E5/10/2

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 11 / MAR / 2009
ម៉ោង (Time/Heure): 10:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: C.A. Fay

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: **10 March 2009**

Classification: **PUBLIC**

ឯកសារចម្លងត្រឹមត្រូវនៃដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 11 / MAR / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: C.A. Fay

DECISION ON ADMISSIBILITY OF NEW MATERIALS AND DIRECTION TO THE PARTIES

Co-Prosecutors

CHEA Leang
Robert PETIT

Accused

KAING Guek Eav alias "DUCH"

Lawyers for the Civil Parties

KONG Pisey
HONG Kimsuon
YUNG Panith
KIM Mengkhy
MOCH Sovannary
Silke STUDZINSKY
Martine JACQUIN
Philippe CANONNE
TY Srinna
Pierre Olivier SUR
Alain WERNER
Brianne McGONIGLE
Annie DELAHAIE
Elizabeth RABESANDRATANA
Karim KHAN

Lawyers for the Defence

KAR Savuth
François ROUX

THE TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC");

BEING SEISED of Case File No. 001/18-07-2007-ECCC/TC pursuant to the "Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch," rendered orally by the Pre-Trial Chamber on 5 December 2008 and filed in Khmer on 9 December 2008 ("Decision");

HAVING RECEIVED the Co-Prosecutors' list of new documents and their Motion to submit New Evidence dated 28 January 2009,

HAVING CONSIDERED the submissions made by the Parties during the initial hearing held on 17 and 18 February 2009 concerning the admissibility of new materials

PURSUANT to Rules 39, 80, 87 and 92 of the Internal Rules ("Rules");

BACKGROUND AND FINDINGS:

A. BACKGROUND :

1. By Order dated 11 December 2008[1] the Trial Chamber notified the Parties of the scheduling of a Trial Management Meeting and ordered the parties to file, at the same time as the filing of the list of witnesses referred to in Rule 80 of the Rules, a list of any new documents they intend to file in the case;

2. According to Rule 80, the deadline for the Co-Prosecutors to file their witness list and additional material expired 15 days after the Indictment became final, namely on 24 December 2008.

3. On 19 December 2008[2], the Co-Prosecutors filed their Response to the Trial Chamber's Order concerning the filing of Additional Materials, which included a list of new documents, and requested guidance from the Chamber as to how to put the original Khmer version of a particular document, "The Last Joint Plan" (Document No.29)[3], before the Chamber for examination. The Co-Prosecutors indicated that David Chandler, in his book entitled *Voices*

[1] Document E5
[2] Document E5/2
[3] Document E5/2.29

from S-21[4], notes that the Khmer language original is archived in the Tuol Sleng Museum and copied on microfiche at Cornell University[5];

4. By motion to File New Evidence dated 28 January 2009[6], the Co-Prosecutors, also asked that the Trial Chamber allow the filing of newly discovered film footage of S-21, and that the Trial Chamber accept this film as evidence at the trial of this case;

5. According to the Co-Prosecutors, the existence of these films became known publicly on 26 December 2008, when the Documentation Center of Cambodia announced to the media that it had received the material. The video-footage was reviewed by representatives of the Office of the Co-Prosecutors at DC-Cam from 6 January 2009; and at their request, copies of the films were given to them on 8 January 2009 by the Documentation Center of Cambodia. The Co-Prosecutors have identified two particular segments of the films that they deem relevant to Case File No. 001/18-07-2007/ECCC/TC [7];

B. FINDINGS:

6. To be declared admissible a new document must:

   1. (a) be filed prior to any deadline fixed by the Chamber or by the Internal Rules; or

      (b) where exceptional circumstances exist, and the applicant seeks to file the document after the expiration of the time limit, he/she shall demonstrate that it was impossible to comply with the deadline, and further, that the document has been filed at the first available opportunity thereafter.

   2. *prima facie* appear relevant to the ascertainment of the truth, subject however, to the assessment of such evidence during the substantive hearing.

7. The Chamber reserves the right, in accordance with Rule 39(4)(b), to accept documents falling into the above categories for filing. The Co-Prosecutors' application concerning the document entitled 'the Last Joint Plan' was clearly filed within time. While its authenticity remains to be determined, *prima facie* it appears relevant to the ascertainment of the truth concerning the facts in case No. 001/18-07-2007/ECCC/TC and is therefore admissible.

[4] CHANDLER, David *Voices From S-21* footnote 26 at page 168
[5] Document E5/2, paragraph 14.
[6] Document E5/10
[7] ERNs V00271181- V00271181 and V002711821- V00271182

8. However in order to assist the Chamber in its determination concerning the authenticity of this document, it is necessary to consider all material which might have a bearing on this issue. If the Tuol Sleng Museum holds the Khmer language original or, failing that, the microfiche copy held at Cornell University is available, then the Chamber authorises the Co-Prosecutors without delay, to seek access for the Chamber to those documents. The Chamber will be responsible for their safe-keeping and the documents may be transferred direct to it should that be appropriate. In the alternative, the Co-Prosecutors may take possession of the documents and file them in the case file, in accordance with the set procedure. The Co-Prosecutors are directed to request these materials formally from the Tuol Sleng Museum and/or from Cornell University.

9. The Chamber seeks the cooperation of these two institutions and will not at this stage, make any order against them relating to the materials sought.

10. The Co-Prosecutors have until 17 March 2009 to comply with this direction.

11. The accused through his lawyers denies that the original of this document either exists or that he wrote it. He must substantiate this submission, and following the receipt from Tuol Sleng Museum or Cornell University, by the Chamber or by the Co-Prosecutors of the material referred to above, he will have an opportunity to comment. A specific time limit will be set as soon as the material becomes available.

12. The application to admit the two segments of film footage is now well out of time. However, relying on the Co-Prosecutors' assurance that they were unaware of, and could not reasonably have known of its existence before the date it was discovered or revealed by the Documentation Center of Cambodia, the Chamber accepts that it was impossible for the Co-Prosecutors to obtain the film footage within the relevant time period. It was filed at the first available opportunity thereafter and is prima facie relevant material. Moreover, there is no reason to infer that the delay in filing this material was intentional, and in order to avoid the investigation phase.

13. The Accused through his lawyer also submits that this film footage lacks authenticity, giving a number of examples during the Initial Hearing for this view. He should set out his specific allegations in writing to be filed by 24 March 2009.

14. The Co-Prosecutors and the Civil Parties through their lawyers will have two weeks to respond.

15. The Chamber therefore considers that the two segments of film footage are admissible, subject to a review of its relevance during the substantive hearing.

DECISION and DIRECTION:

FOR THE FOREGOING REASONS:

16. The Trial Chamber makes the following directions and decisions:

1. The document entitled 'the Last Joint Plan' is declared admissible,
2. The Co-Prosecutors are directed to request formally, the material purporting to authenticate the document 'The Last Joint Plan' filed by them, from Tuol Sleng Museum and/or from Cornell University, and have until 17 March 2009 to comply with this direction.
3. Further directions will be given following the receipt of such material from either institution or a report by the Co- Prosecutors seeking further or other directions. The Accused will also be given a right to respond at an appropriate time.
4. The two segments of film footage material are declared admissible, subject to a review of their relevance and authenticity during the substantive hearing.
5. The defence has until 24 March 2009 to file a statement setting out briefly and specifically its reasons for questioning the validity or authenticity of the film material, focusing in particular on the two segments that the Co-Prosecutors seek to introduce.
6. The Co-Prosecutors and the Civil Parties through their lawyers will have two weeks to respond. NNR

Phnom Penh, 10 March 2009

On behalf of the Trial Chamber

Nil Nonn