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

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: **29 July 2009**

Classification: **PUBLIC**

DECISION ON THE VIETNAMESE FILM FOOTAGE FILED BY THE CO-PROSECUTORS AND ON WITNESSES CP3/3/2 AND CP3/3/3

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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")[1];

HAVING RECEIVED the Co-Prosecutors request to introduce as evidence two segments of film footage, dated 28 January 2009 ("Motion"), and the Defence response, dated 16 February 2009[2];

NOTING the submissions of the Co-Prosecutors and Defence concerning the admissibility and relevance of this footage, and the Defence request to confront its authors with child survivors[3];

RECALLING the Trial Chamber's decision of 11 March 2009 regarding the admissibility of this footage, and the Defence submissions of 24 March 2009 concerning its relevance and authenticity[4];

FURTHER NOTING the request by Civil Party Group 3 of 2 March 2009 to call witnesses CP3/3/2 and CP3/3/3, and its withdrawal of this request on 28 April 2009[5];

RECALLING the testimony of Norng Chanphal and additional submissions relating to the video footage on 2 July 2009 and the Accused's declaration in relation to this witness of 8 July 2009[6];

PURSUANT to Rule 80 and 87(3) of the Internal Rules;

HEREBY DECIDES as follows:

BACKGROUND AND FINDINGS

A. BACKGROUND

1. In their Motion, the Co-Prosecutors sought to put before the Chamber two segments of film footage provided by the Government of Vietnam to the Documentation Center of Cambodia (DC-

[1] "Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch", 5 December 2008 (Document D99/3/42).
[2] "Motion of Co-Prosecutors to Submit New Evidence", 28 January 2009 (Document E5/10); "Defence Response to the Co-Prosecutors'Motion to Submit New Evidence", 16 February 2009 (Document E5/10/1).
[3] Transcript of Proceedings (T.), 18 February 2009, pp.37-44 and 47-50 (English).
[4] "Decision on Admissibility of new Materials and Direction to the Parties", 11 March 2009 (Document E5/10/2); "Submissions of the Co-lawyers for Kaing Guek Eav alias Duch concerning the two sequences of film footage presented by the Co-Prosecutors", 24 March 2009 (Document E5/10/4).
[5] "Additional Witness List and New Document", 2 March 2009 (Document E5/13); « (Groupe 3) Renonciation à l'audition comme témoins de [CP3/3/2] et [CP3/3/3]», 28 April 2009 (Document E5/14).
[6] T. 2 July 2009, pp. 2-21 and 22-98 (English) and T., 8 July 2009, pp.3-5 (English).

Cam).[7] According to the Co-Prosecutors, these segments contain images of S-21 taken in the immediate aftermath of its discovery by Vietnamese forces on or about 10 January 1979. They are relevant and probative as the only film footage known to have been taken of S-21 soon after its use as a prison in Democratic Kampuchea.[8] The existence of this footage became publicly known on 26 December 2008 and was reviewed by representatives of the Office of the Co-Prosecutors at DC-Cam from 6 January 2009. As the footage was *prima facie* relevant material and the Motion was filed at the first opportunity, the Chamber provisionally declared this footage to be admissible on 11 March 2009, subject to a review of its relevance and authenticity during the substantive hearing.[9]

2. In contesting the authenticity of the footage, the Defence allege that it is politically motivated, and that it contains a number of inaccuracies and distortions. For instance, it is alleged to wrongly depict the location of the entrance to S-21 and other features of its layout. The Defence contend that only four corpses remained at S-21 at the time the interrogators abandoned the facility on 7 January 1979, whereas the footage shows a greater number. Contrary to what is depicted in these segments, no children were present at S-21 when the Vietnamese forces arrived. Nor could children have survived unassisted in such conditions for longer than a few days. Further, the children featured in the film appear to be in good health, whereas the conditions of detention in S-21 were harsh and detainees were deprived of food. Finally, the footage does not present a true record of S-21 as it fails to show the survivors who were found there after the departure of the Accused on 7 January 1979.[10] Should this footage be used as evidence, the Defence requests that the authors of the video footage be called to testify and be confronted with child survivors.[11]

B. FINDINGS

3. According to the Co-Prosecutors, the first segment of the footage includes images of the main gate of the S-21 central compound, overview scenes of the interior of the compound, scenes of various types of cells and restraint devices within the S-21 central compound, and images of decapitated corpses chained to beds. The second segment appears to depict Vietnamese soldiers removing two live infants and two live children from the central S-21 compound, also in the

[7] Evidence Reference Numbers ("ERN") V00271181- V00271181 and V00271182-V00271182.
[8] "Motion of Co-Prosecutors to Submit New Evidence", 28 January 2009 (Document E5/10), paras. 8, 13-15.
[9] "Decision on Admissibility of new Materials and Direction to the Parties", 11 March 2009 (Document E5/10/2), p. 5 (disposition). The Defence was invited to set forth its objections to the authenticity and relevance of this footage by 24 March 2009 (*ibid*, para. 13 and p. 5 (disposition)).
[10] "Submissions of the Co-lawyers for Kaing Guek Eav alias Duch concerning the two sequences of film footage presented by the Co-Prosecutors", 24 March 2009 (Document E5/10/4), paras. 4-15.
[11] Transcript of Proceedings (T.), 18 February 2009, pp. 50 (English).

immediate aftermath of its discovery by Vietnamese forces.[12] The Co-Prosecutors seek to put this footage before the Chamber, firstly, to corroborate the testimony of witnesses that children of arrested cadre were also brought to S-21. Secondly, as the infants seen in the film appear to be in poor health, it also supports the allegation that conditions at S-21 were inhumane.[13]

4. In relation to the alleged presence of children at S-21, the Chamber heard the testimony of Norng Chanphal, an alleged child survivor of S-21, on 2 July 2009.[14] During his testimony, Norng Chanphal was shown a still image from one of the two video sequences showing two children standing in front of soldiers. The witness identified the boy on the left of the image as himself, and the other boy as his younger brother.[15] During the hearing of 8 July 2009, the Accused acknowledged that Norng Chanphal and his mother were detained at S-21.[16] The Defence has also previously acknowledged that the policy of smashing enemies almost always extended to their families, including children.[17] In view of the testimony of Norng Chanphal and other witnesses, agreed facts before the Chamber and the Accused's acknowledgment, the Chamber finds that this footage is superfluous to establish that children of arrested cadre were also brought to S-21.

5. Regarding the second limb of the Motion, it is undisputed that conditions of detention at S-21 were inhumane.[18] The footage is likely to have little impact upon the trial and is in substance repetitious as a means of establishing these facts within the meaning of Rule 87(3)(a).

6. The Defence contests the authenticity of this footage on a number of grounds.[19] In order to clarify the circumstances in which this footage was created, and thus to satisfy itself as to its accuracy and reliability, the Chamber would have to undertake a number of supplementary investigations, including the identification and summoning of additional witnesses. This would be likely to lead to significant delays in the trial.

7. The Chamber further notes that Civil Party Group 3, having initially sought to call Vietnamese witnesses CP3/3/2 and CP3/3/3, withdrew this request on 28 April 2009.[20] These

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[12] Motion, paras. 8, 13-14.
[13] *Ibid.*, paras. 8, 13-15.
[14] T. 2 July 2009, pp. 22-98 (English).
[15] T. 2 July 2009, p. 92; ERN V00271181-V00271181 (at 7 minutes and 9 seconds).
[16] T. 8 July 2009, pp. 3-5.
[17] "Defence Position on the Facts Contained in the Closing Order", 21 May 2009 (Document E5/1.1/6.1), paragraph 80.
[18] "Defence Position on the Facts Contained in the Closing Order", 21 May 2009 (Document E5/1.1/6.1), paras. 138-171.
[19] "Submissions of the Co-lawyers for Kaing Guek Eav alias Duch concerning the two sequences of film footage presented by the Co-Prosecutors", 24 March 2009 (Document E5/10/4), paras. 4-15.
[20] « (Groupe 3) Renonciation à l'audition comme témoins de [CP3/3/2] et [CP3/3/3]», 28 April 2009 (Document E5/14).

proposed witnesses were the first journalists to enter S-21 after the fall of the Khmer Rouge regime and may have been in a position to verify the accuracy of the footage's purported depiction of the layout and conditions at S-21 in January 1979. The Court's own efforts to contact these witnesses have been unsuccessful. Consequently, it declines to call them.

8. The Chamber recalls Rule 87(3)(b), which permits the exclusion of evidence that is impossible to obtain within a reasonable time. The Chamber considers that verification of the reliability of this footage, a pre-condition for its use as evidence, is unlikely to be obtained within a reasonable time. It is accordingly excluded pursuant to Rule 87(3)(b).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Motion to put the two segments of film footage before it;

DECLARES in consequence the request by the Defence for a confrontation between the authors of this footage and child survivors to be moot.

DECLINES to call witnesses CP3/3/2 and CP3/3/3 in the present case.

Phnom Penh, 29 July 2009
President of the Trial Chamber

Nil Nonn