

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

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DEFENCE REQUEST FOR VARIATION OF INTERNAL RULE 80 TO ORDER THE  
CO-PROSECUTORS TO DISCLOSE THE LIST OF EXHIBITS  
PRIOR TO THE DEFENCE PROVIDING AN ADDITIONAL LIST OF WITNESSES

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## I INTRODUCTION AND PETITION

1. Internal Rule 80 of the Rules of Procedure and Evidence provides that within fifteen days after the final Closing Order, the Co-Prosecutors shall file their witness list, after which the defence has a further fifteen days in which to file their list of additional witnesses. This Rule further provides, *inter alia*, that the Chamber may order the parties to provide a list of exhibits.
2. On 17 January 2011, the Trial Chamber issued its 'Order to File Material in Preparation for Trial',<sup>1</sup> in which the Chamber orders the parties *inter alia* to file their witness, exhibits and documents lists.
3. The defence submits that it is essential to have knowledge of the Co-Prosecutors' list of documents and exhibits before submitting its own list of additional witnesses to the Chamber. Accordingly, the defence respectfully requests the Trial Chamber to order the Co-Prosecutors to file both their witness and exhibits lists, before ordering the Charged Person to file her witness list.

## II RELEVANT LEGAL PROVISIONS

4. Internal Rule 80 provides, insofar as is relevant:
  1. The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses, including a statement of any relationship referred to in Rule 24(2) and experts they intend to summon 15 (fifteen) days from the date the Indictment becomes final. The Greffier shall place the list on the case file and, subject to any protective measures, forward a copy of the list to the parties.
  2. Where the Accused and/or the consolidated group of Civil Parties wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, they shall submit an additional list, including a statement of any relationship referred to in Rule 24(2) to the Greffier of the Chamber within 15 (fifteen) days from notification of the list. The Greffier shall place such list on the case file and, subject to any protective measures, forward a copy of the list to the other parties.
  3. The Chamber may order the parties, within a prescribed time limit prior to the Initial hearing, to file documents including the following:
    - a) [...].
    - b) A list of exhibits they intend to offer in the case, containing a brief description of their nature and contents.

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<sup>1</sup> TC, Order to File Material in Preparation for Trial, 17 January 2011, Document No. E9.

[...].

5. Internal Rule 87(1) reads:

Unless provided otherwise in these IRs, all evidence is admissible. The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

6. Internal Rule 21, on fundamental principles, provides:

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]

7. The International Covenant on Civil and Political Rights (ICCPR) provides in Article 14(3)(e) that everyone has the right to ‘examine, or have examined, the witnesses against him’.

### III SUBMISSIONS

8. Internal Rule 87 provides that the onus to prove the guilt of the accused is on the Co-Prosecutors. The defence must know the case the Co-Prosecutors intend to present against the Charged Person at the trial and the evidence upon which they intend to rely in order to prove their case. This requires the defence to know both the witnesses to be relied upon and the exhibits to be adduced in the course of the trial. Only once the defence knows the extent of the case it has to meet can it make a proper assessment as to which, if any, additional witnesses it requires to testify in the proceedings.

9. Moreover, the adversarial nature of the proceedings requires the defence to have the right to cross-examine a witness who gives incriminating evidence. The defence submits that no witness statement should be relied upon if it is incriminatory in nature without the maker of such statement giving live testimony, unless the parties consent. This right is supported by Article 14(3)(e) of the

ICCPR, which provides the Accused the right to examine, or have examined, the witnesses against her.<sup>2</sup> The rationale of this provision is that the defence must be given a fair chance to challenge evidence against the accused and to bring its own evidence. As stated by Trechsel:

Questions put by the defence will not only influence the assessment of the credibility of the witness, they may also bring to light further elements of fact which may be of relevance for the final decision of the court, be it in relation to the conviction or sentencing.<sup>3</sup>

10. The trial proceedings allow for the Co-Prosecutors to submit statements of persons interviewed by the Office of the Co-Investigating Judges without calling them as witnesses at trial. Indeed, the Trial Chamber confirmed this practice where the President stated that 'after each statement is read out then parties to the proceedings will be given opportunity to make their observations in relation to the read out statement within this Court hearing'.<sup>4</sup>
11. The defence is concerned to avoid a situation in which the Co-Prosecutors seek to adduce, in the form of 'Exhibits', witness statements which contain prejudicial evidence against the Charged Person without calling the witness to testify and be subjected to cross-examination. The defence contends that it has a fundamental right to require the presence in court of any witness who gives prejudicial evidence against the Charged Person in order that the evidence of that witness may be tested. The current practice at the ECCC allows the witness list of the Co-Prosecutors to exclude witnesses whose statements were considered by the Co-Investigating Judges and contain potentially prejudicial evidence against the Charged Person. In such a circumstance, the defence would not add the witness to its additional list of witnesses.
12. If, in the system prevalent at the ECCC, the Co-Prosecutors subsequently decide to include the potentially harmful OCIJ statements as exhibits, thus introducing the evidence without calling the witness the defence would be severely

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<sup>2</sup> This same provision is enshrined in Article 6(3)(d) of the European Convention on Human Rights.

<sup>3</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings* (2005), p. 292-293.

<sup>4</sup> TC, Case 001, Transcript 4 August 2009, p. 77.

prejudiced. It would not be possible to meaningfully challenge the content of the statement in the absence of the maker.

13. Furthermore, this would violate the Charged Person's right to examine, or have examined, the witnesses against her, as enshrined in Article 14(3)(e) of the International Covenant on Civil and Political Rights.

#### IV CONCLUSION

14. For the reasons stated above, the defence respectfully requests the Trial Chamber to order the Co-Prosecutors to disclose both their witness and exhibit lists before requiring the Charged Person to disclose her list of additional witnesses and exhibit list.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	27 January 2011	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh	

