

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

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**CO-PROSECUTORS' REQUEST TO ESTABLISH AN EFFICIENT SYSTEM FOR  
ADMITTING DOCUMENTARY EVIDENCE AT TRIAL**

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## I. INTRODUCTION

1. The Trial Chamber has recently provided the parties with directions in relation to documents to be admitted in connection with witnesses and civil parties who may be called to testify during the first three weeks of trial. The Co-Prosecutors request that the Trial Chamber provide further guidance to the parties in relation to the admission of documentary evidence.
2. Specifically, the Co-Prosecutors request that the Trial Chamber: (1) confirm that parties will be permitted to submit documents directly to the Trial Chamber in addition to tendering documents through witnesses; (2) order that documents included on parties' document lists that are not objected to by opposing parties be admitted into evidence without further inquiry; (3) allocate regular sessions during the trial for oral arguments to take place on any objections by the parties or concerns raised by the Chamber itself as to particular documents; and (4) immediately assign E3 numbers to documents that are admitted.

## II. PROCEDURAL BACKGROUND

3. During the Trial Management Meeting on 5 April 2011 the Trial Chamber identified four topics to be covered during the first phase of the trial in Case 002.<sup>1</sup> On 27 June 2011, during the Initial Hearing, the Trial Chamber requested the parties to submit lists of documents to be admitted during this first phase (First Phase Document Lists).<sup>2</sup> The Co-Prosecutors filed their First Phase Document List in response to this order on 22 July 2011.<sup>3</sup>
4. On 18 October 2011, the Trial Chamber issued a memorandum identifying 5 witnesses and 3 civil parties who may be called during the first three weeks of the first trial ("Memorandum").<sup>4</sup> The Memorandum directed the parties to indicate, by no later than 1 November 2011, which documents and exhibits from their First Phase Document Lists they would seek to admit in connection with those witnesses and civil parties. The Memorandum directed the parties to submit any objections to opposing parties' proposed documents and exhibits within 10 days of their notification. It further directed the parties to indicate by no later than 5 January 2012 which, if any, of the remaining documents included on opposing parties' First Phase Document Lists they objected to, and the basis for these challenges.

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<sup>1</sup> **E1/2.1** Transcript of Trial Management Hearing, 5 April 2011, p.52.

<sup>2</sup> **E1/4.1** Transcript of Initial Hearing, 27 June 2011, p. 25.

<sup>3</sup> **E109/4** Co-Prosecutors' response to the Trial Chamber's request for documents relating to the first phase of the trial, 22 July 2011.

<sup>4</sup> **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 (an advance courtesy copy of the memorandum was communicated to the parties by email on 18 October 2011).

5. On 1 November 2011, the Co-Prosecutors filed a notification and accompanying document list identifying 978 documents that they would seek to admit in connection with the 5 witnesses and 3 civil parties who may be called during the first three weeks of trial.<sup>5</sup> The Co-Prosecutors further notified the Trial Chamber and other parties that they may seek to admit other documents from their previous First Phase Document List in connection with those witnesses and civil parties if required.<sup>6</sup>

### III. REQUEST

#### A. INTRODUCTION OF DOCUMENTS DIRECTLY TO THE TRIAL CHAMBER

6. The Co-Prosecutors observe that apart from directing parties to identify documents to be introduced in connection with witnesses and civil parties, the Trial Chamber has not yet issued any guidance as to other modalities for the introduction of evidence. It is therefore requested that the Trial Chamber issue such guidance and specifically confirm that, in addition to documents which may be tendered in connection with witnesses, civil parties, experts and the accused persons (should they choose to testify), the parties will be permitted to submit documents directly to the Trial Chamber for introduction into evidence throughout the trial.
7. In support of this request, the Co-Prosecutors note that there is no principle of evidence at the ECCC or in international criminal procedure that requires documents to be tendered into evidence through a witness. Rule 87(2) provides that only evidence that has been “put before the Chamber and subjected to examination” can be relied upon by the Trial Chamber in its decision. Rule 87(3) clarifies that evidence is considered to be put before the Chamber where it is “summarised, read out in court or appropriately identified in court”. There is no requirement in the Rules for evidence to be put before the Chamber in conjunction with witness testimony.
8. In previously interpreting Rule 87, the Trial Chamber has confirmed that material on the case file must be “produced” in court before it is considered evidence but it has not limited this to production in conjunction with a witness.<sup>7</sup> In terms of the requirement for evidence to be “subjected to examination”, the Trial Chamber has held that this is fulfilled where “opportunity has been provided for adversarial argument, even where the parties do not avail themselves of this opportunity.”<sup>8</sup> Again, the Trial Chamber has not limited this to examination in the context of witness testimony. In accordance with this interpretation, in Case 001, the Trial Chamber provided the parties with the

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<sup>5</sup> **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.

<sup>6</sup> *Ibid* at para. 3.

<sup>7</sup> See **E43/4** Decision on admissibility of material on the case file as evidence, Case 001, 26 May 2009 at paras. 5-6; **E176** Decision on parties’ requests to put certain materials before the Chamber pursuant to Internal Rule 87(2), Case 001, 28 October 2009 (Decision on Materials) at para.2.

<sup>8</sup> **E176** Decision on Materials, *ibid* at para. 2.

opportunity at the end of all witness testimony to put additional materials before it and subsequently admitted a number of those materials into evidence.<sup>9</sup>

9. Subsequent to Case 001, a new Rule 80(4) was adopted to specifically provide for parties to file, *in advance of trial*, written objections to documents which opposing parties were proposing to put before the Trial Chamber at trial.<sup>10</sup> The intention behind this rule amendment was clearly to facilitate trial preparation and management by allowing for the resolution of issues relating to the admissibility of documentary evidence in advance of, and separate to, witness testimony at trial.
10. At the international level, it is common practice to tender documentary evidence without it being introduced by a witness. In *Katanga*, the International Criminal Court established a general rule in that case in favour of introducing documentary evidence (other than written records of testimonial evidence of a particular witness) independently of witnesses.<sup>11</sup> It observed that this approach was necessary “to avoid the need of having to call large numbers of witnesses for the only purpose of introducing documents.”<sup>12</sup> Similarly trial chambers at the ICTY<sup>13</sup> and ICTR<sup>14</sup> have routinely permitted the introduction of documentary evidence directly from the bar table.
11. Permitting the introduction of evidence directly to the Trial Chamber will promote a fair, expeditious and efficient trial as it will enable the Trial Chamber to properly consider the wealth of available relevant and probative evidence proposed by the parties, ensure that witness testimony time is not unduly wasted on legal arguments relating to the admissibility of documents, and reduce the number of witnesses that may need to be called.

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<sup>9</sup> E176 Decision on Materials, *ibid*.

<sup>10</sup> Rule 80(3) and (4), inserted 17 September 2010.

<sup>11</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No ICC-01/04-01/07, Direction for the conduct of proceedings and testimony (ICC Trial Chamber), 20 November 2009.

<sup>12</sup> *Ibid* at para. 98

<sup>13</sup> See e.g., *Prosecutor v Momčilo Perišić*, Case No. IT-04-81-T, Order for Guidelines of the Admission and Presentation of Evidence (ICTY Trial Chamber), 29 October 2008 at para. 22; *Prosecutor v Milan Martić*, Case No IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence (ICTY Trial Chamber), 19 May 2006 at para. 15; *Prosecutor v Sefer Halilović*, Case No IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of record of Interview of the Accused from the Bar Table, 19 August 2005 at para. 14.

<sup>14</sup> See e.g., *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Decision on the Prosecutor’s Motion to Reconsider and Rescind the Order of 28 January 1997 (ICTR Trial Chamber), 6 March 1997 p. 3; *Prosecutor v Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-T, Interim Order for the Prosecution to Identify Relevant Passages of Certain Materials (ICTR Trial Chamber), 8 August 2007 at para. 2.

**B. ADMISSION OF DOCUMENTS FROM PARTIES' DOCUMENT LISTS WHERE  
NO OBJECTIONS ARE RECEIVED**

12. In its Memorandum, the Trial Chamber set deadlines for the filing of objections, if any, to the admissibility of documents sought to be admitted by opposing parties. With respect to documents proposed to be admitted in connection with the 5 witnesses and 3 civil parties who may be called during the first three weeks of trial, a deadline of 10 days from notification of each party's document list was set. With respect to the remaining documents included on the parties' First Phase Document Lists, a deadline of 5 January 2012 was set for objections.
13. The Co-Prosecutors request that the Trial Chamber issue a direction that documents included on parties' document lists that are not objected to by any other party within the relevant time limits will be admitted into evidence without further inquiry and conditional only upon those documents being appropriately identified in court. The Co-Prosecutors clarify that, for the purposes of this request, only those documents that have been identified with sufficient specificity in accordance with the relevant direction of the Trial Chamber should be considered as having been proposed by the parties.<sup>15</sup>
14. Under the Rules, as interpreted by the Trial Chamber, all evidence is admissible subject to satisfying minimum standards of relevance and reliability.<sup>16</sup> This threshold standard requires no more than a showing that the proffered evidence is *prima facie* relevant to the issues in dispute and *prima facie* credible. In the absence of objections to either the relevance or reliability of particular documents being raised by opposing parties, these documents can be presumed to meet the threshold standard for admissibility.
15. Further, given that the parties' document lists have been filed with the Trial Chamber in accordance with Rule 80(3) and that opposing parties have been provided with the opportunity to raise objections in advance of trial in accordance with Rule 80(4), the requirement in Rule 87(2) that evidence be "put before the Chamber and subjected to examination" can be fulfilled by those documents being merely being identified by document reference number in court singularly or in groups, where appropriate.<sup>17</sup> It is suggested that this identification should take place at the opening of the proposed

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<sup>15</sup> The Trial Chamber directed: that lists of documents on the Case File should include document reference number, title, available language/s and, if available, a brief description of their nature and contents; that lists of new documents should include a brief description of their nature and contents; and that documents be linked to the relevant parts of the Closing Order. See **E9** Order to file material in preparation for trial, 17 January 2011 at paras. 12-13.

<sup>16</sup> See Rules 87(2) and 87(3); **E188** Judgment, Case 001, 26 July 2010 at para. 41; **E43/4** Decision on Admissibility of Material on the Case File as Evidence, Case 001, 26 May 2009 at para. 7; **E176** Decision on Parties Requests to put Certain Materials before the Chamber Pursuant to Internal Rule 87(2), Case 001, 28 October 2009, at para. 3

<sup>17</sup> As noted earlier, Rule 87(3) clarifies that evidence is considered to be put before the Chamber where it is "summarised, read out in court or appropriately identified in court."

regular sessions for arguments relating to the admission of documents (set out in C below).

16. This approach is particularly appropriate in the present case considering the length of time the parties will have had to consider the documents proposed by the opposing parties by the time objections fall due and considering that the majority of documents proposed were included on the case file by the investigating judges during the course of their independent investigation. It will also obviate the need for valuable trial time and resources to be expended discussing the admissibility of documents about which there is no dispute between the parties or other basis for concern.

**C. REGULAR ALLOCATION OF TIME FOR ORAL ARGUMENTS RELATING TO  
THE ADMISSION OF DOCUMENTS**

17. In its Memorandum, the Trial Chamber indicated that it will provide “opportunity for adversarial argument at trial, where this is warranted” in relation to objections to documents or exhibits proposed to be admitted in connection with the 5 witnesses and 3 civil parties who may be called during the first three weeks of the trial.<sup>18</sup>
18. This opportunity for adversarial argument is welcomed in relation to objections to the admission of documents proposed by opposing parties. Consequently, the Co-Prosecutors urge the Trial Chamber to schedule time for such argument to take place as soon as possible following the filing of objections and responses thereto so that admissibility can be resolved as early as possible in the trial and in advance of the testimony of witnesses and civil parties that may be required to refer to those documents. It is requested that the Trial Chamber regularly set aside time during the early phase of the trial for oral arguments to take place where necessary. These regular sessions would commence following the submission of objections (if any) on 5 January 2011 to the parties First Phase Document Lists and responses thereto. During these sessions, the proffering and objecting parties could make brief oral arguments as to the relevance and reliability of challenged documents or categories of documents.
19. As noted in B above, such sessions could also be used for the identification of documents which are not objected to and which the Co-Prosecutors propose should be admitted without further inquiry. In the event that the Trial Chamber does not agree with the Co-Prosecutors’ proposal as to the admission of documents that are not objected to, such sessions could alternatively be used to address any questions or concerns the Trial Chamber may raise of its own motion as to the admissibility of such documents. Given the vast numbers of documents that have been proposed by the various parties, it is requested that an allocation of approximately one half day each week would be appropriate. The regular scheduling of time to address the admissibility

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<sup>18</sup> E131/1 Memorandum, at p. 2.

of documents will ensure the smooth and expeditious functioning of the trial by avoiding interruptions and arguments on points of law during witness testimony.


#### D. ASSIGNING E3 NUMBERS

20. As a final procedural matter, the Co-Prosecutors request that upon the admission of any documents into evidence those documents be immediately assigned an E3 number in order to permit uniform referencing and to facilitate the ease with which documentary evidence is used by all parties during trial proceedings.

#### IV. RELIEF REQUESTED

21. For the reasons expressed above, the Co-Prosecutors request the Trial Chamber to:
- (1) confirm that parties will be permitted to submit documents directly to the Trial Chamber in addition to tendering documents through witnesses;
  - (2) order that documents included on parties' document lists that are not objected to by opposing parties be admitted into evidence without further inquiry;
  - (3) allocate regular sessions during the trial for oral arguments to take place on any objections by the parties or concerns raised by the Chamber itself as to particular documents; and
  - (4) immediately assign E3 numbers to documents that are admitted.

Respectfully submitted

Date	Name	Place	Signature
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