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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

សាធារណៈ / Public

TRIAL CHAMBER

Date: 19 October 2012



TO: All parties, Case 002.

FROM: Nil Nonn, President, Trial Chamber.

CC: All Trial Chamber judges; Trial Chamber Senior Legal Officer.

SUBJECT: Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223).

1. Further to memorandum E233 of 25 September 2012, the Trial Chamber will shortly schedule additional hearings to enable adversarial challenge to all remaining documents at issue in Case 002/01 for which opportunity for adversarial argument has yet to be provided to the parties pursuant to Internal Rule 87(3). It also provides a number of further guidelines in relation to written statements tendered pursuant to Decision E96/7.

A) Adversarial argument in relation to all remaining documents at trial

2. The Trial Chamber will shortly issue its decision on objections to documents proposed to be put before the Chamber on the Co-Prosecutors' Annexes A6-A11 and A14-A20, as well as documents proposed by the other parties, and considered at earlier document hearings. At that point, the majority of documents tendered to date by the parties as relevant to Case 002/01 will have been subject to adversarial argument pursuant to Internal Rule 87(3) and, where considered to satisfy the criteria contained in that sub-rule, provided E-numbers and put before the Chamber.

3. Following the reading in court of the indictment paragraphs relevant to these segments, the Trial Chamber will also shortly commence the hearing of evidence in relation to the final factual portions of Case 002/01, namely military structures and population movement (E236/1). On 8 October 2012, the Trial Chamber further advised the parties that it would expand the scope of trial to include a select number of allegations in relation to Toul Po Chrey, but that no further extensions of the scope of trial in Case 002/01 would be entertained (E163/5).

4. Pursuant to its earlier directions, the parties are requested to indicate which additional documents, from their original (*i.e.* April 2011) document lists, they seek to tender in

relation to the population movement and Toul Po Chrey trial segments no later than 30 November 2012. These supplementary lists concerning Toul Po Chrey and population movement trial segments may include documents from the Case File and documents contained in the parties' April 2011 document lists. The parties are requested not to include documents already contained in their later (July 2011) lists of documents relevant to the earlier trial segments in Case 002/01, documents cited in the footnotes of the relevant Closing Order paragraphs (as indicated in E124/7.3 which reflects amendments following the issuance of E163/5), or those already provided with an E3 classification. To facilitate review by the Chamber, the parties shall also provide the reference number of each document from their April lists.

5. The Chamber intends shortly to hold hearings in relation to all remaining documents and categories of documents sought by the parties in Case 002/01 but not yet subject to adversarial argument, namely:

- All documents cited in the Closing Order paragraphs relevant to population movement (phases one and two) and Toul Po Chrey, namely 205-209, 698-711, 975-977, 1105-1113, 1191-1193, 1375 and 1384;
- Documents now admissible in consequence of the Trial Chamber's new document decision (E190, as identified in E190.1 and E190/2.1) or documents subsequently put before the Chamber pursuant to Internal Rule 87(4), for which opportunity for adversarial argument has yet to be provided (e.g. E216/3 and E172/24/4);
- Those statements identified in paragraph 28 of E96/7 (documents or other evidence cited in the footnotes to the relevant portion of the Closing Order) that have already received an E3 classification but not considered in prior document hearings; and
- Any other documents previously included in lists submitted pursuant to paragraphs 12-13 of the Trial Chamber's Order E9 that are relevant to Case 002/01 and for which opportunity for adversarial argument has yet to be provided.

6. Once parties have indicated all documents from their original document lists considered relevant to the population movement (phases one and two) and Toul Po Chrey trial segments, hearings to permit adversarial argument in relation to these documents will also be scheduled in due course.

B. Written statements tendered in consequence of Decision E96/7

7. In view of the large number of written statements proffered by the parties, and the limited probative weight that can be accorded to them in absence of the testimony of their authors, the Chamber requested the parties to specify, no later than 27 July 2012, which statements they sought to proffer and the evidentiary purpose for which each statement or category of statement is sought. Where this evidence is voluminous or essentially repetitive, the parties were requested to consider proposing to be put before the Chamber a representative sample of each type of evidence (as opposed to all documents or statements in each category) (E96/7, paragraph 35).

8. On 29 August 2012, the KHIEU Samphan Defence, alleging that there was an "appearance of fraud" surrounding the circumstances in which OCIJ investigators conducted the interview of one witness, opposed the large number of statements put before the Chamber by the Co-Prosecutors pursuant to E96/7, in light of the caution that must be exercised with regard to the reliability OCIJ written statements and even more when they concern individuals that have not been called to give evidence at trial (E223,

paragraphs 6-7 (noting that approximately 2416 statements have been tendered by the Co-Prosecutors)). Many of these statements are further alleged to fall outside the scope of the trial in Case 002/01 and are not yet available in translation. Given the need for Defence scrutiny of these statements, they allege that submission of this quantity of material undercuts the Trial Chamber's efforts to ensure judicial economy and to safeguard the right of the Accused to an expeditious trial (E233, paragraphs 9-22). The KHIEU Samphan Defence request that the Chamber order the Co-Prosecutors to revise requests E208, E208/2 and E96/8 in light of the Trial Chamber's directives designed to achieve trial efficiency, which will also enable the Defence to be in a position to raise objections to this material. In response, the Co-Prosecutors allege that the KHIEU Samphan Defence misstates the scope of the translation burden posed by Co-Prosecutors' requests and disputes that the Defence have lacked sufficient time to scrutinize the statements in question. It also denies that any of the statements at issue are irrelevant to the scope of Case 002/01 or that significant time would be needed to hear objections to this material (E223/1).

9. Concerns expressed by the KHIEU Samphan Defence regarding alleged defects in the OCIJ investigators' conduct of witnesses' interviews have been previously dealt with in Decision E142/3 and will shortly be addressed in response to a number of similar motions currently before the Chamber. Having reviewed the remaining submissions of the parties, the Chamber notes that the Co-Prosecutors have not significantly reduced the number of statements submitted to the Trial Chamber, despite being asked to do so. Although the precise impact on the Interpretation and Translation Unit ("ITU") of submitting all of the statements proffered has yet to be identified, this will indisputably add to its workload, as well as that of the Chamber. To permit effective adversarial challenge to these statements, the Chamber, in accordance with its previous directions and the criteria outlined in its decision E96/7, advises the Co-Prosecutors that only those statements which can be made available in all official ECCC languages by Friday 29 February 2013 may be proposed to be put before the Chamber as evidence. The Co-Prosecutors are directed to liaise with the ITU in order to ascertain which of the statements identified in E208, E208/2 and E96/8 can be made available in all ECCC official languages by this date and to advise the Chamber and the parties at the earliest opportunity if in consequence of these consultations, certain statements identified by the Co-Prosecutors will no longer be tendered into evidence. Once available in all official ECCC languages, the Chamber will afford these statements an E3 number, and will then consider them in light of the legal principles set forth in its decision E96/7.

10. The Chamber's efforts to allow the Defence to challenge, where sought, material tendered pursuant to its Decision E96/7 has been further hampered by the Lead Co-Lawyer's non-compliance with the directions contained in paragraph 35 of that Decision.

11. In contrast to the Co-Prosecutors, who at least provide some specification of the intended uses for which they proffer particular written statements, the Lead Co-Lawyers stress the particularity of Civil Party applications and the prior admissibility decisions made in relation to them to justify a refusal to provide the information sought by the Chamber, or to reduce the numbers of applications they intend to put before the Chamber as evidence (E208/4). They further contend that Civil Party applications are statements by a party to the trial (and thus, cannot be excluded from the proceedings), although the Lead Co-Lawyers later indicate that they reserved the right to put before the Chamber a representative sample of Civil Party applications (E208/4, paragraph 43, disposition,

paragraph d). They nonetheless fail to indicate in that filing which applications fall within that sample, or to provide any of the other specifications requested by the Chamber in paragraph 35 of E96/7. They further request an extension of 1-2 months in order to file submissions regarding Civil Party applications relevant to population movement phases 1 and 2 that they seek to tender into evidence (E208/4, disposition, paragraph e).

12. The Trial Chamber notes that it did not rule upon the legal characterisation of Civil Party applications or their admissibility as Civil Parties in Decision E96/7: a competence which the Lead Co-Lawyers correctly identify as belonging to the Co-Investigating Judges during the pre-trial phase. Decision E96/7 instead addressed certain practical realities and fair trial considerations that stem from the consequences of putting large volumes of written statements or Civil Party applications before the Trial Chamber as evidence in connection with the verdict absent the testimony of their authors. This is distinct from the issue of the admissibility of Civil Parties. In consequence, compliance with the Trial Chamber's directives in paragraph 35 of E96/7 is a pre-requisite for Civil Party applications to be considered to be put into evidence in Case 002/01 for the following reasons:

- A significant number of the 3866 Civil Party applications are as yet untranslated. The ITU advise that its resources are insufficient to ensure that all can be translated within the likely lifespan of the ECCC. As submission of all evidence at trial requires its availability in all ECCC official languages, the Lead Co-Lawyers are also therefore directed, in consultation with the ITU, to tailor the number of Civil Party applications they seek to tender so as to ensure that only those Civil Party applications which can be made available in all official ECCC languages by Friday 29 February 2013 are sought to be put into evidence.
- As it may be impracticable for all Civil Party applications to be tendered into evidence in Case 002/01, it is essential for the Lead Co-Lawyers to specify which statements they ultimately seek to have placed into evidence in order to permit adversarial argument in relation to them. As, in accordance with the ECCC's legal framework, no evidence may be adduced against an accused unless it has been subject to adversarial challenge, proper identification of which Civil Party applications the Lead Co-Lawyers wish to tender is a necessary prerequisite to their being put before the Chamber.

13. The Trial Chamber shall nonetheless grant the Lead Co-Lawyers until 29 February 2013 to indicate which Civil Party applications form part of the representative sample of Civil Party applications they wish to tender into evidence (in relation to all trial segments), in addition to all other information sought by the Chamber in E96/7, paragraph 35. Failure to do so will have the consequence that no Civil Party applications shall be considered as having been proposed into evidence by the Lead Co-Lawyers.

14. Pursuant to paragraph 36 of Decision E96/7, and where parties wish to pose objections to any material tendered in accordance with this decision, they may do so by written motion at any stage of proceedings but in any event no later than Friday 26 April 2013. The Chamber shall weigh these objections when considering the material proffered in accordance with the criteria outlined in Decision 96/7.

15. This constitutes the Chamber's official response to E208/4 and those portions of E223 and E223/1 concerning evidence tendered following Decision E96/7.