

E276/2



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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
..... 10 / 04 / 2013

ម៉ោង (Time/Heure): 13 - 40

មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé
du dossier: **SANN RADA**

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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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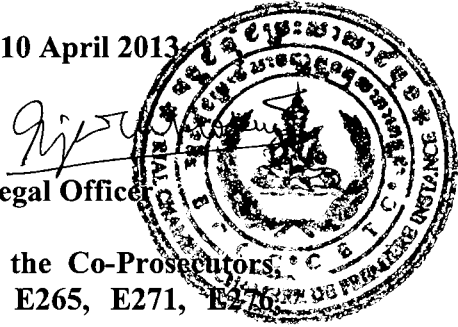
TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 10 April 2013

FROM: NIL Nonn, President of the Trial Chamber

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

SUBJECT: Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276/1)



1. The Chamber is seised of several requests to put new evidence before the Chamber (E236/4/1, E265, E271 and E276).
2. According to Internal Rule 87(4), the Trial Chamber may admit any new 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 has previously indicated that a document not included on a party's initial Internal Rule 80(3) list constitutes new evidence subject to the requirements of Internal Rule 87(4) and may be admitted as such where the interests of justice so require (E190, paras 19-21). Finally, parties must lodge a consolidated Internal Rule 87(4) request for all new documents intended for use during the testimony of a witness at least two weeks before his or her scheduled appearance (E218, para. 22).
3. Ordinarily, the requesting party must satisfy the 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 due diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criteria, 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, 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 (*see e.g.* E190 and E172/24/5/1).

4. The Co-Prosecutors request to put before the Chamber two letters from the Secretary General of Amnesty International (D84/2.3 and D84/2.4) (“Amnesty International Letters”). These letters have been on the case file since 12 February 2009, but were not included on the Co-Prosecutors’ initial Internal Rule 80(3) lists (E265). Due to an internal file management error, the Co-Prosecutors discovered the proposed evidence when preparing for the 31 January 2013 document hearings. Without further explanation, belated discovery during preparation for a hearing, nearly four years after placement of material on the case file, does not demonstrate reasonable diligence (*see e.g.* E251, para. 31). Further, the Defence objects to the admission of the Amnesty International Letters which are potentially incriminating and repetitive of other evidence already before the Chamber (E265/1). The Co-Prosecutors have neither satisfied the strict requirements of Internal Rule 87(4) nor demonstrated exceptional circumstances warranting the admission of the Amnesty International Letters. The request is therefore denied.

5. The NUON Chea Defence requests to put before the Chamber a letter from TCW-110 and TCW-326 (A71) (“TCW-110 Letter”). This letter was placed on the case file on 4 December 2007 and more than five years later, proposed to the Chamber on 24 January 2013 (E236/4/1). The NUON Chea Defence has not shown that it exercised reasonable diligence in discovering and proposing the TCW-110 Letter. The TCW-110 Letter, however, relates closely to the upcoming testimony of TCW-110, particularly his credibility, and was presented more than two weeks before his re-scheduled testimony. The Chamber therefore considers it is in the interests of justice that this document be evaluated together with the testimony of the witness.

6. The KHIEU Samphan Defence requests to place on the case file and to put before the Chamber a 7 March 2013 *Phnom Penh Post* interview with Philip SHORT entitled “Pol Pot Biographer Talks Tribunal” (“SHORT Interview”). The SHORT Interview was proposed on 26 March 2013 in relation to the upcoming testimony of expert Philip SHORT (E271). The Chamber finds that presentation of the SHORT Interview within 19 days of its publication and more than a month before Philip SHORT is scheduled to testify constitutes reasonable diligence. This interview also closely relates to the testimony of an upcoming expert and is conducive to ascertaining the truth. The requirements of Internal Rule 87(4) are therefore satisfied. The Chamber notes, however, that the SHORT Interview is currently only available in English and French. Use and admission of the SHORT Interview at trial is subject to its timely availability also in Khmer.

7. The KHIEU Samphan Defence also requests to place on the case file and to put before the Chamber an interview with the late King NORODOM Sihanouk (“NORODOM Interview”) allegedly contradicting another interview by the late king which was presented by the Co-Prosecutors at the 31 January 2013 document hearing (E276). The KHIEU Samphan Defence has not shown that it exercised reasonable diligence in discovering and presenting the NORODOM Interview. The NORODOM Interview, however, is exculpatory, closely related to other evidence before the Chamber and the Co-Prosecutors do not object to its admission (E276/1). The Chamber considers it

is in the interests of justice that this evidence be evaluated together with other evidence already before the Chamber.

8. In sum, the Chamber finds that the requirements of Internal Rule 87(4) have been satisfied with regard to the TCW-110 Letter, the SHORT Interview and the NORODOM Interview. The Chamber will hear any objections to the admissibility of this new evidence pursuant to Internal Rule 87(3) if and when the Defence seeks to put this evidence before the Chamber.

9. This constitutes the Chamber's official response to E236/4/1, E265, E265/1, E271, E276, and E276/1.