

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

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**NUON CHEA'S RESPONSE TO CO-PROSECUTORS' SUBMISSION REGARDING
USE OF EVIDENCE FROM CASE 002/01 IN CASE 002/02**

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The Co-Lawyers for Nuon Chea ('the Defence') hereby respond to the Co-Prosecutors' submissions concerning the use of evidence admitted in, and recall of witnesses heard during, Case 002/01 in Case 002/02:

1. On 15 January 2014, the Co-Prosecutors filed submissions concerning the modalities for the use of evidence introduced in Case 002/01 during Case 002/02 and the procedures for recalling witnesses heard during Case 002/01 in Case 002/02 ('OCP Evidence Submission').¹ On 31 January 2014, in accordance with a prior instruction from the Chamber, the Defence filed brief submissions concerning the scope of Case 002/02 ('Submission on Scope').² By email notification, the Chamber granted an extension to all parties to respond to the OCP Evidence Submission until 3 February 2014.
2. The OCP Evidence Submissions seeks a ruling to the effect that: 'a) all evidence accepted in Case 002/01 and assigned an E3 number will be considered as duly placed before the Trial Chamber for the purpose of all future trial proceedings concerning the remaining charges; and b) witnesses, civil parties and experts heard in Case 002/01 may be recalled in the trial Case 002/01 only if the requesting parties satisfy the court that further questioning is in the interests of justice.'³ The Defence concurs in full with the Co-Prosecutors' first request, and in part with the second.

Admissibility of evidence admitted in Case 002/01

3. The Defence concurs with the Co-Prosecutors that documents admitted in Case 002/01 should be deemed admissible in Case 002/02.⁴ That position aligns with Nuon Chea's Submission on Scope, which argued that the Chamber should consider evidence pertaining to any fact within the Closing Order as a whole to be relevant to the allegations in Case 002/02.⁵

Witnesses heard in Case 002/01

¹ Document No. **E302**, 'Co-Prosecutors' Submission Regarding the Use of Evidence and Procedure for Recall of Witnesses from Case 002/01 in Case 002/02', 15 January 2014 ('OCP Evidence Submission').

² Document No. **E301/5/4**, 'Nuon Chea's Response to Trial Chamber's Request for Submissions Concerning the Scope of Case 002/02', 31 January 2014.

³ OCP Evidence Submission, para. 1.

⁴ The Defence's position comes with one caveat: it has yet to see whether the Chamber relies on certain documents to which the Defence objected in Case 002/01 and it may furthermore seek to appeal Trial Chamber rulings concerning the standards applicable to the admission of evidence 'at the same time' as its appeal against the judgment. *See* Rule 104(4). The Defence reserves its right to object to evidence admitted by the Chamber in Case 002/01 pending applicable Supreme Court Chamber rulings and the Trial Chamber's judgment in Case 002/01.

⁵ Submission on Scope, para. 4.

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4. The Defence concurs in part with the Co-Prosecutors that witnesses, experts and civil parties should be recalled in Case 002/02 where their appearance is in the interests of justice. The Defence agrees that any party is entitled to request the appearance in Case 002/02 of any person who testified before the Chamber in Case 002/01. However, the Defence disagrees that special criteria should apply to witnesses, experts and civil parties who previously appeared in Case 002/01. The Chamber should instead consider whether each witness serves the Chamber's objective of assessing Nuon Chea's criminal liability for crimes at issue in Case 002/02.⁶
5. The Defence emphasizes (as it has on many previous occasions) that it is and always has been prohibited from performing its own investigations or from participating in any meaningful way in the investigation of the CIJs.⁷ Cross-examination at trial, which began more than four years after Nuon Chea was first detained, constitutes Nuon Chea's only opportunity even to *investigate* facts in support of his defence. Those facts are entered into evidence live before the Chamber, at the same moment in which the Defence learns of them for the very first time.
6. In that regard, the Defence is differently situated from the Co-Prosecutors, who conducted their own investigations prior to filing the Introductory Submissions and set the parameters and direction of the judicial investigation.⁸ Nor was that judicial investigation (notwithstanding the presumptions in place before this Chamber) a truly impartial exposition of the facts.⁹ Rather than evenly consider the competing perspectives of the defence and the prosecution, the investigation built a (quantitatively) massive case against the Accused before Nuon Chea was permitted to even begin to respond. Cross-examination is more important, not less, as a consequence of that investigation.
7. For these reasons, the Co-Prosecutors' proposed test, whether rehearing a witness is 'in the interests of justice', is overly vague and insufficiently attentive to the Accused's distinctive right to confront the evidence against him. The Accused should not be effectively required to rebut a presumption against the so-called 'recalling' of witnesses

⁶ See Code of Criminal Procedure of the Kingdom of Cambodia, Art. 2.

⁷ Document No. **A110/I**, OCIJ's Letter entitled 'Response to Your Letter Dated 20 December 2007 Concerning the Conduct of the Judicial Investigation', 10 January 2008; Document No. **E251**, 'Decision on Defence requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1)', 7 December 2012, paras 37-38.

⁸ See Rules 53(1), (2); Rules 55(2), (3); see also Document No. **D130/11**, 'Fifteenth Request for Investigative Action', 1 September 2009, para. 4.

⁹ See e.g., Document No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013, paras 27-37.

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in Case 002/02. Case 002/02 is a distinct trial, with distinct charges – and possibly distinct judges. The fact that a witness previously appeared before the Chamber in Case 002/01 may prove to be a relevant factor in the Chamber’s assessment with regard to the propriety of hearing any given witness. It should not be the starting point from which the Chamber must be ‘satisfied’ that a deviation is necessary and ‘would not unduly delay the proceedings.’¹⁰ The hearing of relevant evidence is the proceedings.

8. The Defence notes further that, according to the Co-Prosecutors, parties were entitled to examine experts and elderly witnesses on any subject within the scope of the full Case 002 Closing Order.¹¹ The Co-Prosecutors are only partially correct. The Chamber held that although parties were permitted to question experts in regard to any facts within the scope of the Closing Order, they were ‘encouraged’ to ‘focus’ on areas within the scope of Case 002/01.¹² The Chamber accordingly recognized that the time allocated to each party was insufficient for an examination in regard to the totality of the Closing Order. In that sense, parties were not in fact permitted to question experts in regard to the full Closing Order.
9. The Defence notes that only two experts appeared in Case 002/01 in relation to the substance of the Closing Order: David Chandler and Philip Short. Only a small number of elderly witnesses were examined on the totality of the Closing Order.¹³ Accordingly, no risk exists of weeks of repetitive testimony. The Nuon Chea Defence furthermore has no intention of seeking the appearance of Philip Short in Case 002/02. Neither does at least one other party, the Co-Prosecutors.¹⁴
10. Chandler’s appearance in Case 002/02, however, is critical. Chandler has written extensively on S-21 and is also one of only a handful of people to have thoroughly reviewed original Khmer language S-21 confessions. Those confessions were central to his findings, and those of other academics, in relation to both S-21 and larger issues, such as CPK factionalism, at the core of Nuon Chea’s substantive defence in Case 002/02.¹⁵ As the Defence has previously observed, the Co-Prosecutors have relied

¹⁰ OCP Evidence Submission, para. 9.

¹¹ OCP Evidence Submission, para. 4.

¹² Document No. **E1/189.1**, ‘Transcript of Trial Proceedings’, 6 May 2013, p. 1:18-25.

¹³ See e.g., Document No. **E188.1**, ‘Confidential Annex A: List of Witnesses and Civil Parties Aged Over 70 Years’, 24 April 2012 (listing only 11 proposed ‘elderly’ witnesses and civil parties to be heard on the totality of the Closing Order).

¹⁴ Document No. **E301/2/1.1**, ‘Annex A: Co-Prosecutors Trial Plan & Tentative Witness List for Case 002/02’, 10 December 2013.

¹⁵ See e.g., Stephen R. Heder, *Khmer Rouge Opposition to Pol Pot*, 28 August 1990.

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heavily on secondary sources and so-called expert testimony in their submissions.¹⁶ Indeed, Chandler testified in Case 001 and the Co-Prosecutors have sought to admit that testimony into evidence in Case 002.¹⁷ The opportunity to cross-examine Chandler in relation to his methodology and the substance of his findings – an opportunity not practically provided in Case 002/01 – is critical.

11. Finally, the Defence notes that the current pace of Case 002/02 is likely to add months of delay to the start of the proceedings. The Chamber scheduled a single trial management meeting in the first three and one half months following the conclusion of closing argument in Case 002/01. While the Defence recognizes that some degree of delay was inevitable, in our submission the present trajectory of Case 002/02 is both unnecessarily long and inconsistent with the express instructions of the Supreme Court Chamber.¹⁸ The Defence submits that if the hearing of the evidence in Case 002/02 is delayed for close to one year from the conclusion of Case 002/01, considerations of efficiency and judicial economy ought not to then be invoked to limit the substantive evidence heard live before the Chamber. It is for the purpose of hearing testimony – and not a lengthy process of bracing itself to hear testimony – that this institution was conceived.

CO-LAWYERS FOR NUON CHEA



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¹⁶ Document No. **E1/232.1**, 'Transcript of Trial Proceedings', 22 October 2013, pp. 17:17-20:17.

¹⁷ Document No. **E9/31.11**, 'Annex 11 – CF1 Transcripts', 19 April 2011, Entry 51.

¹⁸ Document No. **E284/4/8**, 'Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002', 25 November 2013, para. 76 (ordering that the evidentiary hearings in Case 002/02 begin 'as soon as possible' after closing submissions in Case 002/01).