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E289/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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Nation Religion Roi

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TRIAL CHAMBER

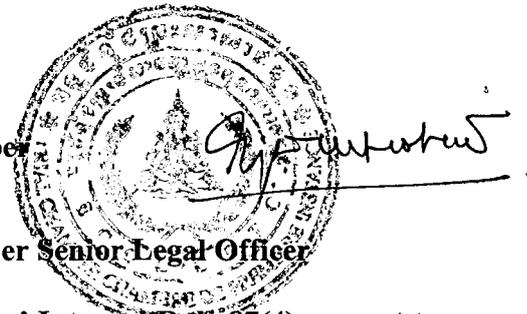
Date: 14 June 2013

TO: All Parties, Case 002

FROM: NIL Nonn, President of the Trial Chamber

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

SUBJECT: Decision on Civil Party Lead Co-Lawyers' Internal Rule 87(4) request to put before the Chamber new evidence (E289) and KHIEU Samphan's Response (E289/1)



1. The Chamber is seized of a request from the Civil Party Lead Co-Lawyers to put before the Chamber new evidence in both audio and transcript form of a radio interview of KHIEU Samphan broadcast on 20 August 2007 (E289). The Lead Co-Lawyers assert that the proposed transcript illustrates KHIEU Samphan's adherence to POL Pot's policies, knowledge of the crimes committed, experience as part of the Khmer Rouge inner circle, and his refusal to apologise for the crimes committed under the regime.
2. The KHIEU Samphan Defence objects to the Civil Party Lead Co-Lawyers' request on the basis that the Lead Co-Lawyers failed to offer a reasonable explanation as to why they could not have obtained the interview earlier given that it was publicly available. It further submits its admission is not in the interests of justice as it violates the Accused's right to be informed in advance and to mount an effective defence (E289/1).
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 Internal Rule 87(3). Ordinarily, the requesting party must satisfy the Chamber that the proposed new 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 criteria,

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, where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice, or where the other parties do not object to the evidence (*see e.g.* E190, paragraphs 19-21 and E172/24/5/1).

4. The Civil Party Lead Co-Lawyers accept that the proposed interview was available well before the opening of the trial in November 2011 but submit it was only with extensive research that they were able to recently discover this document. Absent any reasoned explanation as to why the radio interview could not have been discovered with due diligence between 2007 and 2013 or presented earlier, the Civil Party Lead Co-Lawyers have not satisfied the strict requirements of Internal Rule 87(4).

5. The interview, however, is closely related to other evidence before the Chamber insofar as it discusses KHIEU Samphan's role and knowledge of the POL Pot regime and its policies, as well as the evacuation of Phnom Penh. The Chamber therefore does not agree that admission of the proposed interview violates the Accused's right to adequate notice or his right to prepare a defence. The Chamber thus considers it is in the interests of justice that this evidence be evaluated alongside other evidence on the Case File.

6. The Trial Chamber finds that the proposed material otherwise *prima facie* satisfies the criteria in Internal Rule 87(3) of relevance, reliability and authenticity and is conducive to ascertaining the truth.

7. Accordingly, the Chamber, in the exercise of its discretion, grants the request to put before the Chamber E289.1.1 in audio and transcript form. Objections, if any, to this evidence, and observations as to its probative value (and thus weight to be accorded to it) may in due course be made by the parties either in connection to its use in-court or at the final document hearing before the Chamber in Case 002/01 (currently scheduled for the week commencing 17 June 2013).

8. The Chamber notes the transcript of the radio-interview is presently only available in French. Placement of the written transcript before the Chamber is subject to the timely availability of its translation, and its in-court use subject to its timely availability at least in Khmer.

9. This constitutes the Chamber's official response to E289 and E289/1.