

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

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**NUON CHEA'S RESPONSE TO INTERNATIONAL CO-PROSECUTOR'S REQUEST
TO ADMIT DOCUMENTS PURSUANT TO RULE 87(3) AND (4) [E319/52]**

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I. INTRODUCTION

1. On 27 July 2016, the International Co-Prosecutors (hereinafter ‘the Prosecution’) filed a request pursuant to Rule 87 (3) and (4) of the Internal Rules, requesting the admission into evidence of 35 documents from case 004 which it had just disclosed to the parties.¹ An overview of the documents, together with a summary, was provided in Annexes P1, P2 and P3 of the Prosecution’s Request.² The Prosecution seeks the admission into evidence of 34 written records of interview and one written record of investigation (‘the Requested Documents’).³

2. On 1 August 2016, the Khieu Samphân Defence requested an extension of time until 29 August 2016 to file its response, in order to have sufficient time to review the proposed documents.⁴ On 4 August 2016, oral arguments were made on the matter and the Co-Lawyers for Mr Nuon Chea (‘the Defence’) joined the Khieu Samphân’s Request.⁵ In particular, the Nuon Chea Defence requested until 1st November 2016 to file any request arising out of the newly disclosed materials, including those related to the recall of prior witnesses or the calling of new witnesses pursuant to Rule 87 (4).⁶

3. On 8 August 2016, the Trial Chamber granted the request for extension of time and ordered that any response to E319/52 be filed on 29 August 2016.⁷ It added that it would rule on the remainder of the requests in “due course”. The Nuon Chea Defence hereby submits its response.

II. APPLICABLE LAW

4. Pursuant to Internal Rule 87(4), the Co-Prosecutors' may seek the admission of new evidence which they consider to be conducive to ascertaining the truth, including inculpatory evidence from Cases 003 and 004 or other sources. In order for this new evidence to be accepted by the Chamber, however, the Co-Prosecutors, as any moving party, must meet the specific requirements of Internal Rule 87(4) by filing a separate reasoned submission. They

¹ E319/52, ‘International Co-Prosecutor’s Request to Admit Documents Pursuant to Rule 87(3) and 87(4)’, 25 Jul 2016. It was notified to the parties by email on 27 Jul 2016 at 1:53 pm. (‘Prosecution’s Request’)

² E319/52.2, E319/52.3 and E319/52.4.

³ Prosecution’s Request, para.1.

⁴ E319/52/1, ‘Demande de la Défense de M. KHIEU Samphân de prorogation du délai de réponse à la requête du co-Procureur international tendant à l’admission en preuve de 35 documents issus des dossiers 003 et 004 (E319/52)’, 1 Aug 2016.

⁵ Trial Management Meeting, 4 Aug 2016.

⁶ *Ibid.*, 4 Aug 2016, p. 41 [14.41.33] (Draft).

⁷ E319/52/2, ‘Decision on Khieu Samphân Request for an Extension of Time to Respond to the International Co-Prosecutor’s Motion E319/52’, 8 Aug 2016.

must show that the proposed evidence meets the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). They must also satisfy the Chamber that the evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence.⁸

5. Finally, the Trial Chamber held that:

In any case, 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.** The value that additional evidence may have in ascertaining the truth must be weighed against **the uncertainty created by allowing the admission of large amounts of new evidence near the close of the proceedings when other parties may not have a sufficient opportunity to assess and respond to this information.** For this reason, the Chamber will subject requests to admit new evidence at the late stages of this trial with heightened scrutiny, particularly when such evidence was previously available to the parties and when the new evidence is mainly proposed for corroboration purpose without a clear demonstration that their admission is in the interests of justice.⁹

III. RESPONSE

6. According to the Prosecution, the requested documents are relevant to the allegations of genocide against the Cham (9 documents), the Vietnamese (6 documents), the targeting of former Khmer Republic Soldiers (3 documents), purges (6 documents), Kraing Ta Chan prison (1 document), forced marriage (5 documents) and channels of communication (4 documents). It argues that the requested documents were not available before the commencement of the trial and are conducive to ascertaining the truth.¹⁰

A. None of the Requested Documents Constitute Prior Statements of Witnesses in Case 002/02

7. As a preliminary matter, the Defence notes that none of the documents constitute prior statements of witnesses who testified in the present case or who are scheduled to testify.

B. The Prosecution Failed to Exercise Due Diligence and Submitted an Untimely Request

8. The Prosecution argues that the documents were not available prior to the start of the trial since they were only authorised for disclosure by the OCIJ on 15 July 2016.¹¹ The

⁸ E319/47/3, 'Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4)', 29 Jun 2016, para. 16.

⁹ *Ibid.*, para. 23. (Emphasis added).

¹⁰ Prosecution's Request, para. 1.

¹¹ *Ibid.*, para. 5.

Prosecution had requested permission from the OCIJ to disclose the requested documents on 12 May 2016.¹²

9. However, the Requested Documents have been obtained by the OCIJ, and presumably disclosed to the Prosecution, between February 2015 and March 2016. More particularly, 14 documents are dated from 2015, and the newest document is dated March 2016.¹³ Yet, the Prosecution fails to explain why it only sought permission from the OCIJ to disclose them in the present case on 12 May 2016.¹⁴

10. The Trial Chamber repeatedly held that all parties must exercise due diligence and request the admission of documents in a timely manner - as soon as practicable after becoming aware of the material sought for admission - and emphasised the rights of the Accused to legal certainty.¹⁵ The Defence further recalls that Mr Nuon Chea is entitled to examine evidence against him¹⁶ and to have an opportunity to challenge any aspect of a witness' statement or testimony during a confrontation or an examination.¹⁷ It is the duty of the Trial Chamber to protect those rights, and to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused.¹⁸

11. Not only have the Requested Documents been in the possession of the Prosecution for a lengthy period of time, but the vast majority (71%) relates to segments of the trial which have already passed. In addition, five documents relate to the ongoing segment (regulation of marriage), and only four presumably relate to an upcoming segment (the role of the Accused).

12. By disclosing and requesting the admission into evidence of documents which it has had in its possession for several months only after the segments to which they relate have finished, the Prosecution effectively prevents Mr Nuon Chea from exercising his most fundamental right to cross-examining the relevant witnesses who appeared in the present case on the topics covered by the Requested Documents. In addition, the Prosecution seriously

¹² Prosecution's Request, para. 3.

¹³ Feb 2015 (1); Mar 2015 (2); Aug 2015 (1); Sep 2015 (4); Oct 2015 (3); Nov 2015 (2); Dec 2015 (1); Jan 2016 (8); Feb 2016 (9); Marc 2016 (4). See E319/52.2, E319/52.3 and E319/52.4.

¹⁴ Prosecution's Request, para. 3.

¹⁵ E319/47/3, 'Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4)', 29 Jun 2016, para.18.

¹⁶ Article 35 (e) new of the Law on the Establishment of the ECCC.

¹⁷ See e.g. ECHR, *Bricmont v. Belgium*, Application No. 10857/84, Judgment, Court (Chamber), 7 Jul 1989, para. 81, in E402.1.3.

¹⁸ Article 33 new of the Law on the Establishment of the ECCC.

endangers Mr Nuon Chea's right to legal certainty, by seeking to introduce what it considers "unique" evidence at such a late stage of the trial.¹⁹

13. The Prosecution should not be permitted to delay its requests for disclosure to the OCIJ in case 004 in order to keep certain incriminating evidence "under its wing" and attempt to surprise the Defence with it, once the relevant witnesses have testified, thereby depriving the Accused of his right to test evidence and to confront witnesses, removing any legal certainty from the judicial process. On this basis alone, the Prosecution's Request must be rejected.

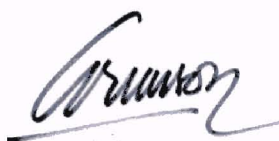
C. The Prosecution Failed to Demonstrate the Relevance of the Requested Evidence

14. Further, the Prosecution failed to provide any justification as to why the proposed evidence should be admitted into evidence in the interest of justice. The Prosecution has not demonstrated the uniqueness and non-repetitiveness of the evidence it seeks to adduce, nor has it linked the Proposed Documents to evidence already on the case file. In any event, even if the Prosecution had made such demonstration, the late disclosure and the admission into evidence of incriminating materials at such a late stage of the trial would seriously prejudice Mr Nuon Chea's fair trial rights, prejudice which largely outweighs any probative value of the Proposed Evidence.

IV. CONCLUSION

15. In light of the above, the Defence requests the Trial Chamber to reject the Prosecution's Request in its entirety. In the alternative, should the Trial Chamber admit parts of or the totality of the Requested Documents into evidence, the Defence requests permission to file submissions in order to 1) recall relevant witnesses from past segments in order to confront them with the new evidence; and/or 2) request to call the individuals concerned by the Requested Documents as witnesses, in order to test the evidence, by 1st November 2016.

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¹⁹ Prosecution's Request, para. 6.