, para. 23.

³⁷ Decision to Call Witnesses on Appeal, paras 17, 26.

³⁸ Fourth Request, para. 22 referring to Decision to Call Witnesses on Appeal, fn. 51.

appellate stage at the ICC is necessarily of a “corrective nature”.³⁹ At the ECCC, whilst the Supreme Court Chamber does assess the correctness of findings, it limits that assessment to the examination of the issue whether the Trial Chamber established the content of the applicable legal norms based on the appropriate sources of law and applied rules of interpretation pertinent to those sources of law.⁴⁰

26. The Lead Co-Lawyers submit that the exceptional holding by the appellate chamber in the *Lubanga* case was not understood to be a regular recourse on appeal for routinely admitting evidence that was simultaneously being considered by the Trial Chamber. The ICC Appeals Chamber acknowledged that it would *not* generally admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial,⁴¹ adopting a stricter standard derived from the “principle that evidence should, as far as possible, be presented before the Trial Chamber and not on appeal”.⁴²

27. Therefore, the Lead Co-Lawyers submit that not only does the Fourth Request misinterprets the standard applied by the Supreme Court Chamber, it also fails to reasonably submit how Pech Chim’s transcripts would further the ascertainment of the truth concerning the factual and legal findings that the Supreme Court Chamber is seized of.

³⁹ See *Lubanga* Appeal Judgement, para. 16 *cf. Prosecutor v. Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, F28, 3 February 2012, paras 11-17. See further, *Lubanga* Appeal Judgement, para. 56: “The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings. Importantly, appellate proceedings at the Court are of a corrective nature, which finds expression in, inter alia, the standard of review on appeal, as set out above. With respect to alleged factual errors, the standard of review is deferential to the determinations of the Trial Chamber and the review is primarily limited to whether the Trial Chamber’s factual findings were unreasonable, rather than a *de novo* assessment. Similarly, article 83 (2) of the Statute limits the scope of appellate proceedings by requiring that a procedural error or an error of fact or law must materially affect the conviction or sentencing decision or that the unfairness of the proceedings has the potential to make these decisions unreliable. In this respect, appellate proceedings are not concerned with correcting all errors that may have occurred at trial, but rather only those errors that have been shown to have materially affected the relevant decision.” Pursuant to article 81 (1) (b) of the ICC Statute, in an appeal against a conviction decision, the convicted person may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) “[a]ny other ground that affects the fairness or reliability of the proceedings or decision”. Article 83 (2) of the ICC Statute also establishes that the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error “materially affected” that decision, and, in respect of unfairness allegations, that the unfairness “affected the reliability of the decision”.

⁴⁰ *Duch* Appeal Judgement, para. 14.

⁴¹ *Lubanga* Appeal Judgement, para. 58.

⁴² *Lubanga* Appeal Judgement, paras 57, 59. The jurisprudence at the ICC and ECCC is consistent to the extent that both recognize that the evaluation of evidence is the primary responsibility of the Trial Chamber that has heard all the evidence. See also *Duch* Appeal Judgement, para. 17 *relying on Kupreškić* Appeal Judgement, para. 30.

D. The Fourth Request is not conducive to ascertainment of truth and must be viewed in light of the severance

28. The Lead Co-Lawyers submit that Trial Chamber in Case 002/02 is seized of the evidence “concerning targeting of former Khmer Republic officials, limited to implementation at the Tram Kok Cooperatives, 1st January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre”⁴³ for which it is bound to make relevant factual and legal findings afresh, independent of the findings concerning the existence and implementation of the said policy in Case 002/01. Pech Chim’s testimony in Case 002/02 therefore, has to be viewed in that context of the specific allegations that the Trial Chamber is seized of in that case.

29. The Lead Co-Lawyers submit that if his testimony in Case 002/02 is admitted into evidence before the Supreme Court Chamber pursuant to this request, it would not be conducive to the ascertainment of the truth on appeal, which in this particular instance has to be assessed in light of the severance. The Lead Co-Lawyers submit that admitting transcripts from an ongoing trial absent the guidance of the charges, context of the testimony, and the other evidence being heard by the very same Trial Chamber would not be in the interest of justice.

30. Considering the specific circumstances surrounding the nature of this piece of evidence, the Lead Co-Lawyers further submit that the grant of the Fourth Request and any similar requests in the future would not advance the cause of holding expeditious appeal proceedings. It would make it imperative for other parties to request related contextual and substantive evidence to be admitted as additional evidence decisive of the factual findings to assist the Supreme Court Chamber in properly characterising the totality of evidence before the Trial Chamber. The Lead Co-Lawyers submit that this exercise would run counter to the need for an expeditious trial and the balance of rights of all parties, including those of Civil Parties.⁴⁴

⁴³ Decision on Additional Severance, para. 44. As noted before, the Co-Accused was not charged for having committed through a JCE the crime of persecution on political grounds in connection with executions of former Khmer Republic officials at Toul Po Chrey. *See* Trial Judgement, para. 812.

⁴⁴ Internal Rules, Rule 12 *ter* (1).

31. Therefore, the Lead Co-Lawyers urge the Supreme Court Chamber to dismiss the Fourth Request and take the aforementioned considerations in Section D into account when deciding on any potential similar requests in the future.

IV. REQUEST

WHEREFORE, the Civil Party Lead Co-Lawyers respectfully request that the Supreme Court Chamber:

(1) **REJECT** Nuon Chea's Fourth Request.

Respectfully submitted,

Date	Name	Place	Signature
26 June 2015	Marie GUIRAUD International Lead Co-Lawyer	Phnom Penh	