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ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

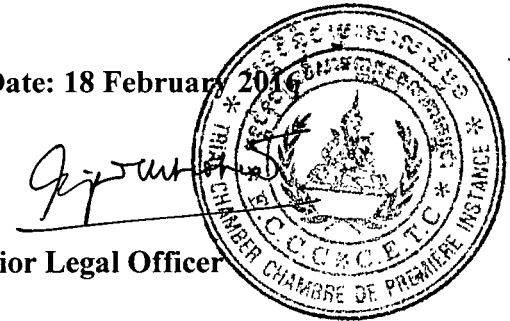
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

TRIAL CHAMBER

TO: All Parties, Case 002

Date: 18 February 2016

FROM: NIL Nonn, President of the Trial Chamber



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

SUBJECT: Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Relating to Treatment of Cham Pursuant to Rules 87(3) & 87(4)

1. The Trial Chamber is seized of the International Co-Prosecutor's request to admit into evidence 25 written records of interview pursuant to Internal Rules 87(3) and 87(4), filed on 25 September 2015 ("Request", E319/32). The statements, further identified in a table annexed to the Request (*See* Annex I, E319/32.1), are interviews of witnesses and civil parties taken by the Office of the Co-Investigating Judges in Cases 003 and 004 and subsequently disclosed in Case 002/02. The International Co-Prosecutor submits that these statements are relevant to the persecution and killing of the Cham people in various districts of Democratic Kampuchea (E319/32, paras 1-3). The International Co-Prosecutor further submits that the Request is timely because the statements were not available before the opening of the trial (E319/32, para. 4).

2. On 28 September 2015, following an oral request by the KHIEU Samphan Defence, the Chamber granted an extension of time allowing the Parties to respond to the Request after the Chamber issued a decision on E363. (*See* Transcript of 28 September 2015, pp. 3-8, 24). Oral responses were subsequently scheduled for 1 December 2015 (email from the Senior Legal Officer, 12 November 2015). The NUON Chea Defence did not make any submissions in response. The KHIEU Samphan Defence objects to the admission of 22 of the proposed written records of interview but does not object to the admission of statements listed as number 4, 2 and 19 in Annex I, namely E319/13.3.17, E319/28.3.1 and E319/19.3.95. The Defence submits that statement E319/13.3.17 has already been admitted into evidence, while statement E319/28.3.1 relates to a witness who has already testified and statement E319/19.3.95 relates to another witness who is expected to testify

shortly (Transcript of 1 December 2015, pp. 46-47). The Chamber notes that this last witness, 2-TCW-988 (SAY Doeun), eventually testified on 12 January 2016.

3. The KHIEU Samphan Defence objects to the admission of the remaining 22 written records of interview on the basis that they do not meet the criteria set forth in Rules 87(3) and 87(4). The Defence submits (Transcript of 1 December 2015, pp. 47-53) that:

- a) Rule 87(4) is exceptional and should be limited to evidence that is relevant to the ascertainment of the truth;
- b) the admission of statements in the form of written records of interviews instead of hearing oral testimony does not allow for cross-examination of the content of those statements and, therefore, very low probative value should be attached to them;
- c) the International Co-Prosecutor has not demonstrated that the statements are essential for them to be admitted in the interests of justice;
- d) the International Co-Prosecutor has failed to exercise due diligence by submitting an untimely request only after the hearings on the trial segment of the treatment of the Cham had already started, when he should have been aware of the relevance of the statements earlier.
- e) the Request is not in line with the findings and instructions of decision E363/3, in which the Chamber found that only exceptionally may evidence that does not meet the criteria laid down in Rule 87(4) be admitted;
- f) the statements are repetitious as the Trial Chamber already has sufficient written and oral evidence regarding the treatment of the Cham as well as other trial topics and admitting new evidence at this stage would unnecessarily overload the case file; and
- g) the request to admit statements number 11 and 12 of Annex I, namely E319/19.3.219 and E319/19.3.93, is premature as the Chamber has not yet ruled on the KHIEU Samphan's objections to the Chamber's own decision to call Witness 2-TCW-987 (*See* E364).

4. The International Co-Prosecutor replies that all of the proposed written records of interview meet the criteria of Rule 87(4) and reiterates that due diligence was exercised in bringing each of the statements to the attention of the Chamber in a timely manner. The International Co-Prosecutor submits that, according to Decision E363/3, evidence from Cases 003 and 004 is considered unavailable for the purposes of Rule 87(4) until the Office of the Co-Investigating Judges authorises the Co-Prosecutors to provide it to the Parties in Case 002/02, and notes that these statements were authorised for disclosure between February and August 2015. (Transcript of 1 December 2015, pp. 54-58).

5. 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 (E319/7, para. 8). The Chamber will determine 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 speaking satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and 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 (E276/2, para. 2 referring to E190 and E172/24/5/1).

6. The Trial Chamber further recalls its decision of 22 October 2015 regarding the Co-Prosecutors' disclosure obligations in which the Chamber limited future disclosure to exculpatory evidence and the statements of individuals who have testified or who are proposed to testify. The Chamber clarified in this decision that admission of evidence not falling under these categories may still be sought under Rule 87(4) (E363/3, para. 36).

7. At the outset, the Chamber notes that the request with respect to statements E319/28.3.1 and E319/13.3.17 (numbers 2 and 4 in Annex I) is moot as they have already been admitted into evidence and classified as documents E3/9649 and E3/9580, respectively (See E373, Annex 1; Transcript 5 October 2015, pp. 14-16; E1/353). Further, Document E319/19.3.93 (number 12 in Annex I) was put before the Chamber by the International Co-Prosecutor during the examination of witness 2-TCW-987, with none of the parties raising objections, and was subsequently allocated number E3/9659 (See Transcript of 11 January 2015, pp. 12, 15, 17, 23, 26, 36, 41, 43, 49, 69). Statement E319/19.3.226 (number 21 in Annex I) was admitted into evidence pursuant to an oral ruling of the Chamber, with reasons to follow, on 12 January 2016 (See Transcript of 12 January 2015, p. 59). The Chamber notes that statement E319/19.3.226 was unavailable prior to the opening of Case 002/02. It was disclosed by the International Co-Prosecutor on 18 March 2015 further to the Office of the Co-Investigating Judges' authorisation for disclosure of 11 March 2015 (Case 004-D193/15). Considering the large amount of disclosed statements made by the International Co-Prosecutor at the time, the Chamber finds that due diligence has been exercised in submitting this request and that it therefore remains timely. The Chamber also finds that the statement meets the *prima facie* standards of reliability and authenticity, having been obtained by the Office of the Co-Investigating Judges (See E319/11/1, para. 5; E319/17/1, para. 4). The Chamber considers that statement E319/19.3.226 is *prima facie* relevant as it contains information regarding the alleged arrests of Cham people by the members of the Long Sword Group, which are conducive to the ascertainment of the truth in Case 002/02.

8. For the remaining 21 statements listed in Annex I, the Chamber notes that they were obtained by the Office of the Co-Investigating Judges during the investigation phases of Cases 003 and 004 and are dated between August 2011 and May 2015. They became available after the International Co-Investigating Judge authorised their disclosure in eight decisions issued between February and August 2015 (Case 004-D193/11, D-193/15, D193/21, D193/24, D193/33, D193-34; case 003-D100/9, D-100/12). The Chamber recalls that it is expected that parties will exercise due diligence and request admission of documents in a timely manner, notably as soon as practicable after becoming aware of the material sought for admission (E319/30/1, para. 3; *see also* E344/1, para. 4; E323/1).

In the present case, the statements were respectively disclosed by the International Co-Prosecutor on 18 February 2015 (E319/13), 18 March 2015 (E319/19), 13 April 2015 (E319/21), 3 June 2015 (E319/23), 9 June 2015 (E319/24), 10 August 2015 (E319/27) and 12 August 2015 (E319/28), that is, between one and seven months before the submission of this Request. It is clear that the International Co-Prosecutor exercised due diligence with respect to requesting the admission of those statements made available in the more recent decisions of the International Co-Investigating Judge, particularly those authorized for disclosure between June and August 2015. Considering the large volume of disclosed statements as a whole, the Chamber also finds that the admission of statements disclosed earlier in 2015 has been requested in a timely manner, under the circumstances.

9. The Chamber further notes that the statements, having been taken by investigators from the Office of the Co-Investigative Judges, meet the *prima facie* standards of reliability and authenticity (See E319/11/1, para. 5; E319/17/1, para. 4).

10. The Trial Chamber has reviewed the remaining 21 statements and considers that they contain evidence relevant to the treatment of the Cham, including, but not limited to, detentions, disappearances, executions of Cham people in different districts of Democratic Kampuchea, and the alleged existence of a policy targeting this group. The statements also appear relevant to other trial topics, including regulation of marriage, internal purges and the treatment of the Vietnamese. Accordingly, the Chamber finds that these statements are conducive to ascertaining the truth and are *prima facie* relevant to Case 002/02.

11. In respect of statements E319/19.3.219 and E319/19.3.93 from 2-TCW-987, the Chamber recalls the KHIEU Samphan Defence's objection to the hearing of this witness on the basis that it would violate the principle of equality of arms and the accused's right to adequate time and facilities to prepare his defence due to the late notice provided and the fact that the Defence had never heard about this individual before being notified of his selection (E364, para. 10). The Chamber has addressed this objection separately in deciding to call this witness, who eventually testified on 11 and 12 January 2016 (email from the Senior Legal Officer, 24 December 2015; E364/1). Further, the objection has no bearing on the present Request, which concerns the admission of these statements and is made pursuant to Rule 87(3) and 87(4).

12. The Trial Chamber therefore finds that the requirements of Internal Rule 87(4) have been satisfied and grants the International Co-Prosecutor's Request to admit 21 written records of interviews into evidence in Case 002/02. E3 designation numbers have been assigned to the statements as detailed in Annex A attached to the present memorandum. The parties are reminded that the use of these statements is subject to the procedural requirements set out in the Chamber's decision E319/7.

13. This constitutes the Chamber's official response to E319/32.