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REPLY TO INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO NUON CHEA'S MOTION IN SUPPORT OF IENG SARY'S REQUEST TO HEAR HOR NAMHONG AND KEAT CHHON

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1. On 14 September 2012, counsel for Ieng Sary filed a request that the Trial Chamber summons Keat Chhon and Hor Namhong to testify on the basis of new facts discovered at trial ('Ieng Sary Request').[1] On 28 September 2012, the International Co-Prosecutor ('ICP') argued in response that although such testimony may be conducive to ascertaining the truth, it was not 'vital' to Ieng Sary's case. Accordingly, it may later warrant exclusion if it proves impossible to obtain within a reasonable time under Rule 87(3)(b).[2]

2. On 11 October 2012, the Co-Lawyers for Nuon Chea ('the Defence') filed a motion in support of the Ieng Sary Request ('Motion in Support'),[3] which concurred in Ieng Sary's analysis of the relevance of the witnesses' testimony and further urged the Chamber to consider that their prior unlawful failure to appear before the Co-Investigating Judges is a relevant consideration in deciding whether to summons them before the Chamber. The motion also criticized the ICP for his ambivalence about the prospect of the witnesses' failure to appear, especially in contrast to his prior, more principled position.[4]

3. The International Co-Prosecutor responded to the Motion in Support on 29 October 2012 ('ICP Response').[5] The ICP argued that (i) the Motion in Support was 'absurd in its effect' because it made no meaningful effort to demonstrate the relevance of the two witnesses to the case of Nuon Chea;[6] (ii) political interference is irrelevant to the question of whether the witnesses ought to be heard;[7] and (iii) his view with regard to hearing the witnesses at trial is properly different from the investigation due to distinctions in the respective statutory and factual contexts.[8] The Defence hereby submits that these arguments are misleading, unpersuasive and ought to be rejected by the Chamber.

4. First, the ICP alleges that the Motion in Support could only be 'rational' if, in addition to the showing of relevance made by Ieng Sary 'the Defence were to also show how the requested witnesses' testimony would be relevant to the Defence's client, Nuon Chea.'[9] In fact, the Ieng Sary Request demonstrated that both witnesses were senior DK officials

[1] Document No. **E-228**, 'Ieng Sary's Rule 87(4) Request to Hear Testimony from H.E. Keat Chhon and H.E. Hor Namhong', 14 September 2012, ERN 00846399-00846410 ('Ieng Sary Request').
[2] Document No. **E-228/1**, International Co-Prosecutor's Response to 'Ieng Sary's Rule 87(4) Request to Hear Testimony From H.E. Keat Chhon and H.E. Hor Namhong'', 28 September 2012, ERN 0849279-0849279 ('ICP Original Response').
[3] Document No. **E-228/2**, 'Motion in Support of Ieng Sary's Request to Hear Hor Namhong and Keat Chhon', 11 October 2012, ERN 00853849-00853853 ('Motion in Support').
[4] Motion in Support, paras 5-6.
[5] Document No. **E-228/3**, 'International Co-Prosecutor's Response to Nuon Chea's 'Motion in Support of Ieng Sary's Request to Hear Hor Namhong and Keat Chhon'', 29 October 2012, ERN 0857214-0857214.
[6] ICP Response, paras 3-7.
[7] ICP Response, para. 8.
[8] ICP Response, paras 9-13.
[9] ICP Response, para. 3.

with regular interactions with Pol Pot and others at the highest levels of the party. Those descriptions were explicitly adopted by the Motion in Support.[10] The Defence assumed that the legal relevance of such evidence to the tiny group of party leaders alleged to have worked collectively toward the implementation of sweeping policies across the regime would be obvious.[11] To the extent it was not, the following clarifications are provided.

5. The Ieng Sary Request explains, for instance, that Keat Chhon can testify as to: who in the party structure had effective control over who was arrested and purged; the extent to which persons below the Accused were independently responsible for establishing 'protocol'; the 'reporting structure' within a DK ministry and the knowledge that the head of such a ministry was likely to have had; and direct linkages between Pol Pot and individuals below the level of the Accused. The Ieng Sary Request demonstrates that Hor Namhong can testify to: the role played by Pang, an intermediary between the Central Committee and S-21 who, according to Duch, carried messages directly between him and Pol Pot;[12] his autonomy in running Boeng Trabek, for which Nuon Chea was allegedly responsible[13]; and the relationship between the head of a ministry and his subordinates.

6. The unifying theme is that both Keat Chhon and Hor Namhong were senior figures immediately below the Accused persons in rank with *first-hand knowledge* of the command structures linking the party center above them with themselves and the lower level cadres below them. Any testimony describing their autonomy or authority, direct linkages (or lack thereof) between subordinates of the Accused and Pol Pot, or the limits of upstream communication to the party centre is relevant. Moreover, it is the Defence's position that the autonomy and freedom of action of lower-downs in the hierarchy (such as Hor Namhong and Keat Chhon) was much larger than is reflected in the Closing Order, and submits that (frank) testimony by those directly involved would reflect this; their testimony would thus be clearly exculpatory, as it would (assist in) diminishing or excluding the culpability of Nuon Chea for acts committed by lower-downs. Similarly placed witnesses whose interactions with Nuon Chea were more direct are rare, and

[10] Motion in Support, para. 2.
[11] Document No. **D-427**, 'Closing Order', 15 September 2010, ERN 00604508-00605246 ('Closing Order'), paras 34 (individual members could make decisions only in concert with other members; division of responsibility within the Standing Committee only a matter of assigning 'thematic responsibilities'), 893-894 (alleging *inter alia* that Nuon Chea lived and worked daily with Ieng Sary for almost the entire duration of the regime), 948 (alleging that Nuon Chea 'played a role in the arrest of cadres in other ministries especially the Ministry of Foreign Affairs').
[12] Document No. **E-1/55.1**, 'Transcript of Trial Proceedings', 28 March 2012, ERN 00796319-00796427, p. 77:8-16; see also *Id.*, p. 69:1-9 (Pang was in 'overall control' at S-21, instructed directly by Pol Pot).
[13] Motion in Support, para. 3 (citing the Closing Order at para. 1101 (alleging that Boeng Trabek 'was under the authority of Pang, who reported to Nuon Chea, who had overall responsibility for education and training')).

efforts by the Defence to persuade the Chamber to hear them (e.g. in the case of Heng Samrin and Chea Sim) have so far been unsuccessful. The paucity of such testimony is reflected in the fact that much of the evidence of upper level command structures has so far come from witnesses making suppositions based on documentary evidence rather than personal experience, be they experts or those in effect testifying as such.[14]

7. Second, the ICP dismisses the suggestion that, *in addition to* the evidentiary value of their testimony, the prior refusal of these witnesses to obey validly issued summonses should be relevant to the question of whether to call them for testimony, noting that '"political interference" is not a charge against [Nuon Chea] in the Closing Order[...]'[15] While droll in its formulation, the underlying premise is worrying. It makes clear that the ICP refuses to acknowledge that trials should involve more than mere corroboration or disproval of paragraphs in a closing order. Fair trial considerations are essential to any (proper) trial and deserve full attention during public sessions of the Chamber. This is especially true at the ECCC, where part of the responsibility of the international legal professionals is to assist their Cambodian colleagues and inform the Cambodian public on fair trial standards; this does not seem to be an acute concern for the ICP, who rather hides behind 'facile' witticisms.

8. Moreover, the Defence is not sure whether the ICP fully appreciates the bitter irony of his emphatic reference to Rule 35[16] in this context: the *exact* issue of Hor Namhong's and Keat Chhon's non-appearance *has been* the subject of a Rule 35 application by the Defence, resulting in an infamous split decision by the PTC, with the Cambodian judges duly and predictably following the CPP party line, resulting in the inevitable dismissal of our Rule 35 Request.[17] That experience neatly illustrates the *futility* of Rule 35 when it comes to applications related to *political* interference. Hiding behind this rule amounts to

[14] With regard to Duch, *see e.g.*, Document No. E-1/61.1, 'Transcript of Trial Proceedings', 9 April 2012, ERN 00800388-00800514, pp. 1:24-2:9 (during the regime, function, knowledge and movements were limited to S-21); Document No. **E1-51.1**, 'Transcript of Trial Proceedings', 20 March 2012, ERN 00792960-00793045, pp. 42:9-43:14 (similar); Document No. **E1-60.1**, 'Transcript of Trial Proceedings', 5 April 2012, ERN 00799802-00799922, pp. 67:2-20, 73:1-21, 82:24-83:25.

[15] ICP Response, para. 8.

[16] ICP Response, para. 8.

[17] The international judges, of course, concluded that 'no reasonable trier of fact' could have failed to consider that there was a 'reason to believe that one or more members of the government may have knowingly and willfully interfered' with witnesses. Document No. **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 September 2010, ERN 00600748-00600774.

willful blindness with respect to the realities at the ECCC, and Cambodian society more generally.[18]

9. Third, the ICP argues that the standard for the admission of evidence under Rule 87(3) may not be satisfied in this case and that, for that reason among others, he may properly object to the admission of the witnesses' testimony without raising any inconsistency with his position during the investigation that the same witnesses should be compelled to appear.[19] According to the ICP, in his original response he

> explicitly expressed his doubts that Rule 87(3) had been satisfied...stating that he did not believe Keat Chhon and Hor Namhong's testimony to be "vital" nor "required in order to respect Ieng Sary's fair trial rights", and reserving opining on whether their testimony was, or would be, excludable under the Rules or was conclusively conducive to ascertaining the truth.[20]

10. That characterization can only be described as a series of distortions intended to obfuscate reality. In fact, the ICP's original response expressed no 'doubt' whatsoever that Rule 87(3) *had been* satisfied, stating *only* that at the present moment he 'does not oppose' the request and that he (i) *might* (ii) at some future point in time object. But the *only* basis he identified in the original response for any such objection concerned the possibility that 'future attempts to secure these testimonies will result in significant delays, or that the evidence may well prove impossible to obtain'.[21] He did not (and still does not) suggest that the testimony might be irrelevant pursuant to Rule 87(3)(a) or fail to satisfy Rule 87(4), which requires that evidence be 'conducive to ascertaining the truth'; indeed, he

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[18] *See*, among others: *Tell them that I want to Kill Them, Two decades of impunity in Hun Sen's Cambodia*, Human Rights Watch, 2012 ('HRW Report'), pp. 12 ('The courts and justice system are controlled by Hun Sen and the CPP. Most judges and prosecutors are CPP members who implement party directives, and believe they have no leeway to do otherwise.'), p. 64 ('[T]he justice system remains a deeply and unwaveringly politicized institution, with senior officials being political appointees whose primary allegiance is to the prime minister and the ruling CPP.').

[19] The Defence wishes to emphasize that the Motion in Support did not criticize the ICP for failing to request that the witnesses be compelled to appear – still less, for failing to do so at this stage. The motion criticized the ICP for implying that he would *affirmatively object* to the testimony; it used his earlier position merely as an illustrative point of contrast. The ICP's conclusion that 'it should be no surprise that [he] did not request the Trial Chamber to attempt to compel the testimony of witnesses' is therefore beside the point. *See* ICP Response, para. 14. The observation of the ICP that in March 2010 the witnesses already had been summonsed by the CIJs is similarly irrelevant, as the Defence made no claim that the ICP should actually seek the compulsion of these witnesses. *See* ICP Response, para. 13. In any case, the ICP had contemplated objecting *in the event* the Chamber tried and failed to secure the testimony, thus assuming the existence of a summons.

[20] ICP Response, para. 12. See also *Id.*, para. 14 (claiming that in the original response he 'forthrightly stated that he did not deem [the testimony] of significant importance to the charges facing Ieng Sary').

[21] ICP Original Response, para. 4 ('it is possible (though not certain) that future attempts to secure these testimonies will result in significant delays, or that the evidence may well prove impossible to obtain [...] Such developments may eventually militate in favour of a determination that the proposed evidence should be excluded pursuant to Rule 87(3)(b), because it is impossible to obtain within a reasonable time. *For this reason, and while not currently objecting to the Defence request*, the [ICP] reserves his right to make further submissions at a later date with respect to whether the proposed testimonies should be excluded.').

conceded that was the case, stating that the Ieng Sary Request 'put forward a sufficient description of [Keat Chhon's] purported evidentiary value in relation to Ieng Sary.'[22] The other considerations invoked by the ICP – whether the testimony is 'vital' or required 'to respect Ieng Sary's fair trial rights' – are irrelevant to the applicable standard which, as the ICP acknowledges,[23] is whether the evidence is 'conducive to ascertaining the truth.' With this string of convoluted diversions swept from view, it is clear that the only *real* reason Rule 87(3) might fail to be satisfied in the future is that the witnesses would unlawfully fail to appear. As the Defence argued from the outset,[24] that hardly supplies a legitimate basis on which to exclude the evidence.

11. Finally, the ICP asserts that '[t]he Defence also appear to argue that Hor Namhong and Keat Chhon should be summoned because of the ostensible symbolic, rather than evidentiary, value of such an action.'[25] While incorrect as such (see paragraphs 4-6, *supra*) the observation by the ICP does touch upon an important issue: symbolism. In a country like Cambodia, where impunity and lack of accountability before the courts of government officials is of major concern,[26] there *does* lie value in symbolism. Forceful support from the ICP for the summonsing of high-ranking CPP officials who have brazenly flouted validly issued summonses might not amount to more than symbolism; yet it would matter tremendously for the development of the rule of law in Cambodia. The ICP's taciturn approval of the status quo, on the other hand, amounts to another symbol – this one, less constructive.

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[22] ICP Original Response, fn. 2. The ICP also points out that the question during the investigative stage is whether the prospective testimony is relevant to the introductory submissions, whereas the question during the trial phase is whether it is relevant to the Closing Order. *See* ICP Response, para. 11. The ICP does not even try to show what bearing that has – indeed, could have, in light of the fact that the relevant entities and command structures are so central to both documents – on his analysis. In any case, as noted here, the ICP has already conceded that the testimony is relevant.

[23] ICP Response, para. 8.

[24] Motion in Support, para 6.

[25] ICP Response, para. 8.

[26] *See*, among others, HRW Report, p. 5 ('Senior officials are not held accountable under law.'), 64 ('As early as 1995, UN special representative Michael Kirby recommended that a high-level interdepartmental committee be established to investigate and report on judicial complaints concerning refusal or failure of military, police, or other officials to execute court warrants directed at military, police, or political figures or members of their families. Two years later no improvements were evident and his successor, Thomas Hammarberg, called for determined action to address impunity. Hammarberg's successors […] have repeated these calls. Not only have they been unsuccessful, but Hun Sen has frequently responded to their allegations with angry attacks on their character.').