E212/1

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RESPONSE TO NUON CHEA'S REQUEST FOR A PUBLIC ORAL HEARING REGARDING THE CALLING OF DEFENSE WITNESSES

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I. INTRODUCTION

1. On 22 June 2012, the defence for Nuon Chea ("Defence") submitted a *Request for a Public Oral Hearing Regarding The Calling of Defence Witnesses*[1] ("Request"). The Request was notified to the Co-Prosecutors on 25 June 2012. The Defence request a public, oral hearing pursuant to Rule 80*bis* of the Internal Rules ("Rules") for the Trial Chamber ("Chamber") to hear submissions from the parties on the selection of witnesses and experts proposed by the Defence.

2. The Co-Prosecutors hereby respond to the Defence Request. The Co-Prosecutors submit that an additional public, oral hearing is not required in this instance and that the Request should be dismissed in its entirety. Should the Chamber find that the present circumstances give rise to a risk of prejudice to the fair trial rights of Accused Nuon Chea, the Co-Prosecutors submit that the appropriate remedy, in the first instance, would be for the Chamber to issue a written decision on the selection of witnesses and experts proposed by the Defence and, at the end of the first phase of the trial, afford an opportunity for written submissions from the Defence as to whether additional witnesses should be heard, in the exercise of the Accused's fair trial rights.

II. PROCEDURAL HISTORY

3. The instant Request follows a lengthy history of submissions from the Defence, spanning both the pre-trial and trial phases of proceedings. For brevity, the Co-Prosecutors limit their review only to the most immediately relevant submissions.

4. On 17 January 2011, the Chamber directed the parties to file lists of proposed witnesses, experts and Civil Parties for the trial proceedings in Case 002,[2] according to prescribed templates[3] ("Proposed Lists").[4] The parties were required to provide for each witness, *inter alia*, "[t]he estimated length of time required to testify", "[a] summary of the facts on which each proposed witness is expected to testify" that is "sufficiently detailed to allow the Chamber and the other Parties to understand fully the nature and content of the proposed testimony", and "the points of the Indictment

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1 **E212** Request for a Public Oral Hearing Regarding the Calling of Defence Witnesses ("Request"), 25 June 2012 ("Request").

2 **E9** Order to File Material in Preparation for Trial, 17 January 2011 ("Order").

3 **E9.2** Proposed List of Witnesses, 17 January 2011; **E9.3** Proposed List of Civil Parties, 17 January 2011; and **E9.4** Proposed List of Experts, 17 January 2011.

4 **E9** Order, *supra* note 2 at para. 6.

to which each proposed witness, Civil Party or expert is expected to testify, including, where possible, the exact paragraph(s) of the Closing Order and the specific counts."[5] The Chamber afforded the parties until 23 February 2011 to file this information.[6]

5. On 15 February 2011, the Defence proposed 527 witnesses, 13 experts and five Civil Parties for the consideration of the Chamber.[7] By comparison, the Co-Prosecutors proposed 247 witnesses, 16 experts and 32 civil parties;[8] Accused Khieu Samphan proposed 35 witnesses (*in addition* to 26 witnesses on the Co-Prosecutors' list) and 32 experts;[9] Accused Ieng Sary proposed five experts;[10] and the Lead Co-Lawyers for the Civil Parties proposed 16 witnesses, 15 experts and 140 Civil Parties[11] for questioning by the Chamber.

6. Amongst the 527 witnesses proposed by the Defence, at least 134 were identified as being relevant to historical context. The entirety of the description provided for those individuals was "Pre-1975 Conditions", "Post-1975 Conditions", "US Involvement", and/or "CIA Involvement". The Defence list included 73 diplomats, 57 foreign government officials, 19 embassy staff, 59 members of staff of international organisations, 15 foreign political party members, 11 foreign delegates, 30 academics or historians, and 50 journalists, many of whom were proposed to testify solely regarding either the "pre-1975 conditions" in Cambodia or the conduct of the United States during that period.

7. The International Co-Prosecutor filed initial objections to the Defence's Proposed List on 7 March 2011, with 10 annexes detailing objections to specific witnesses and categories of witnesses ("Initial Objections").[12] The International Co-Prosecutor submitted that the proposed witness list failed to comply with the Chamber's Order on three grounds: (1) the Proposed List was not definitive, but instead provided multiple

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5 **E9** Order, *supra* note 2 at paras. 2, 6.
6 **E9** Order, *ibid.*
7 **E9/4/4.4** List of Proposed Witnesses, Experts, and Civil Parties, 15 February 2011.
8 **E9/4** Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, including Confidential Annexes 1, 2, 3, 3a, 4 and 5 28 January 2011.
9 **E9/4/6** Listes de Témoins et Experts Proposés, 21 February 2011.
10 **E9/4/2** Ieng Sary's List of Proposed Experts and Notification Concerning his Witness and Civil Party Lists, 14 February 2011.
11 **E9/8** Civil Party Lead Co-Lawyers' Rule 80 Summaries and Expert Qualifications with Points of the Indictment, Including Confidential Annexes, 23 February 2011.
12 **E9/14/1/1** Co-Prosecutors' Objection to Witnesses and Experts Proposed by the Other Parties, with 11 Confidential Annexes, 7 March 2011.

witnesses in relation to what the Defence termed "recurring categories", and made a "deliberate omission" as to preferences among those witnesses; (2) the summaries, in most cases, did not provide sufficiently detailed information on the nature of the witnesses' proposed testimony to allow the Parties to understand how the testimony purportedly related to the issues at trial; and (3) the Defence did not provide time estimates for the testimony of their proposed witnesses.[13] In addition, the contact information provided by the Defence for the proposed witnesses on pre-1975 conditions was over 30 years outdated or otherwise inadequate. [14]

8. The International Co-Prosecutor also objected to certain witnesses from the Defence's Proposed List both specific and categorical bases.[15] In relation to the witnesses that the Defence claimed would testify regarding "pre-1975 conditions", the International Co-Prosecutor noted that the summary provided by the Defence of the proposed witness testimony tended to state that the witness would offer insight into pre-1975 conditions but did "not specify those conditions or explain how such testimony relates to the Closing Order." [16] In relation to those witnesses that the Defence claimed would testify regarding US foreign policy and operations in Cambodia, the International Co-Prosecutor similarly observed that "Nuon Chea fails to specify the reasons why these witnesses are proposed or the specific points in the indictment on which they will testify."[17] The International Co-Prosecutor expressed similar concerns regarding the deficiencies of descriptions of witnesses that the Defence claimed would provide information on other contextual and historical matters.[18]

9. On 15 March 2011, with an extension of time granted to consider the Defence's Proposed List, which was filed solely in English, the National Co-Prosecutor joined the Initial Objections and added further objections to five witnesses proposed by the Defence, each of whom held senior positions in the executive or legislative branches

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13 **E9/14/1/1** Initial Objections, *ibid.* at paras. 13-17.

14 **E9/4/4.4** Annex A: Proposed Witness List, 15 February 2011. For example, the only contact information provided by the Defence for witnesses who worked for UNICEF in the early 1970's in Phnom Penh was the UNICEF office in New York. For witnesses who worked for foreign governments in Phnom Penh during that same time period, the Defense simply listed the Ministry of Foreign Affairs for their respective countries.

15 **E9/14/1/1** Initial Objections, *supra* note 12.

16 **E9/14/1/1** Initial Objections, *ibid.* at para. 22.

17 **E9/14/1/1** Initial Objections, *ibid.* at para. 24.

18 **E9/14/1/1** Initial Objections, *ibid.* at paras. 27-29.

of the Royal Government of Cambodia ("Further Objections").[19] In this regard, the International Co-Prosecutor observed that the posing of written questions from the Parties through the Chamber, in lieu of actual appearance, was a practice adopted by other inquiries and courts in respect of witnesses who are sensitive on account of current position or responsibilities.[20]

10. On 25 October 2011, the Trial Chamber released a *Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002*.[21] The Trial Chamber explained that the witnesses included in this list concerned the first four topics to be considered at trial. The Trial Chamber also stated that "[w]itnesses, experts and Civil Parties relevant instead to the factual portions of the first trial in Case 002 (concerning population movement phases one and two) will be communicated to the parties at a later date."[22]

11. On 8 February 2012, during the oral hearing and in response to a request by the Defence, the Trial Chamber invited the Defence to submit a list of additional witnesses it considered relevant to the ongoing trial segment on Historical Background.[23] The following day, the Defence submitted a list of 47 witnesses regarding historical context, all of whom were part of the Defence's initial list of witnesses.[24]

12. On 17 February 2012, the Trial Chamber rejected the Defence request, stating that: "These witnesses were considered by the Trial Chamber in formulating its provisional witness list ... and the Nuon Chea Defence filing ... fails to demonstrate why any of these 47 witnesses should be heard immediately."[25] The Trial Chamber noted, however, that all proposed witnesses remain under consideration by the Chamber until they are called or rejected, and that it would shortly be issuing its first list of rejected witnesses, experts, and/or Civil Parties.[26]

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19 **E9/14/1/1/1** Co-Prosecutors' Further Objections and Observation to the Witnesses and Experts Proposed by the Other Parties, 11 March 2011.

20 **E9/14/1/1/1** Further Objections, *ibid.*

21 **E131/1.1** Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, 25 October 2011 ("Partial List").

22 **E131/1.1** Partial List *ibid.*

23 **E1/40.1** Transcript, 8 February 2012 at pp. 32 ln. 32-35 & 33 ln. 1-9.

24 **E155/1.1** List of Additional Witnesses Relevant to Historical Background, 9 February 2012.

25 **E172** Memorandum: Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/1 ("Memorandum"), 21 February 2012 at p. 4.

26 **E172** Memorandum, *ibid.*

13. On 16 March 2012, the Defence filed a further *Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context*.[27] The Co-Prosecutors responded on 29 March 2012, submitting that this latest Defence request amounted to a mere re-litigation of "previous deficient filings."[28]

III. ARGUMENT

A. Rule 80*bis* does not require hearing of oral submissions from the Defence on the content of its Proposed List

14. Much of the Request is premised on the assumption that Rule 80*bis* necessitates "oral arguments for and against the calling of witnesses."[29] The Request makes repeated reference to the "plain language" of Rule 80*bis*[30] in support of the position that a public, oral hearing on the Defence's Proposed List is a legal requirement of Rule 80*bis*. Equating the requirement that the Chamber hold a public, oral hearing on potential witnesses and experts with the requirement that the Chamber consider the submissions of all Parties on their proposed witnesses, the Defence claims that the Chamber is "in breach of its obligations" in not hearing its oral representations concerning potential witnesses from its Proposed List in assessing whether to call these witnesses at trial.[31]

15. The Co-Prosecutors submit that this position rests upon a mischaracterisation of the procedure required by Rule 80*bis*, which provides that the Chamber "shall consider the lists of potential witnesses and experts submitted by the parties" at the Initial Hearing, which must be "open."[32] Where the Chamber determines that the hearing of a proposed witness or expert is not "conducive to the administration of justice," it shall exercise its power to reject the given witness.[33]

16. The Co-Prosecutors observe that Rule 80 does not elaborate upon the content or form of the Chamber's "consideration" of Proposed Lists. The requirement that the

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27 **E182** Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context, 16 March 2012.

28 **E182/1** Co-Prosecutors' Response to Nuon Chea's "Request to Hear Defence Witnesses and to take other Procedural Measures in order to Properly Assess Historical Context", 29 March 2012.

29 **E212** Request, *supra* note 1 at para. 15.

30 *Ibid* at paras. 14 and 15.

31 *Ibid* at para. 14.

32 Rule 80*bis*.

33 *Ibid.*

Chamber "shall consider" the proposed witness and expert lists at the initial hearing omits any mention of *oral* argument. Indeed, the Defence acknowledged these ambiguities in a previous oral request for "guidance" as to the meaning of the word "consider" in Rule 80.[34]

17. The Co-Prosecutors submit that the proper interpretation of Rule 80*bis*, given the Chamber's trial management responsibilities,[35] affords broad discretion to limit the nature and scope of the consideration given to "lists of potential witnesses and experts" at the Initial Hearing.

18. The extent of the Chamber's discretion may be clarified by an examination of other Rules, which provide necessary context for the proper interpretation of Rule 80*bis*. Unlike Rule *80bis,* other Rules expressly envisage oral submissions from or exchanges between the Parties. For instance, Rule 79(7), concerning formal trial management meetings, states: "the purpose of this meeting will *inter alia* be to allow exchanges between the parties to facilitate the setting of the date of the initial or of the substantive hearings [...]"[36] As regards witness testimony, Rule 91 provides: "the Co-Prosecutors and all the other parties and their lawyers shall also be allowed to ask questions with the permission of the President"[37] and "the Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses [...]."[38] Similarly, Rule 89*bis* specifies that, prior to the questioning of any Accused, the Co-Prosecutors may "make a brief opening statement," to which the Accused or his or her lawyers may respond in turn.[39] As such, within the framework of the Internal Rules, Rule 80*bis*' silence regarding oral argument suggests that participation through oral submissions is not mandatory and, in the very least, falls within the discretion of the Chamber.

19. Rule 80 specifically empowers the Chamber to require Parties to file written submissions regarding their proposed witness lists: summaries that are "detailed" enough so as to "allow the Chamber and the other parties to understand fully the

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34 **E1/7.1** Transcript of Initial Hearing: Nuon Chea, Ieng Sary, Ieng Thirtih, Khieu Samphan, 30 June 2011 at p. 37, ln. 15-17 ("Transcript, Day 2").
35 *See* para. 24, below.
36 Rule 79(7).
37 Rule 91(2).
38 Rule 91(3).
39 Rule 89*bis*

nature and content of the proposed testimony."[40] Proposed Lists are submitted prior to the Rule *80bis* Initial Hearing. Given the expectation of detail in these submissions – with which the Defence has repeatedly failed to comply[41] – it falls within the Chamber's trial management discretion to set the appropriate scope of its "consideration" of potential witnesses and experts at the Initial Hearing. In the case at hand, the Chamber requested that parties list in "descending order of relevance and probative value" proposed new witnesses "most relevant to the first four trial segments" and further asked parties to provide "reasons for listing them in the priority indicated."[42] The availability of these written submissions on Proposed Lists limits the necessity of oral argument before a Chamber already appraised of the Parties' substantiated proposals.

20. The flexibility built into Rule 80*bis* indicates that the Chamber retains the discretion to pursue one of several routes of public "consideration" of Proposed Lists at the Initial Hearing: (i) to offer its own tentative conclusions on the Proposed Lists; (ii) to present its tentative list to the Parties and invite oral submissions; or (iii) to allow Parties to make oral submissions not only concerning the Chamber's tentative list, but also about the Parties' Proposed Lists. In the case at hand, the Chamber has taken a middle road, notifying the Parties of its tentative list and hearing the views of the Parties on the Chamber's determinations.[43] The Co-Prosecutors observe that the Chamber took care to notify Parties of this potential outcome at a Trial Management Meeting in advance of the Initial Hearing:

> [T]*he Chamber will, for instance, render summary decisions with respect to matters of judicial administration, including time limits applicable to responses and whether oral argument or responses are necessary.*[44]

21. While the Chamber has not afforded the Parties the opportunity to make oral submissions on individuals omitted from the its tentative list, the possibility remains: "[I]f any further public hearings for oral argument are required, those hearings will be

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40 Rule 80(3).

41 **E9/14/1/1** Initial Objections, *supra* note 12 at paras. 12-38; **E182/1** Additional Defence Witnesses Response, *supra* note 28 at paras. 10-11.

42 **E93** Directive in Advance of Initial Hearing Concerning Proposed Witnesses ("Directive"), 3 June 2011 at p. 2.

43 **E1/7.1** Transcript Day 2, *supra* note 34 at p. 2, ln. 7-9.

44 **E1/2.1** Transcript of Hearing: Trial Management Meeting ("Transcript Meeting"), 5 April 2011 at p. 8, ln. 19-22 [emphasis added].

announced giving as much notice as possible."[45] Inviting Parties to make additional submissions regarding witnesses of particular relevance to the first segments of the trial,[46] the Chamber has indicated that, as the case proceeds, it will provide more information about its acceptance or rejection of witnesses not on the tentative list.[47] Given that the Chamber has already allowed for substantive oral commentary and has also authorised written submissions on witnesses excluded to date, its rulings fall well within the discretion afforded by Rule 80*bis*.

B. The Accused's right to a fair and expeditious trial does not require hearing of oral submissions from the Defence on the content of its Proposed List

22. The Co-Prosecutors submit that the Chamber's practice concerning the Defence's Proposed Lists complies with the Accused's right to a fair and expeditious trial, the fundamental principles outlined in Rule 21 and the specific practice of other international criminal tribunals concerning witness testimony.

23. Rule 21 provides, in part, that ECCC proceedings "shall be fair and adversarial and preserve a balance between the rights of the parties"[48] and that such proceedings "shall be brought to a conclusion within a reasonable time."[49] At the Case 002 Trial Management Meeting, the Chamber stated:

> [T]*he complexities of such trials demand a degree of procedural flexibility, and as such the Chamber will exercise its discretion within the parameters set by the ECCC agreement, ECCC Law and Internal Rules to establish trial procedures required to ensure fair and expeditious proceedings.*[50]

In its *Directive in Advance of the Initial Hearing*, the Chamber further noted, "as the Accused are entitled to a *fair* and *expeditious* trial, there is a need to significantly reduce the number of witnesses to be called at trial."[51] The circumstances in Case 002 differ from the circumstances in Case 001. By the Initial Hearing in Case 001, during which the Chamber allowed parties to present oral arguments on parties' respective

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45 **E1/7.1** Transcript Day 2, *supra* note 34 at p. 48, ln. 11-13.
46 *See, e.g.*, **E1/7.1** Transcript Day 2, *ibid.* at p. 2, ln. 13-21.
47 **E172** Memorandum, *supra* note 25 at p. 4.
48 Rule 21(1).
49 Rule 21(4).
50 **E1/2.1** Transcript Meeting, *supra* note 44 at p. 8, ln. 12-17.
51 **E93** Directive, *supra* note 42 at p. 1.

witness lists, the Defence had proposed a total of thirteen witnesses.[52] In contrast, by the time of the Case 002 Initial Hearing, the Nuon Chea Defence alone had proposed a total of 527 witnesses,[53] with the cumulative total of proposed witnesses, experts, and Civil Parties standing at 1054: a simply unworkable number.[54] The Co-Prosecutors consistent position has been to support the public character of the proceedings; however, as "the managers of [the] case," the Chamber must oversee the selection of witnesses as it sees fit.[55] Taking these factors into account, the Chamber fulfilled its obligation under Rule 21 in determining that allowing oral argument concerning each of the 1054 proposed individuals (nor indeed, the 527 proposed by the Defence) would not favour a fair and expeditious trial.

24. This determination follows a line of jurisprudence at both the ICTY and ICTR that affords trial chambers broad discretion in discharging trial management responsibilities over witness testimony. In *Prosecutor v. Ndayambaje* et al., the ICTR Appeals Chamber, assessed whether a Trial Chamber abused its discretion as regards the procedure employed to reduce the number of witnesses, and referred to the Trial Chamber's "familiarity with the day-to-day conduct of the parties and practical demands of the case."[56] According deference to Trial Chamber's decision to condense the witness list, the Appeals Chamber further noted that the Trial Chamber's "duty to ensure the fairness and expeditiousness of trial proceedings entails a delicate balancing of interests":[57] a statement particularly pertinent to the case at hand. In *Prosecutor v. Karemera et al.*, the ICTR again affirmed the Trial Chamber's discretionary powers in the area of judicial administration, finding that Chamber "the authority best placed to address matters related to trial management."[58] The ICTY has adopted similar procedural rules. In *Prosecutor v. Milutinovic et al.*, decision concerning the exclusion of a witness from trial proceedings, the Appeals Chamber

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52 **E1/3.1** Transcript of Proceedings: "Duch" Trial Initial Hearing ("Transcript Duch Hearing"), 17 February 2009 at at p. 104, ln. 6.

53 **E212** Request, *supra* note 1 at para. 19.

54 **E1/4.1** Transcript of Initial Hearing: Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan, 27 June 2011 at p. 23, ln. 19.

55 **E1/7.1** Transcript Day 2, *supra* note 34 at p. 16-17, ln. 22-2.

56 *Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List (ICTR Appeals Chamber), 21 August 2007 at para. 10.

57 *Ibid.* at para. 24.

58 *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Casimir Bizimungu (ICTR Trial Chamber III), 7 April 2010 at para. 4.

stated, "it is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in various types of decisions for purposes of fair and expeditious management of a trial . . ."[59]

25. On this basis, the Co-Prosecutors submit that the Trial Chamber's decision to confine the scope of oral argument at the Initial Hearing to its tentative witness list constitutes a proper exercise of its trial management discretion. The Defence's contention that this exercise of discretion is a violation of both Rule 80*bis* and the right to a fair trial must fail.

C. The principle of the equality of arms does not require hearing of oral submissions from the Defence on the content of its Proposed List

26. The Chamber has recognised that the fundamental nature of the principle of equality of arms is acknowledged in the Internal Rules.[60] The Appeals Chambers of other international criminal tribunals have recognised and defined the scope of application of the principle of equality of arms.[61] In this line of jurisprudence, equality of arms is defined to mean "each party must have reasonable opportunity to present its case under conditions that do not place in substantial disadvantage *vis-à-vis* his opponent";[62] and that "a fair trial must entitle the accused to adequate time and facilities for his defence."[63]

27. Whilst acknowledging the principle of equality of arms as an important guarantor of the fair trial rights of the Accused, the Co-Prosecutors submit that the Request misinterprets the scope of application of this principle, and specifically the term "adequate time and facilities" to present a defence, to mean identical treatment in all procedural and substantive matters. International jurisprudence clearly provides that

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59 *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* List (ICTY Appeals Chamber), 20 April 2007 at para. 8.

60 **D288/6.90** Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009 at para. 4.

61 *See, e.g., Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (ICTY Appeals Chamber), 15 July 1999 at para. 44, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment (Reasons) (ICTR Appeals Chamber), 1 June 2001 at para. 67, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Decision on Defence Notice of Appeal and Submissions Regarding the 4 May 2009 Oral Decision Requiring the Defence to Commence its Case on 29 June 2009 (SCSL Appeals Chamber), 23 June 2009 at para. 16.

62 *Taylor*, *supra* note 61 at para. 17.

63 *Tadić*, *supra* note 61 at para. 47.

"the rights of the accused and equality between the parties should [...] not be confused with a requirement for precise parity of means, resources and time. The principle of equality of arms was designed to provide the parties with rights and guarantees that are procedural in nature."[64]

28. The Defence's claim that the Trial Chamber's initial witness list violates the principle of equality of arms because it fails to ensure "basic proportionality" between the time and number of witnesses allocated to all sides[65] is inaccurate in its assumption that "proportionality" means absolute equivalence. On the contrary:

> [T]*he principle of equality of arms does not entitle an Accused to precisely the same amount of time or the same number of witnesses as the Prosecution and that basic proportionality, rather than strict mathematical equality, generally governs the relationship between the time and the number of witnesses allocated to each Party.*[66]

29. Furthermore, in the unique context of ECCC proceedings, the Co-Prosecutors submit that the Defence's characterisation of witnesses as "allocated" to a side and favouring either inculpatory or exculpatory evidence conflates ECCC proceedings with those of other internationalised tribunals and common law jurisdictions.[67] In contrast with common law jurisdictions where witnesses testify on behalf of either the prosecution or defence, the Chamber alone determines which witnesses should be heard, and summons witnesses to appear.[68] It is the Chamber's responsibility to determine the testimony that will be conducive to ascertaining the truth, not to engineer some form of mathematical proportionality between the Parties based on their Proposed Lists.[69]

30. International criminal tribunals routinely determine the "adequate time and facilities" required to present a defence on the basis of the circumstances of each case and "in light of a trial chamber's obligation to ensure that a trial is fair and expeditious."[70] Before the ECCC, it is similarly within the discretion of the Chamber to determine what constitutes "adequate time and facilities" for the presentation of a defence as an

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64 *Taylor*, *supra* note 61 at para. 18.
65 **E212** Request, *supra* note 1 at para. 21.
66 *Prosecutor v. Issa Sesay et al.*, Case No. SCSL-04-15-T, Consequential Orders Concerning the Preparation and Commencement of the Defence Case (SCSL Trial Chamber I), 28 March 2007 at p. 4.
67 *Ibid.*
68 Rules 84(2) and 91.
69 Rule 91(3).
70 *Taylor*, *supra* note 61 at para. 19.

expression of the equality of arms. On this basis, the Co-Prosecutors submit that the principle of equality of arms cannot provide a legal basis for the Defence's assertion that it must be heard in open court on the contents of its Proposed List.

D. The right to present a defence does not require hearing of oral submissions from the Defence on the content of its Proposed List

31. The Co-Prosecutors acknowledge the Accused's right to present a defence within the framework of "fair and adversarial" proceedings that may be "brought to a conclusion within a reasonable time."[71] Internationalised tribunals have recognised the ability of their chambers to respect the equality of arms between parties and the right of the accused to present a complete defence while simultaneously ordering the defence to significantly reduce its witness list.[72] The ICTR Appeals Chamber has even noted that "mounting a full Defence often necessitates less time and fewer witnesses than establishing the prosecution case."[73]

32. The Co-Prosecutors cannot agree with the Defence submission that the Accused's right to present a defence has been violated because the tentative witness list limits his counsel to the "defensive act of cross-examination" or prohibits his counsel from "exploring a version of events outside the framework of the Prosecution's narrative."[74] These assertions disregard two key characteristics of ECCC proceedings: (1) the Internal Rules do not support a procedure of cross-examination that exists at other international criminal tribunals[75] but rather all Parties have the same rights to question witnesses with the permission of the President;[76] and (2) the tentative witness list necessarily reflects the Trial Chamber's view of which testimony will be

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71 Rule 21.

72 *See, e.g., Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (ICTR Trial Chamber II), 26 August 2011 at para. 56; *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Decision on Defence Motion for Reconsideration of the Chamber's Further Order for the Defence to Reduce its Witness List (ICTR Trial Chamber III), 26 February 2009 at para. 8; *Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-T, Decision on the Defence Motion to File Proposed List of Witnesses and Statement of Agreed and Contested Matters of Facts and Law (ICTR Trial Chamber III), 2 August 2007 at para. 7.

73 *Ngirabatware*, *ibid.* at para. 46.

74 **E212** Request, *supra* note 1 at para. 19.

75 **E1/60.1** Transcript 9 April 2012 at p. 11, ln. 15.

76 Rule 85(1).

conducive to ascertaining the truth, not the narrative preferred by any individual party.[77]

33. On this basis, the Co-Prosecutors submit that the right to present a defence does not afford a legal basis to support the Defence's assertion that the Chamber must permit oral submissions on the content of its Proposed List.

E. The Accused's right to a *public* hearing does not imply an exclusively *oral* hearing

34. The Co-Prosecutors' consistent position has been to favour the publicity of the trial proceedings, consistent with the applicable ECCC Law and Internal Rules.[78] As discussed above, hearings before the Chamber do not *necessarily entail oral argument*. Indeed, the use of oral argument to resolve every procedural dispute between the Parties would contravene a fundamental principle of the Internal Rules, namely that proceedings before the ECCC should be brought to a conclusion within a reasonable time.[79]

35. The Co-Prosecutors acknowledge the dual importance that public hearings hold for the integrity of the ECCC proceedings and the rights of the Accused, both to ensure that the public is "duly informed of ongoing ECCC proceedings"[80] and to allow the scrutiny of the public and the press to contribute to the fairness of the trial.[81] However, contrary to the position of the Defence that a hearing "must involve substantive argumentation,"[82] the Co-Prosecutors submit that it remains within the Chamber's trial management discretion to determine to what extent a public hearing will or will not include oral argument.[83]

F. In the event of potential risk to the Accused's fair trial rights, the appropriate remedy is a written decision, not a public, oral hearing

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77 Rule 87(4).

78 Rule 79(6), **E1/7.1** Transcript of Trial Proceedings, 30 June 2011 at p. 38.

79 Rule 21(4).

80 Rule 54.

81 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M" (ICTY Trial Chamber), 28 April 1997 at para. 34.

82 **E212** Request, *supra* note 1 at para. 14.

83 Rule 85(1) ("The President of the Chamber shall preside over the proceedings, and facilitate interventions by the other judges. He or she shall guarantee the free exercise of defence rights. In consultation with the other judges, the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.").

36. The Co-Prosecutors disagree with the Defence's assertion that the equality of arms, the right to a fair trial or to present a defence require an 80*bis* hearing to allow the Defence to make oral submissions on the contents of its own Proposed List.[84] Should the Chamber identify any potential risk to the Accused's fair trial rights in the circumstances, the Co-Prosecutors respectfully submit that the appropriate remedy, in the first instance, would be for the Chamber to issue a written decision on the selection of witnesses and experts proposed by the Defence and, at the end of the first phase of the trial, afford an opportunity for written submissions from the Defence as to whether additional witnesses should be heard, in the exercise the Accused's fair trial rights.

IV. REQUEST

37. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

a. reject the Request in its entirety;

b. issue a written decision on the selection of witnesses and experts proposed by the Defence; and

c. afford an opportunity for written submissions from the Defence, at the end of the first phase of the trial, concerning additional witnesses it considers necessary to ensure the Accused receives a fair trial.

Respectfully submitted,

Date	Name	Place	Signature
5 July 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

84 **E212** Request, *supra* note 1 at para. 18.