

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

FILING DETAIL

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**RULE 87 REQUEST TO PUT NEW EVIDENCE
TO TCW-797 FOR IMPEACHMENT PURPOSES**

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REQUEST

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this request to put certain material to TCW-797—in particular, a certain order of the Office of the Co-Investigating Judges¹ (the ‘Order’)—in order to test the witness’s credibility. 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 Trial Chamber for the truth of its content. In this regard the Defence hereby adopts by reference the submissions contained in its previously-filed ‘Notice of Impeachment Material for TCW-487’.³ However, in light of the Trial Chamber’s intransigence on this issue, the Defence is forced to comply with the bench’s erroneous approach to documents used only to test the credibility of witnesses.⁴
2. As potential impeachment material, the Order *ipso facto* ‘satisf[ies] the criteria contained in [...] Rule 87(3)’.⁵ 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.⁶ With respect to Rule 87(4), the Order was indeed ‘available before the opening of the trial’.⁷ Yet neither the Defence, nor anyone without powers of clairvoyance, could have possibly foreseen its relevance at that time with respect to TCW-797, whose testimony was confirmed and scheduled by the Trial Chamber *well after* ‘the opening of the trial’. As previously noted, cross-examination is not prepared months, or even weeks, in advance based on hypothetical information. Moreover, the Defence could hardly be expected to have anticipated topics of relevance which fall outside the limits of TCW-797’s existing statements on the case-file.

¹ Document No **D-303**, ‘Order on Co-Prosecutors’ Requests for Investigative Action’, 12 January 2010, ERN 0042761–00427628. *N.B.* This document was listed on the Trial Chamber’s document interface in all available languages on 18 June 2012.

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

³ Document No **E-206**, 28 May 2012, ERN 00811080–00811083. The Defence additionally incorporates by reference its previous oral submissions and notes that this Chamber has yet to squarely address any of them. See *ibid*, Annex B (setting out previous submissions).

⁴ 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’).

⁵ Impeachment Memo, para 2.

⁶ The attached material is: (i) relevant; (ii) already in hand and available to all the parties; (iii) 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).

⁷ Rule 87(4).

3. Accordingly, the Defence hereby requests to be permitted to make use of the Order for impeachment purposes during the testimony of TCW-797. The Defence has not determined whether the Order is contained on any of the parties' existing document-and-exhibit lists; such information is clearly irrelevant to any meaningful analysis of the admissibility of impeachment material.

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