



**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គជំនុំជម្រះសាលាដំបូង**

Trial Chamber  
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

<b>ឯកសារដើម</b>
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**Before:** Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

**Date:** 30 April 2012  
**Original language(s):** Khmer/English/French  
**Classification:** PUBLIC

**DECISION CONCERNING NEW DOCUMENTS AND OTHER RELATED ISSUES**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Accused**  
NUON Chea  
IENG Sary  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
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## **1 INTRODUCTION**

1. The Trial Chamber is seized of three requests filed by the Co-Prosecutors on 5 July 2011, 5 December 2011 and 17 April 2012 to place on the Case File new evidence that they intend to put before the Chamber pursuant to Internal Rule 87(4).<sup>1</sup> The present decision identifies the criteria to be satisfied and the procedural steps for putting new documents (*i.e.* those presented after the start of trial) before the Chamber pursuant to this Rule. The Chamber also addresses a further category of new documents – namely, those which were not contained on the Case File in Case 002 at the time the Trial Chamber was seized of it, but which are permissibly included in the document lists initially filed by the parties pursuant to Internal Rule 80(3)(d) (concerning the entirety of Case 002) and their subsequent lists (indicating those documents on their earlier lists relevant to Case 002/01).

2. Further, the Chamber has noted that some of these later document lists include (contrary to the Chamber's order) documents not contained on the filing party's earlier lists. Some parties have also sought, through their document lists and related filings, to place before the Chamber the entirety of the contents of the Shared Materials Drive or the Case File. This decision also addresses these, and related, issues.

## **2 PROCEDURAL HISTORY**

3. On 17 January 2011, the Trial Chamber ordered the parties to file lists of documents and exhibits they intended to put before the Chamber at trial ("Order").<sup>2</sup> The IENG Sary Defence provided lists on 1 April 2011, 8 April 2011 and 19 April 2011 and the KHIEU Samphan Defence, Co-Prosecutors and Civil Party Lead Co-Lawyers filed their lists on 19 April 2011 ("Initial Lists").<sup>3</sup> The NUON Chea Defence did not file a list in compliance with this Order,

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<sup>1</sup> Co-Prosecutors' Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-clips Relating to NUON Chea before the Trial Chamber Pursuant to Rule 87(4), E93/7, 5 July 2011 ("Co-Prosecutors' First Request"); Co-Prosecutors' Disclosure of a KHIEU Samphan Video Interview and Book Entitled 'Behind The Killing Fields: A Khmer Rouge Leader And One Of His Victims' by Gina CHON and THET Sambath, E152, 5 December 2011 ("Co-Prosecutors' Second Request"); Co-Prosecutors' Disclosure of Documentary Film Entitled "Enemies of the People", E186, 17 April 2012 ("Co-Prosecutors' Third Request").

<sup>2</sup> Order to File Material in Preparation for Trial, E9, 17 January 2011.

<sup>3</sup> IENG Sary's Initial List of Documents Already on the Case File and Notice Concerning his Forthcoming Initial List of New Documents to put before the Chamber at Trial, E9/22, 1 April 2011; IENG Sary's Second Initial List of Documents, E9/24, 8 April 2011; IENG Sary's Third Initial List of Documents, E9/25, 19 April 2011 (listing 1037 new documents in E9/25.2); KHIEU Samphan's List of Documents, E9/29, 19 April 2011 (listing 33 new documents in E9/29.2); Co-Prosecutors' Rule 80 (3) Trial Document List, E9/31, 19 April 2011 (listing 481 new documents in E9/31.21); Civil Party Lead Co-Lawyers Lists of Documents and Exhibit (Annex 7 and 8), E9/32, 19 April 2011 (listing 31 new documents in E9/32.2).

instead indicating that it would “strive to notify the Chamber and the parties of any new documents it intends to rely upon at trial in due course and well in advance of the date of such material’s contemplated proffer.”<sup>4</sup>

4. At the Initial Hearing on 27 June 2011, the Chamber ordered the parties to indicate by 22 July 2011 which of the documents and exhibits identified in their Initial Lists they considered relevant to the early trial segments in Case 002/01.<sup>5</sup> The KHIEU Samphan Defence, Civil Party Lead Co-Lawyers and Co-Prosecutors filed these lists (“Revised Lists”) on 22 July 2011. The Chamber also accepted the IENG Sary Defence’s Revised List filed on 8 August 2011.<sup>6</sup> The NUON Chea Defence declined to provide a list, indicating that documents it intended to put before the Chamber would instead be disclosed in due course.<sup>7</sup>

5. On 5 July 2011, the Co-Prosecutors notified the Chamber pursuant to Rule 87(4) of their intention to put before it seven recently obtained video clips relating to the Accused NUON Chea (“NUON Chea Video Clips”).<sup>8</sup> The NUON Chea Defence did not respond to this motion.

6. On 5 December 2011, the Co-Prosecutors filed a request under Rule 87(4) seeking to place on the Case File a video interview with the Accused KHIEU Samphan (“KHIEU Samphan Video Interview”) and a book entitled ‘Behind The Killing Fields: A Khmer Rouge Leader And One Of His Victims’ by Gina CHON and THET Sambath (“Book”).<sup>9</sup> The KHIEU Samphan Defence responded to this request on 19 December 2011.<sup>10</sup>

7. On 31 January 2012, the NUON Chea Defence filed a “first list of specific documents to be put before the Chamber during the first mini-trial in Case 002” (“NUON Chea List”), to

<sup>4</sup> Notice of Joinder in IENG Sary’s Initial Submissions Regarding Documents to be Relied upon at Trial and Additional Submissions Regarding New Documents, E9/26, 19 April 2011, para. 4.

<sup>5</sup> T., 27 June 2011, p. 25.

<sup>6</sup> Listes de Documents pour les Premières Phases du Procès, E109/1, 22 July 2011 (listing 34 new documents in E109/1.1); Civil Party Lead Co-Lawyers Revised List of Documents and Exhibit Relevant the First Four Trial Segments, E109/2, 22 July 2011 (listing 19 new documents in E109/2.3); Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, E109/4, 22 July 2011 (highlighting 452 new documents in E109/4.1 to E109/4.20) and IENG Sary’s Document and Exhibit List for the First Four Trial Topics, E109/6, 8 August 2011 (listing 6 new documents in E109/6.2).

<sup>7</sup> Observations Regarding Documents Considered Relevant to the Early Segments of the Trial, E109/3, 22 July 2011.

<sup>8</sup> Co-Prosecutors’ First Request.

<sup>9</sup> Co-Prosecutors’ Second Request. On the same date, the Co-Prosecutors notified the Chamber and the parties that the new documents they intended to put before the Chamber had been made available on the Shared Materials Drive (Co-Prosecutors’ Notice to the Trial Chamber and Parties Regarding Access to New Documents Listed in OCP Trial Document Lists E9/31.21, E109/4.1, E131/1/4.1, E151, 5 December 2011).

<sup>10</sup> Response to Co-Prosecutors’ Request to Admit Two New Items into Evidence, E152/1, 19 December 2011.

which the Co-Prosecutors responded on 13 February 2012.<sup>11</sup> The NUON Chea Defence replied on 27 February 2012.<sup>12</sup>

8. On 9 April 2012, following its review of all new documents (*i.e.* those not on the Case File at the time the Chamber was seized of Case 002 but proposed to be put before it prior to the start of trial pursuant to Internal Rule 80(3)(d)) contained in Annexes 1-5 of the Co-Prosecutors' Revised List (Section 4.2.1), the Chamber admitted 35 of these documents.<sup>13</sup>

9. On 17 April 2012, the Co-Prosecutors filed a request under Rule 87(4) seeking to place on the Case File a documentary film entitled 'Enemies Of The People' and related footage ("Documentary").<sup>14</sup>

### 3 SUBMISSIONS

10. The Co-Prosecutors request that the NUON Chea Video Clips be placed on the Case File, as they intend to put this evidence before the Trial Chamber pursuant to Internal Rule 87(4). The Co-Prosecutors submit that, as of 5 July 2011, they do not have in their possession a copy of the Documentary, from which the clips were extracted, but that they discovered on 1 July 2011 that the NUON Chea Video Clips were available on the internet.<sup>15</sup> The Co-Prosecutors further contend that these video excerpts will "help in the ascertainment of the truth regarding the senior role which NUON Chea played in the CPK security apparatus, including his involvement in creating a policy of 'smashing' bourgeois elements, his receipt and perusal of confessions of arrested cadres and his knowledge of executions of supposed 'traitors'."<sup>16</sup>

11. Regarding the KHIEU Samphan Video Interview, the Co-Prosecutors submit that it is relevant to ascertaining the truth as it contains statements from the Accused KHIEU Samphan

<sup>11</sup> List of Documents to be put before the Chamber During the First Mini-Trial, E131/1/13, 31 January 2012 (including 14 new documents in E131/1/13.1) ("NUON Chea Application"); Co-Prosecutors' Response to NUON Chea's List of Documents to be Put Before the Chamber During the First Mini-Trial, E131/1/14, 13 February 2012.

<sup>12</sup> Reply to Co-Prosecutors' Response to NUON Chea's List of Documents to be Put Before the Chamber During the First Mini-Trial, E131/1/14/1, 27 February 2012.

<sup>13</sup> See Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, E185, 9 April 2012, admitting documents #11, #49, #51, #160, #161, #162, #166, #168, #169, #170, #187, #188, #189, #190, #191 and #207 in E109/4.1; #80 in E109/4.2; #9, #32, #66, #73, #75, #79, #137, #217, #223, #225 and #338 in E109/4.4; and #73, #123, #245, #278, #283, #355 and #357 in E109/4.5.

<sup>14</sup> Co-Prosecutors' Third Request.

<sup>15</sup> Co-Prosecutors' First Request, paras 33 and 35.

<sup>16</sup> Co-Prosecutors' First Request, para. 34.

relating to the structure of Democratic Kampuchea (“DK”), its historical background, government policies, and “the roles and responsibilities of the Accused before, during and after the DK period”. They further contend that the KHIEU Samphan Video Interview was not available to them before the opening of the trial, but was posted online by a third party claiming to be the Accused KHIEU Samphan and discovered by the Co-Prosecutors on 1 November 2011.<sup>17</sup>

12. In respect of the Book, the Co-Prosecutors submit that it is based in large part on interviews with NUON Chea and is relevant to ascertaining the truth regarding the roles and responsibilities of the Accused during the periods relevant to the Indictment. Although it was published in 2010, the Co-Prosecutors contend that the Book was not acquired by the ECCC Library until August 2011 or discovered by the Co-Prosecutors until 30 November 2011.<sup>18</sup>

13. The Co-Prosecutors submit that the Documentary is also conducive to ascertaining the truth as it contains statements from the Accused NUON Chea relating to the historical background of the DK period, the roles and responsibilities of the Accused, the structure of DK and the policies of the DK government. The Co-Prosecutors argue that the Documentary could not have been provided prior to the opening of the trial due to difficulties encountered by the Co-Prosecutors and the Co-Investigating Judges in obtaining a copy of the film.<sup>19</sup>

14. The KHIEU Samphan Defence objects to the admission as new evidence of the Book and the KHIEU Samphan Video Interview on the grounds that the Co-Prosecutors have not demonstrated that they exercised due diligence or that it was impossible for them to comply with the Chamber’s earlier deadlines for filing document lists. They have also failed to show that they sought to admit the Book and the KHIEU Samphan Video Interview at the earliest possible opportunity, that the admission of the new material is vital in the interests of justice and that the material meets the criteria for admissibility set out in Rule 87(3).<sup>20</sup>

15. The NUON Chea Defence assert a right based on Cambodian law to propose documents for admission at any stage during trial proceedings.<sup>21</sup> The Co-Prosecutors respond that this request should be dismissed and the NUON Chea List rejected in view of the NUON Chea

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<sup>17</sup> Co-Prosecutors’ Second Request , paras 2-3.

<sup>18</sup> Co-Prosecutors’ Second Request, paras 4-5.

<sup>19</sup> Co-Prosecutors’ Third Request, paras 2-3 and 5-6.

<sup>20</sup> Response to Co-Prosecutors’ Request to Admit Two New Items into Evidence, E152/1, paras 7, 8 and 10-14.

<sup>21</sup> NUON Chea Application, paras 5-6; Reply to Co-Prosecutors’ Response to NUON Chea’s List of Documents to be Put Before the Chamber During the First Mini-Trial, 27 February 2012, E131/1/14/1, paras 2-5.

Defence's consistent failure to file timely document lists pursuant to the Chamber's earlier orders.<sup>22</sup>

## 4 FINDINGS

### 4.1 Legal framework

#### 4.1.1 *Introduction*

16. Pursuant to Internal Rule 87(3), evidence to be put before the Chamber is drawn from the Case File, which was forwarded to the Trial Chamber by the Co-Investigating Judges or Pre-Trial Chamber Greffiers along with the Closing Order.

17. Material which was not part of the Case File originally forwarded to the Trial Chamber may, under certain conditions, also be placed on the Case File and put before the Chamber, either on the Chamber's own initiative or at the request of a party. For instance, prior to the commencement of trial, parties may include on their document lists 'new' documents (*i.e.* those not already on the Case File at the time the Trial Chamber was seised of the case) pursuant to Internal Rule 80(3)(d). Once the trial has commenced, parties may also, by reasoned submission addressing the criteria in Internal Rule 87(4), seek to tender new evidence (*i.e.* that which was unavailable before the opening of the trial).

18. All evidence must fulfil the general criteria for admission contained in Internal Rule 87(3) (a)-(e). It follows that an opportunity for the parties to object to any document pursuant to these criteria is also a precondition for the admission of all new documents before the Chamber. Where, however, the Chamber rejects an objection posed to a document, or where no objections are raised, a document is considered to be put before the Chamber and is accorded an E3 number.<sup>23</sup> The general procedural framework governing the placing of documents before the Chamber has been amply elaborated in other decisions of the Chamber addressing the provisions of the Internal Rules that pertain to the rules of evidence.<sup>24</sup>

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<sup>22</sup> Co-Prosecutors' Response to NUON Chea's List of Documents to be Put Before the Chamber During the First Mini-Trial, E131/1/14, 13 February 2012.

<sup>23</sup> Only evidence with an E3 number can be used as the basis for the Trial Chamber's decision: *see* Internal Rule 87(2) (providing that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination"); *see also* Trial Chamber Memorandum entitled "Requests by the KHIEU Samphan Defence to Clarify the Status of Certain E3 Documents and its Motion E167", E178/1, 11 April 2012.

<sup>24</sup> *See e.g.* Decision on Admissibility of Material on the Case File as Evidence, E43/4, 27 May 2009, paras 5-7; Judgement, KAING Guek Eav *alias* Duch, 001/18-07-2007/ECCC/TC, 26 July 2010, paras 36-43; Trial

#### *4.1.2 Features of the ECCC legal framework reflecting the requirements of trials of mass crimes*

19. In order to facilitate the expeditious conduct of proceedings involving a large volume of documents and to safeguard the fair trial rights of all parties, Internal Rule 80(3)(d) empowers the Chamber to order the parties to file lists of documents they seek to rely on prior to the commencement of trial. In the present case, the Chamber ordered the parties to file their Initial Lists (with regard to the entirety of Case 002), and later, their Revised Lists (concerning the early trial segments in Case 002/01) (Section 2). Only documents contained in these lists (and those that satisfy the requirements of Internal Rule 87(4)) may be tendered before the Chamber following the modalities envisaged by Internal Rule 87(3) and subject to objections (Section 4.1.1). The purpose of these lists is to facilitate trial preparation by identifying, for the benefit of the parties and the Chamber, all evidence potentially at issue at trial. The expeditiousness of proceedings is further promoted by reducing the scope of discussion of documents at trial to those specifically contested by a party, and by ensuring that evidence may only be proffered belatedly before the Chamber subject to strict conditions.

20. In this regard, the ECCC procedural framework, which differs in certain respects from Cambodian law, reflects the particular demands of trials of mass crimes and international standards designed to safeguard the parties' fair trial rights and the expeditiousness of proceedings.<sup>25</sup> It follows that the purported right, claimed by the NUON Chea Defence on the basis of Cambodian law, to tender any document it considers relevant at any stage of the trial is rejected.<sup>26</sup>

21. It also follows that the attempt by the IENG Sary Defence to include as part of their document lists the contents of the entire Shared Materials Drive is similarly denied as

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Chamber Memorandum entitled "Response to Portions of E114, E114/1, E131/1/9, E131/6, E136 and E158", E162, 31 January 2012 and Decision on Objections to Documents Proposed to be Put Before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, E185, 9 April 2012, paras 20-21, 31.

<sup>25</sup> Article 334 of the Cambodian Code of Criminal Procedure permits parties to submit all documents and evidence that they consider to be conducive to ascertaining the truth at any point until the end of the trial hearing; *see, however*, Decision on NUON Chea's Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, E51/14, 8 August 2011; *see also* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Articles 20 new, 23 new and 33 new and Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law Of Crimes Committed During the Period of Democratic Kampuchea, Article 12(1).

<sup>26</sup> NUON Chea Application, paras 5-6.

contravening both the Chamber's earlier orders and the applicable legal framework.<sup>27</sup> This modality is incompatible with a fair and expeditious trial, as the voluminous nature of the Shared Materials Drive ensures that the Chamber and the parties would lack adequate notice of which documents are potentially at issue at trial.<sup>28</sup> In relation to all documents not included in the parties' lists filed in accordance with the Chamber's earlier orders, the parties are not, however, precluded from making future applications to tender them pursuant to Internal Rule 87(4) where they consider the interests of justice to so require.

#### 4.1.3 *Criteria for admission of new documents pursuant to Internal Rule 87(4)*

22. When a request is made to put new documents before the Chamber after the commencement of the trial, Internal Rule 87(4) provides that the party seeking to admit new evidence must first "satisfy the Chamber that the requested [...] evidence was not available before the opening of the trial."<sup>29</sup>

23. Reference to the relevant international jurisprudence shows that the notion of 'availability' of evidence is linked to the exercise of due diligence. The Appeals Chamber of the ICTY has held, for example, that when a party seeks to adduce evidence that was not previously available after the close of its case, "the primary consideration [...] is [...] whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application".<sup>30</sup> The Appeals Chambers of the ICTY

<sup>27</sup> While the IENG Sary Defence filed an Initial List in accordance with the Chamber's earlier Order (*see* IENG Sary's Third Initial List of Documents, E9/25, 19 April 2011 (listing 1037 new documents in E9/25.2)), it also indicated an intention to include within the list of documents it sought to tender at trial an inventory of the whole Shared Materials Drive (*see* IENG Sary's Second Initial List of Documents, E9/24, 8 April 2011).

<sup>28</sup> Similar issues of certainty and due notice are raised by the attempt of some parties to include the contents of the entire Case File within the scope of documents they may potentially tender at trial (*see e.g.* IENG Sary's Initial List of Documents Already on the Case File and Notice Concerning his Forthcoming Initial List of New Documents to be put before the Chamber at Trial, E9/22, 1 April 2011, paras 12-25; *see also* NUON Chea's Notice of Joinder in IENG Sary's Initial Submissions Regarding Documents to be Relied upon at Trial and Additional Submissions Regarding New Documents, E9/26, 19 April 2011, paras 1-2, 4; KHIEU Samphan's List of Documents, E9/29, 19 April 2011 and Civil Party Lead Co-Lawyers Lists of Documents and Exhibit (Annex 7 and 8), E9/32, 19 April 2011, paras 6-9). The use at trial of documents on the Case File that are not on a parties' document list will be addressed by the Chamber in due course, in the context of ongoing trial management.

<sup>29</sup> *See also* Internal Rule 80 *bis* (1): "The trial begins with an initial hearing". The initial hearing in Case 002/01 took place on 27 June 2011.

<sup>30</sup> *Prosecutor v. Delalić et al.*, Judgment, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001 ("*Prosecutor v. Delalić*"), para. 283. At other international tribunals, evidence that has not been disclosed in accordance with prescribed deadlines is not admissible at trial as a matter of course, and may be excluded at the discretion of the judges, depending on circumstances. Trial Chambers have exceptionally granted requests to amend an initial list of exhibits during the presentation of a party's case when satisfied that good cause has been shown and that the new material is relevant and of sufficient importance to justify the late addition, carefully balancing this against the need for adequate protection of the rights of the accused (*see e.g. Prosecutor v. Popović et al.*, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning,



and ICTR have repeatedly held that evidence may be considered to have been unavailable at trial only if the requesting party could not have discovered the evidence through the exercise of due diligence.<sup>31</sup> A lapse of time between the taking of active steps to pursue the documents or an unexplained delay between the discovery of a document's location and the application to admit it as evidence may indicate a failure to exercise reasonable diligence.<sup>32</sup>

## 4.2 Analysis

24. The present decision evaluates the following categories of new documents:

- a) *Documents not on the Case File at the time the Trial Chamber was seised of Case 002 but proposed to be put before it prior to the commencement of trial pursuant to Internal Rule 80(3)(d).*

This category of documents on the parties' Initial Lists filed prior to the commencement of trial pursuant to the Chamber's earlier Order (and subsequently included in their Revised Lists) comprises:

- i) 448 documents proposed by the Co-Prosecutors<sup>33</sup>;
- ii) 33 documents proposed by the KHIEU Samphan Defence<sup>34</sup>;
- iii) Six documents proposed by the IENG Sary Defence<sup>35</sup>; and
- iv) 19 documents proposed by the Civil Party Lead Co-Lawyers.<sup>36</sup>

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ICTY Appeals Chamber (IT-05-88-AR73.1), 14 December 2007, para. 37); *see also* ICTY Rules of Procedure and Evidence, Rule 68 *bis*; *Prosecutor v. Sesay et al.*, Ruling on Oral Application for the Exclusion of Additional Statement for Witness TF1-060, SCSL Trial Chamber (SCSL-04-15-211), 23 July 2004, para. 10; *Prosecutor v. Ntawukulilyayo*, Decision on Defence 'Requete en Urgence de la Defense concernant les Manquements du Procureur a ses Obligations de Communiquer les Pieces et ses effets sur le Calendrier du Proces' Rules 66 And 68 Of The Rules Of Procedure And Evidence, ICTR Trial Chamber (ICTR-05-82-PT), 27 February 2009, paras 19-25.

<sup>31</sup> *See e.g. Prosecutor v. Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, ICTY Appeals Chamber (IT-94-1-A), 15 October 1998, paras 35-45; *Prosecutor v. Krstić*, Decision on Application for Admission of Further Additional Evidence on Appeal, ICTY Appeals Chamber (IT-98-33-A), 15 September 2003; *Prosecutor v. Naletilić and Martinović*, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, ICTY Appeals Chamber (IT-98-34-A), 20 October 2004, para. 10; *Prosecutor v. Kajelijeli*, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, ICTR Appeals Chamber (ICRT-98-44A-A), 28 October 2004, para. 9.

<sup>32</sup> *Prosecutor v. Delalić*, paras 285-286.

<sup>33</sup> Co-Prosecutors' Response to the Trial Chamber's Request for Documents Relating to the First Phase of Trial, E109/4, 22 July 2011. Of the 452 documents classified as new in the annexes to E109/4, three (documents #14 in E109.5, #789 in E109/4.12 and #181 in E109.16) are already on the Case File under the document numbers D262.2 (now E3/30), D2-12, and D299.1.77R, respectively. Another document is mistakenly listed twice (documents #21 and #22 in E109/4.19).

<sup>34</sup> Listes de Documents pour les Premières Phases du Procès, E109/1, 22 July 2011. Of the 34 entries on the list of "Nouveaux Documents" in E109/1.1, one (document #2 ("Notes on IENG Sary and the Khmer Rouge hierarchy, Ben Kiernan")) is already on the Case File under IS 14.1.

<sup>35</sup> IENG Sary's Document and Exhibit List for the First Four Trial Topics, E109/6, 8 August 2011.

<sup>36</sup> Civil Party Lead Co-Lawyers' Revised List of Documents and Exhibit Relevant the First Four Trial Segments, E109/2, 22 July 2011. The 19 documents classified as new in E109/2.3 are already on the Case File by virtue of their having been annexed to another filing and not as a result of any decision by the Trial Chamber

- b) *Documents put forward after the commencement of trial and whose admission must instead satisfy the criteria contained in Rule 87(4).*

The documents in this category comprise:

- i) The new documents proposed by the Co-Prosecutors in their motions of 5 July and 5 December 2011 (*i.e.* the NUON Chea Video Clips, KHIEU Samphan Video Interview and the Book);
- ii) Three new documents proposed by the Co-Prosecutors and one proposed by the IENG Sary Defence in their lists of 2 November 2011<sup>37</sup>; and
- iii) The 14 new documents included in the NUON Chea List filed on 31 January 2012.

25. All documents evaluated by the Chamber in this decision are listed in an annex to this decision for ease of reference.

**4.2.1 Documents not on the Case File at the time the Trial Chamber was seized of Case 002 but proposed to be put before it prior to the start of trial**

26. Although documents in this category may permissibly be tendered pursuant to Internal Rule 80(3)(d), the Chamber notes that to date some of these documents have neither been placed on the Case File nor annexed to the submissions of the relevant party.<sup>38</sup>

27. 444 of the 448 new documents identified in the Co-Prosecutors' Revised List<sup>39</sup>, one of the 6 new documents on IENG Sary's Revised List<sup>40</sup>, five of the 33 new documents on KHIEU Samphan's Revised List<sup>41</sup> and all of the 19 new documents on the Civil Party Lead

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to place them there (*see* Co-Prosecutors' Objections to Parties' Proposed Document List For First Three Weeks of Trial, E131/1/8, 14 November 2011, footnote 41; Co-Prosecutors' Third Request, Annex 1).

<sup>37</sup> Co-Prosecutors' Notification of Documents to be Put Before the Chamber in Connection with those Witnesses and Experts who may be Called During the First Three Weeks of Trial with Confidential Annex A, E131/1/4, 2 November 2011 (documents #171, #924 and #928 in E131/1/4.1); IENG Sary's Document List for the First Trial Segment, E131/1/3, 2 November 2011 (document #20 in E131/1/3.2, referring to the statement of TCW-564 of 19 December 2010).

<sup>38</sup> New documents in all categories may be placed on the Case File where the Chamber is satisfied that the evidence in question appears *prima facie* "conducive to ascertaining the truth" (*see* Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges' Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes, D365/2/17, 28 September 2010, para. 47); *see also* Decision on Admissibility of New Materials and Direction to the Parties, E5/10/2, 11 March 2009, para. 6 (finding that new evidence must "*prima facie* appear relevant to the ascertainment of the truth") and Rule 87(4) (requiring, in relation to the admission of new evidence during the trial, that such evidence also be "conducive to ascertaining the truth").

<sup>39</sup> Comprising all documents classified as new and highlighted in green in the annexes to E109/4, excluding the four specified documents listed in footnote 45 below and the four documents identified in footnote 33 above.

<sup>40</sup> Document #5 in E109/6.2 appears on the Shared Materials Drive twice under the ERN S00047300-00047329 and S00047272-00047299. The copies are substantially similar but not identical.

<sup>41</sup> Documents #3 ("Conversation avec M. PECH Lim Kuon"), #4 ("Escaped because of Khmer Rouge brutality"), #5 ("Cambodia: Two views from inside"), #6 ("Defecting Khmer Rouge helicopter pilot tells of life

Co-Lawyers' Revised List<sup>42</sup> have, however, been uploaded to the so-called Shared Materials Drive or annexed to other filings and are therefore accessible to the parties and the Chamber. Having examined these 469 documents and considering that 465 of them are *prima facie* conducive to ascertaining the truth, the Chamber has placed 35 of these documents on the Case File and will place the other 430 on the Case File shortly.<sup>43</sup> The four remaining documents pertain to IENG Thirith and are at present irrelevant to the scope of trial in Case 002/01 in consequence of the stay of proceedings against this Accused.<sup>44</sup>

28. The 37 remaining documents in this category – namely four new documents on the Co-Prosecutors' Revised List<sup>45</sup>, 28 of the new documents on KHIEU Samphan's Revised List<sup>46</sup> and five of the documents on IENG Sary's Revised List<sup>47</sup> – have yet to be placed on the Shared Materials Drive or otherwise made available to the Chamber. Although the parties bear the burden of making their proffered documents available in a timely fashion, the Chamber shall on an exceptional basis permit these remaining documents to be placed on the Shared Materials Drive no later than Friday 11 May 2012. Should these documents not be made available by this date, the Chamber may consider any subsequent attempt to rely on them to be an application to admit new evidence pursuant to Internal Rule 87(4).

29. Once the above documents are made accessible to the Chamber, they shall be assessed and placed on the Case File where found to be *prima facie* conducive to ascertaining the truth. All documents in this category ultimately placed on the Case File will, however, receive an

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in Phnom Penh”) and #24 (“AFP-164, Arrivée d’une délégation laotienne en visite officielle au Cambodge”) in E109/1.1 are on the Shared Materials Drive under the ERNs 00389075-00389077, 00005745, S00005751-00005752, 00005730 and 00391115, respectively. Some other documents on the Shared Materials Drive or the Case File appear to correspond to documents identified in E109/1.1 (e.g. document #12, “Une tragédie sans importance: Kissinger, Nixon et l’anéantissement du Cambodge, William SHAWCROSS”, seems to correspond to E3/88, and document #15, “Cambodia: The verdict is guilty on Nixon and Kissinger”, seems to correspond to ERN 00006030-00006033), but as the KHIEU Samphan Defence has not provided ERNs for these documents the Chamber cannot be certain.

<sup>42</sup> See E109/2.3.

<sup>43</sup> See paragraph 8, above. While the 19 new documents proposed by the Civil Party Lead Co-Lawyers possess a Case File reference number only by virtue of inclusion in a separate filing (see footnote 36, above), the Chamber considers it unnecessary for them to be re-filed under different Case File reference numbers.

<sup>44</sup> Documents #356 in E109/4.5 (ERN 00420026-00420042) and #56 (ERN P00513616), #63 (ERN P00513407) and #90 (ERN P00513619) in E109/4.15; see further Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011.

<sup>45</sup> Documents #115 (which may already be on the Case File under D56-Doc. 437) and #233 in E109/4.1, #17 in E109/4.5 (the document with the ERN 00002196-00002203 does not correspond to the Co-Prosecutors' description of document #17) and #230 in E109/4.15.

<sup>46</sup> Documents #1 (“Entretien avec Laurence PICQ par Jean-Paul Desgoutte”), #7 (“Témoignage de Philippe JULIAN”) to #23 (“Mémorandum de conversation entre le Président de l’Indonésie et Ford et Kissinger”), and #25 (“A Special Supplement: Cambodia, The New York Review of Books, Noam Chomsky”) to #34 (“Document ina.fr, Intervention de feu M. le Président Pompidou sur la grâce à Touvier”) in E109/1.1.

<sup>47</sup> Documents #1, #3, #4, #6 and #8 in E109/6.2.

E3 classification only after the Trial Chamber has heard and ruled on specific objections to them, if any, pursuant to Internal Rule 87(3)(a)-(e) and the modalities described above (Section 4.1.1).<sup>48</sup> A later hearing for this purpose will be scheduled in due course.

**4.2.2 Documents tendered after the commencement of trial and which must satisfy the criteria contained in Internal Rule 87(4)**

**4.2.2.1 Documents sought by the Co-Prosecutors**

30. The Co-Prosecutors contend that the KHIEU Samphan Video Interview “was posted online by a third party claiming to be Khieu Samphan and discovered by the Office of the Co-Prosecutors on 1 November 2011.”<sup>49</sup> Although not specifying when the KHIEU Samphan Video Interview was posted online, the Chamber considers that the Co-Prosecutors’ application to add this interview to the Case File by 5 December 2011 demonstrates, in the circumstances, reasonable diligence and accordingly grants the Co-Prosecutors’ request that it be placed on the Case File.

31. The Chamber notes that the Documentary, of which the NUON Chea Video Clips are part, was identified in the Civil Party Lead Co-Lawyers’ lists of documents of April and July 2011.<sup>50</sup> It has therefore already been examined by the Chamber in the course of its review of the Civil Party Lead Co-Lawyers’ new documents and placed on the Case File, having been found to be *prima facie* conducive to ascertaining the truth. The Co-Prosecutors’ Third Request is consequently moot. As the NUON Chea Video Clips are excerpts from this film, the Chamber does not consider them to be separate documents, and they will be placed on the Case File in conjunction with the Documentary.

32. With regard to the Book, which was published in 2010, the Chamber notes that the Co-Prosecutors have failed to explain why they could not have obtained it through the exercise of due diligence prior to its acquisition by the ECCC Library and before the opening of the trial. As, however, the Documentary is based on, and is thus closely related to, the Book, the Chamber considers it to be in the interests of justice to evaluate these sources together and

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<sup>48</sup> See further 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”, E131/1, 25 October 2011 (noting the obligation on parties seeking to put a document before the Chamber to ensure its availability in all official languages).

<sup>49</sup> Co-Prosecutors’ Second Request, para. 3.

<sup>50</sup> Exhibit #1 in E109/2.3, which appears as Exhibit #1 in E9/32.2.

will therefore assesses them both in accordance with the same criteria. It has on this basis granted the Co-Prosecutors' request to place the Book on the Case File.<sup>51</sup>

33. A hearing will be scheduled to permit the parties to pose any relevant objections to all documents in this category (namely, the KHIEU Samphan Video Interview, Book and Documentary) pursuant to Internal Rule 87(3) in due course.

#### 4.2.2.2 Documents identified belatedly by the NUON Chea Defence

34. The Chamber notes that two of the 14 new documents identified in the NUON Chea List were also included in the Co-Prosecutors' Initial List and Revised Lists, filed on 19 April and 22 July 2011 respectively.<sup>52</sup> They have therefore already been examined by the Chamber in the course of its review of the Co-Prosecutors' new documents and placed on the Case File, having been found to be *prima facie* conducive to ascertaining the truth.

35. Regarding the remaining 12 documents, the Chamber has previously observed that the NUON Chea Defence has failed to comply with the deadlines set by the Chamber for filing lists of documents, despite having been warned that this failure would restrict its ability to put documents before the Chamber during the trial.<sup>53</sup> The Chamber therefore regards reference to these 12 documents to be an application to admit them as new evidence pursuant to Internal Rule 87(4). Although the NUON Chea Defence characterises the submissions that accompany its list as a reasoned submission for the purposes of Internal Rule 87(4), the Chamber notes that this submission does not attempt to explain why the specified documents were unavailable before the opening of the trial, and why they could not have been identified earlier with the exercise of due diligence on the part of the NUON Chea Defence.<sup>54</sup>

36. Despite the lack of due diligence on the part of the NUON Chea Defence, the Chamber notes the international jurisprudence which exceptionally permits a Chamber to belatedly admit material that is relevant and of sufficient importance to justify its late addition, where

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<sup>51</sup> The Book, the KHIEU Samphan Video Interview and the NUON Chea Video Clips are also presently on the Case File only in consequence of being annexed to another filing (E152.2, E152.1.1R – E152.1.54R, and E93/7.3R respectively). The Chamber nonetheless finds it unnecessary for them to be re-filed under different Case File reference numbers.

<sup>52</sup> Documents #22 and #23 in E131/1/13.1, which appear as documents #89 and #90 in E109/4.19 (*see* E131/1/14, footnote 2).

<sup>53</sup> 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", E131/1, 25 October 2011, p. 4.

<sup>54</sup> NUON Chea Application, para. 7

weighing the need for adequate protection of the rights of the Accused.<sup>55</sup> The Chamber will generally have regard to such documents only where they are considered by the Chamber to be exculpatory and to require evaluation in order to avoid a miscarriage of justice.

37. The Chamber has reviewed those of the remaining 12 documents currently accessible to it and considers most to be neither relevant nor exculpatory.<sup>56</sup> It has nonetheless placed them on the Case File. The Chamber emphasises, however, that these documents may only be put before the Chamber if found to satisfy the criteria contained in Internal Rule 87(3). Opportunity for the parties to formulate objections, if any, to these documents pursuant to these criteria will be provided at a later date, in accordance with the above procedural framework (Section 4.1.1).

#### 4.2.2.3 *Documents contained in the parties' Revised Lists not identified in the original lists*

38. The Chamber notes that, contrary to the terms of its order of 25 October 2011, some parties have included in their Revised Lists documents that were not identified in their Original Lists filed in April 2011.<sup>57</sup> This describes three of the new documents on the Co-Prosecutors' list of 2 November 2011 and one of the new documents on IENG Sary's list of 2 November 2011.<sup>58</sup> As the Chamber was not notified of the parties' intention to rely on these documents until the parties filed their Revised Lists in November 2011, well after the opening of the trial, these additions would usually be regarded as applications to admit new evidence under Internal Rule 87(4). The parties have not to date sought to satisfy the criteria set out in this sub-rule in relation to these documents.

39. One of the above-mentioned documents on the Co-Prosecutors' list, however, was a biography of a witness who has already testified in Case 002/01. It has already been provided

<sup>55</sup> See e.g. *Prosecutor v. Popović et al.*, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, ICTY Appeals Chamber (IT-05-88-AR73.1), 14 December 2007, para. 37; see also footnote 30 (above) and accompanying text.

<sup>56</sup> Only 11 of the 12 above-mentioned new documents identified in the NUON Chea List are annexed to the NUON Chea List itself, namely documents #24 (E131/1/13.2), #25 (E131/1/13.12), #26 (E131/1/13.3), #27 (E131/1/13.4), #28 (E131/1/13.5), #29 (E131/1/13.6), #31 (E131/1/13.7), #32 (E131/1/13.8), #33 (E131/1/13.9), #34 (E131/1/13.10) and #35 (E131/1/13.11) in E131/1/13.1. The Chamber has retained these documents on the Case File under the above reference numbers.

<sup>57</sup> 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", E131/1, 25 October 2011, p. 1.

<sup>58</sup> Documents #171, #924 and #928 in E131/1/4.1 (Co-Prosecutors) and document #20 in E131/1/3.2 (IENG Sary). Entries #928 in E131/1/4.1 and #20 in E131/1/3.2 refer to the same document, namely the record of an interview with TCW-564.

an E3 classification following reference to it in court in the course of the testimony of that witness and in the absence of any objections to this document.<sup>59</sup> Under the circumstances, and given the close nexus between this document and the testimony of its author, the Chamber has in the exercise of its discretion affirmed the E3 classification afforded to this document. The other two documents appear, similarly, to be the statements of individuals who are scheduled to testify before the Chamber at a later date.<sup>60</sup> Despite the belated identification of these documents, the Chamber will also exceptionally permit this material to be placed on the Case File and to be put before the Chamber, subject to the right of the parties to pose objections, if any, based on the Internal Rule 87(3) criteria in due course.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**REJECTS** as contrary to the ECCC legal framework the assertion of the NUON Chea Defence (E131/1/13) that it may tender any document it considers relevant to the trial at any stage during the trial;

**DENIES** the request of the IENG Sary Defence to include the contents of the entire Shared Materials Drive (E9/24) within the scope of documents upon which they may seek to rely at trial as contravening the ECCC legal framework and the requirements of a fair and expeditious trial;

**FINDS** that the 465 new documents identified in paragraph 27 of this decision and accessible to the Chamber and the parties are *prima facie* conducive to ascertaining the truth, notes that 35 of these documents have since been placed on the Case File in consequence of decision E185 (paragraph 8) and places on the Case File the remaining 430 of these 465 new documents;

**DECLINES** to place on the Case File the new documents numbered 356 in E109/4.5 (ERN 00420026-00420042), 56 in E109/4.15 (ERN P00513616), 63 in E109/4.15 (ERN P00513407) and 90 in E109/4.15 (ERN P00513619) in consequence of paragraph 27 of this Decision;

**ORDERS** that the 37 new documents identified in paragraph 28 of this decision be uploaded to the Shared Materials Drive no later than Friday 11 May 2012 to permit assessment by the Chamber of whether they are *prima facie* conducive to ascertaining the truth and thus to be placed on the Case File;

**PLACES** on the Case File the KHIEU Samphan Video Interview, the NUON Chea Video Clips and the Book;

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<sup>59</sup> Biography of LONG Narin *alias* Rith, E3/128 (document #171 in E131/1/4.1.); *see also* T., 8 December 2011, pp. 2-58.

<sup>60</sup> Interview with TCW-564 (document #928 in E131/1/4.1, also listed as document #20 in E131/1/3.2); Interview with TCCP-142 (document #924 in E131/1/4.1); *see further* Trial Chamber Memorandum entitled "Next group of witnesses, Civil Parties and experts to be heard in Case 002/01", 21 February 2012, E172.

**PLACES** on the Case File the three new documents described in paragraph 39 of this Decision, as well as the 11 new documents described in paragraph 37 of this Decision, notwithstanding the filing parties' belated identification of them; and

**ADVISES** that opportunity will be provided to the parties at a later date for the hearing of objections, if any, to all material placed on the Case File or proposed to be put before the Chamber in consequence of this Decision pursuant to Internal Rule 87(3). *ff am*

