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..... SACNN PADO

E424/1

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

TRIAL CHAMBER

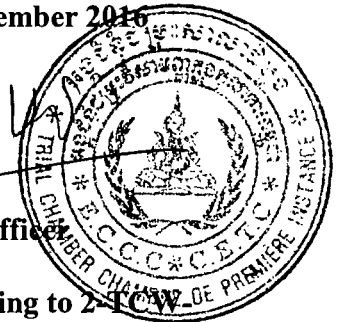
TO: All Parties, Case 002

Date: 2 September 2016

FROM: Judge Ya Sokhan, for the President of the Trial Chamber

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

SUBJECT: Decision on NUON Chea Defence Rule 87(4) Request relating to 2-TCW-1005



1. The Trial Chamber is seised of a request filed confidentially by the NUON Chea Defence on 20 July 2016 (E424), in which they seek the admission of a written record of interview from a witness in Case 003 (“Document”) that is relevant to the anticipated testimony of 2-TCW-1005 (“Request”). Having heard oral submissions on the Request on 26 July 2016, the Trial Chamber rendered an oral ruling on the same day, with written reasons to follow, in which it granted the Request and admitted E319/43.3.3 into evidence as E3/10639. The Chamber hereby provides reasons for its decision.

2. The NUON Chea Defence submits that two other written records of interview of this Case 003 witness have already been admitted by the Trial Chamber in June 2016 (E319/47/3.1) and that it is in the interests of justice that the sources be evaluated together. It submits that the document is *prima facie* reliable, relevant and not repetitious as it contains additional information not available from the evidence on the record (E424, paras 1, 8-14). The NUON Chea Defence notes that the Document was disclosed to them on 29 March 2016, and thus was not available to the Defence before the opening of the trial (E424, para 10).

3. During oral submissions on 26 July 2016, the KHIEU Samphan Defence, while not objecting to the Request, noted that the Trial Chamber had previously denied a request by the International Co-Prosecutor for the admission of the same document (*See* T. 26 July 2016, pp. 7-8 (Draft); E319/47/3, fn. 38). No other Party made oral submissions in response.

4. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all 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). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial 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. However, in certain cases, the Chamber has admitted evidence which does not strictly satisfy this criterion, including in instances where 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 require evaluation to avoid a miscarriage of justice (*See* E319/36/2).

5. The Chamber notes that it rejected a previous request for the admission of the Document on procedural grounds, as the International Co-Prosecutor had failed to adhere to the Chamber's disclosure guidelines with respect to Rule 87(4) requests (E319/47/3, fn. 38 referring to E363/3, para. 36). In contrast, the Defence are not bound by those same obligations. The Chamber accordingly considers the merits of the instant Request.

6. The Chamber notes that the Document was disclosed to the Defence on 29 March 2016 and it was therefore not available to the NUON Chea Defence prior to the start of trial. However, while the Parties were notified of 2-TCW-1005's selection as witness on 8 April 2016, the Request was made only on 20 July 2016, almost four months later and on the eve of testimony of 2-TCW-1005. The Chamber reminds the parties that Rule 87(4) requests should be filed as soon as possible and observes that the NUON Chea Defence could and should have filed this request earlier. Nonetheless, having considered the submissions of the parties, and noting that two other written records of interview of this individual had already been admitted into evidence, the Chamber finds that the proposed Document relates closely to material already before the Chamber and finds it to be in the interests of justice for the third written record of interview (E319/43.3.3) to be also admitted in order to ascertain the truth.

7. This constitutes the Chamber's official response to E424.