

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

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LIST OF PROPOSED WITNESSES, EXPERTS, AND CIVIL PARTIES

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I. INTRODUCTION

1. Pursuant to Rule 80(2) of the ECCC Internal Rules (the 'Rules') and this Chamber's 'Order to File Material in Preparation for Trial' (the 'Preparation Order'),¹ counsel for the Accused Nuon Chea (the 'Defence') submit its lists of proposed witnesses,² experts,³ and civil parties⁴ (collectively, the 'Defence Witness List'). On Monday, 31 January 2011, the Defence received the 'Co-Prosecutors' Rule 80 Expert, Witness, and Civil Party Lists' (the 'OCP Witness List').⁵ In accordance with Rule 80(2)'s fifteen-day deadline,⁶ the instant list has been timely filed. Additionally, the Defence makes the following submissions regarding the Preparation Order, the OCP Witness List, and various other related issues.

II. SUBMISSIONS

A. General Notices and Disclaimers

2. At the outset, it must be emphasized that—given the size of, and ongoing translation into English and Khmer of potential evidentiary material on, the case file—the Defence has been unable to review the entire case file and has not been able to discuss certain relevant information with Nuon Chea (whose fitness to participate effectively in these proceedings remains an open question).⁷ Accordingly, the Defence reserves its right to supplement and/or otherwise modify these submissions, *at any time*, pursuant to further instructions from the Accused.
3. Additionally, the Defence has filed a general objection with respect to the legality of the Rules.⁸ While that objection does not specifically concern the application of Rule

¹ Document No E-9, 'Order to File Material in Preparation for Trial' (the 'Preparation Order'), 17 January 2011, ERN 00635754–00635759, paras 1–4.

² Attached hereto as Annex A.

³ Attached hereto as Annex B.

⁴ Attached hereto as Annex C.

⁵ Document No E-9/4, 'Co-Prosecutors' Rule 80 Expert, Witness and Civil Parties Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5' (collectively, the 'OCP Witness List'), 28 January 2011, ERN 00640669–00640676.

⁶ Rule 80(2) provides: 'Where the Accused [...] wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, [he] shall submit an additional list, including a statement of any relationship referred to in Rule 24(2) to the Greffier of the Chamber within 15 (fifteen) days from notification of the list.'

⁷ See Document No E-30, 'Urgent Application for Appointment of Fitness Expert', 2 February 2011, ERN 00641421–00641436.

⁸ See Document No E-36, 'Preliminary Objection Concerning the Legality of the Internal Rules and Effect of the Trial Chamber's Order of 17 January 2011', 11 February 2011, ERN 00642561–00642576.

80(2), it does take issue with certain aspects of the Preparation Order and seeks suspensive effect thereof pending resolution of the objection. In this regard, the Defence reserves its right to continue to challenge any Rules which unlawfully depart from existing Cambodian procedure.

4. The Defence intends to file additional requests for investigative action prior to the Initial Hearing.⁹

B. Language and Translation

5. As required by Article 2.2 of the Practice Direction on Filing of Documents Before the ECCC, the Defence hereby notifies the Trial Chamber greffiers that it intends to file and receive documents in English and Khmer.¹⁰ As the Defence has no French-language capacity, it is unable to verify the accuracy of any translations from the original English and/or Khmer into French. Accordingly, the Defence does not intend to file *any* documents in that language. Moreover, in view of current (and ongoing) ITU constraints, the Defence is unable to provide Khmer translations of the attached annexes at this juncture.¹¹ Translation of these documents is pending, and the Khmer versions will be submitted at the earliest practicable opportunity.

C. Information Concerning Each Proposed Witness

6. To the extent possible, the Defence has endeavored to provide the material requested by the Trial Chamber at paragraph two of the Preparation Order. However, as noted by counsel for Ieng Thirith,¹² the Defence considers itself bound by the prohibition on conducting investigations as announced by the OCIJ very early in these proceedings:

Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which

⁹ See Rule 93(1) ('Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations.')

¹⁰ See Practice Direction ECCC/01/2007/Rev5 (Article 2.2 provides: 'Any person entitled to file documents before the ECCC shall notify the relevant greffiers of the official language(s) in which, in addition to Khmer, they intend to file and receive documents.')

¹¹ *N.B.* If required, the Defence is in a position to provide correspondence from the ITU and the DSS translators.

¹² See Document No E-9/1, 'Ieng Thirith Defence Motion Regarding Order to File Materials in Preparation for Trial' (the 'Ieng Thirith Filing Motion'), 21 January 2011, ERN 00637123-00637125, paras 4-5.

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authorizes the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.¹³

Not wishing to run afoul of ‘the provisions of Rules 35 and 38 of the ECCC Internal Rules’,¹⁴ or established Cambodian procedure relating to ‘coercion of witnesses’,¹⁵ the Defence has strictly adhered to the Co-Investigating Judges’ admonition.

7. In this regard, much of the requested information has not been—or has only partially been—provided.¹⁶ In any event, a name (and any other *available* information) has been submitted for each proposed witness, expert, and civil party.¹⁷ The Defence considers such information to be consistent with its obligations under Cambodian law¹⁸ and the Trial Chamber’s recent interpretation of the Preparation Order.¹⁹ The Defence will include estimates of the length of proposed testimony along with any submitted witness summaries.

D. Additional Witnesses

8. The OCP has indicated that it has not placed the names of certain individuals on its lists ‘on the basis that the Co-Prosecutors will be permitted to introduce into evidence their witness statements and related documents pursuant to Rule 87’.²⁰ The Defence reserves its right to call as witnesses each and every individual named in any such statements subsequently offered by the OCP (or the other parties) and admitted by the Chamber. Additionally, the Defence reserves its right to call *any* witnesses related to *any* new or unforeseen evidentiary developments at trial.

¹³ Document No A-110/I, Memorandum from OCIJ to Son Arun and Michiel Pestman, 10 January 2008, ERN 00157729–00157729, para 3.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See, e.g., the Ieng Thirith Filing Motion, para 6 (‘[G]iven that the decisions concerning protective measures fall within the “strictly confidential” part of the case file, to which the defence does not have access, the defence is not in a position to provide’ such information.)

¹⁷ *N.B.* To the extent that such information was available, the Defence has sought to provide the (full) name, gender, birth details, and relevant contact information for each proposed witness, expert, or civil party. With regard to those individuals about whom little is presently known, the Defence has sought to provide as much information as was available at the time of filing in order to facilitate the locating of those persons by the Trial Chamber.

¹⁸ See n 8, *supra*.

¹⁹ See Document No E-9/1/1, Interoffice Memorandum from the Trial Chamber to All Parties in Case 002, 3 February 2011, ERN 000641351 (‘The Chamber accordingly clarifies that Annex 2 of the Chamber’s Order to File Materials should be understood as requiring the parties to provide all relevant information which is available to the parties. This will be relevant mainly to witnesses proposed to the Trial Chamber for the first time by the parties themselves.’)

²⁰ OCP Witness List, para 10.

**E. Certain Witnesses Named by Kaing Guek Eav
in Statements Provided to the OCIJ in Case 001**

9. On 11 August 2008, the Defence filed its 'Second Request for Investigative Action', requesting the OCIJ to identify, locate, and interview ninety-four individuals referred to by then Charged Person Kaing Guek Eav (alias 'Duch') in interviews conducted by the OCIJ.²¹ In the event that individuals were identified as deceased, the OCIJ was requested to 'provide proof to that effect'.²² In carrying out the request, the OCIJ eventually provided a list of names of individuals for whom it claimed there was evidence of death. On appeal to the Pre-Trial Chamber (the 'PTC'), the Defence challenged the sufficiency of such putative evidence;²³ however, the PTC affirmed the decision of the OCIJ.²⁴ At this stage of the proceedings, the Defence reiterates its original objections and informs the Trial Chamber that it does not accept the justifications advanced by the Co-Investigating Judges to support their assertions that the individuals in question are actually deceased. Accordingly, the Defence considers they should be heard as witnesses a trial for the same reasons advanced in the Second Request.²⁵ Should the Trial Chamber decline to do so at this stage, the Defence reserves its right to call them in response to Duch's testimony at trial.

F. Prosecution Witnesses

10. This Chamber has ordered the parties to 'provide an indication of whether each party intends to object to the calling of any proposed witnesses or experts and why,'²⁶ no later than 28 February 2011. Obviously, the Defence will not be able to make such determination until the witness summaries (due on 23 February 2011²⁷) have been filed and scrutinized. A five-day period in which to do so—given the length of the OCP Witness List²⁸—is patently unreasonable. Accordingly, the Defence will in good faith

²¹ See Document No **D-100**, 'Second Request for Investigative Action', 11 August 2008, ERN 00212314–00212322.

²² *Ibid*, para 10.

²³ See Document **D-100/9/1**, 'Appeal Against OCIJ Order on Second Request for Investigative Action', 28 January 2010, ERN 00439479–00439488, paras 2–13.

²⁴ See Document No **D-100/9/2**, 'Decision on Appeal Against the Co-Investigating Judges' Order on Nuon Chea's Second Request for Investigative Action', 5 May 2010, ERN 00494530–00494543.

²⁵ *N.B.* As these names are already set out in a self-contained list (see Document No **D-203/1.1**, 'Annex A: Table Summarising the Results of the Investigations', 10 August 2009, ERN 00375831–00375858), the Defence has not additionally included them on its Witness List.

²⁶ Preparation Order, para 8.

²⁷ Preparation Order, para 6.

²⁸ *N.B.* The OCP has proposed the calling of 295 witnesses (247), experts (16), and civil parties (32).

attempt to provide its objections in time, subject to its right to adequate time and facilities to prepare its case. The Defence considers that such approach is consistent with its obligations under Cambodian law.²⁹

G. Proposed Order of Witness Testimony

11. The OCP has suggested the order in which its proposed witnesses ‘should be called to appear at trial and in which the key issues or areas of the Indictment should be presented’.³⁰ At this stage, the Defence simply notes the OCP’s suggestions and submits that the issue of witness order—among many others—should be tabled for extensive discussion at the upcoming trial management meeting.

H. Contextual Elements

12. According to the OCP: ‘In the interests of clarity, efficiency, and justice, [...] those witnesses [put forward by the other parties] [should] be assessed in accordance with the key issues and criminal events to which they are able to testify and [...] appear for questioning in accordance with the primary issue or site to which they can provide evidence, such that the overall structure proposed by the Co-Prosecutors is maintained.’³¹ Notably absent from the OCP’s proposed agenda is any reference to the pre-1975 period, which suggests that the Co-Prosecutors do not consider contextual evidence related to that time to be of relevance to the trial proceedings. Yet the OCP has previously argued the importance of such contextual elements to a full understanding of the issues in this case.³² In assessing the relevance of certain witnesses proposed by the Defence, the Trial Chamber is directed to international jurisprudence indicating that ‘acts prior to the temporal jurisdiction may be relied upon where evidence is aimed at “clarifying a given context”’.³³

²⁹ See n 9, *supra*.

³⁰ OCP Witness List, para 15.

³¹ OCP Witness List, para 20.

³² See Document No **D-365**, ‘Co-Prosecutors Request to Place on the Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ Knowledge of the Crimes’, 11 February 2010, ERN 00478047–00478055, para 1.

³³ See Document No **D-365/2/1**, ‘Co-Prosecutors’ Appeal Brief in Response to Co-Investigating Judges’ Order Regarding Request to Place on Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ Knowledge of the Crimes’, 5 April 2010, ERN 00508881–00508908, para 11 (quoting Document No **D-300**, ‘Order on Requests D-153, D-172, D-174, D-178 & D-284’, 12 January 2010, ERN 00428047–00428058, para 9 (citing ICTR-99-52-A, *Prosecutor v Nahimana et al*, Appeals Judgment, 28 November 2007, para 315)).

I. Witness Proofing

13. The OCP has asserted that 'the Co-Prosecutors have not been in contact with experts, witnesses, and civil parties'.³⁴ In light of the general prohibition against witness proofing in civil-law proceedings and Cambodian law/regulations on the issue,³⁵ the Defence hereby requests the Chamber to remind the OCP and counsel for the other parties of their continuing obligation to refrain from substantive contact with witnesses, experts, and civil parties at any time prior to their testimony.

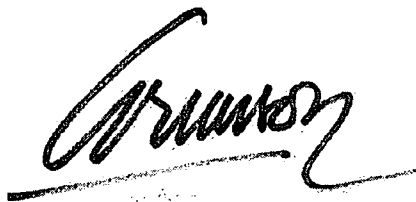
J. Experts

14. Pursuant to the Preparation Order, the Defence has filed a separate list of proposed experts. Additionally, many of the names included on the list of witnesses may also qualify as experts, and the Defence may seek to call them as such at the trial. (Such names are currently indicated in red text and marked with an asterisk on the list of witnesses). Because these individuals may also be in a position to provide factual testimony and given the fact that their legal qualification as an 'expert' may be open to debate and further submission, the Defence hereby reserves its right to subsequently reclassify and clarify their status.


III. CONCLUSION

15. These submissions are not intended to be exhaustive. Accordingly, the Defence hereby reserves all rights available to Nuon Chea under Cambodian and international law.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE

³⁴ OCP Witness List, para 3.

³⁵ See Cambodian Code of Criminal Procedure, Article 326; Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, Article 33(3).