

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

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RESPONSE TO OCP OBJECTIONS TO DEFENCE DOCUMENTS

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Counsel for Nuon Chea ('the Defence') hereby submits this written response to the Co-Prosecutors' oral objection to document E131/1/13.11,¹ made during the documentation hearing on 21 January 2013.²

1. In January 2012 the Defence requested that several documents be put before the Chamber, including document E131/1/13.11.³ The Chamber placed E131/1/13.11 on the case file and indicated that it would later determine if the document satisfied the criteria set out in Internal Rule 87(3), subject to objections from other parties.⁴ On 21 January 2013, the Co-Prosecutors objected to E131/1/13.11 orally in the course of the Chamber's document admissibility hearing.⁵ The Co-Prosecutors alleged that there is no 'direct link' between the information in this document and 'the crimes committed during Democratic Kampuchea', and that the document is therefore irrelevant.⁶ On 22 January 2013, the Chamber instructed the parties that the Defence would be entitled to file written submissions concerning the admissibility of documents at issue in the previous day's hearing by 8 February 2013.⁷
2. Pursuant to Internal Rule 87(3), material is admissible as evidence if it is (i) not 'irrelevant or repetitious', (ii) possible 'to obtain within a reasonable time', (iii) suitable 'to prove the facts it purports to prove', (iv) 'allowed under the law', and (v) not intended to be frivolous or prolong the proceedings.⁸ Document E131/1/13.11 satisfies all these criteria.
3. Document E131/1/13.11 is a People's Republic of Kampuchea ('PRK') Report to the Council of Ministers, on the 'K-5 Construction Plan for Fiscal Year 1987', dated 23 August 1986.⁹ As the title suggests, the 10-page report details the 1987 construction

¹ Document No. **E-131/1/13.11**, 'The People's Republic of Kampuchea Independence Peace Liberty Happiness', 23 August 1986, ERN 00773822-00773831.

² See Document No. **E-1/161.1**, 'Transcript of Trial Proceedings', 21 January 2013, ERN 00882521-00882613, p.20:15-19 and pp. 25:14-26:5.

³ See Document No. **E-131/1/13.1**, 'ANNEX: List of Documents to Be Put Before the Chamber During the First Mini-Trial', 31 January 2012, ERN 00774395-00774403, p. 9 (no. 35).

⁴ See Document No. **E-190**, 'Decision Concerning New Documents and Other Related Issues' 30 April 2012, ERN 00804367-00804382, para. 37.

⁵ See Document No. **E-1/161.1**, 'Transcript of Trial Proceedings', 21 January 2013, ERN 00882521-00882613, p. 20:15-19 and pp.25:14-26:5.

⁶ See Document No. **E-1/161.1**, 'Transcript of Trial Proceedings', 21 January 2013, ERN 00882521-00882613, p. 20:15-19.

⁷ See Document No. **E-1/162.1**, 'Transcript of Trial Proceedings', 22 January 2013, ERN 00883761-00883840, p. 68:15-20.

⁸ Internal Rule 87(3).

⁹ See Document No. **E-131/1/13.11**, 'The People's Republic of Kampuchea Independence Peace Liberty Happiness', 23 August 1986, ERN 00773822-00773831, p. 1.

plans for the K-5 project, and includes detailed estimates of the number of laborers needed to execute the plan, in addition to descriptions of the structures to be built.¹⁰

4. The K-5 Plan was a large-scale building project initiated by the PRK that lasted from 1982 to 1988.¹¹ Hun Chhunly, the author of the book ‘The Life of a Physician Under the Khmer Rouge Regime’, and who has testified before this Chamber, describes the K-5 Plan in his book as follows:

Another tragic event took place in 1982. It was the infamous Strategic K 5 Plan that was twice longer than the Khmer Rouge time and *took lives of many hundreds of thousands people throughout the country* ... Many laborers died or were injured by stepping on landmines, by work accidents and died from malaria. Battambang Hospital was overcrowded with patients, many of them slept on the floor and the corridors...One time, in 1984, Battambang Hospital was overcrowded, with patients exceeding one thousand. Health staff had to move to all beds outside and put them under the trees in the hospital yards. Patients slept on the floors, on the corridors and on beds under the trees.¹²

5. In the course of Hun Chhunly’s testimony before this Chamber, counsel for Nuon Chea attempted to examine the witness concerning this excerpt. The Chamber disallowed the question on the basis that it concerned events outside the temporal jurisdiction of the ECCC. The following exchange ensued:

MR. PAUW:

In document D140/1/1, which is the demographic expert report by Ewa Tabeau, the following is stated:

"It is unquestionable that the data from the DC-Cam mass grave mapping are an essential source on victims of the Khmer Rouge Regime in Cambodia. Thus using this data for an estimate of victims not only makes a lot of sense but is important and needs to be done. It is unquestionable that a vast majority of victims in the mass graves, if not all, are Khmer Rouge victims." Also in that report, Ewa Tabeau states that she is not aware of any other incident in Cambodian history that caused massive loss of life. So it is clear that she is not familiar with the K-5 episode, which, according to this witness, has caused the life of hundreds of thousands of people. K-5 took place especially around the region of Battambang and for that reason, it is likely that 17 people that died in K-5 or under the K-5 project ended up in mass graves simply because there were hundreds of thousands of them. So it is a relevant question whether this witness knows where these bodies were disposed of, the K-5 victims, simply because we need to know what the source is of these bodies in the mass graves, especially around Battambang. So in this exceptional situation, a question

¹⁰ See Document No. **E-131/1/13.11**, ‘The People’s Republic of Kampuchea Independence Peace Liberty Happiness’, 23 August 1986, ERN 00773822-00773831, pp. 7-10.

¹¹ See Document No. **D-313/1.2.8**, ‘The Life of a Physician Under the Khmer Rouge Regime’, March 2008, ERN: 00369669- 003696820, p. 138.

¹² See Document No. **D-313/1.2.8**, ‘The Life of a Physician Under the Khmer Rouge Regime’, March 2008, ERN: 00369669- 003696820, p. 138-139 (emphasis added).

outside the temporal jurisdiction of this Court is appropriate simply because it goes to direct evidence. It provides --

MR. PRESIDENT:

Witness needs not answer this question because the Defence himself understands it very well and he has also made it clear that it is not within the temporal jurisdiction of the ECCC.

MR. PAUW:

But I will ask for a better reason to order than that "it is not in the temporal jurisdiction". I am claiming, the Defence is claiming that hundreds of thousands of victims are not killed by the Khmer Rouge but by the K-5 Plan instead. It's an alternative theory. This witness has valid information. He speaks of hundreds of thousands of people that were killed. It, simply, is relevant and is exculpatory and we need to be allowed to pursue this. And simply pointing at the temporal jurisdiction will not do in this instance, Mr. President, with all due respect.

MR. PRESIDENT:

We have listened to your own explanation that, it is outside the temporal jurisdiction of the ECCC. So it is very clear now that it is not relevant. That's why the Chamber advised you not to ask any question that is not within the confines of the current case. And you may put the questions that are within the confines of Case 002/01. Now, the witness is testifying on two aspects; the evacuation as well as the application of local policy. And I made it clear from the outset of the topics of his testimony. So, all parties were advised to put the questions relevant to this topic with the witness in question. So the question you put just now to the witness is beyond the scope of Case 002/01 and, in addition, it also goes out of the topics that the witness before us may have the capacity to testify before the Chamber.

MR. PAUW:

Mr. President, I will move on. I will simply, for the record, state that it is within the knowledge of this witness. He has actually written a book about it. And simply being outside the --

MR. PRESIDENT:

You move on. If you do not have any further questions, you may hand over the floor to the other defence teams. So move on please.

BY MR. PAUW:

I will move on to the next topic, as I'm prevented from pursuing this exculpatory line of questions.¹³

6. As counsel argued before the Chamber, the Tabeau Report -- which was entered into evidence by the Co-Prosecutors and is currently before the Chamber¹⁴ -- is based on an explicit assumption that no mass graves anywhere inside the country are attributable to

¹³ Document No. E-1/150.1, 'Transcript of Trial Proceedings', 7 December 2012, ERN 00870086- 00870205, pp. 77:2-79:20.

¹⁴ See Document No. E-185/1.3, 'Annex C -- Documents Proposed by the Co-Prosecutors', 3 December 2012, ERN 00884447-00884623 ('Tabeau Report'), p. 51.

any source other than the Khmer Rouge. Indeed, Dr. Tabeau concluded that ‘[a]ll in all, it is highly unlikely and practically impossible that the mass graves mapped so far and the remains contained in them can be linked with non-Khmer Rouge episodes of the Cambodian history’.¹⁵

7. The factual proposition that no mass graves exist in Cambodia which are not linked to the Khmer Rouge is therefore already, at the behest of the Co-Prosecutors, before this Chamber. Any evidence which rebuts or contradicts that proposition is clearly relevant. Dr. Chhunly’s book is in evidence before the Chamber¹⁶ and, by tending to prove that mass graves unrelated to the Khmer Rouge do exist in Cambodia, constitutes precisely such rebuttal evidence. Document E131/1/13.11, as a contemporaneous PRK document detailing the construction plan for the K-5 Project, corroborates the existence of K-5 and therefore enhances the probative value of Dr. Chhunly’s assertions in that regard.
8. The significance of document E131/1/13.11 is yet greater because, as Dr. Tabeau herself points out, the mass grave mappings on which she relies are not based on any physical or forensic examination of the mass graves they documented.¹⁷ Her conclusion in that regard instead amounts to a bare assumption. Dr. Chhunly’s evidence is therefore not only *prima facie* inconsistent with the claims underlying the Tabeau Report, but also compelling in that regard.
9. Finally, because the import of document E131/1/13.11 would be to suggest that fewer persons died during the Khmer Rouge than the Tabeau Report would indicate (possibly, according to Dr. Chhunly, by a measure of hundreds of thousands of persons), it is not only relevant to, but exculpatory in these proceedings.¹⁸
10. Document E131/1/13.11 meets the criteria set out in 87(3). E131/1/13.11 is relevant and, as an original document which details facts not yet reflected on the case file, not repetitious. For similar reasons, the document is neither frivolous nor tendered with the intent of prolonging the proceedings, and is suitable ‘to prove the facts it purports to prove’. There are no reasons why E131/1/13.11 is otherwise disallowed under the law.

¹⁵ See Tabeau Report, p. 17 (of main report).

¹⁶ See Document No. E-185/1.3, ‘Annex C – Documents Proposed by the Co-Prosecutors’, 3 December 2012, ERN 00884447-00884623, p. 123.

¹⁷ Tabeau Report, p. 12 (of main report).

¹⁸ Arguably, the question of the precise number of victims during DK is not strictly relevant to Case 002/01. On that assumption, however, the Tabeau Report itself is irrelevant. If the Tabeau Report is admissible, it must also be the case that evidence which directly contradicts it is admissible.

11. For these reasons, the Defence respectfully requests that the Chamber admit document E131/1/13.11 into evidence.

INTERNATIONAL CO-LAWYER FOR NUON CHEA

A handwritten signature in blue ink, consisting of a long horizontal stroke on the left, a loop, and a vertical stroke on the right that crosses the horizontal one.

Victor KOPPE