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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):
..... 15 03 2016

ម៉ោង (Time/Heure): 15 : 20

មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé
Dossier: SANN LADA

E383/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Kingdom of Cambodia
Nation Religion King
Extraordinary Chambers in the Courts of Cambodia
Royaume du Cambodge
Nation Religion Roi
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

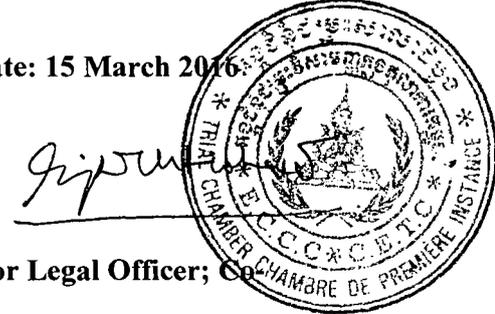
TRIAL CHAMBER

សាធារណៈ / Public

TO: All Parties, Case 002

Date: 15 March 2016

FROM: NIL Nonn, President of the Trial Chamber



CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer; Co-
Investigating Judges

SUBJECT: Decision on NUON Chea's Rule 87(4) Request for admission of 11
diplomatic cables

1. The Trial Chamber is seized of a request by the NUON Chea Defence filed on 6 January 2016 to admit into evidence, pursuant to Internal Rules 87(3) and (4), 11 diplomatic cables ("Request", E383 and annexes 1-11). Cables 1-2 were sent by the Australian Embassy in Hanoi (dated 8 May and 20 August 1975, respectively); cables 3-7 and 9 were sent by the American Embassy in Bangkok (dated between 16 March 1976 and 18 August 1978); cables 8 and 10 were sent by the American Embassy in Paris (dated 8 and 16 March 1976, respectively); and cable 11 was sent by the American Embassy in Phnom Penh (dated 6 June 2002) (Request, paras 4, 16-25). The NUON Chea Defence submits that the 11 cables fulfil the requirements of Internal Rules 87(3) and (4). The cables are relevant to Case 002/02 as they provide evidence about internal purges and S-21, the existence and nature of the armed conflict between Vietnam and the Democratic Kampuchea at the relevant time, the administrative and military structures of the Democratic Kampuchea and the role of NUON Chea (Request, paras 13-14, 31-37). Further, it is submitted that the cables are reliable: cables 1-2 bear official stamps of the Australian Department of Foreign Affairs, the handwritten signature of the author and various handwritten notes (Request, para. 15); cables 3-10 were downloaded from the official website of the United States National Archives and Records Administration (Request, para. 38); and cable 11 contains information that is corroborated by other evidence on the Case File and relied on in the Closing Order (Request, para. 39). Finally, the NUON Chea Defence submits that the cables could not have been discovered with the exercise of reasonable diligence prior to the start of Case 002/02 trial. The existence of the Australian cables was discovered through a press article in October 2015 while the US cables came to the knowledge of the Defence between 7 April 2013 and 24 April 2014 and could not have been identified earlier given the scarce resources at the

Defence's disposal and the fact that these cables are part of a database comprising over two million diplomatic cables (Request, paras 9, 28).

2. The KHIEU Samphan Defence supports the Request (E383/1, para. 10). It also submits that it is in the interests of justice to evaluate the 11 cables jointly with "The Khmer Rouge and the Vietnamese Communists: A history of their relations as told in the Soviet archives" (E383/1, para. 8). This study, conducted by Dimitry Mosyakov, has already been admitted and assigned the number E3/9644 (see E347/1, para. 6) and provides evidence on the armed conflict between Vietnam and the Democratic Kampuchea (E347/1, para. 6). The Co-Prosecutors and the Lead Co-Lawyers did not file any response to the Request.

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 speaking 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 (E276/2, para. 2 referring to E190 and E172/24/5/1; E260, para. 5).

4. The Chamber notes that the cables in question, classified at the time of original transmission, were released to the public on different dates and via different means. Cables 1 and 2 appear to have been declassified sometime during the year 2011 and donated to DC-Cam in September 2015. These two cables were reported in a press article in October 2015, at which time the Defence was alerted to their existence (Request, para. 9). The Chamber accordingly considers the Defence request in this respect to be timely. The Chamber considers that these two cables provide relevant contemporaneous evidence which concerns the existence of an armed conflict between Vietnam and the Democratic Kampuchea as well contemporaneous descriptions of the military and administrative structures of the latter. Cables 1 and 2 are also authentic, as demonstrated by the stamp of the Australian Department of Foreign Affairs and the signature of the First Secretary. Thus, admitting these cables may be conducive to ascertaining the truth.

5. Cables 3-10 were made accessible to the public by the US National Archives: cables 3-6 in March 2014, cable 7 in 2009 and cables 8-10 in 2006 (Request, paras 27-28). While noting that cables 7-10 were technically available prior to the start of trial, the Chamber observes that they were part of a database comprising approximately 10 billion pages and over two million cables from the relevant time (Request, para. 28). The NUON Chea Defence became aware of the existence of these cables after their publication on WikiLeaks between 7 April 2013 and 24 April 2014, after the start of trial (Request, para. 28). However, the Chamber notes that the duty to exercise reasonable diligence is a continuing one and that Parties must request admission into evidence of materials on which they wish to rely as soon as practicable

after they are discovered (E319/30/1, para. 3). The Chamber is not persuaded by the NUON Chea Defence's submission that scarce resources justify a 20-month delay from the time the cables became available on WikiLeaks to the filing of its request to admit them. Accordingly, the Request in this respect is untimely.

6. Nevertheless, the Chamber considers that cables 3-10 from two American embassies provide contemporaneous evidence with regard to the existence of an armed conflict between Vietnam and the Democratic Kampuchea at the relevant time of the charges, and that they are closely related to other material admitted into evidence, including cables 1 and 2 from an Australian embassy, such that the interests of justice favour admitting these cables together. Furthermore, these cables are authentic, taking into account their metadata (senders, recipients, classification and date of transmission) as well as the official sources from which they were obtained (Request, paras 38-39). Finally, the Chamber notes that none of the Parties object to the admission of these cables into evidence. In light of the above, these cables may be conducive to ascertaining the truth and therefore are admitted.

7. Finally, the Chamber considers the request for the admission of cable 11 to be untimely. This cable was available since its publication on WikiLeaks on 1 September 2011 and the NUON Chea Defence fails to demonstrate the existence of any particular impediment to its earlier discovery. The Chamber also considers that the information contained in the cable is irrelevant to Case 002/02: it is not a contemporary document from the Democratic Kampuchea period and provides information about HOR Namhong, currently a member of the Cambodian government, and his purported role in the Boeng Trabek camp, which is tangential to the scope of Case 002/02 trial. The Chamber accordingly rejects the request to admit this cable into evidence.

8. In light of the above, the Request is granted in respect of cables 1-10 and the Chamber assigns E3/ numbers to these 10 cables, as specified in the attached annex. This constitutes the Chamber's official response to E383.