

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S LIST OF DOCUMENTS  
TO BE PUT BEFORE THE CHAMBER DURING THE FIRST MINI-TRIAL**

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## I. INTRODUCTION

1. On 31 January 2012, the defence team for Nuon Chea (“Defence”) filed its *List of Documents to be Put before the Chamber during the First Mini-Trial* (“List of Documents”).<sup>1</sup> The List of Documents includes 35 documents, none of which have previously been proposed by the Defence and 12 of which are new documents within the meaning of Rule 87(4).<sup>2</sup> The Defence requests the Trial Chamber to admit all of the documents on the List of Documents, arguing that the documents are relevant and have sufficient indicia of reliability. In addition, the Defence argues that although it has not previously complied with the Chamber’s orders to file document lists and notified its intention to rely on these documents, it is not precluded from doing so at this stage because Cambodian law does not include an “advance notice requirement”.<sup>3</sup>
2. In response, the Co-Prosecutors submit that, due to the Defence’s willful non-compliance with the Chamber’s previous directions to file document lists pursuant to Rule 80(3) and its failure to meet the requirements of Rule 87(4) in respect of its proposed new documents, the Trial Chamber should reject the List of Documents. The Co-Prosecutors observe, however, that 14 of the documents on the List of Documents have either already been put, or are proposed to be put, before the Chamber at the request of the Co-Prosecutors or by the Chamber on its own motion. These documents are identified in Annex A to this response. The Co-Prosecutors clarify that they will not oppose the Defence making use of these particular documents at trial.

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<sup>1</sup> **E131/1/13** List of Documents to be put before the Chamber during the First Mini-Trial, 31 January 2012 (notified 1 February 2012) and accompanying Annex 1 E131/1/13.1 (notified 2 February 2012). The present response is filed within the time limit set out in Practice Directions 8.3 and 8.5, calculated as 10 days from the day following notification of Annex 1.

<sup>2</sup> It is noted that there are 14 documents on the List of Documents that do not have case file numbers. However, two of these 14 documents (documents 22-23) were included on the Co-Prosecutors’ Document List submitted in April 2011 prior to the opening of the trial. As such, the Co-Prosecutors submit that they are not new documents within the meaning of Rule 87(4). It is further noted that nine of the 12 new documents appear to have been added to the case file as annexures to the List of Documents. See documents 24-29, 32-33, and 35 on the List of Documents added to the Case File as Reference as, respectively, E131/1.13.2; E131/1.13.12; E131/1.13.3; E131/1.13.4; E131/1.13.5; E131/1.13.6; E131/1.13.8; E131/1.13.9 and E131/1.13.11.

<sup>3</sup> **E131/1/13** List of Documents, *supra* note at 1 at paras 2-7.

## II. RELEVANT BACKGROUND

3. On 17 January 2011, the Trial Chamber directed the parties to file a list of the documents they intended to rely on at trial.<sup>4</sup> On 27 June 2011, during the initial hearing for Case 002, the Trial Chamber directed the parties to identify the documents and exhibits they considered to be relevant to the first phase of the trial.<sup>5</sup> In response to the Chamber's orders, the Defence refused to identify specific documents to be introduced at trial. Instead the Defence argued that the Chamber's orders were contrary to Article 334 of the Cambodian Code of Criminal Procedure ("CCCP") and reserved the "right" to introduce documents at any later point of the trial.<sup>6</sup>
4. On 5 August 2011, the Co-Prosecutors filed a submission to the Trial Chamber in which they noted the Defence's "willful and unapologetic" non-compliance with the Trial Chamber's orders and requested the Trial Chamber to preclude the Defence from introducing at trial documents that were not identified pursuant to those orders.<sup>7</sup> On 18 October 2011, the Trial Chamber issued a memorandum in which it referred to the Co-Prosecutors' request and clarified that documents not identified in accordance with the Trial Chamber's deadlines would only be admitted at trial where the moving party could demonstrate that the documents could not have been disclosed earlier with the exercise of due diligence and that it was in the interests of justice for the documents to be admitted.<sup>8</sup>
5. In the same memorandum, the Trial Chamber ordered the parties to file a list of documents they would seek to admit in connection with the witnesses and civil parties who may be called during the first session of the first trial.<sup>9</sup> Again the

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<sup>4</sup> E9 Trial Chamber's order to file material in preparation for trial, 19 April 2011.

<sup>5</sup> E1/4.1 Public Transcript of Initial Hearing; 27 June 2011 at p. 25.

<sup>6</sup> E9/26 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 and E109/3 Observations regarding documents considered relevant to the early segments of the trial, 22 July 2011.

<sup>7</sup> E109/5 Request regarding Nuon Chea's second failure to comply with the Trial Chamber's orders to provide their list of documents and exhibits which they intend to put before the Chamber, 5 August 2011 ("Co-Prosecutors' Request"). See also E109/5/2 *Co-Prosecutors' reply to Nuon Chea's response regarding his second failure to comply with the Trial Chamber's orders to provide their list of documents and exhibits which they intend to put before the Chamber*, 22 August 2011 ("Co-Prosecutors' Reply").

<sup>8</sup> E131/1 Trial Chamber Memorandum entitled *Witness lists for early trial segments; deadline for filing of admissibility challenges to documents and exhibits and response to motion E109/5*, 25 October 2011 at p.4 (an advance courtesy copy of the memorandum was communicated to the parties by email on 18 October 2011).

<sup>9</sup> *Ibid.*, p.1.

Defence failed to comply with this order, reiterating its position that it was not required to do so under Cambodian law.<sup>10</sup> The Defence instead provided, on an “indicative and entirely provisional” basis, general information regarding the types of documents it intended to proffer in “due course”.<sup>11</sup> On 5 January 2012, the Defence re-iterated its intention to put these types of documents before the Chamber at some point.<sup>12</sup> On 31 January 2012, the Defence finally filed the foreshadowed List of Documents whilst at the same time reserving the “right” to rely upon any additional documents at any point during the trial.<sup>13</sup>

### III. ARGUMENT

#### A. The Defence has not provided a legitimate justification for its refusal to comply with the Chamber’s previous orders to file document lists

6. As noted above, the Chamber has already ruled that parties wishing to rely on documents that were not identified in accordance with its previous orders, would need to demonstrate that the documents could not have been disclosed earlier with the exercise of due diligence and that it is in the interests of justice for the documents to be admitted.<sup>14</sup> In filing the present List of Documents, more than nine months after the initial deadline, the Defence has provided no justification for its failure to previously identify which documents it intended to rely on at trial. On the contrary, in its filing the Defence disputes the Chamber’s ruling as “at odds with the letter and spirit” of Article 334 of the CCCP which, it argues, does not require parties to provide advance notice of documents they intend to rely on at trial.<sup>15</sup>
7. The argument that, in the case of a real or apparent conflict of procedural rules, the general provisions of the CCCP have priority over the specifically tailored Internal Rules has been dismissed by both the Pre-Trial Chamber and the Trial Chamber. As the Pre-Trial Chamber has stated, in a passage subsequently approved by the Trial Chamber:

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<sup>10</sup> E131/1/9 Objections, observations and notifications regarding various documents to be put before the Trial Chamber, 14 November 2011 (“Nuon Chea Objections, Observations and Notifications”) at paras. 14,15, 27.

<sup>11</sup> *Ibid*, at paras. 28-34.

<sup>12</sup> E131/1/12 Document objections & further submissions pursuant to Rule 92, 5 January 2012 at paras. 4-5.

<sup>13</sup> E131/1/13 List of Documents, *supra* note 1 at para.9.

<sup>14</sup> E131/1 Memorandum, *supra* note 8 at p.4

<sup>15</sup> E131/1/13 List of Documents, *supra* note 1 at paras. 5-6.

*The Internal rules form a self-contained regime of procedural law related to the unique circumstances of the ECCC ... They do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.<sup>16</sup>*

8. The fact that the Defence does not agree with the Chamber’s ruling on this issue and maintains its earlier position concerning the hierarchy of applicable procedural rules<sup>17</sup> is not a legitimate basis on which to flout trial management orders of the Chamber. Accordingly, the Co-Prosecutors maintain their earlier position that the Defence should be precluded from introducing at this stage documents that would have been identified earlier had a good faith and reasonably diligent effort been made to comply with the Chamber’s orders.<sup>18</sup>

**B. The Defence has not met the requirements set out in Rule 87(4) for the admission of “new” documents**

9. Further to the above, the Co-Prosecutors submit that, the Defence has not met the requirements of Rule 87(4) in respect of 12 new documents on the List of Documents.<sup>19</sup> This Rule provides that new evidence may be admitted after the opening of the trial where it is conducive to ascertaining the truth. It requires the requesting party to submit a “reasoned submission” and to satisfy the Chamber that the evidence was not available prior to the opening of the trial.
10. Contrary to the Defence’s assertion, the brief description provided in the filing of the purported relevance of each document does not amount to a “reasoned

<sup>16</sup> E55/I/8 Decision on Nuon Chea’s appeal against order refusing request for annulment, 26 August 2008 at para. 14 (Pre-Trial Chamber); cited with approval by the Trial Chamber in E51/14 Decision on Nuon Chea’s Preliminary Objection alleging the unconstitutional character of the ECCC Internal rules, 8 August 2011 at para. 7.

<sup>17</sup> In an earlier filing the Defence stated that it “does not accept the position advanced on this point by the Trial Chamber” and that it would continue to reiterate its objections for the sake of an “eventual appellate record”. It further clarified that “[d]espite the erroneous position recently advanced by the Trial Chamber, the Defence stands by [its earlier] position.” E131/1/9 Nuon Chea Objections, Observations and Notifications *supra* note 10 at note 52 and para.27.

<sup>18</sup> See E109/5 Co-Prosecutors’ Request and E109/5/2 Co-Prosecutors’ Reply, *supra* note 7, for arguments in support of the imposition of preclusive sanctions.

<sup>19</sup> Documents 24-35 on the List of Documents.

submission” as required by the Rule. Nor, as noted above, has the Defence made any attempt to demonstrate that the documents were not available before the opening of the trial.

**C. The Co-Prosecutors do not object to the Defence relying on documents that have already been put, or proposed to be put, before the Chamber**

11. The Co-Prosecutors observe that four of the 35 documents on the List of Documents have already been put, or proposed to be put, before the Chamber of the Chamber’s own motion. Specifically, three of the documents, being documents cited in the footnotes to the historical background paragraphs of the Closing Order, have already been assigned E3 numbers.<sup>20</sup> Another document is listed in the footnotes to paragraph 222 of the Closing Order concerning forced movement.<sup>21</sup> In accordance with the Chamber’s prior directions, this document will be considered put before the Chamber once that paragraph is read out in court.<sup>22</sup> In addition, a further ten documents on the List of Documents also appear on the Co-Prosecutors’ list of documents filed in April 2011.<sup>23</sup> This includes eight documents with case file reference numbers<sup>24</sup> and two documents that have not yet been assigned case file numbers.<sup>25</sup>
12. Whilst maintaining that the Defence should be precluded from introducing documents at this stage that could and should have been identified previously, the Co-Prosecutors clarify that they will not oppose the Defence making use at trial of

<sup>20</sup> IS 2.6 assigned E3/49 (document 1 on the List of Documents); IS 4.1 assigned E3/20 (document 2 on the List of Documents); D313/1.2.2 assigned E3/88 (document 16 on the List of Documents).

<sup>21</sup> D178.11 (document 10 on the List of Documents) is cited in footnotes 785 and 788 in support of paragraph 222 of the Closing Order.

<sup>22</sup> See **E141** Trial Chamber memorandum, 17 November 2011 p.2-3 and **E162** Trial Chamber memorandum, 31 January 2012 at para. 3.

<sup>23</sup> **E9/31** Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011 (“Co-Prosecutors Document List”).

<sup>24</sup> IS 4.25 (document 3 on List of Documents / Annex 19. 165 on Co-Prosecutors’ Document List); D210/5 (document 12 on List of Documents / Annex 12.797 on Co-Prosecutors’ Document List); D210/6 (document 13 on List of Documents/Annex 12. 1097 on Co-Prosecutors’ List); D222/1.17 (document 14 on List of Documents; Annex 19. 244 on Co-Prosecutors’ Document List); D269/9.1.15 (document 15 on List of Documents; Annex 12. 796 on Co-Prosecutors’ Document List); D313/1.2.4 (document 17 on List of Documents; Annex 19. 178 on Co-Prosecutors’ Document List); D313/1.2.406 (document 18 on List of Documents; Annex 12. 87 on Co-Prosecutors’ Document List); (document 19 on List of Documents; Annex 18. 60 on Co-Prosecutors’ Document List).

<sup>25</sup> Document 22 on List of Documents / Annex 19.90 on Co-Prosecutors’ Document List; Document 23 on List of Documents / Annex 19.89 on Co-Prosecutors’ Document List.


the 14 documents mentioned above. These documents are identified in Annex A to this response for ease of reference.

#### IV. RELIEF REQUESTED

13. For the reasons expressed above, the Co-Prosecutors request the Trial Chamber to:

- (1) **reject** the List of Documents; and
- (2) **note** that the Co-Prosecutors will not oppose the Defence relying on the 14 documents identified in Annex A to this response.

Respectfully submitted,

Date	Name	Place	Signature
13 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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