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Nation Religion King

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Nation Religion Roi

អគ្គិសមីបន្ទុកសំណើរឿង

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

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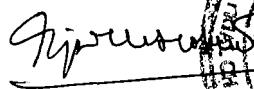
TRIAL CHAMBER

TO: All Parties, Case 002

FROM: NIL Nonn, President of the Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Office

SUBJECT: Decision on the Co-Prosecutors' and KHIEU Samphan's Internal Rule 87(4) Requests concerning US Diplomatic Cables (E282 and E282/1; E290 and E290/1)

Date: 13 June 2013



1. The Chamber is seised of a request from the Co-Prosecutors to put before the Chamber new evidence consisting of 26 diplomatic cables sent between United States embassies and the Secretary of State between 1973 and 1975 (E282). The KHIEU Samphan Defence opposes the Co-Prosecutors' request on the basis that the cables are unsuitable to prove the facts they purport to prove and violate the Defence's right to cross-examine. They also submit that E282.1.7 is irrelevant (E282/1).

2. The Chamber is also seised of a request from the KHIEU Samphan Defence to put before the Chamber new evidence consisting of 14 diplomatic cables sent between various United States embassies and the Secretary of State between 1973 and 1975, and 2006 to 2007 (E290). The Co-Prosecutors oppose admission of two proposed cables from 2006 and 2007 (E290.1.13 and E290.1.14, respectively) which they consider irrelevant, repetitious and unsuitable to prove the facts they are intended to prove. The Co-Prosecutors do not object to the admission of the remaining 12 cables authored between 1973 and 1975 (E290/1).

3. According to Internal Rule 87(4), the Trial Chamber may admit any new 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). Pursuant to Internal Rule 87(3), the Trial Chamber may reject a request for evidence where it finds, *inter alia*, that it is irrelevant or repetitious, impossible to obtain within a reasonable time, or unsuitable to prove the facts it purports to prove. Ordinarily, the requesting party must satisfy the 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. The Chamber has previously indicated that a document not included on a party's initial Internal Rule 80(3) list constitutes new evidence subject to the requirements of Internal Rule 87(4) but that it may be admitted where the interests of justice so require (E190, paragraphs 19-21).

4. With the exception of E290.1.13 (authored in 2007 and still classified as confidential), the Trial Chamber finds that all the proposed documents were available before the opening of the trial given that all but one of the diplomatic cables were declassified and released by the US State Department on either 30 June 2005 or 5 July 2006. The remaining cable was authored in July 2006 and was unclassified (E290.1.14).

5. The Chamber accepts that the cables proposed by the Co-Prosecutors could not have been previously discovered with the exercise of reasonable diligence given none of the cables formed part of the OCIJ's prior requests to include in the Case File cables previously obtained from the US State Department covering the same period (E282, paragraph 4). Further, the cables could not have been discovered via WikiLeaks, a non-profit organisation that publishes online classified or declassified (but not publicly available) information from anonymous sources given they were previously available only in "a group of 1.7 million diplomatic cables 'in a raw, unorganized form'" (E282, paragraph 3). The Chamber considers the Co-Prosecutors subsequently exercised reasonable diligence in discovering and presenting this new evidence once WikiLeaks created a searchable database on 8 April 2013 (E282, paragraph 3), after which the Co-Prosecutors filed their request to put this new evidence before the Chamber on 22 April 2013.

6. By contrast, the KHIEU Samphan Defence offers no reasoned explanation as to why 13 of the 14 proposed cables could not have been discovered with reasonable diligence between 2005/2006 and April 2013 when WikiLeaks created their searchable database, during which time 12 cables were declassified and one was always unclassified. Nor do they explain the delay in filing their request of almost two months after the creation of WikiLeaks' searchable database. In the circumstances, the KHIEU Samphan Defence have not satisfied the strict requirements of Internal Rule 87(4).

7. The Trial Chamber further notes that all proposed cables originate from the WikiLeaks website rather than from official State Department sources. It is therefore unable to conclude that material obtained from the WikiLeaks website is authentic. Although the parties could seek to obtain authentic copies of the proposed cables from official sources and to place those on the Case File, this process is likely to be lengthy and thus, the evidence proposed does not satisfy the Internal Rule 87(3) requirement of availability within a reasonable time.

8. The Trial Chamber also considers the 26 diplomatic cables proposed by the Co-Prosecutors and eight cables proposed by the KHIEU Samphan Defence (E290.1.1, E290.1.2, E290.1.3, E290.1.4, E290.1.5, E290.1.8, E290.1.9 and E290.1.10) are repetitious insofar as they tend largely to corroborate other background evidence already

on the Case File concerning circumstances that prevailed in Cambodia between 1973 and 1975.

9. Excerpts from four cables proposed by the KHIEU Samphan Defence relate to KHIEU Samphan's role and authority both prior to and after 1975 (E290.1.5, E290.1.6, E290.1.11 and E290.1.12). By the Defence's own acknowledgement, these excerpts corroborate testimony already before the Chamber (E290, paragraphs 19 and 21). Insofar as excerpts of other cables support evidence lead regarding the Accused KHIEU Samphan's character (E290.1.1, E290.1.5, E290.1.6 and E290.1.7), significant evidence has already been presented in court regarding this and additional character witnesses are still to testify (E288). The excerpts from these cables are therefore repetitive (E290, paragraph 16).

10. Lastly, the KHIEU Samphan Defence propose E290.1.13 and E290.1.14 as evidence of political interference in the work of the ECCC, in support of allegations of political bias of two national prosecutors, the unwillingness of DC-Cam to cooperate, corruption in the hiring of national staff-members, the leaking of confidential information to the United States' embassy officials concerning the number and identity of the suspects investigated by the investigative judges, and the recruitment of Stephen HEDER by the Co-Prosecutors. The information they contain is generalised, and the KHIEU Samphan Defence has not demonstrated the relevance of these issues to the Accused's alleged responsibility in Case 002/01 or facts otherwise at issue at trial.

11. The Trial Chamber therefore finds that the proposed material does not satisfy the *prima facie* standards of relevance, reliability and authenticity required under Internal Rule 87(3), and denies the Co-Prosecutors and KHIEU Samphan requests on grounds of impossibility of obtaining (the authenticated versions of these cables) within a reasonable time (Internal Rule 87(3)(b)). The Chamber also rejects the requests on the basis that the proposed cables are repetitious of evidence already on the Case File and/or irrelevant (Internal Rule 87(3)(a)).

12. This constitutes the Chamber's official response to E282, E282/1, E290 and E290/1.