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

សាធារណៈ / Public

TRIAL CHAMBER

TO: **All Parties, Case 002** **Date: 21 October 2014**

FROM: **NIL Nonn, President of the Trial Chamber**

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

SUBJECT: **Decision on Joint Request for *de novo* Ruling on the application of Internal Rule 87(4)**

1. The Chamber is seised of a joint motion by the Co-Prosecutors and the Civil Party Lead Co-Lawyers filed on 15 August 2014 requesting the Chamber to consider *de novo* its prior decision (E307/1) in which it held that Internal Rule 87(4), regarding new evidence, is applicable to all witnesses, civil parties and documents proposed by the parties after the Initial Hearing in June 2011 (E307/1/1, para. 9 ("Joint Request")). They further request the Chamber to confirm that "new evidence" in IR 87(4) refers to evidence which was neither on the Case File nor on a Party's IR 80 list. The NUON Chea and KHIEU Samphan Defence teams did not respond.

2. The Joint Request submits that the Supreme Court Chamber's decision on the Trial Chamber's additional severance of Case 002 (E301/9/1/1/3 ("SCC Decision"), in which it clarified the notion of severance, constitutes a new circumstance requiring the Trial Chamber to revisit the timing of the applicability of IR 87(4).

3. As interpreted by the Joint Request, the SCC Decision held that severance creates separate and distinct cases, requiring a separate determination of the Parties' procedural rights in each case. It asserts that IR 80 (relating to the preparation of trial) and IR 87(4) apply separately to each trial. Therefore, it submits that the Further Initial Hearing in Case 002/02, on 29 July 2014, is the operative date for the determination of which evidence is "new". It suggests that only witnesses, civil parties, experts, and documents proposed after the Further Initial Hearing need satisfy the criteria set forth in IR 87(4). Moreover, the Joint Request seeks a declaration that "new evidence" refers to evidence which was neither on the Case File nor on the Party's Rule 80 list (E307/1/1, paras 10, 12-13, 22(b)).

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4. The Internal Rules provide no procedure for reconsideration of Trial Chamber decisions as such would result in the endless re-litigation of the same issues (E238/11/1, para. 7). Nonetheless, the Chamber has considered fresh applications of parties when warranted by new facts or circumstances (E282/2/1/2, para. 3). The Chamber considers the SCC Decision to constitute a new circumstance meriting a new consideration of its prior decision. While the idea that severance creates separate trials is not new (the Trial Chamber has itself previously indicated this to the parties: E307/1, para 2), the SCC Decision has specifically elaborated on what this means in practice. The Trial Chamber considers that this could potentially raise new issues for consideration with respect to the application of IR 87(4).

5. It is common ground that severance creates separate and distinct cases. The Joint Request focuses on one of the procedural consequences that flow from this: the application of IR 87(4).

6. The Joint Request submits that the SCC Decision "ruled that the creation of separate cases requires a separate determination of the Parties' procedural rights in each case." (E307/1/1, para 12). The SCC Decision in fact made the more limited holding that "issues of rights arising from the duration of proceedings and pre-trial detention must be thereafter evaluated separately for each of the criminal cases so created" (E301/9/1/1/3, para. 44). The Trial Chamber accepts, however, that IR 87(4) should be applicable from the beginning of trial in Case 002/02. It has previously made clear its position that this trial started in 2011 (E307/1 para. 2). This position is now challenged in the Joint Request.

7. The Joint Request submits that the trial in Case 002/02 started only with the Further Initial Hearing of 30 July 2014. It bases this on the assumption that the Trial Chamber separately ordered the parties to file their respective witness and document lists for each case: on 17 January 2011 in Case 002/01 ("2011 lists") and on 8 April 2014 in Case 002/02 (E307/1/1, para 13). This assumption is not well founded. In 2011, the Trial Chamber ordered the parties to file their respective lists for Case 002 on 17 January 2011, prior to any consideration of severance and before any provision for severance existed in the Internal Rules (adopted on 23 February 2011). These lists covered the case as a whole as it then stood, which includes the witnesses and documents relevant to what is now Case 002/02. This view is further supported by IR 80(1), which imposes a deadline on the filing of witness lists with reference to the Closing Order. Accordingly, the 2011 lists were not filed specifically or only for Case 002/01 and the Joint Request submission on this point has no basis.

8. The SCC Decision is consistent with this position. It states that Case 002/01 was not formally severed until 23 July 2013 (E301/9/1/1/3, para 74). At the time of the 17 January 2011 order, therefore, the order to file witness lists concerned Case 002 generally, including what would later become Cases 002/01 and 002/02. Further according to the SCC Decision, all hearings until 23 July 2013 took place as part of Case 002 and concerned evidence common to both Cases 002/01 and 002/02 (E301/9/1/1/3, para. 43).

9. The Joint Request appears to submit that the Trial Chamber must order separate lists for each trial in Case 002 (E307/1/1, paras 12-13). This submission has no basis in the Internal Rules or the SCC Decision. The 2011 lists covered witnesses, civil

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parties, experts and documents for all of Case 002 and accordingly encompass both cases which were later created as a result of severance. Despite the broad scope of the 2011 lists, the SCC Decision does not suggest that they are not valid for Case 002/01, nor does it mandate that new lists must be filed for Case 002/02. The Joint Request raises no valid impediment to accepting the 2011 lists as similarly applicable for the witnesses and documents now within the scope of Case 002/02, as originally intended. This argument does not provide a basis for finding that the trial in Case 002/02 started only on 30 July 2014.

10. The Trial Chamber accordingly reiterates that the 2011 lists fulfilled the requirements of IR 80 for the purposes of Case 002/02, and that IR 87(4) applies as of that time. Nonetheless, the Chamber is aware that a significant amount of time has passed since the 2011 lists were filed and that there may be arguments in favour of allowing the parties to exceptionally supplement, without prejudice, the 2011 lists prior to the commencement of hearings in Case 002/02, which represents a significant milestone in the trial.

11. IR 87(4) balances the need to ensure that all relevant and reliable evidence is put before the Chamber with the need to provide timely notice of such evidence, to ensure a fair and expeditious trial and to allow efficient trial management to this end. There are hundreds of documents in the parties' Case 002/02 lists that were not proposed to be put before the Chamber prior to the commencement of trial in January 2011. Imposing a requirement that the parties justify the failure to include these documents in their 2011 lists and subsequently evaluating the documents on the basis of the IR 87(4) criteria would be highly time-consuming. Furthermore, none of the parties object to the fairness of evaluating the admissibility of the documents proposed in Case 002/02 without reference to IR 87(4). Under the circumstances, requiring the parties to establish that these documents were not available before trial would not advance the purposes sought to be achieved by IR 87(4). Therefore, on an exceptional basis, the Chamber will consider the 2014 lists filed pursuant to E305 as constituting a permissible revision of the 2011 lists to which Internal Rule 87(4) does not apply. Of course, all documents sought to be put before the Chamber must continue to satisfy the requirements of IR 87(3). This exception shall extend to the 2014 lists of witnesses which will be considered as constituting a permissible revision of the 2011 lists.

12. The Joint Request asks the Trial Chamber to confirm that 'new evidence', for the purposes of IR 87(4), is evidence which was neither on the Case File nor included in any party's IR 80 list. The Chamber recalls that documents proposed to be put before the Chamber *prior* to the commencement of trial (i.e. those contained in IR 80 lists filed in 2011) are not subject to the requirements of IR 87(4) (E190). All documents proposed to be put before the Chamber *after* the commencement of trial are subject to the requirements of IR 87(4). In the interests of a fair and expeditious hearing, the Chamber is now considering the parties' 2014 lists filed pursuant to E305 as permissible revisions to the 2011 lists to which Internal Rule 87(4) does not apply, even though they were filed after the commencement of trial. The Chamber emphasises that proposals to put before the Chamber any new documents or any request to hear new witnesses in future must satisfy the requirements of IR 87(4).

13. This is the Chamber's official response to E307/1/1.

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