

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**PARTIES' JOINT REQUEST FOR CLARIFICATION REGARDING THE
APPLICATION OF RULE 87(4) IN CASE 002/02**

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I. INTRODUCTION

1. The Defence for Nuon Chea, the Defence for Khieu Samphan, the Civil Party Lead Co-Lawyers and the Co-Prosecutors (“the Parties”) hereby seek the Trial Chamber’s clarification as to the application of Internal Rule 87(4) in the context of the upcoming trial in Case 002/02.¹
2. Internal Rule 87(4) states that, during a trial, the Chamber may hear “any person” or admit “any new evidence” conducive to ascertaining the truth. It further states that, where a party makes an application under the Rule, it “must also satisfy the Chamber that the requested testimony or evidence was not available before the *opening of the trial*.”² The Parties are of the common view that, in the present circumstances, the phrase “before the opening of the trial” refers to the start of the next trial, that is the trial in Case 002/02. The Parties respectfully request the Chamber to confirm this understanding.
3. The Parties submit that the above interpretation is consistent with the letter and spirit of Internal Rule 87(4). It also ensures that all Parties are able to exercise effectively their rights to prepare and present relevant and probative evidence in the next trial.

II. PROCEDURAL HISTORY

4. On 26 April 2013, the Trial Chamber severed Case 002, directing that a limited set of charges and allegations be heard in the first trial, designated as Case 002/01.³ As directed by the Supreme Court Chamber, the Trial Chamber also prepared a tentative outline for the conduct of future trials.⁴ On 4 April 2014, the Trial Chamber issued the “Decision on Additional Severance of Case 002 and Scope of Case 002/02,” by which it severed the remaining proceedings in Case 002, and selected a number of charges, crime sites and criminal events to be included in the next trial, Case 002/02.⁵
5. On 8 April 2014, the Chamber issued the “Order to File Updated Material in Preparation for Trial in Case 002/02” (“Trial Preparation Order”).⁶ In the Trial Preparation Order, the

¹ This Request was drafted in English and there was insufficient time for it to be translated into French prior to filing, due to the urgency of the matter. The absence of a final French translation has had an impact on the Khieu Samphan Defence team’s ability to understand fully the subtleties of the legal argumentation in the Request. Nevertheless, the need for clarification is fully understood and supported by the Khieu Samphan Defence.

² Emphasis added.

³ E284 Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, at para 89-90.

⁴ Ibid, at paras 152-153; Annex.

⁵ E301/9/1 Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014.

⁶ E305 Order to File Updated Material in Preparation for Trial in Case 002/02, 8 April 2014.

Chamber directed the Parties to file updated lists of proposed witnesses, experts and Civil Parties, as well as updated lists of documents and exhibits. The Chamber indicated that applications to hear new witnesses, experts and Civil Parties, as well as applications to add new or additional documents or exhibits, should be filed in accordance with Internal Rule 87(4).⁷

III. SUBMISSIONS AND REQUEST FOR CLARIFICATION

6. The Parties have conducted meetings in order to facilitate orderly preparations for the trial, and to proceed, where possible, on the basis of consensus on administrative and planning matters. The submissions stated in this Request reflect the Parties' common view on the application of Internal Rule 87(4).
7. As noted above, the Trial Chamber has severed Case 002 into a series of *trials*.⁸ The first of these, Case 002/01, concluded on 31 October 2013.⁹ The Parties and the Chamber are currently preparing for the commencement of the trial in Case 002/02. Internal Rule 80*bis* provides that a trial "begins with an initial hearing." Each *trial* must, therefore, *start* with an Initial Hearing. It is at that hearing that the Chamber considers, *inter alia*, parties' lists of potential witnesses and experts.¹⁰ The plain and unambiguous language of Internal Rule 87(4) directs the restrictions on the introduction of new evidence to that moment in time - the *start* of each *trial*. In the present case, Internal Rule 87(4) therefore refers to the date of the Initial Hearing, yet to be held, in Case 002/02.
8. An alternative interpretation - for example, that Rule 87(4) should be applied by reference back to the Initial Hearing held in June 2011- is both impractical and illogical. It would require the Trial Chamber to make numerous decisions as to whether individual documents or witnesses satisfy the requirements of Rule 87(4) because they were not on the parties' lists submitted in 2011. It also could mean that the parties could *never* satisfy

⁷ Ibid, at paras 1 and 14.

⁸ See, for example, E284 Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, at para 95, 98, 99, 150-153; E301/9/1 Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, at para 19, referring to "two separate trials" as contrasted with a "single unsevered trial;" see also paras 22, 23 (reference to "a series of severed trials," and para 24 ("subsequent trial or trials"). This is also the Supreme Court Chamber's interpretation of the effect of severance. See E284/4/8 Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, at para 37 (reference to the difference between "a single trial on all charges contained in an indictment [and]...holding multiple trials"), para 38-39, 43.

⁹ E1/237.1 Transcript, at 14.16.12 ["The Trial Chamber now wishes to pronounce the conclusion of the proceedings in Case 002/01."] and at 14.18.37 [With regard to the proceedings in Case 002/02...the Chamber will hold the Trial Management Meeting...to discuss on the preparation of future trials in Case 002/02."].

¹⁰ Internal Rule 80(1) and (2).

Rule 87(4) where they wish to revise their 2011 Rule 80 lists to exclude witnesses no longer considered crucial, and include witnesses (or documents) who were technically “available” in 2011 but were not then selected. This would lead to an unfair limitation that was never envisaged by Rule 87(4). It would also contravene the plain meaning of Rule 87(4) by applying it to an entire Case (regardless of severance into multiple trials), whereas the Rule clearly applies to *trials*.¹¹

9. The application of Rule 87(4) separately to each trial is consistent with the Accused’s rights in Article 33 *new*,¹² the fundamental principles set out in Internal Rule 21,¹³ as well as the underlying aims of the trial - to ascertain the truth of the allegations in the Closing Order.¹⁴ It is in the interests of a fair trial and the ascertainment of the truth to permit all Parties to undertake a fresh, good-faith evaluation of what additional evidence (beyond that already heard and admitted in Case 002/01) should be put before the Chamber in Case 002/02.
10. Following a two year trial, the Parties’ assessment of what evidence may be most conducive to ascertaining the truth of the remaining charges and crime sites has necessarily evolved. Clearly, strategies are now more focused. Preventing the Parties from putting forward probative evidence which may have been *technically* available in 2011 but was not *then* considered crucial (or was simply not known to the Parties) serves no useful purpose. On the contrary, it would preclude the Chamber from considering *all* evidence which is currently identified by the Parties as having high probative value and being conducive to the ascertainment of the truth. It should also be borne in mind that there have been changes both to Defence teams and Civil Party teams since the Initial Hearing in Case 002/01. It would not be in the interests of justice to tie them to the lists of Civil Parties, witnesses and documents prepared by their predecessors in the context of preparation for the next trial.
11. Moreover, circumstances have changed significantly since 2011. Some witnesses and Civil Parties who were proposed to testify may be deceased, or otherwise unable to

¹¹ It would also encourage parties to file excessive witness and document lists at the start of every case, listing every known individual and document that may conceivably become relevant.

¹² This provision requires compliance with Article 14 of the *International Covenant on Civil and Political Rights*, which, in turn, gives the Accused a right to a fair hearing (14(1)), as well as the right to “adequate time and facilities for the preparation of his defence” (14(3)(b)), the right to “defend himself” (14(3)(d)), and the right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” (14(3)(e)).

¹³ Internal Rule 21(1)(a): “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”

¹⁴ Internal Rules 85(1), 87(1), (3) and (4).

testify. Additional evidence has come to light which was not available in 2011, some from ongoing interviews by outside organisations such as DC-Cam, some from ongoing investigations in Cases 003 and 004, which overlap in part with Case 002/02. While these changed circumstances would likely satisfy the requirements of Rule 87(4), requiring the parties to make submissions on potentially hundreds of documents and tens of witnesses, and burdening the Trial Chamber with making decisions on so many applications, would slow the progress of the proceedings unnecessarily, with no benefit to any Party or the Chamber. Adopting the interpretation proposed by the Parties in this Request would save considerable resources which the Chamber would otherwise have to dedicate to the determination of separate applications relating to newly proposed witnesses and evidence.

12. Therefore, and while the Parties are firmly of the view that the interpretation in paragraph 7 above reflects the actual meaning of Internal Rule 87(4), the approach proposed in this Request also facilitates an expeditious conduct of proceedings. On a number of occasions during the trial in Case 002/01, the Chamber permitted the admission of evidence not proposed by the Parties before the start of the trial in 002/01. For example, the Chamber rendered such decisions where it found that the newly proposed material was closely related to other evidence already identified on a party's list, and where it was in the interests of justice to allow the two sources to be evaluated together.¹⁵ It also admitted such evidence where it considered it necessary to protect the rights of the Accused to a fair trial.¹⁶
13. For the avoidance of doubt, all Parties accept that any evidence which has not already been admitted by the Chamber must meet the requirements for admission set out in Rule 87(3). However, prior to the Initial Hearing for Case 002/02, Rule 87(4) should not apply to evidence that is submitted by the Parties under Rule 80 in accordance with the Chamber's directions.
14. The Parties therefore respectfully request the Chamber to confirm that:
 - a. The trial in Case 002/02 will commence with the Initial Hearing which is to be scheduled; and

¹⁵ E172/24/5/1 Response to IENG Sary's second Rule 87(4) request regarding material which may be used during the examination of Expert David Chandler (E172/24/5), 16 July 2012, paragraph 3; E299 Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, at para 35-36;

¹⁶ E190 Decision Concerning New Documents and Other Related Issues, 30 April 2012, at paras 36-37; see also para 21.

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b. In Case 002/02, Rule 87(4) will apply only to new evidence proposed by a Party after the opening of the trial, that is after the upcoming Initial Hearing.

Respectfully submitted,

| Name | Signature | Date |
|--|--|---------------|
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| Nicholas KOUMJIAN Co-Prosecutor |  | 30 April 2014 |
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