

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

FILING DETAIL

Case no: 002/19-09-2007-ECCC/TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 22 July 2011



CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សាធារណៈ/Public
Classification status:
Review of interim classification:
Records officer name:
Signature:

**OBSERVATIONS REGARDING DOCUMENTS CONSIDERED
RELEVANT TO THE EARLY SEGMENTS OF THE TRIAL**

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla
Annebrecht VOSSENBERG
Professor Michael RAMSDEN

Distribution

All Defence Teams

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

Civil-Party Lawyers:

STUDZINSKY Silke
Tristan TZARA

I. INTRODUCTION

1. In response to this Chamber's request to 'the parties to indicate which documents and exhibits from their earlier document and exhibits list are considered to be relevant to [the] early trial segments'¹ (the 'Document Request'), counsel for the Accused Nuon Chea (the 'Defence') hereby submits these initial observations and incorporates by reference its previous submissions on the issue of document presentation at trial (the 'Initial Submissions').² For the reasons stated below (as well as those set out earlier), the Defence: (a) reserves its right to rely upon any document—including those on the Case File, in the Shared Materials Drive (the 'SMD'), or elsewhere—at any time prior to the close of the substantive hearing; (b) is neither required nor able, at this time, to identify the specific documents it intends to rely upon at trial; and (c) will disclose any documents it intends to put before the Chamber in due course.

II. OBSERVATIONS

2. While perhaps intended as an opportunity to clarify various outstanding issues related to the upcoming trial, the Initial Hearing in fact left several key questions unanswered:
 - a. It remains unclear 'whether [the Defence is] still forbidden from carrying out *any investigation* on behalf of the [Accused] prior to the start of the [substantive] hearing'.³ Despite repeated Defence requests for clarification on this point, a comprehensible direction from the Chamber has yet to be provided. While the issue of witness contact was indeed raised at the Initial Hearing, the query previously posed by the Defence—which included in its scope the permissibility of collecting new documents and exhibits from witnesses, apart from the possibility of merely contacting them—was not squarely addressed.⁴

¹ Document No **E-1/4.1**, Public 'Transcript of Initial Hearing', 27 June 2011, ERN 00712135–00712252 (the 'Initial Hearing Transcript'), p 25:11–13.

² Document No **E-9/26**, Public 'Notice of Joinder in Ieng Sary's Initial Submissions Regarding Documents to Be Relied Upon at Trial & Additional Submissions Regarding New Documents', 19 April 2011, ERN 00665543–00665543 (the 'Previous Document Submissions').

³ Document No **E-1/2.1**, Confidential, 'Transcript of Trial Management Meeting', 5 April 2011, ERN 00664215–00664345, 116:10–12 (emphasis added).

⁴ See Initial Hearing Transcript, pp 24:7–25:7 ('The Chamber is in receipt of a number of motions from the parties seeking clarification as to what, if any, contact is permitted between the parties and witnesses and experts in advance of their testimony at trial. A feature of the civil law system which governs proceedings before the ECCC is that the vast majority of witnesses and experts relevant to this trial have previously been heard before the Co-Investigating Judges. Accordingly, witnesses who have already been the subject to a judicial process and if appearing before this Chamber do so as witnesses of the Court. In a select

- b. The tentative list of witness to be heard during the so-called early segments of the trial (the ‘Tentative List’) has only recently been announced by the Chamber.⁵ The Defence has objected to this ‘piecemeal (and inchoate) approach’ to the sequencing of the proceedings and has requested additional names to be added to the Tentative List following further open debate at a continued Initial Hearing.⁶ The appearance of the individuals appearing on the Tentative List—whose identities are currently shrouded in secrecy given purported concerns regarding protective measures⁷—has yet to be confirmed. Equally, the global number of witnesses to be heard, as well as the total number of envisaged trial ‘segments’, are currently unknown; although, it appears almost certain that the Chamber does not intend to hear witnesses⁸ on the majority of the topics proposed by the Defence.⁹
- c. The vast size and byzantine state of the Case File (and the SMD) make it difficult and time-consuming to identify relevant documents and present them to the Accused for his information and instructions.¹⁰ Moreover, potentially relevant documents requiring detailed examination by counsel are—to this day—appearing on the Case File (in Khmer and English) for the first time. Such logistical

number of cases and where the Chamber has doubts as to the internal consistency of these witnesses’ and experts’ prior statements or whether a witness or expert may recall features of them, the Chamber may take steps to ascertain this. The party will, in all cases, be advised of the Chamber’s initiatives in this regard. Where proposals to hear new witnesses are accepted by the Chamber, it will be for the Chamber to ascertain whether testimony from these new witnesses or experts complied with Rule 87(4). This may also, in some cases, entail the Chamber having direct contact with proposed witnesses or experts to ensure that valuable Court time is not wasted in calling witnesses or experts whose testimony may not comply with Rule 87(4).’)

⁵ See Initial Hearing Transcript, pp 7–9.

⁶ See Document No **E-93/9**, Confidential ‘Request for Additional Witnesses & Continuation of Initial Hearing’, 5 July 2011, ERN 00711970–00711975.

⁷ See Initial Hearing Transcript, p 17:12–15 (‘This list is provided to the parties on a strictly confidential basis and indicates the pseudonyms by which all witnesses, experts and civil parties contained on this list are to be identified in open session.’); *ibid*, p 40:11–18 (‘[T]he reasons that [...] it is not the appropriate times for the identification of the witnesses, experts, or civil parties in response to the principle of the protective measures for those witnesses, experts and civil parties, the Chamber has so far not received any report from the victims and Witness Support Section regarding the status and the requirements as to whether which civil parties or civil—the expert witnesses require the protective measures.’) *N.B.* The Defence has taken exception to this approach. See *ibid*, p 39:18–24. The mere fact that a particular individual has been suggested by one of the parties as being a potential witness does not raise any immediate protection concerns.

⁸ See Initial Hearing Transcript, pp 23:13–17 (‘In view of the Chamber’s obligation to ensure an expeditious and fair trial, however, the Chamber will not, as a rule, call witnesses, experts and civil parties whose testimony, even if relevant, is likely to be repetitive of other evidence before the Chamber.’)

⁹ See, e.g., Document No **E-9/10.1**, ‘Annex D: Witness Summaries with Points of the Indictment’, 23 February 2011, ERN 00646679–00646736.

¹⁰ See Initial Submissions, para 3(d).

shortcomings are all the more problematic given that the question of Nuon Chea's fitness to stand trial remains an open one.

- d. Finally, the Cambodian Code of Criminal Procedure (the 'CCP') provides no advance-notice requirement with respect to the right to present material at trial: '*Until the end of the trial hearing, the accused [...] may [...] submit all documents and evidence that [he] think[s] will be conducive to ascertain[ing] the truth.*'¹¹ The Defence has consistently objected to departures from existing Cambodian procedure not justified by specific reference to Article 12(1) of the ECCC Agreement.¹²

As all of these factors undoubtedly impact the Defence's approach to document presentation at the substantive hearing, it is neither appropriate nor required *at this time* to provide the indication sought by the Chamber in the Document Request.

3. As noted previously, the Defence will endeavor to notify the Chamber and the parties of any document and/or exhibit it intends to rely upon at trial in due course and—where appropriate—well in advance of the date of such material's contemplated proffer.¹³ This position is without prejudice to Nuon Chea's right under Cambodian law to rely upon any material he considers conducive to ascertaining the truth, so long as such material is submitted prior to the conclusion of the trial proceedings. As well as potentially exculpatory material, this would include any document that may impeach the credibility of any adverse witness. With respect to such documents, the Defence considers it essential to be able to confront inculpatory witnesses without any advance warning to the particular individual providing the testimony (and with very little notice to the other parties). In any event, the Defence will take steps to ensure that any document utilized at trial for any purpose will be translated into the official languages of the Tribunal.¹⁴

¹¹ CCP, Article 334 (emphasis added).

¹² See Document No E-51/3, 'Consolidated Preliminary Objections', 25 February 2011, ERN 00648279-00648310.

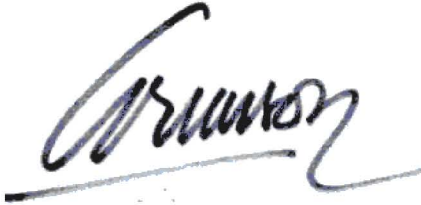
¹³ *N.B.* The Defence has previously indicated that it would likely seek to put before the Chamber all of those documents referenced in the various Requests for Investigative Action filed before the Office of the Co-Investigating Judges, as well as certain material contained in the SMD, which goes to the contextual issues identified in the Summaries. See Initial Submissions, para 5. However, given the Chamber's approach to the case thus far, it seems likely that such material will be considered irrelevant.

¹⁴ *N.B.* Such assurance should alleviate the Chamber's anxiety regarding translation expressed at the Initial Hearing. See Initial Hearing Transcript, p 25:16-19 ('These early indications will allow the interpretation and translation pool to ascertain the translation status of key documents and the Chamber to identify pending difficulties as soon as possible.')

III. CONCLUSION

4. For the reasons stated above, as well as those expressed previously, the Defence declines to accede to the Document Request *at this juncture*.

CO-LAWYERS FOR NUON CHEA

A handwritten signature in black ink, appearing to read 'Arun' with a stylized flourish underneath.

SON Arun

A handwritten signature in black ink, consisting of a horizontal line followed by a stylized, abstract shape.

Michiel PESTMAN & Victor KOPPE