ព្រះរាជាណាចក្រកម្ពុជា E176
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: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: **28 October 2009**

Classification: **PUBLIC**

DECISION ON PARTIES REQUESTS TO PUT CERTAIN MATERIALS BEFORE THE CHAMBER PURSUANT TO INTERNAL RULE 87(2)

Co-Prosecutors

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I. INTRODUCTION

1. On 16 and 17 September 2009, upon the invitation of the Chamber, the Parties made a number of oral requests to have various materials put before the Chamber pursuant to Internal Rule 87(2).[1] The Chamber notes at the outset that various requests are moot, as the material in question has already been put before the Chamber and subjected to examination.[2] A number of other requests seek to place additional material before the Chamber, or clarification of the status of a number of documents previously placed before it.

II. FINDINGS

A. LEGAL FRAMEWORK

2. Internal Rule 87(2) provides that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination." Although the wording of Rule 87(3) refers to "evidence from the case file", it is apparent from the entirety of Rule 87 that material on the case file is not "evidence" as such until it is produced in court in accordance with Rule 87(2).[3] According to Internal Rule 87(3), material contained in the case file is considered put before the Chamber if its contents have been summarised, read out in court or appropriately identified.[4] Material may be considered to have been subjected to examination where opportunity has been provided for adversarial argument, even where the parties do not avail themselves of this opportunity.

3. When putting a document before the Chamber, the party should specify whether or not it seeks consideration of the entire document. If the party seeks to introduce only part of the

[1] T., 16 September 2009, p. 53-115; 17 September 2009, p. 1-47. Some requests were anticipated in previous applications filed by the Parties. On 17 September 2009, Lawyers of Civil Party Group 1 sought to file and subsequently place before the Chamber new materials (namely certain S-21 Prisoner Lists) under Internal Rule 87(4). In its Decision of 6 October 2009, the Chamber denied this request. (See "Decision on the Oral Request of Lawyers of Civil Party Group 1 to Be Allowed to File New Material", 6 October 2009 (Document E173)). While the Defence initially requested that an interview given by Civil Party Chum Mey to a French newspaper be also put before the Chamber, this request was subsequently formally withdrawn.

[2] These requests pertain to Document 5.65 from the Introductory Submission ("S-21 Letter from Duch to Ya" (Document E3/372) and "S-21 Letter from Pon to Ya" (Document E3/377)), requested by Civil Party Group 1; Documents D80/2 ("Voices from S-21 – Terror and History in Pol Pot's Secret Prison", David Chandler, Silkworm Books (Document E3/427)); D80/4 (« Le Portail », François Bizot, Folio, 2000 (Document E3/4)); D80/5 (« Les clés du Cambodge », Raoul Marc Jennar, Maisoneuve et Larose, 1995 (Document E3/515)); D80/8 ("Genocide sites in Cambodia (1975-1979)", Cambodian Genocide Program, Yale University (Document E3/512)); D80/9 ("Composite Landsat Satellite images of Cambodia, 1972-1976, and 1990 with mass grave and prison sites from 1975-1979", Cambodian Genocide Program, Yale University (Document E3/513)); D80/10 ("Mapping the Killing fields of Cambodia 1975-1979", Documentation Center of Cambodia (Document E3/514)) and D82 ("DUCH's lawyers' Request to admit consultation prepared by Mr Raoul M. Jennar in the Investigation Case File" (Document E[illegible]). The latter requests were made by the Defence.

[3] "Decision on Admissibility of Material on the Case File as Evidence", 26 May 2009 (Document [illegible]), para. [illegible].

[4] This is also reflected in the practice of the Chamber prior to the adoption of the present Rule 87(3) (see [illegible] T., [illegible] June 2009, p. 83-84).

document, it should identify the relevant part.[5] Internal Rule 87(3) provides that, in order to constitute evidence, material should satisfy minimum standards such as relevance and reliability.[6] Once produced, the Chamber will assess the probative value of all evidence and determine the weight to be accorded to it.[7]

4. Where parties seek to admit new evidence pursuant to Internal Rule 87(4), the moving party must demonstrate that the requested testimony or evidence was not available before the opening of the trial. In relation to material admitted under Internal Rule 87(4), the Chamber must affirmatively decide whether or not this material satisfies the above-mentioned criteria in Internal Rule 87(3).[8]

B. MATERIALS REQUESTED BY THE OFFICE OF THE CO-PROSECUTORS

5. Document D99/1 is an aerial map of S-21 annexed to the Closing Order and therefore part of the Case File.[9] The Defence does not dispute that this document is evidence. The Chamber finds this document to be relevant to the trial and grants the Co-Prosecutors' request.

6. Document E61.1 contains, in a table format, reference to 430 materials from the Case File. According to the Co-Prosecutors, these materials concern the existence of an international armed conflict between Cambodia and Vietnam during the period relevant to the Closing Order ("Armed Conflict Materials").[10] Several of these materials, or portions of them, have already been put before the Chamber and referred to during the trial proceedings. Further to a Defence request, the Co-Prosecutors recently filed a summary of these materials.[11] While the Defence notes that this summary is not an objective reflection of the referred materials, it does not contest the use as evidence of these materials, with the exception of 9 documents described as suspect statements.[12] These documents include telegrams sent to the United Nations Security Council as well as news broadcast featuring excerpts of speeches attributed to individuals currently charged in Case 002. Despite the classification given to them in the Case File and in Document E61.1, the Chamber determines that none of these 9 documents are in substance "suspect statements" as understood by

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[5] T., 20 May 2009, p. 4-5.
[6] Internal Rule 87(3) provides that the Chamber may reject as evidence material which is a) irrelevant or repetitious; b) impossible to obtain within a reasonable time; c) unsuitable to prove the facts it purports to prove; d) not allowed under the law; or e) intended to prolong proceedings or is frivolous.
[7] "Decision on Admissibility of Material on the Case File as Evidence", 26 May 2009 (Document E43/3), paras 5-7.
[8] "Decision on Admissibility of New Materials and Direction to the Parties", 30 March 2009 (Document E5/10/2), para. 5.
[9] "Annex A: Map of S-21 Security Centre" (Document D99/1).
[10] "Annex A: Armed Conflict", 29 April 2009 (Document E61.1). See also "Rule 92 Submissions: Notification of Armed Conflict Documents to be Put Before the Trial Chamber pursunt to Rule 87(2)", 29 April 2009 (Document E61).
[11] "Co-Prosecutors Summary of the Material on Armed Conflict Filed with Their Motion of 29 April 2009 [illegible] 29 September 2009 (Document E61/1.1).
[12] « Observations de la defense sur le resume des Co-procureurs concernant la documentation sur le conflit armé et demande de la defense relative aux declarations des personnes mises en examen dans le dossier 002/19-09-2007/ECCC/OCIJ », 5 October 2009 (Document E61/2).

the Defence. However, one of these documents has already been put before the Chamber[13] while three of them are irrelevant, repetitious or not properly identified. The request for their admission into evidence is accordingly rejected.[14] With respect to all other Armed Conflict Materials referred to in Document E61.1, the Chamber finds these to be relevant to the trial proceedings and grants the Co-Prosecutors request.

7. Document E152.1 refers, in a table format, to various statements given by the Accused during the investigation phase and associated documents ("Accused Statements").[15] Document E152.2 contains, in a table format, reference to 69 statements given by various witnesses interviewed during the investigation phase ("Witness Statements").[16] All statements bar one are part of the Case File and their use as evidence is uncontested by the Defence.[17] Several of these Statements, or portions of them, have already been put before the Chamber and repeatedly referred to during the trial proceedings.[18] With the exception of the statement referred to at number 25[19] of Document E152.1, which is not part of the Case File, the Chamber finds all Accused Statements and associated documents (upon which the accused has commented during the investigation phase) as well as all Witness Statements to be relevant to the trial proceedings. The Trial Chamber grants the Co-Prosecutors' request. Where only portions of these statements were previously put before the Chamber, the entire statement is now put into evidence.

8. Document E152.3 contains, in a table format, reference to 60 S-21 documents containing annotations made by the Accused. The Defence objects to these documents being put before the Chamber on the basis that they were not subjected to adversarial discussion and that the English and French versions of them are inconsistent. A total of 14 of these documents, or portions of them,

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[13] "Telegram dated 3 January 1979 from the Deputy Prime minister in Charge of Foreign Affairs of DK addressed to the President of the Security Council, 3 Januray 1979" (Document D60, Annex 374, renumbered as E3/209).
[14] "News Broadcast in Phnom Penh by the Voice of Democratic Kampuchea No. 015" (Document 20.29 from the Introductory Submissions); "Chinese Ambassador to Cambodia gives Reception for Nuon Chea" and "Visit to Cambodia by Japanese Friendship Delegation" (Document D60, Annex 305); and "National Public Statement by KHIEU Samphan (Document D60, Annex 243). The Chamber also notes that only partial Khmer translation for some of these documents is available.
[15] "Annex A: Accused's Statements and Associated Documents" (Document E152.1). See also "Co-Prosecutors' Request for the Admission of Relevant Testimonial Statements and Annotated S-21 Documents Collected During the Judicial Investigation", 19 August 2009 (Document E152).
[16] "Annex B: Witness Statements", 29 April 2009 (Document E152.2).
[17] The Defence indicated that it does not contest the use of "all of the documents that were commented upon by the Accused at the request of Investigating Judges" whether they are appended to the Accused Statements or handed in later by the Accused. T., 16 September 2009, p. 71.
[18] These include Document D48/1, namely the "Report of the Crime Scene Reenactment at Choeung [illegible] February 2009 which was erroneously omitted from Document E152.1.
[19] According to the Defence, this document is a statement relevant to Case 002 (T. 16 September 2009, p. 71). This document does not appear in the Case File and therefore it will not be considered by the Chamber.

were previously put before the Chamber and subjected to examination during trial.[20] Where only portions of these documents were previously put before the Chamber, the entire document is now included into evidence. The relevance of these documents is limited to the fact that they were made and, where appropriate, constitute evidence that they were made under torture. They are not admitted for the truth of their contents.[21]

9. With respect to the remaining 46 documents, the Chamber finds that sufficient similar material has already been put before the Chamber during the trial. The Chamber therefore finds these 46 documents in question to be irrelevant and repetitious. Accordingly, this request is denied.

10. Document E160.1 is a book entitled "The Lost Executioner", by **Nic DUNLOP**.[22] The Defence does not object to this book being put before the Chamber. Events narrated in this book were referred to during trial, including by the Accused, but it was not formally put before the Chamber. In addition, Mr. Dunlop was initially included on the witness list but later withdrawn by the Chamber.[23] The Chamber finds this book relevant to the trial and grants the Co-Prosecutors' request.

C. MATERIAL REQUESTED BY THE DEFENCE

11. Document D80/1 is a book entitled "Pol Pot: Anatomy of a Nightmare" by **Philip SHORT**.[24] Document D80/6 is a book entitled "Cambodia Year Zero" by **Francois PONCHAUD**.[25] While part of the Case File since the investigation phase, these books were never

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[20] "S-21 Confession of ACHAR KANG" (Document E5/2.21), "S-21 Confession of SMANN Sless" (Document E5/2.2), "Possible evidence against Duch", in particular "DUCH ordering torture on prisoner MOT Heng" and "S-21 Prisoner list" (Document IS 18.81, renumbered as E3/367), "Interrogation of SUAN San" (Document E5/2.34), "Confession of KE Kim Huot" (Document IS 5.35, renumbered as E3/369), Confession of SAR Phon (or SMANN Sless)" (Document E5/2.1), "S-21 Prisoner List [Executions]" (Document D57-Annex 00296, renumbered as E3/371), "S-21 Confession of KIM Sok" (Document E5/2.52), "S-21 Confession of BUNN Narak" (Document E5/2.9), "S-21 Confession of CHHEAV Sun Heng" (Document E5/2.8), "S-21 Confession of PRUM Samneang" (Document E5/2.3), "S-21 Confession of ROUN Savy" (Document E5/2.5), "Name of members of Sok and Mai Lun 's family who have to be distroyed" (Document IS 18.31, renumbered as E3/383), "S-21 Letter from DUCH to PON" (Document IS 18.15, renumbered as E3/376).

[21] In this regard, the Chamber notes Article 15 of the Torture Convention: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". *See also* T., 20 May 2009, p. 6.

[22] "The Lost Executioner – A Story from the Khmer Rouge", Nic Dunlop, Bloomsbury, 2005 (Document 160.1). *See also* "Co-Prosecutors' Notice to place NIC DUNLOP's Book 'The Lost Executioner' on the Case File and for its Admission as Trial Evidence", 24 August 2009 (Document E160).

[23] T., 29 June 2009, p. 4.

[24] "Pol Pot: Anatomy of a Nightmare", Philip Short, Denoel, 2007 ("Document D80/1"). See also "Request to Place Materials in the Case File", 9 May 2008 ("Document D80").

[25] "Cambodia Year Zero", François Ponchaud, Kailash, 2001 ("Dcoument D80/6").

referred to during the trial proceedings.[26] The Defence now requests that they be put before the Chamber

12. In addition, the Defence also requests that the following new material be put before the Chamber: a) a book entitled "The Two Worlds of Albert Speer" authored by Mr. **Henry T. KING;**[27] b) the Trial Judgment and other materials from the *Obrenovic* Case before the International Criminal Tribunal for Yugoslavia;[28] c) the book entitled "God Has a Dream – A Vision of Hope for Our Time", by Archbishop **Desmond TUTU;**[29] and d) a letter from Mr. **Henry T. KING.**[30]

13. The Chamber finds that books and judgments of other Tribunals do not as such constitute evidence for the purposes of Rule 87(2). Being publically available, there is naturally, no barrier to such material being referenced in support of legal submissions. While the Co-Prosecutors do not object to Mr. King's letter being included as evidence, the Chamber finds that the letter contains Mr. King's own opinions concerning the weight given by the Nuremberg Tribunal to Albert Speers' admission of responsibility. It refers only to Albert Speer and makes no direct comparison to the current proceedings. Sufficient other general material concerning the impact of an accused's admission of responsibility has already been put before the Chamber. Accordingly, all these requests are denied.

D. MATERIAL REQUESTED BY THE LAWYERS OF CIVIL PARTY GROUP 2

14. Document E2/32/5 contains submissions from the Lawyers of Civil Party Group 2, raised in open court, regarding the alleged rape of Civil Party NAM Mon.[31] The Defence opposes this request, on grounds that it refers to new facts not contained in the Closing Order. The Chamber notes that these allegations were raised at a late stage in the proceedings, after Civil Party NAM

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[26] Civil Party Chum Sirath mentioned having once met with Mr. Ponchaud. (T., 20 August 2009, p. 38).

[27] "The Two Worlds of Albert Speer – Reflections of a Nuremberg Prosecutor", Albert T. King with Bettina Elles, University Press of America, 1995. An excerpt of this book has been filed in the Case File. *See* Document E5/9.1.

[28] *Prosecutor v. Dragan Obrenovic*, Sentencing Judgment, ICTY Trial Chamber, Case No. IT02/60/2, 10 December 2003. Excerpts of the transcripts and video recording of the trial proceedings in this case have been filed in the Case File *See* Documents E5/9.3 and E5/9.4.

[29] "God Has a Dream – A Vision of Hope for Our Time", Desmond Tutu, Rider, 2005 (Document E5/9.6).

[30] "Affidavit of Henry T. King", 3 September 2009 (Document E5/9/2). Mr. King was initially included on the Experts List but died before being heard. The letter was filed subsequently and outlines Mr. King's opinion on the conviction of Albert Speer by the Nuremberg Military Tribunal. Mr. King was requested to provide oral testimony on the trial of Albert Speer, the only defendant to admit responsibility before the International Military Tribunal of Nuremberg, the judgement rendered in that case and his life after conviction. (*See* Decision Concerning the Assignment of [illegible] April 2009 (Document E51)).

[31] "Request for Submission of Additional Statement of Civil Parties E2/32 of the Case File 001/18-07-2007/ECCC/TC 2 September 2009 (Document E2/32/5). Document E2/32/4 is a statement from Civil Party Nam Mon also concerning the same allegations.

Mon was heard in court. The Chamber, pursuant to Internal Rule 87(4), finds these allegations to be belated. Further, evidence relevant to them will be impossible to obtain within a reasonable time. The request is therefore denied.

E. MATERIALS RELEVANT TO CIVIL PARTIES

15. Documents E139, E161 and E164 contain in their annexes various materials concerning several Civil Parties whose applications have been challenged by the Defence.[32] The Defence does not object to these materials being put into evidence. It is recalled that, following lengthy adversarial argument during trial, the Chamber directed Civil Parties whose status had been challenged to file any additional evidentiary materials which may establish their relationship to the victims of the alleged crimes in Case 001 within a set timeframe.[33] The production of such material is relevant and conducive to ascertaining the truth. The request is accordingly granted.

16. For the same reasons, the Trial Chamber considers that other additional evidentiary material relating to Civil Parties whose applications have been challenged by the Defence and filed by the other Civil Party groups are also included as evidence.[34] As this material has not been examined in court, the Defence may file written submissions in relation to this material.

17. The Trial Chamber further considers that, with the exception of the documents E2/32/4 and E2/32/5 mentioned in paragraph 12 above, the Civil Party applications and related attachments of Civil Parties who were heard as alleged survivors, as well as those who withdrew their request to be heard, are considered as having been put before the Chamber.[35] The Chamber recalls that the Defence has already had an opportunity to comment on these documents, either in the context of the Civil Parties' appearance in court,[36] or during adversarial discussion on challenges to Civil Party applications.[37]

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[32] See the materials annexed to the following documents : « Nouveaux documents relatifs aux Parties Civiles D25/11, E2/39, E2/81 et E2/84 », 12 August 2009 ("Document E139"); « Requête en soutien au dépôt de nouveaux documents relatifs aux parties civiles E2/30, E2/34, E2/63, E2/70, E2/71, E2/72, E2/78, E2/79 et E2/81 », 28 August 2009 ("Document E161"); « Requête en soutien au dépôt de nouveaux documents relatifs aux parties civiles E2/30, E2/38 et E2/76 », 3 September 2009 (Document E164).
[33] T., 27 August 2009, p. 4.
[34] "Request for Submission of Evidence in Support of Civil Parties Group 2: E2/22, E2/35, E2/64, E2/66 and E2/83", 10 September 2009 (Document E163/3); "Motion to Provide Exhibits in Support of Five Civil Parties of Group 1", 3 September 2009 (Document E165) and documents annexed thereto.
[35] *See* Applications and attached documents of the following Civil Parties: Chum Mey (D25/3), Bou Meng (D25/1), Ly Hor (E2/61), Lay Chan (E2/23), Phaok Khan (E2/33), Chin Meth (E2/80), Nam Mon (E2/32), Morn Soth, Ros Men (D25/9), Chhat Kimchhun (E2/81), Jeffey James (E2/86) and Keang Vannary (E2/77).
[36] T., 30 June and 1-13 July 2009.
[37] T., 17, 26 and 27 August 2009.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

GRANTS the requests to put before the Chamber the following materials:

- Document D99/1;
- The materials referred to in Document E61.1, with the exception of Document 20.29 from the Introductory Submissions, Document D60, Annex 305 and Document D60, Annex 243;
- The statements referred to in Document E152.1, including all documents on which the Accused has commented during the investigation phase and with the exception of document referred to at number 25 of Document E152.1;
- The statements referred to in Document E152.2;
- Those documents referred to in Document E152.3 which have already been put before the Chamber.
- Document E160.1;
- The materials annexed to Documents E139, E161 and E164;

Where only portions of these materials were previously put before the Chamber, the entire material is now included into evidence;

REJECTS all the remaining requests;

CONSIDERS, on its own motion, that the materials annexed to Documents E163/3 and E165 are put before the Chamber and consequently, **ORDERS** the Defence to file any written submissions in relation to these materials within 7 days from the notification of the present Decision;

CONSIDERS, on its own motion, that, with the exception of documents E2/32/4 and E2/32/5, the Civil Party applications and the documents attached to these applications of Civil Parties who were heard as alleged survivors, as well as of Civil Parties who withdrew their request to be heard, are put before the Chamber.

A table specifically identifying the materials put before the Chamber following this Decision will be issued in due course. The table will also indicate which materials should be placed in the E3 folder of the Case File.

Phnom Penh, 28 October 2009
For the Trial Chamber

Nil Nonn