



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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
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Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before:

Judge KONG Srim, President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge MONG Monichariya

Judge Florence Ndepele MWACHANDE-MUMBA

Judge YA Narin

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16 March 2015

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DECISION ON PART OF NUON CHEA’S THIRD REQUEST TO OBTAIN AND CONSIDER ADDITIONAL EVIDENCE IN APPEAL PROCEEDINGS OF CASE 002/01

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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seized of the “Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01” filed by NUON Chea on 25 November 2014 (“Request”).¹ The Co-Prosecutors responded on 19 December 2014 (“Response”).² The present decision disposes of one of NUON Chea’s prayers, contained in the Request, that the Supreme Court Chamber order the Co-Prosecutors to review the Case 003 and Case 004 case files and seek permission from the International Co-Investigating Judge (“ICIJ”) for the disclosure of any material that is either “(i) given by a witness who worked directly with Ruos Nhim at any time during Democratic Kampuchea; or (ii) concerns Northwest zone opposition to Pol Pot and Nuon Chea prior to 6 January 1979”.³

A. BACKGROUND

2. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (“Trial Judgment”),⁴ convicting KHIEU Samphân and NUON Chea of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity), and sentencing them each to life imprisonment.⁵ These convictions were based on the charges in the Closing Order relating to the roles and functions of KHIEU Samphân and NUON Chea within the Communist Party of Kampuchea (“CPK”), and their

¹ Document number F2/4 (strictly confidential version notified to the parties on 5 December 2014; public redacted version notified on 15 December 2014). NUON Chea filed other two requests for additional evidence: *see* Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, F2, 1 September 2014; Second Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, F2/1, 2 September 2014 (corrected version notified on 3 September 2014).

² Co-Prosecutors’ Response to NUON Chea’s Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01 (strictly confidential), F2/4/1, 19 December 2014 (despite a specific request from this Chamber to submit a redacted version of this response – which could then be classified as public – no such filing has been received thus far from the Co-Prosecutors).

³ Request, paras 33, 34(c).

⁴ Case 002/01 Judgement, E313, 7 August 2014.

⁵ Trial Judgment, p. 622.

criminal responsibility in relation to the movements of the population (phases 1 and 2), as well as the executions of former Khmer Republic officials at Tuol Po Chrey.⁶

3. On 29 September 2014, NUON Chea and KHIEU Samphân filed their respective Notices of Appeal against the Trial Judgment.⁷ On 29 December 2014, NUON Chea and KHIEU Samphân filed their respective Appeal Briefs against the Trial Judgment.⁸

4. Through his Request, NUON Chea seeks to identify and admit into evidence on appeal any such material from Cases 003 and 004, presently under investigation by the Co-Investigating Judges, which could serve to exonerate NUON Chea by showing that other persons held control over the crimes of which he was convicted in the Trial Judgment.⁹

B. SUBMISSIONS

5. Specifically, NUON Chea asks the Supreme Court Chamber, *inter alia*, to order the Co-Prosecutors to review the Case 003 and Case 004 case files and seek permission from the ICIJ for the disclosure of any relevant and exculpatory material included therein that is either “(i) given by a witness who worked directly with Ruos Nhim at any time during Democratic Kampuchea; or (ii) concerns Northwest zone opposition to Pol Pot and Nuon Chea prior to 6 January 1979”.¹⁰

6. NUON Chea recalls that the International Co-Prosecutor (“ICP”) has disclosed material from the Case 004 case file, indicating that the material was relevant to Case 002/02, presently at trial.¹¹ NUON Chea submits that a portion of that material in reality relates to Case 002/01,¹² and notes that “[e]ven now, the international Co-Prosecutor fails to alert the

⁶ See Trial Judgment, paras 11, 168, 410, 414, 425, 434, 441, 449, 456, 459, 575, 658-659, 722-723, 838, 943. See also [Corrected 2] List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber’s Decision on IENG Thirith’s Fitness to Stand Trial (E138) and the Trial Chamber’s Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), E124/7.3, 18 October 2012.

⁷ Notice of Appeal Against the Judgment in Case 002/01, E313/1/1, 29 September 2014; *Déclaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, E313/2/1, 29 September 2014. See also Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs, F3/3, 29 August 2014.

⁸ NUON Chea’s Appeal Against the Judgment in Case 002/01, F16, 29 December 2014 (“NUON Chea Appeal Brief”); [*Corrigé 1*] *Mémoire d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, F17, 29 December 2014 (corrected version filed on 31 December 2014). See also Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond, F13/2, 11 December 2014; Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, F9, 31 October 2014.

⁹ Request, paras 3, 18-20, 24-25, 33-34.

¹⁰ Request, paras 33-34.

¹¹ Request, paras 6, 29.

¹² Request, para. 30.

parties to the relevance of [...] [the] evidence for Case 002/01”.¹³ On this basis, NUON Chea submits that the “existence of other relevant evidence on the Case 003 or Case 004 case file which the international Co-Prosecutor has not deemed relevant to the charges in Case 002/01 appears, at a minimum, possible”.¹⁴ NUON Chea also argues that his request for disclosure is sufficiently specific, as required by international jurisprudence.¹⁵

7. The Co-Prosecutors request the Supreme Court Chamber to dismiss the Request in its entirety.¹⁶ They submit that the Request is speculative, misrepresentative of the facts and unlikely to produce exculpatory evidence.¹⁷ The Co-Prosecutors declare to have already conducted a comprehensive review of the case files of Case 003 and Case 004, identified more than 300 documents relevant to Case 002 and requested the ICIJ leave to disclose them.¹⁸ Accordingly, they see no need for any further perusal of the case file.¹⁹ Moreover, they maintain that the evidence of the kind sought by NUON Chea would have no exculpatory value, given that the rift in the CPK that it purports to establish occurred years after the crimes charged in Case 002/01 had allegedly been committed, and therefore does not support NUON Chea’s contention that RUOS Nhim acted independently when committing crimes attributed to NUON Chea.²⁰ Finally, in response to NUON Chea’s claim that the Co-Prosecutors fell short of fully complying with their disclosure obligations,²¹ the Co-Prosecutors recall the ICP’s “diligent efforts to obtain leave to disclose [...] Case 003 and 004 interviews”,²² and reiterate the relevance of the disclosed material to Case 002/02.²³

C. DISCUSSION

1. Request to order the Co-Prosecutors to review the Cases 003 and 004 case files and seek leave to disclose potentially exculpatory evidence

8. According to the documents available to the Chamber,²⁴ on 1 or 2 May 2014, the ICP requested leave to disclose 231 Written Records of Interview (“WRI” or “interview records”)

¹³ Request, para. 31.

¹⁴ Request, para. 33.

¹⁵ Request, paras 32-33.

¹⁶ Response, para. 18.

¹⁷ Response, paras 5-10.

¹⁸ Response, paras 11-12, 14.

¹⁹ Response, para. 15.

²⁰ Response, paras 5-6, 15, 17.

²¹ Request, para. 31.

²² Response, para. 13.

²³ Response, paras 11-14.

²⁴ See Order for Immediate Compliance with Rule 108 of the Internal Rules, E238/9/1/4, 12 March 2013.

from Case 004 to Case 002/02.²⁵ On 5 May 2014, the ICP sought disclosure of additional 94 interview records and other documents.²⁶ On 8 May 2014, the ICIJ denied the requests²⁷ as premature, given that the commencement date of Case 002/02 trial had not yet been set.²⁸

9. On 19 September 2014, the Trial Chamber scheduled the hearing on the substance in Case 002/02.²⁹ On 29 September 2014 and 9 October 2014, the ICP reiterated his requests with the ICIJ, seeking leave to disclose the interviews of 27 Case 004 witnesses considered to be relevant to the first segment of Case 002/02 trial.³⁰ The ICP indicated that those interviews refer either to individuals who are likely to be called to testify in the first segment of the Case 002/02 trial, or to individuals whose interviews “are nevertheless important” to the parties in Case 002/02.³¹

10. On 14 October 2014, the ICIJ issued the First Disclosure Decision,³² authorising, under strict conditions, the disclosure of 33 interview records obtained from 26 witnesses in Case 004 to the Trial Chamber and the parties in Case 002/02.³³

11. On 3 November 2014, the ICIJ authorised the disclosure of one additional WRI, which had not been authorised by the First Disclosure Decision, and, upon request by the ICP, the three interview records newly included in the Case 004 case file and deemed relevant to the first segment of the Case 002/02 trial.³⁴

²⁵ Decision on Co-Prosecutor’s Urgent Request to Disclose Case 004 Interviews Relevant to 1st Segment of Case 002/02 Trial (strictly confidential), E319.2, 14 October 2014 (“First Disclosure Decision”), para. 2. *Cf.* Response, para. 11.

²⁶ Response, para. 11.

²⁷ From the documents in the possession of this Chamber, it is unclear whether on 8 May 2014 the ICIJ rejected both requests or addressed only the first one (compare Response, para. 11 and First Disclosure Decision, para. 3). It appears unequivocal, in any event, that no disclosure in the Case 002/02 trial has been permitted by the ICIJ prior to the First Disclosure Decision.

²⁸ First Disclosure Decision, para. 3.

²⁹ Response, para. 12 (citing Scheduling Order for Hearing on the Substance in Case 002/02, E316, 19 September 2014).

³⁰ First Disclosure Decision, paras 6-8.

³¹ First Disclosure Decision, paras 10-14.

³² *See* above, footnote 25.

³³ First Disclosure Decision, para. 23 (compare *ibid.*, paras 8-14, in which there are inconsistencies as to the actual number of WRI authorised for disclosure and the number of witnesses from which they were obtained); Response, para. 12.

³⁴ Decision on International Co-Prosecutor’s Urgent Request to Disclose Newly Posted Case 004 Interviews Relevant to 1st Segment of Case 002/02 Trial (strictly confidential), E319/8.3, 3 November 2014 (“Second Disclosure Decision”), para. 13.

12. On 27 January 2015, the ICIJ granted, in part, a further application by the ICP, authorising the disclosure of 20 additional interview records from Case 004, including interviews considered by the ICP to fall within the scope of NUON Chea's Request.³⁵
13. On 6 February 2015, the ICIJ gave permission to disclose further 90 WRI from Case 004, including previously undisclosed statements considered by the ICP to fall within the scope of the Request.³⁶
14. On 23 February 2015, the ICP declared in the context of the trial in Case 002/02 that approximately 190 documents are still subject to pending requests for disclosure before the Co-Investigating Judges.³⁷
15. On 24 February 2015, the ICIJ authorised the disclosure of five WRI relating to one witness.³⁸
16. The ICP requested, and the Trial Chamber granted, the admission of a substantial number of those interview records into the Case 002/02 case file, thus making them available to the parties.³⁹

³⁵ Partial Decision on International Co-Prosecutor's Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial and Case 002/01 Appeal, Dated 21 January 2015, E319/12.1.1, 27 January 2015, as amended by Amendment of Disclosure Decisions D193/4, D193/6, and D193/8 (strictly confidential), E319/12.1.2, 30 January 2015 ("Third Disclosure Decision").

³⁶ Decision on the International Co-Prosecutor's Case 002 Disclosure Requests D193/7 and D193/9 (strictly confidential), E319/13.1.1, 6 February 2015 ("Fourth Disclosure Decision"), paras 8, 9, 11 (87 of the disclosed WRI were identified by the ICP in his request of 15 December 2015, which was granted only in part by the Third Disclosure Decision; 3 disclosed WRI were identified in the ICP's request of 29 January 2015; the figures considered by the Supreme Court Chamber do not include the requests for correction).

³⁷ Information and Clarification Regarding the Disclosure Process in Case 002/002 [sic] in the Context of the Ongoing Investigations in Cases 003 and 004, E319/14, 23 February 2015 ("ICP Information on Disclosure"), para. 8.

³⁸ Decision on International Co-Prosecutor's Case 002 Disclosure Requests Concerning a Witness (strictly confidential), E319/15.1, 24 February 2015 ("Fifth Disclosure Decision"), para. 8.

³⁹ International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre Pursuant to Rules 87(3) & 87(4) (confidential), E319/5, 13 November 2014; Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre[re] and Order on Use of Written Records of Interview from Case Files 003 and 004, E319/7, 24 December 2014; International Co-Prosecutor's Disclosure of Statements from Case File 004 Relevant to 1st Segment of Case 002/02 Trial, E319/8, 22 January 2015; International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre[re] Pursuant to Rules 87(3) & 87(4) (confidential), E319/11, 4 February 2015; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002, E319/12, 11 February 2015 ("ICP Request of 11 February 2015"); International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/11, E319/13, 18 February 2015 ("ICP Request of 18 February 2015"); International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/13, E319/15, 27 February 2015. *See also* Request to Disclose Confidential Case 004 Interviews to Standby Counsel, E319/9, 28 January 2015.

17. The Supreme Court Chamber recalls that the Co-Prosecutors are under a continuing obligation to disclose to the Chambers and the parties “any material in [their] possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence”, as confirmed by Internal Rule 53(4).⁴⁰ This duty is a component of fair trial, accords with the prosecutorial role of assisting the court in ascertaining the truth⁴¹ and, as such, extends to the appeal proceedings.⁴²

18. The Co-Prosecutors submit that they have devoted “[s]ubstantial time and resources” to perform a systematic and in-depth scrutiny of the Case 003 and Case 004 case files,⁴³ and assure that they will continue to do so with respect to material that will be included in the case files of Cases 003 and 004 in the future, until the conclusion of the investigations in those cases.⁴⁴ The Supreme Court Chamber notes, however, that the record – as accessible to this Chamber – shows that the ICP’s initial inspection of the case files was directed at identifying evidence relevant to Case 002/02, and not to Case 002/01.⁴⁵ Furthermore, it appears that, out of the 325 documents initially identified by the ICP, the ICP prioritised for disclosure those that were considered to be directly relevant to the allegations being adjudicated within the Case 002/02 trial. Only one of his recent requests, made after the filing

⁴⁰ Trial Chamber Memorandum entitled “Disclosure of witness statements for witnesses who may testify in Case 002” (confidential), E127/4, 24 January 2012.

⁴¹ See Code of Criminal Procedure of the Kingdom of Cambodia, Article 4. See also Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, E72/3, 12 October 2009, paras 24-25 (Dissenting Opinions of Judge Lavergne, Judge of the Trial Chamber).

⁴² See e.g. International Criminal Court, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-621, “Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”, Pre-Trial Chamber I, 20 June 2008, para. 3; International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Blaškić*, IT-95-14-A, “Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings”, Appeals Chamber, 26 September 2000, paras 32, 37, 42; International Criminal Tribunal for Rwanda (“ICTR”), *Ndindabahizi v. Prosecutor*, ICTR-01-71-A, “Judgement”, Appeals Chamber, 16 January 2007, para. 72 and ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, “Judgement”, Appeals Chamber, 17 December 2004, paras 183, 242 (declaring that the prosecutor’s obligation to disclose exculpatory material “is not a secondary obligation, and is as important as the obligation to prosecute); ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, “Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations”, Appeals Chamber, 30 June 2006, para. 9.

⁴³ Response, para. 14.

⁴⁴ Response, para. 14.

⁴⁵ First Disclosure Decision, para. 2. With regards to the ICP’s request of 5 May 2014, this Chamber does not have information concerning its title or content, since the request is not mentioned in the First Disclosure Decision. It assumes, however, that the object of such request closely resembled that of the request of 1 or 2 May 2014 (see Response, para. 11).

of the Request, recognised the need to consider also relevance to the Case 002/01 appeal.⁴⁶ Hence, on the face of it, the scope of the initial inspection carried out by the ICP may have been limited to issues relevant for Case 002/02. As such, it cannot be excluded that the case files of Cases 003 and 004 still contain evidentiary material that might be relevant to the defence of NUON Chea in Case 002/01, and more specifically, constitute evidence “(i) given by a witness who worked directly with Ruos Nhim at any time during Democratic Kampuchea; or (ii) concerns Northwest zone opposition to Pol Pot and Nuon Chea prior to 6 January 1979”. Notably, the Response does not go to say that upon the scrutiny of the Case 003 and Case 004 case files the Co-Prosecutors do exclude that those case files contain such material.

19. The Co-Prosecutors contend that the subjects defined by NUON Chea are neither relevant nor exculpatory *vis-à-vis* the allegations in Case 002/01. The Supreme Court Chamber takes note of this submission; however, it is of the view that, as argued by NUON Chea,⁴⁷ at this stage of the proceedings it is sufficient for the defence to show *prima facie* that the material may have exonerating or mitigating value for the defence. Considering that NUON Chea’s key contention is that the CPK was a highly fragmented party, with RUOS Nhim wielding independent authority over crimes attributed to NUON Chea in the Trial Judgment,⁴⁸ such material as described by the Request would be subject to disclosure under Internal Rule 53(4), and, where it has not been disclosed earlier, should be disclosed on appeal. This finding is without prejudice to any potential future decision as to whether the material satisfies the requirements of Internal Rule 108(7), should any of the parties request for it to be admitted into evidence.

20. Whereas the Supreme Court Chamber declines imposing on the Co-Prosecutors the manner in which they are to proceed, it orders the Co-Prosecutors to ascertain whether the Cases 003 and 004 case files contain the material sought by the Request and, if so, to seek leave from the Co-Investigating Judges to disclose it to this Chamber and the parties.

⁴⁶ ICP Request of 11 February 2015, paras 1, 2 (stating that the ICP requested on 15 December 2014 leave to disclose documents believed by NUON Chea to be relevant and exculpatory to the Case 002/01 appeal). *See also* ICP Information on Disclosure, para. 7.

⁴⁷ Request, para. 32.

⁴⁸ *See e.g.* NUON Chea Appeal Brief, para. 462; Request, paras 24-26, 31.

2. Procedure regarding disclosable evidence the disclosure of which has not been authorised by the ICIJ

21. A related matter, which the Chamber wishes to address on its own motion as part of its obligation to ensure the fairness of the proceedings, concerns the interface of the proceedings before it and the province of the Co-Investigating Judges, who must guarantee the confidentiality of the Cases 003 and 004 investigations in order to “preserve the rights and interests of the parties”.⁴⁹ In the present case, this has led to the non-disclosure of a number of documents: Although the ICP apparently identified 328 relevant witness statements in his May and October 2014 requests as being disclosable,⁵⁰ the ICIJ has thus far only authorised disclosure of 152 of those statements. Similarly, although the ICP recently identified 16 documents that fall within the categories of potentially exculpatory evidence identified in the Request,⁵¹ the Third and Fourth Disclosure Decisions did not authorise complete disclosure, with two documents remaining unavailable for use in Case 002/01.⁵²

22. The Supreme Court Chamber recognises the Co-Investigating Judges’ duty to guarantee the confidentiality of their investigation. Nevertheless, it must also fulfil its own duty to assess whether a fair trial may still be conducted, despite restrictions on the disclosure of evidence.⁵³ The necessary implication is that the Chamber must have access to the evidence the disclosure of which has not been permitted by the ICIJ, in order to evaluate whether, even in the absence of their disclosure to NUON Chea, a fair trial is still possible. In this connection, the Supreme Court Chamber may be called upon to “determine whether and,

⁴⁹ Internal Rule 56(1); *see also* Practice Direction on Classification and Management of Case-Related Information, ECCC/004/2009/Rev.2, 24 April 2014, Articles 5, 8.

⁵⁰ The information available to the Supreme Court Chamber does not allow it to determine whether the 20 statements disclosed by the ICP Request of 11 February 2015 and the 90 statements disclosed by the ICP Request of 18 February 2015 were included in his two initial requests of 1 and 5 May 2014. Hence, the above calculation adds together only the interviews included in the two May 2014 and one October 2014 requests, and not the last 110 disclosed statements, for they might have been discovered by the ICP at a later stage.

⁵¹ Third Disclosure Decision, para. 4(e).

⁵² Annex A – Documents authorised for disclosure, E319/12.2 (attached to the Third Disclosure Decision), section entitled “Documents requested in Annex 5”; Annex B – Documents authorised for disclosure (from D193/7), E319/13.1.3 (attached to the Fourth Disclosure Decision), section entitled “Annex 5”. The indicated figure does not include the requests for correction.

⁵³ *See* International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1486 (OA 13), “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, Appeals Chamber, 21 October 2008 (“*Lubanga* Decision on Non-Disclosure”), paras 45-47 (citing relevant jurisprudence of the European Court of Human Rights).

if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information”.⁵⁴

23. Unless, at the time of the release of this decision, the disclosure of the two documents identified as falling within the categories of potentially exculpatory evidence described in the Request has taken place, the Co-Prosecutors are instructed to seek leave from the Co-Investigating Judges to disclose, on a strictly confidential basis, the two aforementioned documents exclusively to the Supreme Court Chamber. Should a similar situation, in which a Co-Prosecutors’ request for disclosure pursuant to Internal Rule 53(4) is not granted by the Co-Investigating Judges, arise in the future, the Co-Prosecutors are instructed to follow the same procedure outlined herein.

⁵⁴ *Lubanga* Decision on Non-Disclosure, para. 48.

D. DISPOSITION

24. For the foregoing reasons, the Supreme Court Chamber:

GRANTS the Request, in part;

ORDERS the Co-Prosecutors to identify within the Case 003 and Case 004 case files evidence which is either: (i) given by a witness who worked directly with Ruos Nhim; or (ii) concerns Northwest zone opposition to Pol Pot and NUON Chea prior to 6 January 1979, and seek leave from the Co-Investigating Judges to disclose such evidence to this Chamber and to the parties in Case 002/01;

ORDERS the Co-Prosecutors to seek leave from the Co-Investigating Judges to disclose solely to the Supreme Court Chamber the two documents identified under para. 21 above;

ORDERS that, in the event where any other documents relevant to Case 002/01 will not be authorised for disclosure by the Co-Investigating Judges despite the Co-Prosecutors' request for leave to disclose under Internal Rule 53(4), the Co-Prosecutors seek leave from the Co-Investigating Judges to disclose the documents, on a strictly confidential basis, solely to the Supreme Court Chamber;

REMAINS SEIZED of the remainder of the Request.

Phnom Penh, 16 March 2015

President of the Supreme Court Chamber



KONG Srim