



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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩កញ្ញា២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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**Before:** Judge NIL Nonn, President  
 Judge Jean-Marc LAVERGNE  
 Judge YA Sokhan  
 Judge Claudia FENZ  
 Judge YOU Ottara

**Date:** 22 October 2015  
**Original language(s):** Khmer/English/French  
**Classification:** PUBLIC

**DECISION ON KHIEU SAMPHAN DEFENCE MOTION REGARDING CO-PROSECUTORS' DISCLOSURE OBLIGATIONS**

**Co-Prosecutors**  
 CHEA Leang  
 Nicolas KOUMJIAN

**Accused**  
 NUON Chea  
 KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
 PICH Ang  
 Marie GUIRAUD

**Lawyers for the Defence**  
 SON Arun  
 Victor KOPPE  
 KONG Sam Onn  
 Arthur VERCKEN  
 Anta GUISSÉ

## 1. INTRODUCTION

1. The Trial Chamber is seised of a request by the KHIEU Samphan Defence regarding the Co-Prosecutors' obligation to disclose documents from the Cases 003 and 004 investigations. The Defence requests that the Chamber provide a list of all the witnesses that it intends to call in the trial of Case 002/02. The Chamber is requested to remind the Co-Prosecutors that they must disclose only exculpatory material and prior statements of witnesses called by the Chamber, and to proscribe further disclosure of any material outside these two categories. The Defence further requests that the Chamber require the Co-Prosecutors to review the documents disclosed to date, identify which of these two categories they belong to and inform the parties of the outcome by 11 September 2015. The Defence also requests that the Chamber remove from the Case File those Case 003 and 004 documents which do not fall within these categories, and give the Defence additional time to review and, if need be, contest those documents properly disclosed to date. In the alternative to the aforementioned requests, the Defence requests that the Chamber stay the trial of Case 002/02 until such time as judicial investigations in Cases 003 and 004 are concluded.<sup>1</sup> The Co-Prosecutors oppose the KHIEU Samphan Request in its entirety.<sup>2</sup> The NUON Chea Defence and Civil Party Lead Co-Lawyers did not respond.

## 2. SUBMISSIONS

### 2.1. KHIEU Samphan Defence Request

2. The KHIEU Samphan Defence submits that the disclosures of Case 003 and 004 documents made since October 2014 in Case 002/02 by the International Co-Prosecutor are inconsistent with his disclosure obligations and violate the rights of the defence.<sup>3</sup>

3. The Defence submits the International Co-Prosecutor has distorted the applicable Internal Rules and the Trial Chamber memorandum of 24 January 2012 by asserting that he can disclose any relevant material whether inculpatory or exculpatory, whereas his disclosure obligation is limited to exculpatory material and prior statements of witnesses called to

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<sup>1</sup> *Conclusions de la Défense de M. KHIEU Samphan sur l'obligation de communication des co-Procureurs*, E363, 27 August 2015 ("KHIEU Samphan Request").

<sup>2</sup> Co-Prosecutors' Response to KHIEU Samphan's Motion regarding the Co-Prosecutors' Disclosure Obligations, E363/1, 7 September 2015 ("Co-Prosecutors' Response").

<sup>3</sup> KHIEU Samphan Request, para. 5.

testify.<sup>4</sup> In the Defence's view, the Supreme Court Chamber supports the Defence's reading of Internal Rule 53(4) which is consistent with international criminal precedents emphasising the Prosecution's responsibility to disclose exculpatory evidence in good faith and as soon as practicable.<sup>5</sup>

4. The KHIEU Samphan Defence submits that the International Co-Prosecutor has acted in deliberate violation of the applicable law by disclosing an ever-increasing volume of material that is relevant to Case 002/02. It contends that the disclosure of anything other than exculpatory documents and the prior statements of witnesses called to testify is barred after the close of the investigative phase. The Defence further submits that the International Co-Prosecutor's failure to specify what information he considers to be exculpatory is also contrary to the practice of international criminal tribunals and imposes additional burdens on the Defence. The Defence contends that the Co-Prosecutors are in effect "bur[ying] the exculpatory evidence under a mountain of incriminating evidence"<sup>6</sup>, and that the purpose of disclosure is not to allow the preservation of evidence collected during confidential investigations in other cases, the prospects of which are uncertain.<sup>7</sup>

5. The KHIEU Samphan Defence further submits that the right to an expeditious trial and the principle of equality of arms are violated by the present disclosures.<sup>8</sup> With respect to equality of arms, the Defence notes that the Co-Prosecutors can make investigative requests in Cases 003 and 004 and gain earlier access than the Defence to the material gathered in those cases.<sup>9</sup> In contrast, the Defence lacks time to consider the documents and is not in a position to rebut the presumption of reliability applied by the Chamber due to inadequate access to information from Cases 003 and 004.<sup>10</sup> It is submitted that the Co-Prosecutors have considerably more staff than KHIEU Samphan Defence team, permitting the Co-Prosecutors to better manage disclosure.<sup>11</sup>

6. It is submitted that the manner in which disclosures are effectuated further violates KHIEU Samphan's right to adequate time and facilities to prepare his defence as the Defence

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<sup>4</sup> KHIEU Samphan Request, paras 6-8, 31.

<sup>5</sup> KHIEU Samphan Request, paras 11-16.

<sup>6</sup> KHIEU Samphan Request, paras 19-24.

<sup>7</sup> KHIEU Samphan Request, paras 30-31.

<sup>8</sup> KHIEU Samphan Request, paras 33-40.

<sup>9</sup> KHIEU Samphan Request, paras 36-39.

<sup>10</sup> KHIEU Samphan Request, para. 39.

<sup>11</sup> KHIEU Samphan Request, para. 41.

does not have time and/or the resources to search through fresh material.<sup>12</sup> The Defence contends that extensions of time or adjournments, when granted by the Chamber, are insufficient and that it is overwhelmed.<sup>13</sup> Documents that are not translated into French frustrate the work of the Defence.<sup>14</sup> Finally, the Defence submits that the Chamber has blurred the distinction between the concept of placement on the Case File and admission into evidence which has engendered further uncertainty.<sup>15</sup>

## **2.2. Co-Prosecutors Response**

7. The Co-Prosecutors respond that the KHIEU Samphan Defence misconstrues the applicable law by failing to recognise the distinction between the Co-Prosecutors' duty to disclose evidence pursuant to Internal Rule 53(4) and a party's right to seek admission of new evidence pursuant to Internal Rule 87(4).<sup>16</sup>

8. The Co-Prosecutors submit that the Trial Chamber's memorandum of 24 January 2012 also requires the disclosure of all materials that may affect the reliability of the evidence, including any evidence that is relevant to Case 002/02, whether inculpatory or exculpatory.<sup>17</sup> In the Co-Prosecutors' view, the Chamber's acceptance of the disclosures to date indicates that it considers these to be in compliance with the Co-Prosecutors' obligations.<sup>18</sup> They submit that it is in the interests of ascertaining the truth to undertake a broad approach to disclosure, regardless of the KHIEU Samphan Defence's preferences.<sup>19</sup> The fact that Case 002/02 is at the trial stage is of little relevance as the Trial Chamber must continue to ascertain the truth and the Co-Prosecutors must bring all relevant evidence before the Chamber.<sup>20</sup>

9. The Co-Prosecutors submit that similar rules at the *ad hoc* Tribunals are limited to exculpatory evidence or evidence which negatively affects the prosecution evidence, whereas the ECCC operates within a civil law system and the standard adopted by the Trial Chamber is not restricted to "prosecution" evidence.<sup>21</sup> They note that the NUON Chea Defence

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<sup>12</sup> KHIEU Samphan Request, paras 42-45.

<sup>13</sup> KHIEU Samphan Request, para. 43.

<sup>14</sup> KHIEU Samphan Request, para. 44.

<sup>15</sup> KHIEU Samphan Request, para. 46.

<sup>16</sup> Co-Prosecutors' Response, para. 4.

<sup>17</sup> Co-Prosecutors' Response, para. 6.

<sup>18</sup> Co-Prosecutors' Response, para. 8.

<sup>19</sup> Co-Prosecutors' Response, para. 9.

<sup>20</sup> Co-Prosecutors' Response, para. 10.

<sup>21</sup> Co-Prosecutors' Response, para. 11.

recognises the importance of disclosure from Cases 003 and 004 and has sought the admission of documents obtained in this manner before the Trial Chamber and Supreme Court Chambers.<sup>22</sup>

10. The Co-Prosecutors respond that Internal Rule 87(4) gives them the right to seek the admission of any new evidence conducive to ascertaining the truth and therefore it need not use disclosure to bring inculpatory evidence into Case 002/02.<sup>23</sup> They submit that most written records of interview contain both inculpatory and exculpatory elements and that it is difficult to determine which evidence the two Defence teams will consider to be most helpful to the preparation of their respective cases.<sup>24</sup> They further contend that the KHIEU Samphan Defence fails to demonstrate any obligation to identify the exculpatory elements in the disclosed material.<sup>25</sup>

11. The Co-Prosecutors submit that the KHIEU Samphan Defence fails to show that disclosures have unduly prolonged the trial and therefore fails to establish a violation of his right to a speedy trial.<sup>26</sup> They further submit that there is no violation of the principle of equality of arms, which requires procedural equality and not parity of resources, as the Defence maintains an ability to present its case and to seek procedural relief.<sup>27</sup>

12. Finally, as to the Accused's right to have adequate time and facilities to make his defence, the Co-Prosecutors contend the KHIEU Samphan should have made reasoned requests for additional time if such was needed. Although many disclosures are not available in French, one international lawyer for KHIEU Samphan is fluent in English. In addition, the process for admission of documents is clear and should not be confused with disclosure.<sup>28</sup>

### **2.3. KHIEU Samphan Defence Reply**

13. The KHIEU Samphan Defence replies that the Co-Prosecutors' disclosure obligation is dictated not by the Chamber's memorandum, but instead by Internal Rule 53(4) which requires disclosure of evidence which may affect the "credibility of the Prosecution

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<sup>22</sup> Co-Prosecutors' Response, para. 13-14.

<sup>23</sup> Co-Prosecutors' Response, para. 15.

<sup>24</sup> Co-Prosecutors' Response, para. 16.

<sup>25</sup> Co-Prosecutors' Response, para. 18.

<sup>26</sup> Co-Prosecutors' Response, paras 20-22.

<sup>27</sup> Co-Prosecutors' Response, paras 24-28.

<sup>28</sup> Co-Prosecutors' Response, paras 30-34.

evidence”.<sup>29</sup> The obligation to disclose exculpatory elements is part of the professional responsibility of the Prosecution and includes the obligation to disclose evidence which is directly or indirectly favourable to the Accused.<sup>30</sup>

14. The KHIEU Samphan Defence agrees that the first goal of the Court is to ascertain the truth. However, it believes that the hearings in Case 002/02 must be adjourned if the evidence collected during the investigation appears to be insufficient.<sup>31</sup> The admission of new evidence under Internal Rule 87(4) must only be done in exceptional circumstances and should therefore be limited.<sup>32</sup> The Defence asserts the Co-Prosecutors are capable of identifying exculpatory elements as they have done before the Supreme Court Chamber.<sup>33</sup> They further submit that the timing of the Defence’s reaction to this matter does not change the substantive issue and that it was only now apparent that the Prosecution was distorting the rules.<sup>34</sup> Finally, the Defence requests that the Co-Prosecutors be sanctioned pursuant to Internal Rule 35 for interfering with the administration of justice.<sup>35</sup>

### 3. APPLICABLE LAW

15. Pursuant to Internal Rule 53(4):

The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.<sup>36</sup>

<sup>29</sup> *Réplique de la Défense de M. KHIEU Samphan sur l’obligation de communication des co-Procureurs et réponses aux questions de la Chambre de première instance*, E363/2, 17 September 2015 (“KHIEU Samphan Reply”), paras 8-10.

<sup>30</sup> KHIEU Samphan Reply, paras 11-12.

<sup>31</sup> KHIEU Samphan Reply, para. 19.

<sup>32</sup> KHIEU Samphan Reply, para. 20.

<sup>33</sup> KHIEU Samphan Reply, para. 22.

<sup>34</sup> KHIEU Samphan Reply, paras 23-24, 30-31.

<sup>35</sup> KHIEU Samphan Reply, para. 32.

<sup>36</sup> The Chamber notes a discrepancy between the Khmer, English and French versions of Internal Rule 53(4). The French and Khmer versions of this rule, like Article 67 (2) of the Rome Statute, refer to the notion of “inculpatory evidence” (“élément à charge”) and not to the broader category of “prosecution evidence” (“*les éléments de preuve de l’Accusation*”); See Internal Rule 53(4)(French) (“Les co-procureurs doivent, dans les meilleurs délais, communiquer aux co-juges d’instruction toutes pièces susceptibles, à leur connaissance, d’établir l’innocence du suspect ou de la personne mise en examen, de constituer un élément à décharge ou d’affecter la crédibilité d’un élément à charge”); Internal Rule 53(4)(Khmer) ក្នុងរយៈពេលឆាប់ដែលអាចធ្វើទៅបាន សហព្រះរាជអាជ្ញាត្រូវបង្ហាញទៅសហចៅក្រមស៊ើបអង្កេតនូវសម្ភារៈទាំងឡាយ ដែលសហព្រះរាជអាជ្ញាបានដឹង ហើយដែលសម្ភារៈទាំងនេះនឹងអាចនាំឱ្យ គ្មានពិរុទ្ធភាព ឬ សម្រាលពិរុទ្ធភាពនៃជនសង្ស័យ ឬជនត្រូវចោទ ឬធ្វើឱ្យប៉ះពាល់ដល់ភាពជឿជាក់នៃ ភស្តុតាងក្នុងការចោទប្រកាន់។

16. The Trial Chamber has ruled, and the Supreme Court Chamber has confirmed,<sup>37</sup> that Internal Rule 53(4) requires the Co-Prosecutors to disclose new documents to the Accused and the Chamber:

The Chamber considers that Internal Rule 53(4) imposes a continuing obligation on the Co-Prosecutors to disclose to the Trial Chamber any material in its possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence. It is in the interests of ascertaining the truth that the Trial Chamber has access to these documents, not least because consideration of the prior statements will assist in evaluating the credibility of these witnesses.<sup>38</sup>

17. As to new evidence, Internal Rule 87(4) provides:

During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

## 4. FINDINGS

### 4.1. Timeliness of Submission

18. As an initial matter, the Chamber considers that the filing of this request is not timely. The first disclosure motion in Case 002/02, the propriety of which is challenged by the Defence, was filed in October 2014. At that time, the Co-Prosecutors informed the Chamber and the parties that a substantial number of additional statements would be disclosed from Cases 003 and 004 and that it would present an on-going issue in this trial.<sup>39</sup> Setting aside for

<sup>37</sup> Decision on Part of Nuon Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01 (SCC), F2/4/2, 16 March 2015 ("SCC Decision"), para. 17.

<sup>38</sup> Disclosure of witness statements for witnesses who may testify in Case 002, E127/4, 24 January 2012 ("TC Disclosure Decision"); The French version of the decision provided: "La Chambre considère que la règle 53 4) du Règlement intérieur impose aux co-procureurs une obligation à caractère permanent de lui communiquer tous les documents en leur possession qui permettraient de conclure à l'innocence des Accusés, atténuer leur culpabilité ou avoir des conséquences sur la fiabilité qu'il est possible d'accorder à des éléments de preuve."; The Khmer states: "វិធាន ៥៣(៤) នៃវិធានផ្ទៃក្នុងបង្គាប់ដល់សហព្រះរាជអាជ្ញាឱ្យជូនដំណឹងមកអង្គជំនុំជម្រះសាលាដំបូង ពាក់ព័ន្ធនឹងសម្ភារៈទាំងឡាយដែលសហព្រះរាជអាជ្ញាមាន ហើយដែលសម្ភារៈទាំងនេះនឹងអាចនាំឱ្យគ្មានពិរុទ្ធភាព ឬសម្រាល ពិរុទ្ធភាពរបស់ជនជាប់ចោទ ឬដែលប៉ះពាល់ដល់ភាពអាចជឿជាក់បាននៃភស្តុតាងក្នុងការចោទប្រកាន់។"

<sup>39</sup> T. 21 October 2014, p. 11 (CS)("I want to make sure that Your Honours understand that there are substantially more Case 003 or 004 interviews that relate to other upcoming segments. The Judge - Judge Harmon has expressed in his decision a preference to do the disclosure in stages, but, for example, we have the Trapeang Thma Dam coming up when we get to the worksite segment. There is at least 44 current interviews - interviews that were conducted in Case 004 relating to that site. There are many interviews that relate to the

the moment the capacity of the Defence team to read the entirety of the disclosures within the time allotted, the motion itself was five pages in length. No response was received by the Chamber to this motion, nor to the 14 additional motions filed by the Co-Prosecutors over the next eleven months which contained the same language to which the Defence now objects.<sup>40</sup>

19. If there was any question as to the overall size and impact of these disclosures at the outset, significant disclosures in February and March 2015 put all on notice of the importance of the issue.<sup>41</sup> Similarly, the KHIEU Samphan Defence has not filed responses, nor requested additional time to do so, to four separate motions to admit evidence which was previously disclosed from Cases 003 and 004.<sup>42</sup> It submits that it did not have the resources to file such responses, yet it failed to raise this issue or to make any requests for resources in the nearly

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subject of purges. So, this will be an ongoing issue, but we wanted to make sure that it was understood that this disclosure is the first of what is likely to be many disclosures of Case 003 and Case 004.”)

<sup>40</sup> See International Co-Prosecutor’s Disclosure of Statements from Case file 004, E319, 20 October 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 Disclosure of Documents from Case File 004 Relevant to Case 002, E319/12, 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; 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; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/15, E319/19, 18 March 2015; International Co-Prosecutor’s Disclosure of Document from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/16, E319/20, 16 March 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/21, E319/21, 13 April 2015; International Co-Prosecutor’s Disclosure of: 1) Two DC-Cam Statements; and, 2) Documents from Case File 003 Relevant to Case 002 Pursuant to Case 003-D100/9, E319/23, 3 June 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/24, E319/24, 9 June 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/28, E319/25, 24 July 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/30, E319/26, 3 August 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 003 and Case File 004 Relevant to Case 002 Pursuant to Case 003-D100/12 and Case 004-D193/33, E319/27, 10 August 2015; International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/34, E319/28, 12 August 2015; International Co-Prosecutor’s Disclosure of Two Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/37, E319/29, 12 August 2015; Although the KHIEU Samphan Defence requested additional time to review these disclosures, which the Chamber partially granted, the Defence at no time indicated opposition to the disclosures in principle. *See e.g.*, T. 5 March 2015, p. 45 (TMM)(requesting six weeks adjournment); After the filing of the KHIEU Samphan Request, the Co-Prosecutors disclosed an additional 11 statements. *See* International Co-Prosecutor’s Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/43 and Case 004-D193/44, E319/33, 29 September 2015.

<sup>41</sup> Significant disclosures of 1600 English pages (590 in French, 1440 in Khmer) and 2620 English pages (1340 in French and 2370 in Khmer) were provided to the Chamber and parties in February and March 2015 respectively. *See* Annex H - Disclosure of Case 004 Documents Related to Case 002, E319/13.3, 19 February 2015 (including 90 WRIs); Annex K - Disclosure of Case 004 Documents Relevant to Case 002, 20 March 2015, E319/19.3 (including 226 WRIs).

<sup>42</sup> 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), E319/5, 13 November 2014; 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), E319/11, 4 February 2015; International Co-Prosecutor’s Motion to Admit Statements Pursuant to Rules 87(3) & 87(4), E319/22, 25 May 2015; NUON Chea’s Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30, 24 August 2015.



eight months since 1 January 2015.<sup>43</sup> The KHIEU Samphan request is therefore extremely late.<sup>44</sup> Nonetheless, due to the fair trial issues raised, and considering that disclosure issues are likely to confront the Chamber throughout the remainder of this trial, the Chamber addresses the merits of the request.

#### **4.2. The Co-Prosecutors' Disclosure Obligations**

20. The Chamber considers that Internal Rules 53(4) and 87(4) create two separate regimes for the disclosure and the admission of additional materials at the trial phase of these proceedings. Internal Rule 53(4) addresses the Co-Prosecutors' obligation to disclose to the other parties and the Chamber certain material that is not yet on the Case File, including that arising from Cases 003 and 004. Internal Rule 87(4) clarifies the conditions under which new material may be admitted. These obligations are addressed separately in sections 4.2 and 4.3, before the framework is applied in section 4.4.

##### ***4.2.1. Disclosure of Exculpatory Evidence***

21. Cambodian Law recognises the right of the Accused to his or her defence which shall be guaranteed by the President of the Trial Chamber.<sup>45</sup> It further recognises and respects human rights enshrined within all treaties and conventions related to human rights, including the International Covenant on Civil and Political Rights (ICCPR) which sets forth the most basic fair trial rights of an Accused in a criminal proceeding.<sup>46</sup> These include the right to have adequate time and facilities for the preparation of his or her defence and the right to be tried without undue delay.<sup>47</sup> While the Cambodian Code of Criminal Procedure contains numerous provisions designed to guarantee the Accused's right to a fair trial, and recognises the general

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<sup>43</sup> Response from the Office of Administration concerning the request for clarification on additional resources for Defence teams in Case 002/02, E369/1, 29 September 2015. The Defence also corrected the Chamber's mischaracterisation of the Defence submissions regarding the procedures for the use of Case 003 and 004 statements in court, while failing to mention any prejudice caused by the decision which admitted 30 WRIs from Case 004. See *Demande de la Défense de M. KHIEU Samphân de rectification d'erreur matérielle dans la décision E319/7*, E319/7/1, 6 February 2015.

<sup>44</sup> Although the Trial Chamber recently addressed the Co-Prosecutors practice of disclosing Civil Party Applications (See E319/14/2), this was due to the specific nature of such applications and the fact that the Co-Prosecutors had not been in the practice of disclosing these documents from Case 003 and Case 004 in any meaningful way until 24 July 2015 (See E319/25 *et seq.*).

<sup>45</sup> Constitution of the Kingdom of Cambodia, Article 38; Cambodian Code of Criminal Procedure, Article 318; Internal Rule 85.

<sup>46</sup> Constitution of the Kingdom of Cambodia, Articles 31, 33.

<sup>47</sup> International Covenant on Civil and Political Rights, Article 14(b), (c).

right of the Accused to have access to information which may form part of his trial,<sup>48</sup> it does not specifically delineate the right to the disclosure of exculpatory evidence. The Chamber therefore has reference to procedural rules developed at the international level.<sup>49</sup>

22. As recognised in the Internal Rules and international jurisprudence, the Accused has a fundamental right to have access to potentially exculpatory material.<sup>50</sup> This right is enshrined within the Rome Statute as well as the rules of all of the international and internationalised criminal tribunals.<sup>51</sup> The duty to disclose exculpatory information falls to the Co-Prosecutors as they are the only party to have access to the Case File during the confidential investigative phase of the proceedings.<sup>52</sup> As the Supreme Court Chamber has held, “[t]his duty is a component of [a] fair trial” and “accords with the prosecutorial role of assisting the court in ascertaining the truth”.<sup>53</sup> The duty to disclose is a continuing obligation that remains in effect throughout the trial proceedings. It must be scrupulously observed in good faith to allow a fully adversarial and fair discussion of the evidence.<sup>54</sup>

23. The definition of exculpatory evidence contained in Internal Rule 53(4) is consistent with all other international tribunals, comprising any material that in the actual knowledge of

<sup>48</sup> Cambodian Code of Criminal Procedure, Article 304; *see also* Article 301 (guaranteeing the right to the assistance of counsel in felony cases).

<sup>49</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, Article 12(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 33 new.

<sup>50</sup> Internal Rule 53(4); *Prosecutor v. Lubanga*, ICC Trial Chamber, ICC-01/04-01/06, 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, 13 June 2008 (“*Lubanga* Decision”), para. 77; *Prosecutor v. Katanga and Ngudjolo*, ICC Pre-Trial Chamber, ICC-01/04-01/07, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, 20 June 2008, para. 3; *Prosecutor v. Oric*, ICTY Trial Chamber, IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-compliance with Rule 68 of the Rules, 13 December 2005 (“*Oric* Decision”), para. 20.

<sup>51</sup> Rome Statute, Article 67(2); ICTY Rule of Procedure and Evidence 68(i) (“The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”); ICTR Rule of Procedure and Evidence 68(A)(same); STL Rule of Procedure and Evidence 113(A) (“Subject to the provisions of Rules 116, 117 and 118, the Prosecutor shall, as soon as practicable, disclose to the Defence any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence.”); SCSL Rule of Procedure and Evidence 68(B) (“The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.”)

<sup>52</sup> Internal Rule 53(4), 55(3) & (10).

<sup>53</sup> Decision on Part of NUON Chea’s Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, F2/4/2, 16 March 2015, para. 17.

<sup>54</sup> TC Disclosure Decision.

the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of the prosecution evidence. The Co-Prosecutors initially requested to disclose Case 003 and 004 statements encompassed by this precise definition, which was not opposed by either Defence team.<sup>55</sup> The Chamber subsequently ordered the Co-Prosecutors to disclose any material that may suggest the innocence or mitigate the guilt of the Accused or “affect the reliability of the evidence”. This order shall be interpreted to mean both that the disclosure obligation continues during the trial phase and that it applies to any exculpatory evidence, including material affecting the reliability of inculpatory evidence which in effect amounts to exculpatory evidence.<sup>56</sup>

24. The Chamber further clarifies that the Co-Prosecutors’ duty is limited to disclosing material that “in the actual knowledge of the Co-Prosecutors” is exculpatory. The Co-Prosecutors need not speculate as to Defence theories.<sup>57</sup> Uncertainties as to the precise theories of the Defence teams do not provide an excuse to undertake an overbroad approach to disclosure, nor does it justify including clearly inculpatory evidence within disclosures made pursuant to Internal Rule 53(4). Rather, it is the exclusive responsibility of the Co-Prosecutors to determine in good faith what information may be exculpatory.<sup>58</sup> The Co-Prosecutors should be guided by this in implementing their obligations pursuant to Internal Rule 53(4).

<sup>55</sup> See International Co-Prosecutor’s Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, E127, 6 October 2011, paras 6, 12; Although the NUON Chea Defence and KHIEU Samphan Defence did not respond to the OCP request, the Defence teams of former Accused IENG Sary and IENG Thirith supported the disclosure on this basis. See IENG Sary Response to the International Co-Prosecutor’s Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004, E127/1, 14 October 2011; IENG Thirith Defence Response to the ‘International Co-Prosecutor’s Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A’, E127/3, 17 October 2011.

<sup>56</sup> The Chamber notes that within the ECCC legal framework, evidence at the trial stage does not belong to the Prosecution, instead composing part of the Case File for examination by the Chamber. In this context, a reference at this stage of the proceedings to the reliability of “prosecution evidence” would be misleading. Further, as noted above (See FN 36) the French version of Internal Rule 53(4) refers to inculpatory evidence and not the broader category of prosecution evidence. This supports the Chamber’s interpretation of the scope of the disclosure obligation.

<sup>57</sup> T. 10 August 2015, p. 15; Co-Prosecutors’ Response, paras 18-19.

<sup>58</sup> See *Oric* Decision, para. 20 (“The jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of Rule 68 Material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal. The determination of what material might fall within the limits of Rule 68 of the Rules is a fact-based judgement made by and under the responsibility of the Prosecution. It is this Trial Chamber’s firm opinion that in view of the imperative to provide a fair trial to an accused, considerations of fairness must be the overriding factor in making that determination.”); *Prosecutor v Kordic & Cerkez*, ICTY Appeals Chamber, IT-95-14/2-A, Judgement, 17 December 2004, para. 183; *Prosecutor v Kamuhanda*, ICTR Appeals Chamber, ICTR-99-54A-R68), Decision on Motion for Disclosure, 4 March 2010, para. 14.

#### 4.2.2. *Statements of Individuals Called to Testify*

25. The Chamber recalls its finding that consideration of the prior statements of witnesses called to testify assists in evaluating their credibility.<sup>59</sup> It is in the interests of ascertaining the truth that the Chamber and parties have access to all of the statements of witnesses and Civil Parties who will be heard in Case 002/02.<sup>60</sup> Further, these documents should be put before the Chamber to permit a complete assessment of their testimony.

26. As in Case 002/01,<sup>61</sup> the Chamber has adopted a phased approach to determining which witnesses, Civil Parties and experts will testify on a particular topic. This is done for a variety of reasons, including the unpredictability of whether witnesses contacted at the beginning of trial will be available to testify on a date far in the future and the limited resources of the Witness and Expert Support Unit to contact every proposed individual. The Chamber has generally provided the parties with at least four weeks' notice of the list of witnesses, Civil Parties and experts it intends to hear on a trial topic. The Chamber considers this sufficient time for the parties to prepare for the examination of witnesses in view of their participation during the pre-trial phase of this case. Providing at this time a comprehensive list of witnesses, Civil Parties and experts is impracticable and unnecessary to the proper administration of these proceedings.

27. Given the Chamber's phased approach to selecting witnesses, it is not possible at this time for the Co-Prosecutors to identify the Case 003 and 004 statements of all individuals who will testify in this case. Therefore, in order to ensure the parties have access to all statements of individuals who will testify sufficiently in advance of their testimony, Case 003 and 004 statements of those *proposed* to testify should also be disclosed, as the Chamber's decisions to call individuals to testify is based primarily on these proposals.<sup>62</sup> The Chamber considers this approach reasonably limits the number of statements to be disclosed while

<sup>59</sup> TC Disclosure Decision; *See also*, Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02, E319/14/2, para. 5 (ordering the disclosure of Civil Party Applications of "individuals who have been heard or are likely to be heard in Case 002/02").

<sup>60</sup> *See e.g.*, Internal Rules 60 and 87(4).

<sup>61</sup> Final Decision on Witnesses, Experts and Civil Parties to Be Heard in Case 002/01, E312, 7 August 2014 ("Witness Decision"), paras 29, 123-125.

<sup>62</sup> The list of witnesses, Civil Parties and experts proposed to testify is comprised of the initial lists filed by the parties pursuant to E305 (265 individuals) and those later proposed in Internal Rule 87(4) requests in Case 002/02 (approximately 40 individuals to date). *See* E305/15.1. Considering the parties have been notified of 76 individuals who will testify in Case 002/02, the remaining number of individuals that may testify in this case is relatively limited.

providing the Defence adequate notice of such statements prior to hearing the testimony in question.

#### **4.3. Admission of New Evidence**

28. As the Internal Rules make clear, evidence that arises after the investigative phase may be admitted at trial if it fulfils the requirements of Internal Rule 87(4). The Co-Prosecutors as well as both Defence teams have availed themselves of this opportunity in Case 002/02.<sup>63</sup> Although the Co-Prosecutors' duty to disclose is limited to exculpatory information, they may also seek the admission of new evidence which they consider to be conducive to ascertaining the truth, including inculpatory evidence from Cases 003 and 004 or other sources.

29. In order for this new evidence to be accepted by the Chamber, however, the Co-Prosecutors, as any moving party, must meet the specific requirements of Internal Rule 87(4) by filing a separate reasoned submission. They must show that the proposed evidence meets the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). They must also satisfy the Chamber that the evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence.<sup>64</sup>

30. On an exceptional basis, evidence not meeting these criteria may nonetheless be admitted where the Co-Prosecutors show that the evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated

<sup>63</sup> See Decision on Khieu Samphan Rule 87(4) Request to Admit Documents in respect of Witness THET Sambath, E335/5, 15 June 2015 (granted); Decision on KHIEU Samphan's Request Pursuant to Internal Rule 87(4) to Admit New Documents to Case 002/02, E347/1, 30 June 2015 (granted in part); Decision on NUON Chea's rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30/1, 21 September 2015 (admitting seven documents disclosed by the Co-Prosecutors from Case 004).

<sup>64</sup> Evidence from the confidential investigations in Cases 003 and 004 is unavailable for the purposes of Internal Rule 87(4) until the Office of the Co-Investigating Judges authorises the Co-Prosecutors to provide it to the parties in Case 002/02. See Internal Rules 56(1) and 35(a); See also, Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, E319/7, 24 December 2014, para. 10; Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre Pursuant to Rules 87(3) and 87(4), E319/11/1, Confidential, 26 February 2015, para. 4; Decision on International Co-Prosecutor's Request Pursuant to Rules 87(3) and 87(4) to Admit Documents and to Hear an Additional Trial Witness Relating to the Tram Kak District/ Kraing Ta Chan Segment of Case 002/02, E319/17/1, paras 4-5; Decision on International Co-Prosecutor's Request to Admit Statements Pursuant to Rules 87(3) and 87(4), E319/22/1, 17 July 2015, para. 3; Cf. Decision on NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30/1, 15 September 2015, para. 3 (by contrast, the starting point to assess the due diligence of other parties who seek to admit such documents is the date when the documents are provided to them by the Co-Prosecutors).

together; where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice; or where the other parties do not object to the evidence.<sup>65</sup>

#### **4.4. Assessment of Co-Prosecutors' Disclosures**

31. As explained above, the Co-Prosecutors must disclose exculpatory evidence and evidence of the statements of individuals who have testified or will testify in this case. The Chamber considers that by including in their Case 003 and 004 disclosures any evidence that is relevant to Case 002/02, including evidence that is inculpatory, the Co-Prosecutors' have applied an overly broad interpretation of Internal Rule 53(4). Nonetheless, the duty of disclosure sets a minimum standard designed to guarantee the fair trial rights of the Accused. Disclosure of additional materials does not in itself constitute a violation of the Accused's rights, even in cases where a large quantity of materials are provided, so long as other accommodations are made.<sup>66</sup>

32. In this regard the Chamber reminds the parties that disclosed documents are not admitted by the simple fact of being made available to the other parties. The Trial Chamber cannot rely on them for the purposes of making any decision or in its verdict until they have been found admissible and put before the Chamber pursuant to Internal Rule 87.<sup>67</sup> This factor reduces significantly the harm allegedly suffered by the KHIEU Samphan Defence because of the disclosure.

33. The Chamber further notes that the NUON Chea Defence, which has sought additional disclosure from Cases 003 and 004 and the admission of statements from those cases in Case 002/02,<sup>68</sup> might be prejudiced if the Chamber were to be overly restrictive in its approach. Indeed, where disclosure violations are alleged at other international tribunals, these generally arise where the Defence considers that evidence has been unfairly withheld.<sup>69</sup> The Accused

<sup>65</sup> Decision on Co-Prosecutors' Request To Correct and Supplement Documents Relating to Sector 5 Mobile Chief Ta Val and Sector 5 Secretary Heng Rin, E357/1, 30 September 2015, para. 2; Response to the Internal Rule 87 (4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1), E276/2, 10 April 2013, para. 3.

<sup>66</sup> See *infra*, note 72.

<sup>67</sup> Internal Rules 87(2) and 87(4); *NUON Chea and KHIEU Samphan*, Case 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, E313, 7 August 2014, para. 23; *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Case 001 Judgement, E188, 3 August 2010, para. 38.

<sup>68</sup> SCC Decision; NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30, 24 August 2015.

<sup>69</sup> See e.g., *Prosecutor v. Kamuhanda*, ICTR Appeals Chamber, ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14; *Ngirabatware v. Prosecutor*, MICT Appeals Chamber, MICT-12-29-A,

are within their rights to pursue their own unique defence strategies, but the Chamber must be cognisant of preserving the rights of both Accused as well as the other parties.

34. The fact remains that the addition of a very significant amount of material in this case which the parties may seek to admit, raises legitimate concerns as to how to guarantee adequate time and facilities for the preparation of the defence while preventing any undue delay to the completion of the trial proceedings. Considering these issues, the Chamber sets out below two directives to create more legal certainty as to which documents will be relied upon by the Co-Prosecutors and to ensure that Case 003 and 004 evidence is provided to the Defence through the appropriate mechanism in future.

#### 4.4.1. *Directive for Prior Disclosures*

35. The Chamber first considers it appropriate to impose a deadline by which the Co-Prosecutors must take action where they seek to rely on prior disclosures. If the Co-Prosecutors intend to rely on any information disclosed in filings made from 17 October 2014 to 29 September 2015 (i.e. E319 through E319/33), they shall file an Internal Rule 87(4) motion by 30 January 2016. As always, the Defence and Civil Parties will have an opportunity to respond prior to the Chamber ruling on the request. The Chamber considers that this provides the Co-Prosecutors an adequate opportunity to seek admission of evidence which is conducive to ascertaining the truth, while providing the Defence sufficient notice and opportunity to respond to any new evidence, thereby protecting the fair trial rights of the Accused. It does not consider it necessary for the purposes of ascertaining the truth to also require the Co-Prosecutors to review all prior disclosures to determine whether certain information may not strictly meet the definition of exculpatory evidence. Such is likely to increase, rather than reduce, the workload of the Defence as well as the other parties.

#### 4.4.2. *Directive for Future Disclosures*

36. The Co-Prosecutors indicate that most of the Case 003 and 004 statements that they consider relevant have already been disclosed to the parties. Nonetheless, due to the continuing investigations in those cases, additional statements will continue to be disclosed.<sup>70</sup>

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Decision on Ngirabatware's Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014, para. 6, 18; *Lubanga* Decision, paras. 91, 92(ii).

<sup>70</sup> T. 10 August 2015, pp. 27-28 ("We're receiving three to five - certainly under 10 - statements every week from the Co-Investigating Judges").

For the reasons above, the Co-Prosecutors must adhere to the disclosure guidelines set forth in this decision and limit all future disclosures to exculpatory materials and the statements of individuals who have testified or who are proposed to testify.<sup>71</sup> If the Co-Prosecutors intend to seek the admission of Case 003 and 004 materials which do not fit within these categories, admission must be sought pursuant to Internal Rule 87(4), attaching the proposed documents. The Chamber understands that some documents may contain both inculpatory and exculpatory information and shall rely on the Co-Prosecutors' discretion, acting in good faith, to determine for which documents admission should be sought directly, pursuant to Internal Rule 87(4). Untimely Internal Rule 87(4) requests will be rejected.

#### **4.5. Further Fair Trial Remedies in view of Size of Disclosures**

37. The Chamber recognises that the disclosures of Cases 003 and 004 documents in Case 002/02 constitute a sizable number of pages. This is not, however, an unprecedented situation in an international criminal trial of this magnitude.<sup>72</sup> Further, only 147 documents from Cases 003 and 004 have been admitted upon motion of the Co-Prosecutors (as well as 7 documents admitted upon motion by the NUON Chea Defence).<sup>73</sup> The disclosures themselves, though significant, amount to 2% of the Case 002/02 Case File provided to the parties over the course of 10 months. The fact that additional relevant documents are admitted during the trial phase does not signify that the Case 002 investigation was deficient or failed to meet the required

<sup>71</sup> See Section 4.2.1.

<sup>72</sup> See e.g., *Prosecutor v. Radovan Karadžić*, ICTY Trial Chamber, IT-95-5/18-T, Decision on Accused's Motion for Fourth Suspension of Proceedings, 16 February 2011, paras 1, 12-13 (where prosecution disclosed potentially exculpatory material totaling an estimated 32,000 pages, Chamber ordered six week adjournment); *Prosecutor v. Radovan Karadžić*, ICTY Trial Chamber, IT-95-5/18-T, Decision on Accused's Motion for Fifth Suspension of Proceedings, 17 March 2011, para. 9 (where prosecution disclosed further potentially exculpatory material totaling an estimated 20,000 pages, Chamber ordered further two week adjournment); *Prosecutor v. Radovan Karadžić*, ICTY Trial Chamber, IT-95-5/18-T, Decision on Accused's Twenty-Ninth Disclosure Violation Motion, 11 January 2011, para. 14 ("The Chamber is also satisfied that the Accused and his team can conduct and complete their review of this batch of documents with a total length of 648-pages on a rolling basis and incorporate them if necessary into his ongoing trial preparation without the need for a further suspension of the proceedings.")

<sup>73</sup> Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, E319/7, 24 December 2014; Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre Pursuant to Rules 87(3) and 87(4) – Confidential, E319/11/1, 26 February 2015; Decision on International Co-Prosecutor's Request to Admit Statements Pursuant to Rules 87(3) and 87(4), E319/22/1, 17 July 2015; Decision on NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30/1, 21 September 2015; The Chamber notes that it remains seised of the Co-Prosecutors' motion to admit an additional 25 statements disclosed from Cases 003 and 004. See International Co-Prosecutor's Request to Admit Written Records of Interview Relating to Treatment of Cham Pursuant to Rules 87(3) & 87(4), E319/32, 28 September 2015.



standard as contended by the Defence.<sup>74</sup> Rather, it recognises the practical reality that despite the issuance of a Closing Order, new evidence may come available that is conducive to ascertaining the truth.

38. Noting the time required to read and analyse a large quantity of newly-disclosed documents, the Chamber has taken steps to ease this burden. It has adjourned proceedings for a total of 4.5 weeks to permit parties to review disclosures and has indicated a willingness to grant further adjournments.<sup>75</sup> Where appropriate, it has delayed the hearing of particular witnesses or Civil Parties and informed the parties that witnesses may be recalled if good reason is shown to do so.<sup>76</sup> It has also issued guidelines restricting the scope for disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02.<sup>77</sup> Furthermore, upon learning that the Defence were in need of additional resources, the Chamber has contacted the Office of Administration which has pledged to identify additional financial resources as warranted by the disclosure process.<sup>78</sup> The Chamber therefore directs the Defence teams to contact the Defence Support Section if they consider further resources are required.<sup>79</sup>

39. More recently, the size of the disclosures coupled with the need for the Defence teams to simultaneously prepare for the Appeals Hearings in Case 002/01 necessitated additional time for the Defence teams to review disclosures whilst the hearings were not in session. The Chamber accordingly adjourned the hearings of 21-24 September.

40. Although the Defence initially requested additional time to review disclosures,<sup>80</sup> it does not specify any amount of time required to do so, and in its Reply clarifies that it does not seek any adjournment at this time as they wait for the Chamber ruling on the validity of the

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<sup>74</sup> KHIEU Samphan Defence Reply, para. 19.

<sup>75</sup> Email from Trial Chamber Senior Legal Officer to parties, 16 October 2014, E363/3.1; Email from Trial Chamber Legal Officer to parties, 17 February 2015, E363/3.2; T. 19 March 2015, pp. 38-40; T. 27 July 2015, pp. 30-32.

<sup>76</sup> *See e.g.*, T. 27 July 2015, pp. 30-32.

<sup>77</sup> Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02, E319/14/2, 24 August 2015. Civil Party Applications must be distinguished from Written Records of Interview in that the latter are taken by a judicial entity, are presumed to be relevant and reliable, and may contain both exculpatory and inculpatory information.

<sup>78</sup> Request for clarification on additional resources for Defence teams in Case 002/02, E369, 23 September 2015; Response from the Office of Administration concerning the request for clarification on additional resources for Defence teams in Case 002/02, E369/1, 29 September 2015.

<sup>79</sup> Request for clarification on additional resources for Defence teams in Case 002/02, E369/2, 1 October 2015.

<sup>80</sup> KHIEU Samphan Request, para. 48.

disclosure practice.<sup>81</sup> The Chamber notes that it will address future requests for adjournment based on the totality of circumstances.

41. As to the Defence's alternative request for relief to stay the proceedings until the Closing Orders are issued in Cases 003 and 004, the Chamber considers that a stay of proceedings would run counter to the fair and efficient completion of this case and would violate the right of the Accused to a speedy trial. The Chamber therefore does not consider it to be in the interests of justice.<sup>82</sup>

42. Finally, the Defence request to institute Internal Rule 35 proceedings against the Co-Prosecutor is raised for the first time in its reply and is entirely unreasoned. No substantive argument has been provided to support the allegation that the disclosure was a deliberate attempt of the Co-Prosecutors to interfere with the administration of justice or to bury the Defence under an unmanageable volume of evidence. It is therefore rejected.

#### **FOR THE FOREGOING REASONS, THE TRIAL CHAMBER**

**FINDS** that the Co-Prosecutors have a continuing obligation to disclose to the Defence exculpatory evidence comprised of any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of the inculpatory evidence;

**DIRECTS** the Co-Prosecutors to disclose to the Chamber and the parties exculpatory evidence from Cases 003 and 004 on a continuing basis until the completion of Case 002/02;

**FURTHER DIRECTS** the Co-Prosecutors to disclose to the Chamber and the parties, the Case 003 and 004 statements of all individuals who have been proposed to testify in Case 002/02 as defined in footnote 62;

**RECALLS** that the Co-Prosecutors and other parties may seek the admission of any new evidence from Cases 003 and 004 that they consider to be conducive to ascertaining the truth;

**DIRECTS** the Co-Prosecutors to seek the admission of any Case 003 and 004 materials disclosed to date in Case 002/02 and upon which they intend to rely, through (a) reasoned application(s) pursuant to Internal Rule 87(4) by 30 January 2016 at latest;

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<sup>81</sup> KHIEU Samphan Defence Reply, para. 28.

<sup>82</sup> Cf. *Prosecutor v Karemera et al*, ICTR Trial Chamber, ICTR-98-44-T, Decision on Joseph Nzirorera's 13th, 14th and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi and Tharcisse Renzaho, 18 February 2009, para. 31 ("Although the Prosecution has committed three new disclosure violations, the Chamber does not find that a stay of the proceedings until all Rule 68 material is disclosed is an appropriate remedy. The Prosecution has a continuous obligation to disclose exculpatory material under Rule 68(A) because it is understood that such material may appear as the trial proceeds. The Chamber considers that it would be impractical to impose an indefinite stay of the proceedings until all Rule 68 material is disclosed.").

**FURTHER DIRECTS** that all future requests to adduce from Case 003 and 004 materials that are neither exculpatory nor the statements of individuals who have testified or are proposed to testify in Case 002/02, be notified to the Chamber and the parties through reasoned applications pursuant to Internal Rule 87(4);

**RESERVES** ruling on whether future reasoned requests for adjournments to the proceedings to review disclosures are merited; and

**REJECTS** the remainder of the KHIEU Samphan request.

Phnom Penh, 22 October 2015  
President of the Trial Chamber

