BEFORE THE SUPREME COURT CHAMBER OF THE

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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KHIEU SAMPHÂN'S REPLY TO THE PROSECUTION'S RESPONSE TO HIS REQUEST TO ADMIT ADDITIONAL EVIDENCE

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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 8 October 2019, the KHIEU Samphân Defence ("the Defence") filed a request for admission of additional evidence ("Request").[1]

2. On 24 October 2019, the Prosecution filed a response opposing the Request ("Response").[2]

3. In these submissions, the Defence is replying to the Prosecution about the unique character of the proposed evidence (I), the timeliness of the Request (II) and, the lack of diligence on the part of Prosecution (III).

I. Unique character of the proposed evidence

4. Quite surprisingly, the Prosecution argues that the Request ought to be dismissed for failure to satisfy the stringent Internal Rule 108(7) requirements on the admission of evidence during the appellate phase of the proceedings, and that there are no interests of justice pursuant to Internal Rule 104(1) requiring its admission. The Prosecution contends that admitting the proposed evidence could not have led to a different verdict, and/or would be repetitive.[3]

5. This is indeed the first time in Case 002 that a party has opposed the admission of statements of witnesses who attended for testimony, whether or not their statements were recorded before or after their testimony. It is the case that, all the parties have thus far deemed it to be in the interests of justice to admit such statements in order to assess the credibility of the witnesses concerned. All the parties have submitted requests to that effect, none of which have been challenged by any one party.[4]

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[1] KHIEU Samphân's Request for Admission of Additional Evidence, 8 October 2019, **F51** ("Request"), served on 9 October 2019.
[2] Co-Prosecutors' Response to KHIEU Samphân's Request to Admit Additional Evidence (F51), 24 October 2019, **F51/1** ("Response"), served in English and Khmer on 28 October 2019, whereby the deadline for filing a reply is 4 November 2019. The Defence worked on the basis of draft French translation received from the Translation Unit, as the latter was unable to produce the translation within the requested time frame due to staffing constraints.
[3] Response, paras.1-2, 21-40, 44.
[4] The following are just a few examples concerning the Prosecution: Transcript of Trial Proceedings ("T.") of 18 April 2016, **E1/417.1**, after 09.13.20 (Assistant Co-Prosecutor DE WILDE: "It is in the interests of justice and it is normal that previous statements of civil parties who appear before the Chamber be put on the case file." [*emphasis added*]); T. 23 May 2016, **E1/429.1**, after 10.44.23 (Assistant Co-Prosecutor LYSAK: "no one ever seems to have any objection to the admission of these statements," [*emphasis added*]); International Co-Prosecutor's Request to Admit Two Items Related to 2-TCW-850, 23 June 2016, **E417**, paras. 1-5 (where the International Co-Prosecutor

6. Moreover, both the Trial Chamber[5] and the Supreme Court Chamber have consistently admitted such statements, either at the request of a party or *proprio motu*.

7. The Supreme Court Chamber has, for example, held that Internal Rule 104(1) permits the introduction of evidence "that is closely related to other evidence that is already before the Chamber or that could significantly affect its reliability or credibility."[6] Based thereupon, it has admitted previous statements of witnesses who testified before it on the understanding that such statements were conducive to assessing the credibility and reliability of their testimony.[7]

8. The witness accounts proposed by the Defence significantly affect the reliability and credibility of testimony of the witnesses concerned, and therefore ought to be admitted, even on appeal. It is difficult to fathom why the Prosecution opposes the Request.

II. Timeliness of the Request

9. The Prosecution also argues that the Request ought to be rejected because it is untimely. It contends that the onus was on the Defence to request the Trial Chamber to admit the proposed documents or to reopen the proceedings.[8] It cites a decision which was rendered by the Trial Chamber towards the end of the trial, according to which the Defence was permitted to request the admission of disclosed documents within two weeks of their receipt after 1 September 2016 as an exception to the general time limits afforded for requests for new evidence.[9] However, nothing in the reasoning of the said decision indicates that the Trial Chamber intended to allow

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highlights a witness' contradictions concerning a meeting which was led by NUON Chea, and then goes on, at paragraph 4, to request "the admission of the Recording on the grounds that it is the most reliable version of 2-TCW-850's statement and of the WRI on the grounds that its admission is necessary to have a complete record of the witness's accounts before the Chamber.").

[5] Request, para. 12 and footnotes 15-16. See also regarding examples of *proprio motu* admission: Decision on Prior Statements of Witness 2-TCW-816, 31 May 2016, **E410**; Decision on written record of interview E319/42.3.3 and its annexes, 3 June 2016, **E319/42/1**; T. 22 September 2016, **E1/479.1**, p. 3, L5-25; *Admission of newly disclosed written records of interview from Cases 003 and 004 of witnesses heard in the course of the [Case 002] trial proceedings*, 26 January 2017, **E319/67**; *Admission of newly disclosed written records of interview from Cases 003 and 004 of witnesses heard in the course of the [Case 002] trial proceedings*, 9 May 2017, **E319/69** ("Memorandum **E319/69**").

[6] Case 002/01 Appeal Judgement, 23 November 2016, **F36** (Case 002/01 Appeal Judgement), para.31.

[7] See for example Case 002/01 Appeal Judgement, para. 56. See also para. 70: "The Supreme Court Chamber admitted *proprio motu* the SAO Van DC-Cam Interview, which, as a previous statement of a witness who appeared before it, is important to the assessment of his reliability". That statement was admitted *proprio motu* after the witness had testified.

[8] Response, paras. 1-2, 17-20, 44.

[9] Response, paras. 4 and 18.

requests to be submitted after the close of the proceedings by way of exception to Internal Rules 92 and 96(2),[10] i.e. after 23 June 2017.[11] Quite the contrary.

10. As a matter of fact, in setting the time limits, the Trial Chamber began by recalling that the end of the evidentiary proceedings was approaching,[12] and went on to underscore its duty to reach a judgement within a reasonable amount of time, commensurate with the equality of arms and adversarial principles.[13] As to the Prosecution's argument that new evidence could yet be discovered from Cases 003 and 004, the Chamber stated, *inter alia*, that:

> "should new evidence be made available from Cases 003 and 004 at such time as to make it impossible to put forward during these proceedings, the Co-Prosecutors will have an opportunity on appeal to request the consideration of such evidence if in their view it could have been a decisive factor in the Chamber verdict."[14]

11. The Trial Chamber also provided for exceptions "as an exception to the 1 September 2016 deadline", such as any requests submitted by the Defence after disclosures or requests by the parties in anticipation of expert testimony.[15] Lastly, it pointed out that:

> "As previously indicated, the Chamber has entered the final stages of Case 002 02 and expects the completion of evidentiary proceedings in Case 002 02 by December 2016. As the end of the trial approaches it becomes imperative that all parties respect the need to react in timely fashion to new developments in the case. The Chamber therefore considers that the Defence must respond to disclosures of potentially exculpatory evidence made after September 2016 with Internal Rule 87 motions within two weeks of receipt of the disclosures."[16]

12. Therefore, a full, objective review of the grounds for the decision cited by the Prosecution reveals that it was not the Trial Chamber's intention to allow requests to be submitted after the close of

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[10] Internal Rule 92: "The parties may, up until the closing statements, make written submissions (…)". [*emphasis added*]; Internal Rule 96 (Deliberations of the Trial Chamber): "1. The judges shall deliberate in camera (…). 2. At this stage, no further applications may be submitted to the Chamber, and no further submissions may be made. During the course of the deliberations, the judges may reopen the proceeding." (*emphasis added*); Request, para. 13 and footnote 17.
[11] Response, para. 6.
[12] Decision on Requests Regarding Internal Rule 87(4) Deadlines [reasons], 21 September 2016, **E421/4** ("Decision **E421/4**"), para.13 ("[…] as the Chamber approaches the close of evidence in Case 002 02, there must come a point when the parties can rely upon the evidentiary record that has been established throughout the investigation and trials in this case. (…)").
[13] Decision **E421/4**, paras. 14-15.
[14] Decision **E421/4**, paras. 16-17 (quoting from para. 17, [*emphasis added*]).
[15] Decision **E421/4**, paras. 19-20 (quoting from para. 19).
[16] Decision **E421/4**, para. 23 (*emphasis added*).

the proceeding, and that, rather, that the Chamber was keen to quickly address the issue of admitting new evidence before the close of the proceedings.

13. Evidence of that lies in the fact that on 9 May 2017, shortly after the closing briefs were filed and a few weeks before the closing arguments, the Trial Chamber admitted *proprio motu* (even before the lapse of the time limit afforded to the Defence) two statements from Case 004 from witnesses who had been heard at trial; the Prosecution had disclosed those statements eight days earlier on (1 May 2017).[17]

14. Therefore, there is no onus on the Defence to submit any requests, as such action would be in violation of the Internal Rules. The reason why the Prosecution wrongly puts such an "onus" on the Defence[18] is because it is seeking to make up for its lack of diligence, which is mainly the issue at hand.

III. Lack of diligence on the part of the Prosecution

15. In its Response, the Prosecution provides information that had hitherto been unknown to the Defence – which is not a party to Cases 003 and 004 – and thereby further exposes the lack of diligence which has been highlighted in the Request.[19] It indicates that the two statements sought were available in Zylab in Khmer on 1 and 15 March 2017, and thereafter in English on 27 June and 17 July 2017.[20]

16. That means that the Prosecution could have disclosed them prior to the close of the proceedings, or at least on 1 May 2017 as was the case for the two statements it disclosed on that date, which were also available in Khmer at that moment in time.[21] The Trial Chamber would have admitted them, and the issue would not come into play at this time.

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[17] Memorandum **E319/69**. Para. 2: "It is in the interest of ascertaining the truth that the Chamber and parties have access to all of the statements of Civil Parties and witnesses who were heard [in Case 002/02] (E421/4, para. 12). The Chamber clarifies that this practice also applies to statements taken after the witness has testified in order to permit the Chamber and parties to fully assess credibility based on the extent to which the witness's statements are consistent It is therefore in the interests of ascertaining the truth to admit statements post-dating a witness's testimony." Accordingly, the Chamber needed not be "alert[ed]" (Response, para. 20) to the significance of the statements disclosed in September 2018 and should have reopened the proceedings (Request, paras. 12-14).
[18] Response, para. 20.
[19] Request, paras. 9-11.
[20] Response, para. 7 and footnote 13.
[21] Annexes 1 **E319/69.1** and 2 **E319/69.2** to Memorandum **E319/69**.

17. Instead of admitting its mistake and the interest of admitting the statements, the Prosecution asserts that it disclosed them in a timely fashion, citing its hefty workload at the material time in Case 002/02 and four other cases.[22]

18. Yet, its workload did not impede from disclosing statements on 1 May 2017 shortly before the Case 002/02 closing briefs were filed. Also, on 24 February 2017, in the midst of the drafting of the closing briefs, its workload did not impede it from seeking leave to disclose seven statements from Cases 003 and 004, and the admission of two of them, arguing that they were from witnesses who had been heard in court.[23]

19. In light of the foregoing objective facts, the Prosecution's justification is unpersuasive. That is especially true given that it had earlier asserted that the Defence should have been able to multi-task, like it.[24]

20. Even if the Prosecution's workload were the reason why the written records of interview were disclosed in September 2018, it is still the case that the disclosure occurred well after the close of the trial proceedings. That makes the Prosecution's opposition all the more unfathomable.

21. In any event, the Request is not untimely, and is fully justified. The proposed items of evidence, which should have been, but were not, admitted at trial, should now be admitted on appeal.

22. **FOR THE FOREGOING REASONS**, the Defence requests the Supreme Court Chamber to GRANT its Request.

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[22] Response, para. 42.

[23] International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 24 February 2017, **E319/68**, paras. 2-3 (Para. 2: "The annexes further identify which documents are prior statements of individuals who have testified in Case 002, and therefore should be admitted, pursuant to the established practice of the Chamber.", (*emphasis added*). Needless to say, the Chamber admitted the statements to enable it and the parties to fully assess the witnesses' credibility in the interests of ascertaining the truth: Admission of newly disclosed written records of interviews from Cases 003 and 004 of witnesses heard in the course of the [Case 002] trial proceedings, 25 April 2017, **E319/68/1**, paras. 2-3.

[24] See for example what was stated by Assistant Co-Prosecutor LYSAK: T. 23 May 2016, **E1/429.1**, after 09.37.50: ("Anticipating the Defence response that we need this courtroom -- we need to be out of this courtroom in order to prepare, I simply think that is not a reasonable request. These are big defence 2 teams. They have to multi-task. [*emphasis added*]) and around 10.04.56: ("…again, I think the defence team, as the prosecutors do, have to multi-task." [*emphasis* added]).

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