

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

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**INFORMATION AND CLARIFICATION REGARDING THE DISCLOSURE
PROCESS IN CASE 002/002 IN THE CONTEXT OF THE ONGOING
INVESTIGATIONS IN CASES 003 AND 004**

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I. Introduction

1. In the interests of clarity and transparency, the International Co-Prosecutor (“the Co-Prosecutor”) provides the following information regarding the ongoing disclosure practices of the Office of the Co-Prosecutors of Case 003 and 004 documents into Case 002.¹ The Co-Prosecutor notes that this filing is part of an ongoing effort to keep the Trial Chamber and parties apprised of the disclosure process.

II. Summary of Information Previously Provided

2. The Co-Prosecutors have consistently brought to all parties’ attention the fact that because of the overlap between ongoing OCIJ investigations and the facts of Case 002/02, substantial disclosures will be forthcoming. In a 13 June 2014 Rule 80(3) trial document filing in Case 002, the Co-Prosecutors explained that the proposed document list excluded “267 statements by witnesses and Civil Parties in Cases 003 and 004, whose evidence has come to the attention of the Co-Prosecutors solely through interviews conducted by the Co-Investigating Judges” since permission to disclose those documents had been denied by the Office of the Co-Investigating Judges at that point.²
3. On 28 July 2014, in a Rule 87(4) motion regarding proposed trial witnesses in Case 002/02, the Co-Prosecutors noted that at least 13 of their proposed witnesses were chosen on the basis of new evidence or interviews on the Case 003 or 004 Case Files that they had not yet been permitted to disclose, although they had been given permission by the International Co-Investigating Judge to summarize the contents of some of that new information at that point.³
4. The volume of the forthcoming disclosures was again highlighted by the Co-Prosecutors at the Case 002/02 Trial Management Meeting on 21 October 2014, where an Assistant Co-Prosecutor stated: “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.”⁴ He continued:

*... 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 subject of purges. **So, this will be***

¹ The intention to file such a submission was advised to the Trial Chamber Senior Legal Officer and the parties by email from the OCP on 16 February 2015.

² E305/13 Co-Prosecutors’ Rule 80(3) Trial Document List, 13 June 2014, at paras. 8-9.

³ E307/3/2 Co-Prosecutors’ Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, 28 July 2014, at paras. 19-22.

⁴ E1/243.1 Transcript, at 10.20.58 (Closed Session).

*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.*⁵

5. Mindful of the importance of keeping the Chamber and the parties apprised of disclosure matters, the Co-Prosecutor has promptly informed the Chamber and the parties of of OCIJ decisions on his requests for leave to disclose.⁶
6. The Co-Prosecutor now summarizes the information provided to date and provides additional information regarding the mechanics of the disclosure process, the size of pending requests, and, to the extent he is able to do so, the possible impact of disclosure issues on upcoming trial segments.

III. Method of Disclosure

7. As the Case 003 and Case 004 investigations proceed, the OCIJ regularly places new documents on the Case 003 and Case 004 case files. Once notified of these documents, the Co-Prosecutor reviews them to determine whether they are subject to disclosure obligations. He then submits requests to the OCIJ for leave to disclose any statements that he has identified as being subject to disclosure to the Case 002/02 Trial Chamber and parties. He also indicates to the OCIJ the relative urgency of each document, with priority placed on documents that (i) are relevant to earlier segments of the Case 002/02 trial; (ii) contain evidence of the acts and conduct of the accused, or (iii) fall within categories of evidence that Nuon Chea has argued to the Supreme Court Chamber are exculpatory regarding his appeal from the Judgement in Case 002/01.⁷ Whenever the Co-Prosecutor receives permission from the OCIJ to disclose documents in Case 002 (which sometimes is only allowed in redacted form), the Co-Prosecutor files a motion to the Trial Chamber disclosing those documents and provides hard copies of the disclosed documents to the parties in keeping with the restrictions imposed on documents permitted to be disclosed thus far by the International Co-Investigating Judge. These restrictions remain in place until the investigations in Cases 003 and 004 conclude, or until such a time as the OCIJ lifts them.

⁵ E1/243.1 Transcript, at 10.20.58 (Closed Session) (emphasis added).

⁶ See, e.g. E319/8 International Co-Prosecutor's Disclosure of Statements from Case File 004 Relevant to 1st Segment of Case 002/02 Trial, 22 January 2015; E319/12 International Co-Prosecutor's Disclosure of Documents from Case 004 Relevant to Case 002.

⁷ F2/4 Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 25 November 2014, para. 33. While the Co-Prosecutor does not agree that the categories defined by the Nuon Chea Defence have exculpatory relevance to the Case 002/01 appeal, the Co-Prosecutor requested the ICIJ to give priority consideration to the disclosure of these documents so the Nuon Chea Defence would have the chance to review them for purposes of their appeal.

IV. Current Status of Disclosure

8. As of this filing, the Co-Prosecutor has disclosed all of the documents which the Office of the Co-Investigating Judges has approved for disclosure. There is one audio file that has been approved for disclosure but that the Co-Prosecutor has not yet disclosed because he is awaiting further instruction from the OCIJ regarding the permissible method to disclose the file. The OCIJ remains seized of requests for leave to disclose approximately 190 documents.
9. The investigations in Cases 003 and 004 are ongoing, and additional statements and other documents are added on a weekly basis to the case files, in recent months at the rate of approximately 30 statements per month. As to the rate at which statements and documents will be added in the future the Co-Prosecutor does not have this information due to the confidentiality of the investigation nor can the Co-Prosecutor indicate the topics that will be covered in those statements and consequently the proportion of the future documents that will be subject to disclosure to Case 002/002 in the future.

(a) Documents Relevant to Trial Segment Two (the worksites)

10. Of the 190 documents subject to pending requests with the OCIJ, approximately 65 documents relate to the worksites that will be the subject of the second segment of the trial in Case 002/02, with the vast majority relating specifically to the Trapeang Thma Dam worksite. The Co-Prosecutor's first request for leave to disclose a portion of these documents (the 47 that had been placed on the Case 004 case file at that time) was made on 1 May 2014.⁸ On 15 December 2014, the Co-Prosecutor renewed his request for disclosure of these documents, added a request for documents relevant to this segment that had been placed on the case file in the interim, and requested that disclosure of these documents be considered as an "urgent priority".⁹

(b) Documents Relevant Beyond Trial Segment Two

11. Of the 190 documents pending authorization to disclose there are also statements concerning a number of crime sites and charges in later trial segments, as well as a significant number of statements regarding internal purges. There is also a small number of statements that are of significant importance regarding the treatment of the Cham people. Due to the inclusion of forced marriage as part of the Case 003 and Case 004

⁸ Case 004-D193 International Co-Prosecutor's Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial, 1 May 2014.

⁹ Case 004-D193/7 International Co-Prosecutor's Request to Disclose Case 004 Interviews Relevant to the Case 002/02 Trial and Case 002/01 Appeal, 15 December 2014, para. 1.

investigations,¹⁰ it is expected that a high percentage of the interviews that will be conducted by OCIJ until the completion of its investigations will contain at least some information on that subject and thus be subject to disclosure.

V. Implications of Disclosure

12. The Trial Chamber recently observed that managing the ongoing disclosure process presents a challenge to ensuring a fair and expeditious trial.¹¹ In meeting this challenge the Co-Prosecutor is committed to ensuring a fair trial and is cognizant of the Defence's right to adequate time for preparation of their case. At the same time, the Co-Prosecutor is mindful of the obligation to ensure an expeditious trial. The current situation in which investigations are ongoing and potentially impact on a trial in progress is not unique in international criminal law cases. While always a challenge, the great majority of the international trials completed to date at the ICTY, ICTR, SCSL, ICC and ECCC have continued and been completed under similar circumstances.
13. Despite its challenges, the Co-Prosecutors are confident that the disclosure process can be managed in a way that ensures that both the interests of fairness and expeditiousness are protected. By actively managing the witness schedule (as it has so far), the Chamber will be able to tailor a solution that fully secures the Accuseds' right to a fair trial without unduly delaying the necessary progress of the trial. Given the prominence of the Trapeang Thma Dam worksite in the statements for which requests for leave to disclose are pending, the Chamber may wish to consider adjusting the schedule for hearing testimony related to that worksite.

¹⁰ International Co-Prosecutor requests investigation of alleged sexual and gender-based violence in Case 004, 24 April 2014, <http://www.eccc.gov.kh/en/articles/international-co-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence> (accessed 20 February 2015).

¹¹ 17 Feb 2015 Draft Transcript, 13:47:48.

VI. Conclusion

14. The Co-Prosecutor hopes that this information assists the Chamber and the Parties in dealing with the issue of disclosure of relevant information arising out of ongoing investigations. The Co-Prosecutor stands ready to provide any additional information the Chamber may require.

Respectfully submitted,

Date	Name	Place	Signature
23 February 2015	Nicholas KOUMJIAN Co-Prosecutor	Phnom Penh	