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ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

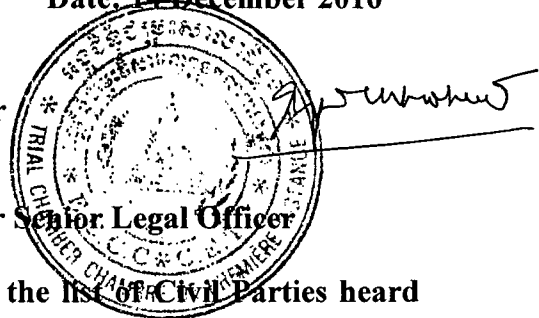
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

TRIAL CHAMBER

TO: All Parties, Case 002

Date: 14 December 2016

FROM: NIL Nonn, President of the Trial Chamber



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

SUBJECT: Decision Withdrawing 2-TCCP-237 from the list of Civil Parties heard in court

1. On 14 September 2016, the Chamber informed the Parties that it would hear SAR Sarin (2-TCCP-237) during the trial topic on the Role of the Accused. The Civil Party was eventually scheduled to appear on 8 November 2016.

2. At the start of the hearing, SAR Sarin (2-TCCP-237) informed the Chamber for the first time that, due to his blood pressure, he preferred to testify for half-days only and that he did not mind testifying over “three or four days” as long as it was for a half-day at a time. Noting that there was no back-up witness that day and that the request had been made very late, the Chamber decided to proceed with the testimony as scheduled with a view to finishing as soon as possible. The Chamber further informed the Civil Party that the ECCC has a duty doctor on the premises (T. 8 November 2016 (DRAFT), p. 26). During the lunch break, the ECCC duty doctor visited SAR Sarin (2-TCCP-237) and concluded that the latter was in good health and could continue with his testimony (T. 8 November 2016 (DRAFT), p. 47). The Chamber therefore continued hearing SAR Sarin (2-TCCP-237) during the afternoon of 8 November 2016 and was due to resume with his questioning on 10 November 2016. During this time period, only the Civil Party Lawyer and the Co-Prosecutor examined the Civil Party. In the early morning of 10 November 2016, however, WESU informed the Chamber that the Civil Party claimed he was feeling unwell and that he had therefore been taken by WESU staff from his hotel to a medical clinic for a check-up. WESU reported that while the results of the check-up did not evidence any medical issue, the Civil Party had insisted that he needed to rest and was therefore taken back to his hotel. The same morning, a WESU staff member called the Civil Party to enquire about his health and learned from the hotel receptionist that SAR

Sarin (2-TCCP-237) had left the hotel to return to his home-town. WESU reported to the Chamber that it had informed the Civil Party's lawyer, Mr. VEN Pov.

3. On 23 November 2016, WESU reported to the Chamber by email that it had had further contact with 2-TCCP-237, who apparently expressed that he did not fear testifying before the ECCC, but that he would return to finish his testimony only on that condition that his request for relocation to a third country (United States or Australia) be granted.

4. On 24 November 2018, WESU filed a formal report (Report), detailing the contacts that it had had with the Civil Party Lawyer, the National Lead Co-Lawyer and the Civil Party himself. According to the Report, SAR Sarin (2-TCCP-237) apparently informed the Lead Co-Lawyer that if the Chamber could not relocate him to a third country, the Civil Party would be satisfied with a letter of guarantee that the local authorities would monitor the safety of he and his family. However, in his conversation with WESU, SAR Sarin (2-TCCP-237) insisted that he requires relocation to a third country as a condition for continuing his testimony before the court, refusing any other type of protective measures (E29/501). The Report concludes that WESU is unable to develop a full understanding of SAR Sarin (2-TCCP-237)'s fears due to a number of inconsistencies in his accounts or to identify any objective basis for said fears. The Report concludes that WESU is unable to recommend any other protective measure (E29/501).

5. The Chamber recalls that, pursuant to Internal Rule 29(3), it may, on its own motion or on request, and following consultation with WESU, order appropriate measures to protect victims and witnesses whose appearance before the Chamber is "liable to place their life or health or that of their family members or close relatives in serious danger." Protective measures are granted on a case-by-case basis when accompanied by information to substantiate the risk or threat of harm to the applicant or their relatives. A genuine fear on the part of the applicant or their relatives is required, as well as the existence of an objective justification for this fear (see E316/2/2, para. 4). When assessing the type and degree of protection to be granted, the Chamber must balance the seriousness of the risk confronting the applicant, the measures most appropriate to address it and any infringement of the rights of the Accused (see E316/2/2, para. 5).

6. The Chamber recalls that SAR Sarin (2-TCCP-237) was previously summonsed in 2013 to be questioned as a Civil Party in Case 002/01. During his hearing on 29 April 2013, SAR Sarin (2-TCCP-237) suddenly requested protection (police or similar) for the rest of his life as a condition for continuing to provide testimony. At the time he stated that no one had threatened him or caused him to be fearful, but that he had a "general fear". He maintained that he had important information on the leadership of the Khmer Rouge that he would share with the Court in exchange for protection (T. 29 April 2013, pp. 37-39). However, he refused other means available to the Chamber to protect his identity, such as face and voice distortion or testimony in closed session (see Internal Rule 29 (4), T. 29 April 2013, pp. 46-47, 52, 54). The Chamber denied the Civil Party's request for protection for the duration of his life, as it did not have the jurisdiction to provide such protection and terminated his questioning (T. 29 April 2013, p. 64).

7. In light of this Case 002/01 experience, when assessing SAR Sarin (2-TCCP-237)'s availability for Case 002/02, the Chamber specifically requested WESU to ask the Civil Party whether he maintained his request for protective measures. He responded that he did not demand any protective measures in Case 002/2. In fact, on 8 November 2016, the Civil Party did not hesitate to provide his personal identification details and give evidence in court in open session, only raising health issues and even stating that he could testify for over three or four days if necessary. He made the request for relocation to a third country only a few days later, after his unannounced departure from Phnom Penh. In making his request, he stated that "he has important information for the court" therefore the Court "should have to help him as well" (see E29/501).

8. The Chamber finds that the Civil Party's behaviour is inconsistent with the existence of "the risk or threat of harm to the applicant or their relatives" or "genuine fear". The Chamber considers that had SAR Sarin (2-TCCP-237) had a genuine fear for his security or that of his family, he would not have appeared in open court, disclosing his identity and place of residence, and stated to the public that he had important information on the leadership of the Khmer Rouge warranting life-long police protection or relocation to a third country.

9. The inconsistency is further heightened by the fact that SAR Sarin (2-TCCP-237) was aware from his participation in Case 002/01 of the possibility of alternative proactive measures that could have concealed his identity and permitted him to testify without putting himself or his family at risk if any, and that he declined an offer of such protective measures in Case 002/02.

10. The Chamber therefore concludes, based on the behaviour of SAR Sarin (2-TCCP-237) and on the WESU Report, that there is no information of a "risk or threat of harm to the applicant or their relatives" and no "genuine fear" warranting any protective measures including the one requested by the Civil Party. The Chamber therefore denies SAR Sarin (2-TCCP-237)'s request for relocation to a third country.

11. Considering that SAR Sarin (2-TCCP-237) is a Civil Party and cannot be compelled to testify, the Chamber withdraws him from the list of witnesses, Civil Parties and experts for the trial topic on the Role of the Accused in Case 002/2.

12. The Civil Party Lead Co-Lawyers are instructed to provide this decision to SAR Sarin (2-TCCP-237).