**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**



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# REPLY TO OCP RESPONSE TO LIST OF DOCUMENTS TO BE PUT BEFORE THE CHAMBER DURING THE FIRST MINI-TRIAL

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**REPLY**

1. Pursuant to the Trial Chamber's order of 15 February 2012,[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits this brief reply to the 'Co-Prosecutors' Response to Nuon Chea's List of Documents to Be Put Before the Chamber During the First Mini-Trial' (the 'Response').[2] The Defence takes the position that the instant submission should be classified as a public one. In any event, the Defence will treat it as such.

2. It bears noting at the outset that, while the Office of the Co-Prosecutors (the 'OCP') objects to the admission of many of the documents proposed by the Defence 'due to [its] willful non-compliance with the Chamber's previous directions to file document lists pursuant to Rule 87(3) and its failure to meet the requirements of Rule 87(4) in respect of its proposed new documents',[3] the OCP's insistence on strict compliance with the ECCC Internal Rules (the 'Rules') is at odds with the clear position expressed in court by the Deputy International Co-Prosecutor:

> [W]e agree with the Nuon Chea team that it's important that this Court applies fundamental principles which apply to the Cambodian Courts, because that's required under the law. But also this Court needs to set an example. And for applying fair process or fair trial rights, protecting the interest of the Accused […] and also making sure that Your Honors get to see all of the evidence, you can adopt those principle that are the same as the—at the National Courts, and so it can be very instructive for the National Courts as to how trials should progress.[4]

Adherence to existing Cambodian procedure is, of course, the position consistently advanced by the Defence since the inception of this case. And, with respect to the presentation of documentary evidence thus far, the Defence has not run afoul of a single domestic provision.

3. This Chamber's decision to prevent the Defence from producing and discussing relevant evidence in court is a violation of international human-rights law, which acknowledges the accused's right to substantiate claims or present his case in response

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1 *See* Draft 'Transcript of Trial Proceedings', 15 February 2012 (Trial Day 32), pp 58:24–59 (The President: 'The Chamber now advised the defence counsel to submit in writing his response concerning the last two documents raised by the prosecutor—concerning the last two documents raised by the co-prosecutor that has not been translated. The Chamber seeks the view of the defence counsel.'); ibid, p 59:13–16 (Judge Fenz: '[W]e invite written submissions to the document of the prosecutor, which objected to the acceptance of the list forwarded by Nuon Chea—or not forwarded, filed by Nuon Chea in January.')

2 Document No **E-131/1/14**, 13 February 2012, ERN 00778329–00778335.

3 Response, para 2.

4 Document No **E-1/28.1**, 'Transcript of Trial Proceedings', 17 January 2012 (Trial Day 16), p 5:2–12.

to adverse submissions.[5] The right to comment on all evidence adduced with a view to influencing to court's decision is part of the right to an adversarial trial and the principle of equality of arms,[6] the latter of which 'requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[7] It follows that the Defence must be given the opportunity to react to—that is, to comment on or otherwise counter—evidence presented in court by the OCP.

4. While the imposition of flexible deadlines for the early identification of documentary evidence to be tendered by the parties may be a useful case-management tool, such deadlines should never be used to thwart the accused's substantive right to present evidence. This is the cause the OCP has advanced. And the Chamber already appears to agree. Yet such approach—if allowed to prevail—would amount to nothing more than a triumph of form over substance that, worse still, serves no legitimate aim. In this regard, the additional hurdles imposed by Rule 87(4) and the Trial Chamber take account of neither the substantive rights of the accused nor the practical realities of Case 002. By contrast, Article 334 of the Cambodian Code of Criminal Procedure was wisely drafted in terms flexible enough to accommodate both. Moreover, and perhaps crucially, the OCP has failed to demonstrate how it would be prejudiced by the admission of the limited number of documents proffered by the Defence. This is because no such prejudice exists. In the search for the truth, the OCP and this Chamber should welcome the admission of relevant material rather than striving to exclude it on technicalities.

5. Should this Chamber insist on ignoring applicable Cambodian law and thus feel the need to look outside the controlling domestic procedure to international practice, the bench would do well to take note of the Rules of Procedure and Evidence at the *ad hoc* tribunals. Unlike Rule 87, these codes—which permit an accused to assert his case *in reaction to* any adverse material presented by the prosecution—embody an approach to evidence presentation that is wholly consistent with the human-rights jurisprudence

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5 *See, e.g.*, Harris, O'Boyle, and Warbrick, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 2nd Ed (2009), pp 253–254.
6 *Ibid*.
7 *De Haas and Gijsels v Belgium*, ECtHR App No 19983/92, 'Judgment', 24 February 1997, para 53.

discussed above.[8] On this point, the Defence is unaware of any jurisdiction in the world that requires an accused person to submit a definitive list of documents to be used at trial (on pain of subsequent exclusion) several months in advance of the proceedings. Such approach—neither (Cambodian) fish nor (international) fowl—is, in practice, unworkable and unfair.

6. Finally, before this Chamber issues its final decision with respect to the documents submitted by the Defence on 31 January 2012, an opportunity should be provided to frankly and openly debate the *relevance* of that material. Relevance—rather than technical compliance with artificially imposed deadlines—should be the central issue of the discussion. Foreclosing open discussion as to the relevance of certain proffered documents simply because those documents may not have appeared on a previously-submitted list seems to serve no other purpose than to unfairly characterize the Defence as willfully insubordinate—when, in fact (and as noted above), the applicable Cambodian procedure has not been breached. In any case, in-court presentation and debate should be part of the process leading to the admission or rejection of documents. In this regard, the documents the Defence attempted to present in court on 15 February 2012 are attached hereto along with a description of their relevance to Case 002/01.[9]

7. As always, given the terms of the ECCC Agreement and Law, this Chamber is in a unique position to apply standards that incorporate the very best aspects of existing Cambodian law as well as the specialized provisions of the various international criminal tribunals around the world. On this very important issue of evidence presentation, the ECCC should evaluate the question (and implement its decision) with the legitimate interests of the Defence in mind.

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[8] *See, e.g.,* ICTY Rule 65*ter*(F) (requiring the defence to file a pre-trial brief *generally* outlining the defence case at least three weeks before the pre-trial conference) and 65*ter*(G)(ii) (requiring the submission of the defence's list of witnesses and documents *after* the close of the prosecutor's case).

[9] *See* Annex.