

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

**FILING DETAILS**

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**NUON CHEA'S RULE 87 (4) REQUEST AND RULE 93 REQUEST IN RELATION  
TO HENRI LOCARD (2-TCE-90)**

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**Filed By**

**Nuon Chea Defence Team:**  
SON Arun  
Victor KOPPE  
LIV Sovanna  
PRUM Phalla  
Doreen CHEN  
Xiaoyang NIE  
Marina HAKKOU  
Léa KULINOWSKI  
DY Socheata

**Distribution**

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

**Co-Prosecutors:**  
CHEA Leang  
Nicholas KOUMJIAN

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

## I. INTRODUCTION

1. Pursuant to Rule 87(4) of the Internal Rules (hereinafter, the “IR”), the Co-Lawyers for Mr Nuon Chea (the “Defence”) submit this request for the Trial Chamber to admit two documents into evidence in relation to the upcoming testimony of Henri Locard (2-TCE-90). In addition, the Defence requests the Trial Chamber to order Henri Locard (2-TCE-90) to produce a number of documents related to his field research in Cambodia, pursuant to Rule 93 of the IR.

## II. APPLICABLE LAW

2. All evidence is admissible, unless otherwise provided in the Internal Rules.<sup>1</sup> The Chamber may reject a request for evidence where it finds that the evidence 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 if it is intended to prolong proceedings or is frivolous.<sup>2</sup> To satisfy the requirements of Rule 87(3), the proposed evidence needs only be *prima facie* relevant and reliable.<sup>3</sup> Pursuant to Rule 87(4), at any stage during the trial a party may request the Chamber to “admit any new evidence which it deems conducive to ascertaining the truth”, subject to the general requirements of Rule 87(3).<sup>4</sup>

3. While Rule 87(4) states that the requested evidence must not have been available before the opening of the trial, the Trial Chamber has interpreted this provision as also encompassing evidence which was available before the opening of the trial but which could not have been discovered earlier with the exercise of due diligence can be admitted.<sup>5</sup> Further, in certain situations, evidence which did not “strictly speaking” satisfy this criterion has been admitted into evidence, particularly where the evidence was closely related to material already before the Chamber and where the interests of justice required the sources to be evaluated together, where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice, or where the other parties do not object to the evidence.<sup>6</sup>

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<sup>1</sup> Rule 87(1) of the Internal Rules.

<sup>2</sup> Rule 87(3) of the Internal Rules.

<sup>3</sup> **E289/2**, ‘Decision on Civil Party Lead Co-Lawyers’ Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and KHIEU Samphan’s Response (E289/1)’, 14 Jun 2013, para. 26 (“Decision on Rule 87(4) Requests”).

<sup>4</sup> A year into the Case 002/02 trial, the TC held that the parties must submit Rule 87 (4) Requests for documents which were on the case file but which had not been included in the list of documents admitted by the Trial Chamber, even if those had been disclosed by the Prosecution subsequently to the initial documents filings, *see* Draft transcripts of 26 Jan 2016, p. 24.

<sup>5</sup> **E313**, ‘Case 002/01 Judgement’, 7 Aug 2014, para. 25; **E289/2**, Decision on Rule 87(4) Requests, para. 3.

<sup>6</sup> **E289/2**, Decision on Rule 87(4) Requests, para. 3.

4. Rule 93 of the Internal Rules permits the Trial Chamber, at any time during the proceedings and where it finds it necessary, to order additional investigations.<sup>7</sup> The investigations may consist of, *inter alia*, interviewing witnesses, conducting searches or seizing any evidence, or ordering expert opinions. Such additional investigations must be done under the same conditions as that of the Co-Investigating Judges.<sup>8</sup> The necessity criteria contained in Rule 93 means that the investigation must be in the interests of justice.<sup>9</sup> Further, the Trial Chamber's discretion must be understood within the context of the ECCC legal framework, including Mr Nuon Chea's right to a fair and expeditious trial.<sup>10</sup>

5. Rule 31 of the Internal Rules regulates the appointment of experts by the ECCC. It contains no provision regarding the sources upon which the expert relies for his/her report/evidence. Article 33 New of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea provides that, if the ECCC's existing procedures do not deal with a particular matter, if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standard, guidance may be sought in the procedural rules established at the international level. As a result, the practice and jurisprudence of the other international jurisdictions provide useful guidance.

6. The ICTY has held that "[a]n expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion".<sup>11</sup> As a result, there must be sufficient information as to the sources used in support of the statements made by the expert.<sup>12</sup> In particular, the sources used by expert

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<sup>7</sup> Rule 93(1) of the Internal Rules.

<sup>8</sup> Rule 93(2) of the Internal Rules.

<sup>9</sup> E294/1, 'Decision on NUON Chea Request to Admit New Documents, To Initiate an Investigation and To Summons Mr. Rob LEMKIN', 24 Jul 2013, para. 11.

<sup>10</sup> E294/1, 'Decision on NUON Chea Request to Admit New Documents, To Initiate an Investigation and To Summons Mr. Rob LEMKIN', 24 Jul 2013, para. 11.

<sup>11</sup> *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 Jul 2002, p. 2; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

<sup>12</sup> *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22;

witnesses must be clearly indicated and accessible,<sup>13</sup> to allow the other party to challenge the basis on which the expert witness reached his conclusions or his/her methodology.<sup>14</sup>

7. If the parties and the Trial Chamber are unable to assess the probative value of the proposed expert report as a result of the lack of transparency, the result might be its non-admission into evidence, or the fact that only limited weight will be attached to the expert report.<sup>15</sup> In the absence of clear references or accessible sources, the ICTY does not treat a statement or report as an *expert* opinion, but as the *personal* opinion of the witness, and weighs the evidence accordingly.<sup>16</sup> In other words, the parts of an expert report and/or testimony for which the sources relied upon are unclear, or on which the parties had no opportunity to test or challenge the witnesses who provided the information, will be given limited weight, if any.<sup>17</sup>

8. As a result, it is an established practice at the ICTY that the party calling the expert discloses the expert report together with the underlying sources.<sup>18</sup> The ICC has also followed this practice.<sup>19</sup> In addition, the ICC held that any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted.<sup>20</sup>

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<sup>13</sup> *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion to Exclude the Expert Report of Kosta Čavoški, 5 Apr 2013, para. 22.

<sup>14</sup> *Prosecutor v. Stanišić & Župljanin*, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea's Hanson as an Expert Witness, 5 Nov 2009, para. 10; *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

<sup>15</sup> *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Disclosure of Expert Materials, 27 Aug 2009, para. 10.

<sup>16</sup> *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 Feb 2007, para. 8; *Prosecutor v. Martić*, IT-95-11-T, Decision on Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to 94 bis, 9 Nov 2006, para. 9; *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9.

<sup>17</sup> *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinović, 21 Feb 2003, para. 9.

<sup>18</sup> See e.g. *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Prosecution's Submission of the Expert Report of Christian Nielsen Pursuant to Rule 94bis With Annexes A and B, 2 Jul 2007, para. 1; *Prosecutor v. Karadžić*, IT-95-5/18-T, Prosecution's Motion for Admission of the Evidence of Eight Experts Pursuant to Rule 94bis and Rule 92bis, 9 Nov 2009, para. 17.

<sup>19</sup> *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Prosecution's Response to Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to Defer Notification Concerning Expert Witnesses (N. ICC-01/05-01/13-1242), 14 Sep 2015, para. 5; *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision on Joint Defence Request pursuant to Regulation 35 of the Regulations of the Court to defer Notification Concerning Expert Witnesses (N. ICC-01/05-01/13-1280), 22 Sep 2015, para. 11.

<sup>20</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses (N. ICC-01/04-02/06-1159), 9 Feb 2016, para. 16; *Prosecutor v. Ruto & Sang*, ICC-01/09-

### III. ARGUMENTS

#### A. Rule 87 (4) Request

##### (i) Overview of the Documents

9. The first document the Defence wishes to tender is Henri Locard (2-TCE-90)'s Curriculum Vitae, which was attached to the Trial Chamber's decision appointing him as an expert.<sup>21</sup> The document is relevant to the background and expertise of Henri Locard (2-TCE-90), and to his credibility.

10. The second document which the Defence seeks to have admitted is an article written by Henri Locard (2-TCE-90) for the Cambodia Daily, entitled 'In Questioning of Becker, Nuon Chea's False History Prevails' and published on 17 February 2015. It can be found in **Confidential Attachment 1**. In this article, Henri Locard (2-TCE-90) clearly expresses bias towards Mr Nuon Chea: he writes that Mr Nuon Chea defined "barbarous policies", refers to his position on the role of the United States in Cambodia as "false history", and generally uses language which unequivocally shows that he has already made his determination on the guilt of Mr Nuon Chea. It is the position of the Defence that this illustrates Henri Locard (2-TCE-90)'s bias towards Mr Nuon Chea and therefore his inability to fulfil his duty to testify on all matters within his knowledge or expertise with the utmost neutrality and objectivity, as required for expert witnesses.<sup>22</sup> As a result, the Defence wishes to have this document admitted into evidence in order to challenge Henri Locard (2-TCE-90)'s neutrality and impartiality.

##### (ii) The Documents Were Not Available Prior to the Start of the Trial and/or Should be Admitted Into Evidence in the Interests of Justice

11. The trial in Case 002/02 commenced in June 2011.<sup>23</sup> Henri Locard (2-TCE-90)'s Curriculum Vitae was made available to the parties on 16 June 2016.<sup>24</sup> Similarly, the Cambodia Daily Article written by Henri Locard (2-TCE-90) was published in February

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01/11, Decision on Sang Defence Application to Exclude Expert Report of Mr Hervé Maupeu (N. ICC-01/09-01/11-844), 7 Aug 2013, para. 27.

<sup>21</sup> E415.1, Curriculum Vitae of Henri Locard (2-TCE-90). The Defence notes that the Khieu Samphân's Defence had requested the admission into evidence of a previous version of the CV, E215.4, in E406, 'Demande de la Défense de M. KHIEU Samphân d'admission en preuve de documents pour son interrogatoire d'Henri LOCARD (règle 87-4)', 11 May 2016.

<sup>22</sup> E215, Experts Decision, para. 15.

<sup>23</sup> E307/1, 'Decision on Parties' Joint Request for Clarification Regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists of Evidence (E305/3)', 11 Jun 2014, para. 2; E307/1/2, 'Decision on Joint Request for *de novo* Ruling on the Application of Internal Rule 87(4)', 21 Oct 2014, para. 6.

<sup>24</sup> E415, 'Decision on Designation of Henri Locard (2-TCE-90)', 16 Jun 2016.

2015. The two requested documents were therefore not available prior to the start of the trial. In any event, all the requested documents are closely related to material already before the Chamber, including Henri Locard (2-TCE-90) books.<sup>25</sup> The Defence submits that the interests of justice require the Trial Chamber to evaluate the documents together. Finally, the admission into evidence of the two requested documents would assist the Trial Chamber in shedding light on Henri Locard (2-TCE-90)'s expertise as well as on his impartiality, which would be conducive to the overall ascertainment of the truth.

**(iii) The Documents are Relevant to Case 002/02**

12. All the requested documents relate to the charges regarding the security centres and internal purges, discussed, *inter alia*, in paragraphs 178-204, 415 to 475, 489-515 and 589-643 of the Closing Order.<sup>26</sup> As stated above, they also relate to Henri Locard (2-TCE-90)'s expected evidence and to his credibility.

**B. Rule 93 Request for Henri Locard (2-TCE-90) to Produce his Research Notes**

13. The Defence requests the Trial Chamber to use its powers under Rule 93 to order Henri Locard (2-TCE-90) to provide the parties with a copy of his "History Doctoral Thesis" on the "*Aspects de l'extermination dans le Kampuchéa démocratique et de l'idéologie khmère rouge (1975-1979)*" ('Aspects of extermination in Democratic Kampuchea and of the Khmer Rouge Ideology'), dated January 2000.<sup>27</sup> The document does not appear on the case file and is not publicly available. It is directly relevant to the evidence to be provided by Henri Locard (2-TCE-90), particularly regarding to the allegations on the use of propaganda by the Democratic Kampuchea ('DK') Regime as well as those regarding the various alleged policies in place.

14. Furthermore, the Defence would like to request the Trial Chamber to order Henri Locard (2-TCE-90) to provide the parties with the notes and any other underlying research material he has used in preparation of his books.<sup>28</sup> The Defence has identified some notes from Henri Locard (2-TCE-90)'s research on the DK Prison Network, which appear to be summarising the interviews he conducted between 1991 and 1994 in Cambodia, in relation to

<sup>25</sup> E3/2419, 'Prisoner of the Khmer Rouge' by Moeung Sonn with Henri Locard; E3/2811, 'The Khmer Rouge Gulag: 17 April 1975 - 7 January 1979' by Henri Locard; E3/2812, LOCARD Henri, *Le Petit Livre Rouge de Pol Pot (Pol Pot's Little Red Book)*.

<sup>26</sup> D427, 'Closing Order, 15 Sep 2010.

<sup>27</sup> E415.1, Curriculum Vitae of Henri Locard (2-TCE-90), at 01299039.

<sup>28</sup> E3/2419, 'Prisoner of the Khmer Rouge' by Moeung Sonn with Henri Locard; E3/2811, 'The Khmer Rouge Gulag : 17 April 1975 - 7 January 1979' by Henri Locard; E3/2812, '*Le Petit Livre Rouge de Pol Pot (Pol Pot's Little Red Book)*' by Henri Locard.

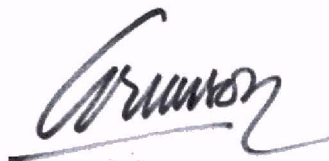
the Northwest region.<sup>29</sup> It therefore requests the Trial Chamber to enquire whether similar notes exist for the research Henri Locard (2-TCE-90) conducted in other parts of Cambodia, and if they do, to order him to produce such notes. In addition, the Defence requests the Trial Chamber to order Henri Locard (2-TCE-90) to provide any other material related to his field research and the interviews he conducted, for review by the parties. As stated unequivocally in the established international jurisprudence, an expert **must** provide sufficient information as to the methodology used and the sources upon which he/she relies to make statements.<sup>30</sup> The requested materials are relevant for the assessment of the methodology used by Henri Locard (2-TCE-90) when preparing the interviews and his books, and go to the probative value of such books, interviews, as well as that of Henri Locard (2-TCE-90)'s evidence. It is therefore conducive to the ascertainment of the truth.

15. The Defence wishes to clarify that it is not seeking those documents to be admitted into evidence. It submits that this would be premature, without knowing what the documents are or their contents. At this stage, all the Defence requests is to be given a copy of the documents in order to assess first, the veracity of Henri Locard (2-TCE-90)'s assertions, and second, whether any of the documents should be tendered into evidence pursuant to Rule 87(4) of the IR.

#### IV. RELIEF

16. For the reasons stated above, the Defence respectfully requests the Trial Chamber to admit the two above mentioned documents into evidence in Case 002/02. In addition, the Defence respectfully requests the Trial Chamber to order Henri Locard (2-TCE-90) to provide the parties with copies of his research notes and any other research material used in the preparation of his books.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

<sup>29</sup> E3/2071, 'Compilation of Statement Notes Related to Prisons in the Northwest Zone', Mar 2007.

<sup>30</sup> See *supra*, applicable Law Section, para. 6. *Emphasis added*.