

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

FILING DETAILS

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**NUON CHEA'S MOTION IN RELATION TO DISCLOSURES FROM CASES 003 AND
004 AND RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S FILING
PROVIDING INFORMATION IN THIS REGARD**

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I. INTRODUCTION

1. On 23 February 2015, the International Co-Prosecutor submitted a filing to this Chamber providing information in relation to his ongoing disclosure into Case 002 of statements from Cases 003 and 004.¹ The Co-Prosecutor echoed the Trial Chamber² in acknowledging that the disclosures “present[] a *challenge* to ensuring a *fair and expeditious trial*”³ but failed to elaborate on the nature of that challenge. In the view of the Co-Lawyers for Mr. Nuon Chea (the “Defence”), this additional explanation is critical. Not only will it enable the Chamber to firmly grasp the situation when determining the appropriate way forward, but it will ensure that the record adequately reflects the extreme difficulties that the disclosures now present to the Defence and to the Case 002/02 trial generally.
2. Accordingly, pursuant to Rule 92, the Defence submits this motion in relation to the disclosure of documents from Cases 003 and 004 providing additional information concerning the challenges posed and grave concerns raised by the ongoing disclosure of documents from Cases 003 and 004 and making various requests in this regard. This motion also serves as a response to the International Co-Prosecutor’s filing Article 8.3 of the Practice Direction on the Disclosure of Documents.

II. ADDITIONAL INFORMATION PROVIDED BY THE DEFENCE

A. Disclosures Received to Date

3. Since 4 November 2014,⁴ the International Co-Prosecutor has, without the apparent approval of his National Co-Prosecutor, disclosed to the Defence 155 witness and civil party statements from Cases 003 and 004. The statements were disclosed with the permission of the International Co-Investigating Judge on the basis of their apparent relevance to Case 002/02. Thus far, they have totalled 2,838 pages in English alone. The majority of statements were delivered in the last two weeks, with the most recent batch received only on Tuesday, 3 March 2015. According to the International Co-

¹ E319/14, ‘Information and Clarification Regarding the Disclosure Process in Case 002/02 in the Context of the Ongoing Investigations in Cases 003 and 004’, 23 Feb 2015 (“International Co-Prosecutor’s Disclosure Clarification”).

² During trial proceedings on 17 February 2015, Judge Fenz described the situation as being about “managing a difficult situation in a way that ensures a *fair and expeditious trial*” (emphasis added): see E1/264.1, ‘Transcript of Proceedings – Public’, 17 Feb 2015, p. 51, ln. 16.

³ E319/14, International Co-Prosecutor’s Disclosure Clarification, para. 12.

⁴ E319/4, ‘Notice of Nuon Chea Acceptance of Documents Disclosed Regarding Tram Kak Cooperatives and Kraing Ta Chan Security Centre’, 12 Nov 2014.

Prosecutor, at least 190 more statements are still to come, with further statements potentially disclosed as the Case 003 and 004 investigations progress.

4. By so disclosing these statements, the International Co-Prosecutor and International Co-Investigating Judge have effectively dumped vast swathes of the Case 003 and 004 case files into the Case 002 case file. Moreover, they have revealed that crucial aspects of Case 002 – including not only Case 002/02 but also critical aspects of the appeal in 002/01 – *remain under active investigation* via the ongoing Case 003 and 004 investigations while simultaneously being *tried at first instance and on appeal*. Indeed, noting the dates on which witness statements were taken in Cases 003 and 004, it appears that statements were undertaken as early as prior to closing submissions in Case 002/01 and also as late as after a given witness had already been scheduled to testify in Case 002/02.

B. Magnitude of Disclosed Evidence

5. The magnitude of the disclosures cannot be emphasised enough. It is not simply a question of volume, although the volume of data the statements contain is indeed vast and overwhelming. Much more important is the evidence contained within these statements. This evidence is not only of critical relevance to the very heart of the Defence's case, and not only of critical relevance to Case 002/02 (and the appeal in Case 002/01) but also appears, at least on initial review, to fundamentally affect the nature of the evidence on the case file in respect of several key issues being contested. Among the disclosed statements that the Defence has reviewed so far, witnesses have:
 - (a) testified to the existence of divisive internal factions within the CPK during the DK; this information included testimony that there were four internal factions (those “affiliated with the Viet Minh”; the “nationalistic Khmer Rouge”; the “Sihanouk[ist] Khmer Rouge”; and “Khmer Rouge from China including Pol Pot”), information on factions especially in the Northwest and East Zones, and information identifying Sao Phim as the leader a one faction plotting a revolt against Pol Pot;
 - (b) detailed the acts and conducts of several CPK leaders, including Nuon Chea himself, and also Ta Mok, Sao Phim, and Ruos Nhim;

- (c) described events contested across all trial segments in Case 002/02 as well as events *already adjudicated* in Case 002/01 and now on appeal before the Supreme Court Chamber;
 - (d) discussed the acts and conduct of witnesses who have testified, are scheduled to testify, have been requested to testify or should now be called to testify;
 - (e) detailed authority structure and operations in the Southwest and Northwest Zones; and
 - (f) provided evidence directly relevant to the existence of policies including as to forced marriage and the treatment of the Cham and Vietnamese.
6. The Defence notes that the International Co-Prosecutor has attempted to determine to which trial segments the statements are relevant and to disclose statements in advance of or during the relevant segment. However, given that it is the Defence and not the International Co-Prosecutor conducting the Defence's case, these assessments have often been inaccurate and unhelpful. For instance, the disclosure statements that the Defence has been able to review have often contained information of critical relevance to multiple aspects of the Defence's case rather than being limited to the current trial segment and require further analysis before the current trial segment can proceed.
7. This, in turn, creates further difficulties for the Defence and for the trial. For example, based on information contained in statements only recently disclosed, the Defence would have posed different or additional questions to one expert who had already testified (Elizabeth Becker) and possibly to the several Kraing Ta Chan prisoners and cadres who had appeared – witnesses who the Defence will now possibly have to request to recall. Proceeding with hearings at all costs while the parties are being flooded with crucial evidence may ultimately undermine the expediency of the trial, especially if the Defence is forced to regularly recall witnesses.
8. Similarly, given the relevance of the disclosed evidence to events contested in Case 002/01, the Defence will now also be filing a further additional evidence request to the Supreme Court Chamber to submit relevant evidence to that Chamber in connection with the appeal. This may then result in delays and complications to appeal proceedings in Case 002/01.

C. Evidence on the Khmer Krom

9. It is important to highlight, moreover, that the disclosure evidence does not stop with the current scope of Case 002. On the contrary, another consistent theme in the Case 003 and 004 statements is a distinct focus on the experiences of the Khmer (or Kampuchea) Krom during the DK. The Defence had already highlighted during Case 002/02 trial proceedings on 12 February 2015 that this consistent focus gives rise to very grave and legitimate concerns about the intended relevance of the Khmer Krom evidence within Case 002/02. As the Defence advised then, and as the Chamber is already aware, the relevance of Khmer Krom experiences in Case 002 has long been fiercely contested⁵ and the Khmer Krom community has lobbied strenuously for their experiences to be prosecuted within the context of Case 002 as a genocide and the maltreatment of a specific group. However, the Co-Prosecutors chose neither to include the Khmer Krom as a specific group in its introductory submission nor within any subsequent supplementary submissions, doing so instead through a limited request for investigative action. At the time, ECCC spokesperson Lars Olsen publicly told the *Cambodia Daily*, with respect to the Co-Prosecutors' failure to file a supplementary submission, that:

It was not a mistake. There was a reason why they didn't do it. I know that reason, but I can't tell you.⁶

10. Whatever the reason, the result was that the Khmer Krom were not identified as a targeted group in the Closing Order, or as an alleged victim of genocide. The mention of Khmer Krom in the Closing Order at all is highly circumscribed. However, given the consistent focus on Khmer Krom experiences in the disclosure statements the Defence is continuing to receive, it is becoming deeply and increasingly troubled that the International Co-Prosecutor intends to effectively expand the scope of Case 002/02 by prosecuting Khmer Krom experiences as those of a "quasi" targeted group and a "quasi" victim of genocide through the "back door" of subsuming their experience within that of the Vietnamese, despite the distinct nature of the two groups and the experience of the Khmer Krom not being specifically charged in the Closing Order. It certainly appears that witnesses' specific identities as Khmer Krom has been relevant at least to the Co-

⁵ E1/262.1, Transcript of Proceedings – Public, 12 Feb 2015 ("Transcript – 12 Feb 2015"), p. 16, ln. 17 – p. 17, ln. 25.

⁶ D274/4/1.1.4, Julia Wallace, 'KR Tribunal Judges Will Not Pursue K Krom Genocide Charges', *Cambodia Daily*, 20 Jan 2010.

Prosecutors, the civil party lawyers, and the Trial Chamber. Even after one witness recently testified that he had never said he was a Khmer Krom and considered himself to be instead a Kampuchea Leu person, Judge Lavergne continued to press the witness on whether he nevertheless *considered* himself as though he were.⁷

D. Legal Status of Statements Disclosed from Cases 003 and 004

11. The Defence is also gravely concerned about the legal status of statements disclosed from Cases 003 and 004. These concerns relate to the probability – underlined last week by emphatic statements of Prime Minister Hun Sen to representatives of the international community⁸ – that Cases 003 and 004 will not proceed to trial, even if the International Co-Investigating Judge attempts to unilaterally issue Closing Orders in their respect. If this occurs, the Defence is unsure what impact, if any, this may have on the validity of statements gathered in the course of the investigation of those cases, how this will affect Case 002/02, and how any such impact will be managed.

E. Evidence Other than Witness and Civil Party Statements

12. The substantive content of the statements disclosed from Cases 003 and 004 thus far also lead the Defence to have an additional concern; namely, whether those case files also contain evidence other than witness and civil party statements, such as documents, that may also be relevant to Case 002/02. The Defence has no standing before the International Co-Investigating Judge to disclose any such evidence to it. Instead, it urges the Chamber to order the International Co-Prosecutor to advise the parties whether such evidence may exist, and if so, to request the International Co-Investigating Judge to disclose evidence of this nature as soon as possible.

F. Prohibitively Onerous Disclosure Conditions on the Defence

13. Not only is the Defence faced with the task of processing evidence of such magnitude, the Defence has also received the statements subject to prohibitively onerous disclosure conditions imposed by the International Co-Investigating Judge. Among other things, the Defence is not permitted to receive the statements in electronic format; is provided only a single paper copy of each statement in each available language; and may only

⁷ E1/262.1, Transcript – 12 Feb 2015, p. 54, lns. 17-18 (“Do you consider yourself as Kampuchea Krom?”).

⁸ See, e.g., Kuch Naren, ‘Hun Sen Warns of Civil War if ECCC Goes Beyond ‘Limit’’, *Cambodia Daily*, 27 Feb 2015, available at <https://www.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757>.

permit its paid staff and not its interns to review the statements, in contrast with the International Co-Prosecutor whose interns do enjoy such access. To enable the statements to be word-searchable and reviewable by multiple Defence staff members simultaneously – i.e., to be effectively usable – the Defence is thus forced to scan, print and run electronic text-recognition processes on each statement disclosed. Given the volume of data and information technology constraints, this is an extremely time-consuming process.

14. These conditions should never have been imposed on the Defence by a party without standing in Case 002. They are also arguably moot now that the International Co-Investigating Judge charged one suspect from each Case 003 and 004 on Tuesday 3 March 2015. The Defence therefore urges the Chamber to quash these disclosure conditions in accordance with its power under Rule 85 to “maintain good order during the trial”.

G. Time and Resource Constraints on the Defence

15. Compounding these difficulties, the majority of statements were disclosed to the Defence less than two weeks ago and even this week, when it was already fully immersed in a four day per week trial schedule. As the Chamber and the parties have been able to observe, it has been essential for all members of the Defence’s paid staff to attend trial hearings every day, which is a result of the limitations that the Defence’s budget constraints impose on the possible size of its staff. By contrast, the International Co-Prosecutor has had at least six international prosecutors leading examination and a rotation of support staff. This leaves the paid staff of the Defence only one additional day per week, in addition to evenings and weekends to review several hundred disclosed statements, and only one day per week to discuss the disclosed statements with Nuon Chea and seek his ongoing instructions. The Defence’s staff must also do so alongside daily trial preparation, without the support of the Defence’s interns, and in the face of what now appears to be a steady stream of new disclosures being provided by the International Co-Prosecutor.
16. Under these circumstances, the Defence has been unable to read, let alone properly analyse, all of the statements disclosed thus far, despite its continued best efforts throughout the course of Case 002 to maintain an understanding of the case file. This is exacerbated by the extremely limited time which has thus far been afforded to the

parties to review the disclosed statements. The Defence notes that the Trial Chamber recently adjourned two hearing days in order to give the Defence and other affected parties an opportunity to “familiarise” themselves with newly disclosed statements. Presuming that this is limited to the statements disclosed in February only, this amounts to 2,838 pages (in English only) to review, that is, a rate of nearly one page per minute for two days straight without sleep.⁹ Clearly, this is quite simply physically impossible. Should the disclosure process continue in a similar manner, the Defence will be forced to make a request for additional resources if it is to have any hope of maintaining an understanding of the case file.

H. Gross Violation of Nuon Chea’s Right to a Fair Trial

17. The ongoing disclosure process in itself violates Nuon Chea’s fundamental fair trial rights to know the evidence against him, have adequate time and facilities to prepare his defence, and enjoy equality of arms. Moreover, the severity of the violation is far worse when considered in context. As extensively argued in our appeal brief¹⁰ and currently being assessed by the Supreme Court Chamber, the trial in Case 002/01 was deeply flawed and already grossly violated Nuon Chea’s right to a fair trial. The current management of the disclosure process shows that there has been no change of approach in Case 002/02. On the contrary, the situation appears to have deteriorated, with significant violations of Nuon Chea’s fundamental rights such as these in addition to the “garden variety” daily violations. The Defence’s fears, outlined in its motion to disqualify judges of the Trial Chamber,¹¹ are being realised, and Judge Downing’s dissenting opinion that there were “grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias” on the parts of President Nonn and Judges Sokhan, Lavergne and Ottara¹² is being vindicated every day.
18. Finally, the Defence wishes to highlight in particular that the Co-Prosecutors had requested on 28 July 2014 that “at least 13 of their proposed witnesses [...] on the basis of new evidence or interviews on the Case 003 or 004 Case Files” the relevance of

⁹ The Defence also notes that in contrast, the Chamber responded to the first disclosure binder, containing 515 pages in English, by adjourning trial proceedings for a week.

¹⁰ F16, ‘Nuon Chea’s Appeal Against the Judgment in Case 002/01’, 29 Dec 2014.

¹¹ E314/6, ‘Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara’, 29 Sep 2014.

¹² E314/12/1, ‘Reasons for Decision on Applications for Disqualification’, 30 January 2015, Partly Dissenting Opinion of Judge Rowan Downing, para. 40.

which they were permitted to only briefly summarise.¹³ They therefore had a lengthy opportunity to craft their strategy around the then-yet to be disclosed statements and to do so well in advance of the start of the Case 002/02 trial and the statements' eventual disclosure to the Defence. In this situation, the Defence's position can only be likened to a blindfolded person fighting an unencumbered opponent. Contrary to the International Co-Prosecutor's assurance that it is possible to "tailor a solution that fully secures the Accused's right to a fair trial",¹⁴ the management of the disclosure process has thus far served only to continue the gross violations of Nuon Chea's right to a fair trial, and in particular the three specific rights already mentioned. In this respect, whether or not the Co-Prosecutors had warned of the impending disclosures in advance – which it took pains to explain that it did – is of no consequence.

III. RELIEF

19. For the above reasons, the Co-Lawyers for Nuon Chea request that the Trial Chamber:
- (a) adjourn hearings in Case 002/02 with immediate effect; or in the alternative, hear only (cadre) witnesses in the first trial segment who were not in leading positions (i.e. do not hear the witnesses 2-TCW-803 and 2-TCW-809);
 - (b) schedule a Trial Management Meeting to facilitate a public discussion by the parties of the ongoing disclosure process and the possible ways forward;
 - (c) ensure that it consults with the Defence in determining the length of any adjournment provided to enable the Defence to review the disclosed statements;
 - (d) in considering the ongoing sequence in Case 002/02, select as the next trial segment that which appears to be least affected by the ongoing disclosures (such as the 1st January Dam) and ensure that there is adequate time to review disclosed statements prior to the commencement of segments that are more significantly affected;
 - (e) assure the parties that the Khmer Krom will not be included as a "quasi" targeted group in the Case 002/02 trial;

¹³ E307/3/2, 'Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02', 28 Jul 2014, discussed in E319/14, International Co-Prosecutor's Disclosure Clarification, para. 3.

¹⁴ E319/14, International Co-Prosecutor's Disclosure Clarification, para. 13.

- (f) order the International Co-Prosecutor to advise the parties whether there may be relevant evidence on the case files of Cases 003 and 004, and if so, to request the International Co-Investigating Judge to disclose evidence of this nature as soon as possible; and
- (g) quash the prohibitively onerous disclosure conditions imposed on the Defence with respect to the access to and use of the Case 003 and 004 documents.

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