



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

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SANN RANA	

Before: Judge NIL Nonn, President
Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

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**DECISION ON NUON CHEA’S RULE 87(4) REQUESTS FOR ADMISSION OF 29 DOCUMENTS
RELEVANT TO THE TESTIMONY OF 2-TCE-95**

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1. INTRODUCTION

1. The Trial Chamber is seized of two requests pursuant to Internal Rule 87(4) for the admission into evidence of, respectively, 15 and 14 documents relevant to the testimony of YSA Osman (“Mr. Osman”), filed by the NUON Chea Defence on 2 February 2016 (“First Request”)¹ and 3 February 2016 (“Second Request”).²

2. The Chamber heard oral submissions by the NUON Chea Defence as well as responses by the other parties on both requests on 3 February 2016.³ The Chamber granted, in part, the First Request and the Second Request on 8 February 2016, admitting 18 documents and assigning E3 numbers to them.⁴ The Chamber hereby provides reasons for its decision.

2. SUBMISSIONS

3. The First Request concerns three categories of documents. Category I includes one video relating to Mr. Osman's personal and professional background (E367/4.1.1), which the NUON Chea Defence submits is relevant to Mr. Osman's methodology and the probative value of his books, interviews and evidence.⁵ The NUON Chea Defence further submits that Mr. Osman can be identified in the video and that the footage has the requisite indicia of authenticity and reliability.⁶

4. Category II includes three documents of purported relevance to Mr. Osman's independence, impartiality and participation in the investigations in Case 002/02: a UNAKRT vacancy announcement (E367/4.1.2), an OCIJ list of witnesses interviewed in presence of Mr. Osman between 22 October 2007 and 27 November 2008 (E367/4.1.3) and a newspaper

¹ NUON Chea's First Rule 87(4) Request for Admission into Evidence of 15 Documents Relevant to YSA Osman's (2-TCE-95) Testimony (on Background, Independence and Impartiality and Death Tolls), 2 February 2016, E367/4, para. 37.

² NUON Chea's Second Rule 87(4) Request for Admission into Evidence of 14 Documents Relevant to YSA Osman's (2-TCE-95) Testimony (on the Khmer Sar, the Khmer Serei and Les Kosem), 3 February 2016, E367/5, para. 30.

³ T. 3 February 2016, pp. 102-124.

⁴ Decision on NUON Chea's Requests for Admission of Documents Relevant to the Testimony of 2-TCE-95, 8 February 2016, E367/7, para. 2. The following documents were admitted from the First Request and assigned E3 numbers accordingly: E367/4.1.1 (E3/9678); E367/4.1.3 (E3/9679); E367/4.1.4 (E3/9680); E367/4.1.6 (E3/9681); E367/4.1.7 (E3/9682); E367/4.1.9 (E3/9683); E367/4.1.10 (E3/9684); E367/4.1.11 (E3/9685); and E367/4.1.12 (E3/9686). The following documents were admitted from the Second Request and assigned E3 numbers accordingly: E367/5.1.1 (E3/9687); E367/5.1.2 (E3/9688); E367/5.1.6 (E3/9689); E367/5.1.7 (E3/9690); E367/5.1.8 (E3/9691); E367/5.1.9 (E3/9692); E367/5.1.10 (E3/9693); E367/5.1.11 (E3/9694); and E367/5.1.12 (E3/9695). For ease of reference, in the present decision the Chamber will refer to all documents sought for admission by their initial document reference number.

⁵ First Request, paras 4-5.

⁶ First Request, para. 7.

article written by Mr. Osman and published in the Phnom Penh Post (E367/4.1.4).⁷ The NUON Chea Defence contends that these documents bear *prima facie* indicia of reliability.⁸ E367/4.1.2 and E367/4.1.3 are official documents emanating from the UNAKRT official website and the OCIJ, respectively. E367/4.1.4 was published by a recognised and well-established newspaper and Mr. Osman himself will be able to testify that he was indeed the author of the article.⁹

5. Category III includes 11 scholarly articles, written between 1988 and 2015, relating to the treatment of the Cham during the DK era, including death tolls within that community, and the international crime of genocide more generally (E367/4.1.5 to E367/4.1.15). They are authored by Mr. Osman, George Wright, Khuon Narim, Ben Kiernan, Michael Vickery, Philip Short, Touch Bora, Stéphanie Giry, Stuart A. Becker, Kevin Poniah and Koam Chanrasmey, and are part of a scholarly debate over the reliability of the estimates concerning the casualties within the Cham community during the DK era.¹⁰ The NUON Chea Defence submits that these articles are relevant to Mr. Osman's estimates regarding Cham deaths between 1975 and 1979 and that they are *prima facie* reliable having been written by journalists and experts, including Mr. Osman, and having been published by renowned sources.¹¹

6. The NUON Chea Defence submits that E367/4.1.1, E367/4.1.14 and E367/4.1.15 were unavailable before the opening of the trial and that all 15 documents are closely related to material already before the Chamber, including Mr. Osman's books which are admitted into evidence as E3/1822 and E3/2653.¹² The remaining documents could not have been discovered earlier given that they directly relate to the independence, statements and alleged expertise of Mr. Osman. According to the NUON Chea Defence, Mr. Osman was only appointed as an expert on 18 September 2015 and was officially allowed to testify by the United Nations on 25 January 2016.¹³

7. The Second Request concerns 14 documents relating to three resistance movements considered to have opposed the CPK and the DK government at the relevant time, namely the

⁷ First Request, paras 8-12.

⁸ First Request, para. 12.

⁹ First Request, para. 12.

¹⁰ First Request, paras 15-32.

¹¹ First Request, paras 13-14, 35-36.

¹² First Request, paras 5 and 33-34.

¹³ First Request, paras 10 and 33.

Khmer Sar, the *Front Uni de Lutte de la Race Opprimée* (“FULRO”) and the Khmer Serei, and to their potential connections with the Cham community. These documents also relate to LON Nol and to the most senior Cham official in the Royal Cambodian Army, LES Kosem, and his diplomatic relationships with several Muslim countries.¹⁴ The NUON Chea Defence submits that this material may provide insight into the reasons behind the alleged arrests or killings of Cham people during the DK period and is hence relevant to the allegations regarding to the treatment of the Cham and to the alleged genocidal intent of the accused.¹⁵ Moreover, the material directly concerns Mr. Osman's expected evidence during the topic on the treatment of Cham.¹⁶

8. E367/5.1.1 is a DC-CAM interview of TIT Tum conducted by Mr. Osman in December 1999, which concerns, among other topics, the Khmer Sar anti-Khmer Rouge rebellion.¹⁷ E367/5.1.2 is a confession from CHEK Prahim, discussing the FULRO.¹⁸ E367/5.1.3 is a blog entry from Jean-Michel Filippi, also discussing the FULRO.¹⁹ E367/5.1.4 is an article by Robert L. Turkoly-Joczic published by *Asian Affairs*, discussing the Khmer Serei Movement.²⁰ E367/5.1.5 is an article published in the Phnom Penh Post which summarises the background and role of General LES Kosem, analysing US diplomatic cables published by Wikileaks.²¹ Documents E367/5.1.6 through E367/5.1.12 are contemporaneous United States' diplomatic cables, obtained from the Wikileaks website.²² They relate, *inter alia*, to LON Nol and LES Kosem's relationships with the US, FURLO, the Cham community and a number of Islamic States, including Saudi Arabia, and to their activities relating to the Islamic Conference of Kuala Lumpur.²³ E367/5.1.13 is an article published in the Cambodia Daily discussing the creation of the Revolutionary Committee and the involvement of LON Nol, LON Non and LES Kosem in the attempted coup against Sihanouk in 1970.²⁴ Lastly,

¹⁴ Second Request, paras 1, 6-7.

¹⁵ Second Request, para. 5.

¹⁶ Second Request, para. 27.

¹⁷ Second Request, para. 10.

¹⁸ Second Request, para. 11.

¹⁹ Second Request, para. 12.

²⁰ Second Request, para. 13.

²¹ Second Request, para. 14.

²² Second Request, paras 15-21.

²³ Second Request, paras 15-21.

²⁴ Second Request, para. 22.

E367/5.1.14 is an article published in the Washington Post discussing the creation of the Khmer Sar in the Kompong Sor area.²⁵

9. The NUON Chea Defence submits that all 14 documents bear *prima facie* indicia of reliability. They all emanate from reliable sources such as DC-CAM and renowned newspapers, editors or websites and were written by experts in their fields.²⁶ E367/5.1.3, E367/5.1.5 and E367/5.1.13 were published after the start of the trial, while the remaining documents became available before the start of the proceedings. Taking into account that Mr. Osman's appearance was confirmed only on 25 January 2016 and that all 14 documents are sought for admission for the specific purpose of challenging Mr. Osman's statements and expertise, the NUON Chea Defence submits that they could not have been tendered earlier.²⁷

10. The International Co-Prosecutor does not object to the admission of documents E367/4.1.1, E367/4.1.3, E367/4.1.4, E367/4.1.6, E367/4.1.7, E367/4.1.12 and E367/4.1.14 from the First Request and document E367/5.1.3 from the Second Request.²⁸ With regard to the remainder of the documents, the International Co-Prosecutor contends that they are either irrelevant (E367/4.1.2 and E367/4.1.15 from the First Request and E367/5.1.4, E367/5.1.5, E367/5.1.7 and E367/5.1.8 to E367/5.1.13 from the Second Request), contain personal views on legal issues by individuals without a legal expertise (E367/4.1.5, E367/4.1.8, E367/4.1.9 to E367/4.1.11 and E367/4.1.13 from the First Request), are only in Khmer language (E367/5.1.1 and E367/5.1.2 from the Second Request), are documents whose content was obtained through the use of torture (E367/5.1.2 from the Second Request), or do not contain new information (E367/5.1.6 and E367/5.1.14 from the Second Request).²⁹ The Lead Co-Lawyers for Civil Parties object only to document E367/5.1.2 from the Second Request, which they submit should be rejected on the basis of the Chamber's established practice with regard to confessions.³⁰ The KHIEU Samphan Defence did not make any submissions.

²⁵ Second Request, para. 23. The Chamber notes that the Washington Post article appears to refer to the Kompong Cham area and not to the Kompong Sor area.

²⁶ Second Request, paras 28-29.

²⁷ Second Request, para. 24.

²⁸ T. 3 February 2016, pp. 105-111.

²⁹ T. 3 February 2016, pp. 106-113.

³⁰ T. 3 February 2016, p. 114.

3. APPLICABLE LAW AND FINDINGS

11. 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 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 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.³¹

3.1. Timeliness of the Requests

12. As a preliminary matter, the Chamber recalls that according to established practice parties must ordinarily lodge a request to admit new documents intended for use during testimony at least two weeks before the person's scheduled appearance.³² The documents here at issue were proposed for admission on the basis of their relevance to the questioning of the expert Mr. Osman. While Mr. Osman was scheduled to appear starting 8 February 2016, the two requests were only filed on 2 and 3 February respectively. The NUON Chea Defence submits that the requests could not have been filed earlier because, among other reasons, the appearance of Mr. Osman was only confirmed on 25 January 2016, when the Chamber received a waiver of immunity of Mr. Osman by the United Nations.³³ In this regard, the Chamber recalls that it informed all parties on 7 August 2015 that it would be hearing the

³¹ See Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1), 10 April 2013, para. 2.

³² Decision on NUON Chea Rule 87(4) Request to Admit Documents in respect of Civil Party OUM Suphany, 9 April 2015, E337/3, para. 3

³³ First Request, para. 33; Second Request, para. 24. See Letter from the United Nations Legal Counsel to the President of the Trial Chamber entitled "Request for a waiver of immunity of Mr. Ysa Osman", 25 January 2016, E367/3. A waiver of United Nations immunity from legal process was requested by the President of Trial Chamber on 8 January 2016, in order to allow Mr. Osman to provide testimony as an expert in Case 002/02 trial (E367/2).

expert testimony of Mr. Osman on the topic of the treatment of the Cham.³⁴ On 18 September 2015, the Chamber rejected the objections presented by the KHIEU Samphan Defence to the designation as an expert of Mr. Osman and affirmed that it would hear him.³⁵ The Chamber also observes that on 29 September 2015, the NUON Chea Defence requested to expedite two witnesses and to summons four additional witnesses for the topic on the treatment of the Cham, mindful of the “imminent appearance of expert witness Ysa Osman”.³⁶ While a waiver of immunity from the United Nations allowing Mr. Osman to testify was only received on 25 January 2016, the Chamber finds that the parties have been on notice since 7 August 2015 of the decision to hear Mr. Osman. Accordingly, contrary to the submission of the NUON Chea Defence, the Chamber finds that the First Request and the Second Request could have been filed two weeks in advance of Mr. Osman’s appearance. The failure to do so contributed to the decision of the Chamber to postpone the testimony of Mr. Osman for one day, in order to entertain the two Defence requests, among other pending issues.³⁷

13. The Chamber also finds that the First Request and the Second Request are untimely pursuant to Internal Rule 87(4), as acknowledged by the NUON Chea Defence in its oral submissions.³⁸ Regarding the First Request, nine of the relevant documents (E367/4.1.3, E367/4.1.4 and E367/4.1.6 through E367/4.1.12) are dated between October 1988 and 16 March 2010 and thus were available prior to the start of the trial.³⁹ Documents E367/4.1.1, E367/4.1.2, E367/4.1.5 and E367/4.1.13 through E367/4.1.15 were not available prior to the start of the trial, but their admission was requested between approximately five months to four years after their publication or discovery by the Defence,⁴⁰ thus demonstrating a failure to exercise reasonable diligence.

14. As for the Second Request, four of the relevant documents (E367/5.1.1 to E367/5.1.2, E367/5.1.4 and E367/5.1.14) are dated between 7 October 1973 and 4 December 1999 and therefore were available several years prior to the start of the trial.⁴¹ As for the remaining 10 documents (E367/5.1.3 and E367/5.1.5 to E367/5.1.13), the Chamber observes that they were

³⁴ E-mail by the Senior Legal Officer of the Trial Chamber to all parties, 7 August 2015.

³⁵ Decision on Designation of 2-TCE-95, 18 September 2015, E367, p. 7.

³⁶ NUON Chea’s Urgent and Consolidated Request To Expedite Two Already-Requested Witnesses and Summons Four Additional Witness Regarding the Treatment of the Cham, 29 September 2015, E370, para. 15.

³⁷ E-mail by the Senior Legal Officer of the Trial Chamber to all parties, 5 February 2016.

³⁸ T. 3 February 2016, p. 104.

³⁹ First Request, paras 8-9, 16-28.

⁴⁰ First Request, paras 4, 15, 30-32. The delays in requesting admission of these documents are as follows: E367/4.1.1 (18 months); E367/4.1.2 (seven months); E367/4.1.5 (five months); E367/4.1.13 (17 months); E367/4.1.14 (four years and 2 months) and E367/4.1.15 (23 months).

⁴¹ Request, paras. 13, 23 and attachments 1-2.

not available prior to the start of the current trial, either because they were published or declassified (in the case of the diplomatic cables) afterwards. However, the request to have these documents admitted was made between approximately 10 months to nearly four years after their publication or discovery by the Defence.⁴² The explanations put forward by the NUON Chea Defence that lack of resources prevented an earlier filing and that submitting a request at an early stage does not necessarily lead to a timely decision by the Chamber are unpersuasive.⁴³

3.2. The First Request

15. The Chamber notes that E367/4.1.1 is relevant in so far as it relates to Mr. Osman's biographical information and his field of expertise. E367/4.1.3 is relevant to the extent that it deals with the investigative functions of the expert in his capacity as a staff member of the Office of the Co-Investigating Judges of the ECCC. E367/4.1.4, E367/4.1.6, E367/4.1.7, E367/4.1.9, and E367/4.1.10 to E367/4.1.12 provide relevant evidence, which goes beyond the personal views on the definition of genocide expressed by the authors of E367/4.1.9 to E367/4.1.11, as purported by the International Co-Prosecutor. These documents concern the estimates of Cham casualties during the DK period, the sources of these estimates and an appraisal of the methodology employed by the various experts when collecting data and making findings accordingly. All the above documents are reliable, as Mr. Osman is the identifiable subject or author of some documents or his findings and expertise are discussed by others on known sources, including newspapers and scholarly journals. The Chamber further observes that the proposed documents relate to material already on the Case File, namely two books by Mr. Osman titled "Oukoubah" and "The Cham Rebellion", which are admitted into evidence as E3/1822 and E3/2653, respectively. Accordingly, the Chamber considers it appropriate to evaluate the proposed documents together with the evidence referred to above. In light of the foregoing, despite the untimeliness of the First Request, it is in the interests of justice to admit these 10 documents.

16. As for the remainder of the documents in the First Request, the Chamber considers that they bear no relevance to Case 002/02, as they are either not directly relevant to the personal background or the expertise of Mr. Osman (E367/4.1.2), or they constitute general and

⁴² Request, paras. 12, 14-22. The delays in requesting admission of these documents are as follows: E367/5.1.3 (three years and 10 months); E367/5.1.5 to E367/5.1.12 (two years and 10 months); and E367/5.1.13 (10 months).

⁴³ T. 3 February 2016, p. 104.

repetitive summaries of information which is tangential to the treatment of the Cham and/or rely essentially on second hand sources (E367/4.1.5, E367/4.1.8, E367/4.1.13 to E367/4.1.15). For these reasons, the First Request is rejected with regard to these five documents.

3.3. The Second Request

17. The Chamber considers that documents E367/5.1.1, E367/5.1.2 and E367/5.1.6 through E367/5.1.12 are relevant to Case 002/02, as they provide potentially exculpatory evidence. This information concerns Khmer Sar and anti-Khmer rebellions, the Cham community's purported political opposition to the Khmer Rouge as the reason for their targeting, the Cham's relationship with other Muslim communities abroad and the diplomatic efforts of the Cham's leaders to take part in the Islamic conference of Kuala Lumpur during the DK era. In addition, E367/5.1.2 is mentioned in one of Mr. Osman's books, which is already admitted as E3/1822. The Chamber finds that these documents are reliable, as they originate from Mr. Osman (E367/5.1.1), they are referred to in material already before the Chamber (E367/5.1.2) or, in the case of the diplomatic cables, were obtained from known sources.

18. With regard to the S-21 confession of Chek Prahim (E367/5.1.2), for which only some excerpts were sought for admission, the Chamber considers it appropriate to admit the totality of the document, in order to provide the parties and the Chamber with the context of the evidence admitted. The Chamber notes the objections of the International Co-Prosecutor and the Lead Co-Lawyers for the Civil Parties to the admission of this document on the basis that it is a confession extracted by torture. In this regard, the Chamber recalls that torture-tainted evidence may only be considered for certain limited purposes. This does not, however, preclude its admission into evidence where it is sought to be used against a person accused of torture as evidence that the statement was made.⁴⁴ In light of these considerations, despite the untimeliness of the Second Request, it is in the interests of justice to admit the above documents.

19. As for the remaining 5 documents in the Second Request, the Chamber considers that they are either repetitive (E367/5.1.3 and E367/5.1.13), or they constitute a summary of other general information (E367/5.1.3 and E367/5.1.14), they contain information which falls outside the temporal scope of the trial (E367/5.1.4) or are otherwise not relevant and rely on other sources (E367/5.1.5). The Second Request is rejected in this respect.

⁴⁴ Decision on Evidence Obtained Through Torture, 5 February 2016, E350/8, pp. 33-34.

20. Lastly, the Chamber notes that all documents sought for admission in the First Request and the Second Request were submitted in only one of the official languages of the ECCC. Their admission into evidence is therefore contingent to their translation in English and/or French and/or Khmer. Documents E367/4.1.1, E367/4.1.4, E367/4.1.9, E367/4.1.10 and E367/4.1.11, have since been translated into Khmer. In this respect, the Chamber reminds the parties to ensure that all admitted evidence is available in the three official languages of the ECCC.⁴⁵

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the First Request in part;

ADMITS the following documents in the First Request and **ASSIGNS** the E3 numbers indicated in brackets:

- E367/4.1.1 (E3/9678);
- E367/4.1.3 (E3/9679);
- E367/4.1.4 (E3/9680);
- E367/4.1.6 (E3/9681);
- E367/4.1.7 (E3/9682);
- E367/4.1.9 (E3/9683);
- E367/4.1.10 (E3/9684);
- E367/4.1.11 (E3/9685);
- E367/4.1.12 (E3/9686);

REJECTS the following documents in the First Request:

- E367/4.1.2;
- E367/4.1.5;
- E367/4.1.8;
- E367/4.1.13;
- E367/4.1.14;
- E367/4.1.15;

GRANTS the Second Request in part;

ADMITS the following documents in the Second Request and **ASSIGNS** the E3 numbers indicated in brackets:

- E367/5.1.1 (E3/9687);
- E367/5.1.2 (E3/9688) (the document is admitted in its entirety);
- E367/5.1.6 (E3/9689);
- E367/5.1.7 (E3/9690);
- E367/5.1.8 (E3/9691);

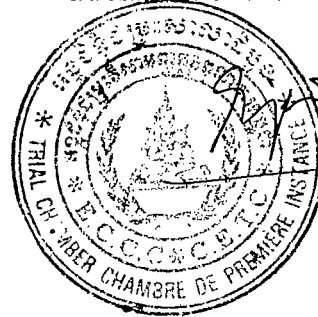
⁴⁵ Case 002/01 Judgment, 7 August 2015, E313, para. 36.

- E367/5.1.9 (E3/9692);
- E367/5.1.10 (E3/9693);
- E367/5.1.11 (E3/9694);
- E367/5.1.12 (E3/9695);

REJECTS the following documents in the Second Request:

- E367/5.1.3;
- E367/5.1.4;
- E367/5.1.5;
- E367/5.1.13;
- E367/5.1.14.

Phnom Penh, 5 May 2016
President of the Trial Chamber



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NU Non