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E393/4

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

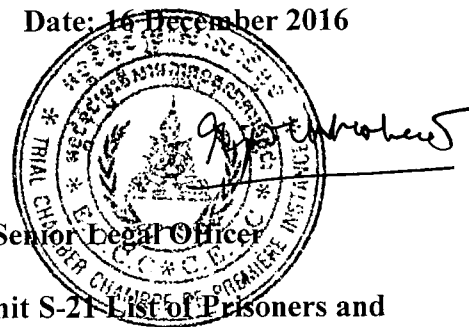
អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

TRIAL CHAMBER

TO: All Parties, Case 002

Date: 16 December 2016

FROM: NIL Nonn, President of the Trial Chamber



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

SUBJECT: Decision on Co-Prosecutors' Request to admit S-21 List of Prisoners and four S-21 documents (E393/3)

1. The Chamber is seised of a request filed by the Co-Prosecutors to admit (1) a list of S-21 prisoners whose names do not appear on a list prepared by the Office of the Co-Investigating Judges (“OCIJ”) and (2) four further documents originating from S-21 (E393/3).

2. As background, on 19 May 2009, the Co-Prosecutors filed a list of S-21 prisoners in Case 001 identifying 12,273 names supported by contemporaneous documents (“OCP S-21 Prisoners List”) which was later admitted by the Chamber as document E3/342 (E185.1, p. 19). On 5 April 2016, the Chamber informed the parties that the International Co-Investigating Judge had notified the Chamber that an OCIJ analyst, under the supervision of the Analyst Unit Team Leader within the OCIJ, had prepared a new S-21 prisoner list based upon contemporaneous documents collected from Tuol Sleng and the Documentation Center of Cambodia (“OCIJ S-21 Prisoners List”) (E393). The Chamber admitted on its own motion the OCIJ S-21 Prisoners List (E393.2) and the list of 871 documents relied upon by the OCIJ in preparing this list (E393.3). The Chamber subsequently admitted all of the documents underlying the OCIJ S-21 Prisoners List which had not previously been admitted (T. 3 May 2016, pp. 52-53) and on 11 May 2016 provided a list of these documents to the parties (E393/1; E393/1.1).

3. On 8 August 2016, the Co-Prosecutors filed a list including 1,606 names of persons they assert having identified as not appearing on the OCIJ S-21 Prisoners List, while their presence at S-21 is supported by contemporaneous documents (“List of 1,606”)(E393/2.1) and requested that the Chamber take into account this list of names, in determining the total number of persons imprisoned and executed at S-21 (E393/2, para. 1). They also attached a list of documents that appear not to have been considered by the OCIJ as these documents were not listed among the 871 noted by the OCIJ as relevant to

the preparation of the OCIJ S-21 Prisoners List (E393.3). On 19 August 2016, the Trial Chamber requested the Co-Prosecutors to clarify whether they seek the admission of the List of 1,606 and underlying documents.

4. In response, the Co-Prosecutors request the admission of the List of 1,606 and four contemporaneous S-21 documents in which some of these names are recorded (E393/3, paras 1, 10). The Co-Prosecutors submit that the 1,606 names appear in 92 contemporaneous S-21 lists which do not appear in the OCIJ's list of 871 supporting documents (E393.3). They submit that four of the 92 documents are not on the Case File and seek their admission pursuant to Internal Rule 87(4) (E393/3, paras 3, 10). Finally, the Co-Prosecutors submit that the List of 1,606 as well as the four new documents relate closely to documents already on the Case File and that it is therefore in the interests of justice to admit them at this stage of the proceedings (E393/3, paras 7-8).

5. The KHIEU Samphan Defence submits that the four contemporaneous documents requested by the Co-Prosecutors have already been admitted. It notes however that one additional document in the List of 1,606 (D288/6.68.18), has neither been admitted nor sought for admission (E393/3/1, paras 12, 13 FN 13). As to the List of 1,606, the KHIEU Samphan Defence submits that the reliability of the document is doubtful since the Co-Prosecutors have already corrected their lists of S-21 prisoners on multiple occasions and, furthermore, a judicial entity of the ECCC, namely the OCIJ, has expressed disagreement with the conclusions reached by the Co-Prosecutors by correcting the OCP S-21 Prisoners List (E393/3/1, paras 14). The KHIEU Samphan Defence submits that the List of 1,606 is internal work product of the Co-Prosecutors, containing the conclusions of the Co-Prosecutors and therefore should not be admitted as evidence. Rather, it would be more appropriate to annex the List of 1,606 to the Co-Prosecutors' Closing Brief as it is the practice of the Chamber to reject documents created by the parties (E393/3/1, paras 15-17, 20). The KHIEU Samphan Defence also submits that the Co-Prosecutors make contradictory submissions by: (1) claiming that establishing the final number of prisoners held at S-21 is a significant element in determining the criminal responsibility of the Accused; and (2) at the same time, in a separate context, rejecting the importance of a demographic expert to determine the exact number of victims in all of Cambodia because it does not impact on the criminal responsibility of the Accused (E393/3/1, paras 18-19). The other parties did not respond to the Co-Prosecutors' request.

6. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice (*See* E319/36/2).

7. As a preliminary matter, the Chamber finds that the request to admit four contemporaneous documents is moot as all four have already been admitted in Case 002/02 (See E3/8436, E3/8433, E3/8761, E3/8435).

8. The Chamber considers the List of 1,606 is directly relevant to a crime site within the scope of the current trial and is complementary to the initial OCP list and to the OCIJ list of S 21 prisoners which have already been admitted. This new list, as the previous ones, was compiled on the basis of documents which are part of the evidence admitted in Case 002/02 and which have already been found to meet the *prima facie* requirements of reliability and authenticity. The Chamber shall ensure a full adversarial discussion of the evidence on the Case File, including these underlying pieces of evidence and the various lists which have been produced by either a judicial body or the parties themselves. For these reasons, the Chamber decides to admit the List of 1,606.

9. In the interests of completeness, the Chamber also admits on its own motion the document noted by the KHIEU Samphan Defence (D288/6.68.18) which fulfil the requirements of IR 87(3) and accords it document reference number E3/10771.

10. This is the Chamber's official response to E393/3.