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BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case Number: 001/18-07-2007-ECCC/TC

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MOTION OF CO-PROSECUTORS TO SUBMIT NEW EVIDENCE

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I. INTRODUCTION

1. Pursuant to Internal Rule 39 (4), the Co-Prosecutors hereby move and request that the Trial Chamber allow the Co-Prosecutors to supplement their list of new documents and exhibits filed on 19 December 2008 to include new evidence that was discovered after the date of that filing.

II. PROCEDURAL AND FACTUAL BACKGROUND

2. On 5 December 2008, the Pre-Trial Chamber publicly announced its Decision On Appeal Against Closing Order Indicting Kaing Guek Eav alias DUCH. A written decision was published and filed on 8 December 2008.¹
3. The Pre-Trial Chamber's decision amended the indictment against DUCH, and thus made final the indictment in Case File 1. Pursuant to Rule 80(1) of the ECCC Internal Rules, the Co-Prosecutors had 15 days from that date to submit a list of witnesses and experts to the Greffier of the Trial Chamber.
4. On 11 December 2008, the Trial Chamber ordered the Co-Prosecutors to file with the Greffier of the Trial Chamber, at the same time as the Rule 80(1) filing, a "list of exhibits, namely any tangible objects, they intend to offer in the case" and a "list of the new documents they intend to offer in the case."²
5. As ordered by the Trial Chamber, on 19 December 2008 the Co-Prosecutors filed a Response to its Order to File Additional Materials in the Case of Kaing Guek Eav alias Duch with Confidential Annexes A, B and C.³ The Co-Prosecutors advised the Trial Chamber that they did not intend to offer any "tangible objects" as exhibits, as they understood the term, but did intend to offer "scanned documentary evidence currently available on the Case File including

¹ *Case of KAING Guek Eav alias DUCH*, Decision On Appeal Against Closing Order Indicting Kaing Guek Eav alias "DUCH," Case No. 001/18-07-2007-ECCC/OCIJ (PTC02), 8 December 2008, D99/3/42, ERN 249846-249887.

² *Case of KAING Guek Eav alias DUCH*, Notification of a Trial Management Meeting and Order to the Parties to File Additional Materials, Case No. 001/18-07-2007-ECCC/TC, 11 December 2008, E5, ERN 250117-250121, paragraphs 4(b) and 4(c).

³ *Case of KAING Guek Eav alias DUCH*, Co-Prosecutors' Response to the Trial Chamber's Order to File Additional Materials in the Case of Kaing Guek Eav alias Duch with Confidential Annexes A, B and C, Case No. 001/18-07-2007-ECCC/TC, 19 December 2008, E5/2, ERN 268747-268775 [*hereinafter* Co-Prosecutors' Response to Trial Chamber's Order].

the photographic and video material.”⁴ A list of the new documents the Co-Prosecutors intended to offer was submitted as Annex C.⁵ The Co-Prosecutors also expressly undertook to “disclose to the Trial Chamber any other evidence that is brought to their attention whether exculpatory or inculpatory.”⁶

6. On 26 December 2008, one week after the Co-Prosecutors’ filing, the Documentation Center of Cambodia (DC-Cam) announced to the international media that it had received a collection of films from the government of Vietnam. On 5 January 2009, immediately following his return from the Christmas/New Years holiday, ECCC/OCP Investigator Craig Etcheson was assigned to review those films in order to determine whether they had any probative value to the pending cases before the Court.
7. On 6 January 2009, Investigator Etcheson and Senior Assistant Prosecutor Tan Senarong visited DC-Cam to review the Vietnamese film collection, and determined that the films appeared to have probative value for both Case Files 1 and 2. Accordingly, on 7 January 2009, the OCP issued a formal request to DC-Cam for copies of the films. Those copies were provided to OCP by DC-Cam at 6 p.m. on 8 January 2009.
8. Since receiving this evidence from DC-Cam, OCP investigators have carefully examined the entire film collection and have determined that there are two particular film segments that are relevant to Case File 1. Those segments contain picture images of S-21 taken in the immediate aftermath of its discovery by Vietnamese forces, including footage of prison cells, restraint devices and corpses. These two segments (ERNs V00271181-V00271181 and V00271182-V00271182) have been copied onto one DVD which is attached as **Annex A** to this motion.

⁴ Co-Prosecutors’ Response to Trial Chamber’s Order, para. 18.

⁵ Co-Prosecutors’ Response to Trial Chamber’s Order, para. 10 and Annex C (at ERN 268771-268775).

⁶ Co-Prosecutors’ Response to Trial Chamber’s Order, para. 17.

III. ARGUMENT

A. The ECCC Internal Rules Allow the Co-Prosecutors to Introduce New Evidence and to Supplement Their List of New Documents.

9. The ECCC Internal Rules contain provisions that would allow the Co-Prosecutors to amend or supplement their list of new documents filed on 19 December 2008 and to introduce the newly discovered films obtained from DC-Cam as evidence at trial.
10. First, Internal Rule 39(4) provides that the Chambers (which includes the Pre-Trial Chamber, the Trial Chamber and the Supreme Court Chamber of the ECCC) may, at the request of a concerned party, “a) extend any time limits set by them...” ; or b) recognise the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.” Rule 39(4) thus would allow the Trial Chamber to extend the time for the filing of the Co-Prosecutors’ list of new documents and exhibits, or to recognise and accept a supplemental or amended list. Given that the evidence in question here was not discovered until after the date on which the list of new documents and exhibits was initially due, it is appropriate for the Trial Chamber to take such action here and allow the filing of a supplemental list.
11. Second, Internal Rule 92 authorizes the parties “up until the closing statements” to make written submissions and “put before the Chamber any evidence that they consider conducive to ascertaining the truth.” As discussed below, the newly obtained films contain segments depicting S-21 immediately after its discovery by Vietnamese troops that are highly relevant and conducive to ascertaining the truth about the S-21 security centre.

B. The Films Provided by the Government of Vietnam to DC-Cam Contain Evidence Relevant to these Proceedings.

12. The films that were provided by the Vietnamese government to DC-Cam and recently reviewed by OCP contain two segments that are relevant to the charges against KAING Guek Eav *alias* DUCH on which he will be tried by this Court.
13. The first relevant segment is 7 minutes and 35 seconds in duration, and consists of black and white silent motion picture images that appear to depict the central S-21 compound in the immediate aftermath of its discovery by Vietnamese forces on or about 10 January 1979.

The images include scenes of the main gate of the S-21 central compound, overview scenes of the interior of the compound, and scenes of various types of cells and restraint devices within the S-21 central compound and decapitated corpses chained to beds in Building A of the compound, among other things.

14. The second relevant segment is 4 minutes in duration, and consists of black and white silent motion picture images that appear to depict Vietnamese soldiers removing two live infants and two live children from the central S-21 compound, also in the immediate aftermath of its discovery by Vietnamese forces. This footage is relevant because (a) it corroborates the testimony of witnesses that children of arrested cadre were also brought to S-21 and (b) the infants seen in the film appear to be in very poor health, supporting the charge that conditions inside S-21 were inhumane.
15. This is the only film footage known to have been taken of Tuol Sleng that close in time to the period when it was used as a DK prison, which makes this evidence particularly important and probative.

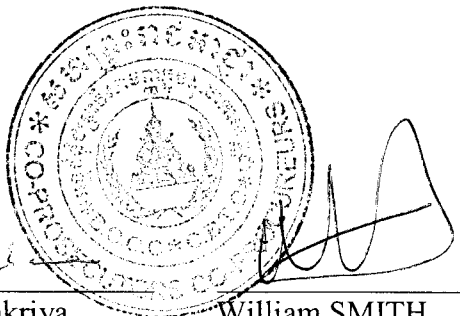
C. The Co-Prosecutors Acted with Due Diligence in Reviewing the Newly Discovered Evidence and Disclosing it to the Trial Chamber.

16. The evidence in question did not come to the attention of the Co-Prosecutors until after the date on which they had to file their lists of new documents and exhibits, as the announcement that DC-Cam had obtained this new film collection from the government of Vietnam was made on 26 December 2008. The Co-Prosecutors had no knowledge of or basis on which to obtain these films prior to that time.
17. Upon learning of the existence of the films, the Co-Prosecutors acted with due diligence to obtain copies of the films, review them for probative evidence and disclose such evidence to the Trial Chamber. The existence of this evidence was announced by DC-Cam during the Christmas holiday period. In the first week after the holidays, OCP was able to obtain copies of the films and immediately began to review them for relevant information. The Co-Prosecutors finalised this review before the Trial Management Meeting held by this Chamber on the 15 and 16 January 2009, which enabled them to announce their intent to disclose the material to the Chambers and the other parties in the course of the meeting.

IV. CONCLUSION

18. For the foregoing reasons, the Co-Prosecutors respectfully request that the Trial Chamber allow the filing of the newly discovered film footage of S-21, and that these films be accepted as evidence by the Trial Chamber at the trial of this case.

Respectfully submitted,



YET Chakriya William SMITH
Deputy Co-Prosecutor Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 28th day of January 2009