

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

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**NUON CHEA'S OBJECTIONS TO THE LISTS OF MATERIAL TO BE USED BY THE
CO-PROSECUTORS AND LEAD CO-LAWYERS FOR THE CIVIL PARTIES DURING
QUESTIONING OF SCW-3, SCW-4 AND SCW-5**

Filed By

Nuon Chea Defence Team:
SON Arun
Victor KOPPE
LIV Sovanna
PRUM Phalla
Doreen CHEN
Xiaoyang NIE
Marina HAKKOU

Distribution

Co-Lawyers for Khieu Samphân:
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for the Civil Parties:
PICH Ang
Marie GUIRAUD

Pursuant to the Supreme Court Chamber's directions,¹ the Co-Lawyers for Mr. Nuon Chea (the "Defence") submit these objections to the lists of materials to be used by the Co-Prosecutors and the Lead Co-Lawyers for the Civil Parties in questioning SCW-3, SCW-4 and SCW-5:

I. THE DOCUMENTS WERE SUBMITTED DEFECTIVELY

1. While it is quite astounding to have to make such an objection at this late stage of proceedings, the Defence objects to the documents of the Co-Prosecutors and Lead Co-Lawyers for the Civil Parties on the basis that they were defectively submitted. The Chamber's directions regarding the lists of material were unambiguous. Parties had to submit their lists of material by 4.00pm by email, whereas by contrast, objections to those lists were to be submitted "using the usual e-filing procedure".² The Co-Lawyers for Khieu Samphân emailed their list at 3.57pm; the Defence at 4.00pm. The Lead Co-Lawyers emailed their list at 4.15pm without explanation. The Co-Prosecutors emailed their list at 4.42pm, explaining that they had apparently filed their list, minus some Khmer (and all French) ERNs, "that afternoon" via the electronic filing system. They did not explain why they did not do so via email as directed; why they were unable to notify the Chamber and the parties of this fact by 4.00pm; or why they were unable to submit the necessary ERNs.
2. Accordingly, the Co-Prosecutors and Lead Co-Lawyers for the Civil Parties should be prohibited from using any item in their list of materials during their questioning of SCW-3, SCW-4 or SCW-5. This is not merely a pedantic quibble over negligence as to form. Strict adherence to deadlines in respect of the lists of material is also important as a matter of fairness and transparency. It prevents any party from obtaining or having the opportunity to obtain an unfair tactical advantage by reviewing another party's list of material, anticipating that party's examination strategy based on the evidence selected, and then reacting to it through their own list of material.
3. In the event that the Chamber nevertheless determines that the Co-Prosecutors and Lead Co-Lawyers for the Civil Parties are entitled in principle to use the materials included in their respective lists, the Defence objects to their documents as follows.

¹ F26, 'Directions on the Conduct of the Hearing', 17 Jun 2015 ("Directions"), para. 3(b), and Email from Supreme Court Chamber Legal Officer to the Defence Senior Legal Consultant, 23 Jun 2015.

² F26, Directions, paras. 3(b) and 3(c).

II. DOCUMENTS FROM CASE 002/02

4. Nearly one third of the Co-Prosecutors' list of materials (a total of 44 documents) consists of evidence from Case 002/02, namely Case 002/02 trial transcripts or statements disclosed from Cases 003 and 004.³ However, none of this evidence has been requested by the Co-Prosecutors for admission as evidence in Case 002/01. The Defence understands that where parties wish to use evidence from Case 002/02 in Case 002/01, they must request the Supreme Court Chamber to admit that evidence via an additional evidence request in which the requesting party demonstrates that the requirements of ECCC Internal Rules 108(7) or 104(1) have been satisfied. To the Defence, this is the clear and logical consequence of the severance of Case 002/02 into discrete, sequential trials. It is based on this understanding that the Defence recently submitted its fourth and fifth additional evidence requests to the Chamber.
5. It appears that the Co-Prosecutors and Lead Co-Lawyers for the Civil Parties share this view. In the Co-Prosecutors' 19 December 2014 response to the Defence's third additional evidence request, they acknowledged that Rule 108(7) was the applicable standard by which to evaluate the admissibility of new evidence on appeal⁴ and, by responding to the third additional evidence request on its merits, signalled their acceptance that an additional evidence request was the appropriate means by which to request evidence from Cases 002/02, 003 or 004. As for the Lead Co-Lawyers for the Civil Parties, they indicated in their recent objection to the Defence's fourth additional evidence request, that they agreed in principle that parties could request the admission of evidence from Cases 003 or 004 or otherwise unavailable at the Case 002/01 trial, and that any such evidence must meet the requirements of Rules 108(7) or 104(1).⁵

³ The following references, for the ease of the Chamber, are to the item number on the Co-Prosecutors' list and the corresponding document number: #20 (E305/13.23.375), #21 (E319/12.3.10, E319/12.3.10/Corr-1), #23 (E319/19.3.107), #24 (E319.1.28), #25 (E319.1.28.1), #56 (E319.1.32), #67 (E305/13.23.405), #71 (E319/19.3.125), #74 (E319.12.3.2), #75 (E319.1.21), #77 (E1/278.1), #78 (E1/279.1), #79 (E319.1.2), #80 (E319/23.3.42), #81 (E319/21.3.51), #83 (E1/298.1), #84 (E1/299.1), #85 (E1/290.1), #86 (E1/291.1), #87 (E1/215.1), #88 (E1/256.1), #89 (E1/258.1), #92 (E1/255.1), #93 (E1/269.1), #95 (E319.12.3.12), #100 (E1/296.1), #122 (E1/249.1), #123 (E1/252.1), #124 (E1/253.1), #125 (E1/263.1), #126 (E1/264.1), #127 (E1/265.1), #128 (E1/281.1), #129 (E1/283.1), #130 (E1/287.1), #132 (E1/289.1), #133 (E1/257.1), #134 (E1/300.1), #135 (E1/222.1), #142 (E319.1.8), #143 (E319.1.23), #144 (E319/8.2.4), #145 (E319/12.3.8), and #146 (E319/13.23.451). We note that document #131 in the Co-Prosecutors' list is in fact the same document as document #30 (E1/287.1) and we therefore have not included it in the above list.

⁴ **F2/4/1**, 'Co-Prosecutors' Response to Nuon Chea's Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 19 Dec 2014, para. 2.

⁵ **F2/6/1**, 'Civil Party Lead Co-Lawyers' Response to Nuon Chea's Fourth Request Re Appeal Against Trial Judgment in Case 002/01', 26 Jun 2015, paras. 8-11 and 15.

6. The Co-Prosecutors have failed to submit an additional evidence request in respect of any of the 44 documents identified at footnote 3. Therefore, the Co-Prosecutors should not be entitled to use any of those documents in questioning SCW-3, SCW-4 or SCW-5.
7. The Defence notes that four documents on its own list are Case 002/02 documents for which it has not yet submitted additional evidence requests to the Supreme Court Chamber. The first and second documents are draft Case 002/02 transcripts appearing on the Defence's list of materials for SCW-5.⁶ These are very recent transcripts from Case 002/02 hearings on 22 and 23 June 2015 which the Defence intends to request for admission into Case 002/01 as part of its forthcoming seventh additional evidence request. The third and fourth documents are E3/9118 and E319/12.3.12, which appear on the Defence's list for SCW-4⁷ and which the Defence had intended to be the subject of another forthcoming additional evidence request dedicated to SCW-4. The Defence received E3/9118, a DC-Cam statement, on 13 June 2014 in Khmer,⁸ but only received its English translation on 25 May 2015 with no indication of any connection between the document and SCW-4. However, upon reading the statement just a few days ago, the Defence realised that the person whose statement was recorded therein was in fact SCW-4 but identified by a different name. Document E319/12.3.12, meanwhile, was disclosed to the Defence on 16 February 2015.⁹ Again, though, it was only after recently reading the English translation of E3/9118 that the Defence realised that the person whose statement was recorded in E319/12.3.12 was in fact a sibling of SCW-4. Given that the Defence has yet to formally request the admission of any of the four documents, however, the Defence advises that it would be willing to withdraw its request to use these documents in questioning SCW-4 and SCW-5 in the event that the Chamber decides to exclude all documents not yet in evidence in Case 002/02.
8. The Defence also takes this opportunity to highlight that a further three documents on its own list of materials for SCW-5 do not appear on the case file at all.¹⁰ These documents are three articles, two of which were published in the *Far Eastern Economic Review* in 1978 and 1979, and one of which was published in *Asiaweek* in 1979. They are currently available only in English. The Defence intends to request all three documents for admission into Case 002/01 as part of its forthcoming seventh additional

⁶ Items #18 and #19 respectively.

⁷ Items #4 and #3 respectively.

⁸ See E305/13, 'Co-Prosecutors' Rule 80(3) Trial Document List', 13 Jun 2014.

⁹ E319/12/1.2, 'Disclosure of Confidential Case File Materials', 16 Feb 2015.

¹⁰ Items #34, #35 and #36 respectively.

evidence request. However, it is the Defence's position that, in keeping with the usual practice in domestic courts, it should be unnecessary to make such a request for documents of this nature, i.e. those which are accessible in the public domain.

III. DOCUMENT E3/1539

9. The Co-Prosecutors circulated a corrected list of materials at 10.50am Thursday, 25 June 2015. That list included one document, E3/1539,¹¹ which the Co-Prosecutors explained had been omitted "due to administrative error".¹² The reason for this document's omission is immaterial; it was submitted too late and the Co-Prosecutors should not be entitled to use it.

IV. DOCUMENTS IN EXCESS OF 30 PAGES FOR WHICH ERNS WERE NOT SUBMITTED ON TIME

10. In addition, and once again astonishingly, the Defence objects to the lists of material submitted by the Co-Prosecutors and the Lead Co-Lawyers for the Civil Parties on the basis that the information they provided by the time of the deadline for the submission of the lists did not satisfy the Chamber's requirements. In particular, the Chamber directed the parties that where a document was "longer than 30 pages, parties are requested to select only the portion thereof they expect to use in questioning, and provide the respective ERN numbers, if available."¹³ In satisfaction of this requirement, the Defence undertook the very time-consuming preliminary task of assessing the page length of each document on its list and then obtaining pinpoint ERNs in all available languages for any document in excess of 30 pages. The Lead Co-Lawyers for the Civil Parties merely submitted transcript time points without ERNs – which, although logical, did not satisfy the Chamber's requirements. The Co-Prosecutors did far worse. Swathes of documents in their original list of material were identified without ERNs in Khmer or French despite being far in excess of 30 pages. On Thursday, 25 June, the Co-Prosecutors subsequently added Khmer ERNs for 33 documents¹⁴ and – only after a

¹¹ E3/1539, S-21 Execution Log.

¹² Email from Assistant Co-Prosecutor to the Chamber and the Parties, 24 Jun 2015.

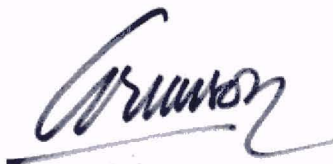
¹³ F26, Directions, para. 3(c).

¹⁴ The following references, for the ease of the Chamber, are to the item number on the Co-Prosecutors' list and the corresponding document number: #32 (E3/4590), #58 (E3/62), #59 (E1/14.1), #60 (E1/216.1), #61 (E1/140.1), #62 (E1/144.1), #63 (E1/138.1), #64 (E1/218.1), #71 (E319/19.3.125), #72 (E3/5649), #77 (E1/278.1), #78 (E1/279.1), #82 (E3/4627), #92 (E1/255.1), #93 (E1/269.1), #100 (E1/296.1), #107 (E3/2120), #112 (E3/3857), #114 (E3/3973), #122 (E1/249.1), #123 (E1/252.1), #124 (E1/253.1), #125 (E1/263.1), #126 (E1/264.1), #127 (E1/265.1), #129 (E1/283.1), #130 (E1/287.1), #131 (E1/287.1), #132 (E1/289.1), #133 (E1/257.1), #134 (E1/300.1), #135 (E1/222.1), and #146 (E305/13.23.451).

request from the Co-Lawyers for Khieu Samphân – French ERNs for 44 documents.¹⁵ Furthermore, they altered the already-notified ERNs for an additional four documents without advising the Chamber or the parties.¹⁶ Finally, there are still 10 documents on the Co-Prosecutors' list which are unidentified by pinpoint ERNs in all available languages, despite being in excess of 30 pages. Given that the Co-Prosecutors and the Lead Co-Lawyers for the Civil Parties have failed to submit the necessary information about these documents within the required time, they should not be entitled to use any of those documents in their questioning of SCW-3, SCW-4 or SCW-5. Permitting them to do so would be the equivalent of granting the Co-Prosecutors significant additional time to prepare their lists of material as compared to the other parties.

11. Finally, the Defence considers this an appropriate opportunity, considering the preceding discussion of fairness, to very briefly reply to the Co-Prosecutors' and the Lead Co-Lawyers for the Civil Parties' belated request for more time to question SCW-5. The Defence notes – yet again astonishingly considering the advanced status of the proceedings – that the Co-Prosecutors' and Lead Co-Lawyers' justification of their request on the basis of equality of arms is wholly inappropriate since it is well established as a matter of international human rights law that the principle of equality of arms is a defence right to be enjoyed and asserted only by the accused.¹⁷

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

¹⁵ #32 (E3/4590), #58 (E3/62), #59 (E1/14.1), #60 (E1/216.1), #61 (E1/140.1), #62 (E1/144.1), #63 (E1/138.1), #64 (E1/218.1), #65 (E1/191.1), #68 (E3/89), #70 (E3/387), #71 (E319/19.3.125), #75 (E3/5649), #73 (E3/5498), #75 (E319.1.21), #77 (E1/278.1), #78 (E1/279.1), #83 (E1/298.1), #84 (E1/299.1), #85 (E1/290.1), #86 (E1/291.1), #87 (E1/215.1), #88 (E1/256.1), #89 (E1/258.1), #92 (E1/255.1), #93 (E1/269.1), #94 (E3//3232), #100 (E1/296.1), #108 (D313/1.2.16), #110 (E3/1682), #112 (E3/3857), #114 (E3/3973), #122 (E1/249.1), #123 (E1/252.1), #124 (E1/253.1), #125 (E1/263.1), #126 (E1/264.1), #127 (E1/265.1), #128 (E1/281.1), #129 (E1/283.1), #130 (E1/287.1), #132 (E1/289.1), #133 (E1/257.1), #134 (E1/300.1), #135 (E1/222.1), #136 (E3/4202), and #146 (E305/13.23.451). Again, we note that document #131 in the Co-Prosecutors' list is in fact the same document as document #30 (E1/287.1) and we therefore have not included it in the above list.

¹⁶ The following references, for the ease of the Chamber, are to the item number on the Co-Prosecutors' list and the corresponding document number: #16 (D313.2.25/D366/7.1.108), #17 (E3/3989), #18 (E3/531), #19 (E3/342), #20 (E305/13.23.375), #22 (E319.1.27), #28 (E3/1805), #67 (E305/13.23.405), #98 (E3/5637), #111 (E3/2792)..

¹⁷ See, e.g. *International Covenant on Civil and Political Rights*, 16 Dec 1966, S. Treaty. Doc. No. 95-920, 6 ILM 368 (1967), 999 UNTS 171, Art. 14.