



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

**អង្គជំនុំជម្រះសាលាដំបូង**

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before:

Judge YA Sokhan, Presiding Judge

Judge Jean-Marc LAVERGNE

Judge YOU Ottara

Judge Claudia FENZ

Judge THOU Mony

Date:

21 September 2016

Original language(s):

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#### DECISION ON REQUESTS REGARDING INTERNAL RULE 87(4) DEADLINES

**Co-Prosecutors**

CHEA Leang

Nicolas KOUMJIAN

**Accused**

NUON Chea

KHIEU Samphan

**Civil Party Lead Co-Lawyers**

PICH Ang

Marie GUIRAUD

**Lawyers for the Defence**

SON Arun

Victor KOPPE

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## 1. INTRODUCTION

1. The Trial Chamber is seised of the parties' submissions regarding the deadline for Internal Rule 87(4) requests for new evidence in Case 002/02.

2. On 28 June 2016, the Chamber informed the parties that all Internal Rule 87(4) motions in Case 002/02 shall be filed on or before 1 September 2016. The Chamber noted that it would nonetheless consider requests for new evidence made available after this deadline or for exculpatory evidence.<sup>1</sup>

3. On 29 July 2016, the NUON Chea Defence requested by email that a Trial Management Meeting (TMM) be held to discuss recent disclosures by the Co-Prosecutors and the established 1 September 2016 deadline for Internal Rule 87(4) requests. The Chamber granted the request and heard submissions of the parties on these issues at a TMM on 4 August 2016. On 26 August 2016, the Chamber filed its Decision on Requests Regarding Internal Rule 87(4) Deadlines and now issues the reasons for the decision.<sup>2</sup>

## 2. SUBMISSIONS

4. The NUON Chea Defence submits that the Office of the Co-Prosecutors will overtax Defence resources if they make a number of requests for disclosure and/or requests under Internal Rule 87(4) close to the 1 September 2016 deadline.<sup>3</sup> It therefore requests an extension of time until 30 September 2016 to react to all Co-Prosecutors' motions filed on or before 1 September.<sup>4</sup> The NUON Chea Defence also requests that the Co-Prosecutors not be permitted to seek the admission of inculpatory material from Cases 003 and 004 after 1 September 2016 because the parties should be able to rely on the evidentiary record as it stands. It further submits that the material being disclosed to date has been primarily inculpatory, rather than exculpatory, and requests the Chamber to require the Co-Prosecutors to highlight the exculpatory elements of the disclosed material.<sup>5</sup> Finally, the NUON Chea Defence submits that exculpatory material is admissible at any stage as this is in the interests of justice and it

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<sup>1</sup> Trial Chamber Memorandum entitled, "Final Stages of Case 002/02 – Notice of Deadlines", E421, 28 June 2016 ("Deadlines Memo"), para. 3.

<sup>2</sup> Decision on Requests Regarding Internal Rule 87(4) Deadlines, E421/3, 26 August 2016.

<sup>3</sup> T. 4 August 2016, pp. 5-6 (Draft).

<sup>4</sup> T. 4 August 2016, pp. 28-29, 37-38 (Draft).

<sup>5</sup> T. 4 August 2016, pp. 8-9 (Draft).

therefore accepts that disclosure, limited to such material, should continue after 1 September 2016.<sup>6</sup>

5. The KHIEU Samphan Defence requests an extension of time to respond to any filing by the Co-Prosecutors that discloses new material, be it in the form of a Rule 87(4) request or in the form of a disclosure of potentially exculpatory material.<sup>7</sup> It is submitted that the Defence should be given adequate time to seek the admission of certain documents or to respond in other ways to such filings.<sup>8</sup> It further submits that time limits to respond to such filings should run only from the time that the Defence has access to the disclosed material.<sup>9</sup> The KHIEU Samphan Defence submits that four weeks from the date of disclosure would allow the Defence to react to the motions made by the Co-Prosecutors.<sup>10</sup> It submits that there should be no time limit for the Defence to seek the admission of exculpatory material.<sup>11</sup> The KHIEU Samphan Defence requests that all Defence deadlines to respond to the Co-Prosecutors' requests filed on or before 1 September should be extended to 30 September so that the Defence can properly organise its work.<sup>12</sup>

6. The KHIEU Samphan Defence have also filed a motion requesting the Chamber to provide to the parties as soon as possible the final list of witnesses, Civil Parties, and experts to be called for the final topic in Case 002/02.<sup>13</sup> It notes that without this final list, it will be unable to identify all new documents that it seeks for admission in Case 002/02.<sup>14</sup>

7. The International Co-Prosecutor acknowledges the continuing obligation of the Co-Prosecutors to disclose exculpatory material and submits that this has been prioritised.<sup>15</sup> It is submitted that the number of documents disclosed to the Defence most recently during July 2016 is unremarkable in the context of international criminal cases, and that the Co-

<sup>6</sup> T. 4 August 2016, pp. 10, 26-27 (Draft).

<sup>7</sup> T. 4 August 2016, pp. 14-16 (Draft).

<sup>8</sup> T. 4 August 2016, pp. 17-20 (Draft).

<sup>9</sup> T. 4 August 2016, p. 20 (Draft); *See also*, Demande de la Défense de M. KHIEU Samphân de prorogation du délai de réponse à la requête du co-Procureur international tendant à l'admission en preuve de 35 documents issus des dossiers 003 et 004 (E319/52), E319/52/1, 1 August 2016 ("Request for Extension of Time"), paras 10-12; The deadline for responses to E319/52 was addressed by the Chamber separately. *See* Decision on KHIEU Samphan Request for an Extension of Time to Respond to the International Co-Prosecutor's Motion E319/52, E319/52/2, 16 August 2016 (courtesy copy emailed to parties 8 August 2016).

<sup>10</sup> T. 4 August 2016, pp. 30 (Draft).

<sup>11</sup> T. 4 August 2016, pp. 39, 42 (Draft).

<sup>12</sup> T. 4 August 2016, p. 42 (Draft).

<sup>13</sup> Demande de KHIEU Samphân visant à obtenir la communication de la liste de témoins, parties civiles et experts cités à comparaître lors de la dernière phase du procès 002/02, E421/2, 5 July 2016 ("Request for Final List of Witnesses"), para. 9.

<sup>14</sup> Request for Final List of Witnesses, para. 5.

<sup>15</sup> T. 4 August 2016, p. 12 (Draft).

Prosecutors bear the greater burden of reviewing documents in Cases 003 and 004 for potential disclosure.<sup>16</sup> The Prosecutors in a civil law system are under an equal duty to seek the admission of inculpatory information.<sup>17</sup> Although it is not expected that a large number of further documents will be disclosed on the basis that they contain exculpatory material, a ruling by the International Co-Investigating Judge on whether to authorise the disclosure of forty-five Written Records of Interview (WRI) from Cases 003 and 004 is awaited, and there may be a further twenty WRIs which will be the subject of an upcoming disclosure request.<sup>18</sup> The International Co-Prosecutor intends to complete the disclosure process with respect to the material presently available by 1 September 2016.<sup>19</sup>

8. The Civil Party Lead Co-Lawyers make no submissions.

### 3. **FINDINGS**

#### **3.1. Disclosure of Exculpatory Information**

9. The Chamber recalls its decision of 22 October 2015, by which it distinguished between the Co-Prosecutors' duty to disclose potentially exculpatory information pursuant to Internal Rule 53(4) and the right to seek the admission of new evidence pursuant to Internal Rule 87(4).<sup>20</sup> The Accused have a fundamental right of access to potentially exculpatory material.<sup>21</sup> Therefore, the duty of the Co-Prosecutors to disclose such material is not subject to any deadlines and shall continue until the end of Case 002/02. The duty to disclose exculpatory material from Cases 003 and 004 falls on the Co-Prosecutors because they have access to the ongoing investigations in those cases whereas the Accused in Case 002 do not. The Chamber reminds the parties however that disclosed documents are not automatically admitted or put before the Chamber.<sup>22</sup> Disclosed documents are made available to the parties to give the Defence an opportunity to rely on potentially exculpatory evidence by seeking its admission through Internal Rule 87(4) requests.

<sup>16</sup> T. 4 August 2016, pp. 3-4 (Draft).

<sup>17</sup> T. 4 August 2016, 12, 33, 35-36 (Draft).

<sup>18</sup> T. 4 August 2016, pp. 5-7 (Draft).

<sup>19</sup> T. 4 August 2016, pp. 7, 30 (Draft).

<sup>20</sup> Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, E363/3, 22 October 2015 ("Disclosure Decision"), paras 20-30.

<sup>21</sup> Disclosure Decision, para. 22.

<sup>22</sup> Disclosure Decision, para. 32 ("In this regard the Chamber reminds the parties that disclosed documents are not admitted by the simple fact of being made available to the other parties. The Trial Chamber cannot rely on them for the purposes of making any decision or in its verdict until they have been found admissible and put before the Chamber pursuant to Internal Rule 87. This factor reduces significantly the harm allegedly suffered by the KHIEU Samphan Defence because of the disclosure.")

10. The Defence fails to identify any jurisprudence that would impose on the Co-Prosecutors, in addition to their duty to disclose, an obligation to highlight portions of disclosed documents that they consider to be potentially exculpatory. There is no suggestion that the Co-Prosecutors have acted in bad faith, nor is there any showing that the size or manner of disclosure has materially prejudiced the Accused.<sup>23</sup> These disclosures are primarily made in the interests of the Defence who are best placed to determine which documents they consider to be exculpatory.<sup>24</sup> The Defence must then decide whether to request the admission of the disclosed material.

11. Furthermore, the Trial Chamber considers it to be impracticable and unnecessary to review all disclosures to determine whether they are fairly characterised as exculpatory. As the Chamber has previously stated, many documents contain both exculpatory and inculpatory evidence and the Chamber will continue to rely upon the Co-Prosecutors to act in good faith when disclosing these documents.<sup>25</sup> Even if the disclosure is eventually found to contain some documents or portions of them which are not exculpatory, the danger that this would prejudice the Defence is limited since it is at the Defence's discretion whether to seek the admission of these documents pursuant to Internal Rule 87(4). Further, in the few circumstances where the Trial Chamber is considering whether to admit such documents on its own motion, it will only do so after all parties, including the Defence, have been granted an opportunity to comment. Therefore, the Defence request to require the Co-Prosecutors to specifically identify potentially exculpatory material is denied.

### **3.2. Prior Statements**

12. The Chamber has also ordered that all prior statements of testifying individuals be admitted. In the interests of justice, the Chamber will continue this practice and consider requests for the admission of prior statements of all testifying witnesses and Civil Parties. Due to the Chamber's phased approach of selecting witnesses, it previously ordered the Co-

<sup>23</sup> *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, Appeals Chamber (ICTR-98-44-AR73.6), 28 April 2006, para. 17; *Prosecutor v. Sesay et al.*, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Trial Chamber (SCSL-2004-15-T), 9 July 2004, para. 39; *Prosecutor v. Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Appeals Chamber (IT-95-14), 26 September 2000, para. 38.

<sup>24</sup> *Prosecutor v. Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, Trial Chamber II (IT-02-60-PT), 12 December 2002, para. 21.

<sup>25</sup> Disclosure Decision, paras 22, 24, 36.

Prosecutor to disclose the prior statements of all witnesses *proposed* to testify.<sup>26</sup> The Chamber has provided to the parties the list of Witnesses, Civil Parties and Experts for the final topic in Case 002/02 and has ruled on all existing requests to hear additional witnesses. As such, the Chamber no longer considers it necessary for the Co-Prosecutors' to disclose all statements of witnesses and Civil Parties *proposed* to testify. Only the statements of individuals selected by the Chamber to testify should be disclosed to the parties.

### **3.3. Internal Rule 87(4) Requests**

13. The Chamber has previously indicated that:

[...] as the Chamber approaches the close of evidence in Case 002/02, there must come a point when the parties can rely upon the evidentiary record that has been established throughout the investigation and trials in this case. The value that additional evidence may have in ascertaining the truth must be weighed against the uncertainty created by allowing the admission of large amounts of new evidence near the close of the proceedings when other parties may not have a sufficient opportunity to assess and respond to this information. For this reason, the Chamber will subject requests to admit new evidence at the late stages of this trial with heightened scrutiny, particularly when such evidence was previously available to the parties and when the new evidence is mainly proposed for corroboration purpose without a clear demonstration that their admission is required in the interest of justice.<sup>27</sup>

#### ***3.3.1. 1 September 2016 Deadline***

14. The Chamber has a duty to conduct the proceedings in a manner which guarantees expeditiousness, legal certainty, and transparency by bringing proceedings in Case 002/02 to a close within a reasonable amount of time.<sup>28</sup> In fulfilling this duty, the Chamber must also ensure that proceedings are adversarial and that the parties enjoy equality of arms. The principle of equality of arms is encompassed by the right to a fair trial and requires, among other things, that each party be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage in relation to its opponent.<sup>29</sup> The right to an adversarial trial means that both the prosecution and the defence must be given the

<sup>26</sup> Disclosure Decision, paras 26-27.

<sup>27</sup> Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), E319/47/3, 29 June 2016, para. 23.

<sup>28</sup> Internal Rules 21(1), 85; *Prlić* Decision, para. 14..

<sup>29</sup> *Prosecutor v. Tadić*, ICTY Appeals Chamber (Case No. IT-94-1-A), Judgement, 15 July 1999, para. 48.

opportunity to have knowledge of, and comment on, the observations filed and the evidence adduced by the other party.<sup>30</sup>

15. In balancing these principles the Chamber finds, with the exceptions noted below, that it cannot leave the current proceedings open to new evidence indefinitely as such would not be conducive to a fair and timely completion of this case.<sup>31</sup> The Chamber considers that the parties, including the Co-Prosecutors, have had sufficient opportunities to seek evidence during a three-year judicial investigation, throughout the 2011-2013 trial in Case 002/01 and the current proceedings from October 2014 to present.<sup>32</sup>

16. The International Co-Prosecutor submits that there remain a small number of requests pending with the International Co-Investigating Judge for authorisation to disclose WRIs from the ongoing Case 003 and 004 investigations and that it cannot be excluded that critical new evidence may be discovered in those cases which would be conducive to ascertaining the truth in Case 002/02.<sup>33</sup> However, the Chamber must balance the right of the Accused to be tried within a reasonable time with the obligation of the Chamber to ensure equality of arms and adversarial proceedings. It is for this reason that the Chamber imposed a deadline which would provide the Defence sufficient opportunity to respond to the Co-Prosecutors' requested evidence prior to the close of evidentiary proceedings. Permitting the International Co-Prosecutor to file such motions after 1 September 2016 would prolong the case unnecessarily considering that the Chamber already has before it a large case file, containing thousands of pieces of evidence.

17. The ongoing disclosures from the investigations in Cases 003 and 004 are a specific feature of this trial. Because the substance of these cases is closely related to Case 002/02, the investigations in those cases are likely to continue producing *prima facie* relevant evidence. However, the Chamber cannot await the completion of those investigations – at a date which is yet to be determined – to bring this case to closure.<sup>34</sup> Nonetheless, should new evidence be made available from Cases 003 and 004 at such time as to make it impossible to put forward

<sup>30</sup> *Case of Edwards and Lewis v. the United Kingdom* (App. Nos. 39647/98 and 40461/98), ECtHR Grand Chamber, Judgement, 27 October 2004, p. 16

<sup>31</sup> *See also*, Disclosure Decision, para. 41

<sup>32</sup> *See* Case 002/01 Judgement, 7 August 2014, paras 2-3.

<sup>33</sup> T. 4 August 2016, pp. 35-36.

<sup>34</sup> Disclosure Decision, para. 41 (“As to the Defence’s alternative request for relief to stay the proceedings until the Closing Orders are issued in Cases 003 and 004, the Chamber considers that a stay of proceedings would run counter to the fair and efficient completion of this case and would violate the right of the Accused to a speedy trial. The Chamber therefore does not consider it to be in the interests of justice.”).

during these proceedings, the Co-Prosecutors will have an opportunity on appeal to request the consideration of such evidence if in their view it could have been a decisive factor in the Chamber's verdict.<sup>35</sup>

18. For all of these reasons, the Chamber considers that it must maintain the **1 September 2016** deadline for Internal Rule 87(4) requests by the Co-Prosecutors and the Lead Co-Lawyers for Civil Parties.

19. The Chamber notes however that because potentially exculpatory evidence must be disclosed until the end of the trial, it may trigger Rule 87(4) requests by the Defence after the 1 September 2016 deadline. In order to maintain equality of arms between the parties under the specific circumstances of this case and at this stage of proceedings and in order to allow a full adversarial debate on the evidence, the Chamber finds that the Co-Prosecutors must be given the opportunity to challenge the evidence adduced by the Defence, particularly where such evidence fundamentally changes the nature of the Defence case.<sup>36</sup> Therefore, as an exception to the 1 September 2016 deadline, the Chamber will consider the Co-Prosecutors' or Lead Co-Lawyers' requests to admit new evidence where they seek to rebut new evidence which is sought by the Accused and admitted by the Chamber after this deadline.

20. Expert testimony also presents an exception to the 1 September 2016 deadline. Several experts are yet to testify in Case 002/02 and the parties, in preparing for their examination, may discover new evidence that may assist in the questioning of these individuals. The Chamber has imposed separate deadlines for Rule 87(4) requests related to the testimony of experts and will continue to do so, in some cases imposing deadlines after 1 September 2016. These requests will be rejected if the proposed evidence is not relevant to the questioning of the expert.

21. Considering all of the foregoing, it is the Chamber's view that the above deadline properly balances the rights of the parties with the need to bring this case to finality within a reasonable time.

22. As to deadlines for responses, the Chamber grants the Defence requests to respond on or before **30 September 2016** to any Internal Rule 87(4) requests filed on or before 1 September

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<sup>35</sup> Internal Rule 108(7).

<sup>36</sup> *Prosecutor v. Aleksovski*, ICTY Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 26.



2016 and to file any Internal Rule 87(4) requests of their own necessitated by the new evidence put forward by the Co-Prosecutors. The parties were provided the list of witnesses, Civil Parties and experts for the final trial topic, as requested by the KHIEU Samphan Defence in E421/2, on 14 September. The Chamber therefore considers that the KHIEU Samphan Defence will have sufficient time to respond to this list with any request for the admission of new evidence by 30 September 2016.<sup>37</sup>

23. As previously indicated, the Chamber has entered the final stages of Case 002/02 and expects the completion of evidentiary proceedings in Case 002/02 by December 2016.<sup>38</sup> As the end of the trial approaches, it becomes imperative that all parties respect the need to react in a timely fashion to new developments in the case. The Chamber therefore considers that the Defence must respond to disclosures of potentially exculpatory evidence made *after* 1 September 2016 with Internal Rule 87(4) motions within two weeks of receipt of the disclosures.<sup>39</sup>

24. Finally, the Chamber recalls that due to the technical requirements of transferring new disclosures from the Case 003 and 004 Case Files to the Case 002/02 Case File, including the renumbering of documents, there is a time lapse from the filing of the disclosure motion until the time when the underlying documents are provided to the parties. In these circumstances, response times will run from the date that the parties receive the documents disclosed or sought to be admitted by the Co-Prosecutors. The KHIEU Samphan Defence request in this regard is therefore granted.<sup>40</sup>

#### **FOR THE FOREGOING REASONS, THE TRIAL CHAMBER**

**GRANTS** the NUON Chea Defence request to maintain the 1 September 2016 deadline for Internal Rule 87(4) Requests filed by the Co-Prosecutors;

**NOTES** however that the Chamber will consider the Co-Prosecutors' and Lead Co-Lawyers' requests to admit new evidence where they seek to rebut new evidence sought by the Accused and admitted by the Chamber after 1 September;

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<sup>37</sup> See Request for Final List of Witnesses. The Chamber recalls that a separate deadline of 31 August has been imposed to respond to the Co-Prosecutors motion E319/52 based on the relevant circumstances.

<sup>38</sup> Deadlines Memo, para. 1.

<sup>39</sup> Parties are notified of the availability of WRIs or other disclosures through a Case File notification listing all of the documents and providing Zylab links to these documents (*See e.g.*, Case File Notification of 28 July 2016, for documents disclosed with E319/50). The Defence will have 14 days from this Case File notification to file any relevant IR 87(4) requests.

<sup>40</sup> Request for Extension of Time, paras 10-12.

**GRANTS** the NUON Chea and KHIEU Samphan Defence Requests for an extension of time until 30 September 2016 to respond to any Internal Rule 87(4) Requests subsequent to E319/52 and prior to 1 September 2016, or to file their own Internal Rule 87(4) requests triggered by disclosures filed by the Co-Prosecutors within that timeframe;

**INFORMS** the parties that it shall consider as untimely Internal Rule 87(4) requests by the Defence concerning Case 003 and 004 documents if filed more than 14 days after notification of the disclosure;

**INFORMS** the parties that Internal Rule 87(4) motions related to experts to be called by the Chamber will be accorded separate deadlines;

**DENIES** the NUON Chea Defence request to require the Co-Prosecutors to identify within disclosed documents the elements that are potentially exculpatory; and

**REAFFIRMS** that the Co-Prosecutors have an obligation to identify any potentially exculpatory material in their possession which continues until the end of Case 002/02.

Phnom Penh, 21 September 2016  
Presiding Judge, Trial Chamber



YA Sokhan