

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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**JOINT REQUEST FOR A *DE NOVO* RULING ON THE APPLICATION OF RULE
87(4) IN CASE 002/02, AND A SUBMISSION REGARDING THE NON-
APPLICABILITY OF RULE 87(4) TO MATERIAL ALREADY ON THE CASE FILE**

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I. INTRODUCTION

1. The Co-Prosecutors and the Civil Party Lead Co-Lawyers (“the Parties”) respectfully request the Trial Chamber to: a) apply the Supreme Court Chamber’s decision of 29 July 2014 by considering *de novo* the application of Internal Rule 87(4) in the context of the upcoming trial in Case 002/02; and b) hold that all material already on the Case File as at the time of an initial hearing (including non-Case File material included by a party on its Rule 80 list) does not constitute “new material” within the meaning of Rule 87(4).
2. The request for a *de novo* ruling is made necessary by the recent Supreme Court Chamber decision on Khieu Samphan’s appeal against the Severance Order in Case 002/02, which decision clarified that the severance of Case 002 had the “procedural consequence” of creating “separate and distinct trials.” A ruling as to whether or not material on the Case File constitutes “new material” under Rule 87(4) is necessary in order for the Parties to understand which of their proposed evidentiary material in Case 002/02 will be considered “new evidence,” requiring a Rule 87(4) application. In particular, the Parties seek this ruling in order to comply with the Trial Chamber’s instruction to file Rule 87(4) motions for all documents which constitute “new evidence.”

II. PROCEDURAL HISTORY

3. The Parties incorporate by reference the procedural history set out in their 30 April 2014 request for a ruling on the application of Rule 87(4) in Case 002/02 (the “Rule 87(4) Motion”).¹ In the Rule 87(4) Motion, the Parties submitted that Cases 002/01 and 002/02 constitute separate trials. They argued that, under Rule 80 *bis* (1), a trial must start with an initial hearing, and that, in each trial, Rule 87(4) applies only to evidence proposed for admission after the relevant initial hearing.² The Parties were of the view that this interpretation was consistent with the Accused’s fair trials rights and would facilitate the ascertainment of the truth. They also submitted that requiring the Parties to make numerous 87(4) applications in relation to witnesses and documents not included in their

¹ E307 Parties’ Joint Request for Clarification Regarding the Application of Rule 87(4) In Case 002/02, 30 April 2014, paras. 4-5.

² Ibid, at paras. 7-8.

respective 2011 lists was of no benefit to any Party, and would unduly prolong the proceedings.³

4. The Trial Chamber responded to the Rule 87(4) Motion by a Memorandum dated 11 June 2014. The Chamber did not accept the above interpretation, ruling instead that: a) the “Case 002 trial” commenced with the 27 - 30 June 2011 Initial Hearing; b) proceedings in Case 002 were subsequently severed into “discrete cases;” c) the “first trial” aims to provide a foundation for further examination of the remaining charges in “later trials;” d) proceedings in Case 002/02 are nevertheless to be seen as part of a “whole case” where preliminary matters were dealt with at the opening of “the trial” in Case 002 in June 2011; and e) “the trial” in Case 002 commenced in June 2011 and procedural issues dealt with at that time concern all “subsequent trials.”⁴ The Chamber nevertheless reiterated that, as in the past, it may admit new evidence even if the evidence does not satisfy the requirements of Rule 87(4).⁵ The Chamber invited the Parties to file Rule 87(4) applications in respect of individuals not included in their initial 2011 lists.⁶
5. On 24 July 2014, the Nuon Chea Defence filed its list of new witnesses, civil parties and experts for Case 002/02.⁷ On 28 July 2014 the Co-Prosecutors filed their Rule 87(4) motion regarding newly proposed trial witnesses.⁸ On 29 July the Civil Party Lead Co-Lawyers filed their Rule 87(4) motion regarding oral testimony, documents and exhibits related to witnesses, experts and civil parties proposed to testify in Case 002/02.⁹ The Further Initial Hearing in Case 002/02 was held on 30 July 2014.¹⁰
6. On 29 July 2014, the Supreme Court Chamber rendered its decision on Khieu Samphan Defence’s appeal against the Trial Chamber’s decision on further severance of Case 002, and scope of Case 002/02¹¹ (the “Supreme Court Decision”).

³ Ibid, at paras 9-11.

⁴ **E307/1** Trial Chamber Memorandum entitled Decision on Parties’ Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists of Evidence (E305/4), 11 June 2014, at para. 2.

⁵ Ibid, para. 3.

⁶ Ibid, para. 5.

⁷ **E307/4** New Witness, Civil Party and Expert List for Case 002/02, 24 July 2014.

⁸ **E307/3/2** Co-Prosecutors’ Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, 28 July 2014.

⁹ **E307/6** Civil Party Lead Co-Lawyers’ Rule 87(4) Request to Admit into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, 29 July 2014.

¹⁰ **E1/240.1** Transcript of Proceedings – Initial Hearing, 30 July 2014.

¹¹ **E301/9/1/1/3** Decision on Khieu Samphan’s Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014.

III. REQUEST FOR A RECONSIDERATION OF THE RULING ON THE APPLICATION OF RULE 87(4)

III.A. Legal Basis for the Request

7. The Pre-Trial Chamber has held that the ECCC Chambers have an inherent discretionary power to reconsider their prior decisions where there is a “legitimate basis” to do so,¹² including where there has been a change of circumstances¹³ and “where it is realised that the previous decision was erroneous or that it has caused an injustice.”¹⁴ The Supreme Court Chamber has held that the Trial Chamber may reconsider its case management decisions “as long as doing so does not run against the interests of justice.”¹⁵
8. The Trial Chamber has ruled that, since the Internal Rules do not provide for reconsideration of decisions, it will not entertain such requests.¹⁶ The Chamber has, nevertheless, recognised that the occurrence of new facts or circumstances after a decision is rendered may warrant a *de novo* consideration of an issue addressed in the decision.¹⁷ The Parties submit that the Supreme Court Decision represents a new circumstance that has arisen since the Trial Chamber’s 11 June 2014 decision because it clarifies and develops the principles that govern the application of Internal Rule 87(4).

¹² **C22/I/68** Decision on Application for Reconsideration of Civil Party's Application to Address the Pre-Trial Chamber in Person, 28 August 2008, at para. 25.

¹³ **D99/3/41** Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008, at para 6.

¹⁴ **C22/I/68** Decision on Application for Reconsideration of Civil Party's Application to Address the Pre-Trial Chamber in Person, 28 August 2008, at para. 25, citing *Prosecutor v. Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13, and *Prosecutor v Mucic et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para. 49.

¹⁵ **E284/2/1/2** Decision on Co-Prosecutors' Request For Clarification, 26 June 2013, at para. 8 (dealing with the issue of reopening of proceedings).

¹⁶ **E312** Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, 7 August 2014, at para 39.

¹⁷ **E313** Judgment, Case 002/01, 7 August 2014, at para. 42 [“The Accused allege no new facts or circumstances arising since these decisions were issued and their requests, which amount to requests for reconsideration of these prior decisions, are therefore inadmissible.”]; see also paras. 43 and 44, and footnote 2154 [“The Chamber notes that the IENG Sary Defence repeats previous arguments before the Pre-Trial and Trial Chambers that JCE I and II did not exist in customary international law by 1975 and alleges no new facts or circumstances arising since decisions were made on these prior submissions... This request for reconsideration is therefore inadmissible.”]; **E312** Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, 7 August 2014, at para 38 [Stating, in relation to a request for reconsideration regarding Civil Party Sar Sarin “The Chamber rejected the OCP request, ruling that even if considered a fresh application, the Co-Prosecutors did not allege any new circumstances.” (emphasis added)]; See also **E127/4** Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, at para. 2 and the Dispositive [The Chamber refusing the request for reconsideration on merits, and not on the basis that it was inadmissible].

III.B. Impact of the Supreme Court Decision on Rule 87(4)

9. As set out in Section II above, in its 11 June 2014 Memorandum, the Trial Chamber determined that, although the severance of Case 002 had the effect of separating the proceedings into discrete cases, these cases are part of the “whole trial” or “whole case,” and procedural steps (such as submission of witness and document lists) taken prior to the June 2011 Initial Hearing in Case 002 apply to all subsequent proceedings. As a consequence of that ruling, in Case 002/02, Rule 87(4) is applied to all witnesses and documents the Parties proposed after that Initial Hearing.
10. The Parties submit that the Chamber must consider this issue *de novo* in light of the Supreme Court Decision. The Supreme Court Chamber noted that there is a need for a clarification of the nature of severance,¹⁸ and provided important guidance to both the Trial Chamber and the Parties. The Supreme Court Chamber held unequivocally that severance creates separate and distinct cases, and that, following severance, each case is subject to separate procedures. This holding is not consistent with the logic of the Trial Chamber’s previous ruling on the Parties’ joint Rule 87(4) motion, which was premised on considering Case 002/02 as being part of the same trial as Case 002/01, which began with the Initial Hearing in 2011. Specifically, the Supreme Court Chamber held:
 - a. Pursuant to Rule 89ter, which governs the severance of proceedings, “severance denotes a separation (or split) of proceedings, consequent to which, instead of one criminal case, there are two or more criminal cases.”¹⁹
 - b. Severance determines the scope of each severed case.²⁰
 - c. The Trial Chamber’s pronouncements to the effect that severance creates separate and discrete trials are “in line with the nature of severance...which has the procedural consequence of creating separate and distinct trials.”²¹
 - d. The fact that there is a commonality of the evidence where a case is severed after the start of the trial does not change the effect of severance (*i.e.* the creation of separate cases / trials from that point).²²

¹⁸ **E301/9/1/1/3** Decision on Khieu Samphan's Immediate Appeal Against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, at para. 41.

¹⁹ Ibid, at para. 42 (emphasis added).

²⁰ Ibid, at para. 44.

²¹ Ibid, at para. 70 (emphasis added).

²² Ibid, para. 43; See also paragraph 76.

- e. A consequence of severance is 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.”²³
11. While noting linguistic differences which have accompanied various pronouncements on severance, the Supreme Court Chamber was unequivocal in its determination that the severance of a case under Rule 89*ter* results in the creation of separate and distinct cases.²⁴
 12. As noted above, the Supreme Court Chamber has ruled that the creation of separate cases requires a separate determination of the Parties’ procedural rights in each case. The Parties submit that this means that the procedural mechanism in Rules 80 and 87(4) applies separately in each trial. Each trial starts with an initial hearing which deals with the witnesses and documents that will be considered in that trial. The Further Initial Hearing on 29 July 2014 was the first hearing to consider witnesses and documents relevant to the charges to be heard in Case 02/02.
 13. In each trial, the Chamber may order the Parties to file lists of proposed witnesses and documentary evidence (as the Trial Chamber has done in Case 002/01²⁵ and Case 002/02²⁶). In each trial, Rule 87(4) imposes a higher threshold for the admission of evidence not proposed prior to the opening (initial hearing) of that trial. The fact that, where there is a commonality of parties, evidence admitted in one case may be transferred to another case does not change the legal effect of these provisions.
 14. The Parties also submit that, if left unchanged, the current interpretation of Rule 87(4) may result in uncertainty and delays, contrary to the overriding principles set out in Internal Rules 21(1) and 21(4). Moreover, if relevant evidence is excluded which “could have been a decisive factor” at trial, Internal Rule 108(7) obligates the Supreme Court Chamber to consider a request to admit that evidence on appeal. Therefore, the adoption of a narrow interpretation of Rule 87(4) would only prolong and complicate the proceedings and increase the chance that findings in the trial judgment are overturned.
 15. The Parties submit that the Supreme Court Decision, being a new circumstance occurring since the 11 June 2014 decision, requires a *de novo* ruling on the application of Rule

²³ Ibid, at para. 44 (emphasis added).

²⁴ Ibid, at para. 72. The Chamber also noted that the separate cases created by severance may be tried by different panels (at para. 45).

²⁵ E9 Order to File Material in Preparation for Trial, 17 January 2011.

²⁶ E305 Order to File Updated Material in Preparation for Trial in Case 002/02, 8 April 2014.

87(4) in Case 002/02. The only reasonable interpretation of the Rules in light of the Supreme Court Decision is that Rule 87(4) applies separately in respect of each trial. The Parties invite the Trial Chamber to so rule.

IV. REQUEST FOR A RULING THAT RULE 87(4) ONLY APPLIES TO EVIDENCE THAT IS NOT ON THE CASE FILE

16. The Parties note the Chamber's direction that Rule 87(4) motions should be made at the earliest possible opportunity.²⁷ As indicated in Section II, several motions have already been made in respect of newly proposed witnesses, civil parties and experts. The remaining motions to be filed relate primarily to documents. The Chamber's ruling on the instant request will have a significant effect on the scope (and therefore the number) of documents in respect of which Rule 87(4) motions will have to be made. This request is therefore made further to, and separately from, the request in Section III above.
17. The Parties submit that the Rule 87(4) reference to "new evidence" applies only to evidence that emerges after the start of a trial, that is documents which: a) were not on the Case File at the time of the relevant initial hearing; and b) were not otherwise included on a Party's Rule 80 list. When applied to witnesses and experts, Rule 87(4) applies to those individuals who: a) did not have a statement already placed on the Case File at the time of the relevant initial hearing; and b) were not otherwise included by any Party in a Rule 80 list of individuals proposed to testify at trial. This interpretation encourages parties to ensure that the Chamber and other parties have notice of evidence which might be used at trial, when it is possible to give such notice.
18. This interpretation follows from a reading of the plain language of the entirety of Rule 87. Specifically:
 - a. Rule 87(1) provides that unless otherwise provided in the rules, all evidence is admissible; Rule 87(3) governs the admission of "evidence from the case file," while Rule 87(4) provides additional rules for "new evidence" that is proposed for admission "[d]uring the trial." The reference to "new evidence" in Rule 87(4) is clearly a reference to material additional to that referred to in Rule 87(3) – that is material which was not on the Case File at the time of the opening of the trial.

²⁷ **E1/240.1** Transcript of Proceedings – Initial Hearing, 30 July 2014, at 11.22.54.

- b. Application of Rule 87(4) to evidence that is on the Case File at the time of the opening of the trial would lead to an absurd result: a requesting party could never demonstrate that such evidence was “not available before the opening of the trial.”²⁸ Such an interpretation could not have been intended by the drafters, especially when the language of Rule 80 is taken into account (see paragraph (c) immediately below). Moreover, such an interpretation would encourage parties to simply list all evidence and witnesses on the Case File in their Rule 80 lists, simply to preserve their rights to put such evidence forward.
- c. Rule 80 infers that Parties’ pre-trial witness and document lists are not final. This is clear from the wording of Sub-Rules 80(1), 80(3)(b) and 80(3)(d). Under these provisions, the Chamber may direct the Parties to submit lists of evidence which they “intend” to use at trial. These lists provide reasonable notice of evidence which each Party may rely upon, and facilitate effective trial preparation. However, the Rules clearly do not treat these lists as being conclusive, binding lists of Case File material which the Parties may use at trial.
19. The above interpretation is entirely consistent with the Trial Chamber’s previous pronouncements on the application of Rule 87(4). In Case 002/01, the Chamber drew a clear distinction between: a) evidence on the Case File (including evidence that is proposed by a Party in its Rule 80 list); and b) evidence which is proposed for the first time after the opening of the trial. The Chamber ruled that Rule 87(4) only applies to the latter category:

*Material which was not part of the Case File originally forwarded to the Trial Chamber may, under certain conditions, also be placed on the Case File and put before the Chamber, either on the Chamber's own initiative or at the request of a party. For instance, prior to the commencement of trial, parties may include on their document lists 'new' documents (i.e. those not already on the Case File at the time the Trial Chamber was seised of the case) pursuant to Internal Rule 80(3)(d). Once the trial has commenced, parties may also, by reasoned submission addressing the criteria in Internal Rule 87(4), seek to tender new evidence (i.e. that which was unavailable before the opening of the trial).*²⁹

20. In a separate ruling in Case 002/01, the Chamber similarly held:

All evidence not previously on the case file and/or not included on the parties' Internal Rule 80(3) lists constitutes new evidence subject to the heightened admissibility requirements of Internal Rule 87(4). A party must demonstrate, by reasoned submission, that new evidence was not available prior to the opening of the trial and/or could not

²⁸ Material that is on the Case File at the time of the opening of a trial is, by definition, “available” to both the Chamber and the Parties.

²⁹ E190 Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 17.

have been discovered and presented earlier with the exercise of reasonable diligence. New evidence must also be conducive to ascertaining the truth and meet the requirements of Internal Rule 87(3).³⁰

21. This interpretation is not only logical, but also in the interests of justice. It allows the admission of relevant evidence that is available and conducive to the ascertainment of the truth, while ensuring that all Parties have sufficient notice of such evidence to prepare for trial. All Parties have had access to documents that were placed on the Case File by the Co-Investigating Judges for several years. Subject to compliance with Rule 87(3) requirements, and the general requirement of reasonable notice, no Party is prejudiced by the admission of such evidence. Moreover, the fact that no Party would be prejudiced by such an interpretation of Rule 87(4) is demonstrated by the fact that all Parties joined in the Rule 87(4) Motion.
22. For the reasons set out above, the Parties respectfully request the Trial Chamber to:
- a. Consider *de novo* the application of Rule 87(4) in Case 002/02, and rule that, consequent upon the Supreme Court Decision, this Rule will apply only to materials proposed for admission after the 30 July 2014 Further Initial Hearing; and
 - b. Confirm that the words “new evidence” in Rule 87(4) refer to evidence which was neither on the Case File nor on a Party’s Rule 80 list.

Respectfully submitted,

Name	Signature	Date
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³⁰ E299 Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, para. 22.