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E396/4

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
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Nation Religion Roi

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TRIAL CHAMBER

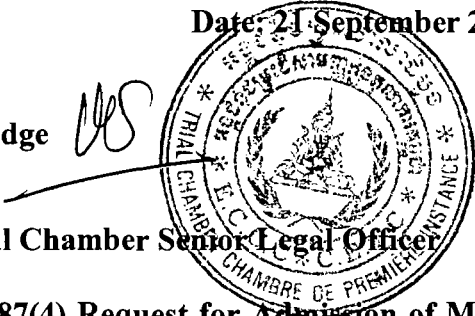
TO: All Parties, Case 002

FROM: Judge Ya Sokhan, Presiding Judge

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

SUBJECT: Decision on NUON Chea Rule 87(4) Request for Admission of Material in relation to the Late King Father Norodom Sihanouk

Date: 21 September 2016



1. The Trial Chamber is seised of a request pursuant to Internal Rule 87(4) filed by the NUON Chea Defence on 8 April 2016 (E396) (“Request”) to admit into evidence three letters authored by the late King Norodom Sihanouk (“late King Sihanouk”), as well as one video and one audio recording of speeches given by him (together “the Material”). On 20 April 2016, the KHIEU Samphan Defence filed a motion supporting the Request (E396/1). On 26 April 2016, the Co-Prosecutors responded to the Request and the Khieu Samphan Motion (E396/2) (“Response”). The NUON Chea Defence filed a reply to the Response on 3 May 2016 (E396/3) (“Reply”).

2. The NUON Chea Defence submits that the Material originates from after the DK period but demonstrates the late King Sihanouk’s views on the Vietnamese and on Vietnam’s invasion of Cambodia. The Defence also submits that the Material is relevant to the credibility of expert Mr. Alexander HINTON (2-TCE-88), particularly regarding his assertion that the use of the term “Yuong” was an incitement to genocide against the Vietnamese during the DK period. It further submits that the Material may assist the Chamber in comparing the late King Sihanouk’s speeches and “CPK discourses” and the position towards Vietnam and the Vietnamese as well as the use of the term “Yuong”. Additionally, the Material would, *inter alia*, provide the Trial Chamber relevant historical and political context behind the intentions of certain expressions used during the DK period (E396, paras 6-7, 12-13, 17-18, E396/3, para. 11). The KHIEU Samphan Defence supports the Request, agreeing that the Material is admissible and relevant in evaluating Mr. HINTON (2-TCE-88)’s testimony (E396/1, para. 4).

3. Although the Material was publicly available prior to the start of trial, the NUON Chea Defence submits that the Request is timely as it was triggered by Mr. HINTON (2-TCE-88)'s testimony in relation to the late King Sihanouk's speech before the United Nations Security Council on 11 January 1979 ("UNSC Speech"), which was unforeseeable (E396, para. 19).
4. The Co-Prosecutors submit that the Material does not assist in assessing the credibility of Mr. HINTON (2-TCE-88), and that the late King Sihanouk's views regarding Vietnamese intentions to annex Cambodia after the DK period and his use of the term "Yuong" are irrelevant, and thus hold no probative value, in relation to the treatment of the Vietnamese during the DK period and the charges against the Accused. In this regard, the Co-Prosecutors note that the Material relates to statements and comments made by the late King Sihanouk after and outside the context of the DK period (E396/2, paras 2-9).
5. In reply, the NUON Chea Defence further submits that the Material is admissible, irrespective of its relevance to the credibility of Mr. HINTON (2-TCE-88), given that it closely relates the UNSC Speech, which is already before the Chamber and which they seek to rely on as evidence (E396/3, para. 9).
6. 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 speaking satisfy this criterion, including in instances where evidence relates closely to the 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 (E276/2, para. 2 referring to E190 and E172/24/5/1; E260, para. 5).
7. The Chamber reminds the parties that they should adhere to the established practice of submitting documents to be used during the testimony of a given witness, Civil Party or expert at least two weeks before their appearance before the Chamber (E337/3, para. 3). In this instance, the NUON Chea Defence had ample notice of Mr. HINTON (2-TCE-88)'s appearance but filed its Request after the completion of his expert testimony. The Trial Chamber has previously notified Parties that it will not look favourably on late-filed requests, particularly requests to admit material which has long been publicly available (E387/3, para. 18).
8. The Chamber notes that the Material proposed for admission was available before the beginning of Case 002 in June 2011. Therefore, the Material should have been discovered sooner with the exercise of reasonable diligence. Contrary to the NUON Chea Defence submission that the Request was "triggered by Hinton (2-TCE-88)'s testimony in relation to the late King Sihanouk's UNSC speech", the Chamber notes that evidence

regarding Mr. HINTON (2-TCE-88)'s views on sentiments towards the Vietnamese has been available since the beginning of the trial proceedings, as further discussed below. Accordingly, the Chamber finds that the Request was untimely. The Chamber considers below whether it is nonetheless in the interests of justice to admit the Material.

9. Contrary to the submission of the NUON Chea Defence, the Trial Chamber does not find it to be in the interests of justice to admit the Material in order to assess whether parallels could be drawn between the late King Sihanouk's speeches and the "CPK discourses" in terms of their positions towards Vietnam and the Vietnamese as well as the use of the word "Yuong". The Chamber notes that it is the NUON Chea Defence who suggests drawing such parallels, not Mr. HINTON (2-TCE-88), who testified that it was "not accurate to compare a speech" given by the late King Sihanouk with the CPK discourses, considering that they were "vastly different" in terms of content and delivered in completely different circumstances. (E1/403.1, Transcript, 16 March 2016, p. 33). The Chamber finds that such comparison can be neither useful nor relevant as the statements were made in different periods of time and in different historical contexts. The letters and the speeches were written months or years after 7 January 1979 when Vietnamese troops were permanently stationed on most of Cambodian territory. Concerning the word "Yuong", the Material shows that such terminology was not used by King Sihanouk in diplomatic letters. In addition the context in which the word "Yuong" is used in the video and audio recorded speeches is not entirely clear but pertains to a period of time which is outside the scope of Case 002/02 and to be distinguished from the usage of that term in the DK era.

10. Therefore the Trial Chamber finds that the proposed Material has limited relevance for the current trial and further notes that the Case File contains already a significant amount of evidence, including evidence relevant to Mr. HINTON (2-TCE-88)'s views, on general sentiments towards the Vietnamese before, during and after the DK period, particularly regarding the use and meaning of the term "Yuong" (*see e.g.* E3/3346, E3/2119, E3/2376, E3/7478). This evidence was available to the NUON Chea Defence when questioning Mr. HINTON (2-TCE-88). More particularly, the Chamber further notes that the parties have already heard in court evidence on the meaning and use of the term "Yuong", especially in the context of the DK period, on previous occasions (*see e.g.* T., 3 February 2016, pp. 4-5, 29-30; T., 6 January 2016, pp. 51-54; T., 2 February 2016, p. 93-97). Mr. HINTON (2-TCE-88) has also provided evidence on this issue during his testimony, which the Defence had an opportunity to cross-examine. The Chamber finds that the Material, therefore would not assist the Chamber in assessing Mr. HINTON (2-TCE-88)'s credibility and, further, would not provide additional relevant evidence to the already admitted evidence relating to these issues. The Chamber finds that there are no exceptional circumstances, as referred to in paragraph 6 above, which would warrant the admission of the Material in the interests of justice.

11. This constitutes the Chamber's official response to E396.