

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA



FILING DETAILS

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CO-PROSECUTORS' RESPONSE TO NUON CHEA RULE 87(4) REQUEST TO ADMIT DOCUMENTS IN RESPECT OF CIVIL PARTY OUM SUPHANY

Filed by:

Co-Prosecutors
Nicholas KOUMJIAN
CHEA Leang

Distributed to:

Trial Chamber
Judge NIL Nonn, President
Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

Copied to:

Accused
NUON Chea
KHIEU Samphan

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

RESPONSE

1. The Co-Prosecutors respond as follows to the Rule 87(4) request filed by the Nuon Chea Defence (the “Defence”) to admit new documents relating to Civil Party Oum Suphany.¹ The Co-Prosecutors do not object to the admission of those documents which are conducive to the ascertainment of the truth and would assist the Trial Chamber, notwithstanding the failure of the Defence to satisfy the express requirements of Rule 87(4). However, the documents proposed by the Defence include a book that is fictional in parts, and a number of other documents that are based upon a fictional portion of that book. Moreover, the Co-Prosecutors object to the procedure by which the Nuon Chea Defence purposefully concealed this evidence, and knowingly failed to comply with the rules of this Court to give advance notice to the Chamber and other parties of the documents they intended to use in relation to the testimony of this Civil Party.
2. In regards to the five documents proposed by the Defence, the Co-Prosecutors do not object to the admission of the Phnom Penh Post May 2013 article that contains an interview of Civil Party Oum Suphany.² The Co-Prosecutors do observe that Nuon Chea’s counsel misrepresented the contents of this article during his examination of the Civil Party, in asserting that Oum Suphany told the Phnom Penh Post that she was forcibly married.³ The Phnom Penh Post article contains a clearly demarcated section that was the reporter’s interview of Oum Suphany. In that section, the statements attributed to the Civil Party regarding her marriage during the Democratic Kampuchea period are consistent with her trial testimony.⁴ It is only the reporter, not Oum Suphany, who characterizes her marriage as “forced” in that article.
3. This highlights one of the reasons Nuon Chea’s counsel cannot be permitted in future examinations to question witnesses or civil parties about new documents he has purposefully concealed and failed to give advance notice of through a Rule 87(4) motion filed prior to the testimony of that individual. Such questioning is not conducive to the

¹ E337 Nuon Chea’s Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany, 28 January 2015.

² Document 4, ENG 01058320.

³ E1/252.1 Trial Transcript, 26 January 2015, 09.24.28.

⁴ Document 4, ENG 01058320: “I loved my husband. We were part of a ‘determination’ and married in front of Angkar. We were once classmates and I followed him to his homeland.”

ascertainment of the truth, because the testifying witness or civil party, the Chamber, the Lead Co-Lawyers and the Co-Prosecutors are all prevented from having before them the actual document that is the basis of the Defence's questioning. It is that document, and not Defence counsel's characterisation of it, that is the best evidence and that should be relied upon by this Chamber. By concealing such documents and not making them part of the record at the time of his examination, Defence Counsel has the ability to misrepresent the contents of those documents to the witness, the Chamber and the public.

4. Nuon Chea's international counsel has already engaged in this same tactic with witness Keo Chandara in regards to an article published in DC-Cam's *Searching for the Truth* magazine. During that examination, Defence counsel asked the witness whether he wrote an article for that magazine, and suggested he was lying when the witness denied writing any article.⁵ If Nuon Chea's counsel had first presented that article to the witness, parties and Chamber, as required by the rules of the ECCC, it would have been discovered that the article in question was in fact not written by Keo Chandara, but instead was a section of a book written by author Chanda Chhay based on an interview of the witness.⁶
5. By circumventing the Court rules requiring advance notice of documents on which parties intend to rely, the Nuon Chea Defence have engaged in a conscious and calculated pattern of misconduct that is harmful to the ascertainment of the truth and should be precluded under Rule 87. In regards to three of the documents relating to Oum Suphany, the Defence has admitted that they obtained those documents "in late November 2014 in preparation for Ms. Suphany's testimony."⁷ In other words, for almost two months, the Defence concealed from the Chamber and other parties documents that it intended to use in the testimony of that Civil Party. The Co-Prosecutors thus request that Defence Counsel be precluded with

⁵ Draft Trial Transcript, 2 February 2015, 15.53.10.

⁶ The Nuon Chea Defence advised by email at the end of the day on 2 February 2015 that it intended to file a Rule 87(4) request to admit this article, but has so far failed to do so. In view of the Defence's questions mischaracterising this document as an article written by the witness, the Co-Prosecutors submit a copy of the document herewith as **Annex 1**. The conclusion of the article contains the following statement: "The *Searching for the Truth* team would like to thank Mr. Chanda Chhay, the author of *War and Genocide: A Never-Ending Cycle of Human Brutality* for allowing us to publish the story of Sok Yav [alias of Keo Chandara] in this magazine."

⁷ **E337** Nuon Chea's Rule 87(4) Request to Admit Documents in Respect of Civil Party Oum Suphany, 28 January 2015, para. 8.

future witnesses and civil parties from posing questions that are based on documents that the Defence has knowingly concealed and failed to notify to the Chamber and other parties.

6. In regards to the four other documents proposed for admission by the Defence, the Co-Prosecutors submit that the book *Under the Drops of Falling Rain* (Document 1), and a review of that book published by an internet website *The Modern Novel* (Document 5), do not merit admission under Rule 87. When asked about this book in trial, the Civil Party testified that the book was only partly based on “real accounts,” but also included “other information” that was “mixed” with the real accounts, and that “characters” had been created for the novel.⁸ The review of that book submitted by the Defence as Proposed Document 5 also noted that there had been “some fictionalisation.”⁹ The Co-Prosecutors submit that there would be no value to spending the considerable time that would be necessary to ascertain which parts of *Under the Drops of Falling Rain* are fictional, and which are based on real events, particularly in view of the fact that the Civil Party has already submitted into evidence her original diary¹⁰ and a book (*When Will We Ever Meet Again*) that was non-fictional.¹¹ The latter documents meet the standards of reliability required for admission of evidence. A book that is partially fictional risks confusion, unless an effort is made to clearly ascertain which parts are fictional and which are not. The Co-Prosecutors also observe that what has been submitted by the Defence as “Document 1” is not an actual copy of the book *Under the Drops of Falling Rain*, but a text file that is only a few pages long and whose origin and accuracy remain unknown.
7. In regards to the Association of Khmer Rouge Victims press release (Document 2) and the National Radio publication of that press release (Document 3), the Co-Prosecutors observe that the press release was issued in English only by a person who used a fictional excerpt from the *Under the Drops of Falling Rain* book. As something written and released only in English, there is no evidence that the press release was reviewed by the Civil Party. Moreover, given that the Civil Party never put forward the fictional forced marriage discussed in that book as part of her evidence before this Court, these documents would not

⁸ E1/251.1 Trial Transcript, 23 January 2015, 15.16.48 to 15.19.16.

⁹ Document 5, at ENG 01058321.

¹⁰ E323.1.1 Diary of Oum Suphany.


¹¹ D22/3248 Book titled “When Will We Ever Meet Again,” KHM 00562753-947; E1/250.1 Trial Transcript, 22 January 2015, 13.50.45 to 13.51.47.

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impeach her testimony or serve any value in the ascertainment of the truth. It is not in the interests of a fair and expeditious trial to allow collateral impeachment using prior statements of a witness that were not part of their court testimony.

8. Finally, in view of the calculated refusal of the Nuon Chea Defence to follow Court rules, the Co-Prosecutors submit that Civil Party Oum Suphany should not be recalled and subjected to further examination on these documents. The Defence had the opportunity to comply with Court rules and question the Civil Party about these matters during her initial testimony, simply by filing a timely Rule 87(4) request. Nuon Chea's counsel should not be rewarded for their intentional refusal to follow Court rules by being given another opportunity to question this Civil Party.
9. Given that these issues relating to the Defence's use of documents is an issue of importance that may affect the questioning of witnesses this week, the Co-Prosecutors request leave to file this submission in English only, with a Khmer translation to follow shortly.
10. For these reasons the Co-Prosecutors respectfully request the Chamber to:
 - (a) admit the May 2013 Phnom Penh Post article (proposed Document 4), but deny the Rule 87(4) request in relation to the other four proposed documents; and
 - (b) preclude the Nuon Chea Defence from posing questions to future witnesses and civil parties that are based on documents the Defence has knowingly concealed and failed to notify to the Chamber and other parties in compliance with the rules and orders of this Court.

Respectfully submitted,

Date	Name	Place	Signature
9 February 2015	SENG Leang Deputy Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		