

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 21 March 2013

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S 22 FEBRUARY 2013
OBJECTIONS TO THE ADMISSIBILITY OF NEW DOCUMENTS**

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I. INTRODUCTION

1. The defence for Khieu Samphan (“Defence”) have filed additional objections¹ (“Objections”) to “new” documents submitted for admission as part of the Co-Prosecutors’ 22 July 2011 lists of proposed documents (“Revised Lists”).² The Defence claim they have not had previous opportunities to object to these documents, and have not had access to some of them. The Objections were notified to the parties on 11 March 2013.
2. The Co-Prosecutors hereby respond. The Co-Prosecutors submit that the Defence have already had opportunity to object orally and in writing to “new” documents contained in the Revised Lists during the debate and submissions on those Revised Lists and that they have had access to those documents through the Shared Materials Drive since at least November 2011. Therefore, there is no reason to consider further objections at this stage.
3. In the alternative, as for the substantive objections raised by the Defence, the Co-Prosecutors submit that only 12 objections have been effectively raised by the Defence regarding documents that are susceptible to objections. The Co-Prosecutors respond in the attached Annex as regards those 12 documents.

II. PROCEDURAL HISTORY

4. On 19 April 2011, the Co-Prosecutors, in response to a Trial Chamber order³, filed a list in table format of documents already on the Case File and “new” documents they intended to put before the Trial Chamber (“Initial Lists”). This list was divided by type of document into 20 Annexes. A 21st Annex was also provided, which merely compiled all of the “new” documents, *i.e.* documents not already on the Case File, which were distributed throughout the other annexes.⁴
5. Subsequently, the Trial Chamber directed the parties to file lists of documents pertinent only to the first phase of trial⁵. The Co-Prosecutors re-submitted their Initial Lists, highlighting in green those documents in each of the 20 Annexes relevant to the first phase (“Revised Lists”).⁶ Included in the Revised Lists were “new” documents. The Co-Prosecutors did not re-submit Annex 21 alongside the Revised Lists.
6. On 25 October 2011, the Trial Chamber ordered the parties to submit lists indicating the documents from their first phase lists the parties considered relevant to the witnesses and

¹ **E246/1/1** Khieu Samphan’s Objections to Admissibility of New Documents, 22 February 2013, as notified on 11 March 2013.

² **E109/4** Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, 22 July 2011 (and related 20 annexes).

³ **E9** Trial Chamber Order to File Material in Preparation for Trial, 17 January 2011, paras. 12(i)-(ii).

⁴ **E9/31** Co-Prosecutors’ Rule 80(3) Trial Document List (with 21 Annexes), 19 April 2011.

⁵ **E1/4.1** Transcript of Initial Hearing, 27 June 2011, p. 25.

⁶ **E109/4** Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, 22 July 2011 (and related 20 annexes).

experts to be called in the first three weeks (first segment) of trial, and to submit any objections within 10 days of those filings.⁷ On 1 November 2011, the Co-Prosecutors provided their list of documents in relation to the first three weeks of trial.⁸ The Co-Prosecutors submitted 978 documents, including documents that were not yet on the Case File.⁹ The defence teams submitted general objections to the Co-Prosecutors' documents.¹⁰ In particular, the Defence submitted objections by category of document, including an objection to "new documents not on the case file and that have not been disclosed to other parties"¹¹. Later in their objections, it became clear that the Defence did not object to the documents because they were "new", but because they claimed they could not access them, requesting as part of their relief that the Trial Chamber "reject all documents that are not accessible to the Defence".¹² The Co-Prosecutors responded, informing the defence teams, and the Defence in particular, that all documents identified as "new" were "available to all parties on the Shared Materials Drive in the folder entitled 'Case 002 OCP New Documents'".¹³

7. In the same 25 October 2011 order, the Trial Chamber also ordered the parties to indicate whether they had objections to the remaining first phase documents proposed by the other parties, including the Revised Lists, by 5 January 2012.¹⁴ The defence teams filed their objections to the remaining documents on the Co-Prosecutors' Revised Lists on 5 January 2012.¹⁵ The Defence merely reiterated their previous challenges to the documents by category including, therefore, their challenges to "new" documents.¹⁶
8. On 11 January 2012, the Trial Chamber clarified that only documents that were not included in the parties' April 2011 lists (including the Co-Prosecutors' Initial Lists) would be considered "new" for the purposes of needing to satisfy Rule 87(4).¹⁷ The Chamber provided

⁷ **E131/1** Trial Chamber Memorandum entitled "Witness Lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5", 25 October 2011, p. 1.

⁸ **E131/1/4** 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, 1 November 2011; **E131/1/4.1** Annex A.

⁹ **E131/19** Co-Prosecutors' Consolidated Response to Objections to Co-Prosecutors' Document List for First Trial Session, 1 December 2011, para. 6 (referencing E131/1/4 at note 9 (identifying the new documents)).

¹⁰ **E114** Ieng Sary's Objections to the Admissibility of Certain Categories of Documents, 6 September 2011; **E131/6** Khieu Samphan's Objections to the Admissibility of Other Parties' Document Lists for the First Session of the First Trial, 14 November 2011; **E131/1/9** Nuon Chea's Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, 14 November 2011.

¹¹ **E131/6** Khieu Samphan's Objections 14 November 2011, para. 41.

¹² **E131/6** Khieu Samphan's Objections, 14 November 2011, para. 48.

¹³ **E131/19** Co-Prosecutors' Consolidated Response to Objections, 1 December 2011, para. 51.

¹⁴ **E131/1** Trial Chamber Memorandum, 25 October 2011, p.2.

¹⁵ **E131/1/10** Ieng Sary's Objections to the Admission of Certain OCP Documents for the First Four Trial Segments, 5 January 2012; **E131/1/11** Khieu Samphan's Objection to the Admissibility of Other Parties' Remaining Document Lists for the First Four Segments of the First Trial, 5 January 2012; **E131/1/12** Nuon Chea's Document Objections and Further Submissions Pursuant to Rule 92, 5 January 2012.

¹⁶ **E131/1/11** Khieu Samphan's Objection, 5 January 2012, para. 5.

¹⁷ **E159** Trial Chamber Memorandum entitled "Scheduling of oral hearings on documents (16-19 January 2012)", 11 January 2012, para. 1.

for oral argument on the admissibility of Annexes 1-5 of the Revised Lists from 16-19 January 2012.¹⁸ It then listed the annexes that it was preparing to put before it (A1-A10), stated that “all documents” in these annexes would be put before it, and provided the number of documents contained in each.¹⁹ The numbers provided by the Trial Chamber for each of the annexes was the totality of the documents in the respective Annex, including all “new” documents.²⁰

9. During 16-19 January 2012 the Trial Chamber held hearings on the admissibility of documents in Annexes A1-A5 to which there were objections.²¹ All defence teams made objections to documents in the relevant Annexes during these hearings, and none of the defence teams claimed that “new” documents were excluded from their objections.²² On 19 January 2012, the Co-Prosecutors submitted an oral motion to put before the Trial Chamber all documents contained in their Revised List Annexes A1-A5.²³
10. On 17 February 2012, the Trial Chamber informed the parties that, “pursuant to Internal Rule 87(3)”, it would shortly hear discussion on “all remaining documents proposed to be put before the Chamber by the parties which have not been discussed to date”.²⁴ It further stated that “[t]his hearing will therefore conclude discussion of all documents proposed to be put before the Chamber by all parties in Case 002/01.”²⁵
11. In a memorandum of 24 February 2012, the Trial Chamber reiterated that an upcoming hearing on 12 March 2012 would “allocate time for oral objections to all documents which the parties have sought to be put before the Chamber as relevant to the trial in Case 002/01 (E109/1.1, E109/2.1, E109/4, E109/6.2) and which have not to date been discussed in court. These oral hearings are intended as an alternative to the filing of written submissions.”²⁶ E109/4 and its related Annexes are the Revised Lists, which contain the “new” documents.
12. The Trial Chamber then specified which documents would be addressed at the hearing, making clear that it intended for the hearing to address all remaining documents from the Revised Lists (except for Annexes 12 and 13)²⁷ by stating that the hearing would encompass “[a]ll categories of documents proposed by the Co-Prosecutors not addressed during

¹⁸ E159 Trial Chamber Memorandum, 11 January 2012, para. 4.

¹⁹ E159 Trial Chamber Memorandum, 11 January 2012, para. 8.

²⁰ E159 Trial Chamber Memorandum, 11 January 2012, para. 8.

²¹ E1/27.1 TC Transcript of Proceedings, 16 January 2012; E1/28.1 TC Transcript of Proceedings, 17 January 2012; E1/29.1 TC Transcript of Proceedings, 18 January 2012.

²² See, e.g., E1/28.1 TC Transcript of Proceedings, 17 January 2012, pp. 63-71, 111-117; E1/29.1 TC Transcript of Proceedings, 18 January 2012, pp. 49-54; E1/30.1 TC Transcript of Proceedings, 19 January 2012, pp. 36-37, 106-112.

²³ E1/30.1 TC Transcript of Proceedings, 19 January 2012, p. 68.

²⁴ E172 Trial Chamber Memorandum entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, 17 February 2011, p.1.

²⁵ E172 Trial Chamber Memorandum, 17 February 2011, p.1.

²⁶ E172/1 Trial Chamber Memorandum entitled “Further oral hearings on documents commencing (12 March 2012)”, 24 February 2012, para. 1.

²⁷ E172/1 Trial Chamber Memorandum, 24 February 2012, note 1.

previous document hearings on 16-19 January 2012 and 16 February 2012, namely ...”²⁸— and proceeded to list Annexes 6-11 and 14-20. Once again, for each of these Annexes the number of documents provided by the Trial Chamber was equal to the total number of documents in that Annex, including all “new” documents, and the Trial Chamber stated that “all documents” in each of the Annexes would be considered.²⁹ The Trial Chamber also informed that “[f]urther directions regarding discussion of all new documents listed by the parties shall follow in due course, following issuance of the Trial Chamber’s pending decision in this area.”³⁰ After receiving additional information from the parties the Trial Chamber issued a revised version of this memorandum on 2 March 2012³¹, which repeated the relevant portions of the previous memorandum, and informed that the afternoon session of 13 March 2012 would be devoted to the “Khieu Samphan Defence objections to all above documents”³².

13. On 12-15 March 2012, the Trial Chamber held hearings on the admissibility of documents listed in Revised List Annexes A6-A11 and A14-20.³³ At the beginning of these hearings the President stated that the hearings would concern the documents listed in paragraph 3 of the Trial Chamber’s 2 March 2012 memorandum³⁴, that is, all documents in Annexes 6-11 and 14-20 of the Revised Lists. All defence teams made oral objections to documents during these hearings, including the Defence.³⁵ The Defence was the only defence team to claim that the “new” documents contained in the Annexes were not under discussion at the hearings.³⁶ The Co-Prosecutors’ responded to the Defence that those documents were not “new” anymore as they were submitted prior to the commencement of the trial and invited

²⁸ E172/1 Trial Chamber Memorandum, para. 2.

²⁹ E172/1 Trial Chamber Memorandum, para. 2.

³⁰ E172/1 Trial Chamber Memorandum, para. 5.

³¹ E172/5 Trial Chamber Memorandum entitled “Updated memorandum for next document hearing (12-19 March 2012)”, 2 March 2012.

³² E172/5 Trial Chamber Memorandum, 2 March 2012, at para. 5.

³³ E1/46.1 TC Transcript of Proceedings, 12 March 2012; E1/47.1 TC Transcript of Proceedings, 13 March 2012; E1/48.1 TC Transcript of Proceedings, 14 March 2012; E1/49.1 TC Transcript of Proceedings, 15 March 2012; see also E172/5 Trial Chamber Updated Memorandum for next document hearing, 2 March 2012.

³⁴ E1/46.1 TC Transcript of Proceedings, 12 March 2012, English version p. 62 (time 13.35.32); see also E1/47.1 TC Transcript of Proceedings, 13 March 2012, English version p. 2 (time 09.08.46).

³⁵ See, e.g., E1/47.1 TC Transcript of Proceedings, 13 March 2012, English version pp. 2-22 (time 09.08.46).

³⁶ E1/47.1 TC Transcript of Proceedings, 13 March 2012, English version p. 4 (time 09.15.36). The Defence stated in Court: “[F]or new documents and also pursuant to the decision of the Trial Chamber; there is document E172/5 which clearly states the facts regarding the new documents that shall be discussed in Annex 21 and that shall be discussed separately, not during this particular hearing. And as defence counsel for Khieu Samphan, we observe that the new documents are not collective in one annex, but they are scattered in almost every annex; that is, the annex of the list submitted by the Prosecution. The new documents amount to 341 and we, as Khieu Samphan’s defence, will not make comments or make our oral objections to these documents yet. This is not the appropriate time for discussion on these new documents and, of course, we believe that the Trial Chamber will give the opportunity for the parties to discuss these documents at a later stage.”

the Chamber to consider them admitted, similarly to any other documents listed in the Annexes A6-11 and A14-20.³⁷

14. On 9 April 2012, the Trial Chamber issued its decision in relation to the admission of all Revised List documents in Annexes A1-A5.³⁸ The Trial Chamber noted that the defence teams had submitted objections in writing and that “[a]ll teams further availed themselves of the opportunity to object orally to certain documents and categories of documents...”³⁹ The Trial Chamber admitted all documents contained therein, including “new” documents, except for 12: 9 considered unreliable and irrelevant to the trial in Case 002/01, and 3 that were at that time unavailable on the shared materials drive.⁴⁰
15. On 30 April 2012, the Trial Chamber issued a decision concerning “new” documents proposed by the Co-Prosecutors for inclusion on the Case File.⁴¹ The Trial Chamber emphasised the difference between two categories of “new” documents. The first category was new documents proposed for admission subsequent to the commencement of trial in three filings pursuant to Rule 87(4).⁴² The second category was of documents that were not on the Case File 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)”⁴³, *i.e.* that were on the Initial Lists and then the Revised Lists.

³⁷ **E1/47.1** TC Transcript of Proceedings, 13 March 2012, English version pp. 73-74 (time: 13.55.17) “I think counsel for Khieu Samphan submitted that their understanding was that new documents identified in Annex 21 of the Co-Prosecutors' list are not the subject of these hearings. I believe they're incorrect on this. These are not new documents submitted after the opening of the trial. They are simply documents that we submitted back in April 2011, in respond [sic] to Your Honours scheduling orders. Those documents are documents which, at that time, were not on the case file, and they were proposed by us. They're very much included in these proceedings. As counsel indicated, they are scattered throughout the 20 annexes, and they're, of course, also separately identified in Annex 21. Annex 21 is simply a listing for convenience of all documents that were proposed as new at that time. I make this point because the label "new" no longer applies to these documents. It is only once a trial commences, with the initial hearing -- it is after that point in time the Rule 87.4 provides specific restrictions on the admission of new material. It is once the trial has opened. And our submission is that all of those documents that are identified as new in our -- all [Rule] 80 lists, and in our first phase list -- that rule does not apply. Those documents have been put before Your Honours and the parties. They were put before you a while ago. They are the subject of these hearings, and we invite the Chamber to consider them admitted, as all of the other documents that are in the annexes.”

³⁸ **E185** Trial Chamber 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, 9 April 2012, para. 1.

³⁹ **E185** Trial Chamber Decision, 9 April 2012, para. 8.

⁴⁰ **E185** Trial Chamber Decision, 9 April 2012, note 56, p. 17. Those documents not admitted are identified in **E185.2**.

⁴¹ **E190** Trial Chamber Decision Concerning New Documents and Other Related Issues, 30 April 2012, paras. 24(a)(i), 27, 28; see also **E190.1** Annex: New Documents Identified by the Parties in their Revised Document Lists of July 2011.

⁴² **E190** Trial Chamber Decision, 30 April 2012, para. 1.

⁴³ **E190** Trial Chamber Decision, 30 April 2012, para. 1.

16. The Trial Chamber noted that 444 of the 448 new documents on the Revised Lists had “been uploaded to the so-called Shared Materials Drive or annexed to other filings and are therefore accessible to the parties and the Chamber.”⁴⁴ The Trial Chamber placed on the Case File as “*prima facie* conducive to ascertaining the truth”⁴⁵ 444 of the 448 new documents dispersed throughout the Revised List annexes, without formally admitting them.⁴⁶
17. On 3 December 2012, the Trial Chamber issued its decisions on the admission to the Case File of the Co-Prosecutors’ Revised List Annexes A6-A11 and A14-A20.⁴⁷ It noted that the decision “follows oral hearings regarding objections to these documents pursuant to Internal Rule 87(3)”.⁴⁸ In further summarizing the procedural history regarding the opportunities provided for objection to the Revised Lists the Trial Chamber stated:
- The parties were first granted an opportunity to present objections to documents listed in Annexes A1-A5 during a hearing on 16-19 January 2012 (‘First Document Hearing’). ... Objections to documents listed in the Co-Prosecutors’ Annexes A6-A11 and A14-20 ... were presented during a hearing on 12-15 March 2012 (‘Third Document Hearing’).*⁴⁹
18. The Trial Chamber further noted that “[i]n addition to their written objections, all Defence teams availed themselves of the opportunity to object orally to documents listed in the Co-Prosecutors’ Annexes A6-A11 and A14-A20 during the Third Document Hearing.”⁵⁰ The Trial Chamber emphasized that it “reviewed each document included in Annexes A6-A11 and A14-A20 and has considered all objections to them raised by the parties”.⁵¹
19. After noting again that it had examined “all documents listed in Annexes A6-A11 and A14-A20”, the Trial Chamber admitted all documents in Revised Lists Annexes A6-A11 and A14-A20 with the exception of 7 considered irrelevant to Case 002/01 and listed in Annex C to the decision.⁵² Surprisingly, however, one paragraph of the Trial Chamber’s conclusion stated that, contrary to all other indications in that decision, it had “deferred its decision on more than 400 documents listed in the Co-Prosecutors’ Annex 21 in consequence of the New Documents Decision. Adversarial argument in relation to these documents will shortly be scheduled and a decision in relation to them rendered in due course.”⁵³ This is surprising not

⁴⁴ E190 Trial Chamber Decision, 30 April 2012, para. 27.

⁴⁵ E190 Trial Chamber Decision, 30 April 2012, para. 27.

⁴⁶ E190 Trial Chamber Decision, 30 April 2012, paras. 24(a)(i), 27, 28; see also E190.1 Annex: New Documents Identified by the Parties in their Revised Document Lists of July 2011..

⁴⁷ E185/1 Trial Chamber Decision on Objection to Documents Proposed to be Put Before the Chamber in Co-Prosecutors’ Annexes A6-A11 and A14-A20 and by the Other Parties, 3 December 2012.

⁴⁸ E185/1 Trial Chamber Decision, 3 December 2012, para. 1.

⁴⁹ E185/1 Trial Chamber Decision, 3 December 2012, paras. 2, 3.

⁵⁰ E185/1 Trial Chamber Decision, 3 December 2012, para. 5.

⁵¹ E185/1 Trial Chamber Decision, 3 December 2012, para. 11.

⁵² E185/1 Trial Chamber Decision, 3 December 2012, para. 18; E185/1.3 Annex C - Documents Proposed by the Co-Prosecutors.

⁵³ E185/1 Trial Chamber Decision, 3 December 2012, para. 22.

only because those hearings already taken place, but also because the Trial Chamber stated repeatedly that it was considering and admitting all documents (which would logically include all “new” documents) in Annexes A6-A11 and A14-A20, and it issued a holding that states that it “considers those documents contained in the Co-Prosecutors’ Annexes A6-A11 and A14-A20 to have been put before the Chamber”⁵⁴.

20. On 6 February 2013, the defence for Ieng Sary submitted a letter to the Trial Chamber Senior Legal Officer requesting “clarification as to whether the Defence may still object to any of the documents contained in the OCP’s Annex A21 (and the other parties’ new documents filed pursuant to Rule 80(3)(d))”.⁵⁵ The defence for Ieng Sary’s letter noted that they had “objected to the documents contained in Annex A21 in writing on 5 January 2012 and then again during oral arguments on 16-19 January 2012 and 12-15 March 2012.”⁵⁶ The defence for Ieng Sary also observed that the Trial Chamber’s decision of 3 December 2012 made statements regarding the admission of “new” documents that “seem to be contradictory”⁵⁷, as the Co-Prosecutors have noted in the preceding paragraph.
21. On 13 February 2013, the Trial Chamber, interpreting the letter from the defence for Ieng Sary as a request for an “opportunity to present further objections to new documents tendered by the Co-Prosecutors in Annex A21 and other parties’ new documents”, granted the request.⁵⁸ The defence for Khieu Samphan (“Defence”) filed their Objections⁵⁹, which were notified to the parties on 11 March 2013.

III. ARGUMENT

A. The Defence Have Had Ample Opportunity to Lodge Objections to the Admissibility of “New” Documents Contained in the Revised Lists

22. The Defence concede that the documents in Annex 21 of the Initial Lists were dispersed among the other Annexes 1-11 and 14-20, the Revised Lists of which have been subjected to adversarial challenge.⁶⁰ The Defence argue, however, that the “new” documents in each of the Annexes were not encompassed in the debate when each of those Annexes were discussed,⁶¹ and they accuse the Co-Prosecutors of acting in bad faith for asserting that there has been opportunity for objections to these documents previously.⁶²

⁵⁴ E185/1 Trial Chamber Decision, 3 December 2012, p. 10.

⁵⁵ Letter from Ieng Sary Defence Team, 6 February 2013.

⁵⁶ Letter from Ieng Sary Defence Team, 6 February 2013, p. 1.

⁵⁷ Letter from Ieng Sary Defence Team, 6 February 2013, para. 8.

⁵⁸ E246/1 Trial Chamber Memorandum entitled “Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines”, 13 February 2013, para. 4.

⁵⁹ E246/1/1 Khieu Samphan’s Objections, 22 February 2013, as notified on 11 March 2013.

⁶⁰ E246/1 Trial Chamber Memorandum, 13 February 2013, para. 3.

⁶¹ E246/1 Trial Chamber Memorandum, 13 February 2013, paras. 2-4.

⁶² E246/1 Trial Chamber Memorandum, 13 February 2013, para 17.

23. As a technical matter it must first be noted that the Revised Lists did not contain an Annex 21. Annex 21 was included with the Initial Lists only.
24. Moving to the substance of the claim, the Defence fails to substantiate its assertion that objections to the “new” documents were not heard in relation to each of the individual Annexes during the document hearings of 16-19 January 2012 and 12-15 March 2012.⁶³ The only defence team to put forward the argument that the oral hearings on the admissibility of the documents in the Annexes did not include the “new” documents contained therein was the Defence, and then only in relation to the March 2012 hearings regarding Annexes 6-11 and 14-20⁶⁴, not the January 2012 hearings regarding Annexes 1-5. Additionally, during those hearings, the Co-Prosecutors informed the Defence that the Co-Prosecutors did not share the Defence’s interpretation that the hearings did not include “new” documents stating: “Those documents have been put before Your Honours and the parties. They were put before you a while ago. They are the subject of these hearings, and we invite the Chamber to consider them admitted, as all of the other documents that are in the annexes.”⁶⁵
25. Furthermore, a review of the Trial Chamber memoranda preceding the document hearings of January and March 2012 show that the intent of the Trial Chamber was to have all documents in the Annexes (excluding Annexes 12 and 13) debated during those hearings. In its first memorandum dated 11 January 2012⁶⁶, the Trial Chamber informed the parties that it intended to “place the following entire categories of contemporaneous DK documents before it pursuant to Rule 87(3)” in reference to Annexes 1-10.⁶⁷ For each of these annexes, the Trial Chamber indicated the number of documents concerned.⁶⁸ The numbers of documents listed for each annex includes the “new” documents. In the same memorandum, the Trial Chamber further stated that “All documents in the above categories that have not been objected to within applicable deadlines shall be deemed to be put before the Chamber.”⁶⁹
26. On 17 February 2012, the Trial Chamber issued a second memorandum on the next group of witnesses, civil parties and experts to be heard in Case 002/01 and stated its intent to discuss “all remaining documents proposed to be put before the Chamber by the parties” and that “this hearing will therefore conclude discussion of all documents proposed to be put before the Chamber by all parties in Case 002/01.”⁷⁰

⁶³ E246/1 Trial Chamber Memorandum, 13 February 2013, para. 2.

⁶⁴ E1/47.1 TC Transcript of Proceedings, 13 March 2012 at 09.14.41 hrs, ENG ERN 00791136.

⁶⁵ E1/47.1 TC Transcript of Proceedings, 13 March 2012, p. 74.

⁶⁶ E159 Trial Chamber Memorandum entitled “Scheduling of oral hearings on documents (16-19 January 2012)”, 11 January 2012.

⁶⁷ E159 Trial Chamber Memorandum, 11 January 2012, para. 8

⁶⁸ E159 Trial Chamber Memorandum, 11 January 2012, para. 8

⁶⁹ E159 Trial Chamber Memorandum, 11 January 2012, para. 8

⁷⁰ E172 Trial Chamber Memorandum entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, 17 February 2011, p.1.

27. In Trial Chamber memorandum E172/1⁷¹, related to the document hearings commencing on 12 March 2012 (A6-A11 and A14-A20), the Trial Chamber stated its intention to hear oral objections “to all documents which the parties have sought to be put before the Chamber as relevant to the trial in Case 002/01 (E109/1.1, E109/2.1, E109/4, E109/6.2) and which have not to date been discussed in court.”⁷² The Trial Chamber again listed the number of documents in each relevant Annex that would be considered at the oral hearings which number included the “new” documents.⁷³ It further stated that each of these quantities represented “all documents” listed in the Initial List that were also included in the Revised Lists.⁷⁴ E172/5 reiterated this, and notes that the afternoon session of 13 March 2012 would be devoted to the “Khieu Samphan Defence objections to all above documents.”⁷⁵ Although E172/5 also states that “[f]urther directions regarding discussion of all new documents listed by the parties shall follow on due course...”,⁷⁶ because the “new” documents listed in the Co-Prosecutors’ annexes A1-A5 had already been debated, the Co-Prosecutors submit that the best interpretation of this is that it is a reference to documents put forward by the parties subsequent to the start of trial and that were not included in the parties’ initial lists. These remaining new documents were later debated on 22 January 2013.⁷⁷
28. All of these memoranda therefore make clear that all documents contained in Annexes 1-11 and 14-20 were the subject of challenge at the respective hearings. Further confirming that these documents have already been the subject of adversarial debate is the fact that the Trial Chamber has since issued a decision admitting the vast majority of documents in Revised Lists Annexes 1-5, including the “new” documents contained therein.⁷⁸
29. The Co-Prosecutors also recall that in addition to submitting oral objections, the Defence also submitted relevant objections in writing on 2 November 2011⁷⁹ and 5 January 2012.⁸⁰ Indeed, the Ieng Sary Defence request that was granted allowing for these additional objections acknowledged that the Ieng Sary Defence had already had an opportunity to object to the “new” documents distributed throughout the annexes, stating: “we objected to the documents contained in Annex 21 in writing on 5 January 2012 and then again during

⁷¹ **E172/1** Trial Chamber Memorandum entitled « Further Oral Hearings on Documents (commencing 12 March 2012), 24 February 2012.

⁷² **E172/1** Trial Chamber Memorandum, 24 February 2012, para. 1.

⁷³ **E172/1** Trial Chamber Memorandum, 24 February 2012, para. 2.

⁷⁴ **E172/1** Trial Chamber Memorandum, 24 February 2012, para. 2.

⁷⁵ **E172/5** Trial Chamber Memorandum: “Updated memorandum for next document hearing (12-19 March 2012), 2 March 2012, para. 5.

⁷⁶ **E172/5** Trial Chamber Memorandum, 2 March 2012, para. 7.

⁷⁷ **E1/162.1** Transcript of Proceedings, 22 January 2013.

⁷⁸ **E185** Decision on Objections to Documents, 9 April 2012.

⁷⁹ **E131/6** Khieu Samphan’s Objections to the Admissibility of Other Parties’ Document Lists for the First Session of the First Trial, 14 November 2011.

⁸⁰ **E131/1/11** Khieu Samphan’s Objection, 5 January 2012.

oral arguments on 16-19 January 2012 and 12-15 March 2012”.⁸¹ The Khieu Samphan Defence had these same opportunities.

30. Thus, the Defence have clearly had the opportunity to challenge the admission of “new” documents contained in the Co-Prosecutors’ Revised Lists Annexes. It is the Defence’s interpretation alone, one that has not been joined by the Co-Prosecutors, the Civil Parties or even the other defence teams, that the March 2012 hearings on the Revised Lists did not encompass “new” documents contained therein. While the Defence are free to choose not to address certain documents when provided an opportunity to do so, that does not mean that their unilateral pronouncements provide them with an additional opportunity to do so at a later date. The Defence are entitled to an *opportunity* for adversarial argument regarding documents, whether they seize that opportunity is their choice.
31. Furthermore, given the above, the Defence’s flippant aspersion of the Co-Prosecutors’ ethics—claiming they have acted in bad faith when noting the prior opportunities for objection the Defence have had—is deplorable and shown to lack a grounding in reality. It also further calls into question the credibility of the Defence’s claims as a whole.

B. All “New” Documents Included in the Revised Lists Are and Have Been Available to the Defence

32. The Defence claim that they did not have access to the “new” documents in the Revised Lists prior to the oral hearings on Annexes 1-11 and 14-20, and therefore could not have objected to them.⁸² The Co-Prosecutors informed the defence teams at least as early as November 2011 that all documents, including “new” documents, were available on the Shared Materials Drive⁸³, a fact that the Trial Chamber also confirmed.⁸⁴ This argument is therefore without merit.

C. Should the Trial Chamber Nevertheless Consider Further Objections, the Co-Prosecutors also Note that the Vast Majority of the Defence’s Objections are Unfounded

33. Most arguments put forward by the Defence concern documents that are no longer susceptible to objections.

i. Exclusion of 29 documents from OCP Initial Document List E9/31

34. The admissibility hearings held so far have only discussed the documents proposed in the Revised Lists (E109/4). 29 documents that the Defence object to appeared in Annex 21 to

⁸¹ Letter from Ieng Sary Defence, 6 February 2013, p. 1.

⁸² E246/1/1 Khieu Samphan’s Objections, 22 February 2013, para. 17.

⁸³ E131/19 OCP Consolidated Response to Objections to Co-Prosecutors’ Document List for First Trial Session, 1 December 2011, para. 51.

⁸⁴ E190 Trial Chamber Decision, 30 April 2012, para. 27.

the Initial Lists but were not retained by the Co-Prosecutors in their Revised Lists and therefore are not properly subject to objection here. These documents include:

- E246/1/1.2, nos. 479-480 (also initially listed in April 2011 in **Annex 8**, under nos. 4 and 92);⁸⁵
- E246/1/1.2, no. 439 (also initially listed in April 2011 in **Annex 9**, under no. 19);
- E246/1/1.2, nos. 398, 401, 419, 430, 431, 432, 433, 435 (also initially listed in April 2011 in **Annex 10**, under nos. 422, 30, 259, 440, 424, 441, 423, 251);
- E246/1/1.2, nos. 79, 89, 96, 107, 131, 135, 143, 150, 154, 159, 167, 168 (also initially listed in April 2011 in **Annex 18**, under nos. 92, 124, 141, 162, 296, 302, 312, 351, 355, 372, 500, 518);
- E246/1/1.2, no. 22 (also initially listed in April 2011 in **Annex 19**, under no.127).

35. Additionally, among the 452 “new” documents scattered in Annexes 1-20 attached to E109/4, the Chamber has pointed out in its Decision E190 dated 30 April 2012 that 3 documents were already put before the Chamber while another document had erroneously been listed twice by OCP.⁸⁶

ii. Exclusion of 34 “new” documents listed in E109/4 - Annexes 12 & 13

36. Documents contained in Annexes 12 and 13 have not yet been the subject of adversarial debate and separate procedures have been established by the Trial Chamber for objection to these documents.⁸⁷ They are therefore not properly part of the present consideration, and the documents appearing under the numbers 445-478 of the Defence E246/1/1.2 table should be excluded from the present debates.

iii. Exclusion of 36 “new” documents listed in E109/4 - Annexes 1-5

37. The Defence cannot ignore the fact that by the Trial Chamber’s decision E185 dated 9 April 2012, the Trial Chamber, following the hearings held between 16 and 19 January 2012 about all OCP documents contained in the Revised Lists Annexes 1 to 5 (including documents already on the case file and “new” documents”), admitted all the “new” documents listed in those A1-A5 documents except two (one deemed irrelevant and another deferred as not

⁸⁵ Those two documents have been later proposed by OCP in relation with the movement of the population- Phase 1, table **E223/2/1.2**, nos. 40 & 70 and have been debated upon before the Trial Chamber in January 2013.

⁸⁶ **E190** Trial Chamber Decision, 30 April 2012, footnote 33.

⁸⁷ See **E96/7** Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, para. 3; **E208/3** Trial Chamber Memorandum Regarding “Co-Prosecutors’ Request to Admit Witness Statements Relevant to Population Movement Phases 1 and 2 (208 and E208/2) and Jeng Sary Response (E208/1), 19 July 2012, at para. 3.

accessible on the Shared Materials Drive).⁸⁸ These documents are therefore no longer susceptible to objection as to admission.

38. In total 35 “new” documents have been admitted as both relevant and reliable and therefore were considered by the Trial Chamber to be put before it: 16 documents from Annex 1 (Accused Statements)⁸⁹, 1 document from Annex 2 (CPK Publications & Directives),⁹⁰ 11 documents from Annex 4⁹¹, and 7 from Annex 5.⁹² In addition to those 35 documents, one other document had previously been put before the Chamber.⁹³ Each of those documents was assigned an E3 reference number, a fact that the Defence, apparently not realizing that those documents were already admitted by the Chamber, “observed and deplored”.⁹⁴
39. Further, the Defence raised objections regarding each of the 16 “new” documents of Annex 1 in the “Observations” field of their table E246/1/1.2. As the decision to admit those documents has been already issued, the Co-Prosecutors submit that those objections must be considered moot. Moreover, the argument made in paragraph 26 of the Defence Filing regarding documents E3/705 and E3/717 are irrelevant as those documents cited are Annex 1 documents already admitted by the Chamber. The Defence argue that they did not have time to object to all the other “new” documents listed in Annexes A2-A5.⁹⁵

⁸⁸ **E185** Trial Chamber Decision, 9 April 2012; **E185.2**, Documents Referred to in Co-Prosecutors’ Annexes A1-A5, at ENG ERN 00799038-39. The document deemed irrelevant as it concerned Ieng Thirith was the DK Media Reports for August 1986[CGDK]. The document deferred was the FUNK Publication entitled “Nouvelles du Cambodge No. 985”, found under E109/4.5 at No. 17. The latter document was actually well on the Shared Materials Drive (see **E190/1**, Co-Prosecutors’ Response to Trial Chamber Decision Concerning New Documents and Other related Issues, 11 May 2012) and was later placed on the case file as being *prima facie* conducive to ascertaining the truth (**E190/2**, Trial Chamber Decision on Placement of New Documents on the Case File, 8 June 2012)

⁸⁹ See **E185.2** Annex B – Documents Referred to in Co-Prosecutors’ Annexes A1-A5, A1 new documents were assigned the reference numbers E3/704 to E3/718 and E3/830. It must be noted that the document no. 15 listed by the Defence in E246/1/1.2 (Annex 1, no. 115) was already on the case file and previously admitted by the Chamber as D56 – Doc. 437 (E3/3802) as mentioned by the Trial Chamber in E190, footnote 45. Finally, document 18 (Annex 1, no. 233) of the same table had been temporarily deemed inadmissible as the Trial Chamber did not find it on the Shared Materials Drive. After the Co-Prosecutors explained where it could be found on Zylab (E190/1, para. 2.), it was later placed by the Trial Chamber on the case file by its decision **E190/2**. In any case, the Defence did not raise any objection regarding this document in E246/1/1.2.

⁹⁰ **E185.2** Annex B – Documents referred to in Co-Prosecutors’ Annexes A1-A5, A2 new document E3/791.

⁹¹ **E185.2** Annex B, A4 new documents E3/1228 to E3/1237 and E3/1582.

⁹² **E185.2** Annex B, A5 new documents E3/1485 to E3/1491 In addition to those 35 documents, E3/30 had previously been put before the Chamber.

⁹³ **E3/30** Grunk Statement entitled “Sihanouk’s 15 Nov 74 Decree relieving RGUNC Ministers” and “Sihanouk names new RGUNC Ministers” (Cambodian Information Agency).

⁹⁴ **E246/1/1** Khieu Samphan’s Objections to the Admissibility of New Documents, para. 5 which states “However, Mr KHIEU Samphan’s Defence team observes and deplores the fact that although no adversarial proceedings were held on the new documents, some of them have been already assigned an E3 reference number”.

⁹⁵ Those documents are the following: (1) **Annex 2**: no. 80 (E3/791) listed as no. 35 in E256/1/1.2; (2) **Annex 4**: nos. 9 (E3/1235), 32 (E3/1233), 66 (E3/1230), 388 (E3/1582), 73 (E3/1237), 75 (E3/1234), 79 (E3/1231), 137 (E3/1229), 217 (E3/1232), 223 (E3/1228), 225 (E3/1236), listed under nos. 52-62 in E256/1/1.2; (3) **Annex 5**:

iv. The Defence effectively objected to only 12 documents in the table E246/1/1.2

40. The Co-Prosecutors observe that, in addition to the 99 documents referred to above in (i) to (iii) that are no longer susceptible to objections at this stage of the proceedings, the Defence chose not to object to 367 documents, arguing a lack of time to do so. In addition, the Defence did not oppose the use of two documents⁹⁶ and mentioned that one video was debated upon in January 2013.⁹⁷
41. As mentioned above, the Defence had more than sufficient time to prepare any objections to those 367 documents. These documents were identified as early as April 2011 and further confirmed in July 2011. Although not on the Case File, the documents were accessible to all parties and the Trial Chamber on the Shared Materials Drive (SMD), as noted to the Defence by the Co-Prosecutors in November 2011.⁹⁸ This is confirmed by submissions by the Co-Prosecutors,⁹⁹ by the Trial Chamber¹⁰⁰ and the Defence for Ieng Sary.¹⁰¹ The Co-Prosecutors note that the Ieng Sary Defence filed objections on all “new” documents listed in Annexes A1-A6 and A8-A20 on 5 January 2012 and never mentioned any difficulty accessing the documents on the SMD.¹⁰²
42. The Co-Prosecutors submit that only 12 objections that were lodged by the Defence merit response in the event that the Trial Chamber considers that they were not already debated before the Chamber.¹⁰³ These 12 “new” documents consist of 7 analytical reports, 4 books and 1 international media report (listed in OCP Revised Lists, Annexes A18 & A19). The Co-Prosecutors submit that those documents display identical features to numerous documents admitted in the Chamber’s Decision E185/1, namely more than 300 international

nos. 73 (E3/1485), 245 (E3/1486), 123 (E3/1487), 278 (E3/1491), 283 (E3/1488), 355 (E3/1489), 357 (E3/1490), 14 (E3/30, previously put before the Chamber).

⁹⁶ E246/1/1.2 nos. 25 (Annex 19, no. 89 of E109/4) and 27 (Annex 19, no. 90).

⁹⁷ E246/1/1.2 no. 481 (Annex 16, no. 256 of E109/4 and E223/2.2.1, no. 7).

⁹⁸ E131/19 OCP Consolidated Response to Objections to Co-Prosecutors’ Document List for First Trial Session, 1 December 2011, para. 51.

⁹⁹ E131/19 OCP Consolidated Response, 1 December 2011, para. 51; E158, Co-Prosecutors’ Rule 92 Submission Regarding Indicia of Reliability of the 978 Documents Listed in Connection with those Witnesses and Experts who may be Called During the First Three Weeks of Trial, 23 December 2011, including footnotes 148, 155, 181, 309, 329 and 415.

¹⁰⁰ E190 Trial Chamber Decision, 30 April 2012, para. 27, fn. 39.

¹⁰¹ E131/1/10 IENG Sary’s Objections, 5 January 2012; IENG Sary’s Request for Clarification Concerning Objections to New Documents, email sent on 6 February 2013, stating in paragraph 2: “[...] we objected to the documents contained in Annex A21 in writing on 5 January 2012 and then again during oral arguments on 16-19 January 2012 and 12-15 March 2012.

¹⁰² E131/1/10 IENG Sary’s Objections, 5 January 2012

¹⁰³ These documents are the following: (1) Annex 18: no. 146 (E190.1.327, also found at no. 97 in Khieu Samphan’s table E246/1/1.2); (2) Annex 19: no. 20 (E190.1.391, no. 19 on E246/1/1.2), no. 21 (E190.1.392, no. 20 on E246/1/1.2), no. 38 (E190.1.393, no. 23 on E246/1/1.2), no. 51 (E190.1.394, no. 24 on E246/1/1.2), no. 137 (E190.1.399, no. 26 on E246/1/1.2), no. 76 (E190.1.396, no. 28 on E246/1/1.2), no. 69 (E190.1.395, no. 29 on E246/1/1.2), no. 234 (E190.1.403, no. 30 on E246/1/1.2), no. 232 (E190.1.402, no. 31 on E246/1/1.2), no. 225 (E190.1.400, no. 32 on E246/1/1.2), no. 227 (E190.1.401, no. 33 on E246/1/1.2).

media reports and more than 200 academic articles, analytical reports and books. The Chamber also stated that material such as analytical reports, books and media articles may be relevant and will not be excluded as a category.¹⁰⁴ The Co-Prosecutors have made specific observations regarding the admissibility of those 12 documents in the table attached to this Response (Annex A).

43. Regarding the observations made by the Defence in paragraphs 26, 27 and 30 of their Objections, the Co-Prosecutors underline that most of them are of a general nature, lack specificity and do not identify characteristics that would render the documents unreliable or inadmissible before the Chamber. In paragraph 27, the Defence present general observations regarding photographs that bear no date or whose author is not identified; this remark is vague and contradicts the fact that the Defence claim that they had no time to review the admissibility of any photograph listed under Annex 15 of the OCP Document List. Further, contrary to the Defence's assertion in paragraph 27, there are not, among the 12 documents objected to, any documents whose original in Khmer is not available.



IV. CONCLUSION

44. For the foregoing reasons, the Co-Prosecutors request that the Trial Chamber:

A. HOLD that the Defence have already had full opportunity to challenge all of the documents identified in the Co-Prosecutors Revised List Annexes 1-11 and 14-20 and therefore DISMISS the Defence's Objections as unwarranted; or

B. DISPENSE with the Defence's Objections as stated above and in the attached Annex.

Respectfully submitted,

Date	Name	Place	Signature
21 MARCH 2013	CHEA Leang Co-Prosecutor	Phnom Penh C.C.C.E. CO-PROSECUTORS CO-PROSECUTORS	
	Andrew CAYLEY Co-Prosecutor		

¹⁰⁴ E185, Trial Chamber Decision, 9 April 2012, para 21 (5).