BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RULE 87 REQUEST TO USE DOCUMENTS DURING CROSS-EXAMINATION OF EXPERT WITNESS PROFESSOR DAVID CHANDLER

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I. INTRODUCTION

1. Pursuant to ECCC Internal Rules (the 'Rules') 87(3) and (4), counsel for Nuon Chea (the 'Defence') hereby submits this request ('Request') to use certain documents in order to test the credibility of expert witness Professor David Chandler. A list of those documents is attached as Annex A.

2. The Defence reiterates its firm position that Rule 87 has no application to material used solely for the purposes of impeachment and is not intended to be put before the Trial Chamber for the truth of its content. In this regard, the Defence hereby adopts by reference its previous written and oral submissions.[1] In light of the Chamber's prior rulings,[2] the Defence has no choice but to submit the present request pursuant to Rule 87. However the Defence submits that any fair and rational application of Rule 87 demands a liberal interpretation of its requirements for admissibility. Such an interpretation is supported by the language of the rule and its purpose and context, as well as the realities of the trial presently before the Chamber.

II. RELEVANT LAW

3. Rule 87(1) provides in relevant part that, '[u]nless otherwise provided in these IRs, all evidence is admissible'.

4. Rule 87(2) provides in relevant part that '[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to cross-examination.'

5. Rule 87(3) provides in relevant part:

> Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court. The Chamber may reject a request for evidence where it finds that it is:
>
> a. irrelevant or repetitious;

[1] Document No. **E-206**, 'Notice of Impeachment Material for TCW-187', 28 May 2012, ERN 00811080-00811083, paras 1-2; Document No. **E-206.2**, 'Annex B: Previous Defence Submissions on Impeachment Material', 28 May 2012, ERN 00812802-00812805.
[2] 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.

b. impossible to obtain within a reasonable time;
c. unsuitable to prove the facts it purports to prove;
d. not allowed under the law;
e. intended to prolong proceedings or is frivolous;

6. Rule 87(4) provides in relevant part:

> During the trial...the Chamber may summon any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth...The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

III. ARGUMENT

7. The list of documents on Annex A includes documents already on the case file and documents not already on the case file.[3] The Defence submits that the documents already on the case file are admissible pursuant to Rule 87(3), or alternatively pursuant to Rule 87(4). The Defence submits that the documents not already on the case file are admissible pursuant to Rule 87(4).

A. Rule 87(4) Applies Only to Evidence Not Already on the Case File

8. Rules 87(2) and (3) describe two different categories or types of evidence: that which is on the case file and that which is 'put before the Chamber'. Under Rule 87(2), only the latter type of evidence, that which has been put before the Chamber, may be the basis of a decision of the Chamber.

9. Rule 87(3) sets out the process by which evidence 'from the case file' becomes evidence 'put before the Chamber.' According to Rule 87(3), 'evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out or appropriately identified in court.' In deciding whether to grant a party's request to put such evidence before the Chamber, the Chamber is instructed to consider a five-factored test, which is set out in the rule.

10. Rule 87(4) introduces a further type of evidence, which it describes as 'new evidence'. Under Rule 87(4), the Chamber decides on a party's request for 'new evidence' using

[3] Annex A clearly distinguishes between the two types of documents.

the same five-factored test set out in Rule 87(3), but with an additional requirement that 'the requested testimony or evidence was not available before the opening of the trial.'

11. The phrase 'new evidence' is not defined or used anywhere else in the Rules and might, in the abstract, have had different possible meanings. For instance, 'new evidence' might mean evidence that is not on the case file or evidence that is on the case file but has not yet been put before the Chamber. However the latter type of evidence is addressed in Rule 87(3). No reference is made in Rule 87 to any other category of evidence or any other administrative requirements under the Rules. It is therefore clear that the only purpose of Rule 87(4) is to allow for the admission of evidence before the Chamber that is not yet on the case file. Evidence that is on the case file is admissible pursuant to Rule 87(3) *only*.

12. Documents A through C on Annex A are therefore not subject to the unavailability requirement in Rule 87(4) and are admissible pursuant to the test set out in Rule 87(3).[4]

B. The Documents on Annex A Were All Unavailable Prior to Trial Within the Meaning of Rule 87(4)

13. Although documents A through C on Annex A are not subject to the requirements of Rule 87(4), those documents were in fact unavailable prior to trial and are, in the alternative, admissible on that basis. The remaining documents listed on Annex A, which are not on the case file, were also unavailable prior to trial.

14. The plain language of Rule 87(4) states that the admissibility of new evidence depends on whether it was 'available' prior to trial. Although the Defence could have, strictly theoretically speaking, following an all-encompassing and massively time-consuming search, gathered and identified the relevance of the documents listed on Annex A prior to trial, that does not render those documents 'available' in the sense intended by Rule 87(4). Strictly speaking, almost any document is 'available' to any party at any time. The Chamber should not impose a definition of availability that would have required each party to prepare a full examination of around 1000 potential witnesses prior to trial.[5]

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[4] *See infra*, paragraph 18.
[5] Of course, in assessing the reasonableness of our propositions one should not only consider the investment of time and resources that would have been needed to identify and analyse all potentially relevant information

15. The question under Rule 87(4) should rather be whether the evidence is being introduced at the earliest reasonable juncture of the trial. Parties should not be able to submit new evidence late in the trial which other parties have not had adequate time to examine and in respect of which other witnesses could have offered probative testimony.

16. This interpretation of the availability requirement under Rule 87(4) is the most appropriate for a number of reasons. First, it is consistent with the language of the statute. Only once a party is reasonably able to appreciate the relevance of a document to the trial proceedings does it become available to that party *as a piece of evidence*. A party might have a thousand *documents* in its possession but until they recognize the evidentiary value of those documents it remains true, as required by Rule 87(4), that the '*evidence* was not available.' Second, it is a pragmatic solution that assigns substantive content to the Rule. Since almost anything is technically 'available', a strict interpretation of the rule would render almost all new evidence inadmissible and read the rule out of existence. Third, it protects real interests without imposing arbitrary administrative burdens. Barring evidence which could have been found earlier but which is not introduced so late as to cause prejudice to any other party creates an artificial and unnecessary hurdle that serves no real purpose except to hinder the Court's search for the truth. It would also make herculean demands of the parties that are, simply, not possible to meet, and therefore could not have been intended by the drafters of the Rule.[6] But by requiring parties to introduce evidence as soon as they are or should be aware of its evidentiary value the Chamber will ensure that no one is taken by surprise and that all evidence is vetted as fully as possible. Fourth, it is consistent

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relating to just this *particular* witness (David Chandler), but rather consider the investment of time and resources that would have been needed to identify and analyse all potentially relevant information relating to *all* potential witnesses.

[6] The interpretation of the rule as propagated by the Trial Chamber simply does not take into account the realities of the case during the investigative stage. The Trial Chamber seems to hold the Defence to a due diligence standard that would have forced the Defence to conduct an investigation parallel to the one conducted by the OCIJ, in order to have prepared, at the end of the investigation, and all-encompassing and exhaustive list of any and all scholarly and secondary publications relating to the period of Democratic Kampuchea, as well as any 'original' evidence it could have unearthed. This simply does not take into account the reality that the Defence, in fact, was occupied by studying and analyzing the truly massive body of evidence as it was compiled by the OCIJ and put on the case file, and, importantly, spent most of its *remaining* time and resources on researching and drafting requests to the OCIJ to investigate on its behalf, *as envisaged by the Rules*. See also Doc No **E-211**, 'Notice to the Trial Chamber Regarding Research at DC-Cam', 19 June 2012, ERN 00818156-00818163.

with the general approach to the law of evidence under both the Internal Rules and the Cambodian Code of Criminal Procedure, both of which avoid extensive rules for admissibility, focussing instead on the weight to be accorded to the evidence before the court.[7]

17. The material listed on Annex A satisfies this standard. As evidence of Professor Chandler's own analyses it is unique and invaluable.[8] For that reason it is being offered now, and not at some other earlier point in the trial.

18. All of the documents listed on Annex A furthermore satisfy the five-factored test set out in Rule 87(3) and incorporated into Rule 87(4). Those documents are relevant because they were written by Professor Chandler and therefore establish his own opinions as he has previously described them. Professor Chandler's prior statements are obviously relevant to the Defence effort to impeach his testimony on cross-examination. The material listed in Annex A is not repetitive because there is no evidence of Professor Chandler's prior statements as probative as his own academic work. For similar reasons, the material listed in Annex A is not frivolous or intended to prolong proceedings, and clearly constitutes suitable evidence of the facts it purports to prove (namely, what the witness has previously said). There are no reasons why any of the documents listed on Annex A are otherwise disallowed under the law.

19. The Defence respectfully requests to put the material described in Annex A before the Trial Chamber and to use such material during its examination of Professor Chandler.

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[7] Code of Criminal Procedure of the Kingdom of Cambodia, Art. 321 ('Unless it is provided otherwise by law, in criminal cases all evidence is admissible.'); Rule 87(1).
[8] *See* para 18, *infra*.