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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

Kingdom of Cambodia
Nation Religion King
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Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
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Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

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DECISION ON INTERNATIONAL CO-PROSECUTOR'S REQUESTS TO ADMIT WRITTEN RECORDS OF INTERVIEW PURSUANT TO RULES 87(3) AND 87(4)

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1. INTRODUCTION

1. The Trial Chamber is seised of the International Co-Prosecutor's requests pursuant to Internal Rules 87(3) and 87(4) to place on the Case File and admit into evidence 48 Written Records of Interview (WRIs) and related annexes, filed on 4 and 6 May 2016.¹ When seised of the Requests, the Chamber was hearing evidence on the S-21 Security Centre, to which several of the WRIs are relevant. The Chamber therefore scheduled oral responses to this motion for 23 May 2016.² Only the KHIEU Samphan Defence chose to make an oral response. On 2 June 2016, the Chamber issued a decision admitting five of the WRIs which are relevant to S-21, noting that they record statements made by witnesses who had testified or were scheduled to testify in Case 002/02 and that there were no objections to the admission of these documents.³ The Chamber now decides on the Requests concerning the remaining 43 documents.

2. SUBMISSIONS

2. The International Co-Prosecutor submits that all of the documents meet the criteria for admission pursuant to Internal Rule 87(3) as they are directly relevant to Case 002/02 subject matter including genocide of the Cham and Vietnamese, the targeting of Lon Nol soldiers, the purges of CPK cadre, forced marriages, joint criminal enterprise, S-21 Security Centre, Tram Kak Cooperatives and Kraing Ta Chan Security Centre and the Kampong Chhnang Airport and Trapeang Thma Dam worksites.⁴

3. As to the timing of the Requests, the International Co-Prosecutor submits that all of the WRIs are interviews produced after the opening of the trial in Case 002/02. They were not authorised for disclosure in Case 002 by the International Co-Investigating Judge until 17 December 2015 at the earliest. Further, the International Co-Prosecutor relies upon the

¹ International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), E319/47, 4 May 2016 ("ICP Request") (Nineteen WRIs and annexes were previously disclosed to the parties from Cases 003 and 004. The remaining 28 WRIs and annexes are disclosed for the first time through the filing of the ICP Request); International Co-prosecutor's Disclosure and Request to Admit One Written Record of Interview Pursuant to Rules 87(3) and 87(4), E319/48, 6 May 2016 ("Second ICP Request") (collectively "the Requests").

² Although granting the Defence one further week to respond, the Chamber rejected the KHIEU Samphan Defence's request for an extension of time from the original deadline of 16 May 2016 until 13 June 2016. *See* Trial Chamber Senior Legal Officer E-mail to Parties, 16 May 2016, E319/47/3.1.

³ Decision on five written records of interview (WRIs) requested to be admitted pursuant to Internal Rule 87(4) (E319/47), E319/47/2, 3 June 2016 ("Decision on Five WRIs"). The documents admitted are: E319/41.3.2, E319/41.3.1, E319/40.4.31, E319/46.3.2, E319/46.3.1.

⁴ ICP Request, para. 2.

description of each statement in the accompanying annex to explain how the documents are conducive to ascertaining the truth.⁵

4. Responding to an inquiry by the Chamber the day after the filing of the motion, the International Co-Prosecutor stated that, generally, apart from potentially exculpatory evidence, and the statements of prior witnesses, documents are disclosed at the same time as a Rule 87(4) motion is filed.⁶ The disclosure of documents is prioritised and when resources allow, documents are reassessed to determine which should be requested for admission at trial pursuant to Rule 87(4). This is why Rule 87(4) applications come sometime after the disclosure of certain documents.⁷

5. The KHIEU Samphan Defence opposes the admission of all the documents proposed in the ICP Request except for the seven WRIs of the witnesses who are scheduled to testify or who have already testified in Case 002.⁸ It submits that the remaining 40 documents do not meet the requirements of Internal Rule 87(3) and 87(4).

6. The Defence notes that, with the exception of one document,⁹ the International Co-Prosecutor requested the disclosure of these WRIs in 2015 and received permission to disclose them by January 2016 at latest. It submits that the International Co-Prosecutor did not exercise due diligence because it failed to request the admission of these documents until May 2016. The failure is particularly egregious because the Co-Prosecutors knew since March of 2016 that seven of the WRIs are from witnesses who were scheduled to testify on the S-21 topic.¹⁰ The KHIEU Samphan Defence further submits that the admission of these WRIs is not conducive to ascertaining the truth because they have very limited probative value as statements put forward in place of the live testimony of witnesses.¹¹

⁵ ICP Request, paras 3-4.

⁶ T. 5 May 2016, p. 85 (DRAFT).

⁷ T. 5 May 2016, pp. 87-88 (DRAFT).

⁸ T. 23 May 2016, pp. 33-34 (DRAFT); Five of the seven WRIs the KHIEU Samphan Defence does not oppose are relevant to S-21. T. 23 May 2016, p. 36 (DRAFT). These documents were admitted on 3 June 2016 pursuant to the Decision on Five WRIs.

⁹ The Chamber notes that this document (E319/46.3.2) was the subject of an urgent International Co-Prosecutor Request to authorise disclosure filed on 25 April 2016 as the statement belonged to 2-TCW-931 who was scheduled to testify regarding S-21 the next day. *See* Decision on International Co-Prosecutor's Urgent Request for Disclosure of One Case 003 Document relevant to S-21 into Case 002, D100/20 [Case 003], 25 April 2016. The ICP Decision authorised the disclosure of this document and clarified that one further document was also authorised for disclosure (if it was not already authorised) (E319/46.3.1). Both documents were admitted pursuant to the Chamber's Decision of 3 June 2016 (E319/47/2).

¹⁰ T. 23 May 2016, p. 35 (DRAFT).

¹¹ T. 23 May 2016, pp. 35-36 (DRAFT).

7. The Defence objects to two documents¹² that are apparently relevant to S-21 because they pertain to facts that were not investigated by the Office of the Co-Investigating Judges in Case 002. In addition, they submit that documents concerning Khmer Krom do not form part of the charges against the Accused in Case 002/02 and therefore should not be disclosed or placed on the Case File. Even if the Chamber has authorised the disclosure of prior statements of all proposed witnesses, the Defence submits that this does not justify admitting the statements until a decision is made to hear the testimony of the individual. The Defence also notes that although the International Co-Prosecutor previously disclosed twelve of the WRIs on the basis that they contained exculpatory information, neither Defence team has asked for the admission of these statements.¹³

8. The International Co-Prosecutor replies that the motion is not belated. He explains that there is a two-step process to these disclosures. First, it must be determined whether a document is exculpatory, which requires a detailed understanding of the case and therefore can only be accomplished by a limited number of staff. Second, the Co-Prosecutors must determine which statements should be sought to be admitted pursuant to Internal Rule 87(4). It is a time-consuming process, but results in a fewer number of statements being sought for admission.¹⁴

9. The International Co-Prosecutor submits that regardless of the timing of Internal Rule 87(4) requests, whether filed by the Defence or any other party, they should be granted if they are conducive to ascertaining the truth. It is submitted that the mere fact that a limited number of witnesses can be called to testify does not render the WRIs irrelevant. Corroborative evidence is very important.¹⁵

10. The International Co-Prosecutor submits that the two statements objected to by the KHIEU Samphan Defence relate to purges in Kratie which is the subject of the testimony of a selected witness and therefore relevant.¹⁶ Evidence on Khmer Krom is relevant and intertwined with the treatment of the genocide of Vietnamese and should be permitted.¹⁷

¹² E319/47.2.19 and E319/47.2.20.

¹³ T. 23 May 2016, pp. 38-39 (DRAFT).

¹⁴ T. 23 May 2016, pp. 40-41 (DRAFT).

¹⁵ T. 23 May 2016, p. 41 (DRAFT).

¹⁶ T. 23 May 2016, p. 42 (DRAFT).

¹⁷ T. 23 May 2016, pp. 42-43 (DRAFT).

11. The KHIEU Samphan Defence surreplies that the rebellion in Kratie is not part of the Closing Order. It submits that the Khmer Krom are Cambodian so it is not clear that facts related to them are relevant to the issue of the treatment of Vietnamese.¹⁸

12. By a separate request, filed two days after the first, the International Co-Prosecutor seeks to admit a statement of 2-TCW-1005 who has been selected by the Chamber to be heard on the topic of internal purges. His statement was authorised for disclosure on 4 May 2016.¹⁹ None of the parties object to the admission of this document.

3. APPLICABLE LAW

13. Internal Rules 53(4) and 87(4) create two separate regimes for the disclosure and the admission of additional materials at the trial phase of these proceedings.²⁰ Internal Rule 53(4) addresses the Co-Prosecutors' obligation to disclose to the other parties and the Chamber certain material that is not yet on the Case File, including that arising from Cases 003 and 004. Internal Rule 87(4) clarifies the conditions under which new material may be admitted at trial.

14. Pursuant to IR 53(4), the Co-Prosecutors are under a continuing obligation to disclose any material that may suggest the innocence or mitigate the guilt of the Accused or "affect the credibility of the inculpatory evidence". This obligation continues throughout the trial and applies to any exculpatory evidence, including material affecting the reliability of inculpatory evidence which in effect amounts to exculpatory evidence.²¹

15. Furthermore, it is in the interests of ascertaining the truth that the Chamber and parties have access to all of the statements of witnesses and Civil Parties who will be heard in Case 002/02. These documents should be put before the Chamber to permit a complete assessment of their testimony. The Chamber has ordered the Co-Prosecutors also to disclose the prior statements of all witnesses proposed to testify in Case 002/02.²²

¹⁸ T. 23 May 2016, p. 46 (DRAFT).

¹⁹ Second ICP Request, para. 1.

²⁰ Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, E363/3, 22 October 2015 ("Disclosure Decision"), para. 20.

²¹ Disclosure Decision, para. 23 and dispositive.

²² Disclosure Decision, para. 27. *See also* Decision on International Co-Prosecutor's request to admit Written Records of Interview pursuant to Rule 87(3) and (4) and to call four additional witnesses for upcoming Case 002/02 Segments, E319/36/2, 25 May 2016, para. 15.

16. Pursuant to Internal Rule 87(4), the Co-Prosecutors' may also seek the admission of new evidence which they consider to be conducive to ascertaining the truth, including inculpatory evidence from Cases 003 and 004 or other sources. In order for this new evidence to be accepted by the Chamber, however, the Co-Prosecutors, as any moving party, must meet the specific requirements of Internal Rule 87(4) by filing a separate reasoned submission. They must show that the proposed evidence meets the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). They must also satisfy the Chamber that the evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence.²³ In certain cases, the Chamber has admitted evidence which does not strictly satisfy these criteria, including instances in which 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 should be evaluated to avoid a miscarriage of justice.²⁴

4. FINDINGS

17. As a preliminary matter, the Chamber notes that three of the WRIs proposed are of witnesses who have testified or have been selected by the Chamber to testify in Case 002.²⁵ These statements are admitted pursuant to established practice.²⁶ The Chamber now considers the remaining 40 documents.

18. The Chamber has consistently held that “[it] expects all parties to exercise due diligence and to request admission of documents in a timely manner, notably as soon as practicable after becoming aware of the material sought for admission.”²⁷ This is in the interests of maintaining expeditious proceedings as well as protecting the rights of the Accused to legal

²³ Disclosure Decision, paras. 28-29.

²⁴ Decision on NUON Chea's Rule 87(4) Requests for Admission of 29 Documents Relevant to the Testimony of 2-TCE-95, E367/8, 6 May 2016, para. 11; *see also* 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), E276/2, 10 April 2013, para. 2.

²⁵ These are documents E319/40.4.21 (Statement of TCW-570); E319/43.3.2 (Statement of TCW-110); E319/48.3.1 (Statement of 2-TCW-1005).

²⁶ *See e.g.* Decision on NUON Chea request to admit into evidence 12 prior statements of KAING Guek Eav *alias* Duch (2-TCW-916), E411/1, 7 June 2016, para. 3; The Chamber also clarifies that the prior statements of witnesses proposed to testify must be disclosed but are not automatically admitted. *See* Disclosure Decision, para. 27.

²⁷ Decision on NUON Chea's rule 87(4) request for admission of six statements and one annex relevant to case 002/02, E319/30/1, 15 September 2015, para. 3; Disclosure Decision, para. 29; Trial Chamber Memorandum Entitled “Decision on Civil Party Lead Co-Lawyers' Rule 87(4) Request Regarding Civil Party D22/2500 with Confidential Annex”, E344/1, 31 March 2015, para. 4.

certainty.²⁸ The Chamber has repeatedly warned the parties that untimely Internal Rule 87(4) requests will be rejected.²⁹

19. To encourage adherence to this principle, in its Disclosure Decision of October 2015 the Chamber imposed a deadline on the Co-Prosecutors to seek the admission of any WRIs disclosed up to the date of that decision.³⁰ The Co-Prosecutors have since disclosed or sought the admission of a large number of additional WRIs for which the Chamber has yet to impose a further deadline. Notwithstanding the lack of a concrete deadline, the Co-Prosecutors, as other parties, continue to be bound by the requirement to exercise due diligence and to seek the admission of WRIs as soon as practicable.³¹

20. As to the documents proposed by the International Co-Prosecutor in the Requests, the Chamber notes that 27 of the documents,³² that is the vast majority, were authorised for disclosure on 17 December 2015, almost five months prior to the filing of the ICP Request.³³ The Chamber considers that the delay in seeking to admit these documents is not satisfactorily explained by the International Co-Prosecutor's suggestion that they have limited resources or the submission that the review of new WRIs from Cases 003 and 004 is time consuming. The failure to seek admission of these documents in a timely fashion amounts to a lack of due diligence and the Chamber considers these requests to be untimely.

21. Moreover, the Chamber recalls that in response to objections by the Defence to the size of disclosures arising from Cases 003 and 004, the Chamber fashioned remedies to strike a balance between the various interests.³⁴ In that decision, the Chamber noted that the prejudicial effect of the disclosures was limited in part by the fact that the Chamber could not rely on disclosures unless and until such documents were admitted pursuant to Internal Rule

²⁸ Disclosure Decision, para. 34.

²⁹ Disclosure Decision, para. 36; *See also*, Trial Chamber Memorandum Entitled "Notice on Choeng Ek Bone Study and Warning regarding Belated Internal Rule 87(4) Requests", E404, 3 May 2016, para. 6.

³⁰ Disclosure Decision, para. 35.

³¹ It is also a misinterpretation of the Chamber's Disclosure Decision to consider it appropriate to first seek the disclosure of a Case 003 or 004 WRI and later seek the admission of the same document. If the Co-Prosecutors intend to rely upon a Case 003 and 004 WRI, it should seek its admission pursuant to Internal Rule 87(4); it should not be disclosed as a potentially exculpatory document.

³² These are documents E319/39.3.3; E319/47/2.3; E319/47.2.5; E319/47.2.6; E319/47.2.7; E319/40.4.7; E319/47.2.8; E319/40.4.27; E319/47.2.9; E319/40.4.22; E319/47.2.10; E319/47.2.11; E319/40.4.42; E319/40.4.39; E319/40.4.15; E319/40.4.49; E319/47.2.12; E319/47.2.13; E319/47.2.14; E319/40.4.23; E319/40.4.38; E319/47.2.15; E319/47.2.18; E319/47.2.24; E319/47.2.25; E319/47.2.26; E319/47.2.27.

³³ *See* Decision on the International Co-Prosecutor's Disclosure Requests D193/29, D193/35, D193/38, D193/39, D193/42, D193/45, D193/46 and D193/48, OCIJ, D193/61 [Case 004], 17 December 2015, Strictly Confidential.

³⁴ Disclosure Decision, paras 20-41.

87(4).³⁵ The Chamber made clear that if the Co-Prosecutors sought to rely on documents from Cases 003 and 004 in future, such documents would only be accepted if proposed in a submission filed pursuant to Internal Rule 87(4).³⁶ The International Co-Prosecutor confirmed this understanding of the Chamber's decision during the 5 May 2016 hearing.³⁷

22. By the present motion, the Co-Prosecutors have now sought to admit 13 WRIs which were previously disclosed to the parties. The Chamber clarifies that this two-step process in seeking disclosure and later seeking admission of the same documents is contrary to the Chamber's order in the Disclosure Decision. Where the Co-Prosecutors seek to rely on WRIs from Cases 003 and 004, they must request to admit them pursuant to Internal Rule 87(4) at the same time that the disclosure is made. The failure to adhere to this order provides an additional reason to reject these 13 WRIs. In addition the Chamber notes that eleven of these 13 documents also fall within the category of documents that are the subject to untimely requests by the Co-Prosecutors. Therefore, the Co-Prosecutors have sought to admit a total of 29 documents for which the request is either untimely or fails to adhere to the Chamber's order in the Disclosure Decision.³⁸

23. The Chamber recalls that it has admitted some documents notwithstanding the untimeliness of the requests seeking their admission. Here, the International Co-Prosecutor has not argued that the present documents should be admitted because they are exculpatory or because they are absolutely necessary to ascertaining the truth and their admission is required in the interests of justice. In any case, as the Chamber approaches the close of evidence in Case 002/02, there must come a point when the parties can rely upon the evidentiary record that has been established throughout the investigation and trials in this case. The value that additional evidence may have in ascertaining the truth must be weighed against the uncertainty created by allowing the admission of large amounts of new evidence near the close of the proceedings when other parties may not have a sufficient opportunity to assess and respond to this information. For this reason, the Chamber will subject requests to admit new evidence at the late stages of this trial with heightened scrutiny, particularly when such evidence was previously available to the parties and when the new evidence is mainly proposed for corroboration purpose without a clear demonstration that their admission is

³⁵ Disclosure Decision, para. 32.

³⁶ Disclosure Decision, para. 36.

³⁷ T. 5 May 2016, pp. 87-88 (DRAFT).

³⁸ Two additional documents were authorised for disclosure by subsequent decisions of the International Co-Investigating Judge and are rejected for failing to adhere to the Chamber's order in para. 36 of the Disclosure Decision (E319/43.3.3, E319/43.5.2).

required in the interest of justice. For these reasons the Chamber denies the admission of the above-mentioned 29 documents.

24. The 11 remaining documents³⁹ were authorised for disclosure on 28 and 29 January 2016.⁴⁰ The ICP Request therefore comes about three months after they were available for purposes of Internal Rule 87(4). Although on the upper limits of what may be considered to constitute due diligence, the Chamber has in the past admitted documents for which requests for admission were filed three months after the documents became available.⁴¹ These 11 documents are relevant to topics within the scope of Case 002/02, namely treatment of the Vietnamese, the role of the Accused, and S-21 Security Centre. In addition, the statements were taken by investigators from the Office of the Co-Investigative Judges and therefore meet the *prima facie* standards of reliability and authenticity.

25. As to the KHIEU Samphan Defence submission that evidence relating to the Khmer Krom is inadmissible, the Chamber recalls its oral ruling of 25 May 2015, in which it held that evidence pertaining to the Khmer Krom may be relevant to issues other than persecution of the Khmer Krom as a distinct group and therefore admissible.⁴² The Chamber also rejects the contention that two statements (E319/47.2.19; E319/47.2.20) relevant to S-21 are outside the scope of Case 002/02. Although the statements contain limited information about S-21 and the decision on these statements was not urgent,⁴³ the Chamber considers that the documents meet the requirements of Internal Rules 87(3) and (4) and should be admitted.

26. The Chamber further rejects the submission that these documents should not be admitted due to their limited probative value in the absence of the live testimony of the witnesses. The Chamber recalls that whether a witness testifies may have an effect upon the probative value and weight of the written statements of that witness. This is not, however, an impediment to the admission of the written statements.⁴⁴

³⁹ These are documents E319/47.2.1; E319/47.2.2; E319/47.2.4; E319/47.2.16; E319/47.2.17; E319/47.2.19; E319/47.2.20; E319/47.2.21; E319/47.2.22; E319/47.2.23; E319/47.3.1.

⁴⁰ Decision on International Co-Prosecutor's Disclosure Requests D100, D100/2, D100/10, D100/13, D100/14 and D100/16, D100/17 [Case 003], 28 January 2016, Strictly Confidential; Consolidated Decision on International Co-Prosecutor's Disclosure Requests, D108/18 [Case 003], 29 January 2016, Strictly Confidential.

⁴¹ Decision on International Co-Prosecutor's request to admit Written Records of Interview pursuant to Rule 87(3) and (4) and to call four additional witnesses for upcoming Case 002/02 Segments, E319/36/2, 25 May 2016, paras 25, 39.

⁴² T. 25 May 2015, pp. 60-62.

⁴³ Decision on Five WRIs, para. 3.

⁴⁴ Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, E299, 15 August 2013.

27. The Chamber therefore admits these 11 WRIs pursuant to Internal Rule 87(4) in addition to the three WRIs of witnesses who have testified or who have been selected to testify in Case 002 (for a total of 14 WRIs).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

RECALLS that it has previously admitted five Written Records of Interview (E319/41.3.2, E319/41.3.1, E319/40.4.31, E319/46.3.2, E319/46.3.1) by its decision of 3 June 2016;

REJECTS the International Co-Prosecutor's request to admit 29 documents E319/39.3.3; E319/47/2.3; E319/47.2.5; E319/47.2.6; E319/47.2.7; E319/40.4.7; E319/47.2.8; E319/40.4.27; E319/47.2.9; E319/40.4.22; E319/47.2.10; E319/47.2.11; E319/40.4.42; E319/40.4.39; E319/40.4.15; E319/40.4.49; E319/47.2.12; E319/47.2.13; E319/47.2.14; E319/40.4.23; E319/40.4.38; E319/47.2.15; E319/47.2.18; E319/47.2.24; E319/47.2.25; E319/47.2.26; E319/47.2.27 as well as E319/43.3.3, E319/40.5.2;

ADMITS E319/40.4.21; E319/43.3.2; E319/48.3.1; E319/47.2.1; E319/47.2.2; E319/47.2.4; E319/47.2.16; E319/47.2.17; E319/47.2.19; E319/47.2.20; E319/47.2.21; E319/47.2.22; E319/47.2.23; E319/47.3.1;

ASSIGNS E3 numbers to all Written Records of Interview that have been admitted through this decision as listed in the attached annex;

ORDERS the International Co-Prosecutor to provide, in the annexed table to any future request to admit Case 003 or 004 WRIs pursuant to Internal Rule 87(4), the document number and date of the International Co-Investigating Judge's decision authorising disclosure for each WRI requested.

Phnom Penh, 29 June 2016
President of the Trial Chamber



Nil Nonn