

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

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**CO-PROSECUTORS' REQUEST REGARDING NUON CHEA'S SECOND  
FAILURE TO COMPLY WITH THE TRIAL CHAMBER'S ORDERS TO PROVIDE  
THEIR LIST OF DOCUMENTS AND EXHIBITS WHICH THEY INTEND TO  
PUT BEFORE THE TRIAL CHAMBER**

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## I. INTRODUCTION

1. In a large criminal trial such as Case 002, it is essential to the proper administration of justice that all parties respect and follow the Court's rules and orders. Nuon Chea has twice refused to comply with Trial Preparation Orders requiring him to identify the documents he intends to put before the Trial Chamber. By not providing a document list, the Accused has made it more difficult for the Trial Chamber and other Parties to prepare for trial and threatens to delay and disrupt the trial process.
2. Accordingly, the Co-Prosecutors request that the Trial Chamber preclude the Nuon Chea Defence from introducing at trial documents that were not identified pursuant to the Trial Preparation Orders. Alternatively, the Trial Chamber should direct the Accused to file a list of documents and exhibits within two weeks, failing which he would be subject to such preclusive sanctions.

## II. RELEVANT PROCEDURAL BACKGROUND

3. On 17 January 2011, the Trial Chamber issued an Order to File Material in Preparation for Trial (the "Initial Trial Preparation Order")<sup>1</sup> directing all parties to file "Lists of Documents and Exhibits" no later than 13 April 2011,<sup>2</sup> which date was later extended to 19 April 2011.<sup>3</sup> On 1 April 2011, Ieng Sary's Defence filed a submission entitled "Initial List of Documents Already on the Case File and Notice of his Forthcoming Initial List of New Documents to be put before the Trial Chamber" (the "First Submission").<sup>4</sup> A second<sup>5</sup> and third<sup>6</sup> submission was filed by the Ieng Sary Defence on 8 and 19 April 2011 respectively. On 19 April 2011, the Nuon Chea Defence filed a Notice of Joinder in Ieng Sary's First Submission.<sup>7</sup>

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<sup>1</sup> **E9** Order to File Material in Preparation for Trial, 17 January 2011, ERN 00635754-59 [hereafter "Initial Trial Preparation Order"].

<sup>2</sup> *Initial Trial Preparation Order*, para. 12.

<sup>3</sup> **E68** Trial Chamber Memorandum entitled "Judicial recess during Khmer New Year period," 28 March 2011, ERN 00656478.

<sup>4</sup> **E9/22** Ieng Sary's Initial List of Documents Already on the Case File & Notice Concerning His Forthcoming Initial List of New Documents to be Put Before the Trial Chamber, 1 April 2011, ERN 00659454-69 ["Ieng Sary's First Document List"].

<sup>5</sup> **E9/24** Ieng Sary's Second Initial List of Documents, 8 April 2011, ERN 00664133-36 ["Ieng Sary's Second Document List"].

<sup>6</sup> **E9/25** Ieng Sary's Third Initial List of Documents, 19 April 2011, ERN 00665535-37 ["Ieng Sary's Third Document List"].

<sup>7</sup> **E9/26** 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 00665543-46 ["Nuon Chea Notice of Joinder"].

4. On 27 June 2011, during the first day of the initial hearings for Case 002, the Trial Chamber directed the parties to identify no later than 22 July 2011 the documents and exhibits they considered to be relevant to the initial four trial segments.<sup>8</sup> On 22 July 2011, the Nuon Chea Defence filed its Observation Regarding Documents Considered Relevant to the Early Segments of the Trial.<sup>9</sup> In both his 19 April 2011 and 22 July 2011 filings, Nuon Chea refused to identify the specific documents he intends to put before the Trial Chamber.<sup>10</sup>

### III. RELEVANT FACTS

#### *The Trial Chamber's Orders*

5. Paragraph 12 of the Initial Trial Preparation Order required each of the Parties to provide, no later than 19 April 2011:
- i) A list of the documents already in the Case File they intend to put before the Chamber, appropriately identified by their document reference number, title, available language/s and, if available, a brief description of their nature and contents;
  - ii) A list of the new documents they intend to put before the Chamber, containing a brief description of their nature and contents; and
  - iii) A “Documentary Evidentiary Chart” which indicates, for each relevant evidentiary topic, the documentary evidence upon which the party will rely with regards to the allegations contained in the Closing Order.<sup>11</sup>
6. The second order of the Trial Chamber was communicated at the Initial Hearing:

*“The Chamber had earlier advised the parties that in due course indications of documents considered relevant to the early trial segments would also soon be sought from them. The Chamber requests the parties to indicate which documents and exhibits from their earlier document and exhibits list are considered to be relevant to those early trial segments no later than Friday, 22<sup>nd</sup> July, 2011”.*<sup>12</sup>

#### *Nuon Chea's Responses*

7. The only document submitted by the Nuon Chea Defence in response to paragraph 12 of the Initial Trial Preparation Order was its Notice of Joinder. This filing merely adopted Ieng

<sup>8</sup> E1/4.1 Public Transcript of Initial Hearing, 27 June 2011, at ERN 00712161.

<sup>9</sup> E109/3 Observations Regarding Documents Considered Relevant to the Early Segments of the Trial, 22 July 2011, ERN 00717666–70 [“Nuon Chea Observations”].

<sup>10</sup> *Nuon Chea Notice of Joinder*, para. 2; *Nuon Chea Observations*, para. 1, 4.

<sup>11</sup> *Initial Trial Preparation Order*, para. 12.

<sup>12</sup> E1/4.1 Public Transcript of Initial Hearing, 27 June 2011, at ERN 00712161.

Sary's First Submission,<sup>13</sup> and failed to provide a specific list identifying the documents Nuon Chea intended to put before the Trial Chamber. Instead, Nuon Chea purported to rely upon the list of all documents in the Case File submitted by the Ieng Sary Defence.<sup>14</sup>

8. The Ieng Sary filing that the Nuon Chea Defence joined consisted of a 1,400-page annex<sup>15</sup> listing every document contained on the Case File for Case 002 (the "Case File Document List").<sup>16</sup> It made no good faith attempt to identify which of those Case File documents the Defence intended to put before the Trial Chamber, as required by the Initial Trial Preparation Order. Nor did it make any effort to indicate the points of the Indictment for which the documents were relevant. (While Nuon Chea only joined Ieng Sary's First Document List, the same deficiencies applied to Ieng Sary's Second Initial List of Documents, which submitted a 560-page annex listing all documents available on the Shared Material Drive,<sup>17</sup> and to his Third Submission, which contained a list of 1,037 "new" documents to be submitted to the Trial Chamber.<sup>18</sup>)
9. Following the further order provided by the Trial Chamber at the 27 June 2011 Initial Hearing, the Nuon Chea Defence again refused to comply with the Chamber's order and to identify the documents they intend to put before the Chamber relevant to the early trial segments. The Accused's non-compliance with the Court's order was willful and unapologetic, stating that Nuon Chea "declines to accede" to the Chamber's directive,<sup>19</sup> and that his Defence is "neither required nor able, at this time, to identify the specific documents it intends to rely upon at trial" and "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."<sup>20</sup>

#### IV. LAW

##### *The Trial Chamber's Authority to Order Document Lists*

<sup>13</sup> *Nuon Chea Notice of Joinder*, para.1.

<sup>14</sup> *Nuon Chea Notice of Joinder*, para.2.

<sup>15</sup> **E9/22.2** Annex A: Case 002 Full Inventory 31 March 2011, 1 April 2011, ERN 00662336-663725.

<sup>16</sup> *Ieng Sary's First Document List*, p.1 and para. 13.

<sup>17</sup> **E9/24.2** Shared Material Drive Inventory, 8 April 2011, ERN 00664706-665265.

<sup>18</sup> **E9/25.2** Annex: Document and Exhibit Lists - IENG Sary, 19 April 2011, ERN 00665582-681.

<sup>19</sup> *Nuon Chea Observations*, para. 4.

<sup>20</sup> *Nuon Chea Observations*, para. 1.

10. The Trial Chamber was expressly empowered to issue the Initial Trial Preparation Order under Internal Rule 80 (3):

*“3. The Chamber may order the parties, within a prescribed time limit prior to the Initial Hearing, to file documents including the following:*

*a. A list of exhibits they intend to offer in the case, containing a brief description of their nature and contents.*

*b. A list of new documents which they intend to put before the Chamber with a brief description of their contents and a list of documents already on the case file, appropriately identified...*

*4. The Trial Chamber may order that any objections to the admissibility of exhibits or documents identified by the parties pursuant to this Rule be made in writing after the Initial Hearing within a prescribed time period. This time period shall allow a reasonable opportunity for the parties to review the lists provided pursuant to this Rule.”*

*The Trial Chamber and Counsel’s Duty to Ensure and Promote  
the Good Administration of Justice*

11. The requirement for the ECCC to act and organise their proceedings in accordance with the principles of the good administration of justice is reflected in the ECCC Statute and the Internal Rules. The Statute provides, for example, that “the Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force...”<sup>21</sup> There are various references to the good administration of justice and the fair and effective conduct of proceedings in the Internal Rules.<sup>22</sup> The fair administration of justice lies at the heart of the rule of law,<sup>23</sup> and is fundamental to the right of the Accused to a fair trial.<sup>24</sup>

12. This requirement to ensure the proper administration of justice is not limited to the Trial Chamber itself, but is also a duty for all lawyers appearing before the Chamber. Rule 22(4) expressly provides that: “[i]n the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions

<sup>21</sup> Article 33 new, ECCC Statute.

<sup>22</sup> Internal Rules 12 *ter* (2), 22(4), 35, 80 *bis* (2).

<sup>23</sup> *Bistrovic v. Croatia*, ECHR No. 25774/05, Judgment of 31 May 2007, at para. 37.

<sup>24</sup> *Delcourt v. Belgium*, ECHR No. 2689/65, Judgment of 17 January 1970, at para. 25: “In a democratic society, within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1...would not correspond to the aim and purpose of that provision...”

and administrative regulations, as well as the Cambodian Statutes of the Bar and recognised standards of ethics of the legal profession. They have an obligation to promote justice and the fair and effective conduct of proceedings.”<sup>25</sup>

13. This Rule reflects similar provisions of other international tribunals. For example, the Code of Professional Conduct for Defence Counsel at the International Criminal Tribunal for Rwanda (“ICTR”) states that “the general purpose of this Code is to provide for standards of conduct on the part of Counsel which are appropriate in the interests of the fair and proper administration of justice.”<sup>26</sup> The principle is repeated in the Code of Professional Conduct for Counsel at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>27</sup> Similarly, the Code of Professional Conduct for the Special Court for Sierra Leone provides that “Counsel shall act with: (iii) integrity to ensure that his actions do not bring the administration of justice into disrepute.”<sup>28</sup>
14. These international provisions reflect the similar duties of Counsel in their national systems. For example, in New Zealand, lawyers are required to “uphold the rule of law and to facilitate the good administration of justice.”<sup>29</sup> In France, the Rules of the Paris Bar provide that: “In order for the counsel to perform its duties with the requisite independence and in a manner consistent with its duty to participate in the administration of justice, the exercise of certain positions or functions may be forbidden.”<sup>30</sup> In the Netherlands, the “[advocates’] role in the administration of justice is seen by society as an essential one...They should use this position in such a way that it furthers the proper administration of justice.”<sup>31</sup> In England and Wales, “[a] barrister has an overriding duty to the Court to act with independence in the

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<sup>25</sup> Internal Rule 22(4).

<sup>26</sup> Article 3, Code of Professional Conduct for Defence Counsel, 14 March 2008, ICTR.

<sup>27</sup> Article 7, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, 29 June 2006, ICTY.

<sup>28</sup> Article 5, Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, 13 May 2006, SCSL.

<sup>29</sup> Chapter 2, Lawyers and Conveyancers Act (Lawyers Conduct & Client Care) Rules 2008.

<sup>30</sup> Article 21.2.5.1, Règlement Intérieur du Barreau de Paris, 11 Juin 2010. The original wording in French reads as follows: “Pour permettre à l’avocat d’exercer ses fonctions avec l’indépendance requise et d’une manière conforme à son devoir de participer à l’administration de la justice, l’exercice de certaines professions peut lui être interdit.”

<sup>31</sup> Paragraph 1.2, *Task and Function of Advocates*, English version of the Code of Conduct of the Netherlands bar Association, The Rules of Conduct of Advocates 1992.

interests of justice; he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.”<sup>32</sup>

*The Trial Chamber’s Obligation to Ensure the Equality of Arms*

15. Equality of arms constitutes one of the core aspects of fair judicial proceedings in the civil law system. This principle requires that the Accused be subject to the same procedures as the prosecution.<sup>33</sup> It is incorporated in Internal Rule 21(a), which provides that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”

16. At the ICTY, in the *Kupreškić* case, the Defence was required to submit summaries of statements of defence witnesses in advance of the presentation of their case, pursuant to ICTY Rule 73ter. Although the Defence produced such summaries, they were not as detailed as those of the Prosecution. Consequently, the Trial Chamber ordered the Defence to provide, within 2 weeks, detailed statements for their witnesses. In so doing, the Trial Chamber found that:

*“the extremely succinct and summary nature of many Defence witness statements...violate[s] the principle of equality of arms, since the Prosecution communicated much more detailed prosecution witness statements to the Defence and to the Trial Chamber before the presentation of its case, thereby enabling the Defence to prepare for cross-examination of prosecution witnesses.”*<sup>34</sup>

*The Trial Chamber’s Power to Regulate its Own Proceedings*

17. Both the ECCC Agreement and ECCC Law authorize the Trial Chamber to seek guidance in international procedure to ensure the consistency of the proceedings before the ECCC with international standards. The language of these articles is similar and sets out that where Cambodian procedure:

*“... does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”*<sup>35</sup>

<sup>32</sup> Rule 302, Code of Conduct of the Bar of England and Wales, 18 September 2004.

<sup>33</sup> *Dombo Beheer B.V. v. The Netherlands*, ECHR 14448/88, Judgment of 27 October 1993, para. 20.

<sup>34</sup> *Prosecutor v. Zoran Kupreskic et al.*, Decision, IT-95-16-T, 11 January 1999.

<sup>35</sup> Article 12, 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 33 (new), ECCC Statute.

18. An essential element of the inherent power of any court to regulate its own proceedings is the power to impose sanctions in the event of non-compliance with an order of the court. Some potential sanctions are set out in Internal Rule 37(3), which provides that:

*“When the disruption consists of deliberate refusal to comply with an oral or written direction of a Chamber, and that direction is accompanied by a warning of sanctions in case of breach, the Chamber dealing with the matter may order the exclusion of that person from the proceedings for such a period as it deems appropriate or, if the disruption is of a more serious nature, take appropriate action as provided in sub-rule 5.”*

19. Sanctions are also provided for in the rules of procedure and evidence and jurisprudence of international criminal tribunals. In this respect, the Co-Prosecutors have previously addressed the power of the Trial Chamber to enforce sanctions in relation to the admission of witnesses,<sup>36</sup> citing the ICTY case of *Milan Lukic*,<sup>37</sup> which concerned the obligations of parties to file witness and document lists for trial pursuant to ICTY Rule 65 *ter*.<sup>38</sup> In its decision, the ICTY Trial Chamber confirmed the importance for parties to meet deadlines and the necessity of imposing sanctions if the parties do not meet their obligations, holding that:

*“While it is in principle for each party to decide which witnesses to call to prove its case, the parties are under a general obligation to meet set deadlines and to act with due diligence in their preparations. The Trial Chamber notes that, pursuant to Rule 65 *ter* (N), and provided that the procedure laid down therein has been complied with, it may impose sanctions upon parties that do not meet their obligations pursuant to Rule 65 *ter*.”<sup>39</sup>*

20. The principle is also demonstrated by the *Kupreškić* case,<sup>40</sup> in which the Defence had indicated that they intended to lead a defence of alibi, but failed to lodge the requisite notice with the court. The Trial Chamber ruled that, in the event of failure to lodge a notice prior to the hearing, whilst the Defendant would be entitled to testify himself, “the evidence of other witnesses as to alibi is liable to be excluded by the trial chamber.”<sup>41</sup> This sanction was not

<sup>36</sup> **E9/15/1** Co-Prosecutors’ Response to Ieng Sary’s Motion in Support of Certain Witnesses Proposed by the Other Defence Teams, 28 March 2011, paras. 7-9.

<sup>37</sup> *Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, IT-98-32/1-PT, 22 April 2008, para.9.

<sup>38</sup> ICTY Rule 65 *ter* (N) provides that “the Trial Chamber shall decide should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence.”

<sup>39</sup> *Prosecutor v. Milan Lukic and Sredoje Lukic*, para. 15.

<sup>40</sup> *Prosecutor v. Kupreškić*, “Decision”, IT-95-16, 11 January 1999.

<sup>41</sup> *Prosecutor v. Kupreškić*, “Decision”, IT-95-16, 11 January 1999, p.3.



expressly provided for by the relevant rule, which instead merely provided that failure to comply did not limit the right of the accused to testify in relation to alibi.<sup>42</sup>

### *Imposition of Personal Sanctions*

21. In exceptional cases, the Trial Chamber is entitled to impose personal sanctions in the event of interference with the administration of justice; i.e. initiate contempt proceedings.<sup>43</sup> This power is expressly provided for in Internal Rules 35 to 38. Rule 35(1) provides that:

*“The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:*

*...*

*b. without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers...”*

The wording of this provision is almost identical in terms to those of the ICTY, ICTR, SCSL and STL.<sup>44</sup> The ICTY has determined that the phrase “including any person who” has the effect of rendering the list of sanctionable conduct non-exhaustive.<sup>45</sup> Furthermore, Internal Rule 38(1) allows the Trial Chamber, after a warning, to impose sanctions upon a lawyer if it is of the opinion that their conduct amounts to, *inter alia*, an abuse of process or obstruction of proceedings.<sup>46</sup>

## V. ARGUMENT

22. The Nuon Chea Defence has knowingly and wilfully refused to comply with two orders of the Trial Chamber directing the parties to identify the documents they intend to put before the Chamber at trial.

23. As purported justification for his refusal to comply with the Trial Chamber’s orders, Nuon Chea has asserted the following arguments:

*(1) 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;’<sup>47</sup>*

<sup>42</sup> Rule 67(B), ICTY Rules of Procedure and Evidence.

<sup>43</sup> *Prosecutor v. Delalić*, “Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnir Delalić and Zdravko Mucić”, IT-96-21-T, 11 November 1996, para. 33.

<sup>44</sup> Article 77(A), ICTY Rules of Procedure and Evidence; Article 77(A), ICTR Rules of Procedure and Evidence; Article 77(A), SCSL Rules of Procedure and Evidence; Rule 60bis, STL Rules of Procedure and Evidence.

<sup>45</sup> *In the Case against Florence Hartman*, “Judgement on Allegations of Contempt”, 14 September 2009, IT-02-54-R77.5, para. 19.

<sup>46</sup> Internal Rule 38(1).

<sup>47</sup> *Nuon Chea Observations*, para. 2(a).

- (2) *the global number of witnesses to be heard, as well as the total number of envisaged trial 'segments', are currently unknown;*<sup>48</sup>
- (3) *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;*<sup>49</sup> and
- (4) *Cambodian Criminal Code provides no advance notice-requirement with respect to the right to present material at trial.*<sup>50</sup>

24. The first purported excuse presented by the Nuon Chea Defence, that it does not know whether it is allowed to investigate and collect new documents on behalf of the Accused, does not justify refusing to identify the existing documents of which they are presently aware. The prosecution and other parties are in the same position as Nuon Chea in relation to this issue. Any party that subsequently discovers new relevant documents and has good cause can submit that evidence to the Trial Chamber pursuant to Rule 87(4).
25. Similarly, the fact the Nuon Chea Defence does not yet know the identity of all witnesses who will be heard at trial, or the precise manner in which the Trial Chamber will organize the trial after the initial four segments, does not justify their refusal to provide a trial document list at this time. As with all parties, Nuon Chea is aware of the allegations of the Indictment and aware of the documents that are on the Case File or available on the SMD, and has no excuse for refusing to identify those documents he presently considers relevant to his defence and intends to put before the Trial Chamber.
26. The third excuse offered by the Nuon Chea Defence is that the size of the Case File and SMD makes it “difficult and time-consuming” to identify relevant documents. However, the Accused has not requested an extension of his deadline to identify documents relevant to the first four trial segments. Rather, the Defence has simply “declined” to comply with the Trial Chamber’s order, and announced that it will “disclose any documents it intends to put before the Chamber in due course.”<sup>51</sup> In other words, the Nuon Chea Defence has presumed to confer upon itself the authority and powers of this Court and to grant themselves an open, unlimited extension for identifying trial documents.

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<sup>48</sup> *Nuon Chea Observations*, para. 2(b).

<sup>49</sup> *Nuon Chea Observations*, para. 2(c).

<sup>50</sup> *Nuon Chea Observations*, para. 2(d).

<sup>51</sup> *Nuon Chea Observations*, para. 1, 4.

27. The conduct of the Nuon Chea Defence in this matter cannot be tolerated by the Court. The prosecution and other parties were faced with the same difficult, time-consuming task as Nuon Chea. In filing its initial Trial Document List on 19 April 2011 and identifying the documents considered relevant to the early trial segments by 22 July 2011, the Co-Prosecutors made their best good-faith effort to identify relevant trial documents from the Case File and other available sources within the time deadlines established by the Trial Chamber.
28. The Nuon Chea Defence failed to make any good faith effort to do so, and must now face the consequences of their refusal to comply with the Court's orders. It is not sufficient for a party to simply incorporate the entire Case File, which includes more than 18,000 documents, and the Shared Materials Drive as their trial document list. Such action cannot be considered good faith compliance with the Chamber's Trial Preparation Orders, would disadvantage the Trial Chamber, Co-Prosecutors and Civil Parties in their ability to prepare for trial and make it more difficult for the Chamber to ensure a fair and expeditious trial for all parties.<sup>52</sup>
29. Previous complaints by Defence teams of insufficient time to prepare their Rule 80 disclosures and filings have been rejected by the Trial Chamber. In decisions issued over five months ago on 14 and 28 February 2011, the Chamber rejected requests by the Khieu Samphan and Ieng Sary Defence for substantial extensions on such filings.<sup>53</sup> In the latter decision, the Chamber concluded that the "Ieng Sary Defence team was on notice of the relevant deadlines ordered by the Chamber since the issuing of the Order to File Materials (E9), has had access to the case file and to most of the relevant information since the start of the judicial investigation and cannot therefore claim a lack of sufficient time for the preparation of its objections."<sup>54</sup> The Nuon Chea Defence team has similarly had access to the documents in the Case File on an ongoing basis for nearly four years now, and cannot reasonably complain that they have had inadequate time to prepare a document and exhibit list.

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<sup>52</sup> Article 14(1) and 14(2), International Covenant of Civil and Political Rights, 1966, 999 UNTS 171.

<sup>53</sup> **E9/6/1** Notification of Trial Chamber's Disposition of Request for Extension of Deadlines (E9/6), 14 February 2011, ERN 00644104; **E9/7/1** Trial Chamber's Disposition of Requests for Extension of Deadlines (E9/7 and E9/4/9), 28 February 2011, ERN 00648637.

<sup>54</sup> **E9/7/1** Trial Chamber's Disposition of Requests for Extension of Deadlines (E9/7 and E9/4/9), 28 February 2011, ERN 00648637.

30. The fourth and final justification offered by the Nuon Chea Defence for their non-compliance is the argument that trial document lists are not required under Cambodian law. The Co-Prosecutors submit that such an argument is ill founded, as the ECCC Rules allow the Court to seek guidance in international practice when Cambodian law does not legislate on a particular matter, as in the present case.<sup>55</sup> In view of the common practice in international criminal tribunals that has been incorporated into Internal Rule 80(3), the Trial Chamber was authorized to order the parties to provide a trial document list prior to the initial hearings.<sup>56</sup>
31. The Co-Prosecutors further submit that the Trial Chamber has the power to sanction parties if they interfere with the proper administration of justice under both Cambodian and the ECCC law.<sup>57</sup> The Nuon Chea Defence has intentionally refused to comply with two orders of the Trial Chamber. This wilful and repeated failure to comply with the Court's orders merits sanctions, and the most appropriate remedy for the refusal of a party to identify the documents he intends to offer at trial is to preclude that party from introducing such documentary evidence during the trial proceedings.<sup>58</sup> Such a ruling would be consistent with the Trial Chamber's 7 June 2011 decision, in which it ruled that because the Ieng Sary Defence had not provided a list of witnesses pursuant to the Chamber's Initial Trial Preparation Order, and the deadline for doing so had elapsed, that party had no basis upon which to request permission to contact potential witnesses.<sup>59</sup>

## VI. RELIEF SOUGHT

32. Accordingly, the Co-Prosecutors respectfully request that the Trial Chamber preclude the Nuon Chea Defence from introducing at trial documents that were not identified pursuant to

<sup>55</sup> See Internal Rule 80(3)(d), pursuant to Article 33 (new) of the ECCC Law. Furthermore, legal texts are to be interpreted "in good faith in accordance with the ordinary meaning to be given to [its] terms in their context and in the light of its object and purpose." Article 31, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. This issue has been previously briefed by the Co-Prosecutors. **E51/5/3/1** Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, para. 82-83.

<sup>56</sup> See, e.g., Rule 65 *ter* (E) to (G), ICTY Rules of Procedure and Evidence, as amended 8 December 2010, IT/32/Rev.45; Rules 73 *bis* and 73 *ter*, ICTR Rules of Procedure and Evidence, as amended 1 October 2009; Rules 67, 73 *bis* and 73 *ter*, SCSL Rules of Procedure and Evidence, as amended 28 May 2010; Rules 127-129, STL Rules of Procedure and Evidence, as corrected 29 November 2010, STL/BD/2009/01/Rev.3 (incorporating STL/BD/2009/01/Rev.3/Corr.1).

<sup>57</sup> See Internal Rule 35 and 38, and the international practice cited above.


<sup>58</sup> The power to order sanctions in case of non-compliance is a common practice in international criminal law. See, e.g., *Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Prosecution's Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, IT-98-32/1-PT, 22 April 08, para.9; *Prosecutor v. Kupreškić*, "Decision", IT-95-16, 11 January 1999.

<sup>59</sup> **E87/3** Trial Chamber Decision in relation to Ieng Sary Defence Motions, 7 June 2011, ERN 00702805-06.

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the Trial Preparation Orders. Alternatively, the Trial Chamber should direct the Accused to file a proper list of documents and exhibits within two weeks, failing which he would be subject to such preclusive sanctions.

Respectfully submitted,

Date	Name	Place	Signature
5 August 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		