

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: International Co-Prosecutor

Filed to: Trial Chamber

Original Language: English

Date of document: 25 July 2016



CLASSIFICATION

**Classification of the document
suggested by the filing party:**

CONFIDENTIAL with
three STRICTLY CONFIDENTIAL ANNEXES and eight
STRICTLY CONFIDENTIAL ATTACHMENTS

Classification by Trial Chamber:

សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**INTERNATIONAL CO-PROSECUTOR'S REQUEST TO ADMIT DOCUMENTS
PURSUANT TO RULES 87(3) & 87(4)**

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I. Introduction

1. Pursuant to Rules 87(3) and (4)¹ and the Trial Chamber's decisions regarding disclosure obligations,² the International Co-Prosecutor (the "Co-Prosecutor") requests to have 34 written records of interview and 1 written record of investigation action from Case 004 ('Materials') admitted into evidence in Case 002/02. The Materials are relevant to Case 002/02, were not available before the commencement of trial, and are conducive to ascertaining the truth. The Materials are identified in three strictly confidential³ annexes: **Annex P(1), Annex P(2) and Annex P(3)**.

II. Disclosure History

2. The Co-Prosecutor is mindful of the Trial Chamber's 22 October 2015 Decision⁴ directing the Co-Prosecutors to disclose to the Chamber and the parties potentially exculpatory evidence from Cases 003 and 004 on a continuing basis until the completion of Case 002/02.⁵ That decision also directed the Co-Prosecutors to disclose Case 003 and 004 statements of all individuals who have been proposed to testify in Case 002/02.⁶ Pursuant to an order of the Supreme Court Chamber, the Co-Prosecutors are also obliged to disclose documents containing two specific categories of information requested by Nuon Chea: (i) evidence given by a witness who worked directly with Ruos Nhim; or (ii) evidence concerning Northwest Zone opposition to Pol Pot and Nuon Chea prior to 6 January 1979.⁷ On 29 June 2016, the Trial Chamber further held that any Case 003 and 004 materials that

¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Rule(s)").

² **E363/3** Decision on Khieu Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations ("Disclosure Obligation Decision"), 22 October 2015; **E319/47/3** Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4) ('Decision on ICP Requests'), 29 June 2016.

³ **E127/4** Trial Chamber Memorandum "Disclosure of witness statements for witnesses who may testify in Case 002", 24 January 2012, p. 1 [Ordering that disclosures should be filed and notified to the Trial Chamber provisionally on a strictly confidential basis, and that the Trial Chamber will then make a determination as to whether the documents should be reclassified as confidential].

⁴ *Ibid.*

⁵ *Ibid.* paras 21-24, disposition, EN 01157631-33, 01157640-41.

⁶ *Ibid.* paras 25-27, disposition, EN 01157634-35, 01157640-41.

⁷ **F2/4/2** Decision on Part of Nuon Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015, para. 24.

the Co-Prosecutors wish to submit pursuant to Rule 87(4) should be disclosed at the time of reasoned applications pursuant to Rule 87(4).⁸

3. The International Co-Prosecutor sought authorisation to disclose the Materials in **Annexes P(1) to P(3)** via a request made on 12 May 2016.⁹ The International Co-Investigating Judge (ICIJ) issued a decision authorising their disclosure on 15 July 2016 ('ICIJ Decision'),¹⁰ and provided the relevant redacted documents on 21 July 2016. **Annexes P(1) to P(3)** contain the documents authorised in the ICIJ Decision which the Co-Prosecutor wishes to submit pursuant to Rule 87(4) and indicate any additional disclosure categories that may apply to each document. Documents authorised in the ICIJ Decision which fall within disclosure categories, but are not sought to be admitted pursuant to Rule 87(4), are disclosed in a separate filing.¹¹

III. Criteria for Admission

4. The Materials meet the criteria for admission laid out in Rule 87(3), as they are authentic, reliable, and are directly relevant to Case 002/02 subject matter,¹² as further detailed in **Annexes P(1) to P(3)**. They include testimony on the following topics:
 - a. genocide of the Cham,¹³ including detailed eyewitness testimony of mass killings of the Cham,¹⁴ and evidence of the significant reduction of the Cham population in villages in Kampong Siem District;¹⁵
 - b. genocide of the Vietnamese,¹⁶ including statements from a former cadre who participated in mass killings of Khmer Krom,¹⁷ statements from two witnesses

⁸ **E319/47/3** Decision on ICP Requests, 29 June 2016, para. 22.

⁹ Case 004-**D193/75** International Co-Prosecutor's Request to Disclose Case 004 Documents into Case 002, 12 May 2016.

¹⁰ Case 004-**D193/90** Consolidated Decision on International Co-Prosecutor's Requests to Disclose Case 004 Document to Case 002 (D193/70, D193/72, & D193/84) 'ICIJ Decision', 15 July 2016.

¹¹ **F2/4/2/5** International Co-Prosecutor's Disclosure of Case 004 Documents Relevant to Case 002, 22 July 2016.

¹² **E390/2** Decision on Nuon Chea's First Rule 87(4) Request to Call One Additional Witness and to Admit One Interview for the Case 002/02 Trial Segment on Phnom Kraol Security Centre, 4 May 2016, para. 3 ["The Chamber recalls that according to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the prima facie standards of relevance, reliability, and authenticity required under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3)."].

¹³ #1-9 of **Annex P(1)**.

¹⁴ See e.g. #1, #3, #5 in **Annex P(1)**.

¹⁵ See e.g. #4, #6 in **Annex P(1)**.

¹⁶ #10-16 in **Annex P(1)**, #1-3 in **Annex P(2)**.

¹⁷ #1-2 in **Annex P(2)**.

- regarding one of the same mass killings,¹⁸ and an account of a district secretary stating that Khmer Krom were “Yuon” and the upper echelon had decided that they had to be “swept clean”,¹⁹
- c. targeting of former Khmer Republic soldiers,²⁰ including a statement from a former cadre who participated in the mass killing of 50 former soldiers in Battambang²¹ and another who escorted former ranking Khmer Republic soldiers and civil servants into the forest in Bakan District and stood guard as their throats were cut;²²
 - d. purges,²³ including from a witness who describes attending a meeting where Nuon Chea stated that the traitors within the Northwest Zone were among the 17 April people and that the Southwest Zone was being sent in to take control;²⁴
 - e. Kraing Ta Chan prison, comprising a statement of Hun Kimseng, the mother of witness Meas Sokha regarding her experience at Kraing Ta Chan prison;²⁵
 - f. forced marriage,²⁶ including a statement from a former Khmer Rouge cadre who describes Ao An, Deputy Secretary of the Central Zone, referring to Pol Pot’s plan to increase the population and stating that couples must produce children after marriage in order to “raise new forces,”²⁷ and two accounts of women committing suicide because they were forced to marry;²⁸ and
 - g. channels of communication, including statements from the bodyguard of Ao An;²⁹ the head of the coding and telegramme unit K-18 in Phnom Penh;³⁰ and the messenger to Vorn San, Northwest Zone military chairman.³¹

¹⁸ #10 in **Annex P(1)**, #3 in **Annex P(2)**.

¹⁹ #10 in **Annex P(1)**.

²⁰ #17-18 in **Annex P(1)**, #3 in **Annex P(2)**.

²¹ #17 in **Annex P(1)**.

²² #3 in **Annex P(2)**.

²³ #19-22 in **Annex P(1)**, #1-2 in **Annex P(3)**.

²⁴ #19 in **Annex P(1)**.

²⁵ #23 in **Annex P(1)**.

²⁶ #24-28 in **Annex P(1)**.

²⁷ #27 in **Annex P(1)**.

²⁸ #24, #26 in **Annex P(1)**.

²⁹ #1-2 in **Annex P(3)**.

³⁰ #29 in **Annex P(1)**.

³¹ #30 in **Annex P(1)**.

Annexes P(1) to P(3) identify how the information contained in each statement is relevant to Case 002/02 and reference the specific sections of the Closing Order to which each document relates.

5. Rule 87(4) states that the Party requesting to admit new evidence must satisfy the Chamber that the requested evidence was not available before the opening of the trial, and the Chamber has stated that new documents from Cases 003 and 004 are not considered ‘available’ until the time they are authorised for disclosure by OCIJ.³² The Materials were produced in Case 004 after the trial opened in June 2011,³³ and were not authorised for disclosure to Case 002 by the International Co-Investigating Judge until 15 July 2016.³⁴ Accordingly, the requested documents were not available before the opening of trial.
6. Rule 87(4) further requires that the new evidence must be deemed to be conducive to ascertaining the truth. The Co-Prosecutor appreciates that the Trial Chamber is applying heightened scrutiny to new evidence;³⁵ however, he submits that the admission of these documents is warranted due to the multiple and detailed factual accounts that go to the most serious charges in the trial, and the unique character of the evidence described in **Annexes P(1) to P(3)**.

IV. Disclosure Conditions

7. Authorisation to disclose the Materials in **Annex P(1)** is subject to the following requirements imposed by the ICIJ:³⁶
 - a. that all Materials provided from Case 004 be treated as confidential;
 - b. in the event that the Materials are admitted as evidence in Case 002, they shall be marked confidential;
 - c. in the event the witnesses/civil party applicants whose documents are authorised for disclosure are called to testify, they can do so in open sessions of the court provided

³² **E363/3** Disclosure Obligation Decision, 22 October 2015, fn. 64.

³³ **E307/1** Decision on Parties’ Joint Request for Clarification Regarding Application of Rule 87(4) (E307) and the Nuon Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3), 11 June 2014; **E307/1/2** Decision on Joint Request for *de novo* Ruling on the application of Internal Rule 87(4), 21 October 2014, para. 10.

³⁴ Case 004-**D193/90** ICIJ Decision, 15 July 2016.

³⁵ **E319/47/3** Decision on ICP Requests, 29 June 2016, para. 23.

³⁶ Case 004-**D193/90** ICIJ Decision, 15 July 2016, para. 16.

- their names and identities are kept confidential, with the exception of SUM Chanthol, and HUN Kimseng;
- d. the Materials shall not be disseminated beyond those explicitly identified herein;
 - e. the Materials shall not be disseminated to the public, in any format or via any form of media whatsoever, beyond the evidence presented in open sessions of the court;
 - f. any party, counsel, or other individual who reads from, cites, or otherwise uses any of the documents disclosed shall identify the witnesses/ civil party applicants only by their assigned pseudonym for Case 002 and use descriptions reasonably calculated to avoid identifying the witnesses by other information, with the exception of SUM Chanthol, and HUN Kimseng;
 - g. the disclosed documents shall be provided to the Defence Counsel of both the Accused, Standby Counsel of Khieu Samphan ("Standby Counsel") and Civil Party Lead Co-Lawyers through electronic copies;
 - h. the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall disclose the material provided pursuant to this decision only to those members of their teams that are officially retained under Internal Rule 22(5) and 12ter (4), respectively, along with their officially assigned interns;
 - i. the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers are not authorised to print, reproduce, photo-copy, scan, or otherwise make duplicate copies of the originals provided to them other than for the internal use of the material by those members of their respective teams who are instructed or authorised to have access to confidential material;
 - j. the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers shall maintain a written record, in a manner that can be reviewed, of the copies that they print, reproduce, photo-copy, scan, or otherwise duplicate for their internal use; and
 - k. should any member of the Trial Chamber or Parties in Case 002 learn of an unauthorised copy of the material disclosed, he/ she shall immediately take all measures to secure and return the copy to the CIJs; and
 - l. should any member of the Trial Chamber or Parties in Case 002 learn of a breach of these conditions and restrictions, he/ she shall immediately report such breach to the CIJs

8. The Materials in **Annex P(2)** are authorised for disclosure subject to the above restrictions and modalities imposed by the ICIJ, but are varied to the following more stringent measures, owing to the confidential and sensitive nature of the ongoing investigations in Case 004 along with the request for protective measures by the concerned witnesses:³⁷
- c. in the event the witnesses whose material is listed in **Annex P(2)** are called to testify, the Trial Chamber should inform the OCIJ and WESU of such decision in enough time for WESU to assess the appropriate protective measures needed to address the safety and security concerns of the civil party applicant;
 - e. no material listed in **Annex P(2)** shall be disseminated to the public, in any format or via any form of media whatsoever, or be presented or referred to in open court in any manner whatsoever; and
 - f. any party, counsel, or other individual who reads from, cites, or otherwise uses any of the documents disclosed in **Annex P(2)** shall request closed session prior to doing so, and in any event identify the civil party applicants only by their assigned pseudonym for Case 002 and use descriptions reasonably calculated to avoid identifying the civil party applicants by other information.
9. The Materials in **Annex P(3)** are authorised for disclosure with the restrictions and modalities imposed by the ICIJ outlined in paragraph 7, but varied to the more stringent measures listed below:³⁸
- c. in the event the witness whose material is listed in **Annex P(3)** are called to testify, they must do so in closed session;³⁹
 - e. no material provided pursuant to **Annex P(3)** shall be disseminated to the public, in any format or via any form of media whatsoever, or be presented or referred to in open court in any manner whatsoever; and
 - f. any party, counsel, or other individual who reads from, cites, or otherwise uses any of the documents disclosed in **Annex P(3)** shall request closed session prior to doing so, and in any event identify the witnesses or civil party applicants only by their assigned

³⁷ Case 004-**D193/90** ICIJ Decision, 15 July 2016, para. 17.

³⁸ Case 004-**D193/90** ICIJ Decision, 15 July 2016, para. 18.

³⁹ The Co-Prosecutor reserves the right to object to the imposition of closed session should this witness be called to testify.

pseudonym for Case 002 and use descriptions reasonably calculated to avoid identifying the witnesses or civil party applicants by other information.

10. The International Co-Investigating Judge further clarified that:

“for the purposes of his decision, "public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Trial Chamber, the staff of the Court Management Section, the Co-Prosecutors and his representatives, the Accused, any employees who have been officially retained under Internal Rules 22(5) and 12ter (4) authorised by the Defence Counsel, Standby Counsel and Civil Party Lead Co-Lawyers, respectively, to have access to the confidential material. "The public" also includes, without limitation, members of the Accused's family, friends, and associates; suspects, defence counsel, and members of their respective staff in other cases or proceedings before the ECCC; the media; and journalists.”

V. Relief Requested

11. On the basis of the foregoing, the Co-Prosecutor respectfully requests, pursuant to Rules 87(3) and (4), that the Trial Chamber place on Case File 002/02 and admit into evidence the documents identified in **Annex P(1)**, **Annex P(2)** and **Annex P(3)**.

Respectfully submitted,

Date	Name	Place	Signature
25 July 2016	Nicholas KOUMJIAN Co-Prosecutor	Phnom Penh	