



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

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E434/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

សាធារណៈ / Public

TRIAL CHAMBER

TO: All Parties, Case 002

Date: 3 November 2016

FROM: Judge NIL Nonn, President of the Trial Chamber



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

SUBJECT: Decision on NUON Chea Defence Internal Rule 87(4) Requests E434 and E435

1. The Trial Chamber is seized of two requests pursuant to Internal Rules 87(3) & 87(4) filed on 30 August 2016 by the NUON Chea Defence for the admission of 19 documents (E434, confidential) and nine documents (E435)(collectively, "Requests"), respectively, which in its submission are relevant to a number of issues, including the Vietnamese aggression towards Cambodia, the role of SAO Phim, and internal rebellions. The Co-Prosecutors filed a confidential consolidated response to both requests on 9 September 2016. The Co-Prosecutors oppose the admission of 11 of the requested documents on grounds of relevance and/ or reliability but do not oppose the admission of the remaining documents (E434/1).

2. On 5 October 2016, the NUON Chea Defence informed the Trial Chamber by e-mail that the documents requested for admission in both requests were relevant to the then expected testimony of Stephen Morris (2-TCE-98). The NUON Chea Defence also requested guidance from the Chamber on the status of the requests prior to the 11 October 2016 deadline for the disclosure of document lists relating to Stephen Morris (2-TCE-98). Accordingly, the Trial Chamber delivered an oral ruling on 11 October 2016 in which it ruled on the admission of the requested documents. With respect to E434, the Chamber admitted documents 1, 11 and 12 and denied the admission of the remaining documents. The Chamber also denied the Co-Prosecutors' request in E434/1 to identify and call an additional witness. With respect to E435, the Chamber admitted document 8 and denied the admission of the remaining documents. (T., 11 October, p. 127, draft). The Chamber hereby provides reasons for its ruling.

3. 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).

4. At the outset the Trial Chamber notes that 27 of the 28 requested documents in both E434 and E435 were available in the public domain prior to the start of the trial, while the other document was available from June 2014 (E434, document 16). The Chamber finds that under these circumstances the Requests should have been made at an earlier date. The justification provided by the NUON Chea Defence for the lateness of the Requests, namely that they had limited resources and that they were restricted in their capacity to conduct independent investigations, is not persuasive. The Chamber accordingly finds the Requests to be untimely and now considers whether it is nonetheless in the interests of justice for these documents to be admitted.

5. The Chamber first notes that three documents which the NUON Chea Defence request for admission are only available in Chinese (documents 14 and 15 in E434 and document 1 in E435). In addition another document is only available in Dutch (document 17 in E434). The Chamber reminds the parties that it is their obligation to obtain the necessary translations so that documents are filed in official languages of the court. While the Chamber has previously waited for the translation of documents and ruled on admissibility, given the late stage of proceedings, the Chamber now relies on the description of these documents provided by the NUON Chea Defence.

6. The Chamber first addresses the documents requested for admission in E434. The Chamber admits documents 1, 11 and 12 and denies the admission of the remaining documents for the following reasons.

7. Document 1 is a bibliography of a book written by William DUICKER, a portion of which has already been admitted and discussed in court. At that juncture, the Chamber raised questions regarding the sources relied upon by Mr. DUICKER in reaching the conclusions in his book. (*See* E3/7340; Hearing, T. 21 June 2016, pp. 91-95, draft). The bibliography provides a list of books and articles relied upon by Mr. DUICKER and the Chamber considers it to be in the interests of justice for these two sources to be evaluated together and therefore admits document 1.

8. Documents 2 to 5 are articles written by 2-TCE-83 describing the role of SAO Phim as well as Vietnam's involvement in the invasion of Cambodia and in supporting rebellions. The parties were informed by email on 15 August 2016 that 2-TCE-83 was no longer available to testify in this case as an expert. In the absence of 2-TCE-83's

testimony as to his sources and the basis for his conclusions, the Chamber does not consider it to be in the interests of justice for these articles authored by him to be admitted at this late stage of the proceedings.

9. Documents 6 and 7 are articles written by a journalist, Anthony PAUL, which contain information relating to internal divisions and possible rebellions in the DK regime. In the absence of Anthony PAUL's testimony as to his sources and the basis for his conclusions, the Chamber does not consider it to be in the interests of justice for these articles authored by him to be admitted at this late stage of the proceedings.

10. Documents 8 to 10 are documents which relate to high level meetings between the United States and Indonesia in which there were discussions about Vietnamese territorial ambitions in Cambodia and the region. The Chamber does not consider these second-hand documents to be relevant or suitable to prove the facts in issue in this case because they contain accounts of meetings where high level individuals speculate about Vietnamese territorial ambitions and political influence in the region.

11. Documents 11 and 12 contain insider accounts from top-ranking defectors from the Vietnamese Communist Party with respect to Vietnam's ambitions and policies concerning Cambodia and the region. While the absence of testimony from these individuals will influence the weight to be attributed to this evidence, given that these top-ranking individuals were in a position to have first-hand knowledge of these issues, the Chamber is satisfied that the documents should be admitted in the interests of justice and evaluated together with other evidence already before the Chamber.

12. Document 13 contains two chapters and end notes from a book written by historian Margaret SLOCOMB, which describe Vietnamese ambitions towards Cambodia and the internal rebellion in the DK period. In the absence of Margaret SLOCOMB's testimony as to her sources and the basis for her conclusions, the Chamber does not consider it to be in the interests of justice for these chapters authored by her to be admitted at this late stage of the proceedings.

13. Documents 14 and 15 are Chinese language articles which, according to the description of these documents provided by the NUON Chea Defence, discuss the period following Vietnam's invasion of Cambodia in 1979 and atrocities committed by the Vietnamese forces against the Cambodian people. The Chamber finds that these second-hand reports are not relevant or suitable to prove the facts in issue in this case given that they relate to events outside the temporal jurisdiction of the ECCC and are of questionable reliability, given the uncertainty surrounding the identity of the authors and their sources in addition to the political dimension of the opinions expressed in these articles.

14. Documents 16 and 17 are documents which, in the submission of the NUON Chea Defence, show that the DK government was legitimate and maintained international relations rather than remaining isolated. Document 16 is an analysis of East German archives about the DK regime. Document 17 is a Dutch government response to questions regarding relations with the DK regime. The Chamber notes that document 17 was not translated from Dutch. Having reviewed the content of the first document and a

summary of the second document, the Chamber does not find them to be relevant to the charges in this case and thus denies their admission.

15. Document 18 is a transcript of an interview of an unknown person conducted by the journalist Sara COLM. In Case 002/01, the Chamber previously rejected the admission of this document as it was a statement which was relevant only to the acts and conduct of the Accused and as parties had no opportunity for in-court examination of the author of the statements (*see* E299, paras 17, 25; E299.2, ENG 00945085 referring to IS19.160). Similarly, in this case and for the same reasons, the Chamber does not consider the document to be suitable for admission. Further, the document is an interview from an unknown source, and thus of questionable reliability and low probative value. In addition, it appears from the face of the document that the interviewee's knowledge of certain matters was derived from confessions which present a real risk to have been obtained under torture, and is thus inadmissible. The Chamber therefore denies the admission of document 18.

16. Related to this, in their response the Co-Prosecutors request the Trial Chamber to ask WESU to identify and invite to testify the person interviewed in document 18. The Co-Prosecutors suggest that this individual's evidence is highly relevant as it includes claims that some orders of POL Pot were changed and also refers to KHIEU Samphan reading S-21 confessions to cadre. The Co-Prosecutors submit that if the individual is unavailable, the document should still be admitted and the unavailability of the witness be taken into account in assessing the weight to attribute to the evidence (E434/1, paras 26, 41). The KHIEU Samphan Defence object to this request on the basis that it would have a detrimental impact on the expeditiousness of the proceedings and the rights of the Defence, and that the Chamber should not rectify the shortcomings of the Prosecution case (E434/1/1). The Trial Chamber denies the Co-Prosecutors' request to identify and call this additional witness as it is extremely belated and would unduly delay the proceedings. The Co-Prosecutors had ample opportunity to make such a request at an earlier date but failed to do so.

17. Document 19 is an academic article written by Stephen HEDER (2-TCE-87) which was the subject of a talk delivered by him at the Australian National University. In this article, Stephen HEDER (2-TCE-87) discusses his analysis and opinion regarding the truthfulness of documents left behind at S-21, including the detailed records of interrogation. The Trial Chamber does not consider evidence about Stephen HEDER (2-TCE-87)'s opinion as to the truthfulness of these confessions to be permissible. The Chamber will make its own assessment about the use of such evidence in accordance with its Decision on Evidence Obtained Through Torture issued on 5 February 2016 (E350/8).

18. The Chamber now turns to the documents requested for admission in E435. The Trial Chamber admits document 8 and denies the admission of the remaining documents for the following reasons.

19. Document 1 is an article published in the Chinese newspaper People's Daily from February 1979, available only in the Chinese language, which, according to the description of this document provided by the NUON Chea Defence, discusses Vietnam's historical expansionist ambitions in the region and the invasion of Cambodia. The

Chamber does not consider this publication from an official newspaper of the Chinese Communist Party whose sources are unknown to be relevant or suitable to prove the facts in issue in this case.

20. Documents 2 to 7 include Chinese newspaper articles, editorials, an excerpt from an internal report to the Chinese Communist Party in March 1973, and an excerpt of speeches made by China's foreign minister in July 1977. The documents contain opinions, assessments and analysis of Vietnam's ambitions in South East Asia and Vietnam's conflict with and intervention in Cambodia. The Chamber does not consider this material to be relevant or suitable to prove the facts in issue in this case as they contain second-hand reports and speculation about the role of Vietnam in the region. The Chamber also considers the documents to be of questionable reliability, particularly the opinion pieces which merely reflect the official political analysis of the Chinese Communist Party concerning a country against which China was in conflict.

21. Document 8 reports on a press conference given by the late King Norodom Sihanouk in Beijing on 8 January 1979. The article quotes the late King Sihanouk's responses to questions in which he condemned Vietnam's aggression against Cambodia, and provided his observation on the conditions he observed during his tours of the Cambodian countryside. The Chamber has already admitted the late King Sihanouk's contemporaneous speech on 11 January 1979 to the United Nations Security Council on similar issues (E3/7335). Furthermore the Chamber has also admitted the book "Prisonnier des Khmers Rouges" authored by Norodom Sihanouk (E3/2813) where he described the circumstances surrounding the 8 January 1979 press conference. The Chamber is therefore satisfied that this evidence relates closely to material already before the Chamber and that the interests of justice require the sources to be evaluated together. The Chamber therefore admits document 8.

22. Document 9 is a book which compiles the views of Thai foreign ministry officials and scholars on the nature of the Vietnamese invasion of Cambodia and Vietnam's territorial ambitions. The Chamber does not consider this document to be relevant or suitable to prove the facts in issue in this case. The Chamber also considers the document to be of questionable reliability, particularly the opinion pieces which reflect official political analysis, from a Thai perspective, on neighbouring countries engaged in a conflict where Thailand had interest.

23. In light of the above, the Trial Chamber, pursuant to Internal Rule 87(4) admits documents 1, 11 and 12 referred to in E434 and assigns numbers E3/10706, E3/10707, and E3/10708 respectively. The Trial Chamber denies the admission of the remaining documents. The Trial Chamber also denies the Co-Prosecutors' request to ask WESU to identify the person interviewed in Document 18 and to invite him to testify. With respect to E435, the Trial Chamber, pursuant to Internal Rule 87(4) admits document 8 and assigns number E3/10709. The Trial Chamber denies the admission of the remaining documents.

24. This constitutes the Chamber's official response to E434 and E435.