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E307/1

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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Nation Religion King
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Nation Religion Roi

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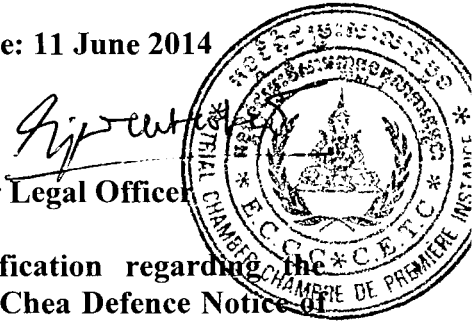
TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 11 June 2014

FROM: NIL Nonn, President of the Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer

SUBJECT: Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice on Non-Filing of Updated Lists Evidence (E305/3)



1. The Chamber is seised of a joint request in which all Parties submit that Internal Rules 80 *bis* and 87(4) limit the requirement to file reasoned submissions for the admission of new evidence exclusively to evidence which “was not available before the opening of the trial” (E307). In Case 002/02 they submit that the limitations imposed by IR 87(4) should apply only to evidence proposed by the parties after a new Initial Hearing. They assert that a new Initial Hearing must be convened at the outset of any trial including Case 002/02 although this case is part of, and is the result of the severance of the entire Case 002. They submit that it would impede the efficiency of the proceedings if they were required to file reasoned submissions and the Chamber to decide on the admission of numerous documents and individuals against the heightened criteria set out in Internal Rule 87(4). The Parties hypothesize that, if there is no new initial hearing, they might never be able to satisfy Internal Rule 87(4) where 1) they wish to exclude individuals no longer considered crucial or who are now deceased, or 2) include individuals and evidence technically available in 2011, but not known to the Parties at that time, or not previously proposed due to strategy or the then composition of Defence and Civil Party teams. They contend that the suggested interpretation of the rules is consistent with both the rights of the Accused and the underlying aim of ascertaining the truth of the allegations. Finally, it is submitted that since the beginning of trial, a number of circumstances have changed which support the suggested interpretation of Rule 87(4), including changes to Defence and Civil Party teams.

2. On 17 January 2011, after being seised of the case file, the Chamber ordered the Parties to file lists of all proposed individuals and evidence relevant to Case 002 (“Initial

Lists”) (E9). Between 27 and 30 June 2011, the Case 002 trial commenced with an Initial Hearing. On 22 September 2011, the Chamber severed the proceedings in Case 002 into discrete cases, commencing with Case 002/01 (E124). On 18 October 2011, the Chamber ruled that these proceedings fell within “the whole trial in relation to all portions of the Indictment” (E124/7, para. 8). The Chamber has always affirmed that Case 002/02 shall be seen as the result of a severance order whose purpose was to divide Case 002 into manageable parts, the first trial aiming to provide a foundation for further examination of the remaining charges in later trials, (E124/7, para. 10; E284, para. 15). Accordingly, proceedings in Case 002/02 shall be seen as being part of a whole case where general preliminary matters were taken into account at the opening of the trial in Case 002, that is the Initial Hearing in June 2011. Any additional hearing that may be held to further clarify issues before the start of Case 002/02 does not change the fact that the trial in Case 002 commenced in June 2011 and that procedural issues the Chamber dealt with at that time concern all subsequent trials following the severance of Case 002.

3. The Parties fail to provide cogent or convincing arguments that the efficiency and fairness of the proceedings will be impeded unless the Chamber modifies the procedural regime for the admission of new evidence. Indeed, the heightened standard set out in Internal Rule 87(4) is intended to promote the efficiency of the proceedings. If the Parties do not meet this heightened standard, the Chamber may summarily reject the proposed evidence. However, taking into account the need to ensure a fair trial, the Chamber has in the past exceptionally admitted new evidence which does not satisfy the Internal Rule 87(4) criteria where the interests of justice so require, in particular where it is exculpatory and requires evaluation in order to avoid a miscarriage of justice (E190, para. 36). The Chamber maintains the discretion to proceed in a similar manner in future.

4. Without further specifics, the Chamber is unable to assess the Parties’ general and unsupported assertions that, due to a change in strategy and/or composition of their teams, their Initial Lists were incomplete and they should therefore be able to amend them. Considering in particular the lengthy investigation during which all Parties had access to the case file, the Chamber has already found that the procedural regime and deadlines for initially proposing evidence pursuant to Internal Rule 80 did not violate the rights of the Accused to adequate time and facilities for the preparation of a defence (E9/16/4, p. 3).

5. Contrary to submissions that Internal Rule 87(4) might impact the ability of the Parties to remove individuals and evidence from their Initial Lists, the Chamber notes that Internal Rule 87(4) only governs the proposal of new evidence. The Parties were able to include on, or omit from, their Case 002/02 lists any individuals or evidence previously included on their Initial Lists. Further, although the Case 002/02 Preparation Order (E305) did not authorise the Parties to add new individuals or evidence to these lists, the Chamber notes that the lists recently filed by the Co-Prosecutors (E305/6.1), the KHIEU Samphan Defence (E305/5.1) and the Lead Co-Lawyers (E305/7.1.1) include individuals not included in their Initial Lists (a confidential table listing these individuals is attached to the present memo). Accordingly, the Chamber invites the Parties to file applications to hear these individuals in accordance with Internal Rule 87(4).

6. The NUON Chea Defence has notified the Chamber that it is unable to file updated document and exhibit lists since it never filed Initial Lists of such evidence, and that it will file lists of new or additional documents prior to the Initial Hearing in Case 002/02 (E305/3). Over the course of the on-going proceedings in Case 002, the Chamber has repeatedly warned the NUON Chea Defence that its failure to timely file evidence lists would restrict its ability to put evidence before the Chamber (*see e.g.* E190, para. 35; E131/1, p. 4). The Chamber again reminds the NUON Chea Defence of its obligation to meet the requirements of Internal Rule 87(4) and demonstrate reasonable diligence in discovering and proposing all evidence at this late stage (E190, paras 23, 35).

7. This constitutes the Chamber's official response to E307 and E305/3.