E9/13

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RULE 80 WITNESS, CIVIL PARTY AND EXPERT SUMMARIES

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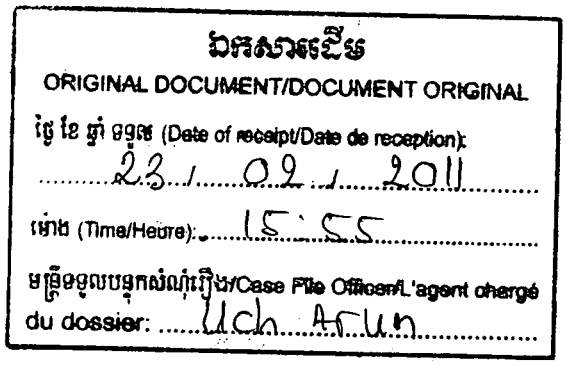

I. INTRODUCTION

1. Pursuant to Sub-rule 80(3) of the Internal Rules, and in accordance with the Trial Chamber's *Order to File Material in Preparation for Trial*,[1] the Co-Prosecutors hereby submit summaries of anticipated testimonies for all the witnesses, civil parties and experts proposed by them.

II. CONTENTS OF THE SUMMARIES

2. Confidential **Annex 1** consists of a table which lists the witnesses, civil parties and experts, and provides summaries of:

   a. the facts on which each witness is expected to testify
   b. the facts on which each civil party is to be heard
   c. qualifications and proposed expertise of each expert; and
   d. the relevant points of the Indictment for each witness, civil party and expert.

   For ease of reference, **Annex 1** lists these individuals in the same order as in Annex 1 to the *Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists* ("Rule 80 Lists").[2]

Civil Parties – update as to status

3. In conducting a fresh review of the information available on the case file, the Co-Prosecutors have found that the individuals allocated numbers P-100 and P-227, who were identified in the Rule 80 Lists as civil parties (and who had been interviewed by the Office of the Co-Investigating Judges as civil parties), have in fact had their civil party applications declared inadmissible. Conversely, the individual allocated number P-218 has been admitted as a civil party. These changes are reflected in **Annex 1**, where current civil parties are marked with an asterisk [*], and identified as such in their respective summaries. Expert Witnesses are marked with a hash symbol [#].

Identification of Points of the Indictment, and Assessment of Witnesses

4. The Points of the Indictment listed for each proposed witness, civil party and expert reflect the Co-Prosecutors' good faith interpretation of the interviews of these individuals conducted during the judicial investigation. While every effort has been made to identify

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1 Order to File Material in Preparation for Trial, Trial Chamber, 17 January 2011, E9.
2 Annex 1 to the Co-Prosecutors' Rule 80 Expert, Witness and Civil Party Lists, Case No. 002/19-09-2007-ECCC/TC, 28 January 2011, E9/4.1.

the points of the Indictment to which each testimony relates, a witness statement, civil party statement or expert statement, summary or materials can never provide an exhaustive account of all relevant and probative facts that the witness, civil party or expert can provide to the Court. In light of this fact, the Co-Prosecutors give notice to the Trial Chamber and the other parties that, where during the testimony of a witness, civil party or expert, it becomes apparent that the individual is able to give evidence in relation to parts of the case that may not have been explicitly identified in the "Points of Indictment" field in **Annex 1**, the Co-Prosecutors will seek to adduce that evidence if it would assist the Chamber in ascertaining the truth of the facts alleged in the Indictment.

5. In preparing the summaries, the Co-Prosecutors have not sought to assess the apparent credibility or otherwise of any individual, other than to indicate the instances where:

   a. a witness has been identified by other evidential sources as holding a position or taking part in events which he / she has not acknowledged (and where, therefore, a simple summary of the witness's statement(s) would provide an inaccurate picture); and
   b. it appears from the statement that the witness is hostile insofar as they have refused to sign their statement or otherwise exhibited a hostile disposition towards the Court.

III. WITNESSES AND EXPERTS NOT INTERVIEWED BY THE OCIJ

6. Ieng Sary has argued that the "OCP should not be allowed to call witnesses who were not interviewed by the OCIJ during the judicial investigation."[3] Of course such an illogical and unfair prohibition suits his interest. Ieng Sary's reliance on Sub-rule 87(3) in making this bold assertion is misplaced: the requirement that the Chamber's decisions be based on "evidence from the case-file" does not equate to a rule that only evidence placed on the case file by the Co-Investigating Judges can be relied upon by the Trial Chamber. To state the obvious, such a rule would preclude the giving of live testimonies before the Trial Chamber, as trial transcripts are by definition placed on the case file *after* the closure of the investigation.

7. Furthermore, there is nothing in the language of Rule 80 or Rule 87, which sets out the rules of evidence applicable before the Trial Chamber, that would limit the categories of

[3] Ieng Sary's Response to the Co-Prosecutors' Motion Which Accompanied Their Rule 80 Expert, Witness and Civil Party Lists, 8 February 2011, E9/4/1, paragraph 10.

individuals whom the Parties may propose as witnesses at trial. In fact, Sub-rule 87(1) provides that "[u]nless provided otherwise in these IRs, all evidence is admissible." Sub-rule 87(3) then sets out specific grounds on which evidence *may* be excluded. The Co-Prosecutors submit that, as long as the Chamber is satisfied, on a *prima facie* basis, that the proposed testimony of a witness meets the criteria set out in Rule 87, it is open to the Chamber to exercise its discretion to summon any witness.

8. The above interpretation is further supported by Sub-rule 87(4), which provides that, during the trial, "the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth." Clearly, if "any person" may be called as a witness during the trial, *a fortiori*, the parties must also have the ability to propose any individual as a witness prior to the start of the trial. In fact, the interests of trial efficiency militate in favour of the identification and proposal of additional witnesses by the parties prior to the start of the trial, thus reducing the need for reliance on Sub-rule 87(4). Ieng Sary also argues that, to allow the Co-Prosecutors to call witnesses whom OCIJ did not interview, would "circumvent the OCIJ's authority."[4] Contrary to this submission, the OCIJ have held, in a number of orders refusing parties' requests to interview certain individuals, that it was open to the parties to propose those individuals as witnesses before the Trial Chamber if the (then) Charged Persons are indicted.[5]

9. Similarly, Ieng Sary's assertion that the proposed new experts "should be allowed to testify...if they are called to explain and interpret statements made in their publications which are already on the Case File"[6] finds no support in the Rules, and is inconsistent with the practice of the Trial Chamber in Case 001, where the testimonies of the three experts who had not been interviewed by the OCIJ (Messrs Nayan Chanda, David Chandler, and Craig Etcheson) were not limited in the way now submitted by Ieng Sary.

10. The Co-Prosecutors note that the Accused have raised various other witness-related issues in their filings, including the statement by Nuon Chea that he intends to call as witnesses

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[4] Ibid.

[5] Order on Co-Prosecutors' Request for Further Investigative Action Regarding the Charged Person Ieng Thirith, Office of the Co-Investigating Judges, 2 April 2010, D350/1, paragraph 12; Order on Nuon Chea's Eighteenth Request for Investigative Action, 17 February 2010, D273/2, paragraph 9; Order on Co-Prosecutors' Request for Investigative Action Regarding Charged Person Nuon Chea, 31 March 2010, D342/1, paragraph 6.

[6] Ieng Sary's Response to the Co-Prosecutors' Motion Which Accompanied Their Rule 80 Expert, Witness and Civil Party Lists, 8 February 2011, E9/4/1, paragraph 10.

"each and every individual" named in any written statements that are admitted into evidence.[7] In the interests of judicial economy, the Co-Prosecutors restrict their submissions in this filing only to the arguments which directly relate to the inclusion of certain individuals in their proposed witness, civil party and expert list. The Co-Prosecutors propose to deal with the remaining witness-related issues at the upcoming Trial Management Meeting.

11. As directed by the Trial Chamber, the Co-Prosecutors will separately submit a Microsoft Word version of the Annex.

Respectfully submitted,

Date	Name	Place	Signature
23 February 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[7] List of Proposed Witnesses, Experts and Civil Parties, 15 February 2011, E9/4/4.