

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

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NOTICE OF IMPEACHMENT MATERIAL FOR TCW-487

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NOTICE

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this notice of material it intends to put to TCW-487 in order to test his credibility.¹ The Defence reiterates its firm position that Rule 87 of the ECCC Internal Rules (the ‘Rules’)² has no application with respect to such material, which is to be used solely for impeachment purposes and is not—unlike substantive ‘evidence’ previously submitted—intended to be put before the Chamber for the truth of its content.³
2. The bench’s refusal to make this obvious distinction is: (i) directly at odds with the position put forward by the Senior Legal Officer (the ‘SLO’) in 2011⁴ and contrary to the parties’ expectations—including those of the Office of the Co-Prosecutors (the ‘OCP’);⁵ (ii) unfair insofar as the OCP and the Civil Parties have made previous use of material not ‘put before’ the Trial Chamber;⁶ (iii) utterly unreflective of the realities of a large-scale, complex criminal litigation;⁷ (iv) unsupported by the plain language or underlying

¹ See Annex A (setting out possible impeachment material). *N.B.* The Defence has not determined whether such material is contained on any of the parties’ existing document lists. Such information is irrelevant.

² See ECCC Internal Rules (Rev 8), as revised on 3 August 2011.

³ *N.B.* The Defence hereby incorporates by reference its previous oral submissions and notes that this Chamber has yet to squarely address any of them. See Annex B (setting out previous submissions).

⁴ See Email from Senior Legal Officer (the ‘SLO’) to the parties, re: ‘Responses to questions posed during the Trial Management Meeting’, 8 April 2011 (‘The Chamber confirms that all parties are obliged, on 19 April [2011], to file only those documents germane to their witnesses sought and the case against their particular client. There is no obligation to submit documents assumed to be of relevance to witnesses called by other parties.’)

⁵ See Document No **E-1/59.1**, ‘Transcript of Trial Proceedings’, 4 April 2012 (Trial Day 47), ERN 00799333–00799437, p 19:5–16 (William Smith: ‘Secondly, in relation to the use of documents that haven’t been put forward on the Defence list of which they wish to put before the Chamber, we do understand there is a difference between some documents that may be required to be used to test the reliability and credibility of a witness. If those documents need to be used, we have certainly discussed with the [SLO] at the trial management meeting that there should be some notice provided to the parties in advance of the documents that they intend to use to challenge the credibility of the witness; otherwise, what will happen is documents will be produced in this Court and the parties will have little knowledge of where they’ve come from and the purpose for which they’re used.’); Document No **E-1/60.1**, ‘Transcript of Trial Proceedings’, 5 April 2012 (Trial Day 48), ERN 00799802–00799922, p 51:17–25 (William Smith: ‘Mr President, we agree that there are – circumstances can arise where documents become significant at a later time, in relation to the – testing witnesses credibility. So we’re not suggesting that every document has to be placed before the Chamber. Certainly, counsel for Nuon Chea hadn’t made it completely clear for what purpose he was using this document, whether he wanted to place it before the Chamber or, alternatively, just to confront the witness.’)

⁶ See Document No **E-1/60.1**, ‘Transcript of Trial Proceedings’, 5 April 2012 (Trial Day 48), ERN 00799802–00799922, pp 51–1:9 (Michiel Pestman: ‘And if I remember correctly, for example, when the director of DC-Cam was interviewed, or examined in Court, both the prosecutor and counsel for the civil parties used the website – which is not on the case file, has no number, and we were not warned that they were going to do that – used the website DC-Cam has and, in one case, even a PowerPoint presentation from that website to examine the witness. What I’m doing is exactly the same as what both the prosecutor and counsel for the civil parties have done in the past.’)

⁷ *N.B.* Taken to its logical conclusion, the Trial Chamber’s position suggests that either the Defence should have submitted comprehensive and final potential impeachment material in 2011 for over one thousand proposed witnesses on or, as stated, possessed powers of clairvoyance beyond known human capabilities. Either way, the Trial Chamber’s position is simply not in conformity with any known (to the Defence)

rationale of Rule 87; and (v) designed, it seems, to punish the Defence for its insistence on following Cambodian law with respect to document and evidence presentation.⁸ In short, the Trial Chamber's unreasoned and unreasonable position 'simply makes no sense'.⁹ More importantly, it undermines Nuon Chea's right to challenge evidence presented against him by way of *effective* cross-examination. There is no conceivable reason why *any material* may not be used—subject solely to the satisfaction of certain reasonable minimum advance-notice obligations¹⁰—to attempt to impeach the credibility of any witness. While the approach put forward by the Defence is plainly conducive to ascertaining the truth in these proceedings and causes no prejudice to any party, the Trial Chamber has instead opted for a hidebound application of Rule 87 (to exclude material clearly beyond the purview of this Rule).

3. In any event, to the extent the Defence is now forced to comply with this Chamber's approach,¹¹ the following submissions are made (without prejudice to the Defence's right to make further objections and/or appeals on this issue). Impeachment material *ipso facto* 'satisf[ies] the criteria contained in [...] Rule 87(3)'.¹² Such material is obviously relevant—it goes without saying that the credibility of a witness is always at issue in any criminal trial—and none of Rule 87(3)'s exclusionary provisions apply.¹³ As for the Trial Chamber's insistence on compliance with Rule 87(4),¹⁴ the Defence stands by its original position: 'impeachment material [...] is a different category of material. It's not

system of impeachment, and considering the vast potential pool of information that exists on the topic of the DK regime, combined with the vast number of potential witnesses in this case, is simply unreasonable to an extreme level. It should furthermore be remembered that it took the OCP and the OCIJ, with well-equipped and sizable teams, more than four years to compile an absolutely massive case file; it is simply unfair to expect from the Defence, with much less resources, to have been staying abreast of the information as produced by the OCP and the OCIJ (and indeed, it filed a disclaimer which stated that it had not yet been able to read the entire case file, let alone discuss the relevant documents with our client), and at the same time somehow search for and analyze documents that could be used for the impeachment of each and every possible witness that might be called during trial. It should also bear noting that the Defence was all this time laboring under an OCIJ-imposed prohibition on independent investigations, and thus had to resort to requesting the OCIJ to conduct its investigations on its behalf.

⁸ To be absolutely clear, this is an entirely different matter that is unrelated to the issue of documents to be used for impeachment; nevertheless, it seems that the Trial Chamber continues to conflate the two issues.

⁹ Document No **E-1/71.1**, 'Transcript of Trial Proceedings', 2 May 2012 (Trial Day 59) (Closed Session), ERN 00806843–00806864, p 15:15–16.

¹⁰ The twenty-four-hour notification period, as currently required by the Trial Chamber, seems a reasonably period for all parties.

¹¹ See Document No **E-199**, TC Memorandum to all parties in Case 002, re 'Directions regarding documents sought for impeachment purposes', 24 May 2012, ERN 00809908 (the 'Impeachment Memo').

¹² Impeachment Memo, para 2.

¹³ The attached material is: (i) relevant; (ii) already in hand and available to all the parties; (3) suitable to test the credibility of the witness; (iv) allowed under the law; and (v) not frivolous nor intended to prolong the proceedings. See Rule 87(3)(1)–(5).

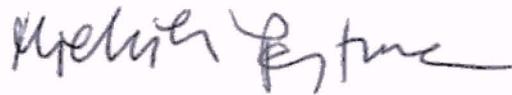
¹⁴ See Impeachment Memo, para 3.

evidence. It's not covered by Rule 87(4)'.¹⁵ And, as any experienced defence practitioner would comprehend, preparation for cross-examination is an ongoing and time-consuming process which obviously cannot be finalized (or, arguably, even commenced) unless and until it is known for certain that a particular witness will testify in court. For this reason alone, the Trial Chamber's suggestion that impeachment material should have been submitted in advance of final notifications of witness appearances defies logic.¹⁶ However, should this Chamber truly expect us to accept its strained position as to the application of Rule 87(4), then the Defence would submit that the term 'not available', as used in Rule 87(4), must be given a subjective, purposive interpretation consistent with the realities of this large-scale, complex litigation. Under such interpretation, impeachment material is 'not available' *unless and until it is known for certain that a particular witness will testify in court.*¹⁷ Accordingly, the Defence must be allowed to make use of the attached material during the testimony of TCW-487.

CO-LAWYERS FOR NUON CHEA



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¹⁵ Document No E-1/71.1, 'Transcript of Trial Proceedings', 2 May 2012 (Trial Day 59) (Closed Session), ERN 00806843-00806864, p 15:4-5.

¹⁶ *N.B.* If the same logic were to be followed, the OCP would have been required to file a definitive list of impeachment material for all 527 witnesses that were on the list of the Nuon Chea Defence Team by April 2011; clearly the OCP did not understand the Trial Chamber's order (Document No E-9) that way, and such a position was entirely justified. Both the clear and explicit answers by the SLO as well as plain common sense support the OCP in that reading. Furthermore, it must be noted that the present-day reading of the notice requirements by the Trial Chamber, as contained in the Directions of 24 May 2012 (Document No E-199), is much less harmful to the case of the OCP, as the vast majority of the witnesses that are going to be heard will be inculpatory witnesses suggested by the OCP. It follows that the OCP will hardly ever need (or want) to impeach its own inculpatory witnesses; the OCP is therefore much less affected by the Trial Chamber's erroneous understanding of this issue, which unjustifiably limits the possibility of impeachment. This is yet another way in which the fair-trial rights of Nuon Chea (i.e. the right to equality of arms) are violated by the Trial Chamber's current position.

¹⁷ According to Rule 87(4): 'The requesting party must also satisfy the Trial Chamber that the requested testimony or evidence was not available before the opening of the trial.' As the Defence did not know before the opening of the trial which witnesses would be called to testify during this part of the trial or subsequent parts, impeachment material must be considered to qualify for 'admission' under Rule 87(4), as long as it satisfies the conditions of Rule 87(3) and a reasonable notice requirement. It bears emphasizing here that the Defence is *still* unaware of which witnesses will or will not appear.