



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

ឯកសារដើម
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សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៨/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

ឯកសារបានថតចម្លងត្រឹមត្រូវ
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Date: 26 May 2009
Classification: PUBLIC

DECISION ON ADMISSIBILITY OF MATERIAL ON THE CASE FILE AS EVIDENCE

Co-Prosecutors

CHEA Leang
Robert PETIT

Accused

KAING Guek Eav alias "DUCH"

Lawyers for the Civil Parties

KONG Pisey	TY Srinna
HONG Kimsuon	Pierre Olivier SUR
YUNG Panith	Alain WERNER
KIM Mengkhy	Brianne McGONIGLE
MOCH Sovannary	Annie DELAHAIE
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Lawyers for the Defence

KAR Savuth
François ROUX
Marie-Paule CANIZARES



The **TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);

BEING SEISED of Case File No. 001/18-07-2007-ECCC/TC pursuant to the “Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch”, rendered orally by the Pre-Trial Chamber on 5 December 2008 and filed in Khmer on 9 December 2008¹;

HAVING HEARD the Defence request of 22 April 2009 that the Chamber exclude as evidence three documents and that it limit the use of a further document against the Accused (“request”)²;

NOTING the oral and written submissions of the Co-Prosecutors and the Civil Party Groups, which oppose the request³;

HAVING HEARD the oral motion by the Co-Prosecutors of 22 April 2009 for authorization to make use of an additional document before the Chamber and noting that the Defence does not oppose this motion⁴;

HEREBY DECIDES as follows:

A. INTRODUCTION

1. This decision consolidates various oral and written motions concerning the use as evidence in the present trial of the following documents:

- a. Statements of two deceased witnesses taken by representatives of the non-governmental organization Documentation Center of Cambodia (“DC-Cam”), included in the case file as Documents D59.4 and D59.12⁵;
- b. A statement of the Accused taken in May 1999 by a representative of the United Nations High Commissioner for Human Rights (UNHCHR), included in the case file as Document D9⁶; and
- c. A document purporting to be a record of an interrogation of Chheun Sothy, which took place on 22 January 1975 (“Report No. 64/75/08, Issue No. 18”), included in the case file as Document No. 19.25 (Annex C of the Introductory Submission)⁷.

¹“Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch”, 5 December 2008 (Document D99/3/42).

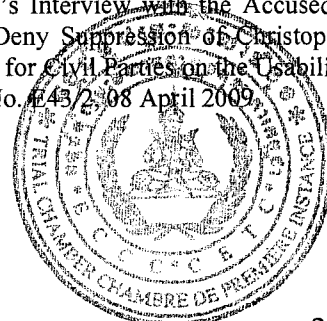
² Transcript (“T.”), 22 April 2009, p. 35; T., 6 April 2009, pp. 9, 12-13.

³ T., 6 April 2009, pp. 10-12; T., 7 April 2009, pp. 46, 53-55; T., 22 April 2009, pp. 8-12, 16-31; “Co-Prosecutor’s Observations on Confronting the Accused with the Record of his UNHCHR Interviews”, Doc. No. E43/3, 08 April 2009; “Observations of the Co-Lawyers for Civil Parties Concerning Mr. Peschoux’s Interview with the Accused”, Doc. No. E43, 07 April 2009; “Group 1 - Civil Parties’ Co-Lawyers Request to Deny Suppression of Christophe Peschoux Interview”, Doc. No. E43/1, 08 April 2009; “Submission of the Co-Lawyers for Civil Parties on the Usability of the Interview of the Accused with OHCHR Representative and a Journalist”, Doc. No. E43/2, 08 April 2009.

⁴ T., 22 April 2009, pp. 3, 15-16.

⁵ Documents D59, Annex 4 and D59, Annex 12 (“deceased witness statements”).

⁶ Document D9 (“UNHCHR interview”).



B. SUBMISSIONS

2. The Defence opposes use by the Chamber of the two deceased witness statements, on grounds that they are not legal documents but instead unsworn statements taken by a representative of a non-governmental organization. The Trial Chamber should limit reliance on witness testimony to those witnesses able to appear in court. It objects to the use of the UNHCHR interview due to the manner in which this statement was taken, and in particular, the absence of a warning to the Accused regarding his right to remain silent prior to questioning.⁸

3. In response, the Prosecution, supported by the Civil Parties, contends that all documents are admissible pursuant to Rule 87(1). There is no basis in the Internal Rules for the exclusion of statements by deceased witnesses, nor anything to suggest that the Accused's UNHCHR statement was not given voluntarily. Once documents are placed on the case file, they may be considered by the Chamber and the only issue is the weight to be afforded to them. If objecting to these documents, the Defense should have utilised the annulment procedure during the investigative phase of the proceedings described in Rule 76(2). Having failed to do so, the Closing Order cured any defects in them and, in accordance with Rule 76(7), the Defense is debarred from requesting the exclusion of this evidence from the case file.⁹

4. According to the Defence, it was not obliged to request annulment of these documents during the investigative phase. Rule 76 does not apply to the documents in question. The operative rule is instead Rule 87(3), in accordance with which the documents in question should be excluded by the Trial Chamber as unsuitable to prove the facts they purport to prove.¹⁰

C. DELIBERATIONS

A. Legal Framework

i. *Provisions of the Internal Rules concerning the admissibility of evidence (Rule 87)*

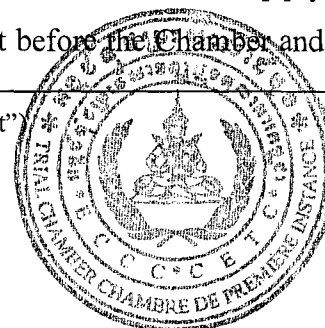
5. Internal Rule 87(1) provides that “[u]nless provided otherwise in these IRs, all evidence is admissible.” The scope of this general principle is qualified by Rule 87(2), which states that “[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and

⁷ Document No. 19.25 (Annex C of the Introductory Submission) (“Chheun Sothy Report”)

⁸ T., 6 April 2009, p. 9; T., 7 April 2009, pp. 36-57 and T., 22 April 2009, p. 64.

⁹ T., 7 April 2009, pp. 54-56; T., 22 April 2009, pp. 18-21.

¹⁰ T., 22 April 2009, pp. 33-41.



subjected to examination”. Rule 87(3) indicates that any material contained in the case file is considered put before the Chamber if its content has been summarised or read out in court.

6. 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). Whilst any material on the case file may be produced before the Trial Chamber, whether at the request of a party or upon its own motion, the Chamber may reject it as evidence on the criteria listed in Rule 87(3), namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence.¹¹

7. In order to be used as evidence, material on the case file must therefore satisfy minimum standards of relevance and reliability necessary for it to be produced before the Chamber. Once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed.

ii. *Scope of the annulment procedure in relation to “any part of the proceedings” (pièce de la procédure) (Rule 76)*

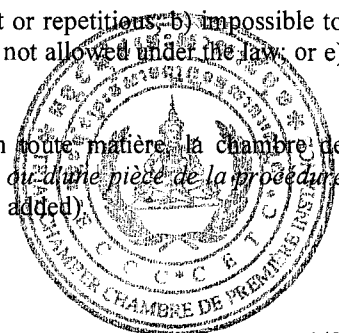
8. Rule 76 of the Internal Rules permits parties before the Office of the Co-Investigating Judges (OCIJ) to request annulment or removal from the case file of “any part of the proceedings”¹² alleged to be vitiated by a fundamental defect in form or a procedural error. According to Rule 76(7), the Closing Order, once final, shall “cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or Supreme Court Chamber.”

9. The Chamber notes that the phrase “any part of the proceedings” in the English version of Rule 76(1) is ambiguous, whereas its French counterpart – *pièce de la procédure* – has a precise legal meaning. Article 170 of the French Code of Criminal Procedure refers to the notion of «*actes ou pièces de la procédure*»¹³, which pertain specifically to investigative actions and their tangible results. Thus, for instance, an annulment request may encompass letters rogatory authorising

¹¹ Rule 87(3) permits the Chamber to 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.

¹² In french, *pièce de la procédure* (*infra*).

¹³ Article 170 of the *Code de procédure pénale français* provides as follows: «En toute matière, la chambre de l'instruction peut, au cours de l'information, être saisie aux fins d'annulation d'un acte ou d'une pièce de la procédure par le juge d'instruction, par le procureur de la République ou par les parties» (emphasis added).



telephone intercepts, as well as transcripts of the intercepted communications or the physical recording itself. *Pièces de la procédure* stem solely from acts carried out by an investigating judge or by any person acting as representative of the judicial authority. Material of this type must be subject to annulment proceedings in accordance with Rule 76; otherwise, any defects contained in it are cured by the Closing Order pursuant to Rule 76(7).

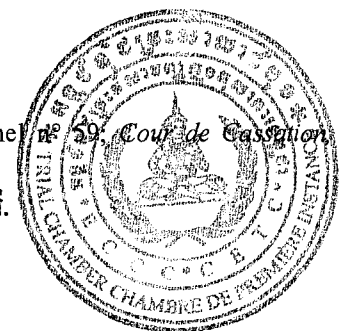
10. Conversely, the case law of the French *Cour de Cassation* has held that letters, documents or recordings submitted by a party or a witness, while comprising part of the case file, do not constitute *pièces de la procédure*.¹⁴ The Investigating Judge is obliged to include such material within the proceedings and may not refuse to place any document submitted by a party on the case file, even if it is alleged to have been obtained through unfair means. This material falls outside the scope of Rule 76. Any irregularities in it may instead be discussed during proceedings before the Trial Chamber, upon request that the material in question be used before the Chamber.

11. As Cambodian law utilises the equivalent expression to *pièce de la procédure* found in French law, the Chamber considers that this notion in the Internal Rules also refers solely to investigative acts of the Co-Investigating Judges or any person acting as representative of the judicial authority, and to the materials resulting from these acts.¹⁵ Consequently, only these acts and their resultant materials are included within the scope of the annulment procedure before the Pre-Trial Chamber. This rule does not extend to materials and documents introduced by the parties, and defects contained in these materials are thus not cured by the Closing Order pursuant to Rule 76(7). Any alleged irregularity attaching to these materials or documents must instead be considered during examination before the Chamber in deciding upon their use as evidence at trial.

12. None of the documents at issue in this decision constitute *pièces de la procédure* in accordance with the above definition and thus, all fall outside the scope of Rule 76. They are nonetheless all on the case file, which the parties may seek to put before the Chamber. As mentioned above, the use of such material in court may be challenged, either by a party or by the Chamber on its own motion, and the Chamber may reject it as evidence on the basis of criteria such as irrelevance or unreliability.

¹⁴ See e.g. *Cour de Cassation*, Chambre Criminelle (30 mars 1999), Bulletin Criminel n° 59, *Cour de Cassation* Chambre Criminelle 16 septembre 2003 Revue Dalloz 2004, sommaire, p. 670.

¹⁵ See *inter alia* Article 253 of the Cambodian Code of Criminal Procedure: **លិខិតនៃនីតិវិធី**.



B. Analysis of Particular Documents*i. Statements of deceased witnesses and related DC-Cam article*

13. These statements were taken by a representative of DC-Cam on 17 August 2001 and 28 April 2003, respectively. Although interviews of these witnesses, HAM In and IM Vorn, were sought, both died before they could take place.¹⁶

14. European Court of Human Rights case law indicates that the right to examine a witness as part of the right to a fair trial normally presupposes that the evidence be produced at a public hearing, in the presence of an Accused, with a view to adversarial argument. While there are exceptions to this general principle, as a general rule an Accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage.¹⁷

15. Other international criminal tribunals permit the use of evidence, in the form of a written statement, of a deceased witness or witness who can no longer with reasonable diligence be traced, where certain conditions are satisfied.¹⁸ Factors taken into account in considering whether or not to admit such evidence include the circumstances in which the statement was made and recorded, whether the statement was subject to questioning by a party against whom the evidence is to be used, and whether the statement relates to events about which there is other evidence.¹⁹ Where the evidence goes to proof of acts and conduct of an accused as charged, this is a factor against the admission of such evidence, or that part of it.²⁰

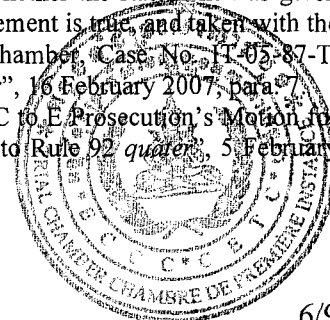
¹⁶ T., 7 April 2009, pp. 36 and 51; *see also* "Co-Prosecutors' Request for interview of 33 witnesses and Admission of documents relevant to these witnesses in the Case File; Annex 4: Interview with HAM In on 17 August 2001", Doc. No. D59 Annex 4, 17 August 2001. "Co-Prosecutors' Request for interview of 33 witnesses and Admission of documents relevant to these witnesses in the Case File; Annex 12: DC-Cam - In the matter of Security Officer M-13, Interview with Im Vorn", Doc. No. D59 Annex 12, 28 April 2003.

¹⁷ *See e.g. Bonev v. Bulgaria*, ECHR 60018/00 (2006), para. 43; *Gossa v. Poland*, ECHR 47968/99 (2007), para. 53; *Lüdi v. Switzerland*, ECHR 12433/86 (1992), para. 47; *Doorson v. The Netherlands*, ECHR 20524/92 (1996), para. 76.

¹⁸ *See* Rules 92bis and quater of the Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL).

¹⁹ *Prosecutor v. Popovic*, ICTY Trial Chamber, Case No. IT-05-88-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater", 21 April 2008, para. 31 (considering also whether the statement was given under oath, signed by the witness with an accompanying acknowledgement that the statement is true, and taken with the assistance of a duly qualified interpreter); *Prosecutor v. Milutinović*, ICTY Trial Chamber, Case No. IT-05-87-T, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater", 16 February 2007, para. 7.

²⁰ *Prosecutor v. Taylor*, SCSL-03-01, "Decision on Public with Confidential Annexes C to E Prosecution's Motion for Admission of the Prior Trial Transcript of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92 quater", 5 February 2009, para. 18.



16. The Chamber notes that the Accused contests the accuracy of these statements, and that he has lacked the opportunity to confront these witnesses, who were not heard before the OCIJ and who have since deceased. Whilst events at M-13 are generally only of background, contextual relevance in this trial, both statements refer to the Accused's alleged criminal acts and conduct.²¹ It appears that no oath was taken by either witness or the interpreters. The Chamber further notes the discrepancies alleged by the Co-Prosecutors between the English and French versions of Document D59/4.²² The Chamber excludes these statements due to their origins, content, their contested character, and the inability of the Accused to challenge their veracity. These factors render these statements unsuitable to prove the facts they purport to prove, in accordance with Rule 87(3).

17. In the course of proceedings, the Chamber referred to an article entitled "The Security System of Special Zone's Office M-13", published in DC-Cam's special English edition newsletter *Searching for the Truth*, dated July 2003 and included in the Co-Prosecutor's Introductory Submission as Document No. 1.8.²³ This article, which details the establishment, structure and functioning of M-13, was based principally on the two above-mentioned DC-Cam statements of deceased witnesses. The Defense has objected to the use of this publication at trial.²⁴ As the deceased witness statements upon which it is derived have been excluded, the DC-Cam article is consequently also excluded.

iii. *UNHCHR interview*

18. According to the Accused, this interview was conducted in 1999 by Christophe Peschoux, a representative of the UNHCHR, in the presence of others.²⁵ The Accused alleges that he submitted to questioning only after he was told that Mr. Peschoux had a "UN mandate".²⁶ He contends that this emphasis on the apparent right to question him suggested an obligation to respond.²⁷ Although conceding that he freely answered the questions asked, the Accused claims that he was not

²¹ The statement of Ham In, a detainee and employee at M-13, refers to torture allegedly committed by the Accused at M-13, and provides a significantly larger estimate of the number of executions carried out there to that indicated by the Accused at trial. The statement of Im Vorn refers extensively to the Accused's alleged involvement in interrogations, torture and executions at M-13 (T., 7 April 2009, pp. 36-37 and 51-52; "Co-Prosecutors' Request for interview of 33 witnesses and Admission of documents relevant to these witnesses in the Case File; Annex 4: Interview with HAM In on 17 August 2001", Doc. No. D59 Annex 4, 17 August 2001 and "Co-Prosecutors' Request for interview of 33 witnesses and Admission of documents relevant to these witnesses in the Case File; Annex 12: DC-Cam - In the matter of Security Officer M-13, Interview with Im Vorn", Doc. No. D59 Annex 12, 28 April 2003).

²² T., 7 April 2009, pp. 43-45, 54.

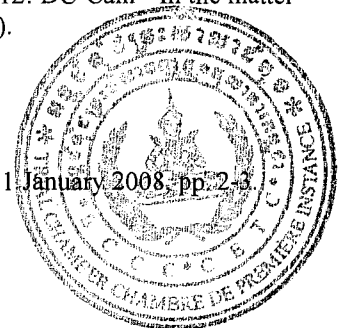
²³ Document 1.8 of the Introductory Submission ("DC-Cam article").

²⁴ T., 22 April 2009, p. 35.

²⁵ Written Record of Interview of Charged Person, Doc. No. D38, 21 January 2008, pp.2-3.

²⁶ T., 22 April 2009, p. 44; Written Record of Interview of Charged Person, Doc. No. D38, 21 January 2008, pp.2-3.

²⁷ T., 22 April 2009, p. 54.



informed either of his right to silence or warned that the interview might subsequently be used in court proceedings.²⁸ In addition to the manner of questioning, the Accused complains that he was induced to attend the interview under false pretences and urged during it to travel to Thailand in order to be sent for trial in Belgium.²⁹ The Office of the Co-Prosecutors contests this account, emphasising the relevance of the interview, its voluntariness, and the fact that it was taken neither by judicial officers nor in the context of arrest or possible prosecution.³⁰ Numerous questions regarding the authenticity of the recording of the interview are also raised by the parties.³¹

19. The right to silence and privilege against self-incrimination, contained in Rule 21(D) of the Internal Rules, mirrors generally-recognized international standards in this area. These establish that statements made during investigation prior to trial can be considered reliable only if they were given voluntarily and free of coercion. Exclusion is the usual remedy when breaches of these rights are demonstrated.³²

20. In order to clarify the circumstances surrounding the Accused's UNHCHR interview, it would be necessary for the Chamber to hear all persons present when the statement was taken and, in particular, the UNHCHR representative. The Chamber excludes this interview on grounds that the supplementary investigations necessary to assess the validity of the Accused's assertions and to assess the accuracy of the transcripts – which would include the hearing of several witnesses, the review of audio records, and requests for revised transcripts and fresh translations – is likely to lead to significant delays in the trial. The Chamber recalls Rule 87(3)(b), which permits the exclusion of evidence that is impossible to obtain within a reasonable time. Further, the Chamber notes the numerous other interviews of the Accused already on the case file or previously produced in court.

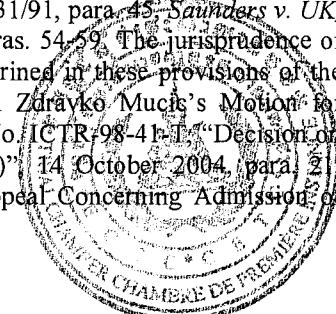
²⁸ Written Record of Interview of Charged Person, Doc. No. D72, 5 May 2008, p. 6.

²⁹ T., 22 April 2009, pp. 50-60.

³⁰ T., 6 April 2009, pp. 10-11 (depicting this interview as freely given to an officer whose mandate was to gather evidence of human rights violations); "Co-Prosecutor's Observations on Confronting the Accused with the Record of his UNHRHC Interviews", Doc. No. E43/3, 08 April 2009, p. 1. The parties also disagree as to the timeliness of the Defence objection to the conduct of the interview: T., 6 April 2009, pp. 10-11; "Co-Prosecutor's Observations on Confronting the Accused with the Record of his UNHCHR Interviews", Doc. No. E43/3, 08 April 2009, p. 2; "Observations of the Co-Lawyers for Civil Parties Concerning Mr. Peschoux's Interview with the Accused", Doc. No. E43, 07 April 2009; "Group 1—Civil Parties' Co-Lawyers Request to Deny Suppression of Christophe Peschoux Interview", Doc. No. E43/1, 08 April 2009, p. 4.

³¹ T., 22 April 2009, pp. 44, 55, 64-65.

³² See e.g. Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR); Article 6 of the European Convention on Human Rights (ECHR); *Murray v. United Kingdom*, ECHR (1996) 18731/91, para. 45; *Saunders v. UK*, ECHR (1996) 19187/91, para. 68; *Shabelnik v. Ukraine*, ECHR (2009), 16404/03, paras. 54-59. The jurisprudence of the ICTY and ICTR affirm the essential provisions of the right to a fair trial as enshrined in these provisions of the ICCPR and ECHR: see e.g. *Prosecutor v. Mucic et al*, IT-96-21-T, "Decision on Zdravko Mucic's Motion for Exclusion of Evidence", 2 September 1997, para. 41; *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, "Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C)", 14 October 2004, para. 21; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table", 19 August 2005, para. 15.



Much of the content of this disputed interview is in substance repetitious and thus likely to have little impact upon the trial. The Chamber does not, as such, exclude the interview as a general matter or order its removal from the case file, but declines to use it in this case as it constitutes evidence which is unavailable within a reasonable time-period and repetitious within the meaning of Rules 87(3)(a) and (b).

iii. *Chheun Sothy report*

21. The Chheun Sothy report contains information based on the subject's detention at M-13. The OCIJ had been unable to locate the witness upon whose statement the report was based.³³ The Co-Prosecutors request permission to use this report in relation to further questioning regarding M-13. The Defence made no objection to the use of the report, although it requests that it be provided with its original translation.³⁴ The Chamber allows the report to be produced. Its probative value, and hence the weight to be accorded to it, will be assessed by the Chamber in due course.

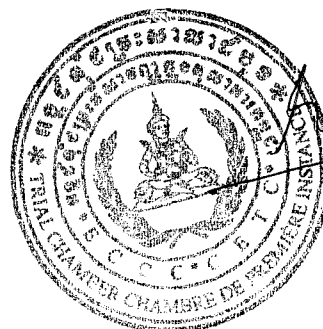
FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

GRANTS the Defence request in relation to the deceased witness statements, DC-Cam article and the UNHCHR interview and excludes these documents as evidence in the present trial pursuant to Rule 87(3) of the Internal Rules;

GRANTS the Office of the Co-Prosecutors' request in relation to the Chheun Sothy report and permits it to be put before the Chamber and subjected to examination in accordance with Rule 87(2) of the Internal Rules;

ORDERS the Office of the Co-Prosecutors to provide the Defence with the original translation of the Chheun Sothy report. *me sp*

Phnom Penh, 26 May 2009
President of the Trial Chamber



Nil Nonn
Nil Nonn

³³ T., 21 April 2009, pp. 76-77.

³⁴ T., 22 April 2009, pp. 4, 15-16..