

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

FILING DETAILS

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**FURTHER REQUEST FOR CLARIFICATIONS ON THE STATUS OF DOCUMENTS IDENTIFIED
AS "E3" DOCUMENTS, AND REQUEST FOR A PUBLIC HEARING ON CHALLENGES TO
DOCUMENTS PROPOSED TO BE PUT BEFORE THE CHAMBER PURSUANT TO DECISION E96/7**

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To:

The Trial Chamber

Judge NIL Nonn

Judge Silvia CARTWRIGHT

Judge YOU Ottara

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. On 19 October 2012, the President of the Trial Chamber issued the Khmer and English versions of Memorandum E223/2, which, among other matters, concerns the forthcoming hearings on “[TRANSLATION] *written statements or transcripts of statements proposed by parties to be put before the Chamber pursuant to Decision E96/7*”. The French version of the Memorandum was issued on 5 November 2012.¹
2. Mr KHIEU Samphân’s Defence views the tenor of the Memorandum with great concern, in that it has added to the already existing confusion as to which documents are assigned an E3 classification. Further, in consequence of Decision E96/7, Mr KHIEU Samphân Defence has indicated that it considers it essential to hold a public hearing on challenges to the evidence adduced, even in the event of an exchange of motions on the issue.

I – Status of documents in the E3 series

3. Already on 5 March 2012, Mr KHIEU Samphân’s Defence requested the Chamber for clarification as to which documents are assigned an E3 classification. On that occasion, the Defence pointed out that certain documents are afforded E3 status without having been subject to adversarial challenge, contrary to the existing Rules before the ECCC.²
4. The President of the Chamber responded to the above question via Memorandum dated 11 April 2012, indicating that:

“The Chamber clarifies that allocation of an E3 number signifies that a document has been put before the Chamber or the parties without objections being made (or, where

¹ Forthcoming document hearings and response to Lead Co-Lawyers’ memorandum concerning the Trial Chamber’s request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223). Memorandum, 19 October 2012, **E223/2** (Memorandum E223/2).

² Request by the Defence for Mr KHIEU SAMPHAN for Clarifications on the Status of Certain Documents Identified as “E3” Documents, 5 March 2012, **E178**.

Further Request for Clarification on the Status of Documents Identified as “E3” Documents, and Request for a Public Hearing on Challenges to Documents Proposed for Admission into Evidence Pursuant to Decision E96/7

*objections are made to a document, these objections are rejected by the Chamber). Pursuant to Rules 87(2) and 87(3), the Chamber may base its decision on documents that have been put before the Chamber or the parties (i.e. their “content has been summarised, read out, or appropriately identified in court”), “subjected to examination” and not excluded on any of the five grounds specified in Rule 87(3)(a) to (e). The Chamber considers a document to have been subjected to examination if adequate opportunity has been given to the parties to object to its use, even if the parties do not in fact avail themselves of this opportunity. New documents that the Chamber deems to have met the criteria in Internal Rule 87(4) are also allocated E3 numbers”.*³

5. In Memorandum issued in an April 2012, the President recognised that “*during the earliest stages of the trial and on an exceptional basis*” the Chamber had allocated E3 numbers to documents which had not been subjected to examination, adding that the parties were given the opportunity to challenge those documents “*subsequently*”.⁴ Mr KHIEU Samphân’s Defence therefore understood the Memorandum to mean that – as per Rule 87 – the Chamber’s practice was to allocate E3 numbers only to those documents which had already been subjected to examination.
6. However, the wording of Memorandum E223/2 creates further confusion. First, the President informs the Co-Prosecutors and the Civil Party Lead Co-Lawyers that only those statements which can be made available in all official ECCC languages by 29 February may be proposed to be put before the Chamber as evidence.⁵ He explains that this is a prerequisite for consideration of materials to be put into evidence “*in order to permit adversarial argument in relation to them*”.⁶ The President rightly adds that “*in accordance with the ECCC’s legal framework, no evidence may be adduced against an accused unless it has been subject to adversarial challenge*”.⁷ So in first part of the Memorandum, things are clear.
7. The President further indicates: “*Once available in all official ECCC languages, the Chamber will afford these statements an E3 number, and will then consider them in*

³ Request by the KHIEU Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and Its Motion E167, Memorandum, 11 April 2012, **E178/1**, para. 3 (Memorandum E178/1).

⁴ *Ibid.*, paras. 3 and 4.

⁵ Memorandum E223/2, paras. 9 and 12.

⁶ *Ibid.*, para.12.

⁷ *Ibid.*, Emphasis added.

*light of the legal principles set forth in its decision E96/7”.*⁸ He adds that “*where parties wish to pose objections to any material tendered in accordance with this decision, they may do so by written motion at any stage of proceedings but in any event no later than Friday 26 April 2013. The Chamber shall weigh these objections when considering the material proffered in accordance with the criteria outlined in Decision 96/7.*”⁹

8. Mr KHIEU Samphân’s Defence therefore understands that the Chamber is already planning to assign E3 classification to the documents proposed by the Co-Prosecutors and the Civil Party Lead Co-Lawyers once those documents are made available in the three official ECCC languages (29 February 2013), **before** it considers any challenges to them (26 April 2013) and, by implication, before those documents are subject to adversarial challenge.
9. Mr KHIEU Samphân’s Defence is uncertain about the usefulness of any *a posteriori* adversarial challenge, as this runs counter to both doctrine and judicial efficiency. The question this raises is, what will happen to the documents which are already assigned E3 numbers should the Chamber subsequently decide to declare them inadmissible? Will it divest them of their E3 status? Will they be assigned another number distinguishing them from admissible documents? This will also raise further questions regarding rules of evidence.
10. Insofar as the Chamber cannot prejudice the admissibility of such documents prior to an adversarial hearing, Mr KHIEU Samphân’s Defence submits that assigning them E3 status prematurely is not conducive to clarity of the proceedings and could raise issues as regards the closing briefs and closing arguments.
11. The Chamber should not afford E3 status until after it has ruled on the Defence teams’ challenges to admissibility, especially given that the evidence involved

⁸ *Ibid.*, para. 9. Emphasis added.

⁹ *Ibid.*, para. 14.

consists in a substantially large volume of written statements or transcripts proposed to be put before the Chamber in lieu of oral testimony, hence the need for a public hearing.

II – Public hearing on adversarial challenges to evidence proposed to be put before the Chamber pursuant to Decision E96/7

12. While Mr KHIEU Samphân’s Defence welcomes the opportunity offered by the President to “*pose objections to any material tendered in accordance with this decision, they may do so by written motion at any stage of proceedings, but in any event no later than Friday 26 April 2013*”,¹⁰ it still maintains – as it previously indicated informally via email – that a public hearing on this issue is crucial.
13. In its Decision E96/7 (issued more than one year after the filing of the Co-Prosecutors’ motion), the Chamber recognises that assessing the relevance and probative value to written statements and other documents in lieu of viva voce testimony is a delicate exercise, involving many fundamental principles, and that it must be subject to stringent conditions.¹¹
14. The Chamber also recognises that the documentary evidence in this trial, as well as the issues relating thereto are such that that it has held public hearings in the absence of adversarial challenges so as “*to ensure a greater measure of public accessibility to the documentary aspect to the trial*”.¹²
15. It should therefore *a fortiori* – in addition to the exchange of submissions between the parties – schedule a public hearing on adversarial challenges, because it is dealing with a large volume of documentary evidence of which the admission involves a

¹⁰ Memorandum E223/2, para. 14.

¹¹ Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, **E96/7**.

¹² See Memoranda E170 and E233.

whole host of fundamental principles. Indeed, the Co-Prosecutors adopted the same reasoning in a recent email to the Chamber's Senior Trial Attorney.¹³

16. **FOR THESE REASONS**, Mr KHIEU Samphân's Defence requests the Trial Chamber to:

- SPECIFY the exact status of the documents it affords E3 status and reconsider the terms of its Memorandum E223/2 accordingly.
- HOLD A PUBLIC HEARING on challenges to the evidence that the parties propose to be put before the Chamber in application of Decision E96/7.

¹³ See email from Prosecution Counsel Bill SMITH to Ms Susan LAMB, 20/11/12, 1.38 pm.

Further Request for Clarification on the Status of Documents Identified as "E3" Documents, and Request for a Public Hearing on Challenges to Documents Proposed for Admission into Evidence Pursuant to Decision E96/7

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