

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

FILING DETAIL

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**LIST OF DOCUMENTS TO BE PUT BEFORE THE
CHAMBER DURING THE FIRST MINI-TRIAL**

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I. INTRODUCTION

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits its first list of specific documents to be put before the Chamber during the first mini-trial in Case 002. These documents are listed in the attached annex, along with additional information related to their location, content, source, and relevance. Copies of documents not already on the case file are attached. The Defence takes the position that the instant submission (and its attachments) should be classified as a public. In any event, the Defence will treat it as such.

II. SUBMISSIONS

A. The Documents Are Admissible

2. Pursuant to the Cambodian Code of Criminal Procedure (the ‘CCP’),¹ the ECCC Internal Rules (the ‘Rules’),² and the relevant international jurisprudence,³ the documents hereby proffered by the Defence meet the *prima facie* test of admissibility.⁴

1. The Documents Are Relevant

3. As submitted at the recent hearing on documentary evidence, given the Chamber’s decision to sever Case 002, the ‘central thread’ of the instant proceedings is Nuon Chea’s alleged participation in the so-called ‘population movement phases 1 and 2’.⁵ Clearly, this encompasses the various motivations attributed to the Accused with respect to his involvement in such activity, as well as the number of any deaths resulting from the alleged transfers. Additionally, as consistently pleaded by the Defence, ‘political interference is always relevant, at any point of the proceedings, no matter what the topic is’.⁶ As set out in greater detail in the annex to this submission, each tendered document relates to one or more of these specific issues.⁷

¹ See para 5, *infra*.

² Rule 87(1) provides, in relevant part: ‘Unless provided otherwise in these [Rules], all evidence is admissible.’

³ See, e.g., Document No E-1/27.1, ‘Transcript of Trial Proceedings’, 16 January 2012 (Trial Day 15), ERN 00770067–00770197, pp 31:16–32:5.

⁴ See Draft ‘Transcript of Trial Proceedings’, 26 January 2012 (Trial Day 22), ERN [not yet assigned], p 86:9–22.

⁵ Document No E-124, ‘Severance Order Pursuant to Internal Rule 89ter’, 22 September 2011, ERN 00743502–00743502 (the ‘Severance Order’), para 5(a); see also Draft ‘Transcript of Trial Proceedings’, 19 January 2012 (Trial Day 18), ERN [not yet assigned], p 85:16–24.

⁶ Document No E-1/23.1, ‘Transcript of Trial Proceedings’, 15 December 2011 (Trial Day 11), ERN 00762459–00762563, p 101:10–11. See also Document No E-116/1, ‘Immediate Appeal Against the Trial

2. The Documents Are Reliable

4. In keeping with the approach adopted by the Office of the Co-Prosecutors (the ‘OCP’) regarding the initial indicia of reliability of its proffered documents,⁸ the Defence submits that the ‘internal characteristics’ and ‘external features’ of the various documents tendered by the Defence suggest that each one is *prima facie* reliable. Twenty-one of the tendered documents are already part of the case file, and nearly all of them have been utilized by one or more of the parties to these proceedings. With the exception of the final two items on the list, the remaining documents are all publicly available. A number of the documents are contained in the archives of the Documentation Center of Cambodia (‘DC-Cam’), and many of their authors are well-known and available to testify (or otherwise vouch for their authorship).⁹ In sum, there is nothing to suggest, at this stage, that any of the tendered documents is not what it purports to be.

3. There is No Advance-Notice Requirement Under Cambodian Law

5. As submitted on numerous occasions, the CCP provides no advance-notice requirement with respect to the right to present documentary material at trial.¹⁰ Article 334 provides: ‘*Until the end of the trial hearing, the accused [...] may [...] submit all documents and evidence that [he] think[s] will be conducive to ascertain[ing] the truth.*’¹¹ Upon information and belief, this provision has not been qualified, limited, or otherwise altered by any piece of binding Cambodian legislation and/or jurisprudence.

Chamber Decision Regarding the Fairness of the Judicial Investigation’, 10 October 2011, ERN 00746636–00746658.

⁷ *N.B.* The Defence has previously notified the Chamber and the parties of its intention to proffer documentary evidence related to, among other things: (i) certain topics identified in the Defence’s Requests for Investigative Action; (ii) the first two phases of the alleged population movement, including the possible criminal activity of individuals who failed to appear before the OCIJ pursuant to validly issued summonses; (iii) the alleged overall death toll, including individuals who may have died in the implementation of the so-called ‘K-5 Plan’; and (iv) political interference at the ECCC. See Document No E-9/26, ‘Notice of Joinder in Ieng Sary’s Initial Submissions Regarding Documents to Be Relied Upon at Trial & Additional Submissions Regarding New Documents’, 19 April 2011, ERN 00665543–00665546, para 5; Document No E-131/1/9, ‘Objections, Observations, and Notifications Regarding Various Documents to Be Put Before the Trial Chamber’, 14 November 2011, ERN 00752669–00752684, para 32–34.

⁸ See Document No E-158, ‘Co-Prosecutors’ Rule 92 Submission Regarding Indicia of Reliability of the 978 Documents Listed in Connection with Those Witnesses and Experts Who May Be Called During the First Three Weeks of Trial’, 23 December 2011, ERN 00763101–00763158, para 3.

⁹ See para 8, *infra*.

¹⁰ See, e.g., Document No E-1/27.1, ‘Transcript of Trial Proceedings’, 16 January 2012 (Trial Day 15), ERN 00770067–00770197, p 31:6–14.

¹¹ CCP, Article 334 (emphasis added).

6. The Chamber has attempted—through a strained interpretation of Rules 87(3) and 87(4)—to impose an ‘extremely high threshold’ on the admission and use of ‘documents not filed in accordance with previous deadlines’.¹² Apart from the Chamber’s failure to provide any legal support for its position, the imposition of artificial deadlines and hurdles is not only at odds with the letter and spirit of Article 334, it appears designed to somehow chastise the Defence for its insistence on proceeding in accordance with applicable Cambodian procedure and practice.¹³ As the Defence has argued, ‘[t]he primary role of this Chamber, rather than simply mediating evidentiary disputes between the parties is [...] to affirmatively ascertain the truth’.¹⁴
7. In any event, very little of the proffered material can be considered ‘new’.¹⁵ As noted, most of these documents are already on the case file and/or referenced in various party submissions. Additionally, the Defence has herein provided a ‘reasoned submission’ as to why all of the documents should be admitted.¹⁶ They are clearly relevant to issues at stake in Case 002/01 and are, therefore, ‘conducive to ascertain[ing] the truth’ pursuant to Article 334 of the CCP. Furthermore, as the number of documents is extremely limited, no party could reasonably claim any prejudice stemming from their admission at this stage. To the extent that any of the documents are not currently available in all three official languages of the ECCC, the Defence has made the necessary requests for translation to the tribunal’s Interpretation and Translation Unit.

¹² Document No **E-131/1**, Trial Chamber Memorandum regarding ‘Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibit, and response to Motion E-109/5’, 25 October 2011, ERN 00747683–00747686 (the ‘Document Memo’), p 4 (‘[D]ocuments not filed in accordance with previous deadlines must satisfy, in accordance with Internal Rule 87(3), the extremely high threshold of showing that they could not have been disclosed within the applicable deadlines with the exercise of due diligence, and that their late admission is vital in the interests of justice. It follows that most belated requests to admit documents are unlikely to be successful.’)

¹³ See Document No **E-131/1/9**, ‘Objections, Observations, and Notifications Regarding Various Documents to Be Put Before the Trial Chamber’, 14 November 2011, ERN 00752669–00752684, para 25 (‘Regarding the Chamber’s position with respect to the admission of new documents at trial, it is baffling that judges in a civil-law trial should wish to articulate such an exclusionary approach to potential evidence [...]. The primary role of this Chamber, rather than simply mediating evidentiary disputes among the various parties, is to affirmatively ascertain the truth regarding the charges contained in the Modified Indictment. Yet the judges appear to have already preempted the admission of as-yet unseen and potentially relevant evidence through the imposition of an unnecessarily strict standard (with no basis in law). Worse still, it seems they have done so with a view to castigating the Defence for asserting and standing by its position with respect to applicable Cambodian procedure. Despite this aggressive posture, the Defence will continue to assist the Chamber in its search for the truth by submitting any new relevant evidence in due course.’)

¹⁴ Document No **E-1/27.1**, ‘Transcript of Trial Proceedings’, 16 January 2012 (Trial Day 15), ERN 00770067–00770197, p 39:1–3.

¹⁵ See Document Memo, p 4. *N.B.* Certain documents not already on the case file, in particular those related to the ‘K-5 Plan’, have only recently become available to the Defence; they could not have been submitted at an earlier stage.

¹⁶ See Rule 87(4).

B. The Documents Will Be Further Authenticated Through Witnesses

8. The Defence is not in possession of hard-copy original versions of any of the documents tendered. As noted above, the copies contained on the case file and attached hereto do contain sufficient indicia of relevance and reliability for their admission before the Chamber at this stage of the proceedings.¹⁷ Moreover, as these documents go to contextual and background issues (as opposed to the acts and conduct of the accused), a more flexible approach to their admission should be applied.¹⁸ With respect to each of the documents tendered, the Defence has previously requested the appearance of a particular witness through which issues of authenticity (as well as content) could be addressed. However, the Chamber has yet to definitively dispose of such request. In any event, the Defence intends to further authenticate the documents and verify their content by putting them to various witnesses already scheduled to appear before the Chamber. And the Defence will seek to call additional individuals from its previously-filed witness list (including Hun Sen and other representatives of the Royal Government of Cambodia) who have not yet been slated to appear by the Chamber.

C. Additional Documents Will Be Submitted in Due Course

9. In accordance with the applicable Cambodian procedure and practice, Nuon Chea hereby reserves his right to rely upon any and all documentary material he considers conducive to ascertaining the truth at any time ‘until the end of the trial hearing’.¹⁹

III. CONCLUSION

10. For the reasons stated herein and previously, the Defence requests the Chamber to admit the documents referenced in the attached annex as evidence in Case 002/01. The Defence readily concedes that the issue of how much weight or probative value, if any,


¹⁷ See, e.g., Document No E-1/27.1, ‘Transcript of Trial Proceedings’, 16 January 2012 (Trial Day 15), ERN 00770067–00770197, pp 33:21–35:2.

¹⁸ See paras 3–4, *supra*.

¹⁹ CCP, Article 334. *N.B.* This includes any document relevant to the cross-examination of witnesses called by the Chamber and/or other parties. See, e.g., email from Senior Legal Officer to the parties re ‘Responses to questions posed during the Trial Management Meeting’, 8 April 2011, (‘There is no obligation to submit documents assumed to be of relevance to witnesses called by other parties.’)

should be assigned to the proffered material is to be determined at the end of the proceedings in light of all other evidence put before the Chamber.

CO-LAWYERS FOR NUON CHEA

A handwritten signature in black ink, appearing to read 'Arun' with a long horizontal stroke underneath.

SON Arun

A handwritten signature in black ink, appearing to read 'Michiel PESTMAN' followed by a flourish.

Michiel PESTMAN & Victor KOPPE