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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE CO-INVESTIGATING JUDGES

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CO-PROSECUTORS' REQUEST FOR PROTECTIVE MEASURES PURSUANT TO THE CO-INVESTIGATING JUDGES' DECISION DATED 30 JULY 2007

TABLE OF AUTHORITIES

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ECCC DOCUMENTS

1. Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea. *Not included – Court Document.*

2. Law on the ECCC. *Not included – Court Document.*

3. Internal Rules of the ECCC. *Not included – Court Document.*

4. Introductory Submission. *Not included – Court Document.*

5. Protective Measures Decision. OCP draft translation of the original Khmer version. *Not included – Court Document.*

6. Provisional Detention Order. *Not included – Court Document.*

INTERNATIONAL LAW

Statutes and Rules of International Tribunals

7. International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 76. *Exceeds 30 pages.*

8. ICTR Rules of Procedure and Evidence, Rule 69. *Exceeds 30 pages.*

9. ICTR Statute, Article 21. *Exceeds 30 pages.*

10. ICTY Rules of Procedure and Evidence, Rule 69. *Exceeds 30 pages.*

11. ICTY Statute, Article 22. *Exceeds 30 pages.*

Case Law

12. *Prosecutor v. Boskoski*, Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release, ICTY Case No. IT-04-81-AR65.2, 28 September 2005.

13. *Prosecutor v. Brdanin*, Case No.: IT-99-36, Decision on Motion by Prosecution for Protective Measures, ICTY Trial Chamber, 3 July 2000.

14. *Prosecutor v. Gbao*, Case No.: SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, SCSL Trial Chamber, 10 October 2003.

15. *Prosecutor v. Haradinaj,* Further Decision on Lahi Brahimaj's Motion for Provisional Release, ICTY Case No. IT-04-84-PT, 3 May 2006.

16. *Prosecutor v. Kamuhanda,* Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, Case No. ICTR-99-54-T, 22 March 2001.

17. *Prosecutor v. Kajelijeli*, Case No.: ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ICTR Trial Chamber, 6 July 2000.

18. *Prosecutor v. Kajelijeli,* Decision on Juvenal Kajelijeli's Motion for Protective Measures for Defence Witnesses, Case No. ICTR-98-44A-T, 3 April 2001.

19. *Prosecutor v. Niyitegeka*, Case No.: ICTR-96-14-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ICTR Trial Chamber, 12 July 2000.

20. *Prosecutor v. Norman*, Case No.: SCSL-2004-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, SCSL Trial Chamber, 8 June 2004.

21. *Prosecutor v. Nteziryayo,* Decision on the Defence Motion on Protective Measures for Witnesses, Case No. ICTR-97-29-T, 18 September 2001.

22. *Prosecutor v. Nyiramasuhuko and Ntahobali,* Decision on Arsene Shalom Ntahobali's Motion for Protective Measures for Defence Witnesses, Case No. ICTR-97-21-T, 3 April 2001.

23. *Prosecutor v. Perisic*, Case No.: IT-04-81, Decision on Prosecution Motion for Protective Measures for Witnesses, ICTY Trial Chamber, 27 May 2005.

24. *Prosecutor v. Simba,* Decision on Defence Request for Protective Measures, Case No. ICTR-01-76-I, 25 August 2004.

25. *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled "First Decision on Prosecution Requests and Amended Requests for Redactions Under Rule 81", ICC Appeals Chamber, Case No. 01/04-01/06(OA.5), 14 December 2006.

Commentaries

26. Peter Bartu & Neil Wilford, *Disarmament, Demobilization and Reintegration & Transitional Justice Project – Cambodia Case Study*, International Centre for Transitional Justice, 6 October 2006.

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0050/N·D12/413

AUTHORITIES 1-6 (Not Reproduced)

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mm/N:D 12/412

AUTHORITY 7

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mro/N-D 12/011

Rules of Procedure and Evidence*

Adopted by the Assembly of States Parties

First session

New York, 3-10 September 2002

Official Records ICC-ASP/1/3

* Explanatory note: The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided for in article 51, in particular, paragraphs 4 and 5.

In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.

The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national court or legal system for the purpose of national proceedings.

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Rule 75
Incrimination by family members

1. A witness appearing before the Court, who is a spouse, child or parent of an accused person, shall not be required by a Chamber to make any statement that might tend to incriminate that accused person. However, the witness may choose to make such a statement.

2. In evaluating the testimony of a witness, a Chamber may take into account that the witness, referred to in sub-rule 1, objected to reply to a question which was intended to contradict a previous statement made by the witness, or the witness was selective in choosing which questions to answer.

Section II Disclosure

Rule 76
Pre-trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77
Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 78
Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

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AUTHORITY 8

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RULES OF PROCEDURE AND EVIDENCE

RÈGLEMENT DE PROCEDURE ET DE PREUVE

Adopted on 29 June 1995; as amended on

12 January 1996
15 May 1996
4 July 1996
5 June 1997
8 June 1998
1 July 1999
21 February 2000
26 June 2000
3 November 2000
31 May 2001
6 July 2002
27 May 2003 and
15 May 2004
7 June 2005
10 November 2006

Adopté le 29 juin 1995; et modifié successivement les

12 janvier 1996
15 mai 1996
4 juillet 1996
5 juin 1997
8 juin 1998
1 juillet 1999
21 février 2000
26 juin 2000
3 novembre 2000
31 mai 2001
6 juillet 2002
27 mai 2003 et
15 mai 2004
7 juin 2005
10 Novembre 2006

(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

(C) If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

Rule 68: Disclosure of Exculpatory and Other Relevant Material

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.

(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

(D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

Rule 69: Protection of Victims and Witnesses

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

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b) Un moyen de défense spécial, incluant l'atténuation ou l'absence de responsabilité pénale due aux facultés mentales et, dans ce cas, la notification indique les noms et adresses des témoins ainsi que tous autres éléments de preuve sur lesquels l'accusé a l'intention de se fonder pour établir ce moyen de défense spécial.

B) Le défaut d'une telle notification par la défense, selon le présent Article, ne limite pas le droit de l'accusé d'invoquer les moyens de défense susvisés.

C) Si la défense introduit la requête prévue au paragraphe B) de l'Article 66, le Procureur est à son tour autorisé à examiner tous livres, documents, photographies et objets matériels se trouvant en la possession ou sous le contrôle de la défense et qu'elle entend utiliser au procès en tant qu'éléments de preuve.

i. Si l'une ou l'autre des parties découvre des éléments de preuve, informations ou documents supplémentaires qui auraient dû être produits plus tôt conformément au Règlement, elle en informe aussitôt l'autre partie et la Chambre de première instance.

Article 68 : Communication des éléments de preuve à décharge et autres éléments pertinents

A) Le Procureur communique aussitôt que possible à la défense tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité de ses éléments de preuve à charge.

B) Dans la mesure du possible et avec l'accord de la défense, sous réserve du paragraphe A), le Procureur met à la disposition de la défense, sous forme électronique, les collections de documents pertinents qu'il détient et les logiciels qui permettent à la défense de les passer au crible électroniquement.

C) Si le Procureur obtient des informations confidentielles d'une personne ou entité donnée dans les conditions prévues à l'article 70 et si ces informations contiennent des éléments entrant dans le cadre du paragraphe A) ci-dessus, il prend les mesures raisonnables pour obtenir le consentement de cette personne ou entité avant de les communiquer à l'accusé ou de l'informer de leur existence.

D) Si le Procureur détient des informations dont la communication pourrait hypothéquer des enquêtes en cours ou ultérieures, ou pourrait, pour toute autre raison, être contraire à l'intérêt public ou porter atteinte à la sécurité d'un Etat, il peut demander à la Chambre de première instance, siégeant à huis clos, de le dispenser de les communiquer. Ce faisant, le Procureur fournira à la Chambre de première instance (mais uniquement à elle) les informations dont la confidentialité est demandée.

ii. A l'issue du procès et de tout appel ultérieur, le Procureur communique à la partie adverse tous les éléments visés au paragraphe A) ci-dessus.

Article 69 : Protection des victimes et des témoins

A) Dans des cas exceptionnels, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non-divulgation de l'identité d'une victime ou d'un témoin pour empêcher qu'ils ne courent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.

Rule 70: Matters Not Subject to Disclosure

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Section 4: Depositions

Rule 71: Depositions

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

B) Lorsqu'elle arrête des mesures de protection des victimes ou des témoins, la Chambre peut consulter la Section d'aide aux victimes et aux témoins.

C) Sous réserve de l'Article 75, l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation.

Article 70: Exception à l'obligation de communication

A) Nonobstant les dispositions des Articles 66 et 67, les rapports, mémoires ou autres documents internes établis par une partie, ses assistants ou ses représentants dans le cadre de l'enquête ou de la préparation du dossier n'ont pas à être communiqués ou échangés en vertu des dispositions susmentionnées.

B) Si le Procureur possède des informations qui lui ont été communiquées à titre confidentiel et dans la mesure où ces informations n'ont été utilisées que dans le seul but de recueillir des éléments de preuve nouveaux, le Procureur ne peut divulguer ces informations initiales et leur source qu'avec le consentement de la personne ou de l'entité les ayant fournies. Ces informations et leur source ne seront en aucun cas utilisées comme moyens de preuve avant d'avoir été communiquées à l'accusé.

C) Si, après avoir obtenu le consentement de la personne ou de l'organe fournissant des informations au titre du présent article, le Procureur décide de présenter comme éléments de preuve tout témoignage, document ou autres pièces ainsi fournis, la Chambre de première instance ne peut pas, nonobstant les dispositions de l'Article 98, ordonner aux parties de produire des éléments de preuve additionnels reçus de la personne ou de l'organe fournissant les informations originelles. Elle ne peut pas non plus, aux fins d'obtenir ces éléments de preuve additionnels, citer cette personne ou un représentant de cet organe comme témoin ou ordonner sa comparution.

D) Si le Procureur cite comme témoin la personne ou un représentant de l'organe fournissant les informations au titre du présent article, la Chambre de première instance ne peut contraindre ledit témoin à répondre aux questions auxquelles il refuse de répondre en raison du caractère confidentiel de ces informations.

E) Le droit de l'accusé de contester les éléments de preuve présentés par le ministère public reste inchangé, sous réserve uniquement des limites figurant aux paragraphes C) et D).

F) Les paragraphes C) et D) n'empiètent en rien sur le pouvoir qu'a la Chambre de première instance en vertu de l'Article 89 C) d'exclure un élément de preuve dont la valeur probante est nettement inférieure à l'exigence d'un procès équitable.

Section 4: Les dépositions

Article 71 : Dépositions

A) A la requête de l'une des parties, la Chambre peut, dans des circonstances exceptionnelles et dans l'intérêt de la justice, ordonner qu'une déposition soit recueillie en vue du procès, et nommer à cet effet un officier instrumentaire.

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UNITED NATIONS NATIONS UNIES

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA
(As amended)

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal

punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9: *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterised as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

(b) The Prosecutor;

(c) A Registry.

Article 11: Composition of the Chambers

1. The Chambers shall be composed of 16 permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals

Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 *bis*: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 *bis* of the Statute of that Tribunal;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter*: Election and Appointment of *Ad Litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;

(e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 *quarter*: Status of *Ad Litem* Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;

(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;

(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;

(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;

(iv) To adjudicate in pre-trial proceedings.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.

2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 *bis* of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.

4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or

through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

AUTHORITY 10

00148142

IT/32/Rev. 39 L2/389

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

IT/32/Rev. 39
22 September 2006

Original:
English & French

Extraordinary Plenary Session
The Hague
The Netherlands
13 September 2006

RULES OF PROCEDURE AND EVIDENCE

00148143

0050/N:D12/388

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

IT/32/Rev. 39
22 September 2006

Original:
English & French

Rule 69
Protection of Victims and Witnesses
(Adopted 11 Feb 1994)

(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 70
Matters not Subject to Disclosure
(Adopted 11 Feb 1994)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused. (Amended 4 Oct 1994, revised 30 Jan 1995, revised 12 Nov 1997)

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance

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AUTHORITY 11

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Date: February 2006

Original: English & French

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)
(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)
(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)

ICTY RELATED RESOLUTIONS:
Resolution 1503 of 28 August 2003
Resolution 1504 of 4 September 2003
Resolution 1534 of 26 March 2004
Resolution 1581 of 18 January 2005
Resolution 1613 of 26 July 2005
Resolution 1629 of 30 September 2005

(Not an official document. This compilation is based on original United Nations resolutions.)

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26
Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27
Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such

00148148

MMD/Pr. D12/383

AUTHORITY 12

mm/N:D 12/382

Case: IT-04-82-AR65.2

BEFORE THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney

Registrar:
Mr. Hans Holthuis

Decision of:
28 September 2005

THE PROSECUTOR

v.

Ljube BOSKOSKI and Johan TARCULOVSKI

DECISION ON LJUBE BOSKOSKI'S INTERLOCUTORY APPEAL ON PROVISIONAL RELEASE

Defense Counsel

Dragan Godzo (for Ljube Boskoski)
Antonio Apostolski (for Johan Tarculovski)

Office of the Prosecutor

Dan Saxon
William Smith
Anees Ahmed

1. Ljube Boskoski ("Appellant") has filed an appeal against the decision of the Trial Chamber rejecting his application for provisional release.[1] Prior to filing his Appeal, the Appellant filed an application for leave to appeal from a bench of three Appeal Judges in accordance with Rule 65 (D) of the Rules of Procedure and Evidence of the Tribunal ("Rules").[2] On 8 August 2005, an amendment to Rule 65 entered into force, granting leave to appeal as a right to a bench of five Judges of the Appeals Chamber.[3] On 15 August 2005, the President issued an order assigning a bench of five Appeals Judges and ordered the parties to brief the appeal with time running from the date of the Order.[4] On 22 August 2005, the Appellant filed his Appeal and on 1 September 2005, the Prosecution filed its response to the Appeal.[5]

Background

2. The indictment against the Appellant was confirmed on 9 March 2005, and he was subsequently transferred to the United Nations Detention Unit ("UNDU") on 24 March 2005. The indictment against the Appellant charges him jointly with Johan Tarculovski for violations of the laws and customs of war. Specifically, he is charged under Article 7(3) of the Statute of the International Tribunal with command responsibility for certain violations of the laws and customs of war, including murder, wanton destruction, and cruel treatment of civilians. The crimes are alleged to have been committed during the period from 10-12 August 2001 during an attack on the village of Ljuboten by police forces of the Former Yugoslav Republic of Macedonia ("FYROM ") [6] under the Appellant's command and control. At that time of the attack, the Appellant held the position of Minister of the Interior in the FYROM government.[7]

3. The Appellant is also facing separate criminal charges in both Croatia and the FYROM stemming out of events unrelated to this case. He is accused of murdering seven civilians in the FYROM on 2 March 2002, events referred to as the "Rastanski Lazja case". The Trial Chamber in this case found that the Appellant, rather than face these charges in the FYROM, had fled the country and was later apprehended in Croatia. At the time of his transfer to the UNDU, the Appellant was in the custody of the County Court in Pula, Croatia, where he was awaiting trial on Croatian criminal charges arising from the Rastanski Lazja case. The Appellant is a citizen of both Croatia and the FYROM, and he now seeks provisional release to either country.[8]

4. Under Rule 65(B) of the Rules, an accused seeking provisional release bears the burden of proving that he "will appear for trial and, if released, will not pose a danger to any victim, witness, or other person". The Trial Chamber in this case held that the Appellant had satisfied neither requirement with respect to release to the FYROM, and that with respect to release to Croatia, he had not established that he would appear for trial. It cited a number of factors indicating the Appellant's potential flight risk, including the seriousness of the criminal charges faced in three jurisdictions, his previous flight from justice in the FYROM, the unreliability of the FYROM's guarantees of the Appellant's presence at trial, and the absence of governmental guarantees from Croatia. With respect to the finding of danger to witnesses in the FYROM, the Trial Chamber cited evidence of witness intimidation in the Rastaski Lozja case as well as his continued ties to the "Lions formation " police unit allegedly formed by the Appellant that had allegedly been involved in violence. For these reasons, the Trial Chamber denied provisional release.[9]

Standard of Review

5. An interlocutory appeal from a decision of a Trial Chamber is not an appeal *de novo*. For the Appeals Chamber to intervene in a Trial Chamber's exercise of discretion, such as the decision on whether or not to grant provisional release, the Appellant must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[10]

Grounds of Appeal

6. In this Appeal, the Appellant alleges a number of errors on the part of the Trial Chamber in the Impugned Decision. Most of those errors relate to the weight the Trial Chamber attributed to various factors that the Appellant claims discharged the burden upon him to show that he would appear for trial and that also show that he would not interfere with victims and witnesses if provisionally released.[11] He claims that the Trial Chamber placed too much weight on the possibility of danger to victims and witnesses and placed undue emphasis on his connections to the Lion's group. He further

argues that the Trial Chamber erred in holding that if the FRYOM conducted its trial against him on the Rastanski Lazja case, it may hinder the Croatian authorities from completing their prosecution of him. Finally, the Appellant claims that the Trial Chamber erred by placing undue weight on the Croatian government's failure to provide a guarantee of his appearance at trial.

(i) Personal Guarantees of the Appellant and Personal Letters of Guarantee by FYROM Politicians.

7. In the Impugned Decision, the Trial Chamber noted that the Appellant had provided personal guarantees that he would appear for trial and abide by any conditions imposed by the Trial Chamber, and specifically stated that it had taken them into account in determining whether or not the Appellant would appear for trial.[12] The Trial Chamber also explicitly stated that it had taken note of the letters provided by the Appellant from leading politicians in the FYROM attesting to his good character.[13] However, the Appellant claims that the Trial Chamber should have placed greater weight on his personal guarantees, including his statement that he was willing to offer "his family's whole personal assets as a bail bond"[14] and should have attached appropriate weight to the personal guarantees given by "relevant present politicians in FYROM".[15] He also claims that the Trial Chamber erred when it failed to consider that he intended to return to political duty once the case at the Tribunal has been determined against him as this factor is relevant to assessment of his motive to flee.[16] The Appellant argues that in the *Haradinaj* case, the Trial Chamber placed significant weight on similar factors, and for the Trial Chamber not to do so in his case would be inconsistent with the Tribunal's jurisprudence.[17]

8. The Appeals Chamber finds that the Trial Chamber's consideration of the factors identified by the Appellant was reasonable in the circumstances of his case.[18] While the Trial Chamber did not explicitly deal with the Appellant's claim that he wanted to return to public life once the Tribunal's proceedings were finalised, the Appeals Chamber is not satisfied that this factor could outweigh the other factors upon which the Trial Chamber relied to conclude that the Appellant would not appear for trial if released, including the Appellant's prior flight from the FYROM. These factors are considered further below. The Appellant's argument that the Trial Chamber attached considerable weight to such factors in the *Haradinaj* case, is irrelevant to the weight such factors should carry in the Appellant's case. These factors are evaluated in light of the circumstances of each case, and there are few similarities between the circumstances of these two cases.

(ii) Letters of the Appellant Seeking Transfer to FYROM to Face Trial

9. In the Impugned Decision, the Trial Chamber did not consider that the Appellant had written to the Court President in Pula, Croatia, seeking transfer to FYROM to face trial in the Rastanski Lozja case, to be a necessary factor for the determination of whether the Appellant would return to The Hague to face trial here if released. The facts that the Trial Chamber considered relevant in this context were that the Appellant had fled FYROM to avoid prosecution there,[19] and had been transferred to The Hague from the custody of the Croatian authorities where he was awaiting trial in that same prosecution, albeit by a different authority.[20] However, the Appellant argues that the Trial Chamber erred by concluding that he had fled the FYROM. He says he did not flee but rather legally entered into Croatia, and that both FYROM and Croatia are legal places of residence for him. He argues that if he had intended to flee prosecution in FYROM, he certainly would not have fled to Croatia, where he has a legal right to reside, and furthermore would not have "legally registered his residence in Zagreb".[21] The Appellant claims that the Trial Chamber's analysis of the evidence was "wholly erroneous" and led to an error of law.[22]

10. In the Impugned Decision, the Trial Chamber considered the evidence of the Prosecution which established that on 30 April 2004, a committee of the FYROM parliament voted to remove the

Appellant's parliamentary immunity. On that day, the Appellant held a press conference at a hotel to discuss the removal of his immunity. The investigating Judge in the FYROM served the Appellant, while at the hotel, with a summons to appear before that judge the following day and informed the Appellant of the reasons for the summons, his legal rights and the consequences should he fail to appear. The Appellant left the FYROM that day.[23] In these circumstances, the finding of the Trial Chamber that the Appellant left the FYROM to avoid criminal prosecution[24] was clearly reasonable, and particularly in light of the conflicting explanations given by the Appellant regarding his departure at that time. He initially claimed that he had never received the summons,[25] and later claimed that he had departed because he "feared for his life and that the trial would not be fair".[26] As such, with this information before the Trial Chamber, it was reasonable for it to conclude that his letters showing that he wished to be transferred back to the FRYOM to face those same criminal proceedings were insufficient to establish that he would return for trial at the Tribunal if provisionally released.

(iii) Seriousness of the Charges in Both Cases Pending Against the Appellant

11. In the Impugned Decision, the Trial Chamber found that even if it accepted the Appellant's claim that the severity of the charges against him were at the "bottom end" of the scale vis-à-vis other accused, the charges are still very serious and if convicted, the Appellant could face a lengthy sentence.[27] The Trial Chamber noted the charges against the Appellant in the Rastanski Lozja case, which alleged participation in the murder of seven people in the FYROM, and while considering that the guilt or innocence of the Appellant was an issue of fact to be litigated in that case, the Trial Chamber considered that if the Appellant were convicted for either that case or this one before the Tribunal, it was likely that a lengthy prison sentence would be imposed. It concluded therefore that "the potential for a lengthy prison sentence resulting from either of these two cases may constitute an incentive for the Accused to flee as a factor in determining whether the Accused will appear for trial".[28] The Appellant argues that the Trial Chamber erred by failing to consider that a not guilty verdict had been rendered against his co-accused in the Rastanski Lozja case. He claims this is not an incentive for him to flee and in fact, he made clear submissions to the Trial Chamber that he was willing to face trial in both cases.[29] The Appellant claims that the Trial Chamber further erred by "regarding the possible severity of the sentence as determinative".[30]

12. The Appeals Chamber finds that that the Trial Chamber's consideration of the severity of a possible sentence in either case was a relevant factor to be weighed in the Trial Chamber's consideration of whether the Appellant would appear for trial. Despite the assertion of the Appellant, it is evident from the Impugned Decision that the Trial Chamber considered this as a relevant factor to be considered and not a determinative factor.[31] Although the Trial Chamber failed to consider the not guilty verdict rendered in favour of the Appellant's co-accused in the Rastanski Lozja case, the Appeals Chamber notes that the Appellant's guilt or innocence remains a matter to be adjudicated. In these circumstances, it was entirely reasonable for the Trial Chamber to take into account the possibility of a conviction of the Appellant in that case, as well as the case before the Tribunal as an aggravating factor providing an incentive for the Appellant to flee.

(iv) Appellant's Previous Attempts to Avoid Criminal Prosecution in the FYROM

13. The Trial Chamber's consideration of this evidence in the Impugned Decision has already been considered above.[32] The Appellant argues that the Trial Chamber erred by failing to consider that "he fully submitted himself to the authorities of Croatia and FYROM".[33] He says that the evidence established that he had entered Croatia legally; properly registered his residence in Zagreb; cooperated with the Croatian authorities regarding the Rastanski Lozja case; and requested transfer to FYROM to face trial in the Rastanski Lozja case.[34]

14. The Trial Chamber's consideration of the evidence demonstrating that the Appellant left the FYROM to escape criminal prosecution has already been discussed above.[35] The finding of the Trial Chamber was well founded and clearly reasonable.

(v) Circumstances of the Appellant's Surrender to the Tribunal

15. The Trial Chamber considered the Appellant's submission that because he was already in custody at the time of his transfer to The Hague, he was not in a position to surrender voluntarily to the Tribunal. The Trial Chamber considered that in these circumstances it could not "give much weight surrounding the surrender of the Accused to the Tribunal".[36] The Appellant claims that the Trial Chamber erred as he did not resist his transfer to the United Nations Detention Unit and "did not employ any legal means to delay or evade extradition".[37] The Appeals Chamber agrees with the Prosecution that "this ground is baseless".[38] As the Appellant was in legal custody, he was not in a position to be voluntarily transferred to the Tribunal and the fact that he did not actively seek to prevent Croatia from carrying out its international legal obligation to transfer him to the Tribunal is not a factor that should be weighed in the Appellant's favour. Accordingly, the finding of the Trial Chamber was clearly reasonable.

(vi) Assessment of the Reliability of the Government Guarantees from the FYROM

16. In the Impugned Decision, the Trial Chamber considered the government guarantees and the oral submissions made by the Minister of Justice of the FYROM with respect to the capacity of the FYROM government to guarantee the appearance of the Appellant at trial and to ensure the protection of victims, witnesses and other persons. It also made note of the Prosecution's concession that the FYROM government "has been cooperative and has acted in good faith in relation to this investigation and others", but also "its concerns regarding the practical ability of the FYROM government to control what actually happens on the ground".[39] In light of the evidence presented, the Trial Chamber found that the FYROM had shown a cooperative attitude to the Tribunal and had been willing to provide investigative and law enforcement assistance.[40] However, it found that these factors had to be balanced against other practical matters and the circumstances of the Appellant. Relevant circumstances included the influence the Appellant has retained among the public and the police and the fact that the Appellant was alleged to have been assisted by the police in fleeing FYROM. The Trial Chamber found "that the failure of the FYROM to prevent the Accused from fleeing to avoid prosecution in the Rastanski Lozja case is a factor that should be weighed in determining whether the Accused will appear for trial".[41]

17. The Appellant claims that the Trial Chamber's assessment of these guarantees was erroneous. He argues that the Trial Chamber "erred when not granting the benefit of the doubt to the FYROM authorities".[42] He again refers to the situation in the *Haradinaj* case as an example of which the Trial Chamber should have followed.[43] The Appellant also claims that the Trial Chamber erred by failing to also consider that the Prosecution had not established that he exercised influence over the police force and by failing to take into account that FRYOM could not legally obstruct his trip to Croatia as there was no proceeding against him at the time he left FYROM.[44]

18. The Appeals Chamber finds that the Appellant has not demonstrated any error in the Trial Chamber's analysis of the government guarantees. It was entirely reasonable for the Trial Chamber to consider the FYROM guarantees in the context of the Appellant's circumstances and to conclude that the guarantees were not sufficient to ensure that the Appellant would appear for trial. It was also entirely reasonable for the Trial Chamber to consider that the Appellant's former position as Interior Minister meant that he retained influence over the police and that the failure of the FYROM authorities to prevent his departure from FYROM at the time of the lifting of his political immunity, was evidence of that continued influence.

(vii) Evidence of Possible Danger to Victims and Witnesses and Other Persons

19. In considering whether the Appellant would pose a danger to victims and witnesses, the Trial Chamber took into account the personal guarantees of the Appellant, the fact that if provisionally released, he would be in close proximity to victims and witnesses, and the fact that there was no witness protection law operative in the FYROM. It also took note of the evidence of witness intimidation in the Rastanski Lozja case and of the threats of violence from former members of the Lions formation. The Trial Chamber agreed with the Prosecution that the influence the Appellant had over the Lions formation "may present a concrete harm to victims and witnesses, and the interference with the administration of justice".[45] It recognised that the fact of influence by the Appellant did not necessarily mean that he would exercise that influence illegally, but noted that he was alleged to have already exercised it illegally by accepting the assistance of the police to flee the FYROM. Considering the totality of the evidence, the Trial Chamber was not persuaded that the release of the Appellant would not pose a danger to victims, witnesses or other persons.[46]

20. The Appellant argues that the Trial Chamber placed undue weight on the consideration of victims and witnesses in denying provisional release and that it placed undue weight on his connection to the Lions formation without actual evidence of there being a likely danger to victims and witnesses.[47] The Appeals Chamber finds these claims to be without merit. The Appeals Chamber notes that while there may not have been specific evidence of witness intimidation in the case before the Tribunal, there was evidence of witness intimidation in the Rastanski Lozja case by members of the Lions formation, and it was reasonable for the Trial Chamber to consider that as evidence of a possible danger to witnesses in this case.

(viii) Influence Over Members of Police Forces

21. The Appellant also argues that the Trial Chamber misjudged the evidence concerning his continued influence over the police force. He says he has not been the Minister of Interior for more than three years and that the Lions formation was disbanded in 2002 by a government decision and no longer exists. He claims that the former members of the Lions are not under his control and that there is not a single incident involving a threat to a victim or witness to support the Trial Chamber's finding.[48] The Appeals Chamber finds that, in making these claims, the Appellant has not demonstrated that the reasoning of the Trial Chamber regarding his continued influence over the police was unreasonable. It was quite reasonable for the Trial Chamber to conclude that his former position as Interior Minister meant that he retained some influence in the present circumstances, where the FYROM failed to prevent the Appellant from fleeing from FYROM to avoid criminal prosecution.[49] The Trial Chamber's finding is supported by the evidence of witness intimidation in the Rastanski Lozja case by members of the Lions formation.

(ix) State Sovereignty and International Comity

22. Another factor considered by the Trial Chamber was that the Appellant has been transferred to the Tribunal from the custody of the Croatian authorities who had the Appellant in custody pending trial in the Rastanski Lozja case. It noted that should it provisionally release the Appellant to the FYROM, where the Appellant faced charges for the same case, a trial there could prevent the Croatian authorities from completing their criminal proceedings in that case. On principles of international comity, it stated that it would not want to provisionally release the Appellant to the FYROM without having the consent of the Croatian authorities.[50] The Appellant contends that the same alleged crimes could be tried either in Croatia or the FYROM so the venue does not matter.[51] But the Appeals Chamber note that the Trial Chamber's holding was not merely based on a concern with enabling those crimes to be effectively prosecuted; rather, it related to respect for Croatia's interest in continuing its own ongoing criminal proceedings in the case. That interest would not necessarily be satisfied by a trial in the FYROM, and so the Trial Chamber was not wrong in stating

that comity concerns made it advisable to seek the views of Croatia on the matter. Accordingly, the Appellant has not established an error in the reasoning of the Trial Chamber.

(x) Erroneous Evaluation of the Government Guarantees

23. The Trial Chamber invited the Croatian government to send representatives to attend the oral hearing on the provisional release application of the Appellant. The Croatian government chose not to send such a representative and while the Trial Chamber noted the submissions of the Appellant and the Prosecution of "the willingness of the Croatian government to respect the decision of the Tribunal in regard to the provisional release", it also noted that the Croatian government had failed to issue guarantees of the Appellant's appearance at trial at the Tribunal, and had not attended the oral hearing. In these circumstances, the Trial Chamber reasonably concluded that it was unable to determine the current position of the Croatian government. Given the Trial Chamber's reservations as to the Appellant appearing for trial, the lack of government guarantees from the Croatian government weighs heavily against the Appellant.[52] The Appellant claims that the Trial Chamber erred by weighing the lack of guarantees too heavily against him given that the jurisprudence of the Tribunal makes clear that government guarantees are not a necessary condition of provisional release.[53] Again, the Appellant has failed to show that the Trial Chamber's reasoning was erroneous. While a lack of governmental guarantees does not alone bar provisional release, the Trial Chamber reasonably concluded that given the lack of such guarantees from Croatia as well as the other above-discussed factors such as the Appellant's history of flight, it could not be confident in the Appellant's presence for trial at the Tribunal. Accordingly, the Appellant has again failed to establish any error on the part of the Trial Chamber.

(xi) Conclusion

24. As noted previously, in order to demonstrate that he is entitled to provisional release, the Appellant must show both that he would appear for trial and that he poses no danger to others. The Trial Chamber's findings, upheld by the Appeals Chamber here, demonstrate that his release to either Croatia or the FYROM would pose a significant risk of his flight, and the first criterion is therefore not satisfied. Although it is therefore not necessary to consider the second criterion, the Appeals Chamber has also found no error in the Trial Chamber's holding that his release to the FYROM would potentially endanger witnesses there.

Disposition

On the basis of the foregoing, the Appellant's interlocutory appeal is **DISMISSED.**

Done in English and French, the English text being authoritative.

Dated this 28th day of September 2005,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]

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1 - Interlocutory Appeal Against Trial Chamber's Decision on Defence Motion of Ljube Boskoski for Provisional Release of 18 July 2005, 22 August 2005 ("Appeal"); Decision on the Defence Motion for Provisional Release, 18 July 2005 ("Impugned Decision").

2 - Application on Behalf of Ljube Boskoski for Leave to Appeal the Decision on Defence Motion of Ljube Boskoski for Provisional Release Filed 18 July 2005, 21 July 2005.
3 - IT/32.Rev.36, 8 August 2005.
4 - Order Assigning Judges to a Case Before the Appeals Chamber, 15 August 2005.
5 - Prosecution's Response to the Interlocutory Appeal Filed on Behalf of Accused Ljube Boskoski Against the Trial Chamber's Decision Denying Provisional Release, 1 September 2005.
6 - The Defence requests that FYROM be referred to by its chosen name, Republic of Macedonia. The Tribunal recognizes that by resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State being provisionally referred to for all purposes within the United Nations as "The former Yugoslav Republic of Macedonia" pending settlement of the difference that had arisen over its name.
7 - Impugned Decision, paras. 2-3.
8 - Impugned Decision, paras, 1-3, 35.
9 - *Ibid*, paras.29-53.
10 - *Prosecutor v Milosevic*, Case No: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, at paras. 9-10.
11 - *See* Rule 65(B) of the Rules
12 - Impugned Decision, para. 39.
13 - *Ibid*, para. 38.
14 - Appeal, para. 27.
15 - *Ibid*, para. 25.
16 - *Ibid.*
17 - Appeal, para. 26.
18 - Impugned Decision, para. 35, 41.
19 - *Ibid*, paras. 34, 35.
20 - *Ibid*, para. 45.
21 - Appeal, para. 29.
22 - *Ibid*, para. 28.
23 - Impugned Decision, para. 33
24 - *Ibid* para.35.
25 - *Ibid*, para. 34.
26 - *Ibid*, para. 35.
27 - *Ibid*, para. 31.
28 - Ibid, para. 32.
29 - Appeal, para. 33.
30 - *Ibid*, para. 34.
31 - Impugned Decision, paras. 31-32.
32 - *Supra*, para. 11.
33 - Appeal, para. 35.
34 - *Ibid*, para. 35.
35 - *Supra*, para. 11.
36 - Impugned Decision, para. 36.
37 - Appeal, para. 36.
38 - Response, para. 34.
39 - Impugned Decision, para. 40.
40 - *Ibid*, para. 40.
41 - *Ibid*, para. 41
42 - Appeal, para. 37.
43 - *Ibid.*
44 - *Ibid*, para. 39.
45 - Impugned Decision, para. 43.
46 - *Ibid*, para. 43.
47 - Appeal, paras. 42-43.
48 - *Ibid*, paras. 46-48.
49 - Impugned Decision, para 43.
50 - *Ibid*, paras. 45-46.
51 - Appeal, para. 49.
52 - Impugned Decision, para. 49.
53 - Appeal, para. 51.

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AUTHORITY 13

IT-99-36-PT D12/373

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
3 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. On 10 January 2000, the Prosecutor filed a motion seeking orders directed to the two accused (Radoslav Brdanin and Momir Talic) and their legal teams – collectively described as the "Brdanin and Talic Defence" – in the following terms:

> (1) The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.
>
> (2) Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:
>
> > (a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor;

(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony;

(3) If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case;

(4) With regard to (3) above, the Brdanin and Talic Defence shall maintain a log indicating the name, address and position of each person or entity receiving such information and the date of disclosure. If there is a perceived violation of the orders described herein, the Prosecutor shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as a duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure log, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate .

(5) If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel. The Brdanin and Talic Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record.

(6) The Prosecutor may make limited redactions to witness statements or prior testimony concerning the identity and whereabouts of vulnerable victims or witnesses. The identities of such persons shall be disclosed to the Brdanin and Talic Defence within a reasonable period before commencement of trial, unless otherwise ordered.(1)

Paragraph 2 of the Motion defines, in wide terms, the expressions "the Prosecutor ", "Brdanin and Talic Defence", "the public" and "the media".(2) The Motion was filed on a confidential basis.

2. The orders sought numbered (1), (2) and (3) were not opposed. The others were opposed.

2 The Statute and the Rules

3. There are three provisions of the Tribunal's Statute which are relevant to this application. Article 20 ("Commencement and conduct of trial proceedings") provides , so far as is here relevant:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence , with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21.2 ("Rights of the accused") provides:

> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

Article 22 ("Protection of victims and witnesses") provides:

> The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include , but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

4. There are also a number of the Rules of Procedure and Evidence ("Rules") which are relevant to the application. Rule 66(A)(i) ("Disclosure by the Prosecutor") is in the following terms:

> Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
>
> (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; [...]

Rule 53(A) ("Non-disclosure") provides:

> In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

Rule 69 ("Protection of Victims and Witnesses") provides:

> (A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 75(A) ("Measures for the Protection of Victims and Witnesses") provides:

> A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of witnesses, provided that the measures are consistent with the rights of the accused.

3 The redactions made by the prosecution

5. On 11 January, the prosecution purported to comply with its obligation under Rule 66(A)(i) by serving on counsel for the two accused copies of the supporting material which had accompanied the indictment when confirmation was sought. *Every* statement served had been redacted to remove the name and any other material which would identify either the persons who had made the statements or their whereabouts , notwithstanding the references in par (6) of the orders presently sought to

"limited redactions" and "vulnerable victims or witnesses". The documents were accompanied by a letter which requested counsel to respect the protective measures sought in the Motion until such time as the Trial Chamber had ruled upon it. (3)

6. It was conceded by the prosecution that this redaction had been effected without having first obtained an order pursuant to Rule 69, but it was said that the redaction had been carried out in advance of such an order "for safety's sake".(4) The first issue to be determined in the Motion is, therefore, whether pursuant to Rule 69(A) the prosecution is entitled to the redaction of the name and identifying features of *every* person who has made a statement until "a reasonable period before [the] commencement of [the] trial", as sought by the Motion.(5)

7. In relation to the power to provide appropriate protection for victims and witnesses in the Statute and Rules, it was held by the Trial Chamber in the *Prosecutor v Tadic*(6) that:

> [...] in the fulfilling of its affirmative obligation to provide such protection, [the Tribunal] has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses. How the balance is struck *will depend on the facts of each case.* (7)

The balance between the right of the accused to a fair and public trial and the protection of victims and witnesses within its unique legal framework had also been referred to in earlier decisions in the same case.(8)

8. The prosecution, however, relies not only upon the facts of this particular case but also upon "the facts and circumstances concerning Tribunal cases generally" to justify the redaction of all identification of *every* person who had made the relevant statements and their whereabouts. It says that Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as the enemy of another, and where –

> [...] much of the war is still being fought, with indictees [sic] or suspects and their supporters (as well as supporters of those detained in The Hague) still at large and where witnesses against them are considered "the enemy".(9)

The Motion proceeds:

> 10. In the past two years, there have been increasing instances involving interference with and intimidation of Tribunal witnesses, including breaches and violations of witness protection orders (including non-disclosure orders) and other security measures . The situations range from witnesses having their lives threatened, to repeated instances of witness statements that have been disclosed to accused and their counsel being published in the media or otherwise made public (despite the existence of non-disclosure orders), to numerous threatening telephone calls, to loss of jobs or job opportunities, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Tribunal.
>
> 11. In light of these past breaches of confidentiality and other serious problems , and their effect on victims and witnesses, the Prosecutor has grave concerns that the safety of witnesses, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses' identities, whereabouts and statements are prematurely disclosed in circumstances where they cannot be protected . The Prosecutor submits that the requested protective measures greatly assist in minimising these concerns.

9. The prosecution submits that the future of this and all other Tribunal cases depends upon the ability and willingness of witnesses to give evidence. Absent evidence, there will be no trials, or no trials which accomplish justice. It says :(10)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

10. It was frankly conceded by the prosecution that the basic argument underlying its submissions was that the requirements of Rule 69(A) – that "exceptional circumstances " must be shown before protective measures will be ordered by the Trial Chamber – are satisfied in relation to *every* witness in *every* case "at this stage" (that is, at the time for service on the accused of the supporting material which accompanied the indictment when confirmation was sought).(11) It was also frankly conceded by the prosecution that it is difficult to argue that *every* witness must be vulnerable.(12)

11. In the opinion of the Trial Chamber, the prevailing circumstances within the former Yugoslavia *cannot by themselves* amount to exceptional circumstances . This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives.(13) Accordingly, the use by those judges of the adjective "exceptional" in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances – in the former Yugoslavia. As was made clear by the Second *Tadic* Protective Measures Decision, the circumstances of each case must be examined.

12. The prosecution submits that the Second *Tadic* Protective Measures Decision should no longer be followed, as it was the Tribunal's first case, and that there had been numerous documented instances of interference since that time.(14) Even if the situation *has* changed since the Second *Tadic* Protective Measures Decision – and the Trial Chamber is not satisfied that there has been any *significant* change – the wording of Rule 69(A) has nevertheless remained the same, and the phrase "exceptional circumstances" in its ordinary usage does not permit any interpretation which equates it with what is now said to be the rule in the former Yugoslavia.

13. The action of the prosecution in redacting the name and identifying features in *every* statement, although no doubt administratively convenient, was both unauthorised and unjustified on the basis which the prosecution has now put forward .

4 An alternative procedure?

14. During the course of the oral hearing of the Motion, on 24 March 2000, there was discussion as to whether a procedure could be devised which would avoid the need for a witness-by-witness application by the prosecution to the Trial Chamber for protective measures before complying with its obligation under Rule 66(A)(i) to serve copies of its supporting material upon the accused.

15. The prosecution proposed a procedure whereby –

> (i) it would take it upon itself to redact the identity of every witness who has asked for his or her identity not to be revealed and who, in its judgment, is a vulnerable witness,

(ii) the accused could make a "reasonable" request to it for the identity of particular victims and witnesses to be revealed, giving reasons why their identity was required at an earlier stage than (say) thirty days before the commencement of the trial, and

(iii) if that request were refused, the accused could then seek relief from the Trial Chamber.(15)

Should the accused require the name of a witness because there are, for example, features directly implicating the accused, the name would be supplied unless there is a very good reason why the prosecution wished to withhold it.(16)

16. Such a proposal, however, has two basic defects. First, it continues to assume that *every* witness (or at least those who ask for their identity not to be disclosed) is in fact "in danger or at risk" (as Rule 69(A) describes them), or "vulnerable" (as the Motion describes them). As already decided, that is not so . Secondly, the proposal completely reverses the appropriate onus. Rule 69(A) places the onus upon the prosecution to demonstrate the exceptional circumstances justifying an order for non-disclosure, whereas this proposal places the onus upon the accused to justify disclosure.

17. There is another problem. The prosecution asserted that, as it has a responsibility to ensure that the accused is given a fair trial, it should be trusted in effect to perform the role which the Rules give to the Trial Chamber in determining which victims and witnesses are vulnerable.(17) It asks the accused "to accept that there are very good reasons why the identity is not being provided".(18) This does not even begin to discharge the onus which the prosecution bears under Rule 69(A). One of the supporting documents served on the accused in the present case consists of the transcript of evidence which a proposed witness gave in open session in another case before the Tribunal, with all material identifying the witness redacted. As it would be a simple thing for the accused to find the relevant transcript and thus to identify the witness in question, there could be no exceptional circumstances warranting a redaction of that witness's name. This example suggests a perhaps less than dispassionate approach by the prosecution to its task.(19)

18. The proposal was opposed by both accused, and the Trial Chamber accepts that its implementation would be contrary to both the Statute and the Rules.

5 A conflict between the Rules?

19. The prosecution claims that there is a conflict which needs to be resolved between the obligation placed upon it by Rule 66(A)(i) to disclose the supporting material to the accused within thirty days of his initial appearance and the protection afforded to victims and witnesses provided by Rule 69 (A).(20)

20. The Trial Chamber does not accept that there is any such conflict. As already decided, Rule 69 (A) does *not* provide the blanket protection asserted by the prosecution. Before protective measures will be granted, Rule 69(A) requires the prosecution first to establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one.(21) The reference to "proceedings" in Article 20 is not limited to the actual trial; it includes every phase of the litigation which affects the determination of the matter in issue.(22)

21. If the prosecution is able to demonstrate exceptional circumstances justifying the non-disclosure of the identity of any particular victims or witnesses at this early stage of the proceedings, then its obligations of disclosure under Rule 66 (A)(i) will be complied with if it produces copies of the statements with the names and other identifying features of only *those* witnesses redacted.

6 Rule 69(A)

22. It is necessary initially to say one thing about Rule 69(A) if only for the purpose of putting it on one side. The Rule expresses the power to make a non-disclosure order in relation to a victim or witness who may be in danger or at risk "until such person is brought under the protection of the Tribunal". This rather curious wording appears to assume that the Tribunal has a witness protection program or scheme which will render the non-disclosure order no longer necessary once it comes into operation. In fact, the Tribunal does not have any such program or scheme.(23) The Rule has always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter. If necessary, such a power is justified by Rule 53(A), which permits a non-disclosure order (so far as the public is concerned) to be made in relation to any document or information until further order – but, again, only "[i]n exceptional circumstances". So far as the accused is concerned, Rule 69(C) requires the identity of the victim or witness to be disclosed to him "in sufficient time prior to the trial to allow adequate time for preparation of the defence".(24)

23. There is therefore clear power to make what may be described as the usual non -disclosure orders in relation to particular victims and witnesses once exceptional circumstances have been shown. That, however, is not what is sought by the prosecution in the present motion. In substance, the present motion seeks only to justify the prosecution's right to make the blanket redactions already made. In that endeavour , the prosecution has been unsuccessful, and it will be necessary to file a fresh motion in which it seeks to justify a non-disclosure order in relation to particular victims and witnesses.(25) As some of the issues which will arise in relation to such a fresh motion have been debated in relation to the present motion, it is appropriate to express the views of the Trial Chamber in relation to those issues at this stage.

24. The first issue concerns the likelihood that prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel , but not to the public. The prosecution says, and the Trial Chamber accepts, that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.(26) Paragraph 10 of the Motion makes the general allegation that there has been an increasing number of instances in which there have been breaches and violations of witness protection orders, thus justifying grave concerns that such instances will increase further if the identity of the witnesses is disclosed earlier than is necessary.

25. The prosecution subsequently gave four examples of these instances.(27) In the first, counsel for an accused was charged (with his client) with contempt arising from alleged interference with a prospective witness for that client. The charge of contempt has been dismissed upon the basis that the Trial Chamber was not satisfied beyond reasonable doubt that the interference had occurred.(28) In the second example, counsel in one case named in open session a person as having been a witness in an associated case who had been granted protective measures in that other case. When charged with contempt, Counsel claimed that he had drawn the inference that that person had given evidence in the associated case from the fact that it was known that he had been in The Hague at the time. The prosecution did not assert that this knowledge had been gained as a result of a breach by anyone bound by the protective measures order in the associated case.(29) In the third example, a witness list was published in a newspaper in Sarajevo. In the fourth example, a witness statement was published in a newspaper in Croatia . The prosecution asserted that:(30)

> As a result of these actions, Prosecution witnesses who had previously agreed to appear before the Tribunal refused to testify.

The reference to "these actions" appears to be limited to the third and fourth examples .

26. It is, however, important to recall the terms of the rule under which the prosecution seeks a non-

disclosure order. Rule 69(A) applies only to "the non-disclosure of the identity of a victim or witness who may be in danger or at risk". Any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent. Most judges can identify cases in which it is obvious that witnesses have been interfered with, but it is by no means so obvious that this has resulted from breaches by defence team members of witness protection orders. The examples of violations in the four cases following (in a temporal sense only) the disclosure of the identity of the witnesses to the defence are accompanied by the prosecution's assertion that they show "a history of violations in virtually every case that has been brought before this Tribunal".(31) This piece of hyperbole does not assist.

27. Counsel for the accused have, with some justification, complained that their integrity has been impugned by these assertions. Such an intention has been denied by the prosecution, which has attempted to explain the relevance of its assertions in this way:(32)

> It is submitted that if, before an order is to be made, the Prosecutor is required to demonstrate that there are grounds for believing that a particular defence counsel would behave improperly and/or until interference with witnesses or improper disclosure of confidential material has taken place, then the purpose of the order (which does no more than comply with the statutory obligation to protect victims and witnesses), has been negated.

This was expanded at the oral hearing:(33)

> We're suggesting that the interference may and has in the past come from persons who have a vested interest in, whether actively sought by the accused or no, helping them. And one of the foolish ways which they see help being given is by interference with witnesses.

These explanations do not entirely eradicate the suggestion by the prosecution that there is a presumption that impropriety will occur, particularly when the terms of Order (4) are considered.(34)

28. The Trial Chamber accepts that, once the defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

29. A second issue which arose relates to the extent to which the power to make protective orders can be used not only to protect individual victims and witnesses in the particular case but also to assist the task of the prosecution to bring other cases against other persons in the future. This issue arises from the prosecution's assertion quoted earlier:(35)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

That is a statement which could easily be misunderstood. In the view of the Trial Chamber, when the required balancing exercise is undertaken before protective measures are ordered, a clear distinction must be drawn between measures to protect individual victims and witnesses in the particular trial

and measures which simply make it easier for the prosecution to present its other cases against other persons.

30. Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia* , interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration . It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.

31. The Trial Chamber accepts that the need to carry out *any* balancing exercise which limits the rights of the accused necessarily results in a less than perfect trial. On the other hand, it also accepts that such a result does not necessarily mean that the trial will not be a fair one. Those propositions were stated by the majority of the Trial Chamber in the First *Tadic* Protective Measures Decision , (36) and they have never been disputed . The question here is whether the extent to which it is necessary to deny the rights of the accused in order to assist the prosecution to have indeterminate victims and witnesses testify on its behalf in future cases tilts the balance too far. The right to a fair trial holds so prominent a place in a democratic society that it cannot be sacrificed to expediency. (37)

32. That said, however, the Trial Chamber accepts that, where the likelihood that a particular victim or witness may be in danger or at risk has *in fact* been established, it would be reasonable, for the reasons already given, to order non -disclosure of the identity of *that* victim or witness until such time that there is still left, in the words of Rule 69(C), "adequate time for preparation of the defence" before the trial. Counsel for Brdanin in the end realistically accepted that the real issue was "when". (38) Counsel for Talic did not accept the right of the prosecution to have *any* documents redacted, (39) although his co-counsel emphasised the requirement of Rule 69(A) that redaction be allowed only in exceptional circumstances.(40)

33. A third issue which arose relates to the *length* of that time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. The prosecution accepts that, although the greater the length of time between the disclosure and the time when the witness is to give evidence, the greater the potential for interference with that witness, the time to be allowed for preparation must be time before the trial commences rather than before the witness gives evidence . (41)

34. The prosecution has also very realistically conceded that what is a reasonable time will depend upon the particular category in which the witness in question falls .(42) For example, where (as in the present matter) the case against the accused does not suggest that either of the accused personally did the acts in question, the witnesses who are to prove the basic facts for which the accused is said to be responsible (either as a superior or by way of aiding and abetting) do not themselves directly implicate the accused , and knowledge of their identity would do little to assist the defence in its preparation for the trial.(43) The witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who directly implicate the accused as having superior authority or as aiding and abetting.(44) The distinction is a valid one, but the problem is that it is in relation to the witnesses who fall into the second category that the prosecution has the greater concerns and whom it seeks to keep anonymous until the last moment.

35. All three of these issues will be relevant to the determination of the fresh motion which the prosecution must now file in which it seeks to justify a non-disclosure order in relation to particular witnesses.

36. The prosecution has suggested that a disclosure of its witnesses' identity thirty days before the trial would be sufficient to allow the accused to be ready for trial . The prosecution asserts that the

name of the witness is –

> [...] normally only relevant to issues of credit and is, therefore, generally only a small part of any case preparation that the Defence may undertake.(45)

The prosecution asked rhetorically:(46)

> [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused?

These statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth.(47) There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were,(48) or have subsequently retracted their evidence.(49) The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence.(50) Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

37. One difficulty which is said by both accused to have arisen in the present case results from the fact that the indictment was sealed, and has remained sealed except in relation to these two accused. Persons whom the defence teams wish to interview have declined to co-operate for fear that they are also named in that indictment , or perhaps in another sealed indictment. This difficulty was said to arise in relation to prospective witnesses for the *defence* whom the defence teams wish to interview, which is hardly relevant to the present issue, which concerns *prosecution* witnesses.(51) However , the Trial Chamber recognises that such a difficulty may well arise also in relation to those from whom the defence teams seek information in relation to the prosecution witnesses.

38. The Trial Chamber does not believe that it is possible to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases,(52) the Trial Chamber accepts that the pre-trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.

7 Return of documents

39. Order (5), if made, would oblige counsel for the accused to return all statements of witnesses to the Registry "at the conclusion of the proceedings". It is said that, as the statements were provided to the accused only to enable him to prepare for the trial, they should be returned to the Registry – thus ensuring that what may be described as the non-public information which the statements contain can never be disclosed to the public.(53) The prosecution would not have access to the documents when they are returned.(54)

40. It was argued on behalf of Talic that the documents became the property of the accused as soon as they are provided to him, and that he should be entitled to keep them "so that he could use them

properly in the future".(55) The prosecution replied that property in the documents does not pass to the accused .(56) The Trial Chamber does not find it necessary to determine this issue, as it accepts the alternative submission made on behalf of Brdanin, that the "work product" of counsel (being the notations inevitably made by counsel on those documents during the preparation and the course of the trial) does become the property of the accused and that it is of a confidential nature.(57) It is unnecessary to determine whether that confidentiality stems from the legal professional privilege which arises (at least in the common law systems) between attorney and client; it is sufficient to say that the "work product" is confidential, and that the accused should not ordinarily be required to divulge it. The issue therefore becomes whether the risk of disclosure is of such a nature that the documents ought nevertheless be returned .

41. When pressed as to how realistic the risk was that the non-public material in these statements would be disseminated if the documents were kept by counsel after the case has been concluded (when the protective measures still operate), the prosecution first referred to the refusal by one defence counsel in another case to return his papers at the conclusion of the trial, and then suggested that:(58)

> One keeps papers in one's office, people wander in and out of the office, or one leaves papers somewhere, and unless they're returned and accounted for, [...] there's always that risk. That's the difficulty.

If there is a deliberate refusal by counsel to return the documents when ordered to do so, he or she would be subject to punishment for contempt. Such a refusal does not lead inevitably to a deliberate disclosure of the documents; however, even punishment for contempt would not cure the damage should there be a deliberate disclosure. But what realistically is the likelihood of a repeat of an event such as this? And what realistically is the likelihood that counsel who has kept the statements *after the conclusion of the case* would leave them in a situation where there would be an unintentional disclosure to somebody who has wandered into his or her office? All but one of the documented disclosures to which the prosecution has referred in the Motion occurred either during the pre-trial phase or during the trial itself. The exception occurred when counsel in one completed case provided an unredacted statement of a witness to counsel in an associated case who had at that time received from the prosecution only a redacted statement of that witness .(59)

42. The Trial Chamber does not accept that the risk is of such significance as to warrant the concern which the prosecution has expressed. There is in any event some difficulty in determining the exact time when the proceedings have concluded , which the prosecution has proposed as the time for the statements to be returned . It was agreed at the oral hearing that, if such documents were to be returned to the Registry at the conclusion of the trial, they would for practical reasons be destroyed, rather then stored.(60) Whether an appeal is to be lodged would be known fairly quickly, and counsel could perhaps be permitted to keep the statements until the time for filing an appeal has expired and, if an appeal is filed, until the appeal is disposed of. But what if, at some later stage, an application is made for a review pursuant to Rule 119 ? Counsel retained for the accused in that procedure would have lost a very valuable resource if the work product on the statements has been destroyed. This would be unfair to the accused. It was suggested by the prosecution that the answer would be for defence counsel to keep his or her work product separately from the statements supplied. The Trial Chamber regards that submission as quite impractical.

43. The Trial Chamber does not accept that the likely risk of either deliberate or unintentional disclosure after the conclusion of the case is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the documents be returned in every case. The fact that orders for the return of statements have been made in similarly general terms in other cases does not impress the Trial Chamber,(61) as the present case appears to be the first in which objection has been taken to orders of the nature sought in this case, and the first in which there has been any examination of what is involved in those orders.

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44. The Trial Chamber is prepared to make an order in the terms of the first part of Order (5) – that, if a member of the Brdanin and Talic Defence team withdraws from the case, all the material in his or her possession shall be returned to the lead defence counsel. Such an order is justified as that member of the team no longer has any need for the documents. But the Trial Chamber is not prepared at this stage to make any further order in relation to the return of documents. It accepts that such orders may be warranted in a particular case. Counsel for Brdanin suggested that an order may be warranted where a document was "akin to a national security document",(62) but the Trial Chamber would not limit the occasions when an order may be appropriate to that class of case. Such orders are better considered at the end of the trial, when the risk involved may more easily be identified. The risk has not been identified in the present case at this stage. The order is therefore otherwise refused, without prejudice to any further application at a later stage.

8 Maintaining a log

45. The accused have not objected to Order (3), which obliges their Defence team (as defined) to inform each person among the public to whom they find it directly and specifically necessary to disclose confidential or non-public materials that such person is not to copy, reproduce or publicise the information disclosed, is not to show or disclose that information to any other person, and is to return the original or any copy of such material provided to that person. Order (4), if made , would oblige counsel to maintain a log indicating the names, addresses and position of each person or entity receiving any of the non-public information in the materials provided by the prosecution. The prosecution points out that similar statutory requirements exist in relation to statements, photographs and medical reports in sexual cases in the United Kingdom.(63) Such a regime was said to be necessary in Tribunal cases as the "only way of tracing these things".(64) An expanded explanation was given in these terms:(65)

> [...] if there is a leak of confidential material, and the Trial Chamber has to conduct an investigation, the only way they can properly do so is by a log being kept. And that's the reason that we are asking for that [...]

The procedure laid down by Order (4) is that, if a "perceived violation" of the non-disclosure order occurs, the Trial Chamber, or a designee [sic] such as a duty judge, may review the disclosure log so that "appropriate" action may be taken. The prosecution asserts that the log will not be disclosed to it..(66)

46. The accused Talic objects to such an order upon the basis that it infringes the confidentiality of his defence team's investigations,(67) in that (a) it will permit both the prosecution and the Tribunal to know those whom his defence team is meeting in order to organise his defence,(68) and (b) it will permit the prosecution to prosecute those persons "secretly".(69) The prosecution denies that legal professional privilege applies to that information . Again, it is unnecessary for the Trial Chamber to determine whether the confidentiality as to the identity of persons to whom the defence team have spoken in the preparation of the case for the accused stems from legal professional privilege, as it is sufficient to say that such information *is* confidential, and the accused should not ordinarily be requested to divulge it.

47. It is significant, in the view of the Trial Chamber, that the review of this log is contemplated only in the event of a "perceived violation" of the non-disclosure order. As that order is binding only upon the Brdanin and Talic Defence (which term is limited by its definition to the accused themselves, their counsel and all staff assigned to them by the Tribunal), Order (4) appears to be intended specifically to provide the basis for "appropriate" action against only those persons responsible for maintaining the log. The "appropriate" action could well include prosecution for contempt of the Tribunal.

48. If, however, any member of the defence team is to be prosecuted for contempt , it is perhaps

disingenuous of the prosecution to assert that the log will not be disclosed to it, as it would be the prosecution to which the Trial Chamber would necessarily have to turn for assistance in proceedings for contempt pursuant to Rule 77. Again, if any member of the defence team is to be prosecuted for contempt , he or she is entitled to the same presumption of innocence and right to silence which any other accused person has. The obligation to keep the log upon which such a prosecution is to be based would require that accused person to provide evidence against him or herself, contrary to Article 21 of the Tribunal's Statute. Such a procedure could be justified only where the situation were so grave that substantial damage was being caused by improper disclosures.(70) The Trial Chamber is not satisfied that such a situation exists here.

49. A requirement that such a log be kept so that any improper disclosure could be traced to a person to whom the defence team has quite properly disclosed the identity of the witness (in its investigation into the background of that witness) would not give rise to these problems, but the non-disclosure order is not binding upon those other persons, and the Tribunal is powerless to take any action against them if such a disclosure by them does occur. The Trial Chamber does not accept that it is appropriate to require such a log to be maintained by the defence team for the purpose contemplated by Order (4). The order is refused.

9 Confidential filings

50. An issue was also raised by the Trial Chamber itself as to the action of the prosecution in filing its Motion on a confidential basis. At the time when the Motion was filed, a Scheduling Order was made which, *inter alia*, lifted its confidentiality.(71) An informal request was made by the prosecution to rescind that order,(72) but the order was merely stayed until further order, so that both the confidentiality of this document and the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential" could be argued at the oral hearing.(73) The Registrar was also invited to make representations pursuant to Rule 33(B) upon the second of those issues, as well as upon the issue as to whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis .(74) A submission of the Registrar was filed.(75)

51. The purported basis for filing the Motion as a confidential document was the fear that, if the material contained in par 10 of the Motion – which is quoted in par 8 of this Decision – could be read by anyone, including those who are potential witnesses and those who have an interest in preventing such witnesses from giving evidence, it could well lead to those witnesses refusing to co-operate,(76) and to the possibility of interference with witnesses being planted in the minds of those who have a vested interest in ensuring that evidence which implicates these two accused is not given. (77)

52. The Trial Chamber repeats what it said earlier,(78) that the issue is the likelihood that prosecution witnesses may be interfered with or intimidated, and that any fears expressed (or held) by potential witnesses themselves that they may be approached are not in themselves sufficient to establish the likelihood that they may be interfered with or intimidated. The Trial Chamber regards the suggestion that those already minded to prevent evidence being given against these two accused would, by reading a publicly filed document such as this Motion, be incited to interfere with or intimidate witnesses as merely fanciful.(79) The reality is that there have already been serious allegations made publicly that witnesses in other cases have been interfered with. In one case, the allegations were upheld in proceedings for contempt against the counsel concerned.(80) In another case, the allegations against other counsel and the accused for whom he appeared were dismissed. (81) Both judgments are public documents, and may be read by anyone. The second was given only recently, but no-one has suggested that there has been an upsurge of interference with witnesses in the period since the first of those judgments was given. Nor could they.

53. There was no justification for filing the Motion on a confidential basis. Article 20.4 of the Tribunal's Statute provides:

> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Pursuant to that Article, Rule 79 provides that a Trial Chamber may exclude the press and the public from the proceedings only for one of three specified reasons (one being the safety, security or non-disclosure of the identity of a victim or witness as provided by Rule 75). Both these provisions make it clear that the proceedings must be in public unless good cause is shown to the contrary.(82)

54. The prosecution has submitted that these provisions relate only to hearings, and not to the filing of motions. That is strictly true, but they indicate a intention that *everything* to do with proceedings before the Tribunal should be done in public unless good cause is shown to the contrary. As a matter of general policy , this must be so. A necessary consequence of the filing of this Motion on a confidential basis has been that the oral argument upon the Motion – which dealt with matters of great importance – took place in closed session, although it was subsequently conceded by the prosecution that nothing said during that oral hearing other than the references to par 10 of the Motion was confidential in nature.(83) If par 10 of the Motion did not justify it being filed on a confidential basis, then the public has been denied its right of access to a hearing, a right which both the prosecution and the Tribunal should have been anxious to enforce.

55. The prosecution also asked rhetorically:(84)

> [W]hat interest can the public have in [...] unnecessarily knowing that there's an application for protection of witnesses and/or that there have been successful attempts in the past?

The answer is that there is a public interest in the workings of courts generally (including this Tribunal) – not just in the hearings, but in everything to do with their working – which should only be excluded if good cause is shown to the contrary . The attitude displayed by the prosecution in the present case appears to be part of an unfortunately increasing trend in proceedings before the Tribunal for matters to be dealt with behind closed doors. When the prosecution seeks to have anything dealt with confidentially, the accused does not usually object because it is in his interest that the less that is made public concerning his case the better.(85) This trend is a dangerous one for the public perception of the Tribunal, and it should be stopped.

56. The stay on the order lifting the confidentiality of the Motion is removed, and the filings by the parties in relation to the Motion, and the transcript and video-recording of the oral hearing on the Motion, will also be made public.

57. The remaining issues concerning confidentiality were the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential ", and whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis.

58. The parties made no specific submissions in relation to these issues, although the prosecution did identify some convenient categories into which its "confidential " filings fall, to which reference will be made later.

59. The Registrar has identified as being relevant to this issue Article 12.1 of the Directive for the Registry–Judicial Department–Court Management and Support Services ("Directive"),(86) which provides :

Documents which are confidential in whole or in part, or which include words or phrases which should not be disclosed to the public, are filed and classified in accordance with the procedure described in Article 11 herein. These documents remain a part of the relevant case file, but they are placed in a distinct folder which is not accessible to the public.

The classification of documents described in Article 11 of the Directive makes no reference to the classification of documents as confidential. The Registrar has submitted that, as it is her view that "her Office is not in a position to make decisions that affect the judicial rights of the parties",(87) and "in accordance with the current practice of the Registry", the parties *do* have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".(88) Such a practice, she says(89) –

[...] is the most appropriate mechanism for satisfying the dual objectives of maintaining the security of each party's documents, and maintaining a transparent and impartial filing system.

60. The Trial Chamber respectfully takes issues with a number of these assertions . First, Article 12 makes it clear that the documents to which it relates are those which are *in fact* confidential, not those which are merely claimed to be so, and to documents which "should" not be disclosed to the public. On the face of it, the Article *does* require the Registry staff to make a determination . Secondly, it is by no means the universal practice of the Registry to leave it to the parties to nominate whether they wish to have the documents filed on a confidential basis, and decisions *are* made by Registry staff on occasions as to whether a document should be filed on a confidential basis.(90) Thirdly, the Directive cannot be interpreted according to the ability of the Registrar to provide staff who are able to apply it. And, lastly, the argument that, by making a determination as to whether a document should be filed on a confidential basis , the Registry staff will no longer be seen as impartial is illogical. The Trial Chamber does not accept the Registrar's conclusion that the parties have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".

61. In relation to the suggested requirement that a party seeking to file a document on a confidential basis must first obtain leave to do so, the Registrar asserts that it would be contrary to the Directive, which can only be amended by the Registrar after consultation with the judges and the Prosecutor. (91) As the parties require documents to be filed on a continuous basis throughout the day, and in some cases after hours, she also asserts that any requirement of leave could potentially result in delays because of the unavailability of the Pre-Trial Judge or the Trial Chamber.(92)

62. Once again, the Trial Chamber respectfully takes issue with these assertions . The contents of the Directive are irrelevant to the suggested requirement of leave. The Directive does not impinge upon the power of a Trial Chamber to control the particular proceedings before it. The Trial Chamber may direct the parties to file certain documents, without infringing the Directive. It may equally direct the parties not to file certain documents without first obtaining leave, again without infringing the Directive. The suggested requirement of leave does not *require* the Registry staff to act in any particular way. If a party seeks to file a document merely labelled "Confidential" on such a basis without leave to do so, and if the Registry staff does not draw the party's attention to that requirement , then the Trial Chamber will exercise its power to order that its confidentiality be lifted, a power which the Registrar recognises.(93) The requirement that leave be obtained in advance will merely ensure that usually this power will not have to be exercised after the filing has been accepted.

63. In relation to the argument of inconvenience, the prosecution informed the Trial Chamber that its confidential filings fell into the following categories:(94)

(i) witness protection measures,

(ii) ongoing investigations, pending indictments and sealed indictments, and

(iii) responses to confidential motions filed by the defence and to Trial Chamber decisions which relate to confidential hearings or motions.

Filings in the second category are almost inevitably *ex parte* in nature and so are almost inevitably also confidential in nature. Filings in the third category would also appear to be necessarily confidential in nature. It is therefore with filings in the first category that the issue of inconvenience principally arises , although the Trial Chamber recognises that there may well be other categories in which it would be appropriate to file a document on a confidential basis.

64. If the requirement that leave be sought prior to filing were couched in terms which excluded –

(a) all *ex parte* applications, whatever their nature,

(b) all *inter partes* applications for witness protection which relate to specific persons, and

(c) all applications which fall within the second and third of the prosecution's categories,

there are few documents which would require leave. The prosecution was unable to supply figures, (95) but it was not suggested that there were many such documents. There would be no significant inconvenience ; rather, there will be an opening up of the proceedings to public scrutiny in every case except where confidentiality is really warranted. The Trial Chamber proposes to give such a system a trial in particular cases.

10 Disposition

65. For the foregoing reasons, Trial Chamber II makes the following orders:

1. For the purposes of these orders:

(a) "the Prosecutor" means the Prosecutor of the Tribunal and her staff;

(b) "Brdanin and Talic Defence" means only the accused Radoslav Brdanin and Momir Talic and such defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Tribunal to Radoslav Brdanin and Momir Talic's trial defence teams and specifically identified in a list to be maintained by each lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions ;

(c) "the public" means all persons, governments, organisations, entities, clients , associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the Brdanin and Talic Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the accused, the co-accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal; and

(d) "the media" means all video, audio and print media personnel, including journalists ,

authors, television and radio personnel, their agents and representatives.

2. The Prosecutor is to comply, on or before 24 July 2000 at 4.00 pm, with her obligation under Rule 66(A)(i) of the Rules of Procedure and Evidence to supply to each of the accused copies in unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by her from that accused;

provided that, in the event that the Prosecutor files a motion within that period for protective measures in relation to particular statements or other material or particular victims or witnesses (which shall be identified in such motion by a number or pseudonym), she need not supply unredacted copies of those statements or that other material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the terms of any order made upon that motion .

3. The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.

4. Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:

(a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor; or

(b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony.

5. If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case.

6. If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel.

7. The stay imposed by the Variation of Scheduling Order of 27 January 2000 dated 2 February 2000, which lifted the "confidentiality" of the Motion for Protective Measures dated 10 January 2000, is removed.

8. The "confidentiality" of the filings in response to the Motion for Protective Measures dated 10 January 2000, of the filings in reply to those responses and of the oral hearing of the Motion on 24 March 2000 is lifted.

9. The remaining orders sought by the Motion for Protective Measures dated 10 January 2000 are refused.

10. Nothing herein shall preclude any party or person from seeking such other or additional protective orders or measures as may be viewed as appropriate concerning a particular witness or other evidence.

Done in English and French, the English text being authoritative.

Dated this 3rd day of July 2000,
At The Hague,
The Netherlands.

Judge David Hunt
|Presiding Judge

[Seal of the Tribunal]

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1. Motion for Protective Measures, 10 Jan 2000 ("Motion"), par 14.

2. Those definitions formed the general basis for the definitions given in par 65.1 of this Decision. The prosecution also seeks to preserve the right of the parties and any other person to seek such other or additional protective orders or measures as may be appropriate concerning a particular witness or other evidence.

3. Transcript, 11 Jan 2000, p 40.

4. Transcript, 24 Mar 2000, p 77.

5. Motion, par 14(6).

6. Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996 ("Second Tadic Protective Measures Decision"), at 4.

7. The emphasis has been added.

8. Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123 ("First Tadic Protective Measures Decision"), at 151 (par 30). See also Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, (1995) I JR ICTY 307 at 318-319 (par 11).

9. Motion, par 9.

10. Ibid, par 4.

11. Transcript, p 78.

12. Ibid, p 88.

13. First Tadic Protective Measures Decision, at 145-147 (par 23).

14. Transcript, p 135.

15. Ibid, p 84, 87-88, 92.

16. Ibid, p 86.

17. Ibid, p 86-87, 93-94.

18. Ibid, p 140.

19. Whatever fears that witness may have in being identified as one who is going to give evidence in this trial, it is difficult to see how the prosecution, having used the transcript as supporting material when the indictment was confirmed, could argue that there were exceptional circumstances justifying a non-disclosure in relation to that witness.

20. Transcript, p 140.

21. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000 ("Further Particulars"), par 4; Transcript, p 83. See also First Tadic Protective Measures Decision, at 215.

22. First Tadic Protective Measures Decision, at 157 (par 38), citing Axen v Federal Republic of Germany, ECHR decision of 8 Dec 1983, Series A, no 72 (see at par 27).

23. First Tadic Protective Measures Decision, at 175 (par 65), 201.

24. This is subject to Rule 75, which permits appropriate measures to be ordered for the privacy and protection of witnesses unlimited in time, but only if the measures are "consistent with the rights of the accused". No issue arises in the present motion in relation to that power, which is discussed in the First Tadic Protective Measures Decision, by the majority at 169-175,179 (pars 53-66, 71) and by Judge Stephen, dissenting, at 221, 225-235.

25. It was submitted by the prosecution that such a motions should proceed ex parte (Transcript, p 86). That would be appropriate only if the identity of the particular witnesses would otherwise be identified: Prosecutor v Simic, Case IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, pars 40-41. Whether ex parte or inter partes, it would nevertheless be appropriate for the application to be made on a confidential basis.

26. Further Particulars, par 12; Transcript, pp 78-79.

27. Further Particulars, par 8.

28. Prosecutor v Simic, Case IT-95-9-R77, Oral Judgment, 29 Mar 2000, Transcript, pp 904-905.

29. Prosecutor v Zlatko Aleksovski, Case IT-95-14/1-T, Finding of Contempt of the Tribunal, 11 Dec 1998.

30. Further Particulars, par 8

31. Ibid, par 9.

32. Ibid, par 10.

33. Transcript, p 90.

34. This provides for a log to be maintained by counsel of those to whom they have disclosed the non-public information in the material provided by the prosecution, and which may be reviewed by the Trial Chamber in the event of a "perceived violation" by counsel or others within the defence team. See Section 8 of this Decision.

35. Paragraph 9 of this Decision.

36. At 179 (par 72). It is perhaps instructive that the authority upon which the majority relied – a decision of the Appellate Division of the Supreme Court of Victoria (Australia), in Jarvie v Magistrates Court of Victoria [1994] VR 84 at 90, delivered by Mr Justice Brooking on behalf of the Court – involved a witness who had been well known to the accused, although only by a pseudonym and not his real name (he was an undercover police officer): First Tadic Protective Measures Decision, per Judge Stephen, at 233.

37. Kostovski v Netherlands, ECHR decision of 20 Nov 1989, Series A, no 166, at 21 (par 44).

38. Transcript, p 115.

39. Transcript, p 123.

40. Transcript, pp 126-128. This is more consistent with the written response filed on behalf of Talic: Response of General Talic to the Further Particulars Provided by the Prosecutor Relating to the Motion for Protective Measures, 10 Feb 2000, par 5.

41. Transcript, p 81.

42. Ibid, p 80.

43. Ibid, pp 83-84. In other words, it is unlikely that there will be any real dispute about their evidence: Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18 (A).

44. Transcript, p 89.

45. Further Particulars, par 13.

46. Transcript, p 84.

47. Counsel for Brdanin quoted Lord Owen: "Never before in over thirty years of public life have I had to operate in such a climate of dishonour, propaganda and dissembling. Many of the people with whom I have had to deal in the former Yugoslavia were literally strangers to the truth." (Balkan Odyssey, David Owen, 1996, Indigo Edition, p 1.)

48. See, for example, Prosecutor v Tadic, Case IT-94-1-T, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 Dec 1996, par 4; Prosecutor v Tadic, Case IT-94-1-A, Judgment, 15 July 1999, pp 26-28 (pars 57-65).

49. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, pars 46, 136.

50. Prosecutor v Aleksovski, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 18.

51. So far as defence witnesses are concerned, the attention of defence counsel is directed to the provisions of Article 29 of the Tribunal's Statute.

52. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000.

53. Motion, par 13.

54. Transcript, p 134.

55. Ibid, p 120.

56. Ibid, p 142.

57. Ibid, pp 131, 133-134.

58. Ibid, p 97.

59. Further Particulars, par 15

60. Transcript, p 94-95.

61. Further Particulars, par 16.

62. Ibid, p 133. See also a reference by the prosecution to such documents, at Transcript, pp 99-100.

63. Sexual Offences (Protected Materials) Act 1997, which contains elaborate provisions to prevent disclosure of such

material to any person (including the accused person, even if unrepresented) in such a way which permits that person to retain possession of it at any time or to make a copy of it: Further Particulars, par 18.

64. Transcript, p 97.

65. Ibid, p 134.

66. Ibid, p 134.

67. Response [by Talic] to Prosecutor's Motion, 31 Jan 2000, par 3.

68. Transcript, p 130.

69. Ibid, p 130-132.

70. Such a situation has been justified in some domestic jurisdictions – for example, where lorry drivers are required to keep log books as to their working hours and rest periods.

71. Scheduling Order, 27 Jan 2000, p 3.

72. Letter from James Stewart, Chief of Prosecutions, to the Pre-Trial Judge, 31 Jan 2000 ("Stewart letter"). The prosecution was subsequently required to file the letter: Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

73. Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

74. Scheduling Order, 29 Feb 2000, p 4.

75. Submission of the Registrar on the Confidential Filing Issue in Accordance with Rule 33(B), 7 Mar 2000 ("Registrar's Submission").

76. Stewart letter, par (a).

77. Ibid, par (b); Transcript, p 102.

78. Paragraph 26 of this Decision.

79. The Trial Chamber has not overlooked that publicity may be given to such documents when publicly filed, although none was in fact given to this Motion notwithstanding its public release when its confidentiality was lifted. In any event, so far as the point made by the Trial Chamber is concerned, it does not matter how the allegations in the filed document might become known to those persons already minded to prevent evidence being given against these two accused.

80. Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, a judgment of the Appeals Chamber.

81. Prosecutor v Simic, Case IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

82. See also Article 21.2 of the Tribunal's Statute.

83. Transcript, p 148.

84. Ibid, p 104.

85. One example of the approach of the parties to hearing matters in closed session may be seen in Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, at par 11. In Prosecutor v Kunarac, Case IT-96-23-T, Order on Defence Motion Pursuant to Rule 79, 22 March 2000, the defence has sought a closed hearing for the evidence of all the prosecution witnesses who had accused the defendant of rape. The application was refused.

86. IT/121, 1 March 1997, as approved by the Judges sitting in Plenary Session on 25 June 1996.

87. Registrar's Submission, par 3.

88. Ibid, par 4.

89. Ibid, par 4.

90. A recent example was the wise decision within the Registry to file a document on a confidential basis, notwithstanding the absence of any label of confidentiality, because it included references to the transcript of evidence given in closed session: Prosecutor v Delalic, Case IT-96-21-A, Order Relating to Appeal Brief Filed on Behalf of Zegnil Delalic, 26 May 2000. There have been many other such occasions.

91. Registrar's Submission, par 5.

92. Ibid, par 6.

93. Ibid, par 4.

94. Ibid, p 100.

95. Transcript, p 99.

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT RECORDS
10 OCT 2003
NAME NEIL GIBSON
SIGN
TIME 12:00

Before: Judge Pierre Boutet, Designated Judge

Registry: Robin Vincent

Date: 10th day of October 2003

The Prosecutor against

Augustine Gbao
(Case No. SCSL-2003-09-PT)

DECISION ON THE PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions

Defence Counsel:
Girish Thanki
Pr. Andreas O'Shea
Kenneth Carr

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING AS Judge Pierre Boutet, designated pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Prosecution Motion by the Office of the Prosecutor for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure ("the Motion"), filed on the 7th day of May 2003;

CONSIDERING the Response thereto of the 26th day of May 2003 ("the Response), filed by the Defence Counsel on behalf of the Accused **Augustine Gbao** ("the Accused");

CONSIDERING the Prosecution Reply thereto filed on the 29th day of May 2003 ("the Reply");

CONSIDERING FURTHER the Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension of Time for the Filing of a Response to the Prosecution Motion, issued on the 16th day of May 2003 by Judge Bankole Thompson, which partly granted the Defence Request;

CONSIDERING the Prosecution Motion to Allow Disclosure to the Registry and to Keep Disclosed Materials under Seal until Appropriate Protective Measures Are in Place, filed on the 7th day of May 2003 and the Scheduling Order and Order on Disclosure to the Registry, issued by Judge Bankole Thompson on the 23rd day of May 2003;

TAKING INTO ACCOUNT the Response by the Defence thereto filed on the 26th day of May 2003 and the Prosecution Reply thereto filed on the 29th day of May 2003;

COGNISANT OF the Statute of "the Special Court" ("the Statute"), particularly Articles 14, 16, 17 and 20 thereof, and of "the Rules", specifically Rules 45, 53, 54, 66, 69, 73 and 75 thereof;

WHEREAS, acting on the Trial Chamber's instruction, the Court Management Section issued a Memorandum on the 26th day of June 2003 stating that the decision on "the Motion" would be rendered on written briefs;

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution "Motion"

1. The Prosecution submits that the persons for whom protection is sought fall into three categories: (1) victims and Prosecution witnesses who presently reside in Sierra Leone

and who have not affirmatively waived their right to protective measures; (2) witnesses who presently reside outside Sierra Leone but in other countries of West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their right to protective measures; and (3) witnesses residing outside West Africa who have requested protective measures.

2. For these categories of victims and potential Prosecution witnesses, the Prosecution requests "the Special Court" to issue the following orders:

(a) An order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for, as set out in paragraph 16 of "the Motion", or any other information which could lead to the identity of such a person, from the Defence until twenty-one (21) days before the witness is due to testify at trial; and consequently, allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is due to testify at trial, unless otherwise ordered;

(b) An order requiring that the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of "the Special Court";

(c) An order permitting the Prosecution to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in "the Special Court" proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aide any person to determine the identity of any such persons;

(d) An order that the names and any other identifying information concerning all witnesses described in paragraph 23 (a) of "the Motion" be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with the established procedure and only in order to implement protection measures for these individuals;

(e) An order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;

(f) An order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any persons or entity other than the Defence;

(g) An order that the Defence shall maintain a log indicating the name, address and

position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public materials, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

(h) An order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 23 (f) of "the Motion", have access to any information referred to in paragraphs 23 (a) through 23 (e) of "the Motion", and requiring the Defence to advise the Trial Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) An order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) An order requiring the Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) An order that the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof for permission to contact any protected witnesses or any relative of such person and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent, or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

3. The Prosecution submits, on the factual basis presented, that the cases before "the Special Court" depend largely on the ability and willingness of witnesses to give testimony and provide evidence. The threat to potential witnesses exists due to the large numbers of members of the armed factions who were involved in the conflict in Sierra Leone, who are not only present in Sierra Leone but also throughout West Africa. A potential threat further exists in so far as the perpetrators and the potential witnesses and victims live as co-habitants in the same communities. The Prosecution submits that, even at a recent stage, there have been reports of harsh intimidation of potential Prosecution witnesses. As a consequence, the Prosecution is very much concerned that the safety of witnesses, their willingness to testify and the integrity of the proceedings would be substantially jeopardised if the witnesses' identities and statements were prematurely disclosed in circumstances under which they could not be protected.

4. The Prosecution relies mainly on decisions rendered by the International Criminal Tribunal for Rwanda (ICTR) ordering protective measures for potential witnesses for reasons of security. The Prosecution maintains that the arrangement of "rolling disclosure", as exercised by the ICTR as a prevailing practice – meaning that the requirements of Rule 69 (C) of the Rules of Procedure and Evidence of the ICTR are met by disclosure of

identifying information twenty-one (21) days prior to the testimony of the witness at trial, and that, if necessary, the Prosecution can still request specific protective measures in certain cases –, should also be applied by "the Special Court", in so far as the language of the applicable Rules of Procedure and Evidence of the ICTR and of "the Rules" of "the Special Court" are highly similar. Furthermore, the Prosecution argues that such a practice of "rolling disclosure" is an adequate balance between the rights of the Accused and the protection of witnesses, i.e. between Articles 16 and 17 of "the Statute" and Rules 66, 67 and 69 of "the Rules".

The Defence "Response"

5. The Defence submissions having exceeded the page limit indicated in the Registrar's Practice Direction on Filing Documents before the Special Court for Sierra Leone, the Defence requested from the Trial Chamber permission to go beyond the page limit, arguing that the oversizing was required by the importance of the issue.

6. In discussing the circumstances that prevailed at the time of the establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda and those of "the Special Court", the Defence questions the requirement and necessity to follow the jurisprudence of the *ad hoc* Tribunals by indicating that there is no necessity for "the Special Court" to follow the path of their jurisprudence.

7. While recognizing that the jurisprudence of the *ad hoc* Tribunals can provide guidance to "the Special Court", the Defence argues that it is too early in the development of international criminal law to say that it is necessarily always desirable to follow such jurisprudence. The Defence suggests that the best practice to be followed is the one that most faithfully respects established principles of international law and justice.

8. The Defence further submits that the request by the Office of the Prosecutor constitutes an unreasonable infringement upon the right of the Accused to a fair trial. Such right, it is argued by the Defence, consists of three fundamental components of relevance for present purposes:

a) the right to adequate time and facilities to prepare for trial,
b) the right to examine or have examined witnesses against him, and
c) a public trial where justice is seen to be done subject to restrictions that are strictly necessary to preserve the interests of justice.

9. The Defence also submits that international human rights law requires that protective measures for witnesses cannot limit the minimum guarantees contained within the Accused's right to a fair trial; the only permissible derogation is in times of public emergency.

10. Furthermore, the Defence asserts that these minimum guarantees of a fair trial have become an established principle of customary international law, in so far as they can be found in all major human rights instruments, are reflected in the practice of national courts worldwide and are generally accepted in the *opinio juris* of States as custom.

11. Contesting the consistency of the jurisprudence of the *ad hoc* Tribunals for Rwanda and Ex-Yugoslavia, the Defence suggests that the jurisprudence relative to protective measures in the ICTR clearly constitutes an unlawful limitation to the rights of the Accused, and argues that the ICTR does not appropriately consider the question of necessity and proportionality in its decisions.

12. Referring to Rule 69 of "the Rules", the Defence further submits that the burden of proof for exceptional circumstances on the issue of protective measures rests with the Office of the Prosecutor. The Defence therefore suggests that the approach of the ICTY in examining protective measures on a case by case basis is more appropriate and consistent with international human rights standards and should therefore be applied. The ability of the Defence to prepare for trial should only be curtailed to an absolutely necessary extent. The Prosecution should produce a schedule that sets out for each witness the justification for such measures and to which extent they are required. It is further suggested that a blanket rule of non-disclosure of the identity of witnesses would indeed be arbitrary and not proportionate to the needs of particular witnesses. The Defence argues that such a blanket rule shifts the burden of establishing the foundation for protective measures in individual cases from the Prosecution to the Defence.

13. The Defence objects to the orders sought by the Prosecution, and more specifically, requested order (a) of "the Motion", arguing that such a request does not create a fair balance between the rights of the Accused and the protection of victims and witnesses, in so far as their identity is central to the preparation of the Defence case. Indeed, the Defence contends that using the date of testimony rather than the date of trial as a point of departure for the disclosure deadline would be a violation of the Accused's right to adequate time and facilities to prepare for his trial. Therefore, the Defence argues that the date of trial should be used, as this would ensure that the Accused can fully prepare his defence. If it were otherwise – if the materials were only disclosed twenty-one (21) days prior to the testimony –, the Defence Counsel would, at that time, already be fully absorbed, mentally as well as physically, in advocacy and in the conduct of the trial itself. This, in addition, would constitute a breach of the principle of equality of arms, in so far as the Prosecution, when the Defence actually presents its case and receives similar protective measures, will, at that stage, already have presented its case, and will therefore only be reacting to any suggested flaws in the case.

14. Moreover, the Defence submits that - contrary to the Prosecution's allegation -, the disclosure of identification data twenty-one (21) days before testimony is not a prevailing practice in the ICTR, and refers, *inter alia*, to a decision in the case of *The Prosecutor v.*

Kanyabashi, where the disclosure of non-redacted statements within thirty (30) days prior to trial was considered as sufficient time to prepare the defence.

15. The Defence objects to the order sought by the Prosecution to provide to the Chamber and to the Prosecution a designation of all persons working for the Defence team who have access to the disclosed information, stating that it is unnecessary and that there is no reasonable justification for such a request.

16. Although not stated in these terms, the Defence is in fact opposing to requested orders (a) and (h), but does not specifically object to orders (b) to (j). *In fine*, the Defence requests that:

1) the request by the Prosecution as set out in paragraphs (a) and (h) of "the Motion" be rejected;
2) the Prosecution be ordered to destroy all copies of witness statements redacted without prior order and redact the name, address, and specific relation to the Accused; and that it be ordered to reinstate any redacted information from original copies of witness statements, which do not specifically relate to the identification of the witnesses as directed by order;
3) the Prosecution be ordered to ensure that the Prosecution Senior Trial Attorney responsible for the case review all original and redacted witness statements to ensure that nothing that has not been permitted by order is redacted from the copies of statements provided to the Defence;
4) the Prosecution be ordered to provide within seven (7) days a schedule of witnesses identified by pseudonyms to the Trial Chamber and the Defence, identifying in each case specific justification for seeking protective measures and the extent of the protection sought. Further, that the Defence be afforded seven (7) days to comment on the above schedule. Further, that the Prosecution disclose unredacted witness statements to the Defence at least sixty (60) days before the date set for trial, unless otherwise ordered, in cases where it has satisfied the Trial Chamber through its schedule that protective measures are required by exceptional circumstances.

The Prosecution "Reply"

17. The Prosecution objects to the oversized "Response", arguing that an authorization has to be requested in advance to exceed the page limit and that therefore the Defence has not chosen the appropriate means to obtain satisfaction.

18. The Prosecution further submits that the Prosecution's requested measures are in full compliance with Article 17 of "the Statute" and with international human rights standards.

19. The Prosecution contends that the Defence is failing to reflect the development of Rule 69 (C) of the Rules of Procedure and Evidence of the ICTR. After an intense debate on the issue of balancing the rights of the Accused and the protection of victims and witnesses, several decisions of the ICTR now fully recognise that the triggering event for the disclosure of identifying data is the date on which the witness is to be called to testify and not, as suggested by the Defence, the date of the trial. This development is also reflected in the amended ICTR Rule 69 (C). Therefore, the Prosecution rejects the request made by the Defence that witness statements should be disclosed sixty (60) days before the date set for trial, arguing that 21 days are sufficient to conduct a proper and efficient defence.

20. Regarding the disclosure of the identity of the Defence team members, the Prosecution submits that it is in the legitimate interest of the Court and the Prosecution to have precise knowledge of the persons dealing with confidential and sensitive information.

AFTER HAVING DELIBERATED ON THE MATTER OF THE REQUESTS BY THE PROSECUTION FOR IMMEDIATE MEASURES FOR THE PROTECTION AND NON-DISCLOSURE OF THE IDENTITY OF WITNESSES AND VICTIMS;

AND ON THE MATTER OF THE PROTECTION OF ALL NON-PUBLIC MATERIALS DISCLOSED TO THE DEFENCE:

Factual issues

21. Prior to addressing the legal issues and the legal basis for this "Motion", "the Special Court" finds it essential for a proper determination of the necessity, or not, of the protective measures requested to consider and try to assess the security situation which currently prevails in Sierra Leone. In this respect, and based upon the information provided to "the Special Court", it is of importance to first note that "the Special Court" currently sits in Freetown, Sierra Leone. Indeed, Article 10 of the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" provides, *inter alia*, that "*the Special Court shall have its seat in Sierra Leone*".

22. The physical location of "the Special Court", in itself, has a substantial impact on security considerations. In comparison, it should be recalled that the *ad hoc* Tribunals, namely the ICTY and the ICTR, do not have their seat in the States over which they have jurisdiction.

23. In proceeding with the assessment of the security situation, "the Special Court" has given much consideration to the situation that now prevails in Sierra Leone, as such is amply described in the materials produced by the Prosecution in support of its "Motion". It should also be observed that no contradictory materials, information or evidence have

been produced, nor has the nature or content of this information been disputed or challenged by the Defence.

24. As an illustration of what can best be described as a rather precarious situation that appears to exist for witnesses and victims in Sierra Leone at this particular time, "the Special Court" would like to refer to some salient parts of the information contained in Attachments B, C, D and F, provided by the Prosecution:

Attachment B - Declaration by Alan W. White, Ph.D., Chief of Investigations for the Office of the Prosecutor of the Special Court for Sierra Leone:

> *"Based upon the information provided to me by these various sources, I have learned the following about the current situation in Sierra Leone and the neighbouring countries. The security situation in most of Sierra Leone and the neighbouring countries is volatile. The perpetrators, the victims and the witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. In the past weeks, there have been increasing instances involving interference with and intimidation of Prosecutor's witnesses. The situation ranges from witnesses having their lives threatened either individually or by group, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Court. This is due to the existence throughout West Africa of a large number of members of the armed factions involved in the conflict that happened in Sierra Leone, including the Revolution United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC) and other people who collaborated with such factions.*
> *Further, I have first hand information that supporters and sympathisers of former Chief of the CDF are actively attempting to identify and intimidate witnesses of the Special Court. Therefore, witnesses living in Sierra Leone, and also those living in other countries in West Africa, are directly affected by this situation and feel threatened."*

Attachment C - Declaration by Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE):

Declaration of threat to Witnesses

> *"Based on our interactions with ex-combatants from all factions throughout the country, we believe that Sierra Leoneans who give statements to the Special Court are at some degree of risk. Ex-combatants who provide testimony against former commanders or colleagues fear retribution and we have extensive direct experience to suggest that such perceptions are justified. Furthermore, we hear regularly from non-combatants in these communities*

that they fear harm if they speak to the Special Court, and our experience with ex-combatants suggests that this perception as well is justified.

Since we began our work relating to the TRC and the Special Court, ex-combatants have told us fiercely and consistently that they are worried about being called to testify before the Special Court because they fear being hurt or killed by their former commanders. Since the indictments and arrests in early April, the fear has intensified considerably.

All factions express this fear. For the past year, the former RUF fighters have been slightly more concerned, and since the arrests, it is the former members that are the most concerned about being harmed if they testify.

In our survey, we found that willingness of ex-combatants to testify was very low until we told them that the Special Court would be providing witness protection.

We also hear from ex-combatants and from non-combatant residents of the many communities that we visit that they are particularly scared because many former high-ranking perpetrators are still in the army and thus can hurt them. Specifically, some of those who have been indicted still have strong allies in the Army, so all people are afraid that those strong men will punish them for helping to put their friends in prison".

Attachment D - Declaration by Saleem Vahidy, Chief of the Victims and Witnesses Unit, of the Special Court for Sierra Leone:

"The 10 (ten) years of civil war in Sierra Leone has really damaged the whole system of Administration of Justice, and the overall level of protection available to the citizens is generally speaking, less than what it should be, although the Government is making every effort to revamp the Army, Police and the Court System, doubts as to the efficacy of the institutions still remain, more so in the minds of the witnesses. The situation in Sierra Leone was further aggravated by the fact that the Government institutions like the Army and the Police took sides with various parties to the conflict, and their impartiality became questionable.

In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion,

before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.

At present the Unit is already looking after numerous witnesses, and several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested factions to determine their exact locations, probably with a view to carrying out reprisals.

Therefore utmost efforts are concentrated on keeping secret and confidential the fact that a person is a potential witness. The longer the witness' identity is withheld, the safer he or she is going to remain.

Therefore, it should be remembered that full un-redacted disclosure at the initial stages of the proceedings implies that witnesses will be completely identified to the accused several months or even longer before they are called for testimony. This certainly increases the risk of threats or even more severe actions being taken against them, and would make the work of the Witness Unit, and indeed the Court itself, much more difficult".

Attachment F - Declaration by Keith Biddle, Inspector-General of the Sierra Leone Police which states in part:

"*In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. This situation poses a threat to the security of victims and potential witnesses. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee safety of witnesses or prevent them from injury or intimidation*".

25. "The Special Court", therefore, based upon its examination of the documentation produced and, in particular, of the foregoing, concludes that there exists, at this particular time in Sierra Leone, a very exceptional situation causing a serious threat to the security of potential witnesses and to victims, and accepts the affirmation that, according to the words of Mr. Vahidy, "*in Sierra Leone the protection of witnesses is a far more serious and difficult matter even than in Rwanda*".

Procedural issues: on the oversizing of the Defence "Response"

26. "The Special Court" acknowledges the fact that the Defence exceeded the page limit when filing its "Response", which according to the terms of the Practice Direction on

Filing Documents before the Special Court for Sierra Leone of the 27th day of February 2003, should not exceed ten (10) pages (Article 9 (3) (C)).

27. Leave is hereby granted to exceed the page limit prescribed. However, "the Special Court" wishes to recall to the Defence, and for that matter to all parties, that, unless specifically authorized by "the Special Court", they are compelled to respect the terms of all Practice Directions, in so far as they are an emanation of "the Rules" (Rule 19 (B), Rule 27 (C) or Rule 33 (D)), and can only be deviated from with leave to that effect.

Legal basis for "the Motion"

28. Article 14 of "the Statute" provides that:
"*The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable* mutatis mutandis *to the conduct of the legal proceedings before the Special Court*".

Article 16 of "the Statute" provides in paragraph (4) as follows:
"*[The Victims and Witnesses] Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses*".

Article 17 of "the Statute", paragraph (2), provides that:
"*The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses*".

Article 20 (3) of "the Statute" reads, *inter alia*:
"*The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda*".

Rule 45 of "the Rules" reads, in part, as follows:
"*The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender (...)*".

Rule 53 of the "the Rules" provides in paragraph (A) that:
"*In exceptional circumstances, a Judge designated pursuant to Rule 28 may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.*"

and in paragraph (C) that:
"*A Judge may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice*".

Rule 69 provides *inter alia* that:
(A) *In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.*

(B) *In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Unit.*

(C) *Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.*

and Rule 75 (A) states that:

"A *Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused*".

Legal issues

29. Turning now to the legal issues, "the Special Court" would like to acknowledge the fact that the Defence "Response" is indeed very well articulated and constitutes an interesting basis for philosophical or doctrinal arguments. However, it seems to ignore in part the realities of "the Special Court", which sits in Freetown, Sierra Leone, and the factual issues related to the Prosecution "Motion" requesting specific measures of protection for witnesses and victims. In the opinion of "the Special Court", the Defence cannot simply state, as it does in paragraph 18 of "the Motion", without any supporting evidence, that "*the circumstances pertaining in Sierra Leone at the time of the establishment of the Court have not worsened*".

30. "The Special Court", after having recalled the relevant provisions above, is of the opinion that issues raised by the Defence in its "Response" need to be addressed specifically and require particular consideration.

First, on the issue of the necessity to follow the jurisprudence of the ad hoc *Tribunals*

31. From a plain reading of Article 20 (3) of "the Statute", it is clear, to "the Special Court"'s understanding, that the jurisprudence from the two *ad hoc* Tribunals is not binding upon "the Special Court", but can be used as guidance in so far as it is adapted to the specificities of "the Special Court".

32. Furthermore, need it be said that international criminal justice is at a developing stage and that there is a constant need for referral to the International Criminal Tribunals'

jurisprudence, bearing in mind the necessity of judicial coherence of rulings on interpretation and application of the law.

Secondly, on the issue of protective measures constituting an unreasonable infringement upon the right of the Accused to a fair trial

- The right to a fair trial comprising three fundamental intangible components

33. The Defence asserts that the right to a fair trial consists of three fundamental components "*of relevance for present purposes*". "The Special Court" would like to highlight the fact that no human rights instrument defines the right to a fair trial as being composed of three fundamental components. Given Article 14 of the International Covenant on Civil and Political Rights (ICCPR) or Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), it is quite clear that the right to a fair trial is much more comprehensive and is composed of many other fundamental rights. Therefore, in "the Special Court"'s opinion, the Defence cannot simply state, as it does, that the right to a fair trial comprises three so-called fundamental components without providing any evidentiary or authoritative support for such a proposal. In this respect, it is "the Special Court"'s view that the Defence cannot simply extract the three components that it deems are relevant for his contention and exclude the others, as such could lead to perverse conclusions.

34. Furthermore, "the Special Court" takes issue with the Defence's view that the three so-called minimum guarantees are intangible rights and notes that the Defence has not submitted any evidence or authorities to support this contention. The Defence appears to have failed to appreciate the contents of Article 17 (2) of "the Statute". "The Special Court" deems that it is clearly stated in "the Statute" that protective measures in favour of witnesses and victims do constitute a valid reason to limit the right of the Accused to a fair trial. "The Special Court" would like to observe that this does not entail that the trial of the Accused will not be respectful of all due requirements of fairness. It should all the more be remembered, as it is detailed in the *Aleksovski* case[1] before the ICTY, that the concept of fair trial must be understood as fairness to both parties and not just to the Accused.

- The minimum guarantees of a fair trial being a principle of customary international law

35. "The Special Court" has considered the Defence contention that the above-mentioned minimum guarantees of a fair trial have become an established principle of customary international law. It should be noted again that the Defence does not refer to any authority, and has not produced any evidence to support its assertion.

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[1] ICTY, *The Prosecutor v. Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, 16 February 1999, para. 25.

36. In asserting this contention, the Defence refers only to these three components of what it claims is of relevance for present purposes and does not mention, nor consider any of the remaining rights. "The Special Court" is of the view that the right to a fair trial must be understood as a whole, not as a flexible right which can be interpreted by the Defence as it deems best serves its purpose.

37. The rights of the Accused as set out in Article 17 of "the Statute" reproduce *in extenso* Article 21 of the ICTY Statute and Article 20 of the ICTR Statute, which themselves are directly inspired by Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and by Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Moreover, it should also be stated that Article 61 of the Rome Statute of the International Criminal Court (ICC) has relied upon the standards set by other international human rights instruments in dealing with the rights of the Accused.

38. The repetition of the same guarantees in all major international human rights instruments could be viewed as creating a strong presumption that the right of the Accused to a fair trial has acceded to the status of international custom. However, in making such an allegation, it is "the Special Court"'s view that the Defence did not fully consider the criteria that must be fulfilled for a practice to be viewed as an international custom. According to Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ), an international custom is "*a general practice accepted as law*". Therefore, the States must have a common practice of what they believe they are legally compelled to do. It is likely that all democratic States respect the right of the Accused to a fair trial, as it is commonly understood by the said States, not only because it is embodied in their national legislation and in international human rights conventions, but also because, were it not law, they would still believe it to be so.

39. However, "the Special Court" is of the view that the answer to this question is not well established: the various international law instruments do not provide any such indication and there is no doctrinal consensus. Indeed, several learned authors have opposite views on this matter. Christoph J. M. Safferling[2] points out that in American literature, there is "*a strong inclination to include fair trial among customary norms*". He refers to Richard B. Lillich, who considers the whole Universal Declaration of Human Rights as customary[3], and to Theodor Meron, who "*[b]elieve[s] that at least a core number of the due process guarantees stated in Article 14 of the ICCPR have a strong claim to customary law status. Such rights include the right to be tried by a competent, independent and impartial tribunal established by law, the right to presumption of innocence, the right of everyone not to be compelled to testify against himself or to confess guilt, the right of everyone to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing, the right of everyone to examine witnesses against him or her and the right to have one's conviction and sentence*

[2] Christoph J. M. Safferling, *Towards An International Criminal Procedure*, Oxford Monographs in International Law, Oxford University Press, 2001, p. 25.
[3] See Lillich in Meron, *Human Rights in International Law*, Oxford University Press, 1984, p. 116-117.

reviewed by a higher tribunal according to law."[4] Safferling, however, underlines the fact that these assertions are not supported by any further explanation and that the authors do not examine the elements which constitute custom, i.e. State practice and *opinio juris*. Safferling further cites and agrees with Phillip Alston and Bruno Simma, who have criticized this view and have a different approach to human rights. Human rights would belong to the third category of sources of international law according to Article 38 of the ICJ Statute, namely principles of international law. This view is shared by many European authors, in order not to blur the concept of customary law.[5]

40. Moreover, even if there were absolute certainty as to whether the right of the Accused to a fair trial were indeed part of customary international law, this would still not entail that such a right constitute a *jus cogens* norm, i.e. a peremptory norm which cannot receive derogation. "The Special Court" finds it useful to stress the fact that, in this respect, there is a difference between *jus cogens* and customary norms. Peremptory norms are defined in Article 53 of the Vienna Convention on the Law of Treaties (1969) as norms "*accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*". It is well recognised that not all customary norms are intangible[6].

41. Based upon the foregoing, "the Special Court" is of the considered view that it has not been established that the right of the Accused to a fair trial has become part of customary international law.

42. "The Special Court" cannot agree with the contention by the Defence that, in such circumstances, protective measures would constitute an unreasonable infringement upon the right of the Accused to a fair trial, and hence, prefers to focus on the matter at stake, i.e. the necessity of protective measures. In this context, what is of more relevance to the present proceedings before "the Special Court" is to determine to which extent the rights of the Accused can reasonably be infringed upon, or limited, for purposes that could be described as being of equal importance, i.e. witnesses and victims protection.

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[4] Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, 1989, p. 96-97.

[5] Christoph J. M. Safferling, *Towards An International Criminal Procedure*, Oxford Monographs in International Law, Oxford University Press, 2001, p. 25-26.

[6] On the issue of international customary law and *jus cogens* norms, see *Nicaragua v. USA* ICJ Rep 1986 14; and ICTY, *The Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, para. 153, in which the Trial Chamber held, as regards torture, that "*because of the importance of the values [the principle of prohibition of torture] protects, this principle has evolved into a peremptory norm or* jus cogens, *that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules*".

B

Thirdly, on the issue of the right of the Accused to a fair trial in relation to disclosure of evidence: equality of arms

43. "The Special Court" finds it useful to look into the jurisprudence of the European Court of Human Rights (ECHR), according to which disclosure is based on: (a) the requirement that there be equality of arms between the prosecution and the defence (*Jespers v. Belgium* (1981), 27DR61, ECmHR); (b) the defendant's right to adequate time and facilities to prepare a defence under Article 6 (3) (b) of the ECHR (*Edwards v. The United Kingdom* (1992) 15 EHRR 417, ECtHR); and (c) the requirement in Article 6 (3) (d) that there be parity of conditions for the examination of witnesses (*Edwards v. The United Kingdom*, Commission Report).

44. In *Kaufman v. Belgium* ((1986) 50 DR 98 ECmHR, p.115), the European Commission held that the principle that there should be equality of arms between the parties before a court is fundamental to the notion of a fair trial under Article 6 of the ECHR. The Commission has repeatedly held that the right to a fair hearing in both civil and criminal proceedings entails that everyone who is party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions that do not place him at substantial disadvantage *vis-à-vis* his opponent. In particular, each party must know the case being made against him, have an effective opportunity to challenge it and an effective opportunity to advance his own case.

45. The jurisprudence of the European Court of Human Rights can provide guidance as to the possibility of limiting the right of the Accused to a fair trial. In *Rowe and Davies v. the United Kingdom* ((2000) 30 EHRR 1, ECHR, para. 61), the Court states that there may be circumstances in which materials need not be disclosed to the defence on grounds of public interest immunity, but they must be subject to strict scrutiny by the courts. This would be the case when protective measures in favour of witnesses are required by the Prosecution.

46. Having recalled what is meant by equality of arms in the jurisprudence of the European Court of Human Rights, "the Special Court" deems it appropriate, at the present stage, to stress the difference that exists between international human rights law and international criminal law. While international human rights law can provide guidance to judges sitting within international criminal courts, it should be borne in mind that the specificities of international criminal law sometimes require a different approach. As Judge Richard May and Marieke Wierda explain in their authoritative work on international criminal evidence[7], international trials constitute a continuous balancing of interests and rights, and this is why they are so challenging.

[7] Judge Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, 2002, p. 298.

47. As regards international criminal law, "the Special Court" does not view the situation to which the Accused is confronted when protective measures are ordered by "the Special Court" for Prosecution witnesses as constituting a violation of the principle of equality of arms, as is contended by the Defence, in relation to the system in which the departure date of the deadline for disclosure is the date of testimony. The process of granting witness protection entails a balance between "*full respect*" for the rights of the Accused and "*due regard*" for the protection of victims and witnesses[8]. In trying to achieve such a balance, "the Special Court" finds the rolling disclosure system to be fair; the restriction imposed on the right of the Accused to a fair trial in this respect is both necessary and proportionate to the aim of the restriction, i.e. witness and victim protection. The system of rolling disclosure does limit the right of the Accused to a fair trial at the preliminary stage of the proceedings, but, in "the Special Court"'s opinion, only within the boundaries of reasonableness and to the least extent possible in the prevailing circumstances. Furthermore, the contention, according to which it would be unfair to impose disclosure on the Defence at a stage when it is already fully absorbed in advocacy and in the conduct of the trial itself, cannot be accepted by "the Special Court": indeed, at the pre-trial stage, this cannot be the case. Moreover, it should also be borne in mind that although the Defence may not have access to materials which could lead to identification of the witnesses, it nevertheless has access to all other materials, thereby enabling it to prepare adequately for the trial. Moreover, should the Defence lack enough time for preparation, it must be recalled that it is always entitled to apply to the Trial Chamber, in due course, for appropriate remedies.

48. The principle of equality of arms has been frequently referred to in the jurisprudence of the *ad hoc* Tribunals[9]. In several cases before these Tribunals, the Defence has argued that there was not a complete equality of arms between the Prosecution and the Defence. In the *Tadic* case before the ICTY[10], the Appeals Chamber held that a fair trial must entitle the accused to adequate time and facilities to prepare his defence. Therefore, while the European jurisprudence views equality of arms as being a procedural equality between the parties, the Appeals Chamber decided that, given the nature of international tribunals, the approach had to be different and that "*under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case*"[11]. This case dealt with evidence which was difficult for the Defence to obtain, due to the lack of cooperation on the part of the States having custody of the said evidence. This decision nonetheless clearly

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[8] See Separate Opinion of Judge Stephen in ICTY, *Tadic*, Protective Measures for Victims and Witnesses, 10 August 1995.

[9] On the issue of equality of arms before international criminal tribunals, see: Judge Richard May and Marieke Werda, *International Criminal Evidence*, Transnational Publishers, 2002, p. 266-273.

[10] ICTY, *Tadic*, Appeals Chamber Judgment, 15th July 1999, para. 30.

[11] *Id.*, para. 52.

states that the facilities that are to be afforded to the parties include the adoption of protective measures[12].

49. "The Special Court" has considered the *Tadic* jurisprudence in perspective with the *Kayishema and Ruzindana* case before the ICTR, where Counsel for Kayishema were requesting from the Trial Chamber to be afforded the same resources as the Prosecution. In the latter case, the Chamber held that "*the rights of the accused and equality between the parties should not be confused with the equality of means and resources*" and that "*the rights of the accused as laid down in Article 20 and in particular (2) and (4) (b) of the Statute shall in no way be interpreted to mean that the Defence is entitled to the same means and resources as available to the Prosecution*"[13]. "The Special Court" is of the opinion that equality of arms before international criminal tribunals is more than a mere procedural equality, like it is for international human rights law, but does not necessarily entail a strict equality in terms of means and resources.

50. In reaching such a conclusion, "the Special Court" has acknowledged the fact that the Accused is entitled, before international criminal tribunals, to such fundamental rights as the presumption of innocence, the right to remain silent and to not have any negative inference drawn from his choice to exercise this right, and consequently, the Prosecution has the burden of proving that the Accused is guilty beyond reasonable doubt, in compliance with Rule 87 (A), and the Defence does not have to prove the Accused's innocence.

Fourthly, "the Special Court" deems it necessary to recall precedent on the issue of protective measures before this Court: case by case approach to protective measures with a schedule setting out for each witness the justification for such measures and rolling disclosure

51. "The Special Court", with Judge Bankole Thompson ruling, has already had the opportunity to decide on the issue of protective measures in the cases of *The Prosecutor v. Issa Hassan Sesay*, *The Prosecutor v. Alex Tamba Brima*, *The Prosecutor v. Morris Kallon* and *The Prosecutor v. Hinga Norman* (Decisions on the Prosecutor's Motions for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, all four filed on the 23rd day of May 2003).

52. It is useful, first of all, to recall the Decision on the Application of the Prosecution Requesting Protective Measures for Witnesses and Victims, dated the 5th November 1996, rendered in the *Blaskic* case, in which the ICTY states that: "*the philosophy which imbues the Statute and Rules of the Tribunal appears clear: the Victims and Witnesses merit protection, even from the Accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that forth, however, the right of the accused to an equitable trial must*

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[12] *Id.*

[13] ICTR, *Kayishema and Ruzindana*, Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of the Statute of the ICTR, 5th May 1997.

take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media".

53. After having noted this general principle enunciated by the ICTY, "the Special Court" now wishes to recall the findings made by Judge Bankole Thompson in the above-mentioned four decisions (paras. 14 and 15): "*Applying this general principle to the totality of the affidavit evidence before me, it is my considered view that a reasonable case has been made for the Prosecution witnesses herein to be granted at this preliminary stage a measure of anonymity and confidentiality. In addition, in matters of such delicacy and sensitivity, it would be unrealistic to expect either the Prosecution or the Defence, at the pre-trial phase, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation (...)*".

54. "The Special Court" concurs with the findings in the above-cited cases and, therefore, contrary to the arguments submitted by the Defence, does not see any valid reason to order a case by case approach combined with a schedule. Indeed, at this stage of pre-trial proceedings, the measures sought for in the "Motion" being merely of a general nature, it would be inappropriate and unrealistic for "the Special Court" to decide otherwise.

55. Regarding rolling disclosure, Rule 69 (C) of "the Rules", as previously quoted, clearly states that the date of testimony is to be used as a starting point for disclosure.

56. In this respect, Judge Bankole Thompson, in the previously described decision, held that "*in the context of the security situation in Sierra Leone and in the interest of justice, one judicial option available to me, at this stage, in trying to balance the interests of the victims and witnesses for protection by a grant of anonymity and confidentiality with the pre-eminent interest of effectively protecting the Accused's right to a fair and public trial is to enlarge the time frame for disclosure beyond twenty-one (21) days to forty-two (42) days*" (paras. 15 and 16).

57. Given the previously reached finding that rolling disclosure is a fair mechanism which is in compliance with the principle of equality of arms, "the Special Court", in light of the above comments, equally does not see any justification for departing or deviating from the rolling disclosure practice.

58. Therefore, "the Special Court" rules that disclosure shall be made within forty-two (42) days of the date of testimony of the witness, instead of twenty-one (21) days, such disclosure achieving a fair balance between "*full respect*" for the rights of the Accused and "*due regard*" for the protection of victims and witnesses[14].

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[14] See Separate Opinion of Judge Stephen in ICTY, *Tadic*, Protective Measures for Victims and Witnesses, 10 August 1995.

Fifthly, on the issue of order (h) of "the Motion"

59. Regarding order (h) requested by the Prosecution in its "Motion", "the Special Court" acknowledges that there is no dispute as to the necessity, in the interest of justice, of controlling the identities of all persons working for each Defence team. However, "the Special Court" does not consider it appropriate, nor justified, that the Defence be compelled to provide to the Trial Chamber and to the Prosecution a designation of such persons and to advise the Trial Chamber and the Prosecution in writing of any changes in the composition of the Defence team. The Defence argues that such a designation should rather be made available to the Registrar. "The Special Court" agrees with the Defence and holds that it is a highly necessary step to take. However, as the organisation of the Special Court for Sierra Leone also includes a Defence Office, such a designation, in the opinion of "the Special Court", should more appropriately also be made available to the said Defence Office. Therefore, requested order (h) of "the Motion" shall be modified and is granted in the following form: "the Special Court" orders the Defence to provide to the Registrar and to the Defence Office a designation of all persons working on the Defence team who have access to any information referred to in paragraphs 20 (a) through 20 (e) of "the Motion", and orders the Defence to advise the Registrar and the Defence Office in writing of any changes in the composition of the Defence team.

Finally, and more generally, on the role of the Judge

60. "The Special Court" would like to recall that the role of every judge is to scrutinize the proceedings and make sure that, at all moments, every ordered measure is still appropriate. As the French Constitution nicely puts it, in its Article 66, one should always remember that every judge is the protector of individual freedoms.

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SCSL-2003-09-PT

FOR ALL THE ABOVE-DESCRIBED REASONS, "THE SPECIAL COURT",

HEREBY

1. GRANTS THE PROSECUTION MOTION REGARDING REQUESTED ORDER (a) OF "THE MOTION" SUBJECT TO THE MODIFICATION WHEREBY ROLLING DISCLOSURE SHALL BE MADE FOURTY-TWO (42) DAYS PRIOR TO TESTIMONY, INSTEAD OF TWENTY-ONE (21) DAYS;

2. GRANTS THE PROSECUTION MOTION REGARDING REQUESTED ORDER (h) OF "THE MOTION" SUBJECT TO THE MODIFICATION WHEREBY DESIGNATION OF ALL PERSONS WORKING FOR THE DEFENCE TEAM SHALL BE MADE AVAILABLE TO THE REGISTRAR AND TO THE DEFENCE OFFICE;

3. GRANTS *IN EXTENSO* THE PROSECUTION MOTION REGARDING REQUESTED ORDERS (b) TO (g) AND (i) TO (k) OF "THE MOTION";

4. DISMISSES, AT THE PRESENT STAGE, REQUESTS (2), (3), AND (4) *AB INITIO* OF "THE RESPONSE".

Done in Freetown, Sierra Leone, this 10th day of October 2003

Judge Pierre Boutet
Designated Judge

Seal of the Special Court for Sierra Leone

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rrro/N·D 12/328

AUTHORITY 15

MN/N-D 12/327

Case No.: IT-04-84-PT

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar:
Mr. Hans Holthuis

Decision of:
3 May 2006

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

FURTHER DECISION ON LAHI BRAHIMAJ'S MOTION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Gilles Dutertre
Mr. Philippe Vallieres-Roland
Mr. Anees Ahmed

Accused / Counsel for the Accused:

Ramush Haradinaj
Mr. Ben Emmerson
Mr. Rodney Dixon
Mr. Michael O'Reilly
Idriz Balaj
Mr. Gregor Guy-Smith
Lahi Brahimaj
Mr. Richard Harvey

BACKGROUND

The Trial Chamber's First Decision Denying Provisional Release

- On 3 November 2005, Trial Chamber II ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Tribunal") denied a motion for

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provisional release filed by one accused in this case, Lahi Brahimaj ("Accused")[1] In its Decision on Lahi Brahimaj's Motion for Provisional Release ("First Provisional Release Decision"), the Trial Chamber found that the Accused had not discharged his burden of proof to satisfy the Trial Chamber that (i) he would appear for trial , if released, and (ii) he would not pose a danger to any victim, witness or other person, as required by Rule 65(B) of the Tribunal's Rules of Procedure and Evidence ("Rules").[2]

- On 9 March 2006, upon an appeal filed by counsel for the Accused ("Defence"), the Appeals Chamber of the Tribunal revoked the Trial Chamber's First Provisional Release Decision and remitted the case to the Trial Chamber for further consideration in accordance with the Appeals Chamber's Decision. The Trial Chamber was furthermore instructed to take into account additional evidence adduced by both the Defence and the Office of the Prosecutor ("Prosecution") which had been admitted on appeal .[3]

- Specifically, the Appeals Chamber directed the Trial Chamber to

> a. Take into account the factors set out above which the [First Provisional Release] Decision failed to consider, such as, the [Accused's] cooperation with the Prosecution ;
>
> b. Re-examine the finding concerning the "vagueness" of the [Accused's] plans, subject to the findings in paragraphs ten and eleven of the present Decision;
>
> c. Re-examine its findings concerning the question of witness intimidation; to this end the Trial Chamber may issue any such orders as it deems necessary for the purpose of availing itself of the evidence required to establish whether the [Accused] poses any threat to witnesses or any other persons.[4]

Proceedings on Re-examination

The Parties

- On 14 March 2006, the Trial Chamber invited the Defence and the Prosecution ("Parties") to submit additional observations regarding the Accused's request for provisional release in light of the Appeals Chamber Decision.[5]

- On 28 March 2006, the Prosecution submitted such additional observations (" Prosecution Additional Submissions")[6] in which it maintains the arguments made in response to the Accused's initial motion for provisional release. The Prosecution specifically submits that the Trial Chamber , in re-examining the Accused's request, should deny provisional release for the reason that he would pose a danger to others.[7]

- On 30 March 2006, two days after the expiry of the time-limit set by the Trial Chamber to file additional observations, the Defence filed a motion to strike the Prosecution Additional Submissions ("Defence Additional Submissions"), which also contained substantive submissions in response.[8] In support of its request to strike, the Defence argues that the Prosecution Additional Submissions are repetitive and thus not in compliance with the Trial Chamber's instructions to submit *additional* observations. Should the Trial Chamber decide not to strike the Prosecution Additional Submissions, the Defence requests to treat its submissions as the response to the Prosecution Additional Submissions.[9]

- On 6 April 2006,[10] the Prosecution and on 13 April 2006,[11] the Defence filed further submissions, in which they essentially argue about the admissibility of the Defence Additional Submissions under the Rules.

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• Regarding the Defence request to strike the Prosecution Additional Submissions , the Trial Chamber recalls that its invitation to submit additional observations was prompted by the emergence of new evidence on appeal which had hitherto not been considered by the Trial Chamber, rather than by a need to hear *de novo* submissions by both Parties on the Accused's request for provisional release. Although the Defence correctly states that the Prosecution Additional Submissions, to some extent, contain arguments raised in earlier submissions, the Trial Chamber does not find them to be purely repetitive.[12] In no event , it is warranted to strike out the entire Prosecution Additional Submissions.

• As to the question how the Defence Additional Submissions should be treated , the Trial Chamber notes that these submissions were not filed within the deadline prescribed by the Order of 14 March 2006. The Prosecution rightly observed that the Trial Chamber did not envisage the filing of a response to the other Party's additional submissions in its Order of 14 March 2006. However, the Trial Chamber finds that it is in the interest of justice to consider the substantive arguments contained in the Defence Additional Submissions, and not to dismiss them on procedural grounds.[13]

UNMIK

• In the context of whether the Accused would pose a danger to third persons if he were to be released, both parties had referred to information purportedly contained in a murder investigation case file maintained by the United Nations Interim Mission in Kosovo ("UNMIK"). On 14 March 2006, the Trial Chamber requested UNMIK to submit this case file to the Trial Chamber for its exclusive perusal. On 21 March 2006, UNMIK submitted the relevant case file confidentially and *ex parte* for the exclusive use of the Trial Chamber. UNMIK also stated that any release of information contained therein beyond the Trial Chamber may not occur without express approval.

• As the Defence had requested access to the relevant information contained in this case file,[14] on 3 April 2006, the Trial Chamber provided UNMIK with an own executive summary of this information . Upon receipt of UNMIK's authorisation, the Trial Chamber envisaged making available this summary to both parties for their observations.[15] However, in a letter dated 13 April 2006, UNMIK informed the Trial Chamber that it could not agree to the release of this executive summary due to prevailing concerns of confidentiality and security.

• Hence, the Trial Chamber is not in a position to grant the Defence request for access to the UNMIK case file.

THE LAW

• Article 21 of the Statute of the Tribunal is entitled "Rights of the accused " and provides, in relevant part:

> 1. All persons shall be equal before the International Tribunal.
>
> ...
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> ...

• Rule 65 of the Rules governs provisional release. The relevant part of the provision reads:

> (A) Once detained, an accused may not be released except upon an order of a Chamber .

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

...

• The burden of proof is upon the Accused to satisfy the Trial Chamber that, if released, he will appear for trial and will not pose any danger to victims, witnesses or other persons.[16] Where a Trial Chamber finds that one of the two conditions mentioned in Rule 65(B) has not been met, it need not consider the other and must deny provisional release.[17]

• Whereas a Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial,[18] it suffices to indicate all the relevant factors that the Trial Chamber has taken into account in reaching its decision, *i.e.,* it must render a reasoned opinion.[19]

SUBMISSIONS

Whether the Accused will appear for trial

• In its initial "Defence Motion on Behalf of Lahi Brahimaj for Provisional Release " ("Initial Motion") of 16 September 2005, the Defence argued that the circumstances of the Accused's voluntary surrender provide indication as to how he would conduct himself, if granted provisional release.[20] Furthermore, the Defence claimed that the Accused demonstrated an exemplary degree of co-operation with the Prosecution ever since he became aware that investigations were being pursued against him, having voluntarily agreed to be interviewed by Prosecution representatives prior to being indicted.[21] The Accused also provided a solemn undertaking to fully comply with all orders, terms and conditions imposed by the Tribunal in connection with his provisional release,[22] as well as with two references attesting to his personal and professional integrity.[23] Concerning the ability of the authorities of the state to which the Accused seeks to be released to detain him, the Defence submitted that UNMIK possesses the ability to monitor and report on compliance with the terms of provisional release.[24] Moreover, the fact that the Accused, if convicted, may face lengthy incarceration , cannot in itself justify long periods of pre-trial detention.[25]

• In response,[26] the Prosecution challenged the assessment that the Accused would re-appear for his trial, if released . In particular, it was argued that the Accused had offered little or no specification regarding the studies he intends to pursue at the University of Pristina/Prishtinë , or how he would earn a livelihood,[27] and that his alleged co-operation with the Prosecution in form of a voluntary interview was nullified by the fact that he remained silent when being asked about activities of the Kosovo Liberation Army ("KLA").[28]

• In the First Provisional Release Decision, the Trial Chamber was not satisfied that the Accused had shown that he would appear for trial, and stated as follows :

CONSIDERING the vagueness of the Accused's plans, if granted provisional release, and the uncertainty about his ability to earn a livelihood;

CONSIDERING that it cannot be said that the Accused co-operated fully and in a meaningful way with the Prosecution during a voluntary interview in December 2004, as far as he remained silent to questions touching upon areas outside his own criminal responsibility;[29]

• The Appeals Chamber allowed the Defence appeal against the Trial Chamber's finding in this

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respect, stating that

> [the Trial Chamber's First Provisional Release Decision] provides no reasons explaining how the uncertainty of the Appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released.[30]

and

> the Trial Chamber appears to have reached its finding concerning the [Accused's] cooperation by assessing solely the value of the information provided, rather than the interview and voluntariness thereof and is therefore in direct conflict with the International Tribunal's jurisprudence.[31]

- During the appellate proceedings, the Defence had adduced an affirmation by counsel and a letter by a representative of the University of Pristina/Prishtinë pursuant to Rule 115 of the Rules.[32] Both documents provide further specification regarding the Accused's ability to support himself and the prospects of his future studies.

- Neither Party made additional submissions during the re-examination proceedings on the issue of whether the Accused would appear for his trial, if provisionally released.

Whether the Accused will pose a danger to victims, witnesses or other persons

- In its Initial Motion, the Defence argued that since his first becoming aware of the Prosecution's investigations against him some months prior to his indictment , the Accused had not interfered unduly with anyone.[33] The Accused denied specific allegations that he had done so.[34]

- In response, the Prosecution contended that there were several instances of witness intimidation by the Accused, and that the record of one such incident is kept under seal by UNMIK.[35] Combined with the volatile situation prevailing in Kosovo for witnesses and victims, the Prosecution submitted, the Trial Chamber could not be satisfied that the Accused would not pose a danger for others if released.[36]

- In the First Provisional Release Decision, the Trial Chamber was not satisfied that the Accused had shown that he would not pose a danger to anyone, and held the following:

> **FINDING** that, although a general fear of intimidation and threatening of witnesses cannot in itself constitute a ground for denying provisional release, the volatile situation in Kosovo makes the possibility that such incidents might occur so vivid that it calls for specific caution when deciding on provisional release;
>
> **FINDING** that, although it has not been verified that the Accused threatened or exercised pressure on victims or potential witnesses, and even if such an incident did occur prior to the date when the indictment against the Accused was confirmed , these allegations by the Prosecution are very serious and the Trial Chamber cannot completely disregard them when it is now called upon to exercise its discretion on whether to grant provisional release;[37]

- The Appeals Chamber also allowed the Defence appeal against the Trial Chamber's findings in this respect, stating that

> [b]ecause the allegations of witness intimidation by the [Accused] that were given weight by the Trial Chamber were based in part on the UNMIK documents whose relevance was called into question by this additional evidence, and were supported in part by the letter from UNMIK whose relevance also has been called into question by the additional evidence, the Appeals Chamber believes that the Trial Chamber should reconsider the issue of witness intimidation.[38]

• During the appellate proceedings, the Prosecution had adduced three documents pursuant to Rule 115 of the Rules[39] in relation to the contents of the confidential UNMIK file.

• The Prosecution Additional Submissions maintain that the Accused was involved in several instances of witness intimidation,[40]which is disputed by the Defence.[41] As mentioned earlier, on 21 March 2006, UNMIK submitted to the Trial Chamber *ex parte* the case file allegedly containing substantiation for one such incident .[42]

DISCUSSION

Whether the Accused will appear for trial

The Accused's plans, if provisionally released, and his ability to earn a livelihood

• Initially, the Prosecution argued that the Accused provided little or no specification regarding the studies he intends to pursue at the University of Pristina/Prishtinë, or how he would earn a livelihood. The Trial Chamber takes note of the evidence adduced by the Defence on appeal, namely, affirmation by counsel to the effect that the Accused's extended family would provide support as necessary to enable him to resume full time studies[43] and a letter by the University of Pristina/Prishtinë confirming and providing details of the Accused's enrolment.

• The Trial Chamber finds that in light of concrete evidence of the Accused's post-release plans, including his ability to earn a livelihood, no substantial incentive remains for him to abscond.

The Accused's co-operation with the Prosecution

• The Trial Chamber notes that in December 2004, the Accused voluntarily made himself available for an interview with Prosecution investigators. The Prosecution initially submitted that this co-operation was invalidated by the fact that the Accused remained silent on all matters concerning the KLA. In light of the Appeals Chamber Decision, the Trial Chamber acknowledges that the Accused's presence at the said interview is indicative of some degree of co-operation with the Prosecution , notwithstanding the results of the questioning and the value for the Prosecution of the information obtained from the Accused during this interview.

Other factors

• The Trial Chamber further notes the circumstances of the Accused's surrender to the Tribunal, as well as the guarantees offered by UNMIK in its letter of 11 October 2005 confirming its ability and willingness to detain the Accused, should he try to abscond. Moreover, the Trial Chamber notes two reference statements given by a Lieutenant General in the Kosovo Protection Corps and by the former Prime Minister of Kosovo, who describe the Accused as a man of integrity with respect for the rule of law.

Conclusion as to whether the Accused will appear for trial

• In light of the new evidence presented, the Trial Chamber finds that the Accused has demonstrated that he will appear for trial, if granted provisional release.

Whether the Accused will pose a danger to victims, witnesses or other persons

• In spite of the finding that the Accused has met his burden of proof regarding the first prong of Rule 65(B) of the Rules, the Trial Chamber must re-examine whether the same holds true for the second prong, namely, whether the Accused would pose a danger to victims, witnesses or other

persons.

Evidence suggesting that the Accused has interfered with others

- The Prosecution submits that "the personal conduct of the Accused provides a perfect illustration of [a] climate of intimidation of victims",[44] referring to several alleged incidents of witness interference by the Accused.

- Based on a statement given by a potential witness in the instant case ("X"), the Prosecution alleges some time in May 2004, the Accused approached X and asked him whether he had agreed to be a witness in the 'Dukagjin case'.[45] According to X, the Accused advised him to refrain from giving a witness statement and uttered threats against the life of X and his family. It appears that X was able to identify the Accused from a group of photographs. The Accused denies his involvement in the incident.[46]

- The Prosecution further alleges that the Accused poses a threat to another potential witness in this case ("Y"). According to a statement given by Y, he and the Accused accidentally met in a restaurant in 2001. Although there was only a superficial exchange of words between the two, Y claims that the Accused would like to see him "eliminated" and that this is commonly known in the area. By contrast , the Defence submits that nothing in the statement of Y suggests improper conduct by the Accused.[47]

- Finally, the Trial Chamber notes that a similar incident of alleged interference by the Accused is contained in the UNMIK file, with which the Trial Chamber was provided *ex parte*. Because UNMIK has not given authorisation to reveal this information, the Trial Chamber is not in a position to set out this incident in further detail.

Evaluation of the evidence

- The Trial Chamber recalls that the Prosecution has provided ample evidence that intimidation of witnesses in Kosovo and even attacks on their lives constitute a recurrent problem.[48] The Trial Chamber has previously exercised caution not to draw inferences from this volatile situation to the detriment of an accused when there was no information that this accused had engaged in improper activities in this regard.[49] Likewise, the Trial Chamber does not consider that the mere expression of generalised concerns or subjective fears of witnesses, justified as they may be, meet the requirements to establish that an accused would indeed pose a danger to others, if released.[50] At the same time, the Trial Chamber believes that the threshold for these requirements must not be set too high; else, it would never be met.[51] This is particularly true in an environment which is hostile to witnesses who are willing to give evidence in criminal proceedings.

- The Trial Chamber notes that it is alleged that the Accused issued threats directly against potential witness X in May 2004. While the Trial Chamber attaches less weight to the allegations made by Y against the Accused due to their generalised nature, it observes that the UNMIK file contains an allegation of more concrete interference by the Accused on a third occasion.

- The Trial Chamber finds that the totality of this evidence, as opposed to each of these incidents considered in isolation, raises a substantial doubt that the Accused, were he granted provisional release, would conduct himself in a way so as not to pose a threat to victims and potential witnesses in his case.

CONCLUSION

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- On the basis of the evidence adduced, and in light of the Appeals Chamber Decision , the Trial Chamber finds that the Accused has not discharged his burden of proof that, if released, he would not pose any danger to victims, witnesses or other persons .

- For the foregoing reasons, the Trial Chamber **DENIES** the Motion by the Accused for provisional release.

Done in English and French, the English version being authoritative.

Dated this third day of May 2006
At The Hague
The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

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1 - "Decision on Lahi Brahimaj's Motion for Provisional Release", 3 November 2005.
2 - First Provisional Release Decision, pp. 5-6.
3 - "Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release", 9 March 2006 ("Appeals Chamber Decision").
4 - Appeals Chamber Decision, para. 31. 2
5 - "Order to Parties and Request to UNMIK", 14 March 2006 (confidential). The Trial Chamber ordered the Parties to make additional observations by not later than 28 March 2006.
6 - "Confidential Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release With *Ex Parte* Annex A", 28 March 2006.
7 - *Ibid.*, para. 4.
8 - "Confidential Motion on Behalf of Lahi Brahimaj to strike 'Confidential Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release', Filed on 28 March 2006. In the Alternative, Motion to Treat the Instant Motion as Defence Response to the Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release", 30 March 2006.
9 - *Ibid.*, paras 5, 18.
10 - "Confidential Prosecution's Response to the 'Confidential Defence Motion on Behalf of Lahi Brahimaj to Strike 'Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release' Filed on 28 March 2006, in the Alternative Motion to Treat the Instant Motion as Defence Response to the Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release' Dated 30 March 2006", 6 April 2006.
11 - "Confidential Reply by the Defence for Lahi Brahimaj to 'Confidential Prosecution's Response to the 'Confidential Defence Motion on Behalf of Lahi Brahimaj to Strike 'Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release' Filed on 28 March 2006, in the Alternative Motion to Treat the Instant Motion as Defence Response to the Prosecution's Additional Submissions on the Accused Brahimaj's Request for Provisional Release' Dated 30 March 2006', Dated 6 April 2006", 13 April 2006.
12 - For instance, paras 12-14 of the Prosecution Additional Submissions contain previously redacted information from witness statements regarding allegations of threats by the Accused against potential witnesses.
13 - *See also* Rule 127(A) of the Rules, which provides: "[...] a Trial Chamber may, on good cause being shown by motion [...] (ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired."
14 - Defence Additional Submissions, para. 11. The Defence conceded that redactions might be appropriate if considerations of confidentiality and security so require.
15 - "Confidential Request to UNMIK With Confidential and *Ex Parte* Annex", 3 April 2006.
16 - *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR65, "Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal", 8 September 2004, para. 28.
17 - *See, e.g., Prosecutor v. Ljube Boskoski and Johan Tarculovski*, Case No. IT-04-81-AR65.2, "Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release", 28 September 2005 ("Boskoski Provisional Release Decision"), para. 24.
18 - *Prosecutor v. Sainovic & Ojdanic*, Case No. IT-99-37-AR65, "Decision on Provisional Release", 30 Oct. 2002, para. 6.
19 - *Ibid.*

20 - Initial Motion, para. 11.
21 - Initial Motion, para. 14.
22 - Initial Motion, Annex A.
23 - Initial Motion, paras 15, 16 and Addendum to Initial Motion of 10 October 2005, containing an undated letter of Bajram Kosumi (Prime Minister of Kosovo) and a letter of 30 September 2005 signed by Agim Çeku (Lieutenant General in the Kosovo Protection Corps).
24 - Initial Motion, para. 12.
25 - Initial Motion, para. 10.
26 - "Réponse du Procureur à la Demande de Mise en Liberté Provisoire Déposée par Monsieur Brahimaj le 16 Septembre 2005 avec les Annexes A-R", filed confidentially by the Prosecution on 17 October 2005 ("Initial Response").
27 - Initial Response, paras 51-55.
28 - Initial Response, para. 22.
29 - First Provisional Release Decision, p. 6.
30 - Appeals Chamber Decision, para. 10.
31 - *Ibid.*, para. 18.
32 - "Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115", 3 March 2006.
33 - Initial Motion, para. 19.
34 - Initial Motion, paras 20-21.
35 - Initial Response, paras 41-44.
36 - Initial Response, paras 35-39.
37 - First Provisional Release Decision, p. 6.
38 - Appeals Chamber Decision, para. 29.
39 - *See* fn. 30, *supra.*
40 - Prosecution Additional Submissions, paras 3, 12-17.
41 - Defence Additional Submissions, paras 13, 14.
42 - *See* paras 9-11, *supra.*
43 - "Affirmation by Counsel for Lahi Brahimaj in Support of Defence Application Under Rule 115 to Present Additional Evidence on Appeal Against the Trial Chamber's Decision of 3 November 2005 Denying Provisional Release to the Accused Lahi Brahimaj", 15 November 2005, paras 14-15.
44 - Prosecution Initial Response, para. 40.
45 - The term 'Dukagjin' designates the western part of Kosovo, which is the geographical area underlying the indictment in the present case.
46 - Defence Additional Submissions, para. 12.
47 - *Ibid.*, para. 14.
48 - Prosecution Additional Submissions, para. 9. *See also* Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 ("Haradinaj Provisional Release Decision"), para. 44.
49 - Haradinaj Provisional Release Decision, para. 48.
50 - *Prosecutor v. Jovica Stanisic*, Case No. IT-03-69-PT, "Decision on Provisional Release", 28 July 2004, para. 35.
51 - *See, e.g.*, Boskoski Provisional Release Decision, paras 19-20.

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ICTR/KA-D) 12/317

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Laïty Kama
Sitting as a single Judge pursuant to Rule 73 of the Rules

Registrar: John M. Kiyeyeu

Date: 22 March 2001

THE PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-99-54-T

DECISION ON JEAN DE DIEU KAMUHANDA'S MOTION FOR PROTECTIVE MEASURES FOR DEFENSE WITNESSES

The Office of the Prosecutor:
Ken Flemming
Ifeoma Ojemeni
Melinda Pollard
Jayantha Jayasuriya

Counsel for Kamuhanda:
Aïcha Condé

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

JUDGE LAÏTY KAMA, sitting as a single Judge pursuant to Rule 73 of the Rules;

BEING SEIZED of the "Requête aux fins de Mesures de Protection des Témoins," (the "Motion") filed on 26 February 2001, to which documents are attached in support of the Motion;

CONSIDERING the "Prosecutor's Brief in Response to Motion by the Defense for Protective Measures Regarding Defense Witness, filed on 24 February 2001" (the "Prosecutor's Response") filed on 14 March 2001;

CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the

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Rules;

CONSIDERING that the Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Defense submissions

1. The Defense seeks protective measures for its potential witnesses before they testify, because they fear for their safety and for the safety of their families. The Defense further submits that the measures sought are justified because she intends to enter a defense of alibi pursuant to Rule 67 of the Rules and if the measures were not to be granted, the Defense would not be in a position to enter such a defense.

2. In support of its request, the Defense relies upon the documents attached to its Motion as well as upon the documents filed by the Prosecutor in support of her Motion seeking protective measures for her witnesses filed on 9 March 2000. The documents attached to the Motion include *inter alia*: a Declaration made on 15 July 1998 by Mr. Philip Reyntjens, a Professor at the University of Anvers, Belgium; three Articles dated 1 February 2001, 19 December 2000 and 18 December 2000 from the "Fondation Hirondelle;" as well Articles by Colette Braeckman on 19 December 2000 reported in the Belgian daily newspaper, "Le Soir."

3. The Articles from the "Fondation Hirondelle" report on the court proceedings in Kenya surrounding the death of Mr. Seth Sendashonga, who was allegedly to testify in the *Kayishema and Ruzindana* trial. The other Articles by Colette Braeckman report on the situation of insecurity in the Democratic Republic of the Congo (the "DRC") resulting from the war of 1998.

4. The Defense, therefore requests the Chamber to order, in essence, the following measures:

[1] Requiring that the names, addresses and other identifying information concerning Defense witnesses and their whereabouts be kept under seal and not included in any records of the Tribunal;

[2] Prohibiting the disclosure to the public or the media of the names and addresses of Defense witnesses as well as their whereabouts and other identifying information;

[3] Requiring the Prosecutor and the Witness and Victims Support Section to limit to the minimum the number of persons with access to information concerning protected witnesses when their names shall have been communicated by the Defense;

[4] Ruling that the Defense shall be allowed a period of 21 days for the disclosure, to the Prosecutor, of information concerning the Defense witnesses prior to the appearance of the latter;

[5] Prohibiting the Office of the Prosecutor from revealing to anyone whomsoever the names and addresses as well as other identifying information concerning witnesses when such information shall have been disclosed by the Defense;

[6] Requiring that the Prosecutor and her representatives, acting on her instructions, shall notify the Defense of any request to contact Defense witnesses and for the Defense to make the necessary arrangements to that end;

[7] Prohibiting the photographing and/or video recording, or sketching of any

Defense witnesses at any time or place without leave of the Chamber and the parties;

[8] Requiring that the Defense shall use a pseudonym to designate each Defense witness it shall call whenever referring to such witness in proceedings, communications and discussions between the parties to the trial, and to the public;

[9] That Defense witnesses shall be entitled to protection by the Victims and Witness Support Section under the same conditions as those granted to Prosecution witnesses;

[10] That the Defense reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

Prosecutor's submissions

5. The Prosecutor does not object to measures [1], [2], [4], [7], [8], [9] and [10], although she states that the Defense has provided a limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC. The Prosecutor, however, objects to granting protective measures for the potential Defense witnesses living in Europe.

6. Furthermore, the Prosecutor objects to measures [3], [5] and [6] submitting that these measures will conflict with her mandate to investigate and prosecute matters unrelated to the present case under Article 15 of the Statute. She argues that, orders limiting her contact to Defense witnesses, if granted, should be limited to contacts concerning the present case. Furthermore, the Prosecutor relies on the "Decision on the Defense Preliminary Motion for Protective Measures for Witnesses," in *Prosecutor v. Kayishema* Case No. ICTR-95-1-T, rendered on 23 February 1998, which underscores a Party's right, in this case, the Prosecutor, to present her case with, particularly the rebuttal to the defense plea of alibi.

AFTER HAVING DELIBERATED

7. The Chamber notes that the Defense brings the Motion on the basis of Articles 20 and 21 of the Statute and Rules 69 and 75 of the Rules.

8. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rule 69 and 75 of the Rules. Such protection measures shall include, but shall not be limited to the conduct of in camera proceedings and the protection of victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

9. The Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.

10. Rule 69 of the Rules *inter alia* provides that in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

11. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute shall therefore, order, pursuant to Rule 75 of the Rules, any

appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

12. The Chamber recalls the findings in *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, "Decision on Protective Measures for Defense Witnesses" rendered on 13 July 1998, at para. 9, that, "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses."

13. In this case, notice is taken of the documents filed in support of the Motion, which tend to describe a particularly volatile security situations at present in Rwanda and in neighboring countries such as the DRC. These volatile security situations could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda.

14. On this basis, the Chamber sees the fears of the potential witnesses and their families, if they testify on behalf of the Accused without protective measures, as being well founded.

As to the Merits of the Measures Requested

15. As to the Prosecutor's argument that the Defense has provided limited factual basis for its potential witnesses residing in Rwanda and insecure African countries such as the DRC, she objects to granting protective measures for the potential Defense witnesses living in Europe. The Defense, on this score, has requested protective measures for its potential witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

16. The Chamber considers that the Defense has indeed demonstrated fears, which pertain to potential witnesses residing in Rwanda and insecure African countries such as the DRC. However, taking into account the present security situation affecting these potential witnesses, the Chamber considers that though the Defense has provided sufficient factual grounds for the protective measures sought by the Defense with respect to those witnesses residing in Rwanda, and neighboring countries such as the DRC only, the security situation would affect any potential witness residing elsewhere, in this case Europe. The Chamber, therefore, grants protective measures for potential Defense witnesses residing in Rwanda neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives residing in Rwanda and neighboring countries such as the DRC.

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measure [1], [2], [4] and [7]. Furthermore, the Chamber notes that the Prosecutor objects to measures [3], [5] and [6] for being in conflict with her mandate under Article 15 of the Statute with respect to her investigations and prosecution of matters unrelated to the present case.

18. The Chamber, upon a plain reading of the requests, is of the opinion that measure [3] and [5] are normal measures assuming the anonymity of witnesses and that they do not conflict with the Prosecutor's mandate under Article 15 of the Statute.

19. At this juncture, as regards anonymity, the Chamber recalls the reasoning in *Prosecutor v. Nsabimana,* Case No. ICTR-97-29-I, "Decision on the Defense Motion to Obtain Protective Measures for the Witnesses of the Defense," rendered on 15 February 2000, (the "Nsabimana Decision"). In the said Decision, the Chamber highlights *inter alia* that, in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear."

20. In the present case, the Chamber, following this reasoning, and considering the submissions

of the Defense, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Defense witnesses were their identity to be disclosed. Consequently, the Chamber grants measures [1], [2], [3], [4], [5], and [7] as requested in the Motion.

21. As regards measure [6] the Chamber, notes the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana,* "Decision on Defense's Motion for Witness Protection" rendered on 25 February 2000, and grants the said measure that requires the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts.

22. As regards measure [8], the Chamber recalls its "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* ICTR-99-50-T rendered on 12 July 2000, whereby at para. 15 the Chamber granted the measure so that the Prosecutor should designate a pseudonym for each protected Prosecution witness. Similarly, the Chamber grants the Defense request in measure [8] as requested.

23. As regards the request made in measure [9], the Chamber, mindful of Article 20(1) of the Statute that all Parties are equal before the Tribunal, considers the Defense request in Measure [9] to be as of right, so that to the extent possible the Defense witnesses should be accorded the same conditions as those granted to Prosecution witnesses when they are under the protection of the Victims and Witness Support Section.

24. As regards measure [10], the Chamber considers that the Defense is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, if necessary.

As to the taking into effect of the protective measures sought

25. The Chamber finally decides that, in conformity with the Tribunal's well-established jurisprudence, in any case such protective measures are granted on a case by case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Chamber adds that the Defense shall furnish to the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Defense requests in measures [1], [2], [3], [4], [5], [6], [7] and [8] of the Motion for its potential witnesses residing in Rwanda, the neighboring countries such as the DRC and for those potential witnesses residing in Europe but who have relatives living in Rwanda and neighboring countries such as the DRC;

Arusha, 22 March 2001.

Laïty Kama
Judge

(Seal of the Tribunal)

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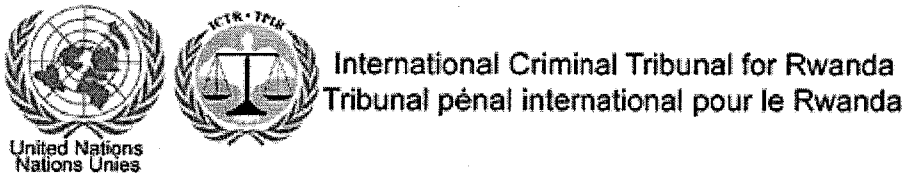
AUTHORITY 17



TRIAL CHAMBER II

Original : French

Before:
Judge Laïty Kama, Presiding Judge
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 6 July 2000

THE PROSECUTOR
V.
Juvénal Kajelijeli

ICTR-98-44-I

DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

Counsel for the Prosecutor:
Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :

Mr Lennox Hinds

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")

SITTING as Trial Chamber II, composed of Presiding Juge Laïty Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in Prosecutor v. Juvénal Kajelijeli (the "Motion"), submitted on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

CONSIDERING that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

WHEREAS Defence Counsel for Juvénal Kajelijeli has not responded to the Prosecution's Motion;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the "Rules"):

ARGUMENTS OF THE PROSECUTION

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.

2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue the following orders articulated at point 3 of its Motion:

a) Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;

b) Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;

c) Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;

d) Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of these individuals, and this order shall remain in effect after the termination of the trial;

e) Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

f) Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

g) Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;

ICTR-98-44-D12/309

h) Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;

i) Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of guardian of that person if that person is under the age of 18,
that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

j) Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise.

Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

3. Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

HAVING DELIBERATED,

On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):

4. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

5. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in Prosecutor v. Tadi‰, IT-94-I-T. In its decision of 10 August 1995, the Chamber held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decision, the ICTY determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

6. After having examined the information contained in the various documents and reports that the

Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation situation prevalent in Rwanda and neighboring countries could be be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. Consequently, the Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

On point 3(f) of the Motion

7. The Chamber will grant the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.

8. The Chamber endorses the holding in Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information".

On points 3(g) and 3(i) of the Motion

9. Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the accused and decides to grant them as they stand.

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

10. According to the Chamber, the seven (7) day period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

11. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (Prosecutor v. Semanza, ICTR-97-21-I, (10 December 1998); Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000); Prosecutor v. Nsabimana and Nteziryayo, IctR, (21 May 1999);).

On the Use of Pseudonyms (point 3(j) of the Motion)

12. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in Prosecutor v. Muhimana, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

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MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";

MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

Arusha, 6 July 2000

Laïty Kama	William H. Sekule	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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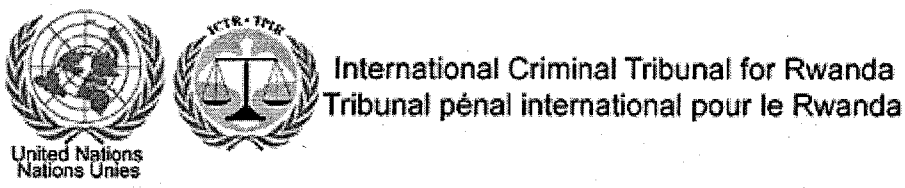

OR: ENG

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registrar: Adama Dieng

Date: 3 April 2001

THE PROSECUTOR
v.
Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

DECISION ON JUVÉNAL KAJELIJELI'S MOTION FOR PROTECTIVE MEASURES FOR DEFENSE WITNESSES

The Office of the Prosecutor:
Ken Flemming
Don Webster
Ifeoma Ojemeni
Melinda Pollard

Counsel for Kajelijeli:
Lennox Hinds
Richard Harvey

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges Laïty Kama, Presiding, William H. Sekule and Mehmet Güney (the "Chamber");

BEING SEIZED of the "Notice of Urgent Motion for the Protection of Defense Witnesses," (the "Motion") filed on 1 March 2001, to which is attached a Certification in Support of the Motion (the "Affidavit");

CONSIDERING the "Prosecutor's Response to Urgent Motion for Protection of Defense Witnesses Dated 21 February 2001" (the "Prosecutor's Response") filed on 14 March 2001;

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CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the Rules;

CONSIDERING that the Motion will be decided solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Defense submissions

1. The Defense seeks protective measures for its witnesses who fall in the following categories:

i. Those who presently reside in Rwanda and who have not affirmatively waived their right to protective measures;

ii. Those who presently reside outside of Rwanda but in other countries in Africa and who have not affirmatively waived their rights to protective measures; and

iii. Those who reside outside the continent of Africa and who have requested that they be granted protective measures.

2. The Defense relies upon the Affidavit, which lays out the reasons why the Defense seeks protective measures for its potential witnesses before they testify. In the Affidavit, Defense Counsel for Kajelijeli states that during his visit to Rwanda and Nairobi, on or about 6 to 14 January 2001, his attempts to contact a number of potential Defense witnesses failed because the potential Defense witnesses would not even agree to meet him without an order of protection pursuant to Article 21 of the Statute and Rules 69 and 75 of the Rules.

3. The Defense alleges that many of the potential Defense witnesses are aware of instances of killings, intimidation and threats upon them, and so they are not willing to testify for the Defense. The Defense gives examples of Defense witnesses who were imprisoned upon returning from Arusha allegedly for having testified in the trial of *Akayesu.* Furthermore, the Defense alleges that some of its potential witnesses were killed mysteriously or beaten to death.

4. The Defense relies upon the Statute of the Tribunal, particularly Article 21 and the Rules of Procedure and Evidence, specifically Rule 69 and 75. The Defense submits that the security situation has not changed for the better since the Tribunal granted similar requests in other cases, and it makes specific reference to the Tribunal's findings in the "Decision on the Prosecution Motion for the Protection of Witnesses," of 10 December 1998 in *Prosecutor v. Semanza,* (Case No. ICTR-97-20-T), which stated at para 6 that, "Additionally, judicial notice is taken of the context of the security situation affecting the potential witnesses."

5. The Defense, therefore requests the Chamber to issue the following orders:

[a] An order requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential defense witnesses described in para 1, be sealed by the Registry and not included in any records of the Tribunal;

[b] An order that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential defense witnesses described in para 1, be communicated only to the Victims and Witnesses Support Unit personnel by the Registry in accordance with the established procedure and only in order to implement protection measures for these individuals;

[c] An order requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information, concerning such victims and potential defense witnesses as contained in existing records of the Tribunal be expunged from those documents;

[d] An order prohibiting the disclosure to the public or the media, of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry, or other information which would reveal the identity of such victims and potential defense witnesses, and this order shall remain in effect after the termination of any trial;

[e] An order prohibiting the Prosecution from sharing, discussing or revealing, directly or indirectly, any documents or any information contained in any documents, or any other information, which could reveal or lead to the identification of any individuals specified in para. 1, to any person or entity other than persons working on the immediate Prosecution team;

[f] An order requiring the Prosecution to provide to the Trial Chamber and the Defense a designation of all persons working on the immediate Prosecution team who will, pursuant to measure [e] have access to any information referred to in measures [a] to [d] and requiring the Prosecutor to advise the Chamber in writing of any changes in the composition of this team and requiring the Prosecutor to ensure that any member departing from the Prosecution team has remitted all documents and information that could lead to the identification of persons specified in para 1;

[g] An order prohibiting the photographing, audio and/ or video recording, or sketching of any defense witness at any time or place without leave of the Trial Chamber and parties;

[h] An order prohibiting the disclosure to the Prosecution of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential witnesses, and any information in the supporting material on file with the Registry, until such time as the Trial Chamber is assured that witnesses have been afforded an adequate mechanism for protection and allowing the Defense to disclose any materials provided to the Prosecutor in redacted form until such mechanism is in place; and in any event, that the Defense is not required to reveal the identifying data to the Prosecutor sooner than 60 days before the commencement of trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules;

[i] An order that the Prosecutor shall make a written request, on reasonable notice to the Defense, to the Trial Chamber or a Judge thereof, to contact any protected victim or potential witnesses or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such protected person or parents or guardian of that person if that person is under the age of 18, to an interview by the Prosecutor. The Prosecutor shall undertake the necessary arrangements to facilitate such contact; and

[j] An order requiring that the Defense designate a pseudonym for each defense witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public until such time that the witness decides otherwise;

[k] The Defense reserves the right to apply to the Chambers to amend the protective measures sought or to seek additional protective measures, when necessary.

Prosecutor's submissions

6. The Prosecutor submits that the Defense Counsel for the Accused sets out the factual basis for the Motion in an Affidavit. The Prosecutor points out that for an order for protective measures to be granted, there must be real fear for the safety of the witness or his/ her family, and there must always be an objective basis for the fear as was the finding in the Chamber's "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* (Case No. ICTR-99-50-T) of 12 July 2000.

7. The Prosecutor is of the position that the Affidavit in support of the Motion does not provide any evidence that potential Defense witnesses will suffer at the hands of the Prosecution witnesses, or anybody, nor does it establish any link to the situation of specific witnesses. The Prosecutor points out that the Defense is, in fact, relying upon the applicable law and the jurisprudence of the Tribunal.

8. Nevertheless, the Prosecutor, in the interests of justice, concedes to the orders sought in measures [a], [b], [c], [d], [g] and [j]. As regards measure [j] the Prosecutor requests the Chamber to strike out the words, "until such time as the witness decides otherwise," because matters concerning designation of a pseudonym and when it can be made public are left to the discretion of the Chamber.

9. The Prosecutor objects to measures [e], [f], [h] and [i] submitting that these measures, as they read, will conflict with her mandate to investigate and prosecute matters unrelated to the present case under Article 15 of the Statute. She argues that orders limiting her contact to Defense witnesses, if granted, should be limited to contacts concerning the present case.

10. As to measure [i], the Prosecutor requests that if the Chamber grants the said measure, the unredacted statements of the Defense witnesses should be disclosed to her 60 days before the testimony of the Defense witness.

AFTER HAVING DELIBERATED

11. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rule 69 and 75 of the Rules. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of victim's identity. Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

12. The Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.

13. Rule 69 of the Rules provides *inter alia* that, in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

14. Thus, the Chamber, mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute, shall therefore order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

15. The Chamber recalls the findings in *Prosecutor v. Rutaganda*, (Case No. ICTR-96-3-T), "Decision on Protective Measures for Defense Witnesses" of 13 July 1998, at para. 9, that, "[...] the

appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses."

16. The Chamber notes that the Defense has not provided sufficient justifying elements that clearly demonstrate that the fears of its potential witnesses are well founded. Nevertheless, the Chamber considers the exceptional circumstances of the case, in particular the fact that trial on the merits has already started and that similar measures for protection have been granted on behalf of Prosecution witnesses, whose security concerns are essentially similar to those of the Defense witnesses in this case. The Chamber is, therefore, satisfied that there is sufficient basis for it to conclude that the fears of the Defense witnesses, if they testify on behalf of the Accused without protective measures, are well founded.

As to the Merits of the Measures Requested

17. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measures [a], [b], [c], [d] and [g]. The Chamber notes that the Prosecutor does not object to granting the protective measures requested for.

18. In the present case, and as discussed at paras. 15 and 16 in this Decision, the Chamber is satisfied that there is sufficient showing of a real fear for the safety of the potential Defense witnesses were their identity to be disclosed. Consequently, the Chamber grants measures, [a], [b], [c], [d] and [g] as requested in the Motion.

19. The Chamber, however, notes that the Prosecutor objects to measures [e], [f], [h] and [i] for being in conflict with her mandate under Article 15 of the Statute with respect to her investigations and prosecution of matters unrelated to the present case. The Chamber, upon a careful consideration of the matter is of the opinion that measures [e] and [f] are normal measures requiring that witnesses remain anonymous and that they do not conflict with the Prosecutor's mandate under Article 15 of the Statute, therefore, the Chamber grants measures [e] and [f] as requested.

20. As regards measure [h], the Chamber considers the measure to be a normal measure that potential Defense witnesses remain anonymous. As regards disclosure of unredacted statements of the Defense, the Chamber recalls the Tribunal's jurisprudence according to which disclosure should be set at least 21 days prior to the day in which the witness is to testify at trial. Accordingly, the Chamber grants measure [h], with modifications by replacing the phrase, "sooner than 60 days before the commencement of trial," with the phrase, "at least 21 days prior to the day in which the witness is to testify at trial."

21. As regards measure [i] the Chamber, mindful of the Tribunal's jurisprudence in this regard, notably in *Prosecutor v. Nahimana,* "Decision on Defense's Motion for Witness Protection" of 25 February 2000, requires that the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts.

22. As regards measure [j], the Chamber, in line with its jurisprudence in *Prosecutor v. Bicamumpaka,* (ICTR-99-50-T) of 12 July 2000, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses, " grants the measure, but modifies it by striking out the words, "until such time that the witness decides otherwise," because the Chamber is of the opinion that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public. (*See,* "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" of 6 July 2000 in this case)

23. As regards measure [k], the Chamber considers that the Defense is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, when necessary.

As to the taking into effect of the protective measures sought

24. The Chamber finally decides that, in conformity with the Tribunal's well-established jurisprudence, in any case such protective measures are granted on a case by case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Chamber adds that the Defense shall furnish the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE TRIBUNAL:

GRANTS the Defense requests in measures [a], [b], [c], [d], [e], [f] and [g] of the Motion.

GRANTS measure [h], with modifications to the effect that disclosure to the Prosecutor of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential witnesses, and any information in the supporting material on file with the Registry is prohibited, until such time as the Trial Chamber is assured that witnesses have been afforded an adequate mechanism for protection and allowing the Defense to disclose any materials provided to the Prosecutor in redacted form until such mechanism is in place; and in any event, that the Defense is required to reveal the identifying data to the Prosecutor at least 21 days prior to the day in which the witness is to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69(A) of the Rules.

GRANTS measure [i] with modifications requiring the Prosecutor and her representatives who are acting under her instructions to notify the Defense of any request for contacting the Defense witnesses, and the Defense shall make arrangements for such contacts."

GRANTS measure [j], with modifications requiring that the Defense designate a pseudonym for each defense witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between the parties to the trial, and the public."

Arusha, 3 April 2001

Laïty Kama	William H. Sekule	Mehmet Güney
Judge, Presiding	Judge	Judge

(Seal of the Tribunal)

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AUTHORITY 19

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original: English

Before:
Judge Laïty Kama, Presiding Judge
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 12 July 2000

THE PROSECUTOR

V.

ELIÉZER NIYITEGEKA

ICTR-96-14-I

DECISION ON THE PROSECUTOR'S MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

Counsel for the Prosecutor:
Mr Ken Fleming
Mr Don Webster
Ms Ifeoma Ojemeni

Counsel for the Defence :
Ms Sylvia Geraghty

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal")

SITTING as Trial Chamber II, composed of Presiding Juge Laïty Kama, Judge William H. Sekule and Judge Mehmet Güney;

SEIZED of the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses in Prosecutor v. Eliézer Niyitegeka (the "Motion"), filed on 9 March 2000;

CONSIDERING the brief in support of the Prosecutor's Motion for Protective Measures for Witnesses and the attached annexes submitted on 9 March 2000;

CONSIDERING that the Chamber decided to adjudicate on the basis of the briefs submitted by the Parties, establishing the deadline of 3 May for any response by the Defence, and that failure to respond would constitute consent;

WHEREAS Defence Counsel for Eliézer Niyitegeka responded to the Motion on 3 May 2000 in a «

Defence Motion in response to Prosecutor"s motion for protection of witnesses dated 9 March 2000 » (« the Response »), filed with the Registry on 4 May 2000;

CONSIDERING that this short delay after the deadline set on 3 may 2000 is not unreasonable in view of the filing process within the Registry, the Chamber decides to consider the Defence Response despite its late filing;

NOTING the provisions of Articles 20 and 21 of the Statute of the Tribunal (the "Statute") and Rules 66, 69 and 75 of the Rules of Procedure and Evidence (the "Rules"):

ARGUMENTS OF THE PROSECUTION

1. The Prosecution argues that the persons for whom protection is sought fall into the following three categories: victims and Prosecution witnesses who reside in Rwanda and who have not affirmatively waived their right to protective measures; victims and potential Prosecution witnesses who are in other countries in Africa and who have not affirmatively waived this right; victims and potential Prosecution witnesses who reside outside the continent of Africa and who have requested that they be granted such protective measures.

2. For these three categories of victims and potential Prosecution witnesses, the Prosecutor requests the Chamber to issue, on the basis of the points made in paragraph 3 of the Motion, the following orders:

3(a). Requiring that the names, addresses, whereabouts of, and other identifying information concerning all victims and potential Prosecution witnesses be sealed by the Registry and not included in any records of the Tribunal;

3(b). Requiring that the names, addresses, whereabouts of, and other identifying information concerning the individuals cited above be communicated only to the Victims and Witness Support Unit personnel by the Registry in accordance with established procedure and only to implement protective measures for these individuals;

3(c). Requiring, to the extent that any names, addresses, whereabouts of, and any other identifying information concerning these individuals is contained in existing records of the Tribunal, that such information be expunged from the documents in question;

3(d). Prohibiting the disclosure to the public or the media of the names, addresses, whereabouts of, and any other identifying data in the supporting material or any other information on file with the Registry or any other information which would reveal the identity of these individuals, and this order shall remain in effect after the termination of the trial;

3(e). Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

3(f). Requiring the Defence to designate to the Chamber and the Prosecutor all persons working on the immediate Defence team who, pursuant to paragraph 3 (e) above, will have access to any information referred to in Paragraph 3(a) through 3(d) above, and requiring Defence Counsel to advise the Chamber in writing of any changes in the composition of this team and to ensure that any member leaving the Defence team has remitted all documents and information that could lead to the identification of persons specified in Paragraph 2 above;

3(g). Prohibiting the photographing, audio and/or video recording, or sketching of any Prosecution witness at any time or place without leave of the Chamber and the Parties;

3(h). Prohibiting the disclosure to the Defence of the names, addresses, whereabouts of, and any other identifying data which would reveal the identities of victims or potential Prosecution witnesses, and any information in the supporting material on file with the Registry, until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection; and authorizing the Prosecutor to disclose any materials provided to the Defence in a redacted form until such a mechanism is in place; and, in any event, ordering that the Prosecutor is not required to reveal the identifying data to the Defence sooner than seven days before such individuals are to testify at trial unless the Chamber decides otherwise, pursuant to Rule 69 (A) of the Rules;

3(i). Requiring that the accused or his Defence Counsel shall make a written request, on reasonable notice to the Prosecution, to the Chamber or a Judge thereof, to contact any protected victim or potential Prosecution witnesses or any relative of such person; and requiring that when such interview has been granted by the Chamber or a Judge thereof, with the consent of such protected person or the parents of guardian of that person if that person is under the age of 18, that the Prosecution shall undertake all necessary arrangements to facilitate such interview;

3(j). Requiring that the Prosecutor designate a pseudonym for each Prosecution witness, which will be used whenever referring to each such witness in proceedings, communications and discussions between the Parties to the trial, and to the public, until such time that the witnesses in question decide otherwise.

Moreover, the Prosecution stipulates in its request that it reserves the right to apply to the Chamber to amend the protective measures sought or to seek additional protective measures, if necessary.

4. Having cited several decisions rendered by the Trial Chambers ordering protective measures for potential witnesses for reasons of security, the Prosecutor maintains that in the instant case there has been no improvement in the reigning insecurity, which existed when the earlier cases were decided.

RESPONSE OF THE DEFENCE

5. Counsel for Niyitegeka objects to point 3(f) of the Motion whereby she should have to disclose the members of her team that were appointed by the Registrar ;

6. Counsel for Niyitegeka contends that point 3(f) violates Rule 69 (c) by limiting the right of the Accused to know the identity of those who will testify at trial until seven days before their appearance. Such a measure would be unreasonable given the Defence's difficulties to conduct investigations and her limited resources. She submits that a period of not less than 60 days prior to the intended appearance of the witnesses would be appropriate.

7. Counsel for Niyitegeka submits that the Prosecutor should set out the specific risks alleged for each Prosecution witness.

HAVING DELIBERATED,

On the non-disclosure of the identity of witnesses (Points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion):

8. The Chamber recalls the provisions of Article 69 (A) of the Rules, which stipulate that in exceptional circumstances, each of the two Parties may request the Chamber to order the non-disclosure of the identity of a witness, to protect him from risk of danger, and that such order will be

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effective until the Chamber determines otherwise, without prejudice, pursuant to Article 69 (C), regarding disclosure of the identity of the witness to the other Party in sufficient time for preparation of its case.

9. With respect to the issue of non-disclosure of the identity of Prosecution witnesses, the Chamber acknowledges the reasoning of the Trial Chamber of the Tribunal in Prosecutor v. Alfred Musema, ICTR-96-13-T (Decision on the Prosecutor's Motion for Protection of the Witnesses, 20 November 1998) quoting the findings of the Trial Chamber of the International Criminal Tribunal for Ex-Yugoslavia ("ICTY") in Prosecutor v. Tadi‰, IT-94-I-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses,10 August 1995). In these decisions, both Trial Chambers held that for a witness to qualify for protection of identity from disclosure to the public and media, there must be real fear for the safety of the witness or his or her family, and that there must always be an objective basis to the fear. In the same decisions, both Trial Chambers determined that a non-disclosure order may be based on fears expressed by persons other than the witness.

10. After having examined the information contained in the various documents and reports that the Prosecutor has included in annex to its brief in support of the Motion, the Trial Chamber is of the view that this information actually underscores that the security situation situation prevalent in Rwanda and neighboring countries could be of such a nature as to put at risk the lives of victims and potential Prosecution witnesses. The Chamber deems justified the measures required by the Prosecution at points 3(a), 3(b), 3(c), 3(d), 3(e) of the Motion.

On point 3(f) of the Motion

11. The Chamber will grant the measures requested by the Prosecutor, with a modification of the measure which provides that any member leaving the Defence team remit "all documents and information" that could lead to the identification of protected individuals, given that the term "information" could be understood to include intangibles which, naturally, cannot be remitted.

12. The Chamber endorses the holding in Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000), concerning the Prosecutor's Motion for Protective Measures for Victims and Prosecution Witness, in which the Trial Chamber substituted the words "all materials" in place of "all documents and information".

On points 3(g) and 3(i) of the Motion

13. Regarding the measures sought in points 3(g) and 3(i), the Chamber considers that these are normal protective measures which do not affect the rights of the accused and decides to grant them as they stand.

On the Period of Disclosure of the Identity of the Prosecution Witnesses to the Defence before they testify (Point 3(h) of the Motion):

14. Counsel for Niyitegeka submitted that the seven day period was unreasonable considering that Rule 69(c) provides that subject to Rule 75, the identity of witness shall be disclosed in sufficient time prior to the trial to allow for the preparation of the Defence. Counsel for Niyitegeka submitted that the disclosure period should be not less than 60 days prior to the appearance of the witnesses.

15. According to the Chamber, the seven (7) day period proposed by the Prosecution to disclose to the Defence identifying information about the Prosecution witnesses before he or she is to testify at trial is not reasonable to allow the accused requisite time to prepare for his defence, and notably, to sufficiently prepare for the cross-examination of witnesses, a right guaranteed under Article 20 (4) of the Statute.

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16. The Chamber thus determines that, consistent with earlier decisions issued by the Tribunal on this matter, it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial (Prosecutor v. Semanza, ICTR-97-21-I, (10 December 1998); Prosecutor v. Bagambiki and Imanishimwe, ICTR-97-36-I and 36-T, (3 March 2000); Prosecutor v. Nsabimana and Nteziryayo, IctR, (21 May 1999);).

On the Use of Pseudonyms (point 3(j) of the Motion)

17. The Chamber grants the measure requested by the Prosecutor to designate a pseudonym for each protected Prosecution witness to be used whenever referring to him or her, but, as affirmed by the Trial Chamber in Prosecutor v. Muhimana, ICTR-95-1B-I, (9 March 2000), the Chamber believes that the witness does not have the right, without authorization from the Chamber, to disclose his or her identity freely.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the measures requested in points 3(a), 3(b), 3(c), 3(d) 3(e) 3(g), and 3(i) of the Motion;

MODIFIES the measure requested in point 3(f) by replacing the words "all documents and information" with the words "all materials";

MODIFIES the measure sought in point 3(h) of the Motion and orders the Prosecutor to disclose to the Defence the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness;

MODIFIES the measure sought in point 3(j) and recalls that it is the Chamber's decision solely and not the decision of the witness to determine how long a pseudonym is to be used in reference to Prosecution witnesses in Tribunal proceedings, communications and discussions between the Parties to the trial, and with the public.

Arusha, 12 July 2000

Laïty Kama	William H. Sekule	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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AUTHORITY 20

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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before:	Judge Benjamin Mutanga Itoe, Presiding Judge Judge Bankole Thompson Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	8 June, 2004

PROSECUTOR **Against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-T)

DECISION ON PROSECUTION MOTION FOR MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

Office of the Prosecutor:
Luc Côté
Robert Petit

Defence Counsel for Sam Hinga Norman:
James Jenkins-Johnston

Defence Counsel for Moinina Fofana:
Michiel Pestman

Defence Counsel for Allieu Kondewa:
Charles Margai

SPECIAL COURT FOR SIERRA LEONE
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COURT RECORDS
- 8 JUN 2004
NAME MAUREEN EDMONDS
SIGN M Edmonds
TIME 12-10

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Judge Benjamin Mutanga Itoe, Presiding Judge, Judge Bankole Thompson and Judge Pierre Boutet;

SEIZED of the Motion for Modification of Protective Measures for Witnesses ("Motion") filed on 4 May 2004 by the Office of the Prosecutor ("Prosecution");

NOTING the Order to the Prosecution for Renewed Motion for Protective Measures of 2 May 2004 ("Order");

NOTING the Response[1] to the Motion filed by Defence Counsel for Moinina Fofana on 14 May 2004 ("Fofana Response");

NOTING the Response[2] to the Motion filed by Defence Counsel for Sam Hinga Norman on 14 May 2004 ("Norman Response");

NOTING also the Order for Filing of a Consolidated Reply of 13 May 2004;

NOTING further that no Response was filed on behalf of the Accused Allieu Kondewa within prescribed time limits;

NOTING the Consolidated Reply to the responses filed by the Prosecution on 18 May 2004 ("Consolidated Reply");

CONSIDERING Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 53, 69 and 75 of the Rules of Procedure and Evidence ("Rules");

MINDFUL of the need to guarantee the utmost protection and respect for the rights of the victims and witnesses, while ensuring the respect of the rights of the Accused to a fair and public hearing, and seeking to balance those rights with the competing interests of the public in the administration of justice;

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[1] Response to Prosecution Motion for Modification of Protective Measures and Request for Permission to Contact Protected Witnesses, 14 May 2004.
[2] Defence Response to Prosecution Motion for Modification of Protective Measures, 14 May 2004.

I. BACKGROUND

1. Initially, the three Accused were separately indicted.[3] Following motions from the Prosecution with respect to each Accused, this Court granted several protective measures for witnesses and victims,[4] including, for the Accused Norman and Fofana, a 42 days period for the full disclosure to the Defence of any identifying data of each of the Prosecution witnesses prior to the date of their testimony at trial.[5]

2. Subsequently, pursuant to an application by the Prosecution, the three cases were joined together as "CDF Case" by an order of the Trial Chamber issued on 28 January 2004.[6] A Status Conference was held on 4 March 2004 during which the Prosecution submitted that certain categories of its witnesses, including victim-witnesses or "insider" witnesses, will require greater levels or forms of protection than some other categories of witnesses.

3. On 2 May 2004 the Trial Chamber issued the Order requiring, *inter alia*, the Prosecution to file a renewed[7] motion for protective measures, specifying, to the extent possible, the form of protection being sought for each of its witness including delayed disclosure, pseudonym, face distortion or closed

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[3] The indictment against the Accused Sam Hinga Norman was approved on 7 March 2003, while each of the indictments against the Accused Moinina Fofana and Allieu Kondewa were approved on 28 June 2003.

[4] *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003 ("*Norman* Decision"); *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 16 October 2003 ("*Fofana* Decision"); *Prosecutor v. Allieu Kondewa*. SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003 ("*Kondewa* Decision"). All these three decisions cumulatively are herein referred to as "Decisions on Protective Measures".

[5] See *Norman* Decision and *Fofana* Decision, order (a):

> "The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 16 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered."

[6] Prosecutor v. *Samuel Hinga Norman*, SCSL-03-08-PT, *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, *Prosecutor v. Allieu Kondewa*. SCSL-03-12-PT, Decision and Order on Prosecution Motions for Joinder, 28 January 2004.

[7] The three Decisions on Protective Measures specified that the protective measures when granted were applicable at that stage of the proceedings, namely at the beginning of the pre-trial phase. See *Norman* Decision, paras 14 and 15 ("a reasonable case has been made for the prosecution witnesses herein to be granted at this preliminary stage a measure of anonymity and confidentiality" and "justify, at this point in time, delaying the disclosure of the identities of the witnesses during the *pre-trial phase*), *Fofana* Decision, para 16. ("justify, at this point in time, delaying the disclosure of the identities of the witnesses during the *pre-trial phase*); *Kondewa* Decision, para. 29 ("at this pre-trial stage").

session. The said motion should further provide an overview of the reasons for the protective measures sought for witnesses whose names appear on the witness list.

II. THE SUBMISSIONS

A. The Motion:

4. The Motion is twofold and the Prosecution seeks the following:

(a) Reduction of the 42 days period for the unredacted disclosure of witness statements for the Accused Norman and Fofana;

(b) Additional Protective Measures to be adopted during the testimony of protected witnesses at trial;

(a) Reduction of Disclosure Period for the Accused Fofana and Norman

5. The Prosecution seeks the reduction of the disclosure period of the unredacted witness statements to the Defence for the Accused Norman and Fofana from 42 to 21 days prior to testimony at trial to bring it in line with the one for the Accused Kondewa. The Prosecution argues that the risk has increased since the issuing of the Decisions on Protective Measures.[8]

6. The Prosecution submits that most witnesses will testify with respect to all three accused. As they and their families live in small communities often next to ex-combatants and strong sympathizers of the Accused and investigations by the Prosecution have taken place or will take place there, hence all of them may be exposed to the same dangers.[9] The Prosecution annexed 7 witnesses statements in support of their Motion to prove the increase in risk of potential harm to witnesses.[10]

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[8] Motion, para. 3.
[9] *Id.*, para. 5.
[10] *Id.*, para. 11. These statements were filed confidential and ex-parte, as annexes 1-7 to the Motion, in order to protect the identity of the witnesses. In addition, the Prosecution filed for this purpose declarations from its Chief of Investigation, from the Inspector General of the Sierra Leone Police, and from the Chief of the Victims and Witness Unit of the Special Court, respectively as annexes 8, 9 and 10 of the Motion. The Prosecution also filed various newspaper reports as annexes 26 to 34 of the Motion.

7. It is further submitted that the 21 days period for disclosure has been regarded as sufficient in many cases at the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY").[11]

8. The Prosecution submits that it is concerned about witnesses not testifying out of fear and intimidation by former CDF members. Moreover, the Prosecution submits that the long absence from their jobs or farms would keep many witnesses from testifying.[12]

9. In addition, the Prosecution argues that once investigators for the Defence begin to enquire about the witnesses whose identities have been disclosed within the above-mentioned communities, persons contacted for inquiries by the Defence in this process could further disclose the identities of the witnesses.[13]

(b) Additional Protective Measures for Witnesses During Testimony at Trial

10. The Prosecution divides its witnesses into two groups, based on its revised witness list filed on 4 May 2004[14]:

I. Witnesses of Fact

Sub-Categories within this group:

A. Witnesses who are victims of sexual assault and gender crimes;[15]

B. Child witnesses;

C. Insider witnesses.[16]

II. Expert Witnesses and witnesses who have waived their right to protection[17]

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[11] *Id.*, para. 9.
[12] *Id.*, paras 12-13.
[13] *Id.*, paras 14-15.
[14] Supplemental Materials filed pursuant to Order from the Bench during Pre-Trial Conference held 28 April 2004 and Order to the Prosecution to File Disclosure Materials and other Materials in Preparation for the Commencement of Trial of 1 April 2004, 5 May 2004.
[15] It has to be noted that, in para. 20 of the Motion, the Prosecution wrongly refers to sub-category A as "Child witnesses" and B "Witnesses who are victims of sexual assault and gender crimes". This is obviously a *lapsus calami*, since on p. 15-17, where details regarding the categories are given, it is changed to A "Witnesses who are victims of sexual assault and gender crimes" and B" Child witnesses".
[16] The pseudonyms indicating each of the protected witnesses belonging to Sub-Categories A, B and C for which the Prosecution is seeking additional protective measures during testimony are contained within Annexes 37, 38 and 39 of the Motion, respectively.
[17] Motion, paras 20-21. Even though the wording and structure of the Motion gives the impression that Group I only consists of Sub-Categories A, B & C, this is obviously not the case, as the total number of these witnesses is 51 -see

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11. The Prosecution seeks for all its witnesses that orders b-k of the current orders contained in the Decisions on Protective Measures should be kept in force to the extent they apply to the trial and post-trial stage. These orders provide as follows:

> (b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;
>
> (c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;
>
> (d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;
>
> (e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;
>
> (f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;
>
> (g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;
>
> (h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above (reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;
>
> (i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;
>
> (j) That the Defence return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

Annexes 37-39 to the Motion-, there are only a few expert witnesses and no witness has so far waived his/her right. Counsel for Fofana properly pointed out this lack in clarity; see Fofana Response, para. 3.

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(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.[18]

12. Moreover, the Prosecution seeks some additional protective measures for all witnesses, namely that they be allowed to testify with use of screening devices from the public and that photography, video-recording, and sketching or any other manner of recording or reproducing images of any witness be prohibited while he or she is in the precincts of the Special Court.[19]

13. Finally, the Prosecution asks for additional protective measures for certain groups of witnesses. Witnesses in Sub-Category A above, namely witnesses who are victims of sexual assault and gender crimes, should testify with voice distortion, to avoid recognition by the public.[20] Witnesses in Sub-Category B above, namely child witnesses, should be allowed to testify with closed circuit television to avoid as far as possible serious emotional distress by facing the Accused, while the image appearing on the public's monitors is being distorted. Finally, witnesses in Sub-Category C, namely insider witnesses, should be allowed to testify with voice distortion, as witnesses in Sub-Category A.[21]

14. As some insiders in Sub-Category C could be easily recognised by the public by the content of their testimony, the Prosecution submits that it will make applications, should the need arise, that their evidence be given in closed session.[22]

B. The Responses:

15. In its Response, Counsel for Fofana opposes the reduction of the disclosure period of unredacted witness statements to 21 days as the statements disclosed so far are so heavily redacted that they are of little use to the Defence in carrying out their investigations.[23] Moreover, it submits that unredacted witness statements of Category II witnesses should be disclosed immediately, as the

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[18] See *Norman* Decision. The wording of the orders differs slightly between each of the Decisions on Protective Measures.
[19] *Id.*, para. 38.
[20] *Id.*, para. 25.
[21] *Id.*, paras 30-33.
[22] *Id.*, para. 35.
[23] Fofana Response, paras 6-7.

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order sought applies only to witnesses in Category I.[24] It further submits that the Defence is obliged not to disclose any protected identity of witnesses and therefore un-redacted statements to the Defence will not endanger any witness. Protective measures should be restricted to sub-categories A, B, C, as category D[25] is ill-defined and the Prosecution has failed to show the high risk justifying protective measures for this group.[26]

16. Finally, the Defence for Fofana asks for the permission to contact all category C witnesses before their testimony at trial.[27]

17. Counsel for Norman submits that any reduction of the disclosure period will substantially interfere with the effective planning of the case for the Defence and that all the evidence in support of the Motion is speculative and subjective and would normally not be admitted as evidence in adversarial proceedings.[28] It is further submitted that voice-distortion equipment and testifying behind screens will have a serious negative effect on the rights of the accused. The Defence strongly opposes the "over-protection" of the A, B, C witnesses groups, which would be the result of the granting of the Motion.[29]

C. The Consolidated Reply:

18. In its Consolidated Reply the Prosecution concurs that the names and un-redacted statements of witnesses in category II can be disclosed, but so far no one has waived his/her right to protection as granted by the court.[30] Regarding the reduction of the disclosure period the Prosecution reiterates that 21 days period is not oppressive to the rights of the Accused and it is an adequate measure given the exceptional circumstances regarding the security of the witnesses.[31]

19. The Prosecution clarifies that in its Motion it seeks that all witnesses be allowed to testify behind a screen in order to protect their identity from the public, but not from the Accused and

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[24] *Id.*, para. 4.
[25] Defence for Fofana refers to this residuum-group as sub-category "D", see also supra note 14.
[26] Fofana Response, para. 13.
[27] *Id.*, para. 14.
[28] Norman Response, para. 2.
[29] *Id.*, para. 3.
[30] Reply, para. 11.
[31] *Id.*, paras 13-15.

stresses that it has submitted reliable and sufficient evidence establishing the existence of imminent risk of harm to the witnesses; moreover, this measure is standard practice at the ICTR. [32]

20. Regarding the request of Defence Counsel for Fofana for permission to contact protected witnesses the Prosecution submits that so far no witness has agreed to be interviewed by the Defence.[33]

II. DELIBERATION

A. Introduction

21. For reasons of clarity, the structure of this Decision will separately address the two reliefs sought by the Prosecution, namely the reduction of the period of full disclosure of witness statements prior to the date of testimony and the additional protective measures during testimony at trial.

B. Applicable Law

22. Pursuant to Article 16 of the Statute, the Special Court is authorized to provide in its Rules for the protection of victims and witnesses. Article 16 (4) provides as follows:

> "[Witnesses and Victims Unit] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses".

23. Article 17 of the Statute, paragraph (2), provides that:

> "The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses".

24. Such protective measures shall include, without being limited to, the protection of a witness's identity. Rule 75 (A) and (B) of the Rules state in particular that:

> "(A) A Judge or a Chamber may, on its own motion, or at the request of either party, or of the victim or witness concerned, or of the Witnesses and Victims Section, order

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[32] *Id.*, paras 6, 9, 19-20.

appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Judge or a Chamber may hold an *in camera* proceeding to determine whether to order:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) Expunging names and identifying information from the Special Court's public records;

(b) Non-disclosure to the public of any records identifying the victim or witness;

(c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and

(d) Assignment of a pseudonym;

(ii) Closed sessions, in accordance with Rule 79;

(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television."

25. Rule 53 of the the Rules provides in paragraph (A) that:

"In exceptional circumstances, a Judge designated pursuant to Rule 28 may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."

and in paragraph (C) that:

"A Judge may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice".

25. Rule 69 of the Rules provides that:

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[33] *Id.*, para. 22.

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(A) In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Witnesses and Victims Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.

C. Reduction of Disclosure Period for the Accused Norman and Fofana

27. Previous jurisprudence of this Chamber established that the process of granting protection to witnesses entails in each specific circumstances a balance between the "full respect" for the rights of the Accused and "due regard" for the protection of victims and witnesses.[34] New Rule 26*bis* of the Rules recently adopted during the continuation of the 5th Plenary Meeting of the Special Court now directly enshrines this principle in the Rules as follows:

> "The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

28. In order to achieve such a balance, the Trial Chamber rules that, together with other measures, that the adoption of the rolling disclosure system of unredacted witness statement is fair, the restriction imposed on the right of the Accused to a fair trial in this respect being both necessary and proportionate to the aim of the witness and victim protection.[35]

29. One of the factors which this Chamber has to take into consideration in the evaluation of this balance is, in particular, the specific feature of this Court that of being located in Sierra Leone. The

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[34] *Prosecutor v. Augustine Gbao*, SCSL-03-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003 ("*Gbao* Decision"), para. 47. See also para. 42. See also *Kondewa* Decision, para 21. See also *Prosecutor v. Tadic*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 ("*Tadic* Decision"), para. 57.
[35] *Gbao* Decision, para. 47.

physical location of the Special Court, in itself, had in this Chamber previous decisions[36] and has indeed in considering the merits of this further Motion a substantial impact on security considerations for witnesses and victims.

30. As stated in the *Kondewa* Decision, witnesses and their families might particularly be endangered by threats arising in the specific milieu of their local community:

> "The Republic of Sierra Leone is a relatively small community where people are bound to and in fact know and identify themselves very easily thereby increasing the danger of risk of a recruitment of hostilities against potential witnesses and victims and their families if they are identified by the indictees of their sympathisers as those whose testimony would incriminate them, or in due course and more still, the indictees who they support out there"[37]

31. In order to satisfy the general requirement of exceptional circumstances envisaged in Rule 69(A) of the Rules,[38] the Prosecution has accompanied the Motion with various confidential statements from its witnesses alleging serious threats made to them or their families in different occasions, aiming at discouraging their testimonies against the Accused. Pursuant to Rule 89(C) of the Rules the Chambers accepts this evidence submitted by the Prosecutor.[39]

32. In addition, in a signed declaration dated 3 May 2004, the Prosecution's Chief of Investigation reports of information as of several threats made against witnesses for the Prosecution in this case as well as various attempts from what is described as CDF hardliners to disrupt the investigative activity of the Prosecution.[40] In particular, the Declaration submits that

> "Potential witnesses have also expressed fear of reprisals from relatives and friends of the accused, associates of the accused, and those who support the causes or faction the accused represents ... Potential witnesses have also expressed fears for their own family members if it became known that the potential witnesses was co-operating with the Special Court ... The fears expressed by potential

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[36] *Norman* Decision, para. 10; *Fofana* Decision, paras 10 and 12; Kondewa Decision, para. 15; *Gbao* Decision, paras 21-25.
[37] *Kondewa* Decision, para. 24.
[38] *Kondewa* Decision, paras 16-20; *Gbao* Decision, para. 25. See also *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecution Motion for Witness Protection, 20 November 1998, para. 15-17; *Tadic* Decision, para. 62.
[39] Rule 89(C) of the Rules provides that "A Chamber may admit any relevant evidence".

witnesses and by sources have increased dramatically over the period of time that I have been supervising the investigations ... indeed almost every individual with whom we come into contact to obtain information regarding the activities of the CDF/Kamajors are at first instance terrified at the thought of testifying in public and are fully convinced that doing so will bring reprisal against themselves and their families ... In addition to the fears expressed by sources and potential witnesses, there have been numerous instances of direct threats against such persons."[41]

33. Finally, the Chief of Investigations concludes the Declaration as follows:

"I firmly believe that witnesses, sources, and/or their family or associates risk their lives on a daily basis through their cooperation with the Special Court. It is essential for the safety and security of these potential witnesses be provided with the greatest possible protection under the law that this Court can provide."[42]

34. This Chamber expresses grave concerns about the seriousness of the increased threats made against the Prosecution witnesses at this stage of the proceedings as such has been described in the evidence adduced by the Prosecution. It emerges also from the review of the evidence in support of this application by the Prosecution that the CDF holds a structure actively organized within the country and still capable of substantial intimidations to witnesses.[43]

35. Furthermore, the Chamber also recalls the contents of the Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, dated 19 March 2004, in which it is stated:

"Some elements of the former Civil Defence Forces (CDF) who are opposed to the indictment of Sam Hinga Norman, the Former Internal Affairs Minister and National Coordinator of the CDF, could seek to disrupt the work of the [Special] Court through violent activities. Although the group was disarmed, it is believed that its command and control structures remain intact, especially in the east. For this reason, some observers believe that CDF could be capable of mobilizing a credible force."[44]

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[40] Motion, Annex 8 ("Declaration"). The contents of the Declaration are corroborated by the Declaration of the Inspector General of the Sierra Leone Police. See also the Declaration from the Chief of the Victims and Witnesses Unit. It is worth to observe that no evidence to rebut the Prosecution's submissions has been produced by the Defence.
[41] Declaration, paras 6-9. See also paras 15, 17 and 20.
[42] *Id.*, para. 39.
[43] Id., paras 16, 20, 22, 24-25, and 30-34. See also Annex 9 to the Motion, paras 4-13.
[44] S/2004/228, Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, 19 March 2004, para. 50.

36. Based on the overwhelming weight of un-contradicted affidavit evidence before us it is therefore in the considered opinion of this Trial Chamber that a reasonable case has been made for the Prosecution witnesses to be granted, now, at this further stage of the trial of the Accused, a modification to the current measures of rolling disclosure of the Prosecution witness statements for the accused Norman and Fofana from a 42 days period to a 21 days period, in line with the same time period provided for in the *Kondewa* Decision. This measure provides now and in these circumstances for a proportionate balance of the interests of the witnesses for protection and the Accused right to a fair trial.

D. Additional Protective Measures During Testimony at Trial

Screen from Public and Prohibition of Photography

37. The Prosecution seeks additional measures for the protection of all witnesses residing in Sierra Leone who have not waived their right to protection. They request that all these witnesses be allowed to testify with the use of screening from the public. Moreover, it is requested that the public and the media shall not be allowed to photograph, video-record, sketch or in any other manner record or reproduce images of any witness while he or she is in the precincts of the Special Court.

38. Article 17(2) of the Statute entitles the Accused to a right "to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses" (emphasis added). As has been clarified in the Prosecution Reply, the use of a screen during the testimony of a witness is intended to protect witnesses' identity from the public and not from the Accused.[45] Thus, the "veil of anonymity" is lifted in favour of the Accused, and the right of the Accused to a fair hearing is not infringed.

39. A screen to protect the identity of the witness from the public does -to a minor extent- negatively affect the public nature of the trial and the possibility of the public to fully follow the proceedings, and, consequently the right of the Accused to a public hearing. It is established by jurisprudence of other international criminal tribunals and courts[46] that, generally, preference should be given to a public hearing to avoid the impression of "*in camera*" justice for the Accused, as well as to give the

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[45] Consolidated Reply, para. 9.

public the possibility to follow the trial. However, it is also established that "this preference has to be balanced with other mandated interests"[47], among them protective measures for victims and witnesses, as laid down in Article 17(2) of the Statute.

40. As stated above, the location of the Special Court in the very country where the crimes were allegedly committed increases considerably the risks to witnesses. Based upon the information provided and the statements submitted, the Prosecution has demonstrated that there exist legitimate fears on the side of the witnesses, making it necessary to give considerable weight to security risks that could be encountered.

41. Concluding, it is our opinion that the use of a screen to protect all witnesses in court, who have not waived their right to protection, is a reasonable, appriate and sensible way of a balancing the right of the Accused to a public hearing and the right of the public to be properly informed about the proceedings before the Special Court on the one side, with the security interests of the witnesses on the other.

42. The Defence did not raise any objection regarding the measure sought by the Prosecution not to allowing photographs, video-recording, sketching or in any other manner recording or reproducing images of any witness while he or she is in the precincts of the Special Court. We would like to observe that, in the case against *Andre Rwamakuba*, the ICTR found that such a measure was a "normal" protective measure which does "not affect the rights of the Accused."[48]

Special Protective Measures for Sub-Categories A, B, C – Voice Distortion and Closed-Circuit-Television

43. The Prosecution also seeks additional protective measures for certain groups of witnesses:

(i) Voice distortion for the public for witnesses in Sub-Category A and C, namely victims of sexual violence and insider witnesses; and

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[46] See *Tadic* Decision, para. 32.
[47] *Id.* para. 33.
[48] *Prosecutor v Andre Rwamakuba*, ICTR-98-44-T, Decision on the Prosecuotr's Motion for Protective Measures for Witnesses, 22 September 2000, para. 14.

(ii) closed circuit television for child witnesses in Sub-Category B, while the image appearing on the public's monitors is distorted.

It is noted that the Fofana Defence did not oppose these additional measures in its Response.

44. Contrary to the understanding of Counsel for the Accused Norman of the Prosecution Motion these protective measures sought apply only with regards to the public. Thus, these measures will not preclude an accused to see and observe the demeanour of these witnesses.

45. The arguments used to demonstrate the necessity of a balancing of public hearing and witness security also apply to these additional measures. Moreover, the need for special consideration to victims of sexual violence or children during their testimonials in court has been widely recognised in both domestic laws of states and in international courts.[49]

46. Specifically, for Sub-Categories A and C, (victims of sexual violence and insider witnesses) voice distortion for the public speakers were sought. Regarding Sub-Category A, victims of sexual violence, the Prosecution pointed out the risk for re-traumatisation and rejection by the victim's family and community and the possibility to recognise the voice of the witness. For insider witnesses in Category C, the Prosecution underlined the vulnerability of this group to acts of retaliation and potential harm, given the strict laws of the Kamajors not to share information with outsiders. In the opinion of the Trial Chamber these submissions demonstrate convincingly again the risks for the security of witnesses of both categories.

47. For Sub-Category B, child witnesses, the Prosecution seeks the possibility for testimony by way of closed-circuit-television. While the witness testifies in a back room in the court building, this would allow the Accused and the Defence, as well as the Trial Chamber and the Prosecution, to see the witness on a television-screen and observe his/her demeanour. The image on the screen for the public at that time would be distorted. As stated by Psychologist An Michels, especially children[50] are vulnerable witnesses, the risk of re-traumatisation and the possibility of stigmatisation and rejection is real and high. On this issue the U.S. Supreme Court held in *Maryland v. Craig* held that the use of

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[49] See *Tadic* Decision, para. 47.
[50] Motion, Annex 11.

closed circuit television does not violate the constitutional right of an Accused to confrontation if it is necessary in the opinion of the Court to protect a child witness from psychological harm.[51]

48. Based upon these information and the evidence submitted the Chamber finds that such risks as described would exist, and, therefore, deems it necessary in the interest of justice for children to be allowed to testify in the way the Prosecution asks for, in accordance with Rule 75(B)(i)(a).

III. DISPOSITION

HEREBY grants the Motion and **ORDERS** as follows:

1.) That the unredacted witness statements for the Accused Norman and Fofana are to be disclosed to the Defence 21 days prior to the testimony in trial of the witnesses;

2.) That orders b-k of the Decisions on Protective Measures[52] remain in full force and application, as shall read as follows:

(b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;

(d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel

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[51] See *Maryland v Craig, 497 U.S. 836 (1990).*

[52] *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 16 October 2003; *Prosecutor v. Allieu Kondewa*. SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003. See supra note 4.

by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

(h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above(reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) That the Defence return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

3.) That all witnesses, who have not waived their right to protection testify with use of screening a device from the public;

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4.) That photography, video-recording, sketching or in any other manner of recording or reproducing images of any witness are prohibited while he or she is in the precincts of the Special Court;

5.) That the voice of witnesses in Sub-Category A and C during their testimony in trial be distorted in the speakers for the public;

6.) That witnesses in Sub-Category B testify with the use of a closed circuit television; the image appearing on the public's monitors being distorted;

And **FURTHER ORDERS** that the Prosecution shall contact the protected witnesses in Sub-Category C above, namely insider witnesses, and ask for his or her consent, or the parents or guardian of that witness if under the age of 18, for an interview by the Defence Counsel for the Accused Fofana, and shall undertake the necessary arrangements to facilitate such contact.

Done at Freetown this 8th day of June 2004

Judge Bankole Thompson | Judge Benjamin Mutanga Itoe | Judge Pierre Boutet

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]

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AUTHORITY 21

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 18 September 2001

The PROSECUTOR
v.
Alphonse NTEZIRYAYO

Case No. ICTR-97-29-T

DECISION ON THE DEFENCE MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

Articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules

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The Office of the Prosecutor:
Silvana Arbia
Japhet Mono
Jonathan Moses
Gregory Townsend
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Manuel Bouwknecht

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Titinga Frédéric Pacere
Richard Perras

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

CONSIDERING that, on 13 December 2000, in the "Décision relative à la Requête de la Défense aux fins d'obtenir des mesures de protection pour ses témoins", the Chamber dismissed a first Defence Motion for witness protection measures, on the basis of lack of evidence warranting the said

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measures;

BEING NOW SEIZED of:

(i) A "Requête aux fins d'obtenir des mesures de protection des témoins de la Défense" filed on 27 March 2001 by Counsel for Nteziryayo with new annex in support (the "Motion"),

(ii) A "Prosecutor's Response to Nteziryayo's Motion for the Protective Measures for Defence Witnesses" filed on 6 April 2001" (the "Prosecutor's Response"); and

(iii) A "Réplique de Alphonse Nteziryayo à la Réponse du Procureur sur les mesures de protection des témoins de la Défense" (the "Defence Reply") filed on 17 April 2001;

CONSIDERING that the Parties were informed that the Motion would be decided solely on the basis of their written briefs, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules, particularly Articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules;

NOW REVIEWS THE MOTION

1. Prior to reviewing the Parties' submissions in regard of the protective measures requested by the Defence for their witnesses (b), the Chamber will consider whether it is satisfied that protective measures are warranted in this case (a).

(a) <u>Justification of the Protective Measures Requested by the Defence</u>

2. The Chamber recalls that, pursuant to Article 19 of the Statute, the trial shall be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses", whereas, pursuant to Articles 14 and 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, "[which] protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of victim's identity" (Article 21 of the Statute).

3. The Rules thereupon provide, notably, that "[i]n exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise" (Rule 69(A) of the Rules) and that "[a] Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused" (Rule 75(A) of the Rules).

4. Mindful of the rights of the Accused, guaranteed notably by Article 20 of the Statute, the Chamber may therefore order, pursuant to Rules 69 and 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter, provided that such measures are justified by exceptional circumstances.

5. The Defence submits that the measures they request for their witnesses, who are scattered in several countries and, in particular, in Rwanda, Zambia, Tanzania, Togo, Cameroon, Benin, Congo, Belgium and France, are justified in view of:

(i) Their precarious security situation as exculpatory witnesses;

(ii) The fear they expressed for their safety and for the safety of their close relatives; and,

(iii) Their willingness to testify at trial, provided that their security is guaranteed.

6. The Chamber recalls that the determination of the need to order protective measures for witnesses cannot be made purely on the *subjective* basis of either fear expressed by witnesses or their willingness to testify at trial if their security is guaranteed. Rather, the Chamber must be satisfied that an *objective* situation exists whereby the security of the said witnesses is or may be at stake, which accounts for such a fear. Only in this case would protective measures be warranted (*See,* International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-I-T, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995: "[F]or a witness to qualify for protection [...], there must be a *real* fear for the safety of the witness or her or his family, *and that there must always be an objective basis to underscore this fear* [...]" (Emphasis ours), a Decision referred to in the "Decision on the Prosecutor's Motion for Witness Protection", *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A1-I, Trial Chamber I of the Tribunal, 17 September 1999; *See also* ICTY, *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36, "Decision on Motion by Prosecution for Protective Measures", 3 July 2000, at para. 26: "Any fears expressed by potential witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk. Something more than that must be demonstrated [...]").

7. In this regard, the Chamber considers that the Affidavit filed by Mr. Ntagangwa, an Investigator for the Defence, which principally concerns the reluctance expressed by potential witnesses to come to testify unless they are granted protective measures, only constitutes an *indicia* of the need of protection measures. It does not prove, as such, that the security of those witnesses is objectively at risk.

8. The Chamber will now consider whether it is satisfied that, as otherwise submitted by the Defence, the precarious security situation affecting the witnesses warrants the adoption of protective measures for them. In doing so, the Chamber shall bear in mind that "[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed [it] needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses" (*Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, "Decision on Protective Measures for Defence Witnesses", 13 July 1998 at para. 9).

9. The Defence adduces numerous documents in support of the existence of a threat to the security of their witnesses. Among these documents are:

(i) Two press excerpts of the Belgian daily newspaper "Le Soir" by Veronique Kiessel, dated 10 and 11 February 2001, on the threat levels in Rwanda due to attacks by infiltrators of the *Interahamwe* militias from the Democratic Republic of the Congo (the "DRC") and assassinations which are alleged to regularly take place in Rwanda;

(ii) Three press excerpts from "Fondation Hirondelle" dated 25 January 2001, 21 and 27 February 2001 which report notably on the judicial proceedings in Kenya surrounding the assassination of Seth Sendashonga, who was allegedly to testify before the Tribunal for the Defence in the *Kayishema and Ruzindana* trial, and on the general precarious security of the witnesses who testify at trial before the ICTR;

(iii) A press release from "ReliefWeb" (PANA) of 12 January 2001 dealing with the precarious conditions of life of the refugees who leave in refugee camps in the Congo-Brazzaville, places where some Defence witnesses reside;

(iv) A press release from "Nouvelles" dated 13 January 2000 dealing with the precarious security situation affecting the refugees in Africa, including those living in the DRC or in Burundi.

10. The Chamber agrees with the Defence that these documents tend to describe a particularly volatile security situation at present in Rwanda and in neighboring countries such as the DRC, which could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda. The Chamber recalls in this respect that it recently emphasised "the upsurge in acts of violence committed against the civilian population in Rwanda and the entire Great Lakes Region" to grant protective measures for the witnesses to appear on behalf of Pauline Nyiramasuhuko (*See*, *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members", 20 March 2001 (the "Nyiramasuhuko Decision of 20 March 2001"), at para. 9).

11. The Chamber notes that the Defence has demonstrated fears, which pertain to potential witnesses residing in Rwanda, the Great Lakes Region and neighboring countries only, and has not demonstrated fears as regards potential witnesses residing elsewhere. However, in the view of the Chamber, the above-mentioned volatile security situation could as well affect witnesses who do not reside in Rwanda, or in the Great Lakes Region. In this respect, the Chamber recalls the Nyiramasuhuko Decision of 20 March 2001 where it considered that "though the Defense has provided sufficient factual grounds for the protective measures sought by the Defense with respect to those witnesses residing in Rwanda the entire Great Lakes Region, and neighboring countries only, the security situation would affect any witness even if residing outside of the Region".

12. The Chamber therefore finds that protective measures for Defence witnesses, in this case, are justified.

(b) <u>The Protective Measures Requested</u>

13. The Prosecutor does not object to the following protective measures requested by the Defence:

(i) Measure (a): That names, addresses and other identifying information of potential Defence witnesses be communicated only to the Witnesses and Victims Support Section for its implementation of appropriate protection measures, set forth below, to guarantee the appearance and security of the witnesses;

(ii) Measure (b): That where names, addresses or any other identifying information concerning potential Defence witnesses appear in any records in any section other than the Witnesses and Victims Support Section, such information be expunged from those documents and withdrawn from said section;

(iii) Measure (c): That disclosure be prohibited of names, addresses, whereabouts and any other identifying information concerning potential Defence witnesses, as well as any other information on file with the Registry or other organ or section of the Tribunal;

(iv) Measure (d): That the Office of the Prosecutor be prohibited from disclosing to whomsoever the names, addresses and other identifying information of witnesses once disclosure of same has been made by the Defence;

(v) Measure (g): That all hearings, which may be held, addressing the issue of witness protection be held in closed session;

(vi) Measure (h): That the Defence be authorised to use a pseudonym to designate each Defence witness during the hearings and throughout the proceedings as well as in

its various communications with the media;

(vii) Measure (k): That the Office of the Prosecutor be prohibited from making an independent determination of the identity of any protected witness or encouraging or aiding or facilitating, in any way, such determination;

(viii) Measure (l): That the Prosecutor ensure that any member of the team leaving the Prosecutor's Office return all documents and information in his or her possession which are likely to reveal the identify of potential Defence witnesses.

14. The Chamber notes that these measures are in accordance with those already granted to witnesses in the present joint cases. They are furthermore warranted in light of the necessary balance between the rights of the Accused to a fair trial and the need, as established above, to protect the witnesses. The Chamber accordingly grants the said measures.

15. The Prosecutor opposes in part measures (e), (f) and (j) of the Motion.

Measure (e) of the Motion: That names, addresses, whereabouts and any other identifying information concerning Defence witnesses not be communicated to the Office of the Prosecutor until said witnesses are under the protection of the Tribunal.

16. The Prosecutor contends that unredacted copies of the statements of the Defence witnesses and their identity should be disclosed, consistent with the current jurisprudence of the Tribunal, at the latest 21 days prior to their being called to testify at trial. The Defence maintains, in its reply, that the measure should be adopted in its unmodified form.

17. The Chamber however recalls that it ordered that the Parties in the present proceedings to immediately disclose the identity and unredacted statements of the protected witnesses to the opposing party upon confirmation of the enforcement of the protection measures by the Witnesses and Victims Support Section of the Tribunal (the "WVSS") (*See*, *'Butare' Cases*, "Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses", 8 June 2001, at para. 25). The Prosecutor's objection is therefore dismissed, and measure (e) is granted in its present formulation.

18. The Defence is further directed to provide the WVSS, as soon as possible, with a list of their witnesses who require protection pursuant to the present Decision. The Chamber further orders the Defence to disclose immediately the unredacted statements and identity of all their witnesses upon confirmation of the enforcement of the protection measures herein ordered by the WVSS.

Measure (f) of the Motion: That at no time and under no circumstances shall the public or the media take photographs or make video recordings or draw sketches of witnesses without the authorisation of the Chamber and the Parties.

19. The Prosecution agrees with measure (f) subject to the deletion of the words "and the Parties". In their Reply to the Prosecutor's Response, the Defence agrees with the proposed deletion. The Chamber therefore grants measure (f), which is consistent with similar measures granted in respect of witness protection, with the said correction.

Measure (j) of the Motion: That no member of the Office of the Prosecutor shall communicate with any Defence witness without the consent of the witness and the express authorisation of the Chamber or a designated judge of the Chamber.

20. The Prosecution submits that contact with the other Party's witnesses is an *inter partes* matter. Such contacts should therefore not be subject to "the express authorization by the Chamber or a

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designated Judge". The Prosecution proposes that the measure read, as in the "Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses" of 3 April 2001 (*See, Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T), as follows: "The Prosecutor and her representatives may notify the Defence of any request for contacting the Defence witnesses, and the Defence shall make arrangements for such contacts". The Defence maintains, in their reply, that the measure should be adopted as such. They notably submit that the principle of the equality between the Parties is at stake, since the Defence is to make such a request to the Chamber or a Judge thereof prior to contacting protected witnesses of the Prosecutor (*See, Prosecutor v. Nsabimana and Nteziryayo*, Case No. ICTR-ICTR-97-29-T, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 21 May 1999, Measure (i)).

21. The Chamber agrees with the Defence that the principle of the equality between the Parties requires that either Party may contact the opposing Party's protected witnesses subject to the same conditions.

22. However, the Chamber recalls that it ordered, on 10 July 2001, in respect of "all the protected witnesses in [the 'Butare' joint] proceedings [...] [t]hat contact or communication with either Prosecution or Defence protected victims or witnesses, or their close family members, that is to say, the witness's father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to either the Prosecution or the concerned Defence. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the party on behalf of which the victim or the witness would testify at trial shall undertake the necessary arrangements to facilitate such contact" (*'Butare Cases'*, "Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protection Measures and Warning to the Prosecutor's Counsel", 10 July 2001).

23. The formulation above encompasses the present Defence request and complements it by referring to contact or communication with victims and close family members of victims or witnesses, by specifying that the contact or communication is subject to a written request, and by providing for the modalities to facilitate such contact or communication. The Chamber therefore grants the Defence request subject to the formulation of the above Order of 10 July 2001.

24. The Prosecutor further opposes measures (m) and (n) of the Motion in their entirety.

> *Measure (m) of the Motion: That a witness may refuse to make any statement which might incriminate him or her, and should the Chamber oblige a witness to testify, such testimony may not be used as evidence against said witness except for prosecution of perjury.*

25. The Prosecutor contends that Rules 90(E) and 77(B) of the Rules account for the concerns underlying this measure, and that the latter, if granted, could undermine the said protections currently afforded by the Rules.

26. The Chamber agrees with the Prosecutor and reiterates a finding made on a similar request presented by the Defence of the co-Accused, that "la mesure sollicitée (...) est redondante en ce qu'elle est prévue par les dispositions de l'Article 90 E) du Règlement" (*Prosecutor v. Nsabimana*, Case No. ICTR-97-29-T, "Décision relative à la Requête de la Défense aux fins d'obtenir des mesures de protection pour les témoins de la Défense", 15 February 2000).

> *Measure (n) of the Motion: That the Defence be allowed to request the amendment of measures sought in any case, or for certain witnesses, on the basis of a change in circumstances or previously unknown circumstances.*

27. The Chamber agrees with the Prosecutor's submissions in respect of this measure which is

unnecessary and redundant, in that "the Defence is obviously at liberty, pursuant to Rule 75 of the Rules to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, if necessary" (*Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, "Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses", 22 March 2001, at para. 24).

28. The Chamber therefore denies the Defence request in respect of measures (m) and (n) of the Motion.

(c) Taking into Effect of the Measures Ordered

29. The Chamber finally decides, in conformity with the Tribunal's well-established jurisprudence, that the protective measures herein ordered shall take effect once the particulars and locations of the witnesses have been forwarded to the WVSS.

FOR THE ABOVE REASONS,

THE TRIBUNAL

I. GRANTS the Defence Motion in part, and ORDERS as follows:

(i) That names, addresses and other identifying information of potential Defence witnesses be communicated only to the Witnesses and Victims Support Section for its implementation of appropriate protection measures, set forth below, to guarantee the appearance and security of the witnesses;

(ii) That where names, addresses or any other identifying information concerning potential Defence witnesses appears in any records in any section other than the Witnesses and Victims Support Section ("WVSS"), such information be expunged from those documents and withdrawn from said section;

(iii) That disclosure be prohibited of names, addresses, whereabouts and any other identifying information concerning potential Defence witnesses, as well as any other information on file with the Registry or other organ or section of the Tribunal;

(iv) That the Office of the Prosecutor be prohibited from disclosing to whomsoever the names, addresses and other identifying information of witnesses once disclosure of same has been made by the Defence;

(v) That all hearings, which may be held, addressing the issue of witness protection be held in closed session;

(vi) That the Defence be authorised to use a pseudonym to designate each Defence witness during the hearings and throughout the proceedings as well as in its various communications with the media;

(vii) That the Office of the Prosecutor be prohibited from making an independent determination of the identity of any protected witness or encouraging or aiding or facilitating, in any way, such determination;

(viii) That the Prosecutor ensure that any member of the team leaving the Prosecutor's Office return all documents and information in his or her possession which are likely to reveal the identify of potential Defence witnesses;

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(ix) That names, addresses, whereabouts and any other identifying information concerning Defence witnesses not be communicated to the Office of the Prosecutor until said witnesses are under the protection of the Tribunal;

(x) That at no time and under no circumstances shall the public or the media take photographs or make video recordings or draw sketches of witnesses without the authorisation of the Chamber and the Parties;

(xi) That contact or communication by the Prosecution with protected victims or witnesses of the Defence, or their close family members, that is to say, the witness's father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to the Defence. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the Defence shall undertake the necessary arrangements to facilitate such contact;

II. DENIES the following prayers for Orders:

(i) That a witness may refuse to make any statement which might incriminate him or her, and should the Chamber oblige a witness to testify, such testimony may not be used as evidence against said witness except for prosecution of perjury;

(ii) That the Defence be allowed to request the amendment of measures sought in any case, or for certain witnesses, on the basis of a change in circumstances or previously unknown circumstances;

III. RECALLS the Defence to provide as soon as possible, and on a continuous basis, the WVSS with the names and whereabouts of their witnesses who require protection pursuant to the present Decision;

IV. ORDERS the Defence, upon confirmation of the enforcement of the protection measures for those witnesses by the WVSS, to disclose immediately, and in any event 30 days prior to the commencement of the Defence case, their unredacted statements and identity to the Prosecution.

Arusha, 18 September 2001

William H. Sekule	Winston C. Matanzima Maqutu	Arlette Ramaroson
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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AUTHORITY 22

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registrar: Adama Dieng

Date: 3 April 2001

THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

DECISION ON ARSÈNE SHALOM NTAHOBALI'S MOTION FOR PROTECTIVE MEASURES FOR DEFENCE WITNESSES

The Office of the Prosecutor:
Japheth Mono
Ibukunolu Alao Babajide
Manuel Bouwknecht

Counsel for Nyiramasuhuko:
René Saint-Léger
Michael Bailey

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal");

SITTING as Trial Chamber II composed of Judges Laity Kama, Presiding, William H. Sekule and Mehmet Güney (the "Chamber");

BEING SEIZED of the:

i. "Requête en Prescription de Mesures des Témoins à Décharge," (the "Motion") filed on 9 January 2001 2000, to which is attached 2 annexes;

ii. "Prosecutor's Response to Arsène Shalom Ntahobali's Motion Seeking Orders for Protective Measures for Defense Witnesses," (the "Prosecutor's Reply") filed on 19 February 2001; and

iii. "Requête en Prescription de Mesures des Témoins à Décharge: Réplique à la Réponse du Procureur," (the "Defense Response to the Prosecutor's Reply") filed on 28 February 2001;

CONSIDERING that attached to the Prosecutor's Reply is a "Brief in Reply to the Motion filed by the Prosecutor for Witness Protection Measures for Victims and Witnesses of the Crimes alleged in the Indictment ICTR-97-21-I and Motion for Protection Measures for Consultants, Investigators, Interpreters, Witnesses and Expert Witnesses of the Defense," which was filed on 20 February 1998, on behalf of the Accused. The newly assigned Defense Counsel for the Accused had written a letter to the Registry requesting the withdrawal of the said Motion of 20 February 1998, which was granted;

CONSIDERING the Statute of the Tribunal (the "Statute") particularly Articles 19, 20 and 21 of the Statute and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the Rules;

CONSIDERING that the Chamber will decide the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

SUBMISSIONS OF THE PARTIES

Defense submissions

1. The Defense seeks protective measures for its potential witnesses before they testify, because they fear for their safety and for the safety of their families, for the following three categories of witnesses:

a) Potential Defense witnesses currently residing in Rwanda, who wish to testify at Trial;

b) Potential Defense witnesses currently residing outside Rwanda, in other African countries who wish to testify at Trial;

c) Potential Defense witnesses residing outside Africa, who also wish to testify at Trial;

2. The Defense relies upon the documents attached, including a report by the Special Representative for the Commission on Human Rights Mr. Michel Moussalli, pursuant to Resolution 1998/69 (E/CN.4/1999/33) dated 8 February 1999, and a report submitted by the ICTR President to Secretary General for transmission to the United Nations General Assembly and the Security Council entitled "Third Annual Report of the ICTR." (A/53/429, S/1998/857) dated 23 September 1998.

3. The Defense, therefore requests the Chamber to make, in essence, the following orders granting the instant Motion:

[1] Order that the names, addresses and other identifying information of all potential Defense witnesses be kept sealed at the Registry and expunged from the Tribunal's records;

[2] Order that names, addresses and other identifying information of all potential Defense witnesses be disclosed by the Registry only to the staff of the Victims and Witnesses Support Section and to witnesses, in accordance with the established procedure and for the sole purpose of implementing protective measures for the persons concerned;

[3] Order that where the names, addresses and other identifying information concerning theses potential Defense witnesses appear in the Tribunal's records and in any section other than the Victims and Witnesses Support Section, such information should be expunged from the said records and withdrawn from the said section;

[4] Prohibiting the disclosure to the public and media of the names and addresses of these witnesses, their whereabouts and all other identifying information concerning them and appearing in the records filed with the Registry, or with any other section of the Tribunal;

[5] Authorizing the use of a pseudonym to designate each potential witness during the proceedings and in all communications on this case to the media and the public;

[6] Order that the names, addresses and other identifying information concerning potential Defense witnesses bearing such pseudonyms and their whereabouts be kept under seal and expunged from the Tribunal's records open to the media and the public;

[7] Prohibiting disclosure of the names and addresses of the Defense witnesses as well as their whereabouts and other identifying information by the Prosecutor or members of her Office as long as the Chamber is not satisfied that adequate protection has been provided for the said witnesses;

[8] Authorizing the Defense, until such time that protective measures have been put in place, to disclose to the Prosecutor only the redacted form of documents submitted for disclosure and that in any event the Defense not be compelled to disclose to the Prosecutor information leading to the identification of potential Defense witnesses no sooner than seven days before they testify before the Tribunal;

[9] Prohibiting the Prosecutor and any member from the team from disclosing, discussing or revealing, directly or indirectly, any document or information contained in any document, or any other information leading to the identification of potential Defense witnesses whose disclosure is prohibited;

[10] Prohibiting any member of the Office of the Prosecutor from disclosing to the media and to the public any item from the records leading to the identification of the witnesses or any other document or information that might reveal the identity of the witnesses;

[11] Prohibiting the Prosecutor or members of the Prosecution team from making independent determination of the identity of any protected witness, encouraging or otherwise abetting anyone, in any way, to try to determine the identity of such a person;

[12] Order the Prosecutor to notify the Chamber and the Defense, in writing of the status of members of the Prosecution team who have access to any information identifying potential Defense witnesses, and that the Prosecutor be compelled to notify the Chamber and the Defense of any change in the composition of the Prosecution team;

[13] Order that the Prosecutor ensures that any member leaving the Prosecution team

returns all materials in his possession, if such materials are likely to reveal the identities of potential Defense witnesses;

[14] Order that photographing, sound or video recording and sketching of any protected witnesses be prohibited at any place and time, save with leave of the Chamber and Parties;

[15] Prohibit members of the Office of the Prosecutor from communicating with any protected witness or members of their families or guardian, if such a family member is a minor unless with the written consent of the witness and the express leave of the Chamber or of a Judge designated by the Chamber.

Prosecutor's submissions

4. The Prosecutor does not object in principle to the Motion, although she objects to measure [11] as being unjustified and impossible to comply with. The Prosecutor also objects to part of measure [8], on the time frames within which the Defense must disclose to the Prosecutor information leading to the identification of potential Defense witnesses before they testify.

AFTER HAVING DELIBERATED

5. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses, namely Rules 69 and 75 of the Rules. Such protection measures shall include, but shall not be limited to the conduct of in camera proceedings and the protection of victim's identity. Thereupon, Rule 75 of the Rules provides *inter alia* that a Judge or the Chamber may, *proprio motu* or at the request of either party or of the victims or witnesses concerned or the Tribunal's Victims and Witnesses Support Section, order appropriate measures for the privacy and protection of victims or witnesses, provided that these measures are consistent with the rights of the accused.

6. The Chamber reiterates that, in accordance with Article 20(4)(e) of the Statute, the Accused has the right to examine, or have examined, the Prosecutor's witnesses. The Accused also has the right to obtain the attendance and examination of his own witnesses under the same conditions as the Prosecutor's witnesses.

7. Rule 69 of the Rules provides *inter alia* that, in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

8. Thus, the Chamber, being mindful at all times of the rights of the Accused, as notably guaranteed by Article 20 of the Statute shall therefore order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of witnesses so as to ensure a fair determination of the matter before it.

9. In support of its request, the Defense relies upon the documents filed as Annexes to the Motion. In particular, the report by Mr. Moussalli highlights some of the security conditions and human rights violations in Rwanda, which he describes as involving, "[g]eopolitical interests of various regional as well as extra regional States," especially the Democratic Republic of the Congo (the "DRC"). At page 6 of the Report, the International Commission of Inquiry is quoted as having reported that; "[t]he danger of the repetition of a tragedy comparable to the Rwandan genocide of 1994, but on a sub regional scale cannot be ruled out."

10. The Chamber recalls the findings in *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, "Decision on Protective Measures for Defense Witnesses" rendered on 13 July 1998, at para. 9, that,

"[...] the appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses."

11. In this case, notice is taken of the documents filed in support of the Motion, which tend to describe a particularly volatile security situation at present in Rwanda and neighboring countries within the Region. This volatile security situation could be endangering the lives of those persons who may have, in one way or another, witnessed the events of 1994 in Rwanda.

12. On this basis, the Chamber notes that the Defense has demonstrated fears pertaining to potential witnesses residing in Rwanda and neighboring countries within the Region only, and has not demonstrated fears as regards potential witnesses residing elsewhere. However, taking into account the representations of the Parties, particularly the documents in support of the Motion and being aware of the present security situation affecting these potential witnesses, the Chamber considers that though the Defense has provided sufficient factual grounds for protective measures to be granted with respect to those witnesses residing in Rwanda and neighboring countries within the Region only, the security situation could affect any potential witness even if residing outside the Region.

As to the Merits of the Measures sought

13. Pursuant to Rule 75(B) of the Rules, the Chamber is empowered to order measures of anonymity such as requested for in measure [1], [2], [3], [4], [7], [9], [10], [12], [13] and [14]. The Chamber recalls the reasoning in *Prosecutor v. Nsabimana,* Case No. ICTR-97-29-I, "Decision on the Defense Motion to Obtain Protective Measures for the Witnesses of the Defense," rendered on 15 February 2000. In the said Decision, the Chamber highlights *inter alia* that in order for witnesses to qualify for protection of their identity from disclosure to the public and the media, there must be, "[...] a real fear for the safety of the witnesses and an objective basis underscoring the fear."

14. In the present case, the Chamber, following this reasoning, and considering the submissions of the Defense, is of the opinion that there is sufficient showing of a real fear for the safety of the potential Defense witnesses were their identity to be disclosed. Consequently, the Chamber grants measures, [1], [2], [3], [4], [7], [9], [10], [12], [13] and [14] as requested in the Motion.

15. As regards measures [5] and [6], the Chamber recalls its "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" in *Prosecutor v. Bicamumpaka* (ICTR-99-50-T) of 12 July 2000, whereby at para. 15 the Chamber granted the measure so that the Prosecutor should designate a pseudonym for each protected Prosecution witness. Similarly, the Chamber considers that such a request is warranted in this case and therefore, grants the Defense requests in measures [5] and [6] as requested.

16. Furthermore, the Chamber grants measure [8] and orders that the Defense disclose information leading to the identification of potential Defense witnesses, at least 21 days before they testify before the Tribunal, in line with its jurisprudence in *Prosecutor v. Nzirorera* (Case No. ICTR-98-44-I), "Decision on the Prosecutor's Motion for the Protective Measures for Witnesses," of 12 July 2000.

17. As to measure [11], the Chamber recalls the findings in *Prosecutor v. Nsabimana and Nteziryayo,* (Case No. ICTR-97-29-I), in the "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses" of 17 June 1999, wherein a similar request was granted to the Prosecutor because the Trial Chamber considered that "[...] granting the Prosecution's request does not lower any ethical duty owed by both Parties." Another request was granted in *Prosecutor v. Bagambiki and Imanishimwe* (Case No. ICTR-97-36-T), "Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses," of 3 March 2000. The Chamber in this case considers that the request in measure [11] is warranted and therefore, grants it.

18. The Chamber furthermore notes that a request similar to measure [15] was granted, as it did not affect the rights of the Accused, in the "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defense Witnesses and Their Family Members" of 20 March 2001 (*Prosecutor v. Nyiramasuhuko,* Case No. ICTR-97-21-T). The Chamber therefore considers that measure [15] is warranted and accordingly grants with modifications to the effect that the Prosecutor request, in writing, leave of the Chamber or one of its Judges, notifying the Defense in sufficient time, to communicate with any potential Defense witness or members of their families. That the Defense, on the instruction of the Chamber or one of its Judges, and with the consent of the witness targeted by such request, or the concerned member of his family or guardian, if such a witness is below 18 years of age, take necessary measures to facilitate such contact.

As to the taking into effect of the protective measures sought

19. The Chamber finally decides that, in conformity with the Tribunal's well-established jurisprudence, such protective measures are granted on a case by case basis, and take effect only once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Section. The Chamber adds that the Defense shall furnish the Victims and Witnesses Support Section of the Registry with all the particulars pertaining to the affected witnesses.

FOR THE ABOVE REASONS, THE CHAMBER:

GRANTS the Defense requests in measures [1], [2], [3], [4], [5], [6], [7], [9], [10], [11], [12], [13] and [14] of the Motion;

GRANTS measure [8], with modifications requiring the Defense to disclose to the Prosecutor information leading to the identification of potential Defense witnesses, at least 21 days before they testify before the Tribunal.

GRANTS measure [15], with modifications to the effect that the Prosecutor request, in writing, leave of the Chamber or one of its Judges, notifying the Defense in sufficient time, to communicate with any potential Defense witness or members of their families. That the Defense, on the instruction of the Chamber or one of its Judges, and with the consent of the witness targeted by such request, or the concerned member of his family or guardian, if such a witness is below 18 years of age, take necessary measures to facilitate such contact.

Arusha, 3 April 2001,

Laïty Kama	William H. Sekule	Mehmet Güney
Judge, Presiding	Judge	Judge

(Seal of the Tribunal)

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AUTHORITY 23

Case No.: IT-04-81-PT

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:
Mr. Hans Holthuis

Decision of:
27 May 2005

PROSECUTOR

v.

MOMCILO PERISIC

DECISION ON PROSECUTION MOTION FOR PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor

Mr. Dermot Groome
Mr. Chester Stamp
Mr. Karim Agha

Counsel for Momčilo Perišić

Mr. James Castle

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

BEING SEISED of a "Prosecution Motion for Protective Measures for Witnesses" filed by the Office of the Prosecutor ("Prosecution") on 24 March 2005 ("Motion"), in which the Prosecution requests:

1. the extension of protective measures ordered in *Prosecutor v. Jovica Stanisic and Franko Simatovic*[1] with respect to two witnesses, identified as B-235 and C-058 ("Prior Protected Witnesses Application"), and

2. with respect to one witness, identified as SS-220, for whom protective measures are sought for

the first time ("First Instance Witness Application")

i. that the Prosecution be relieved of its obligation under Rule 66(a)(i) to disclose the full prior statement of the witness and related exhibits and be permitted to provide a version which is redacted to protect the witness identity,

ii. that the witness be assigned a pseudonym corresponding to the Prosecution witness number already assigned to the witness,

iii. that full disclosure of the witness identity, statement and related exhibits be delayed until 30 days prior to the expected date of his testimony,

iv. that any third party provided with confidential information in preparation of the defence be required to sign a non-disclosure agreement, and

1. the extension of the time limit for service of Rule 66 (A)(i) material that is the subject of the Motion until after the decision of the Trial Chamber on the Motion.

NOTING that the Defence of Momčilo Perišić ("the Accused") has not filed any response to the Motion,

NOTING that the Prosecution submits that delayed disclosure to the Accused and non-disclosure to the public is justified for these witnesses because (1) of the extreme nature of the danger and risk they face, should it become known that they will testify in these proceedings, (2) the witnesses will testify in relation to matters bearing directly on the criminal responsibility of the Accused, matters that relate to high level operations of government agencies, or perpetrator groups identified in the indictment, and (3) in those instances where disclosure to a third party is necessary for the preparation of the defence, the Prosecution submits that a non-disclosure agreement balances the need of the defence to adequately prepare their case with the need to protect witnesses,

CONSIDERING that Article 20 (1) of the Statute of the International Tribunal ("Statute") requires the Trial Chamber to ensure that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses, and that Article 21(2) of the Statute entitled the accused to a fair and public hearing, subject to Article 22 of the Statute, which requires the Tribunal to adopt measures for the protection of victims and witnesses,

NOTING that, with respect to Prior Protected Witnesses Application, Rule 75 (F) of the Rules of Procedure and Evidence ("Rules") provides:

> (F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
>
> > (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
> >
> > (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

NOTING that, in *Stanišić*, the Trial Chamber ordered (1) that the two witnesses be identified by pseudonyms, (2) that their statements and related exhibits be disclosed to the Defence in redacted form, (3) that, unless otherwise ordered by the Trial Chamber, their identities and unredacted

statements and related exhibits be disclosed no later than 30 days prior to the anticipated start of the trial, and (4) that the material relating to these witnesses not be disclosed by the Defence to third parties, except to the extent necessary for the preparation and presentation of the Defence case, in which case non-disclosure agreements be obtained prior to releasing the material to them,[2]

CONSIDERING therefore that, since pursuant to Rule 75(F)(i), the protective measures ordered in that case shall continue to have effect in this case *mutatis mutandis*, the Prosecution's request that identical protective measures be ordered in this case with respect to these witnesses is superfluous,

CONSIDERING further that, pursuant to Rule 75(F)(ii), the appropriate action for the Prosecution to take would have been to disclose the statements of these two witnesses to the Accused, with the statement identified by pseudonym and redacted to remove identifying information, and simultaneously inform the Accused of the existence of the protective measures ordered in respect of those witnesses,[3]

CONSIDERING that delayed disclosure of the identity of a witness to the Defence is governed by Rule 69 (A) and (C) which provides:

> (A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
>
> [...]
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

NOTING that, in *Stanišić*, this Trial Chamber cited with approval the three criteria set out in the *Brđanin* Decision that must be considered when delayed disclosure is requested under Rule 69(A):

a. the likelihood that Prosecution witness will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not to the public,

b. the distinction which must be drawn between measures to protect individual victims and witnesses in the particular trial, which are permissible under the Rules, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future, which are not, and

c. the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused,[4]

CONSIDERING that the requirement that the accused be granted a fair trial dictates that the Trial Chamber should only grant protective measure where it is properly shown, in the circumstances of each individual witness, that the protective measures sought meet the requirements of the Rules, as elaborated in the jurisprudence of the Tribunal,[5]

CONSIDERING that the Trial Chamber is satisfied, on the basis of the information contained in the Motion and its Annexes, that the Prosecution has established that exceptional circumstances exist to merit the protective measures requested with respect to the First Instance Witness Application,

CONSIDERING that, consistent with the general practice of this Trial Chamber, the Prosecution will be required to disclose to the Defence the identity and full statement of this witness 30 days prior to the anticipated start of the trial,

PURSUANT TO Rules 54, 66, 69, 75, and 127 of the Rules,

HEREBY ORDERS AS FOLLOWS:

1. **UNANIMOUSLY:**

   a. the Prosecution First Instance Witness Application is granted;

   b. the witness shall be identified by pseudonym and referred to as SS-220;

   c. the time for disclosing Rule 66(A)(i) material concerning the First Instance Witness is extended, the Prosecution shall disclose the statement and related exhibits of the witness in redacted form within seven days;

   d. the Prosecution shall disclose the full and unredacted statement and related exhibits of the witness no later than 30 days prior to the anticipated start of the trial in this matter, unless otherwise ordered by the Trial Chamber; and

   e. the Defence shall not disclose the material relating to this witness to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case, and shall obtain non-disclosure agreements from any third party as a precondition for release of the material to them.

2. **BY A MAJORITY,** Judge Kwon dissenting:[6]

   (a) The Prosecution Prior Protected Witnesses Application is dismissed.

Done in English and French, the English text being authoritative.

Patrick Robinson
Presiding

Dated this twenty-seventh day of May 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. *Prosecutor v. Stanisic and Simatovic*, "Decision on Confidential Prosecution Motions for Protective Measures", Case No. IT-03-69-PT, 26 October 2004 ("*Stanisic and Simatovic* Decision").
2. *Ibid.*
3. *Prosecutor v. Lazarevic & Lukic*, "Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures", Case No. IT-03-70-PT, 19 May 2005 ("*Lazarevic & Lukic* Decision"), p. 3.
4. *Stanisic and Simatovic* Decision, *supra* note 1, p. 4, citing *Prosecutor v. Brdjanin & Talic*, "Decision on Motion by Prosecution for Protective Measures", Case No. IT-99-36-PT, 3 July 2000, paras 26-38.
5. *Prosecutor v. Mrksic et al.*, "Decision on Confidential Prosecution Motions for Protective Measures and Nondisclosure and Confidential Annex A", Case No. IT-95-13/1-PT, 9 March 2005, p. 3.
6. *See* "Dissenting Opinion of Judge O-Gon Kwon", appended to *Lazarevic & Lukic* Decision, *supra* note 3, p. 7.

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AUTHORITY 24

mo/N-D12/251

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 25 August 2004

THE PROSECUTOR
v.
Aloys SIMBA

Case No. ICTR-01-76-I

DECISION ON DEFENCE REQUEST FOR PROTECTION OF WITNESSES

Office of the Prosecutor:
Richard. Karegyesa
Sulaiman Khan
Ignacio Tredici
Amina Ibrahim

Counsel for the Defence
Sadikou Ayo Alao
Beth Lyons

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence Motion for Protection of Defence Witnesses, filed on 12 August 2004, as well as a motion for an extension of time to file a reply, filed on 19 August 2004;

CONSIDERING the Prosecution's response to the motion, filed on 17 August 2004, and the corrigendum thereto filed on 18 August 2004;

HEREBY DECIDES the motion.

mo/N.D12/250

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial is scheduled to commence on 30 August 2004. On 4 March 2004, the Chamber, at the request of the Prosecution, ordered protective measures for Prosecution witnesses.[1] The Defence filed the present motion for protection of its witnesses on 12 August 2004. On 17 August 2004, the Prosecution filed a response. A copy was made available to the Defence and the Accused during the Status Conference on 18 August 2004. At the same time, the Prosecution read, at the request of the bench, the text of its response, which was simultaneously interpreted into French. On 19 August 2004, the Defence filed a motion requesting a time frame of five days from receipt of a French translation of the Prosecution's motion within which to respond to the motion. On the same day, the Defence sent a written response to the Prosecution in English. A copy was addressed to the Chamber.

SUBMISSIONS

2. The Defence claims that its witnesses have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries as well as outside Africa. In support of its request, the Defence relies upon the general security situation, an article from the *Hirondelle* News Agency, the Prosecution's motion filed on 16 February 2004 and its supporting material, and the decision of the Chamber of 4 March 2004 granting protective measures to Prosecution witnesses. The Defence requests thirteen protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses, including seventeen potential alibi witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecutor on the basis of a "rolling disclosure" no sooner than 21 days before the testimony of each witness. The Defence alleges that the granting of those measures is consistent with the Accused's rights and the interests of a fair trial.

3. The Prosecution asserts that the Defence's motion fails to establish the existence of "exceptional circumstance" showing the existence of a danger or risk for the Defence witnesses. Nevertheless, if the Chamber determines that protective measures are appropriate, the Prosecution agrees that measures 12 (a), (b), (c), (d), (e) and (h) should be granted. The Prosecution objects to measures (f), (g), (i), (j), (k) and (l), submitting that these measures exceed what the Rules of Procedure and Evidence ("the Rules") allow and will impede the Prosecution's power to adequately investigate or interview witnesses.

DELIBERATIONS

Extension of Time for Reply

1. The present Defence motion requests a time frame of five days from receipt of a French translation of the Prosecution's response to the Defence motion. The Chamber reiterates that according to Article 20 of the Statute, Rule 3 of the Rules, and established jurisprudence, the Accused is entitled to be provided with the Indictment, the supporting material and all evidentiary material which will be used in the adjudicative process in a language he understands. There is no entitlement to have translated all documents in the case.[2] The practice of the Tribunal is that Lead and Co-Counsel, who between them have command of both official languages of the Tribunal, co-operate with one another.[3] The Chamber has previously stated that it will consider ordering or facilitating the translation of specific documents on a case-by-case basis.[4]

2. In the present case, the composition of the Defence team is bilingual: Lead Counsel is French speaking but conversant in English, whereas Co-Counsel is an English speaker but conversant in French. One of the legal assistants is a bilingual qualified attorney. During the status conference of 18 August 2004, the written submissions of the Prosecution were read out and interpreted into French, the language of the Accused, who was present. A copy of the Prosecution's response was also made available to the Accused and the Defence. The unofficial French transcripts of the proceedings have been made available. Furthermore, Co-Counsel sent a written reply to the Prosecution's response.

3. In the particular circumstances, the Chamber is satisfied that Lead Counsel and Co-Counsel have been duly able to address the questions raised by the Prosecution's response. The information to which the motion is directed does not fall within that covered by Article 20 (4) (a) of the Statute, and translation is therefore not guaranteed by its provisions. The Rules do not provide for a right of reply to a party's response, and a further pleading on this matter would not materially assist the Chamber. The request for extension of time is therefore denied.

Measures of Protection

4. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for protection of victims and witnesses. Under Rules 69 and 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of victim's identity. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Pursuant to Rule 69 of the Rules:

> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> ...
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

5. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis. In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties.[5]

6. The Chamber considers that the Defence has not provided independent justifying elements that clearly demonstrate that the fears of its potential witnesses are well founded. The main documents relied on by the Defence pertain to the specific situation of the Prosecution witnesses. Nevertheless, the Chamber is mindful of its previous decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.[6] The Chamber notes also that, in its motion filed on 16 February 2004, the Prosecution recognized that Defence witnesses also faced risks.[7] Accordingly, exceptional circumstances have been established.

7. The Chamber notes that the Prosecution objects only to some of the requested measures.

Regarding the "rolling disclosure" (paragraph i), namely the disclosure of the identifying information to the Prosecution not sooner than 21 days before the testimony of each witness, the Chamber relies upon its deliberation in its Decision of 4 March 2004 granting protective measures to Prosecution witnesses.[8] The present case is to be short in comparison with some of the longer trials before the Tribunal in which rolling disclosure has been ordered.[9] As a practical matter, rolling disclosure would not, under these circumstances, significantly enhance the protection afforded to witnesses. Based on a concrete evaluation of the present case, the Chamber shall order complete disclosure of the witness statements to the Prosecution, without redactions to protect the identity of the witness, thirty days prior to the commencement of the Defence case.

8. The Chamber considers that the Defence request for the closed session testimony for each of its protected witnesses (paragraph l) is not necessary at the present stage and goes beyond those in effect for Prosecution witnesses. It is recalled that protective measures may be amended, at any time and when necessary. The measures requested by the Defence at paragraphs (i) and (l) of its motion are therefore denied. The Defence's request that the Prosecution shall make a written request prior to contacting any relative of a potential Defence witness (paragraph j) also exceeds what is normally granted as protective measures in similar cases and should be granted only as regards the potential Defence witnesses.

9. As regards the other protective measures requested by the Defence and to which the Prosecution objects (paragraphs (f), (g) and (k)), the Chamber notes that those measures have normally been granted in previous cases.[10] They do not conflict with the Prosecution's mandate nor impede the Prosecution's power to investigate adequately possible witnesses. Most of the measures sought by the Defence are substantially identical to those previously ordered in respect of the Prosecution witnesses in the present case. The interests of trial fairness strongly favour the adoption of identical measures, which are enumerated below in language customarily adopted in such orders.[11]

10. Finally, in the view of the Chamber, the Defence's request that confidential information only be transmitted by the Registry to officials of the Witness and Victims Support Section (paragraph (c)) is unworkable and unnecessary and consequently denied.[12] Members of the Registry who are not part of the Witness and Victims Support Section may well be called upon to provide assistance for these witnesses in respect of their appearance and protection. Confidential information is handled by the Registry in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion for an extension of time to file a reply; and

HEREBY ORDERS that:

1. The names, addresses, whereabouts, and other identifying information ("identifying information") of any witness for whom the Defence claims the application of this order ("protected witness") shall be kept confidential by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public. If any such information does appear in the Tribunal's non-confidential records, it shall be expunged.

2. The Defence shall assign a pseudonym to each protected witnesses for whom it claims the application of this order. The identifying information of each protected witness, with a corresponding pseudonym, shall be forwarded by the Defence to the Registry in confidence,

and shall not be disclosed by the Registry to the Prosecution unless otherwise ordered. Where necessary to ensure non-disclosure of identifying information, the pseudonym shall be used in trial proceedings, discussions between the Parties in proceedings, and in statements disclosed in redacted form to the Prosecution.

3. Making or publicizing photographs, sketches, or audio or video recordings of protected witnesses without leave of the Chamber or the protected witness, is prohibited.

4. The Prosecution shall not contact, or attempt to contact or influence, whether directly or indirectly, any protected witness in any manner, or encourage any person to do so, without first notifying the Defence which shall, if appropriate, make arrangements for such contacts.

5. The Prosecution shall provide the Registry with a designation of all persons working on the Prosecution team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any persons leaving the Prosecution team and to confirm in writing that such person has remitted all material containing identifying information.

6. The Prosecution shall not attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.

7. The Prosecution shall keep confidential to itself all identifying information of any protected witness, and shall not distribute or disseminate to any person not designated as part of the Prosecution team in accordance with paragraph 5 above, or make public, identifying information in any form.

8. The Defence is authorised to withhold disclosure of identifying information to the Prosecution, and to temporarily redact their names, addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Prosecution.

9. The identifying information withheld by the Defence in accordance with this order shall be disclosed by the Defence to the Prosecutor no later than thirty days before the commencement of the Defence case.

Arusha, 25 August 2004

Erik Møse	Sergei Alekseevich Egorov	Dennis C. M. Byron
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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[1] *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004.

[2] See in particular, *Delalic et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (TC), 25 September 1996; *Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (TC), 6 November 2001.

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[3]
Simba, Oral Decision, T. 13 May 2004 p. 1; Decision on Aloys Simba's Motion for An Extension of Time (AC), 27 July 2004 ("Considering that, to the extent that the Appellant or any members of his defence team are not provicient in English, the essential elements of the Impugned Decision may be effectively conveyed to them without waiting for an official translation").

[4]
Oral Decision, T. 13 May 2004, p. 1.

[5]
Gacumbitsi, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

[6]
Bagosora, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

[7]
The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54, 69, 73 and 75), 16 February 2004, para. 29.

[8]
Simba, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, paras. 6 and 7; *Bagosora et al.,* Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 10.

[9]
Bagosora et al., Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 2; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

[10]
Kajelijeli, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

[11]
Kajelijeli, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004.

[12]
Bagosora et. al., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 5.

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AUTHORITY 25

Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06 (OA 5)**
Date: 14 December 2006

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Navanethem Pillay
Judge Erkki Kourula

Registrar: **Mr. Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Judgment

on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Fabricio Guariglia, Senior Appeals Counsel
Mr. Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence
Mr. Jean Flamme

Legal Assistant
Ms. Véronique Pandanzyla

mo/N.D 12/243

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Thomas Lubanga Dyilo pursuant to the decision of Pre-Trial Chamber I of 28 September 2006, entitled "Decision on Second Defence Motion for Leave to Appeal" (ICC-01/04-01/06-489), against the decision of Pre-Trial Chamber I of 15 September 2006, entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC-01/04-01/06-437),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

(i) The decision of Pre-Trial Chamber I of 15 September 2006 entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" is reversed.

(ii) Pre-Trial Chamber I is directed to decide anew upon the applications of the Prosecutor for the authorisation of redactions that gave rise to the decision referred to in the preceding paragraph, in light of the present judgment.

REASONS

I. KEY FINDINGS

1. A decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision.

2. The presentation by the Prosecutor of summaries of witness statements and other documents at the confirmation hearing is permissible even if the identities of the relevant witnesses have not been disclosed to the defence prior to the hearing, provided that such

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summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

II. PROCEDURAL HISTORY

3. The "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (01/04-01/06-437; hereinafter: "Impugned Decision") of 15 September 2006 that is the subject of the present appeal was prompted by six applications by the Prosecutor to the Pre-Trial Chamber. In these applications the Prosecutor had sought authorisation to disclose to Mr. Thomas Lubanga Dyilo (hereinafter: "appellant") prior to the confirmation hearing copies of certain witness statements, transcripts of witness interviews, investigators' notes and reports, and other documents in a redacted version (see Impugned Decision, page 3, first paragraph, and footnote 6 thereto). While four of the applications were filed *inter partes,* the details of the redactions sought were contained in annexes that were filed *ex parte,* Prosecutor only. The other two applications were filed *ex parte* in their entirety. The Prosecutor amended his applications in filings between 4 September 2006 and 12 September 2006 (see Impugned Decision, page 5, footnote 14 to the first paragraph). The Pre-Trial Chamber held three *ex parte* hearings in closed session with the Prosecutor and the Victims and Witnesses Unit to hear the applications and amended applications of the Prosecutor.

4. The Impugned Decision relates to some of the witness statements, transcripts of witness interviews, and investigators' notes and reports for which the Prosecutor had sought authorisation of disclosure with redactions in order not to divulge the identity of the relevant witnesses to the defence. The witness statements and other documents covered by the Impugned Decision are listed in the Annex to the Impugned Decision, which was filed *ex parte,* Prosecutor only, and marked "confidential." In the fourth paragraph of page 7 of the Impugned Decision, the Pre-Trial Chamber concluded that even if heavily redacted, the unredacted parts of these witness statements and other documents would lead to the identification of the relevant witnesses. The Pre-Trial Chamber considered that under these conditions, it could not grant the applications of the Prosecutor for authorisation to disclose the documents covered by the Impugned Decision to the defence in a redacted version (see Impugned Decision, page 9, first paragraph).

5. Instead of rejecting the applications of the Prosecutor on that basis, the Pre-Trial Chamber considered the conditions under which the content of the witness statements might be introduced by the Prosecutor at the confirmation hearing (see Impugned Decision, page 9,

second paragraph) and ordered the Prosecutor to inform the Pre-Trial Chamber whether the Prosecution

> "(i) withdraws from the Prosecution List of Evidence any of the witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews included in Annex I to the [Impugned Decision], along with the documents attached to those statements, transcripts, notes and reports; or
>
> (ii) assures the Chamber that the relevant witnesses, or some of those witnesses, have freely consented to the immediate disclosure of their identities to the Defence after having been adequately informed of the risks for their security inherent to such disclosure; or
>
> (iii) seeks the authorisation of the Chamber to rely on summary evidence of the above mentioned witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews".

6. In the fourth to seventh paragraphs of page 10 of the Impugned Decision, the Pre-Trial Chamber set out the nature of the information that would have to be included in such summaries.

7. Subsequent to the Impugned Decision, the Prosecutor filed before the Pre-Trial Chamber summaries of the witness statements and other documents covered by the Impugned Decision, requesting the Pre-Trial Chamber to authorise the use of these summaries at the confirmation hearing and their disclosure to the appellant prior to that hearing. On 4 October 2006, Pre-Trial Chamber I rendered a "Decision concerning the Prosecution Proposed Summary of Evidence" (ICC-01/04-01/06-517; hereinafter: "Decision on Summary Evidence"; an *ex parte*, Prosecutor only and confidential version of that decision was registered under the number ICC-01/04-01/06-515-Conf-Exp). In the Decision on Summary Evidence, the Pre-Trial Chamber authorised the use of some of the summaries provided by the Prosecutor and ordered their disclosure to the appellant prior to the hearing. The Pre-Trial Chamber refused authorisation of the use of the other proposed summaries.

8. On 21 September 2006, the appellant filed a "Request for Leave to Appeal the Impugned Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC-01/04-01/06-456, hereinafter: "Application for Leave to Appeal"). On 28 September 2006, the Pre-Trial Chamber rendered the "Decision on the Second Defence Motion for Leave to Appeal" (ICC-01/04-01/06-489; hereinafter: "Decision Granting Leave to Appeal") and granted leave to appeal in respect of the following three issues (see Decision Granting Leave to Appeal, page 15):

> "(i) whether the impugned decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules;
>
> (ii) whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearing;
>
> (iii) whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court's applicable law".

9. On 10 October 2006, the appellant filed a document entitled "Defence Appeal Brief in Relation to Impugned Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC-01/04-01/06-546; hereinafter: "Document in Support of the Appeal"). On 20 October 2006, the Prosecutor filed the "Prosecution's Response to 'Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81" (ICC-01/04-01/06-597-Conf; hereinafter: "Response to the Document in Support of the Appeal"; a public redacted version of that response was registered under the number ICC-01/04-01/06-598). The page and paragraph numbers of the Response to the Document in Support of the Appeal referred to in this judgment are the same in both the confidential and the public redacted versions of that document.

III. MERITS OF THE APPEAL

A. First ground of appeal: lack of factual reasoning

10. As his first ground of appeal, the appellant argues that the factual reasoning given in the Impugned Decision to justify the decision of the Pre-Trial Chamber that the identities of the witnesses should not be disclosed to the defence was insufficient.

1. Relevant part of the decision of the Pre-Trial Chamber

11. The reasoning in relation to the decision of the Pre-Trial Chamber that the identities of witnesses should not be disclosed to the defence appears in the second, third and fourth paragraphs of page 7, and in the first paragraph of page 8 of the Impugned Decision. These paragraphs read as follows:

> "CONSIDERING that the ultimate purpose of the redactions proposed by the Prosecution is to preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because (i) their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and (ii) no other protective measure that could significantly minimise such a danger is currently available and feasible;

CONSIDERING that the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo ("the DRC") has had an impact on the range of protective measures currently available to and feasible for witnesses on whom the Prosecution or the Defence intends to rely at the confirmation hearing; and that, in this scenario, and after having carefully examined each individual case, non-disclosure of identity vis-à-vis the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses;

CONSIDERING, however, that after having thoroughly examined all the witness statements, transcripts of witness interviews and documents for which authorisation for redactions has been requested by the Prosecution under rule 81 (4) of the Rules, the Chamber has found that, even if heavily redacted, the unredacted parts of certain witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews would lead to the identification of the relevant Prosecution witnesses;

CONSIDERING that the Prosecution proposal of delaying the transmission to the Defence of the redacted versions of the said witness statements, transcripts of witness interviews and investigators' notes and reports of witness interviews until a few days before the commencement of the confirmation hearing (i) would be prejudicial to the Defence's preparation of the confirmation hearing due to the number of witness statements and transcripts of witness interviews involved; and (ii) would be an inadequate solution should the charges be confirmed because the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial".

2. *Arguments of the appellant*

12. The appellant argues that the Impugned Decision is not sufficiently reasoned and that this alleged failure "violates the right of the Defence to a fair trial, and may give rise to the conclusion that the decision was arbitrary" (see Document in Support of the Appeal, paragraph 13). To support this claim, the appellant refers to jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY"), which had held that an ICTY Trial Chamber must "indicate its view on all of those relevant factors which a reasonable Trial Chamber would have expected to take into account before coming to a decision" (see Document in Support of the Appeal, paragraph 14). Moreover, the appellant refers to a decision of a Pre-Trial Judge at the ICTY who had held that the provision of sufficient reasoning in applications for protective measures was necessary to enable the accused to decide whether or not to oppose the application (see Document in Support of the Appeal, paragraph 15). In paragraph 16 of the Document in Support of the Appeal, the appellant cites a decision of a Pre-Trial Judge of the ICTY that indicated, by way of example, how an application for protective measures could set out the facts underlying the application without revealing the identity of the witness in question. The appellant notes that the proceedings that led to the Impugned Decision were held *ex parte* and

submits that the *ex parte* character of the proceedings does not obviate "the need to provide particulars in relation to the justification for each witness" and stresses "the impact of the decision on the ability of the Defence to effectively prepare for the confirmation hearing" (see Document in Support of the Appeal, paragraph 15).

13. The appellant submits the following test for a decision pursuant to rule 81 (4) of the Rules of Procedure and Evidence (see Document in Support of the Appeal, paragraph 18):

> "There are thus three components of any factual assessment for protective measures; firstly, that the factual circumstances of the particular witness are of such an exceptional nature that non-disclosure of their identity is required to protect their safety or that of their families, secondly, that it be employed only if less restrictive measures are not available and if the measures in question are necessary; and thirdly, that this measure be employed exceptionally, rather than as a general rule."

14. The appellant argues that in the reasoning of the Impugned Decision, the second component (unavailability of less restrictive measures) was addressed but that the Impugned Decision failed to set out the factual reasoning with respect to the first and the third components of the test (see Document in Support of the Appeal, paragraph 19). In the ensuing paragraphs of his Document in Support of the Appeal, the appellant sets out, mainly by reference to decisions of the ICTY, how the first and third components of the test should be interpreted.

3. *Arguments of the Prosecutor*

15. The Prosecutor, in paragraph 1 of the Response to the Document in Support of the Appeal, states that:

> "On the first issue raised by the Appellant, the Prosecution expresses no view on whether the factual findings supporting the authorization of non-disclosure of identities was adequate, although it believes that the level of specificity required in the findings is not the level proposed by the Appellant. The Prosecution would not oppose the Appeals Chamber remanding the matter to the Single Judge for the confined purpose of permitting her further to specify the factual basis for her determinations..."

16. Furthermore, the Prosecutor submits that the "Single Judge had available to her sufficient factual information to make the required determinations, even if they are not explicit in the text of the Decision" (see Response to the Document in Support of the Appeal, paragraph 18). He submits that the reasoning of a decision should not be seen in isolation but considered in light of the surrounding proceedings and in the context of relevant supporting decisions (see Response to the Document in Support of the Appeal, paragraph 20). The

Prosecutor, making reference to decisions of the ICTY, the International Criminal Tribunal for Rwanda and of the European Court of Human Rights, stresses the importance of reasoned decisions and puts the right to a reasoned decision in the context of the right to appeal and the ability of the Appeals Chamber to review decisions in a meaningful way (see Response to the Document in Support of the Appeal, paragraphs 20 and 21).

17. As to the required level of specificity of factual reasoning, the Prosecutor submits that the argument of the appellant is incorrect. The Prosecutor notes that the example cited by the appellant as to the level of specificity (see paragraph 12, above) related to "the level of detail which could be provided in an application for protective measures, when circumstances permit such detail" (see Response to the Document in Support of the Appeal, paragraph 23). The Prosecutor stresses the difference between a confirmation hearing and a trial and argues that for the purposes of the confirmation hearing, the "Chamber should not be required to articulate the particular circumstances of each witness that justify protective measures" (see Response to the Document in Support of the Appeal, paragraph 24). The Prosecutor also refers to a decision of the Special Court for Sierra Leone in the *Norman* case, which held that "it would be unrealistic to expect either the Prosecution or the Defence, at the pre-trial phase, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation" (see Response to the Document in Support of the Appeal, paragraph 25).

4. *Determination by the Appeals Chamber*

18. In relation to the first ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber erred in not providing sufficient reasoning for its finding that the identities of the witnesses covered by the Impugned Decision should not be divulged to the appellant unless the relevant witnesses consented freely to the immediate disclosure of their identities.

19. The Appeals Chamber notes that the Impugned Decision did not expressly authorise the non-disclosure to the defence of the identities of some of the witnesses of the Prosecutor. Nevertheless, the Pre-Trial Chamber found in the Impugned Decision that, subject to subsequent authorisation by the Pre-Trial Chamber, the use of summaries without disclosure to the defence of the identities of the relevant witnesses would be permissible; this finding was the basis for the Pre-Trial Chamber's order to the Prosecutor. This is confirmed by the Decision on Summary Evidence, where the Pre-Trial Chamber referred to the Impugned Decision and the affirmation therein that the non-disclosure of the identities of the witnesses

was the only feasible protective measure (see Decision on Summary Evidence, page 3, fourth and fifth paragraphs).

20. Decisions of a Pre-Trial Chamber authorising the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning (by way of example, see, in the context of evidentiary matters, rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to "give reasons for any rulings it makes"). The Appeals Chamber notes in this context the judgment in the case of *Hadjianastassiou v. Greece* (application number 12945/87) of 16 December 1992, where the European Court of Human Rights held in paragraph 32 of its judgment that as part of the fair trial guarantees of article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 as amended by Protocol 11 (213 United Nations Treaty Series 221 et seq., registration no. 2889; hereinafter: "European Convention on Human Rights"), courts are required to "indicate with sufficient clarity the grounds on which they based their decision." The European Court of Human Rights went on to state that "[i]t is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him." The cases of the European Court of Human Rights cited by the Prosecutor in the footnotes to paragraphs 19 to 21 of the Response to the Document in Support of the Appeal, although not relating to criminal proceedings, also confirm the importance of a reasoned decision for the right to a fair trial. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible (see *Prosecutor v. Momir Nikolić,* "Judgement on Sentencing Appeal", 8 March 2006, Case No. IT-02-60/1-A, paragraph 96; *Prosecutor v. Dragoljub Kunarac et al.,* "Judgement", 12 June 2002, Case No. IT-96-23 & 23/1-A, paragraph 41). In paragraph 11 of its "Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release" of 1 November 2005 in the case of *Prosecutor v. Milutinović et al.* (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that "as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision". Although in the present case the right of

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the appellant to appeal the Impugned Decision was conditional on the granting of leave by the Pre-Trial Chamber pursuant to article 82 (1) (d) of the Statute and rule 155 (1) of the Rules of Procedure and Evidence, the analysis by the European Court of Human Rights and by the Appeals Chamber of the ICTY in the cases referred to above applies with similar force to the case at hand.

21. The Impugned Decision fails to address properly three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), last sentence, of the Statute). With respect to the endangerment of the witnesses or members of their families, the reasoning of the Pre-Trial Chamber does not provide any indication as to why the Pre-Trial Chamber expected that the security of witnesses or their families may be endangered if the witnesses' identities were disclosed to the appellant. Furthermore, the Pre-Trial Chamber did not indicate which of the facts before it led it to reach such a conclusion. In relation to the necessity of the non-disclosure of the identities of the witnesses, the Pre-Trial Chamber only made a general statement that the security situation in some parts of the Democratic Republic of the Congo had an impact on the availability and feasibility of protective measures, without clarifying the factors which it considered relevant for the protection of witnesses. Thus, the appellant has no knowledge of the facts relied upon by the Pre-Trial Chamber for its decision and how the Chamber applied rule 81 (4) of the Rules of Procedure and Evidence to the facts.

22. The Appeals Chamber is not convinced that the insufficiency of the reasoning is justified because of the *ex parte* character of the proceedings that led to the Impugned Decision. The *ex parte* character of the proceedings itself did not reduce the need for the Impugned Decision to be properly reasoned, but made the provision of proper reasoning more necessary because the appellant could not rely on the context in which the Impugned Decision was made to determine how the Pre-Trial Chamber reached its decision. If the provision of the full reasoning would have led to the identification of the witness in question or would otherwise have disclosed information that needed to be protected, the Pre-Trial Chamber could have considered whether the full reasoning should be provided in a decision marked confidential and *ex parte,* Prosecutor only, with a separate redacted version made available to the defence. Thus, the reasoning of the Pre-Trial Chamber at least could have been reviewed

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properly by the Appeals Chamber in case of an appeal. In such a situation, the reasoning that would not be made available to the defence should be kept to that which is strictly necessary.

23. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the degree of specificity could be reduced because the Impugned Decision related to protective measures prior to the confirmation hearing and not to protective measures prior to the trial. The question raised under the first ground of appeal is not the legal threshold for the authorisation of non-disclosure of the identity of a witness but the adequacy of the reasoning that has to be provided. As has been explained in the preceding paragraphs, the Impugned Decision failed to provide sufficient reasoning in relation to three important elements of a decision authorising the non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence. At a minimum, the Pre-Trial Chamber must provide reasoning to support its findings on these aspects irrespective of the phase of the proceedings.

B. Second ground of appeal: requirements of proportionality and necessity

24. As his second ground of appeal, the appellant asserts that the Impugned Decision failed to meet the requisite test of necessity and proportionality as the Pre-Trial Chamber failed to consider relevant factors enumerated in paragraph 28 of the Document in Support of the Appeal.

1. Relevant part of the Impugned Decision

25. The Pre-Trial Chamber based the necessity of the non-disclosure of the identities of the witnesses upon the premise that no other protective measures were currently available (see Impugned Decision, page 7, second paragraph). The Pre-Trial Chamber discussed and dismissed two potential alternative measures: in the last paragraph of that page, the Pre-Trial Chamber considered that even if the witness statements and other documents were disclosed to the defence with redactions, the relevant witnesses could still be identified. In the first paragraph of page 8 of the Impugned Decision, the Pre-Trial Chamber stated that the proposal of the Prosecutor to delay the disclosure of the redacted versions of the witness statements and other documents until a few days before the confirmation hearing would be inadequate because the identities of the witnesses still would be disclosed a long time before they are called to testify at trial, should the charges be confirmed. Furthermore, delaying the disclosure would be prejudicial to the preparation of the confirmation hearing by the defence. The proportionality of the non-disclosure of the identities of witnesses to the defence was not expressly addressed in the Impugned Decision.

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2. *Arguments of the appellant*

26. As to the necessity of non-disclosure, the appellant argues that the current security situation in the Democratic Republic of the Congo restricts the ability of the defence to carry out investigations and, therefore, it is unlikely that information regarding the witnesses in question would be disseminated in the course of the defence investigation (see Document in Support of the Appeal, paragraph 29). The appellant stresses that the disclosure of the identities of all witnesses prior to the commencement of the trial was of great importance and should take place as soon as practicable (see Document in Support of the Appeal, paragraphs 31 and 32).

27. As to the alleged disproportionality of the infringement of the rights of the defence by the non-disclosure of the identities of witnesses, the appellant emphasises *inter alia* the significance of full disclosure for the fairness of the proceedings and the principle of equality of arms. The appellant submits further that in order to respect the principle of proportionality, the Pre-Trial Chamber should have invited the Prosecutor not to rely on the witnesses in question at the confirmation hearing or should have ordered a stay of the proceedings and the provisional release of the appellant (see Document in Support of the Appeal, paragraphs 35 to 48).

3. *Arguments of the Prosecutor*

28. The Prosecutor in the Response to the Document in Support of the Appeal disputes the defence contention that the principle of necessity and proportionality was not met in the Impugned Decision. He submits that the ruling of the Pre-Trial Chamber was discretionary and that the Appeals Chamber should afford deference to that ruling (see Response to the Document in Support of the Appeal, paragraph 29). The Prosecutor submits further that if the Appeals Chamber finds that the factual reasoning given by the Pre-Trial Chamber was insufficient, the Appeals Chamber "may not be in a position to consider whether the Single Judge applied the principles of necessity and proportionality appropriately" (see Response to the Document in Support of the Appeal, paragraph 27).

29. As to the necessity of non-disclosure of the identities of the witnesses to the defence, the Prosecutor submits that non-disclosure was necessary and that the Pre-Trial Chamber had

> "abundant factual information to sustain a finding of necessity, before and during the *ex parte* proceedings on protective measures from *inter alia* the neutral and independent perspective of the Victims and Witness [sic] Unit, which the Single

Judge took into consideration prior to making the decision" (see Response to the Document in Support of the Appeal, paragraph 32).

30. As to the argument of the appellant that disclosure was necessary in order to prepare for trial, the Prosecutor submits that the timing of trial-related disclosure was not a matter appropriate for determination on this appeal (see Response to the Document in Support of the Appeal, paragraph 34).

31. As to the proportionality of the non-disclosure of the identities of the witnesses, the Prosecutor argues that "the Appellant has not demonstrated that he has suffered such prejudice, as a result of the failure of the Single Judge to further postpone the confirmation hearing, that it renders the measures ordered disproportionate" (see Response to the Document in Support of the Appeal, paragraph 36). As to the alleged failure to consider non-reliance on the evidence, the Prosecutor argues that the Pre-Trial Chamber in the Impugned Decision invited the Prosecutor to consider proceeding without the relevant witnesses as one option. Furthermore, the Prosecutor recalled that the Pre-Trial Chamber had decided in the Decision on Summary Evidence that the Prosecutor could not rely on some of the summaries that the Prosecutor had proposed because of the risk for the relevant witnesses (see Response to the Document in Support of the Appeal, paragraph 37).

4. *Determination by the Appeals Chamber*

32. In relation to the second ground of appeal, the Appeals Chamber considers that for the reasons set out below, it is not in a position properly to review the correctness or otherwise of the application of the principle of necessity and proportionality in the Impugned Decision.

33. Pursuant to rule 81 (4) of the Rules of Procedure and Evidence, a Chamber shall take *inter alia* "necessary steps" to protect witnesses and members of their families. As the Appeals Chamber has explained already in paragraph 37 of its "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" of 13 October 2006 (ICC-01/04-01/06-568), "[t]he use of the word 'necessary' emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary." Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures. As has been explained above in relation to the first ground of appeal, the Impugned Decision lacks sufficient reasoning in respect of the necessity of the

non-disclosure of the identities of the witnesses. In the absence of such reasoning, the Appeals Chamber in the present case is not in a position to determine whether the Pre-Trial Chamber properly abided by the principle of necessity.

34. The principle of proportionality, on the other hand, is not explicitly referred to in the relevant provisions of the Statute and of the Rules of Procedure and Evidence, nor is it mentioned in the Impugned Decision. It may be said that the principle of proportionality is encompassed in the reference to the necessity of the protective measure in rule 81 (4) of the Rules of Procedure and Evidence as well as in the last sentence of article 68 (1) of the Statute, which provides that witness protection measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Again, the lack of sufficient reasoning in the Impugned Decision makes it impossible for the Appeals Chamber to determine conclusively whether or not the Pre-Trial Chamber abided by the principle of proportionality.

C. Third ground of appeal: use of summary evidence at the confirmation hearing without disclosure of the identity of the witness

35. As his third ground of appeal, the appellant argues that summary evidence in relation to witnesses of the Prosecutor may not be used at the confirmation hearing if the Pre-Trial Chamber had authorised the non-disclosure of the identities of those witnesses.

1. Decision of the Pre-Trial Chamber

36. The third ground of appeal arises from an order on pages 9 and 10 of the Impugned Decision. The Pre-Trial Chamber ordered the Prosecutor to inform the Pre-Trial Chamber by 25 September 2006 whether he would seek authorisation for the use of summaries in relation to the witness statements and other documents covered by the Impugned Decision and, if so, ordered him to file by 25 September 2006 the proposed summaries "in which all identifying information of the relevant witness shall be excluded".

37. This decision was based on the consideration that the identities of the relevant witnesses should not be disclosed to the appellant at this stage because "their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage; and ... no other protective measure that could significantly minimise such danger is currently available and feasible" (see Impugned Decision, page 7, second paragraph); that the

redactions proposed by the Prosecutor would still lead to an identification of the relevant witnesses (see Impugned Decision, page 7, fourth paragraph); but that

> "articles 61 (5) and 68 (5) of the Statute and rule 81 (4) of the Rules allows [sic] the Prosecution to request the Chamber to authorise (i) the non-disclosure of the identity of certain witnesses on whom the Prosecution intends to rely at the confirmation hearing and (ii) the reliance on the summary evidence of their statements, the transcripts of their interviews and/or the investigators' notes and reports of their interviews" (see Impugned Decision, page 9, second paragraph).

2. *Arguments of the appellant*

38. The appellant submits in paragraph 65 of the Document in Support of the Appeal that "a proper interpretation of articles 61(5) and 68(5) and Rule 81(5) requires that the prosecution be precluded from relying on summaries at the confirmation hearing, unless it has previously disclosed the corresponding statements to the Defence." The appellant argues that the "purpose of utilizing summaries is to protect the witness in question from disclosure to the public, rather than disclosure to the Defence" (see Document in Support of the Appeal, paragraph 51). He argues further that without access by the appellant to the full statements underlying the summaries "it is impossible for the Defence to contest any assertion of probative value made by the Prosecution" (see Document in Support of the Appeal, paragraph 54). The appellant also makes reference to a decision of the Appeals Chamber of the ICTY, which had confirmed a decision by the Trial Chamber in the *Milosevic* case that a dossier compiled by an investigator of the Office of the Prosecutor of the ICTY containing summaries of witness statements could not be admitted into evidence (see Document in Support of the Appeal, paragraphs 56 et seq.).

3. *Arguments of the Prosecutor*

39. The Prosecutor, in paragraphs 42 et seq. of his Response to the Document in Support of the Appeal, contests the argument of the appellant that summaries can only be used to protect the identity of the witness from the public but not from the defence. He submits that nothing in the procedural law of the Court suggests that summaries may only be used if the identities of the relevant witnesses are disclosed to the defence. In relation to the decision of the ICTY cited by the appellant, the Prosecutor submits that the ICTY jurisprudence is inapplicable because it relates to the use of summaries at trial, not at a confirmation hearing (see Response to the Document in Support of the Appeal, paragraph 46).

4. *Determination by the Appeals Chamber*

40. The Appeals Chamber determines in relation to the third ground of appeal that, for the reasons given below, the use of summaries of witness statements and other documents at the confirmation hearing in relation to witnesses of the Prosecutor whose identities have not been disclosed to the defence prior to the confirmation hearing is, in principle, permissible under the Statute and the Rules of Procedure and Evidence, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

41. The Appeals Chamber recalls that the Impugned Decision itself did not authorise the use of specific summaries at the confirmation hearing in the case of the appellant. Rather, in the Impugned Decision the Pre-Trial Chamber found that the use of summaries was one option that the Prosecutor could choose in relation to the witness statements and other documents covered by the Impugned Decision. Subsequent to the Impugned Decision, the Prosecutor submitted summaries to the Pre-Trial Chamber; the Pre-Trial Chamber authorised the use of some of these summaries in its Decision on Summary Evidence. The Decision on Summary Evidence, however, is not the subject of the present appeal. For that reason, the question arising out of the third ground of appeal is not whether specific summaries may be presented by the Prosecutor at the confirmation hearing of the appellant but whether the use of summaries of witness statements and other documents is, in principle, permissible under the Statute and the Rules of Procedure and Evidence if the identities of the relevant witnesses have not been disclosed to the defence prior to the confirmation hearing.

42. Pursuant to article 61 (5), second sentence, of the Statute the Prosecutor at the confirmation hearing

> "may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial."

43. The use of summaries by the Prosecutor at the confirmation hearing pursuant to article 61 (5), second sentence, of the Statute is not subject to any explicit condition. Neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing. The use of summaries pursuant to article 61 (5) of the Statute leaves the disclosure obligations of the Prosecutor pursuant to article 61 (3) (b) of the Statute and rules 76 et seq. of the Rules of Procedure and Evidence unaffected.

44. The use of summary evidence pursuant to article 68 (5) of the Statute, on the other hand, is primarily a witness protection measure. The provision reads as follows:

> "Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

45. The use of summaries pursuant to article 68 (5) of the Statute affects the presentation of evidence by the Prosecutor at the confirmation hearing; the use of summaries as a protective measure also may have an impact on the obligation of the Prosecutor to disclose evidence prior to the confirmation hearing. Pursuant to rule 81 (4) of the Rules of Procedure and Evidence the Pre-Trial Chamber may authorise the non-disclosure of the identity of a witness. In the present case, the Pre-Trial Chamber, seemingly acting on its own motion as provided for in rule 81 (4) of the Rules of Procedure and Evidence, envisaged that the Prosecutor would present the summaries at the confirmation hearing as evidence and that the Prosecutor would not disclose to the defence prior to the confirmation hearing the underlying witness statements or documents but only the summaries thereof, which would not divulge the identities of the witnesses.

46. This approach by the Pre-Trial Chamber is, in principle, permissible under the Statute and the Rules of Procedure and Evidence. Article 68 (5) of the Statute expressly provides that the Prosecutor may submit a summary of evidence instead of the evidence itself for the purpose of any proceedings conducted prior to trial. This includes the presentation of the summaries at the confirmation hearing pursuant to article 61 (5) of the Statute.

47. The Appeals Chamber is not persuaded by the argument of the appellant that pursuant to rule 81 (5) of the Rules of Procedure and Evidence, the Prosecutor may only rely on the summaries at the confirmation hearing if the underlying statements and other documents have been disclosed to the defence prior to the confirmation hearing. Rule 81 (5) of the Rules of Procedure and Evidence reads as follows:

> "Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused."

48. Thus, rule 81 (5) of the Rules of Procedure and Evidence does not address the introduction into evidence of summaries at the confirmation hearing pursuant to articles 68 (5) and 61 (5) of the Statute; the provision regulates under what conditions the material and information on the basis of which the summaries were compiled may subsequently be introduced into evidence.

49. The Appeals Chamber is not persuaded by reliance of the appellant on the jurisprudence of the ICTY that the use of summaries is impermissible. As the Prosecutor rightly notes in paragraph 46 of the Response to the Document in Support of the Appeal, the jurisprudence cited by the appellant addresses the use of summaries at trial and not at a confirmation hearing. More importantly, article 61 (5) of the Statute expressly provides for the use of summaries at the confirmation hearing.

50. Furthermore, the presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence, as envisaged by the Pre-Trial Chamber, is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), fourth sentence, and (5), second sentence, of the Statute). The use of summaries as envisaged by the Impugned Decision may affect the ability of the suspect pursuant to article 61 (6) (b) of the Statute to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects: first, the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence (anonymous witnesses); secondly, the ability of the defence to evaluate the correctness of the summaries is restricted because the defence does not receive prior to the confirmation hearing the witness statements and other documents that form the basis of the summaries. However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In this context, the Appeals Chamber notes the jurisprudence of the European Court of Human Rights on the use of anonymous witnesses, in particular the case of *Doorson v. The Netherlands* (application no. 20524/92), where the European Court of Human Rights held in paragraph 72 of its judgment of 20 February 1996 that:

> "The maintenance of the anonymity of the witnesses [in a criminal trial] presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6 para. 1 taken together with Article 6 para. 3 (d) ... of the [European] Convention [on Human Rights] can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities..."

51. The Appeals Chamber considers that this analysis of the European Court of Human Rights is relevant for the present appeal as well: where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing. In cases like the present case, the Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents.

IV. APPROPRIATE RELIEF

52. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case and for the following reasons, it is appropriate to reverse the Impugned Decision and to direct the Pre-Trial Chamber to decide anew upon the applications of the Prosecutor for authorisation of redactions that gave rise to the Impugned Decision.

53. The Appeals Chamber has found that the Impugned Decision lacked sufficient reasoning in relation to the finding of the Pre-Trial Chamber that the identities of the witnesses covered by the Impugned Decision should not be disclosed to the defence. The Appeals Chamber considers that this error materially affects the Impugned Decision because it cannot be established, on the basis of the reasoning that was provided, how the Pre-Trial Chamber reached its decision. For that reason, it is appropriate to reverse the Impugned Decision. As the reversal of the Impugned Decision on the basis of the first ground of appeal does not entail a conclusive determination by the Appeals Chamber that the Pre-Trial Chamber could not have authorised the non-disclosure of the identities of the relevant witnesses to the defence in the present case, the Pre-Trial Chamber is directed to decide anew upon the applications that gave rise to the Impugned Decisions, having regard to the findings of the present judgment.

Judge Pikis appends a separate opinion to this judgment in relation to the interpretation and application of article 68 of the Statute and rule 81 of the Rules of Procedure and Evidence.

Done in both English and French, the English version being authoritative.

Sang-Hyun Song

Judge Sang-Hyun Song
Presiding Judge

Dated this 14th day of December 2006

At The Hague, The Netherlands

Separate opinion of Judge Georghios M. Pikis

I agree that the judgment must be reversed for lack of due reasoning as explained in the judgment given. I cannot however associate myself with the approach adopted in the judgment respecting the interpretation and application of article 68 (5) of the Statute and rule 81 (2) and (4) of the Rules of Procedure and Evidence. My position on these issues is reflected in my separate opinion in *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo* (OA6) "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", to be delivered today.

Judge Georghios M. Pikis

Dated this 14th day of December 2006

At The Hague, The Netherlands

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International Center for Transitional Justice

Disarmament, Demobilization and Reintegration

&

Transitional Justice Project

Cambodia Case Study

Peter Bartu & Neil Wilford

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Executive Summary

Disarmament, Demobilization and Reintegration (DDR) processes and Transitional Justice (TJ) measures in Cambodia have been inter-related in a limited manner since DDR was first attempted in 1992 under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC 1991-1993). It is important to understand that DDR and its component parts as conceived under UNTAC was, more or less, managed exclusively by UNTAC's military component; today it is recognized that DDR is a multi-faceted endeavour. Equally, the concept of 'transitional justice' had not yet emerged and even the appearance of a 'human rights' component in UNTAC, was a historical first for a UN peacekeeping operation.

Subsequent government-donor DDR initiatives in 1994, 1996 and through 1999-2006, have floundered, variously, due to political instability, corruption, or, perhaps more importantly, because of different government-donor agendas in approaching such processes. While this can be partly attributed to the dismal legacies of war; namely weak state institutions and factionalism, it is also animated by the nature of Cambodian power politics where the security and justice narratives in particular continue to involve complex negotiations among self-interested leaders and institutions. DDR and TJ initiatives have largely occurred on government terms, the agenda in these areas being set by the dominant political party. the Cambodian People's Party (CPP), under a guise of stability, but with the main focus on controlling resources and outcomes with a steady eye on the consolidation and expansion of political power.

Adding to the complexity of trying to draw a relationship between DDR and TJ initiatives in Cambodia is the manner in which the Royal Government of Cambodia (RGC) has pursued disarmament as a discrete objective, separate to demobilization and reintegration programs. Indeed this is a good example of how the RGC has been able to present and implement a coherent strategy, with local and international partners.

Moreover, overshadowing DDR and TJ trajectories, and indeed, much of contemporary Cambodian history, has been the Khmer Rouge genocide from 1975-1978 and subsequent national and international responses.[1] The DK retained the seat at the UN till 1991 and the international community insisted on DK participation in the 1991 Paris Peace Agreements (PPA), only to see the movement subsequently withdraw itself from the process.

The commencement, in partnership with the United Nations, of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in July 2006, occurs when Cambodia is at its most stable, arguably since 1968.[2] The CPP has consolidated its grip on government

[1] The name 'Khmer Rouges' was coined by Prince Sihanouk in the 1960s. At various times, the organization has called itself the .Communist Party of Kampuchea, the Parti Democratic Kampuchea or simply Democratic Kampuchea. I refer to them as DK or Khmer Rouges interchangeably, for stylistic purposes throughout the paper.

[2] Often also referred to as the Khmer Rouge Tribunal or the KRT.

and the economy and is finessing its historical narrative concerning the DK's defeat, notably Prime Minister Hun Sen's "Win-Win" policies of the early 1990s which are being credited for the collapse of the movement. Also, Cambodia is benefiting from huge infrastructure gains and is expecting significant natural resource revenues (mainly oil and gas) in the mid-term; this is diminishing its reliance on foreign donors and increasing confidence among the ruling elite, but at a time when social inequalities have rarely been so stark.

ECCC proponents hope that the trials will have a 'demonstrative' effect and positively influence Cambodia's 'culture of impunity,' and catalyse wider reforms in the legal and criminal justice sectors.

Genuine reconciliation between and among Cambodians will depend almost entirely on how Hun Sen (and the CPP) dispense their "Victor's Justice." More importantly, Cambodians are increasingly looking for equitable resolution of land and resource disputes, protection from arbitrary abuses of power, and access to education and employment. Everyday and future concerns appear more important than dealing with a past that has been habitually suppressed, overlooked and politicized.

INTRODUCTION

Tracing the linkages between past and ongoing DDR programs with Transitional Justice (TJ) measures (such as prosecutions, truth-telling, reparations for victims, vetting and other forms of institutional reform) in Cambodia is difficult because, fundamentally, such linkages do not appear to exist.

DDR initiatives are commonly looked at in the context of conflict transformation (peace agreements/an end to war) and/or through a development lens; i.e. security sector reform and rightsizing exercises.[3] Cambodia had been at war in one form or another for thirty years, since 1968 – when the Khmer Rouge commenced armed struggle – till early 1999, when the last of the movement yielded to the Royal Government of Cambodia (RGC).

In between, Cambodia has experienced several abrupt, regime changes. Prince Sihanouk, who since 1954 had ruled a relatively peaceful and independent Cambodia, was deposed in a coup by Prime Minister Sirik Matak and Defence Minister Lon Nol, in March 1970. A brutal civil war ensued in which Sihanouk and the Khmer Rouge formed a united front against the US-backed Lon Nol regime, amidst the last rites of the war in Vietnam. Between 1969 and August 1973 Cambodia was subject to massive bombing by the US, with three times more tonnage dropped than on Japan in World War Two.[4]

[3] Security Sector Reform involves rebuilding, restructuring and reforming state security services and developing democratic security-sector oversight mechanisms. Rightsizing is a process where the 'right' size and composition of security forces is determined in relation to its tasks, threat environment and budget.
[4] Evan Gottesman *Cambodia After the Khmer Rouge* (Yale University Press Newhaven 2003) 24. See William Shawcross *Sideshow* (The Hogarth Press London 1993) for a full explication.

On April 17, 1975 the Khmer Rouge took Phnom Penh and commenced a "cultural revolution" aimed at creating a "pure Khmer race."[5] Cities were emptied, money and religion was abolished and 1.7 million Cambodians died through violence and starvation in a Utopian nightmare described by some as auto-genocide.

In late 1978 Vietnam invaded Cambodia, quickly overran the DK and sent its senior leaders and supporters fleeing to the western border. Under Vietnamese tutelage the People's Republic of Kampuchea (PRK) was established and included many former Khmer Rouge cadres. On the Thai-Cambodia border, the DK under Pol Pot reconstituted itself and emerged along with two other Khmer factions; the royalist Funcinpec group and the republican KPNLAF (linked to the Lon Nol regime), as the main opposition to the PRK. This grouping retained Cambodia's seat at the UN until 1991, under the designation of Democratic Kampuchea.[6]

A proxy war ensued in which China, ASEAN and the West lined up in support of the "resistance factions" along the Thai-Cambodia border, and the Soviet Bloc and Vietnam supported the PRK until the withdrawal of the Vietnamese People's Army in 1989.

The Hun Sen-led PRK changed its name to the State of Cambodia (SoC), embraced a 'market economy' and subsequently formed a new political party called the Cambodian People's Party (CPP).

Finally, after protracted negotiations, the four Cambodian factions signed the October 23, 1991 Paris Peace Agreements (PPA) which mandated the United Nations to create a Transitional Authority in Cambodia (UNTAC) to organize and conduct elections and resolve Cambodia's contested sovereignty once and for all. Comprehensive in nature, the PPA also contained military (DDR) provisions and human rights (TJ) provisions (to prevent the return of past practices) but with a forward looking focus enshrined in its key objective; "a continuous process of national reconciliation," among the four factions. The reality was deep distrust among all the factions, and between the DK and the SoC in particular.

Some observers saw the inclusion of the DK in the process as a fatal compromise but it reflected the realities of UN involvement where the DK's chief patron, China, is on the Security Council. In any case, resolving the external elements of the conflict first needed agreement between China and Vietnam (achieved in 1990) and subsequently, the resistance faction's host, namely, Thailand.

Of note, after the Agreements were signed Prince Sihanouk said the DK's inclusion was not his responsibility. "This plan is that of the five major powers ... Let them amend it to read that the Khmer Rouge be left as rebels ... let them change it. I will not object."[7]

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[5] As described by Mey Mak, current deputy-governor of Pailin and one-time private secretary to Pol Pot, at a public forum on reconciliation held in Pailin in February 2006.

[6] It was codified as the Coalition Government of Democratic Kampuchea (CGDK) in 1982 and later as the National Government of Cambodia.

[7] 'Sihanouk Addresses Mass Rally' *Voice of the Cambodian People* 1300 GMT 16 November 1991.

Hun Sen also expressed his frustration: "I just do not understand what a number of countries want really. When I proposed measures to prevent [the return of] the genocidal Pol Pot clique, they said Hun Sen behaved like an obstacle to the political solution. But when we conceded to the Agreement, many countries began expressing concern over the Pol Pot issue...either we have to start negotiating again in order to expel the Polpotists and put them on trial or we have to implement the Paris Agreement."[8]

In any event, the Khmer Rouge withdrew from the peace process in 1992 and the disarmament, cantonment and demobilization process ceased. The three other factions then worked with UNTAC to successfully secure the May 1993 Constitutional Assembly elections and participated in the drafting of a new Constitution and subsequent formation of the Royal Government of Cambodia (RGC) in September 1993. Prior to the elections some 360,000 refugees were repatriated inside Cambodia from the Thai border camps, and predominantly absorbed/integrated in tenuous fashion, into areas under the control of the SoC in Cambodia's north-west.

Political violence was endemic throughout the electoral process and more than 200 Funcinpec activists were recorded killed by members of the SoC.[9] While the royalist Funcinpec party won 45 per cent of the vote to the CPP's 38 per cent, it did not have the required 2/3s majority to rule outright. Under pressure from Sihanouk and the threat of violence and secession from the CPP, and with the tacit acceptance of the international community, Funcinpec's leader and Sihanouk's son, Prince Rannariddh, accepted a power sharing formula with the CPP where the two parties would effectively split government 50:50, with Rannariddh as titular "first Prime Minister." While an accurate reflection of the balance of power in Cambodia, it compromised, some might argue fatally, the democratic gains of holding Cambodia's first ever, free and fair elections.

Meanwhile, the DK continued to fight a low-level war while trying to negotiate a place in government until mid-1994, when the RGC outlawed the organization. Through 1994-96, the coalition-government partners competed with one another in successfully negotiating the capitulation of some DK groups. However, in mid-1997 the RGC coalition disintegrated when the CPP successfully mounted a Coup-de-Etat against Funcinpec, an action now broadly understood as a means of better preparing the CPP for the 1998 national elections, where the CPP could claim that it was solely responsible for the defeat of the DK and simultaneously, broke the prospects for a Funcinpec-DK electoral alliance – feared by the CPP in the emerging electoral contest.

During the violence at least 50 Funcinpec members were killed including key party officials and mobilizers. This had a dramatic impact on Funcinpec's ability to organize in the countryside as did the absence of Funcinpec from Cambodia from July 1997 to March 1998.[10]

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[8] 'Hun Sen Gives 17 Nov News Conference' *Voice of the Cambodian People* 19 November 1991.
[9] Funcinpec suffered the most casualties of all the political parties. See Human Rights Component Final Report UNTAC Phnom Penh September 1993.
[10] See Caroline Hughes *The Political Economy of Cambodia's Transition, 1991-2001* (Routledge-Courzon, London 2003) 122.

Charged with the crimes of illegally importing arms for his bodyguard unit and illicit negotiations with an outlawed group (an allegation that could equally be laid at the CPP's door), Prince Ranaridh was sentenced in absentia, then pardoned and allowed to return to contest the 1998 elections – won by the CPP, but without the 2/3s majority required to govern outright. After a bloody stand-off in the streets of Phnom Penh, Ranaridh again led Funcinpec into a coalition government with the CPP, but this time as a lesser partner, in both form and substance. Hun Sen became the sole Prime Minister of Cambodia.

In parallel, the DK all but dissolved in a renewed series of internal violent purges that saw Pol Pot placed on trial by his own generals in 1997, his eventual death in 1998 and the final surrender of the last pockets of DK remnants in remote parts of Cambodia in 1999.

Through 1999-2006, the CPP steadily consolidated its political and economic power through subsequent elections (2002 Commune elections, 2003 National Elections), each time successfully cajoling Funcinpec back into government. In 2006 it swept village chief elections and Senate elections and took outright control of the legislature.

In March 2006 the Core Group of Donors pledged $600 million dollars to the RGC, the largest promise yet of development funds. Within weeks, China promised $601 million of seemingly unconditional assistance. Preceding the Core Group meeting on March 2, the National Assembly (NA) amended the Constitution to require just 50 per cent plus one – a simple majority – of the NA to form a government. On the same day, Hun Sen fired the two ranking Funcinpec leaders, the Co-Minister of National Defence Nhiek Bun Chhay, and Co-Minister of Interior Prince Norodom Sirivudth. On March 3, Funcinpec chief Prince Norodom Rannaridh resigned as President of the National Assembly.

The changes generally reflect CPP control of all branches of government; the executive, legislature, the judiciary and the security sector, and there are serious concerns that there simply is no separation of powers in Cambodia. But, as the US Ambassador declared: "In reality, [2/3s majority government] hasn't worked very well; it's been terribly inefficient (in fact it was written into the Constitution by the CPP in the first place). [Hun Sen] may have a more efficient and streamlined bureaucracy after this, but he still has to answer to the people. There are serious issues out there like land reform and corruption that the people are fed up with. And now frankly, it's up to the CPP to fix these things."[11]

In this "post-conflict" period the RGC attempted DDR in a development context and also, in passing, finally hammered out an agreement with the United Nations to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC) to bring to trial those Khmer Rouge leaders "most responsible" for the atrocities committed while the group ruled Cambodia between 1975-1979.

[11] Charles McDermid and Vong Sokheng 'RGC counts $601 million blessings' *The Phnom Penh Post* March 10-23, 2006, 1, 7.

Despite huge infrastructure gains in recent years (roads, bridges etc); the combination of demographic challenges, land dispossession, high unemployment and urban migration provide fertile ground for potential violent confrontation with the government. Equally, power appears so entrenched behind the CPP, that people may consider there is no option other than to accept the status quo.

Since 1979, the CPP has completed a journey from penury to hubris in which various strategies have been pursued to co-opt and re-integrate enemies, combatants, political foes and fellow-elite travellers. The overriding consideration has been the preservation of stability, narrowly interpreted by a CPP elite in terms of their own physical, economic and political security, and in the main, broadly supported by the international community – at least to the extent that a consensus never emerged, to seriously challenge this evolution. Post-UNTAC, this journey has been part-underwritten by generous disbursements from the international community and an extraordinary regional economic transformation led by China, Vietnam and Thailand (notwithstanding the set-back of the 1997 Asian financial crisis).

The RGC has played its part in this transformation, through achieving a hard-won stability and by providing bargain-basement raw resources to its neighbours. Further windfalls are anticipated through oil and gas revenues in the Gulf of Thailand, which may realise $2 billion/annum by 2009-2012. Other revenues may materialize from aluminium, iron ore, gold and other mineral deposits in Cambodia's north and north-east or from growth in the economy's current mainstays; the garment industry and the tourism and agricultural sectors. It is in these circumstances that the RGC and the UN commenced the ECCC in July, 2006.

DDR and TJ are emerging disciplines. Contemporary armed conflicts continue to evolve and resolve in unexpected and non-linear ways and the complex relationship between the international community and occupied states, liberated states, conflict states, failed states, parties to conflict and other stakeholders mutates all the time.

There is increasing recognition that "the blurring of the divide between civilians and combatants means that traditional DDR programs, largely focusing on combatants, are insufficient to address the challenges that armed civilians pose for effective and sustainable disarmament and weapons control."[12] Further, the reduction of violence in post-conflict societies is linked to "a broader transformation agenda including security sector reform, reconciliation, (re) establishment of the rule of law, and – ultimately – sustainable development."[13]

Programmes for integrating former combatants and displaced populations have to address the fundamental question "integrate into what exactly?" For example: while Cambodia did undergo a form of DDR (arrested before completion) and TJ (however immature and unrealised) under UNTAC – the preceding question was never seriously addressed in

[12] Cate Buchanan and Mireille Widmer Civilians, Guns and Peace-building: Approaches, Norms and Possibilities *Centre for Humanitarian Dialogue* Summary Paper, December 2005. 1.
[13] Ibid; 1.

planning or implementation. UNTAC did successfully resolve the international dimension of the Cambodia conflict when it conducted the May 1993 elections thereby allowing the international community to engage with a sovereign and legitimate Cambodian government. But, the onus remained with the Cambodians to take responsibility for their own internal reconciliation and development. This was not a complete omission on the part of UNTAC. Indeed, transitional plans for the integration of three of the faction armies were presented – but rejected – by the newly formed government in August 1993. Similarly, international-government interactions concerning the development of Cambodia's security and justice sectors since UNTAC have either been hostage to the turbulent politics of the moment, wallowed in bureaucratic inertia or been more actively side-lined in favour of government initiatives.

This paper examines the DDR processes that have taken place in Cambodia focusing on the linkages, or not, with TJ measures. It concludes with an assessment as to how these linkages (or not) have contributed to the current state of Cambodia in terms of security, levels of militarization, criminal violence and social cohesion. Aspects of the ECCC are also discussed – specifically, the views of former DK combatants.

Each of these processes provides insights into contemporary power politics in Cambodia and notions of justice. In broad terms, it is hard to argue against what Steve Heder describes as an established tradition in Cambodia of "Victors Justice." In part this has been caused by French, US and Vietnamese policies in Cambodia and reinforced by "international apathy and inaction vis-a-vis war crimes, crimes against humanity, persistent patterns of gross violations of human rights and even genocide in Cambodia."[14]

UNTAC 1991-1993

DDR and TJ in Cambodia in the context of a peace process last occurred under the rubric of the Paris Peace Agreements (PPA) signed on October 23, 1991. Collectively the PPA were to "entail a continuing process of national reconciliation and an enhanced role for the United Nations, "with full respect for the national sovereignty of Cambodia." During the transition period, Cambodian sovereignty would reside in the Supreme National Council (SNC), comprising the four Khmer factions and co-chaired by Prince Norodom Sihanouk and Yasushi Akashi, the chief of the United Nations Transitional Authority in Cambodia (UNTAC).

In substance, UNTAC was to regroup and canton 200,000 regular troops, disarm 420,000 (including 200,000 militia) and secure and guard 300,000 weapons and 80,000 rounds of ammunition. On average, each cantonment site would contain 3,846 soldiers and 1.5 million rounds of ammunition. This would occur in the context of broader UN responsibilities for the security of Cambodia's borders and territorial waters, the resettlement of over 500,000 people including the refugees, demobilized soldiers and

[14] Steve Heder 'The Traditions of Impunity and Victors' Justice in Cambodia *Phnom Penh Post* February 19-March 4, 1999. 10.

internally displaced people, and the conduct of nationwide elections.[15] At the time it was the UN's largest undertaking since the Congo operation in the 1950s.

UNTAC Cantonment Table

Faction	Strength	# of deployed positions	Cantonment sites
CPAF	131,109*	397	33
DK	27,422	>100	10
KPNLAF	27,790	114	6
ANKI	17,500	35	3
Total	203,821	646	52

*Figure excludes militia of 220,290 all ranks belonging to the CPAF/SoC.

The cantonment process was to involve a simultaneous, country-wide regroupment of all factions, their weapons and equipment. Under the PPA, the factions had agreed to a phased process of demobilizing at least 70 per cent of their military forces. The DK had in fact sought 100 per cent demobilization but the SoC had easily countered this by arguing that only they could ensure the non-return of the Khmer Rouge. Hence, the factions were to retain 30 per cent of their forces in cantonments and under UN supervision until after elections - at which time the factions would consolidate their militaries, in theory, behind the new government. While the troops were disarmed and cantoned UNTAC would supervise and control a further 54,000 faction police (one UNTAC policeman per 15 local civil police) who were to ensure a neutral political environment for the election.[16]

The numbers are significant. During UNTAC it was thought that the respective factions had each overstated their effective strengths by about two-thirds. That is; they all intended to retain their effective troops for the new army – or for continued struggle, however the process unfolded. So for example the largest faction military, the SoC's CPAF, was thought to only have less than 50,000 troops.[17] The SoC also wanted to canton and demobilise 70 per cent before the wet season (July-October) so manpower would be free for rice planting. The inference was that 70 per cent of the CPAF were seasonal conscripts or had only been hastily recruited since the Vietnamese People's Army withdrew in 1989.[18]

[15] Peter Bartu *The Fifth Faction The United Nations Transitional Authority in Cambodia* (Book manuscript, forthcoming) 83.

[16] Faction police strengths were: CPP - 48,500 police, DK – 9,000 police (UNTAC could not distinguish them from DK soldiers), KPNLF – 400 military police and Funcinpec – 150 military police. Only the SoC could truly claim defacto-government status.

[17] *The United Nations and Cambodia 1991-1995*. 6.

[18] See Peter Bartu *The Fifth Faction* (forthcoming, 2007) 112. Craig Etcheson writes that in August 1989 the National Assembly approved the conscription of all men above the age of 16 who had not enrolled in local or provincial militia forces. Further orders for the conscription of all youth aged 17-30 were issued in May 1991. See *After the Killing Fields Lessons from the Cambodian Genocide* (Praeger, Connecticut 2005). 28-29.

The two smaller factions, the KPNLF and Funcincpec, had only (external) funding for cantonment for three months. The controversy over troop numbers and the lack of distinction between regular professional forces and irregulars and civilians, continues to current day and has hampered all DDR programs and reform efforts of the Royal Cambodian Armed Forces (RCAF).

Also, although UNTAC did set aside $27 million for food and basic shelter (some sites were jungle clearings) and also budgeted $14 million for basic vocational programs for demobilized soldiers (enterprise development, credit facilities, vehicle maintenance and repair, woodworking, carpentry and basic food processing), the reality was that costs for the regroupment, cantonment, disarmament and demobilization, would be borne by the factions – each of which was destitute.[19] Moreover, the war-torn economy could in no way absorb large numbers, however poorly paid, except in basic subsistence agriculture (from where they had come from anyway). But even this was problematic as revealed in the parallel repatriation program for the 360,000 refugees along the Thai-Cambodia border – who also had to somehow be integrated in the countryside.

Repatriation

Each family in the refugee camp population was initially offered two hectares of agricultural land; transport to a final destination in Cambodia of their choice, and housing materials and household kits for 12 months. 90 per cent of the refugees were under the age of 45 and almost half were under the age of 15.[20]

Like military demobilization, in theory, all this had to occur before voter registration commenced in November 1992 so returnees and soldiers alike could register and vote. Two-thirds of the camp populations wanted to return to Cambodia's north-west which was heavily mined and in any case suffered a shortage of good agricultural land. Recognising this, in May 1992, UNHCR broadened the range of discrete options available to include a cash grant of $50 per adult and $25 per child under 12 (with no additional material aid but not excluding the eventual allocation of agricultural land). Ultimately, 87.6 per cent of all returnees would take the cash option.[21]

More than 60 international and local NGOs participated in a broad re-integration program that included literacy training for demobilized soldiers, rehabilitation of schools and hospitals, wells and latrines, small credit schemes and some 400 days free food from WFP and the Cambodian Red Cross.[22] But, many of the returnees would be forced to uproot and flee, some more than once, in renewed fighting after UNTAC. In 2006, still,

[19] S/23613, 19 February 1992 *Report of the Secretary-General on Cambodia containing his proposed implementation plan for UNTAC, including administrative and financial aspects* para 154.
[20] S/23613, 19 February 1992 *Report of the Secretary General on Cambodia containing his proposed implementation plan for UNTAC, including administrative and financial aspects* para 136.
[21] *The United Nations and Cambodia 1991-1995* (UN DPI New York 1995) 33.
[22] Ibid; 40.

the rural population of the north-west remains vulnerable; unemployment and land tenure being the most pressing issues.

In hindsight the mutual obligations bestowed by the Agreements, on UNTAC and the four factions, seem astonishing. It is not clear that such an operation could be repeated today, so cheaply and in such a short time-frame. The cost of maintaining UNTAC troops in the field in 1992 was estimated at $8.50 per day. In stark contrast the cost of feeding a Cambodian soldier in a cantonment site was estimated at 57 cents per ration, which the UN wanted to reduce to just 22 cents.[23] Conversely, daily subsistence payments for UNTAC civilian staff was around $150/day.

While all the refugees were successfully repatriated, the DDR process ceased after only 52,000 troops had been cantoned (of which 38,000 had been released on agricultural leave after surrendering their weapons and ID cards).[24] The 55,000 weapons collected by UNTAC were to be handed over to the government emerging from the elections; the UN was to be only a temporary caretaker. But, in the lead-up to the May 1993 elections, UNTAC released some of the weapons to the KPNLF, the SoC and Funcinpec, so they could help defend the election in their zones, against DK attacks.

On June 10, 1993 the military chiefs of Funcinpec, the SoC and the KPNLF agreed to form a single army, eventually known as the Royal Cambodian Armed Forces (RCAF). In mid-July the Security Council agreed to provide $20 million in emergency financial assistance to Cambodia. The funds were to be used to pay the salaries of civil servants, police and the military for a period of three months to reduce banditry, improve stability and assist an orderly transfer to the new government.[25]

Through July-September 1993, UNTAC paid salaries to 127,464 troops in twenty-one provinces in Cambodia, including the CPAF navy.[26] By faction this comprised 94,706 CPAF, 16,967 KPNLAF and 15,791 ANKI. All three factions had to find recruits to match their claimed numbers. Some soldiers attended several pay parades, some had forged ID cards or none at all and some ID cards were issued on the spot. Children as young as thirteen and old men were also paid.[27]

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[23] Peter Bartu *The Fifth Faction* 118.

[24] S/24800 *Report of the Secretary General on the implementation of Security Council resolution 783 on the Cambodia peace process* 15 November 1992 para 17. The World Bank claims only 28,000 soldiers were demobilized. See Cambodia Consultative Group Meeting May 24-26, 2000 Paris, France. *Military Demobilization Program Current Status and Key Issues.* Prepared by the World Bank in consultation with the Government and Development Partners. 2.

[25] S/26095 *Letter dated 14 July 1993 from the Secretary-General to the President of the Security Council concerning emergency financial assistance during the transitional period in support of the process of restructuring and adjustment of the administrative, police and military structures of the Interim Joint Administration in Cambodia.*

[26] The World Bank put the number of troops at 140,000 troops, after amalgamation. See Cambodia Consultative Group Meeting May 24-26, 2000 Paris, France. *Military Demobilization Program Current Status and Key Issues.* Prepared by the World Bank in consultation with the Government and Development Partners. 2.

[27] Peter Bartu *The Fifth Faction* 262.

Almost immediately, the RCAF went to war against the Khmer Rouge in a series of offensives in central and northern Cambodia. In addition to pressuring the DK the offensives were also designed to test the loyalties of the smaller factions; they led the assaults and propaganda efforts to win over their erstwhile Khmer Rouge comrades. Since UNTAC's arrival a steady stream of DK soldiers had presented themselves to the UN; they were tired of fighting, living a hard life in the forest and wanted to lay down their arms. 200 DK soldiers had defected to UNTAC by the end of 1992.[28] A further 1,300 had come across by September 1993 and by February 1994 approximately 3,000 DK soldiers had defected to the new government.[29] This represented between one-fifth and one-quarter of the movement's core fighters. The government placed them in Russey Keo and Dei-eth re-education camps on the outskirts of Phnom Penh. It was the beginning of the end for the DK.

UNTAC's DDR mandate was devised as a support measure for creating a neutral political environment for the elections. Disarming and cantoning the military factions were seen as prerequisites, and the planning and timings for the process were driven accordingly, like the repatriation process. The factions were to bear the brunt of the costs yet they were hardly in a position to meet the "immediate economic and social needs of the ex-combatants at the time of demobilization."[30] Nor could the economy absorb them after thirty years of war. UNTAC was also not funded for this purpose and in any case much of the countryside experienced high levels of insecurity and near war-like conditions throughout UNTAC's tenure; this was exacerbated by the electoral contest. Only lip-service was paid to gender issues – a head count of women bureaucrats on UNTAC staff was requested by UN headquarters in New York.

There was no relationship between DDR and TJ measures. It is not immediately clear if there could have been, given how contested Cambodian history remained and the forward looking framework of the PPA. In any case, Cambodia was shattered. The new government simply had too many competing priorities; amalgamating several factions, fighting the Khmer Rouge and beginning the task of reconstruction with a zero revenue base when even the unity of the dominant political faction, the CPP, was in doubt.

The UNTAC operation was sensitive to charges of neo-colonialism, drew heavily on its distinctly "Asian" flavour (consensus approaches) and was encouraged to cut-costs. DDR processes were mainly managed by the UN's military component; UNHCR (and partners) worked, with mixed success, in integrating the refugees. The Human Rights component documented abuses but, in aggregate, the UN was unable to modify or arrest violent modes of behaviour, nor create the conditions for national reconciliation.

DDR and TJ 1994-2006

[28] Ibid; para 17.

[29] USAID several projects to assist with the re-integration of defecting Khmer Rouge soldiers in 1994. See Craig Etcheson *After the Killing Fields* Lessons from the Cambodian Genocide (Praeger Westport, Connecticut 2005) 44.

[30] Final Report *Stockholm Initiative on Disarmament Demobilization Reintegration* (Ministry of Foreign Affairs Sweden 2005)14.

By May 1994, the three factions had been amalgamated and restructured into 12 Divisions with ranks being awarded on a proportionate basis by faction.[31] The integration process led to what one RCAF general described as "anarchic recruitment" and "anarchic promotions." Suddenly, the RCAF had more than 2,000 officers of General rank; an over-accommodation of faction sensibilities on the one hand, but a rational, mercantile process on the other. This number was reduced to 400 in 1995 but by 2006 it had grown again to 613.

In 1994 the RCAF was still a grouping of semi-autonomous armed units highly suspicious of each other.[32] Banditry and lawlessness was widespread and weapons were as ubiquitous as employment was not. The ill-disciplined military was as great a threat to Cambodia's recovery as the outlawed Khmer Rouge. Policies were in part designed to keep military personnel out of urban centres. A simple way of dealing with both was to keep the RCAF in the field and fighting the DK. As a reward the government transferred responsibility for timber contracts to the Ministry of National Defence (MND). Although this would be transferred back to the Ministry of Finance (MoF) in August 1994, the sector continues to be dominated by the security sector. Autonomy for the armed forces to exploit natural resources and engage in trans-national business without revenues being directed through the state, was established in the early 1980's strengthened in the 1990's and would become a source of increased national tension by 2006.[33]

Recognizing it could not afford a large military in 1994 the RGC sought international assistance to underwrite DDR packages, including security sector reform. In parallel, the RCAF general staff were allocated 6 per cent of all concession land across the five military regions in which Cambodia is divided. Soldiers were to be granted leasehold title for subsistence plots while adjacent 'development land' was to attract agro industries and provide employment opportunities for demobilized soldiers.[34]

In late 1994 the RCAF halted retirement plans of military personnel in anticipation of a "significant pay-off from donors in the form of benefits for demobilised soldiers."[35] Allied to this was the passing of legislation that would guarantee a pension for retired soldiers.[36] The RCAF was preoccupied with controlling the Defence budget, determining its future on its own terms and obtaining recognition for the sacrifices of the past. The

[31] S/1994/645, 31 May 994 *Final Report of the Secretary-General on the United Nations Military Liaison Team in Cambodia* para 4.

[32] Dylan Hendrickson 'Cambodia's Security Sector Reforms: Limits of a Downsizing Strategy' *Conflict Security and Development* 1:1 1999. 70.

[33] See Evan Gottesman *Cambodia after the Khmer Rouge* pp 230-231 & 298 and also 'Business by the Gun; Lethal Consequences of failed demobilization' Colonel (Ret.) David Mead in *Accord 98* edited by Dylan Hendrickson and ADHOC *Human Rights Situation Report* 2005.

[34] Col. David Mead (Ret.) 'Why does Cambodia need conscription?' *The Phnom Penh Post* November 11, 2001.

[35] Dylan Hendrickson 'Cambodia's Security Sector Reforms: Limits of a Downsizing Strategy' *Conflict, Security & Development* 2000 1:1 70.

[36] Kingdom of Cambodia, Law on Retirement and Infirmity Pensions for Military Personnel of the Royal Cambodian Armed Forces, October 28, 1994.

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key issue was that these institutional pre-occupations came first, along with keeping the new coalition government stable and viable. In 1994-1995 the RCAF had mounted a series of disastrous offensives against the DK. Despite 165,000 troops on paper "in some divisions only 200 out of 2,000 were in reality available."[37] Troops had either bought their way out of the fighting, simply didn't exist, or had abandoned military life altogether.

In 1995-1996 the government and the World Bank prepared a Cambodian Assistance Veteran's Assistance Program (CVAP) targeting some 40,000 RCAF soldiers and 3,000 DK defectors. The program focused on assistance to the disabled, chronically ill and the spouses of deceased soldiers and an implementing agency, a National Commission for Demobilization and Reintegration of War Veterans and a General Secretariat (later superceded by the Council on Demobilization of the Armed Forces CDAF), was established.[38] However, the program was never implemented due to the political turbulence of the time and the 1997 coup.[39] As described by a Cambodian General: "the political reality, of the time, was that recruitment was more important for stability than demobilization."

Winning over an imploding Khmer Rouge

A critical parallel development was Hun Sen's ability to win over Ieng Sary and the DK units based in and around Malai and Pailin in 1996. The "win-win" strategy of "divide, isolate, finish, integrate and develop" was the re-application of a 1979 formula aimed at ending the DK's political and military structures. At the time Hun Sen made many trips to Bejing to discuss bilateral political and military ties. Although he claims he never discussed the Khmer Rouge issue, he knew that the Khmer Rouge leadership believed otherwise. On his part, Hun Sen described it as "psychological warfare."[40]

The first units won over were in Kampong Speu province in 1995. These cadres were enticed down from the mountains with various incentives, sometimes by relatives from the government side. After successful "re-education," (usually involving a cooling-off period in Phnom Penh, socializing with now, fellow-RCAF officers and formal integration into the RCAF), these officers were then sent back into the field to woo over their erstwhile DK colleagues and present themselves as living-proof of Hun Sen's commitment to assure defecting Khmer Rouge of their physical safety and survival, the right to work, to carry out their professions, and the security of their property.[41]

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37 Interview with senior RCAF General, Phnom Penh March 31, 2006.
38 Cambodia Consultative Group Meeting, May 24-26, 2000. 2.
39 One source who participated in designing the program on behalf of the World Bank describes these plans as detailed and far-reaching but ultimately not politically viable at the time. Conversation with Nat Colleta, ICTJ seminar New York July 13, 2006.
40 Interview with Prime Minister Hun Sen June 22, 2006.
41 Closing Remarks for the International Conference Dealing with a past Holocaust and National Reconciliation: Learning from Experiences. 28- 29 August, 2006, Phnom Penh, Cambodia by His Excellency Mr. Sok An, Deputy Prime Minister and Minister in Charge of the Office of the Council of Ministers, Chairman of the Royal Government Task Force for the Khmer Rouge Trials.

The last point is important. At the time the DK were undergoing fatal internal squabbles over private-property rights, among other renewed curbs on life in the movement. DK commanders and Ieng Sary's narrative of the dramatic period place these internal imperatives as the major reason for defection, rather than Phnom Penh initiated policies. Whichever, both internal and external factors reinforced each other. Working through Thai military intermediaries, Ieng Sary, I-Cheann and Mey-Mak, met with RCAF commanders in Thailand to negotiate their breakaway. This included a specific amnesty for Ieng Sary (for his 1979 in absentia conviction and the 1994 law), defacto-amnesty for all others, autonomous control of their region and government protection from attacks by the remaining Khmer Rouge.[42]

The former Khmer Rouge leaders were also expected to join the CPP. When I-Cheann attempted to join the Sam Rainsy Party in early 1998, he was immediately summoned to Battambang province and read the riot act. Subsequently, all ex-DK leaders have faithfully remained with the CPP.[43]

As a consequence of these continuous defections through 1994-1998, the RCAF continued to grow, at least on paper, and DDR programs remained on the shelf. After the 1998 national elections and the re-establishment of a CPP-Funcinpec coalition government, donors, driven by budgetary concerns, placed DDR back on the table. National Defence in 1998 (the RCAF, the national police and the Gendarmerie) accounted for over half of government recurrent expenditures (higher than the economic and social services sectors combined).

DDR Round Three

Following the re-integration of the NADK remnants, the RCAF claimed it had a total force of 155,000 troops and in February and May 1999, the RGC presented a revamped CVAP program to donors taking the extra numbers into account. The initial goal was to reduce the RCAF by 31,500 soldiers *after the ghost soldiers and widows* had been taken out. In theory, any savings obtained would be used to fund the social sectors.[44]

Ultimately, the demobilization program was to cut the RCAF by "one-third," to just under 100,000 soldiers. 15,000 were to be demobilised in October 2001 and 15,000 in 2002 "into the peacetime life of a civilian."[45] The total program cost $45 million of which the RGC would pay $7.2 million. Donors resisted an earlier plan to hand out cash payments of $1,200 per soldier. Instead, they received a $240 cash payment, equal to about one year's pay and allowances, based on the typical $20/month salary.

[42] Interview with Mey Mak, Deputy-governor of Pailin February 2006.
[43] One source claimed that KR leaders who joined the SRP in Kampot province in 1998 were subjected to harassment and even jail for past crimes, and development assistance was withheld to their areas. Interview, Kampot May 19, 2006.
[44] Cambodia Consultative Group Meeting May 24-26, 2000 Paris France. *Military Demobilization Program Current Status and Key Issues.* Prepared by the World Bank in consultation with the Government and Development Partners. 5.
[45] Matt McKinney & Phann Ana 'When the Fighting is Over, former Khmer Rouge Troops Face an Uncertain Future' *The Cambodia Daily* September 15-16, 2001, pp8-9.

The government's plan also promised mosquito nets, farming implements, animals or "even a motorbike."

In 2000 the RGC launched a pilot-demobilization program for 1,500 soldiers (costing 2.5 million) with the support of the World Bank, the United Nations World Food Program, Japan, Sweden, the Netherlands and Germany.[46] The project focused on community development projects in the four pilot provinces, Battambang, Banteay Meanchey, Kampot and Kampong Thom, recognizing that many soldiers had been out of active combat, some for years, and the majority had already settled, for the most part, in local communities and engaged in farming and other rural development activities.

Indeed, a GTZ survey in Kampot and Kampong Thom provinces gave a consistent and coherent picture that most soldiers were already 'de facto' demobilized; "70-90% already live in communities and are active in farming activities."[47] Under the circumstances, donors preferred to allocate resources to long-term development activities rather than the "transitional and short-term needs of the veterans." An allied concern was that the RCAF's pilot demobilization project would commence before a security sector reform strategy had been developed, though a defence White Paper had been produced in 2000.[48]

Disarmament of the demobilized soldiers was the sole responsibility of the RCAF although between 1999 and 2006 the EU would assist the RGC in appropriately disposing of the surplus arms. Notwithstanding this, a perennial concern of the project donors was that there where no clear guidelines for disarming the soldiers and disposing of the surplus weapons.[49]

Criteria for demobilization had been worked out by the Ministry of National Defence (MND) with priority accorded to Category Two soldiers; i.e. the disabled, chronically ill and the elderly. This group represented some 10.14% of the RCAF or 13,334 personnel in 2000 and had been "specifically targeted because of their unfitness for service and the resulting high cost to the military."[50] For example, in the 2000 pilot demobilization project in Samlot district, Battambang province the vast majority of Khmer Rouge recipients were disabled. They were to receive supplies in four shipments over a year:

- A cash payment, a medical check-up, 150kg of rice, 2.55 kg of fish, 3.44 kg of cooking oil, one kg of salt, one mosquito net, one blanket, one mat and one krama.
- A second package of a long knife, axe, hand hoe, big hoe, saw, two tents, two hammocks, one kg of nails, two water baskets, boiling kettle, rice pot, one kg of cleaning powder, basket and some vegetable seeds.

[46] Kao Kim Hournn. *Military Reform, Demobilization and Reintegration in Cambodia* 'Measures for Improving Military Reform and Demobilization in Cambodia' CICP Policy Paper Issue No. 6, Phnom Penh, Kingdom of Cambodia 2002. 2.
[47] Cambodia Consultative Group Meeting May 24-26, 2000 Paris France. 16.
[48] A white paper is a statement of a government's security and defence policies based on a comprehensive analysis of political, security, economic, social, and environmental threats. Generally, the paper establishes the security sector's roles, functions and missions as well as resources and funding requirements.
[49] Cambodia Consultative Group Meeting May 24-26, 2000 Paris France. 19.
[50] Cambodia Consultative Group Meeting May 24-26, 2000 Paris France. 17.

- The third package comprised a bicycle, blanket, mosquito net, mat, three shirts, and one krama.
- A final package of 150kg of rice, six tins of fish, one jar of cooking oil and one kg of salt. It was also envisaged that longer-lasting support might also include a larger item per soldier; "perhaps a motorbike, a water pump, housing materials or a draft animal."

The soldiers complained that it was not enough to buy sufficient land or animals to run a profitable farm. In effect the demobilization effort was a "huge shopping trip for the government," purchasing and delivering thousands of pieces of equipment. Re-integration assistance was to be developed in the form of support to "community based reintegration activities, including: information, counselling, and referral; skills enhancement; micro-projects; community social and physical infrastructure; community social activities and other vocational training. For example; in Kampot province 40 former soldiers were trained as truck drivers.[51]

In another example in November 2001, of 1,500 soldiers in DK Brigade 22, 500 were transferred to the Pailin municipal military and 1,000 old and lame soldiers were demobilised.[52] By December 25, 2001 the government had demobilized 15,000 soldiers.[53] The second tranche of 15,000 was to be demobilised through end 2002, as part of the $42 million demobilization effort.[54]

By 2002, concerns about the demobilization process were beginning to emerge. High ranking officers were not being retired and non-performing soldiers (those working elsewhere but still on RCAF roll-books) also needed to be removed. The government was specifically asked to accelerate the disbursement of allowance packages to demobilized soldiers, strengthen the monitoring mechanism for the exercise, provide vocational training and psychological counselling to soldiers, share information and set up a civil society support group and to collect the weapons from demobilized soldiers.[55]

At no point was there a suggestion that the demobilization and reintegration process be linked to any transitional justice measures. As noted above, concern was also expressed that the process was essentially de-linked from disarmament. The focus in the main was on assisting reintegration through a broader, development lens and by improving the degree of state-provided care and services for veterans in general – driven by donors on the basis that savings from such demobilizations – could be ploughed back into social services. Not so, said the RCAF's Commander-in-Chief Ke Kim Yan in April 1999; any

[51] Cambodia Consultative Group Meeting May 24-26, 2000 Paris France. 9.
[52] Thet Sambath 'RCAF to Dismantle Former KR Brigade 22' *The Cambodia Daily* November 7, 2001. 12.
[53] Ed. Kao Kim Hourn 'Civil Military Relations in Cambodia: Issues, Challenges and Prospects' Cambodian Institute for Cooperation and Peace, Phnom Penh, 2002. VI.
[54] David Kihara '1,200 Soldiers Set for Demobilization' *The Cambodia Daily* October 31, 2001, 8.
[55] See Kao Kim Hourn 'Military Reform, Demobilization and Reintegration: Measures for Improving Military Reform and Demobilization in Cambodia' *The CICP Policy Paper* Issue No. 6 Cambodian Institute for Cooperation and Peace, Phnom Penh, Cambodia, 2002. 2-13.

savings from demobilization would be returned back into professionalizing the RCAF, mainly via higher salaries.[56]

In 1999, Government spokesman Khieu Khanharith, suggested, rather ambitiously, that the armed forces would be reduced from 140,000 to between 30,000 and 40,000 troops by 2005: "If we can pacify the country, we can downsize the military, make the army more professional and reduce its role in politics."[57] If this was truly the government's intention then it has been ignored by the military.

By end 2002, GTZ had ceased its support to the demobilization program as there were no longer any soldiers left to demobilise and "identifying specific groups or individuals was close to impossible," and the majority of ex-combatants had already returned to subsistence agriculture by 2001-2002. Also, the proposed transition packages such as "giving away motorbikes and sewing machines" was dividing communities rather than uniting them," and as a result GTZ abandoned the demobilization program and focused instead on decentralisation.[58]

Finally, the World Bank suspended its involvement in Cambodia's efforts to demobilise the RCAF in July 2003, after declaring massive mis-procurement in its $18.4 million project.[59] The government was forced to repay the Wold Bank $2.8 million or risk all other Bank projects.[60]

In 2006 there were ongoing continuous complaints across the country that disabled soldiers received their salaries and pensions between 150-200 days late with blame shifting between the Ministry of Finance and the Ministry of Social Affairs, Veterans and Youth Rehabilitation. Up to $200,000 earmarked for disabled veterans in Kampong Cham province was embezzled by the provincial social affairs department in 2005, allegedly funds had only been distributed in three of Kampong Cham's 16 districts. Of the province's 1,823 disabled veterans only 368 had received payments.[61]

In August 2006, 200 demobilized soldiers from Banteay Meanchey province camped in front of the National Assembly to protest the sale by their commanders of land earmarked for them and their families in 2001.[62] In Takeo province, the practice of "rich people

[56] Dylan Hendrickson 'Cambodia's Security Sector Reforms: Limits of a Down-sizing Strategy' *Conflict Security and Development* 1:1. 79. Citing *Phnom Penh Post* 'The Delicate Challenge of Downsizing RCAF'. 13-29 April 1999.
[57] Michael Richardson 'With Khmer Rouge Collapse, Pressure Grows to Rein in Army' *International Herald Tribune* January 11, 1999.
[58] NTF: Informal Interview with Mr Marcos Smith, Civil Peace Service, DED (Deutscher Entwicklungdienst) January 31, 2006 Preliminary Investigation into GTZ Demobilization Programme.
[59] Yun Samean 'Retirement Age for Low Ranking Soldiers Slashed' *The Cambodia Daily* March 2, 2006, 12.
[60] Erik Wasson and Phann Ana 'Funds Frozen as World Bank Alleges Misuse' *The Cambodia Daily* May 29, 2006.13.
[61] Lor Chandara and Samantha Melamed 'Governor: Officials Stole Disabled Veteran's Aid' *The Cambodia Daily*, February 24, 2006. 13.
[62] Pin Sisovann '200 Ex-Soldiers Construct Protest Camp Near NA' *The Cambodia Daily* August 31, 2006. 16.

buying the identities of poor, disabled people for a lump sum of money and then collecting their monthly disability pensions in return" was reported in August, 2006. Disabled people in the province had been complaining for months about reductions and late payments of their pensions.[63]

Military veterans in Cambodia have no associations to speak up on their behalf; they have no voice. Demobilized personnel are simply transferred to the Ministry of Women's and Veteran's Affairs, on lower allowances.[64] This process had been halted in 2003 "due to a lack of funds" but at an inter-ministerial meeting between Finance, MND and Social Affairs on March 30, 2006 it was agreed that another 7,500 personnel would be transferred between ministries by end 2006. Further transfers would be made in 2007 to bring troop numbers down to 100,000 with an overall target strength by end 2009, of 70,000-80,000, as more and more Category Two personnel were transferred. In reality, there would be minimal actual demobilization as the number of Category Two personnel will have greatly increased by 2009.[65] As in 1999, the MND will, in theory, plough any savings from personnel transfers back into upgrading facilities and improving conditions of service – and not channelling the savings into national social services – the primary rationale for DDR in Cambodia in the first place.

The RCAF in effect, has been implementing a pension and retirement scheme that has its basis in legislation from 1996.[66] By and large, this has been a process of natural attrition. Demobilization, when it did occur, happened in predominantly Khmer Rouge areas and the target groups were the most vulnerable elements, the aged, infirm and disabled. In effect it too, was a retirement and pension process rather than a DDR program. Troops who had returned to subsistence farming after the various defections in the early-mid 1990s, often found themselves recalled through 2000-2002 to attend demobilization parades and receive reintegration packages. Perhaps it provided a form of closure on their former lives, and any compensation package however meagre, must have been welcomed. However, for unit commanders, demobilized soldiers translated into a loss of revenue, and loss of a personal resource (primarily through lost salary taxes for the commander) with important implications for future force development.

Proposed Conscription – The Law on Military Service

Institutionally, the RCAF was getting old. Conscription was first mooted in the RCAF's *White Paper 2001* (and its supplement, the *Defence Strategic Review 2002*), as "selective compulsory military service" because, in a rather frank disclosure, the RCAF might only have "commanders and aging officers with no fit, strong and young soldiers to perform

[63] Pin Sisovann 'Leaflets Charging Corruption Are Scattered in Takeo' *The Cambodia Daily* August 11, 2006, 17.
[64] Lao Mong Hay 'Redefining the Role of Military in a Post-Conflict Cambodian Society' in Ed. Kao Kim Hourn 'Civil Military Relations in Cambodia: Issues, Challenges and Prospects' Cambodian Institute for Cooperation and Peace, Phnom Penh, 2002. 20.
[65] Interview with senior RCAF General, May 2006.
[66] See Chapter III Responsibility for Managing and Paying for the Retirement Pension System and For the Disabled, Article 14, Law on the Implementation of the Regime of Retirement and Disability Pensions of Military Personnel ANUKRET dated March 27, 1996.

their roles and responsibilities."[67] Where were the troops? By 2004, the average age of the RCAF was 40 years.[68]

The very concept seems absurd in the context of the demobilization program, the first period of sustained peace in Cambodia since 1968 and a government commitment to reduce defence spending.[69] However, in a creative spirit the MND said it would fund the conscription of 3-5,000 conscripts by demobilising 7,000 ghost soldiers in 2006 and 'retiring' 30,000 'elderly' soldiers in 2007. Under the draft law, up to 3 million people aged 18 to 30 years might be eligible for 18 months service.[70] The law is too open for abuse both by candidates paying their way out of the obligation or zealous recruiters taxing same. The RCAF appears to be emerging as an ageing, non-sustainable institution that is unable to raise, train and maintain a volunteer professional force, hence the new conscription and retirement laws.

In March 2006, the National Assembly changed the pensions and disability law to lower the compulsory retirement age across the RCAF. Colonel-level will retire at the age of 60, lieutenant colonels – 58, majors - 43 years and all other ranks must retire between 38-42. Supposedly, the amendment will cut some 38,000 positions from 110,000. However, the 613 one-to-four star generals or those with "Hero" status, who have reached retirement age, can be kept on with the approval of the Minister of National Defence.[71]

Despite three different DDR rounds in the last 15 years in Cambodia the RCAF still has some 112,000 troops. In the unique circumstances described above it is clear that there has been little relationship with TJ measures, although RCAF generals do claim a process of vetting in not allowing former Khmer Rouge leaders in command of armed units; "at best they could only be deputies." It also appears clear that the rank and file left the battlefield for subsistence farming as soon their elite leaders had finalised respective integration deals.

To be sure; security spending (Defence and Interior) has been falling as a percentage of the overall budget in real terms: i.e. in 1995 it absorbed 62% of revenue; in 2000 it was 40% and in 2003 – 23%.[72]

Disarmament 1994-2006

[67] Col. David Mead (Ret.) 'Why Does Cambodia Need Conscription?' *The Phnom Penh Post* Issue 11/11, May 24-June 6, 2002.
[68] Interview with Western Defence Attache, Phnom Penh, April 2006.
[69] Col. David Mead (Ret.) 'Why Does Cambodia Need Conscription?' *The Phnom Penh Post* Issue 11/11, May 24-June 6, 2002.
[70] Draft Law on Compulsory Military Service Chapter One, Article 2, August 2006.
[71] Draft Law on Amendments to the Law on Retirement and Disability Pension Regimes for Soldiers of the Royal Cambodian Armed Forces, Article 1, para 5 October 25, 2005.
[72] Roderic Broadhurst 'Lethal Violence, Crime and Political Change in Cambodia' in Aurel Croissant and Sascha Kneip *The Politics of Death: Political Violence in South East Asia* (Friedrich-Ebert-Stiftung Manila 2006) 353.

Not only has there been a limited relationship between DDR and TJ but within "DDR" itself; the Disarmament and weapons management processes have been pursued separately, and more successfully, than Demobilization and Reintegration in Cambodia. This is because, over time, the Cambodian government was much more serious (self-interested) in dealing with problems associated with Small Arms and Light Weapons (SALW) than with SSR, rightsizing the military, or genuine integration – which were equally shaped by self-interest.

During and after UNTAC, Cambodia was awash in war weapons of every description. Best estimates based on faction data provided to the UN and insider knowledge of the RCAF suggest more than 500,000 SALW and more than 80 million rounds of ammunition in Cambodia in the mid-1990s. In late 1993 the Ministry of Interior registered more than 10,000 handguns from private citizens in Phnom Penh alone. In 1995, the RGC began concerted efforts to regulate the possession and use of small arms outside of government control.[73]

But the real push came after the 1998 elections and in early 1999. A convergence of local and international pressures, NGOs and business, all encouraged the government to crack down on crime and banditry once and for all. Homicide rates had climbed back up to 1993 levels.[74] Presented initially as Hun Sen's "8 point security programme," the new government policies restricted the number of personal bodyguards, outlawed illegal checkpoints, barred tinted car windows, reduced some local militia and curbed the sale and carriage of weapons.[75]

In a matter of months, Sub-decree 38 on Administering and inspecting the import, production, selling, distribution and handling of all types of weapons was promulgated, and the Ministry of Interior established a nationwide system of Provincial-Capital Weapons Confiscation and Control Committees (still extant) under the autonomy of provincial governors.[76] Coercion (in the form of house searches) and incentives

[73] Ministry of Interior Sub-Decree #62 -31 July 1995. Inter-ministerial (Interior and National Defence) Declaration #278 11 June 1996 - 'Controlling the Use of All Kinds of Weapons and Explosives' clarified that the Ministry of Defense has authority to supervise use and issue permits for explosives or weapons for the military, military police and militia, while the Ministry of Interior has the same authority for the police and civilians. The sub-decree also specified which individuals have the right to have a weapon.

[74] Roderic Broadhurst 'Lethal Violence, Crime and State Formation in Cambodia' *The Australian and New Zealand Journal of Criminology* Vol 35 Number 1 2002. 1.

[75] The security services were to "continue to suppress armed robbery groups, kidnapping, illegal connections and drug trafficking, counterfeiting money, and gambling houses, which are a source of intimidation in the country; supervise weapons and explosives closely, and investigate and take weapons which are used or transported against the law - destroy a number of weapons which are not needed for the national armory and security, and do not allow that weapons are taken out of warehouses and given into the hands of criminals; collect weapons from the village and commune militia, and either warehouse or destroy those weapons. It is permitted to keep the militia in the areas where the Khmer Rouge are active; the Ministry of Defense, Ministry of Interior and National Police should identify the areas from which weapons should be collected from the militia, the areas where a number of weapons should be kept, and the kinds of weapons which should be kept and destroyed; clarify again those who should have the use of weapons, check the permits and set the numbers of bodyguards or security guards allowed in various situations.

[76] Decision 27 (invalidating existing licences for carrying guns) and Decision 28 (creating commissions for confiscating and controlling weapons) were issued by H.E Sar Kheng, Deputy Prime Minister and Co-

(including buy-back schemes of varying success) were used in combination to bring all remaining weapons under government control.[77] 29,804 weapons were recorded in provincial and town storage depots and a further 66,309 weapons were confiscated or voluntarily handed in from the general populace.[78] Of these, 36,505 weapons were publicly destroyed in seven provincial ceremonies.[79]

In time, the RGC requested international assistance to finish the job; leading to the establishment of the EU's Assistance on Curbing Small Arms and Light Weapons (ASAC) program in 2000 and a Japanese equivalent JSAC, in 2002. A flurry of programs ensued including the establishment of the National Commission for Weapons Collection and Management in June 2000, the development of a comprehensive new arms law (promulgated April 2005), a registration system and safe storage program for all, military duty-weapons, several community based 'Weapons for Development' and Voluntary Weapons Collection Programs (VWCP), police support/training and commune council capacity building; and many public awareness campaigns. By mid-2006 the RGC and international partners had overseen the public destruction of some 200,000 surplus and illegal SALW.

Between 2000 and 2002 the RGC more or less successfully achieved a monopoly on state violence. By 2006 weapons were harder to come by.[80] However, the misuse of weapons by powerful officials, their associates and family members, as well as by criminals continues to be a problem as acknowledged by National Police Chief Hok Lundy in 2005 when he said: "Phnom Penh has the most big brothers [gangsters] who are usually sons of high ranking officials, Ohknas and ministers. Police could crack down on them, but we do not." Noting that some criminals may have acquired weapons from their powerful fathers, Hok Lundy said that police should also prosecute parents for allowing their weapons to fall into the wrong hands. "We should start to convict them [high ranking parents]. In the past we did not." [81]

The RGC has successfully tackled the widespread proliferation of weapons in Cambodia through a sustained, *whole-of-government* approach including with international and local partners. Disarmament programs, like demobilization pilots were focused in former Khmer Rouge areas, the one exception being Snuol, in eastern Cambodia where a banditry problem persisted till 2002. However, as noted by the national police chief above, elite Khmers and their associates and relations are able to operate above the law.

Minister of the Interior 2 April 1999 Sub-Decree 38 Administering and inspecting the import, production, selling, distribution and handling of all types of weapons abrogated Sub Decree 62 of July 31 1995 on 30 April 1999.

[77] In Battambang Province, citizens were required to sign a form either listing their weapons or denying possession. An offer of 10,000 riel per weapon was abandoned after funds quickly become exhausted. In Rattanakiri province, rice was offered in exchange for returned weapons. Co-author field notes 2001-2005.

[78] Report from the National Workshop on Small Arms in Cambodia. 7.

[79] Report from the National Workshop on Small Arms in Cambodia. 7. See also Weapons Destruction Table available at www.eu-asac.org.

[80] "Before, I would just phone the ministry (of Interior) and ask for as many handguns with licences as my boss needed. Now only two of us are allowed to have guns and we can't get guns through the ministry anymore." Senior bodyguard, January 2006.

[81] Pin Sisovann 'Hok Lundy Claims Nhim Sophea Still in Jail' *Cambodia Daily* January 6, 2005 13.

One by-product of this, since 1991 to current day, has been a long-list of unsolved political crimes, assassinations, murders, intimidation and more. This climate of impunity has been well documented by the UN's office of the High Commissioner for Human Rights and numerous local human rights NGOs. To be sure, fatal attacks have been in steady decline since 1998, in part mirroring the CPP's growing confidence and control since that time. But open discussion of numerous high profile incidents, attacks and deaths is limited to the few in a gossip-hungry press. This is partly because of an increasing elite tendency to file defamation suits where the judicial sector is receptive, if not captured by the government.

More critical examination of Cambodia's recent history and elite affairs in particular has not been encouraged; it could be argued that the legal and moral space for this is even contracting. It is in this context that the ECCC is commencing its examination of crimes committed during the Khmer Rouge period in Cambodia, some 30 years ago.

Information Gathering Efforts on the Cambodian Genocide 1994-2006

Having supported the DK's participation in the PPA, the US Congress passed the *'Cambodian Genocide Justice Act'* (CGJA) on April 30, 1994. The Act "made it the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17 1975 and January 1979" and establish means of investigating such claims. [82]

The Documentation Centre of Cambodia (DC-CAM) opened in Phnom Penh in January 1995 with an initial grant of US$500,000 under the auspices of Yale University's Cambodian Genocide Programme. DC-CAM began researching and gathering information on all aspects of the DK period, for historical purposes, public education and in the event (unforeseen at the time) of a 'new' and internationally acceptable Khmer Rouge trial, to amass a body of potential evidence for any prosecutions.

According to Ben Kiernan, then Director of the Cambodian Genocide Project DC-CAM was to provide verified sources of information so any "duly constituted legal body can pursue charges if it finds that the information warrants them. If it's not useful for legal purposes, I hope it will be useful for scholars and for the Cambodian people themselves who may still be searching for news of what happened to their relatives."[83]

In 1997 DC-CAM became an autonomous Cambodian research organisation and announced, perhaps prematurely, that it had amassed enough evidence to try and convict senior members of the Khmer Rouge for crimes against humanity committed during 1975-1979.[84] A further five years of external funding was secured from the US, Sweden

[82] Craig Etcheson, *After the Killing Fields, Lessons from the Cambodian Genocide* (Praeger, Connecticut 2005) 54.

[83] "Genocide researchers to put records on Net", Jason Barber, *Phnom Penh Post*, Volume 05 Issue 20, October 4 - 17, 1996.

[84] 'Internal affairs', *Phnom Penh Post*, Volume 06 Issue 26, January 2 - 15, 1998.

and the UK.[85] DC-CAM director Youk Chang claims its major achievement as just being there: "we have touched the hearts of the victims. We have reached out - not to all of them, but to many of them."[86]

Meanwhile, DC-CAM has amassed more than 17,000 primary and secondary materials including the PRK's 1983 national survey of Cambodian family experiences under the Khmer Rouge. Some of these materials constitute "legally probative value."[87] By 2005, a biographical database had entries for 10,412 members of the Khmer Rouge as well as records from their 'Human Resources Department'.[88] The centre has completed extensive mapping reports of the majority of Cambodian districts providing evidence of the systematic nature of the Khmer Rouge killings. Between 1995 and 2004, DC-CAM teams located more than 160 'genocide sites' with 19,521 mass-grave pits with approximately 1,100,000 remains of KR victims.[89]

There are also more than 25,000 photos in the archive including 6,000 portraits of Toul Sleng prisoners. Ongoing collection faces the dual challenges of a competitive media market and political sensitivity. Video documentation is invaluable, highly perishable and potentially incriminating. In 2003, 90 reels of Khmer Rouge films were removed to France prior to collection by DC-CAM; amid some speculation that it might incriminate government leaders.[90]

Publication and Dissemination

Since 2000 the DC-CAM journal '*Searching for the Truth*', has provided background articles on the DK period and also tribunal developments. The publication has been produced in both English and Khmer with the cover price of the former offsetting the costs of the latter. In 2006 up to 5,000 copies per month are distributed free at district level.[91]

Youk Chhang views the publication as an essential outreach tool in support of the ECCC. "Whenever we talk to victims of the KR regime they almost always say "I want to know what happened, who ordered the killings, and why. Publicizing exactly what happens as the KR trial proceeds will provide that truth-telling mechanism that is important for national reconciliation." It will also raise the public's general awareness of how the rule

[85] "Moves to get Pol Pot in the dock", Nick Lenaghan, *Phnom Penh Post*, Volume 06 Issue 13, June 27 - July 10, 1997.
[86] Interview with Youk Chhang in "Fighting for the sake of truth and justice," *Phnom Penh Post*, Volume 10 Issue 19, September 14 - 27, 2001.
[87] Craig Etcheson, *After the Killing Fields, Lessons from the Cambodian Genocide* (Praeger, Connecticut 2005) 57.
[88] Ibid: 58.
[89] Ibid: 60.
[90] Ibid: 61- 62.
[91] Ibid: 70.

of law is, or is not, reflected in the KR tribunal.[92]

Searching for the Truth disseminates sensitive information which might otherwise not reach the public domain, sometimes with unintended consequences. During a public forum in Pailin in March 2006, one participant, Mr In Li claimed that his brother Mr In Long had been "killed by people" when his name was linked to the S-21 centre in one particular issue.[93] In Li used the occasion to ask about justice for his brother.

Many DK documents and records were destroyed prior to the Vietnamese invasion and also before the arrival of UNTAC.[94] DC-CAM representatives have visited Vietnam to investigate the existence of documents held there. The Cambodian government's "generally cooperative attitude" towards DC-CAM's work has not extended to granting access to CPP or private archives of "certain political figures." However, Etcheson points out the irony in the concurrent lack of cooperation from US intelligence agencies despite US support in establishing DC-CAM.[95] Despite this support and its stated objective of assisting in bringing perpetrators to trial, the US has not provided financial support to the ECCC, citing an ongoing lack of confidence in the ability of the hybrid court to free itself from government influence and to meet international standards.

To date, it is still not clear how much of the information held by DC-CAM will indeed be of a legally probative value to ECCC prosecutors. But, it continues to make a solid contribution to the academic and historical record. Also, DC-CAM organizes visits to the Toul Sleng Genocide Museum, the Cheoung Ek Killing Fields and the venue of the Extraordinary Chambers for both victims and perpetrators from the provinces in efforts to expand understanding of the process.

Those brought up under the PRK, learnt about the 'genocidal regime' of Pol Pot – Ieng Sary "every day."[96] During UNTAC study of the 'regime' virtually disappeared from the state school system and remains notably absent in curricula in 2006.[97] According to Youk Chang "the younger generation has the right to know their own history and the government has the obligation to provide the whole truth. For example, in the history book for Grade 9 (age 16 and 17) there is only one paragraph about the Khmer Rouge."[98]

Truth-Telling Mechanisms in Cambodia 1994-2006

There have been calls for the establishment of a Truth Commission in Cambodia similar to the Truth and Reconciliation Commission implemented in South Africa in 1996. The

[92] "New magazine on KR tribunal", Anette Marcher, *Phnom Penh Post*,Volume 09 Issue 2, January 21 - February 3, 2000.
[93] Statement by In Li, Centre for Social Development Forum on Issues of National Importance, Pailin City 16 March 2006, Verbatim record by Neil Wilford, para 29. 8.
[94] Craig Etcheson, Op Cit: 64.
[95] Craig Etcheson, Op Cit: 73.
[96] Long Pannavuth, Project Officer, Cambodia Justice Initiative, Phnom Penh, March 2006.
[97] Craig Etcheson, Op Cit: 1-2.
[98] Youk Chhang in "Fighting for the sake of truth and justice", *Phnom Penh Post*, Volume 10 Issue 19, September 14 - 27, 2001.

Cambodian government expressed initial interest in this model but did not follow up early inquiries.

In exploring potential transitional justice options in 1999, the UN Group of Experts acknowledged that a truth commission "could not replace prosecutions for Cambodia in terms of the goals of justice, closure and accountability," yet nonetheless recognized that "by telling a story beyond that concerning the defendants alone, including one that includes the historical context of the atrocities and the roles of many actors," it could help educational and psychological processes and some form of spiritual reparation."[99] The authors suggested the government, civil society and the UN should encourage reflection on the nature and utility of truth commissions in Cambodia, but were not convinced that Cambodians would participate; noting wider experiences that testimony from perpetrators is difficult to obtain.

A Truth Commission can be broadly defined as a body established to investigate past histories of genocide, war crimes or crimes against humanity and can be sponsored either by the executive branch of the relevant national government, the UN, NGOs or a combination.[100] Hayner describes the four primary elements of a Truth Commission as being: a focus on the past; a view of history as an integrated process; a temporary process which is terminated upon conclusion of its work and publication of its findings; and a degree of authority which allows access to sensitive information with the concurrent levels of security and protection to do so. Based on these criteria, there has to date been no formal national truth-telling process implemented in Cambodia. There have however been targeted efforts by civil society groups to initiate truth-telling mechanisms.

DC-CAM's investigative work which has involved extensive interviews with victims and perpetrators (estimated in 2003 to be over 40,000) could be considered a form of truth-telling.[101] The journal *Searching for the Truth* could also fall into this category. DC-CAM-sponsored visits for victims and perpetrators to the Tuol Sleng Interrogation Centre, the Cheoung EK Killing Field site and the ECCC venue also resulted in discussions between the two groups which were subsequently publicised in the media.

Perhaps a better example of localised truth-telling mechanisms have been the six public forums organised between 2000 and 2006 by a local NGO, the Cambodian Centre for Social Development (CSD). These forums on 'National Reconciliation and the Khmer Rouge' (2000) and 'Justice and National Reconciliation' (2006) have brought victims and perpetrators together to discuss reconciliation and the ECCC's work and in passing have provided a voice for everyday folk who might not otherwise be heard.

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[99] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 1999 paras 199-210, 70-71.

[100] Priscilla B. Hayner, Fifteen Truth Commissions – 1974 to 1994: A Comparative Study, *Human Rights Quarterly*, vol 16, no. 4, (1994) 600-611.

[101] "Ex-Khmer Rouge get help for nightmares", Hanne Mølby Henriksen, *Phnom Penh Post*, Volume 12 Issue 13, June 20 - July 3, 2003.

The first forum held in Battambang on January 27, 2000 was attended by 120 former KR cadres and victims and represented the first time such groups had met face to face in a formal venue. As well as former rank and file cadre, the forum was also attended by higher level intellectuals and military commanders, mainly from former KR strongholds in Cambodia's northwest.

Many DK leaders then opposed a tribunal arguing that it would harm national reconciliation and possibly violate the amnesties negotiated through the various defections after the 1994 anti-DK law. Said one: "If there is a trial against those who defected, it seems that the lesson we pass on to our children is not to integrate, but to keep fighting until we win." Echoing comments made by many defectors both in the media and in later forums, cadres disliked the label of Khmer Rouge, arguing that its use contributed to a continued sense of division: "The animosity and the killings for the last three decades were not only on the part of the KR. There were other factions, too. If only one faction is prosecuted for trial, it can lead to discrimination or a form of racism." [102]

Two further forums were held in March 2000 in Phnom Penh and Sihanoukville. At the Phnom Penh forum, 136 participants voted via secret ballot on how best to bring reconciliation to Cambodia. 114 participants (83.8 percent) said Khmer Rouge leaders must be tried, while 77 (56.6 percent) said a trial should apply to persons from all regimes both before 1975 and after 1979, not just to the leaders of the KR regime that claimed the lives of at least 1.7 million people.[103]

Two latter forums held in Pailin on March 16 2006 and Kampot on May 19, 2006 took place when the ECCC was being established. This impacted the nature of the debate as the discussion was not whether there should be a trial or not, but focused a lot on how to conduct outreach and educate young people about Cambodia's recent history. Another forum on September 28 in Kratie province revealed similar themes. The rank and file of the Khmer Rouge and indeed the wider population remain ignorant about the process and often deeply confused about what actually happened under the Khmer Rouge.

In Pailin senior cadres presented familiar themes and defences. The ECCC's temporal jurisdiction (1975-1979) was unfair and needed to be extended to include the US bombing 1970-1973. The roles of China, Vietnam and the USSR needed to be considered. [104] Concerns were expressed whether CPP-affiliated judges could be impartial; and whether current government officials who once served in the Khmer Rouge would be investigated."[105] The term "Khmer Rouge" was discriminatory and therefore there will be no reconciliation. People should use the term "Democratic Kampuchea."

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[102] "Khieu Samphan wants to go public", Anette Marcher and Yin Soeum, *Phnom Penh Post*, Volume 09 Issue 3, February 4 - 17, 2000.

[103] "Forum calls for trial - no date yet for UN team", Anette Marcher and Yin Soeum, *Phnom Penh Post*, Volume 09 Issue 5, March 3 - 16, 2000.

[104] Interview with Nuon Chea, Pailin, March 17, 2006.

[105] Thet Sambath 'Ex-KR Say Judges From CPP Would Be Biased' *The Cambodia Daily* May 23, 2006. 17.

Typical narratives of a DK member defending themselves and the organization would include all or part of the following arguments: "How can we be accused and singled out for genocide when: we joined the DK after Sihanouk was deposed in 1970; we fought against the US's 1970 invasion of Cambodia and subsequent bombing; we had a great victory over US imperialism in 1975; we were legitimate because we had the UN seat through the 1980s and we fought the Vietnamese through the 1980s.[106]

There is a professed demand for knowledge, history and the truth by DK cadres, sometimes for revelatory reasons: i.e. "the trial will show which country tried to eliminate Cambodia." By and large, there have been sensible suggestions to: compile a Khmer Rouge history for the next generation; establish a research committee to study the history clearly (we cannot have a second regime); establish a committee to monitor the history committee to make sure it's the right history; teach the ECCC in schools and at the village level; create committees for national reconciliation and let provincial authorities take more responsibility for local level discussions.

Across Cambodia, CSD plans to conduct 18 one day forums for the next three years and each year there will also be a national conference. Government representatives are in attendance as are Cambodian and international members of the ECCC. The UN is occasionally accused of hypocrisy with its ECCC role on account of the Khmer Rouge retaining the UN seat in the 1980s and of UN inaction when the DK were in power in the 1970s."[107] Also, during negotiations for the PPA, the SoC's proposal to organize a trial of the Khmer Rouge leaders "was rejected on the grounds that it would derail the peace process."[108]

However, by just having the trial process begin, some mythologies are being dealt with, namely: "Cambodians can kill Cambodians. We must admit that Cambodia's biggest tragedy is Cambodians themselves. They always say its' someone else's fault. We never say it's our own fault."[109] Information minister Khieu Khanharith has publicly noted that: "If Cambodians had maturity they should look at their own actions at that time. It was Cambodians killing Cambodians. Pol Pot was the catalyst for the beast in all of us."[110]

Establishing a consensus historical record is difficult but in the view of peace-studies doyen, John Galtung, it is the only way forward for genuine national reconciliation. For Cambodia such a text-book would have to cover 1961-1989 and it would require input from the US, Vietnam, "the Khmer Rouge side and Phnom Penh." In this model all parties must admit wrong to reconcile: "if not then you get a verdict, a result, but not reconciliation and then the ECCC might create some problems." Each of the conflict strands have to be dealt with: "the Khmer Rouge was also about revenge, a peasant revenge against urban societies and 3,000 years of being slaves." The structural urban-

[106] A collective narrative drawn from comments by DK cadres' at public forums in Pailin and Kampot, 2006.
[107] Yun Samean 'PM: Critics of KR Judges are 'Not Human' *The Cambodia Daily* May 12, 2006. 2.
[108] Hang Chuon Naron Letter to the Editor *The Cambodia Daily* May 12, 2006. 19.
[109] Comments by former Khmer Rouge Ong Thong Hoeung, see Michelle Vachon 'He Believed Retracing and Ill-Fated Return' *The Cambodia Daily* July 15-16, 2006. 4.
[110] Erik Wasson 'Gaps Seen in Tribunal's Documentary Evidence' *The Cambodia Daily* July 21, 2006 1-2.

rural violence reveals itself in the differing life expectancy rates and other measures including access to health and education services. This has to be addressed also, otherwise "maybe the Khmer Rouge will come back." According to Galtung, if the ECCC only tries the DK strand of the conflict then it becomes victor's justice:

> *"Reconciliation means healing and closure. Tell the whole story - let it become a uniting force for Cambodians. But if you push it all onto one side or one party - that doesn't work. Do the tribunal. But let the people speak the whole truth. Open the discourse. Don't be square and single-minded about the law. The civil war parties should come together and do something. A peace museum, a joint reconstruction, write the history book together. Relive the horror, condemn the atrocities but [you] also need side-activities."*[111]

Trauma Counselling

Perhaps the mental health work of the Trans-cultural Psychological Organisation (TPO), a Dutch-based international NGO, could also be considered a form of truth-telling. Cambodia's mental health care provision is virtually non-existent in a society where many individuals and families continue to suffer from the effects of suppressed trauma. Of particular importance has been a focus on women traumatised by witnessing the loss of family members. TPO has also acknowledged the impact on the offspring of parents who grew up as children of the Pol Pot regime.

TPO has provided education, training and established self-help groups and counselling services in rural areas to allow traumatised individuals to discuss their experiences under the KR regime and since.[112] This has included perpetrators and TPO has worked in close cooperation with DC-CAM to assist former DK combatants suffering from mental health problems to openly discuss their experiences. "The former Khmer Rouge are human beings and part of our society. They deserve the same treatment as everyone else.....Besides, if their wound inside is mended, they will be able to speak more open, free and true. They all have important stories to tell."[113]

Thus while formal truth commissions have not occurred in the Cambodian context, civil society has implemented numerous localised efforts to enable victims and perpetrators to discuss their experiences.

Conclusion

DDR and TJ initiatives have had a limited inter-relationship in Cambodia since 1992. Under UNTAC and through the PPA the past was contractually erased in a bid to

[111] John Galtung Public Lecture "The Theory and Practice of Reconciliation," Phnom Penh, May 22, 2006.
[112] "Policy of truth helps resolve the past", Bou Sarocun, *Phnom Penh Post*, Volume 10 Issue 24, November 23 - December 6, 2001.
[113] "Ex-Khmer Rouge get help for nightmares", Hanne Mølby Henriksen, *Phnom Penh Post*, Volume 12 Issue 13, June 20 - July 3, 2003.

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promote a forward looking process of ongoing reconciliation. This foundered due to acute mistrust between the factions and in a context of an all or nothing approach to the 1993 electoral contest. DDR attempts after UNTAC initially failed because of the political turbulence of the moment or because, in the quest for political power and stability, recruitment was fundamentally more important than demobilization.

Subsequent initiatives took a path of least resistance in the form of a retirement and pension plan, rather than a DDR program per se. Any savings were returned to the military and not reallocated toward the social services as envisaged by the World Bank and other donors. Subsequent legislation on retirement and conscription are driven equally by institutional self-interest on the RCAF's part.

The wider population was successfully disarmed because of a sustained *whole-of-government*, multi-pronged approach, with international and local partners. But, by the government's own admission, they are yet to confront Cambodian elites. The same applies to the justice sector and indeed most aspects of contemporary Cambodian life; i.e. "no money, no justice." Impunity prevails for those who have been with the organization (the CPP) longest. It is a loyalty-based patronage system that is stable enough to jointly host the ECCC and deal with crimes, long-past. Truth-telling and information-gathering efforts are underway in this regard, but there is no confidence the government will permit scrutiny of more contemporary crimes, anytime soon. It might be moving in the other direction.

For example; a new law removes the right of parliamentarians to speak freely in parliament - described by one diplomat as an act of 'self-castration.' In the future MPs can be charged with criminal offences without their parliamentary privilege first being removed. Immunity cannot be used to "abuse": an individual's dignity, public order, social customs or national security – none of which are defined. A separate clause also lifts immunity for MPs if they commit "obvious crimes" for which they can be charged, arrested and detained without an immunity-lifting vote of the Assembly. The law also violates Article 80 of the Constitution, which reads "No Assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (her) duties."[114] In rather mercantile fashion the law also provides MPs with a lifelong pension and funeral expenses.[115]

The tendency in Cambodia is not toward "rule of law" but rather "rule by law" – where state institutions submit to laws that are entirely of their own creation.[116] Cambodia is stable for now and as one study has suggested there may already be a decline in extra-judicial forms of homicide. But, "without an indigenous moral order that is reflected in

[114] Lor Chandara 'CCHR Criticizes Immunity Law as Unconstitutional' *The Cambodia Daily* September 2-3, 2006. 3.

[115] Yun Samean and Erik Wasson 'US Envoy: Speech Law an Act of Self-Castration' *The Cambodia Daily* September 1, 2006. 16.

[116] To borrow from Nathan J. Brown *Palestinian Politics After the Oslo Accords* (University of California Press, Berkeley, 2003) 57.

law and relief from desperation, homicide will remain a potent symbol of Cambodia's desperation."[117]

One report notes that "significant evidence could be marshalled to paint a bleak picture of the future, in which corruption, feuding elites, an uncompetitive economy, and a stagnant countryside deny the vast majority of Cambodians an opportunity to enjoy, happier, healthier, and more prosperous lives."[118] The same study saw future oil and gas revenues as Cambodia's greatest opportunity (200,000 bpd could easily provide nearly two billion dollars of net revenue in a $4 billion economy) but warned that a misuse of oil revenues could lead to further concentration of wealth, already a problem.

For example, there has also been an "alarming increase" in land concentration. The top fifth of landowners held 59% of land in 1999 and 70% in 2003.[119] This is seen as a major shift toward inequality; "and one very seldom observed in peace time anywhere in the world." There needs to be a fundamental change in the role of the state if Cambodia is to realise its potential. This means shifting the focus from short-term political stability to "investing in a more efficient and inclusive kind of economic growth." Can this be done and what will be the legitimating form of this?

It is not clear through all of the above if the insertion of transitional justice measures against the various DDR initiatives would have improved Cambodia's social cohesion today or not. There are simply too many variables. The overriding assumption is that DDR would have first had to have been grouped together in a coherent manner (it was not) and then correlated to TJ measures (prosecutions, truth-telling, reparations, vetting and other forms of institutional reform), which it was clearly not. Accountability is being sought only now for events that occurred some three decades ago.

Impunity goes unchecked for the elite and the rank and file have no protection. As we have seen above, land, brokered in some integration packages, is not secured and even the identities of disabled veterans are up for sale; a resource that can be exchanged. There are no veteran's or victim's associations to prevent this from happening. Cambodian relationships are still hierarchical and modes of social control remain informal and unpredictable. The need to take the next step and shift to a more predictable, rule of law model is what makes the demonstrative effect of the ECCC so important. Other opportunities to do this just don't appear to be on the horizon.

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[117] Roderic Broadhurst 'Lethal Violence, Crime and Political Change in Cambodia' in Aurel Croissant and Sascha Kneip *The Politics of Death: Political Violence in South East Asia* (Friedrich-Ebert-Stiftung Manila 2006) 353.

[118] 'A SWOT Analysis of the Cambodian Economy' A UNDP funded discussion paper in cooperation with the Supreme National Economic Council and Harvard's Kennedy School, Cambodian Economic Forum, January 17, 2006. 1.

[119] Ibid; 16.

Annexes

Annex A. Interviews
Annex B. Cambodian legislation consulted
Annex C. History of DK defections

Annex A: Interviews

Bradley, Robert	Australian Criminal Justice Assistance Initiative
Chea Vannath	Centre for Social Development
Dunn, Bradley (WOI)	Australian deputy-Defence Attache
Heder, Steve	ECCC Investigator
Hun Sen	Prime Minister
Jarvis, Helen	ECCC Public Affairs
Jenkinson, Anthony (Capt.)	Australian Defence Attache
Long, Pannavudth	Open Society Justice Initiative (OSJI)
McGrew, Laura	Phd Candidate and former OSJI Representative
Nuon Chea	Former deputy-leader of the Khmer Rouge
May Mak	Deputy-Governor Pailin, former advisor to Pol Pot
Minko, Chris	Cambodian National Volleyball League (disabled)
Picken, Margot	UN Office of the High Commissioner for Human Rights
Petit, Robert	Investigating Judge, ECCC
Rogers, Richard	CSD Court Monitoring Program
Ryan, Heather	OSJI
Saray, Thun	ADHOC
Sathavy, Kim Madam	The Royal School of Judges, Phnom Penh
Sok Sam Oun	Cambodia Defenders Project
Smith, Marcus	Civil Peace Service, Deutscher Entwichlungiast
Suon Samnang (MajGen)	Director International Relations branch, RCAF
Tatti, Gio	Austcare
Urs, Tara	OSJI

Annex B: Cambodian legislation consulted.

October 28, 1994 No: 07 ns 94: Law on the Retirement and Infirmity Pensions for military personnel of the RCAF

October 28, 1994 NS-RKM-1094-007 KRAM on the Regime of Retirement and Disability Pensions of RCAF Personnel

March 27, 1996 010-ANK-BK ANKURET on the Implementation of the Regime of Retirement and Disability Pensions of Military Personnel

November 8, 1996 046-ANK-BK ANKURET on the Regime for Military Personnel that are Sacrificed, Deceased, Killed through Provocation, Missing or Disabled.

September 15, 1997 CS/RKM/1197/005 Law on the General Statute of Military Personnel of the Royal Cambodian Armed Forces

April 9, 1999 ANUKRET on the Supplementary Salary of Civil Servants, Military, National Police, Retiree and Disabled Officials

May 12, 1999 ANUKRET on the Establishment of the General Secretariat of the Council for Armed Forces Demobilization

May 12, 1999 ANUKRET on the Establishment of the Council for Armed Forces Demobilization

May 12, 1999 ANUKRET on the Nomination of Members of the Council for Royal Armed Demobilization

May 17, 1999 ANUKRET on the Establishment of the Council for Reform of the Royal Cambodian Armed Forces

March 22, 2000 ANUKRET on the Establishment of the Structure of the Council of Armed Forces Demobilization

March 22, 2000 ANUKRET on the Establishment of Provincial Veteran Committees

October 25, 2005 Draft Law on Amendments to the Law on Retirement and Disability Pension Regimes for the Soldiers of the RCAF.

2005 Draft Law on Compulsory Military Service.

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A History of Khmer Rouge Defections 1993 - 1999

September 1993 onwards: KR defectors transferred to Dei Eth, a Phnom Penh re-education centre, for 3 month courses. Initial numbers were estimated around 900 and another centre was opened in Russei Keo District Phnom Penh and 245 defectors were transferred there in October. The first Dei Eth course saw 599 defectors, the second 198 and the fourth (completed on November 1994) only 77.[1]

October 15 1994: Khmer Rouge Colonel Chhouk Rin, military commander for Kampot Province defects along with 147 defectors, 50 families, 2 DK 80mm mortar launchers, 3 DK 60mm mortar launchers, a heavy machine gun and 100 small arms across to the RGC following negotiations with General Tea Rithichhut.

November -December 1994: Approximately 1000 KR combatants defect from the northern provinces around Siem Reap. Largest single group was 87 combatants on 9 December 1994.
The commander of KR division 980, Huort Him He said he had heard a radio appeal by Prince Norodom Ranariddh for KR guerrillas to lay down their weapons. Among the weapons surrendered by the 87 defectors were 37 AK47s, one M16, 10 CKC rifles and 13 rocket or grenade launchers.

January 1995: 372 KR fighters switch sides in the first six days of January, in the run-up to the end of the amnesty on January 15. Approximately 3,736 weapons were handed over. 1,259 families, with 5,036 civilians from KR-controlled villages come across with the combatants. Siem Reap, Kampot, Kompong Speu and Kompong Cham provinces have the greatest proportion of defectors.

Sept 1993- Jan1995: 2,970 former KR soldiers gain positions within the RCAF including three Brigadier-Generals, nine Colonels, 30 Lieutenant Colonels, 39 Majors and 120 Captains. 1,725 defectors receive training at the national training centre for defectors in Kien Svay, Phnom Penh. The remaining defectors had abandoned their military career to join their families, said Colonel Say Khon, director of a RCAF national training center for defectors.[2]

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[1] "Recruits dry up at center for ex-KR", *Phnom Penh Post*, Issue 3/13, July 1 - 14, 1994.
[2] "KR defections almost 7,000", Ros Sokhet, *Phnom Penh Post,* Volume 4 Issue 1, January 13 - 26, 1995.

February 1995:	Sar Kim Lemouth, KR finance chief defects to the RGC and argues that hardline militant elements now hold precedence, causing considerable internal divisions. "We are not talking anymore about a political solution, only armed struggle."[3]
February 23 1995:	Anlong Veng captured. 260 combatants subsequently defect.[4]
July 7 1995:	Heng Sarath, political commander of KR Division 980, defects with 40 elite combatants after KR commanders ordered that he execute his subordinate for collaboration 431 of his troops had defected in January 1995.[5]
Jan 94 - Aug 95:	Defence Ministry statistics claim 440 KR troops and militia have defected in Banteay Meanchey, with officials claiming another 148 in October, though these could not be confirmed independently. High ranking KR given property and houses in Sisophon to encourage others, which stirs resentment among RCAF combatants.[6]
Feb 23 1996:	General Heng Pong, Commander of KR 18th Division defects on Phnom Aral in Kompong Speu along with 357 of his soldiers, and around 400 families - 1,313 people in all, many of them children.[7] Argues that total strength is less than 10,000 and KR rank and file are frustrated by the continuing fighting and the lack of reconciliation during the 1993 elections.[8]
June 1996:	KR Divisions 415 (under Y Chhean in Pailin) and 450 (under Sok Pheap in Malai) enter negotiations with RCAF (Nhiek Bun Chhay and Tea Chamrath) who estimate that Div 415 in Pailin has 1500 soldiers and 13,000 civilians. Y Chhean and Sok Pheap were subordinates of Ieng Sary but

[3] "Senior KR "money-man" keeps silent on finances", Nate Thayer, *Phnom Penh Post*, Volume 04 Issue 3, February 10 - 23, 1995
[4] "Defectors to help demine Anlong Veng", Ros Sokhet, *Phnom Penh Post*, Volume 04 Issue 5, March 10 - 23, 1995
[5] "KR defector tells of purges and killings", Tricia Fitzgerald, *Phnom Penh Post*, Volume 04 Issue 17, August 25 - September 7, 1995
[6] "KR defectors benefit from Sisophon property boom", Tricia Fitzgerald *Phnom Penh Post* Volume 05 Issue 4, February 23 - March 7, 1996
[7] "Talks with a defector; cognac, ice and landcruisers", Matthew Grainger and Ker Munthit, *Phnom Penh Post*, Volume 05 Issue 5, March 8 - 21, 1996
[8] "KR dying says senior defector", Ker Munthit, *Phnom Penh Post*, Volume 05 Issue 7, April 5 - 18, 1996

	considered more important given their control over large numbers of armed combatants.
August 8 1996:	KR radio accuses Ieng Sary of being a traitor for refusing to implement an order to collectivise property in Malai District.[9]
August 13 1996:	Pailin breakaway inspires 70 KR defections in Kratie Province signalling nationwide discontent
August 23 1996:	Senior RCAF officials imply ongoing negotiations for defection of 8 KR divisions by September including Div 415 and Div 450 through negotiations headed by Keo Pong. Two further divisions in Pursat and Koh Kong also expected to defect. Success would reduce KR strength from 22 to 12 divisions. Potential 4,000 KR combatants ready to defect.[10]
September 15 1996:	At proposal of Hun Sen and Rannaridh, a Royal Decree (Reach Kret) provides a pardon to Ieng Sary for "the sentence of death and the confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979 and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group promulgated by Reach Kram No 1, NS dated 14 July 1994.
October 1 1996:	300 KR from Regiment 408 under Commander Seng Huot defect from bases on the northwest shore of the Tonle Sap.
October 1-13 1996:	Five KR divisions from Battambang and Banteay Meanchey defect[11]. Reportedly among the defectors is Ta Bet, Ta Mok's deputy in the period 1975-1979.[12] Two further divisions in Pursat also defect and a ceremony overseen by Tea Banh and Keo Pong is held in Pursat Province on 13 October. The defectors - from Divisions 695, 35, 19, 277, 26, 36, 91 and 305 - were said to total 2,468 soldiers.[13]

[9] "Ieng Sary: "I never killed anyone"" Jason Barber and Ker Munthit, *Phnom Penh Post*, Volume 05 Issue 19, September 20 - October 3, 1996.

[10] "KR forces may be slashed in half", Huw Watkin, *Phnom Penh Post*, Volume 05 Issue 17, August 23 - September 5, 1996.

[11] "Keo Pong: CPP's point man for KR negotiations", Claudia Rizzi *Phnom Penh Post*, Volume 05 Issue 19, September 20 - October 3, 1996.

[12] "Ta Mok aide jumps to govt", *Phnom Penh Post*, Volume 05 Issue 25, December 13 - 26, 1996.

[13] "Keo Pong: CPP's point man for KR negotiations", Claudia Rizzi *Phnom Penh Post*, Volume 05 Issue 19, September 20 - October 3, 1996.

	KR soldiers had defected in the past six weeks; "It's their last gasp," he said."[25]
June 11 1998:	Five of the top KR 'intelligentsia' defect to RGC; Chan Youran, Mak Ben, Thiounn Thioeunn, In Sopheap and Kor Bun Heng signalling the end of the political struggle. Ta Mok, Khieu Samphan and Nuon Chea are left isolated as the last military and political leadership remnants of the KR.[26]
June 5-8 1998:	700 Anlong Veng KR combatants are officially integrated into the RCAF in a June 5 ceremony. Voter registration begins on 8 June for the estimated 22,000 people in the area, including 1,518 defectors and 2,631 RCAF soldiers.[27]
July 1998:	250 resistance troops based near Preah Vihear promise to defect following the election.[28]
September 1998:	552 combatants from KR Division 801 defect in Kratie Province but quickly become angry at their treatment by the RCAF. One soldier said he defected because "all of my life, all the time fighting, always fighting."[29]
December 4 1998:	Final capitulation of the KR forces following negotiations at Preah Vihear temple. KR Chief of Staff Khem Nguon stated: "Today, at two o'clock, I handed over my forces to the Cambodian government," he said - 20,000 people, he later explained, 5,000 of whom were soldiers. "Experts however say 500 to 1,000 soldiers would be closer the mark."[30]
December 26 1998:	Government announces the defections of Khieu Samphan and Nuon Chea to RGC.

[25] "Rebel rank-and-file roosting with northwest warlord", Elizabeth Moorthy, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998.
[26] "Defection of KR politicos isolates Mok", Bou Saroeun and Peter Sainsbury, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998.
[27] "Life's a party in gov't-controlled Anlong Veng", Tom Fawthrop, *Phnom Penh Post*, Volume 07 Issue 12, June 19 - July 2, 1998.
[28] "RCAF says 250 resistance troops ready to defect", Post Staff, *Phnom Penh Post*, Volume 07 Issue 16, July 31 - August 6, 1998.
[29] "Kratie guerrillas sold short after defection", Bou Sarouen and Peter Sainsbury, *Phnom Penh Post*, Volume 7 Issue 19, September 4 - 17, 1998.
[30] "The KR ends its 47-year war", Bou Sarouen and Peter Sainsbury, *Phnom Penh Post*, Volume 07 Issue 27, Dec. 11 - 24, 1998.

8-9 February 1999:	Final reintegration of all remaining KR combatants takes place in two ceremonies in Samlot and Anlong Veng. Sar Kheng and Ke Kim Yan welcome 1800 defectors in Samlot on 8 February and Tea Banh and Sisowath Sirirath welcome 1700 in Anlong Veng. Tea Banh: "This is the last of the defections, and it is a great contribution to ending the more than two decades of chronic war, and it is the achievement of national unification and reconciliation and a source of peace and stability in Cambodia."[31]

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[31] "KR heart transplant uncertain as clothes changed easily", Beth Moorthy and Sarah Stephens, *Phnom Penh Post*, Volume 08 Issue 4, Feb 19 - Mar 4, 1999.

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APPENDIX A

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DC-Cam Study of Potential ECCC Witnesses Suggests Widespread Fear

A study completed in October 2006 by the Documentation Center of Cambodia revealed a widespread feeling of fear on the part of potential witnesses for the ECCC.[1] The methodology of the study involved in-depth focused and open-ended questionnaires, and the sample size was relatively small, and therefore not statistically significant. Interview subjects included former victims of the Khmer Rouge, former Khmer Rouge cadre and soldiers, and government personnel.

One set of responses was particularly revealing with respect to the level of confidence felt by potential ECCC witnesses. At total of 23 respondents were queried on their willingness to be an ECCC witness, based on their level of fear for harm that might come to them as a result. 11 of the 23 interviewees said that they were "not afraid to appear as a witness of the ECCC," while 12 of the 23 – or 52% – were afraid to appear as a witness of the ECCC.[2]

Of the 12 who were too afraid to testify before the ECCC, the range of reasons given for this fear was also revealing.[3] 4 of the 12 stated that they feared they would face acts of "revenge and intimidation," although respondents were often ambiguous about who they feared would take revenge upon them; persons with this type of fear included 3 victims and 1 former KR combatant or security officer. 4 of the 12 stated that they feared reprisal by senior Khmer Rouge leaders or their families; persons with this type of fear included 1 victim, 1 cadre, and 2 former KR combatants or security officers. 3 of the 12 stated that they feared reprisal by former cadres or KR soldiers living in their community; both victims and KR combatants or security officers expressed this type of fear. Finally, one of the respondents who was afraid to testify before the ECCC said that the source of the fear was threats from present government officials.

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[1] Geerteke Jansen, *Voices of Takeo: a pilot fear assessment with respect to possible witnesses of the Extraordinary Chambers in the Courts of Cambodia*, Documentation Center of Cambodia, October 2006.
[2] Ibid., p. 23.
[3] Ibid., p. 28.

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Voices of Takéo

A pilot fear assessment with respect to possible witnesses of the Extraordinary Chambers in the Courts of Cambodia

Project by Geerteke Jansen
Legal Associate of the Documentation Centre of Cambodia
July – October 2006

Cambodia

ann/N:D 12/181

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Chapter 1 Introduction

On the 3rd of July 2006 Cambodian and international Judges and Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia have been sworn in during a ceremony in the Royal Palace of Cambodia. The formal start of a fundamental process to the people of Cambodia who have been waiting many years for justice. Justice will be presented through the words of the judges, but the people of Cambodia can contribute to the process of finding these words. As in all international and hybrid tribunals one of the forms of evidence is a witness testimony. The words of witnesses are an essential asset to the legal process, while witnesses are the ones who can explain what happened and link the evidence to the alleged committers of the crimes. Unfortunately, the witness contribution to the healing process of Cambodia may have a dark side. Witnesses before international and hybrid tribunals often find themselves in vulnerable positions and there is no reason to believe that witnesses of the Extraordinary Chambers do not share the same vulnerability. Even so, the tragedy brought upon Cambodia and the sensitive character of the trials give reason to believe that witnesses should be supported with ultimate care.

It has appeared within DC-Cam that there is no clear understanding of the attitude in the Cambodian society towards those who may appear as a witness before the Extraordinary Chambers. Such an assessment is, however, important for the process of providing the witnesses the supportive or protective measures they need. This pilot fear assessment answers to the gap of information within DC-Cam. The objectives of the assessment are to understand the possible attitude within society towards witnesses, to assess the threats and risks regarding these individuals, to explicate the needs that the witnesses before the ECCC are likely to have and to formulate possible ways to respond to these needs.

In order to provide an adequate and coherent study, the assessment has focused on one province in Cambodia, Takéo province. This study presents the outcomes of twenty-nine interviews with inhabitants of Takéo province and eighteen official representatives of Takéo and government authorities. The interviewees have been questioned on their personal or professional opinion on the expected approach in society towards the people who may appear as a witness before the Extraordinary Chambers. The interviews touched upon the willingness of people to testify, the safe or unsafe position of witnesses, the financial consequences, the impact on their family situation and other issues possibly related to ECCC witnesses. Each chapter of this study provides an overview of the outcomes of the interviews. Based on these findings the last chapter provides suggestions DC-Cam to support the witnesses during their valuable contribution in the healing process of Cambodia.

Witnesses of the Extraordinary Chambers will form a valuable piece of the complicated puzzle that has to bring justice for Cambodia. They are those who have survived the Khmer Rouge regime and those who witnessed important events that provide links to the people who are most responsible. Their valuable position in the trials may have grant consequences on their personal lives and it is important to support the witnesses in overcoming the possible obstacles. Only when one knows the fears and thoughts of the people involved and of their society, one can form a proper response. This pilot study gives insight in the fears and thoughts of the people in Takéo and hopefully it encourages parties involved to listen to their voices.

Chapter 2 Fear assessment in Takéo province

The threat assessment has taken place in Takéo province, a province known for its ideal performance under the Khmer Rouge Regime and its inhabitants representing a wide range of both victims and perpetrators. The focus on one part of Cambodia is based on the belief that is not feasible to present a coherent and thorough study on Cambodia as a whole in three months.

The pilot fear assessment is based on forty-seven interviews with inhabitants of Takéo, representatives of the local authorities in Takéo, members of the judiciary and representatives of the Ministry of Interior. Their history and the history of their province will be shortly explained in the following paragraphs.

2.1 Takéo province

Democratic Kampuchea was divided in six zones: the North, the East, the West, Northeast, Northwest and the Southwest zone. Present Takéo province was together with parts of present provinces Kandal, Kampot and Kampong Speu part of the Southwest Zone. This Zone was divided in four regions that were again divided in five or six districts and numbers of sub districts. Region thirteen of the Southwest Zone contained five districts and fifty sub districts that nowadays are part of Takéo province.

In 1976 the Southwest Zone received an Honorary Red Flag for its outstanding output of its paddy fields and the revolutionary commitment of its people. Pol Pot stated on the 17th Anniversary day that the comrade division commanders of the Southwest Zone succeeded in defeating many Lon Nol supporters and he regarded the Zone as the best.[1] The Southwest Zone has reached this position under direct leadership of its Secretary Ung Choeun, better known as Ta Mok or Ta 15. Ta Mok was born in Prakieb village, region 13 of the Southwest Zone. Especially this region became well known for its performance and services to the Communist Party of Kampuchea. Although it is hard to estimate the correct amount of victims, Mr. Meng-Try Ea stated in his book "The Chain of Terror" that at least 153.000 people died in four of the security centres of the Southwest Zone.

The security system of the Khmer Rouge in the Southwest Zone held in total 250 security centres at the sub district, district, regional and zone levels. The sub district centres were used to detent those who committed minor crimes and mostly served as places for temporary detention. In some occasions the imprisonment at the sub district level involved work at the labour sites of the Southwest Zone. People brought to these centres were interrogated but these sessions generally did not involve the use of serious violence or torture.[2] Prisoners at these centres were either released after a period of time or brought to the district re-education and occasionally the district security centres. The main

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[1] Meng-Try Ea, "The Chain of Terror: The southwest Zone Security System", Documentation Series No. 7, Documentation Centre of Cambodia 2005, page 23.

[2] Ibidem, page 27.

reason of capturing people at sub district level was to verify whether people needed to be re-educated on the ideologies of Angkar.[3]

If the cadres at the sub district militia centres concluded that people did not improve their commitment, these persons were sent to one of the twenty-one district re-education centres. In these centres prisoners were imprisoned, more seriously interrogated and executed. Most of the people at these centres did not survive their imprisonment and died as a result of torture during the interrogations, illness, exhaustion, starvation or execution.[4]

In some occasions, prisoners of the district re-education centres were sent to the region security centres. The Southwest Zone held three of these centres where mostly Khmer Rouge cadres accused of conspiracy with Angkar's enemies were imprisoned. Similar to the prisoners in the district centres, most of the prisoners in the region security centres did not survive their imprisonment for the abovementioned causes.[5]

An important group of interviewees represents the people that have either been imprisoned or have been working at the Tram Kak District Re-education Centre, also known as the Kraing Tachan prison. This centre was one of few centres in the Southwest Zone where DC-Cam found documents. The majority of prisoners were Lon Nol soldiers, their families and other people who were suspected of being an enemy of Angkar.[6] Prisoners at the Kraing Tachan prison were divided into two categories. The serious offenders were those involved in political matters and were considered as the dangerous type.[7] The light offenders were the ones that committed offences as stealing rice, eating too much food or others ways of disobedience to Angkar.[8] In order to reveal the true nature of the prisoners, guards used various means of torture that were similar to the methods used in prison S-21.[9] Executions at the district centres of the Southwest Zone were performed on a grant scale and chances of survival for the prisoners were slim.[10]

The Southwest Zone Security Centre was under command of Ta Mok and was the centre at the top level of the Southwest Zone. Most of the prisoners in this centre were Khmer Rouge cadres who were accused of betraying Angkar. As there are no records or documents found that relate to this centre, it is difficult to estimate the number of people that have been killed here.[11]

[3] Ibidem, page 28.
[4] Ibidem, pages 28-29.
[5] Ibidem, pages 29.
[6] Ibidem, pages 63 – 70.
[7] Ibidem, page 69.
[8] Ibidem, page 70.
[9] Ibidem, page 73.
[10] Ibidem, page 82.
[11] Ibidem, page 117.

2.2 Interviewees from Takéo province

As mentioned before, the inhabitants of Takéo province represent both victims and perpetrators. The fear assessment has answered these backgrounds by conducting interviews with victims, cadres, combatants, security personnel and base people. The interviewees who have not been involved with the Khmer Rouge organisation or have been imprisoned in one of the Khmer Rouge centres are referred to as victims in this report. Cadres are the interviewees who had positions of authority in the Khmer Rouge regime, either politically or by working in the bureaucracy.[12] Interviewees who held ranks in the Khmer Rouge army or worked as prison guards or security staff are referred to as combatants and security personnel. To conclude the term base people refers to the interviewees who lived in the liberated zones and formed the backbone of Cambodia's rural populace. Base people were often appointed as medical staff or as members of the workers units.[13]

The selection of interviewees is based on their personal history Democratic Kampuchea, their position within the structure of the Khmer Rouge and an estimation of their interest regarding the Khmer Rouge tribunal. The project lists of the DC-Cam Promoting Accountability team[14], the Victims of Torture team[15] and the Mapping team[16] have been used to gather the necessary information on the personal background of possible interviewees. The following paragraphs present a short summary of the background of the interviewees and a list of the interviewees is provided in ANNEX A.

2.2.1 Victims

Interviewees 1, 2, 3, 5, 6 and 8 have been prisoners at the Tram Kak District Re-education centre. Both interviewee 1 and 2 have been imprisoned in Kraing Tachan for 23 months and performed supporting task as a cook or worker in the rice fields. Interviewee 1 is an old lady and did not seem to have a clear recollection of what happened in the Kraing Tachan prison. Her son, interviewee 2, had a better understanding of his experiences. Both interviewees were imprisoned for almost two years, during which interviewee 1 worked as a cook and interviewee 2 took care of the cattle and guard the animals on the rice fields every day. The reasons of their imprisonment have never been explained to them, but they suspect it to be related to the wealthy position of their husband and father. Interviewee 3 has been a village chief during the first years of Democratic Kampuchea and was imprisoned at Kraing Tachan after criticising the methods of Angkar and on the accusation of ethical offences with women living in his village. Interviewee 3 has a good perception of both sides of the history and remembered that almost all prisoners at Kraing Tachan were executed. The imprisonment of interviewee 5 was based on his position as a Lon Nol soldier prior to the Khmer Rouge Revolution. In addition, the Khmer Rouge suspected him to be a CIA agent. He stated to be imprisoned for eight

[12] This categorisation is parallel to the categories used by DC-Cam. See also "Stilled Lives. Photographs from the Cambodian Genocide", by Wynne Cougill in cooperation with Pivoine Pang, Chhayran Ra and Sopheak Sim, 2004, Documentation Centre of Cambodia, Introduction pages v-xii.
[13] Ibidem page vi-vii.
[14] DC-Cam List of the Khmer Rouge cadres in Takeo province investigated by PA team, reviewed by Chhayrann RA, May 24 2006.
[15] DC-Cam List of people interviewed for "Victims of Torture" project in Tram Kak district of Takéo province, reviewed by Socheat Nhean.
[16] DC-Cam List of Mapping Project 1995, 1997, 1999: Takéo Province.

months and was regularly interrogated and tortured. Interviewee 5 has undergone and witnessed the policies closely and mentioned that this experience has had a awful impact on his life up until now. Interviewee 6 stated to have been a prisoner in Kraing Tachan from 1975 – 1979. At that time he was a young boy and the prison guards allowed him more freedom than other prisoners. He has been a close witness of the methods of torture, the executions and other measures taken within Kraing Tachan prison. He remembered the names of the guards in detail but mentioned that some of them are possibly in hiding at the moment. To conclude, Interviewee 8 has been imprisoned in Kraing Tachan for six months as he was accused to be a capitalist. During his interview he informed us on the methods of torture and execution performed by the guards in Kraing Tachan. He also mentioned that this District Re-education Centre was divided in various sections throughout region 13.

Another group of interviewees are former Lon Nol agents. Interviewee 5 and F have both been a Lon Nol agent and their personal history during the Khmer Rouge years will be described in the other paragraphs. Interviewee 7 was married to a Lon Nol soldier and witnessed his execution by Khmer Rouge cadres. She managed to hide their marriage and was not arrested by the Khmer Rouge. During the years of Democratic Kampuchea interviewee 7 worked in a women's work unit. She remembers that some of the women in her unit were abused and some of them disappeared without a clear explanation.

Two interviewees of the fear assessment have been imprisoned in S-21. Interviewees 9 and 10 were sent to fight as a Khmer Rouge soldier near the border in Ratanak Kiri province but refused and managed to escape the Khmer Rouge on more occasions. In the end of 1976 interviewee 9 was arrested and sent to prison S-21 in Phnom Penh. He was imprisoned for almost one year and explained that he was often interrogated and tortured. He stated to have witnessed the methods and policies of the guars in S-21 closely but does not remember their names. Interviewee 9 was never informed on the exact grounds for his arrest. Interviewee 10 was arrested and imprisoned together with interviewee 9 and declared that he was imprisoned for three months.[17] The Khmer Rouge accused him of being a CIA agent and interrogated him on several occasions.

Interviewee 4 was married to a wealthy man who was captured and killed by the Khmer Rouge. After his death she was sent to work in a women's work unit with other women whose husbands were killed by the Khmer Rouge. Many of her relatives have disappeared but interviewee 4 never witnessed certain methods of torture preformed.

[17] Both interviewee 9 and interviewee 10 declared that they have been arrested and released together. It is important to note that their statements, especially regarding their period of imprisonment, do not comply with one another.

2.2.2 Khmer Rouge Cadres

As mentioned before the term cadres refers to the people who had positions of authority in the Khmer Rouge regime, either politically or by working in the bureaucracy. Interviewees B, C, J, P and R represent a group of cadres in this fear assessment. Interviewee B stated that he was a soldier of Sihanouk but did not reveal his specific position during the Khmer Rouge or his age. He seemed not willing to explain his personal involvement with the regime but answered the questions related to the threat assessment in great detail. Interviewee C was chief of commune within Democratic Kampuchea and explained some policies within his commune. During his appointment as commune chief interviewee C witnesses the arrests of several of his villagers. He was accused of ethnical offences but was never arrested. Interviewee J was trained in 1972 and 1973 to be a village chief and was educated on the directives of Angkar. Interviewee P was assigned as deputy chief of Sanlung commune in 1975 and worked most of the times as a farmer on the rice fields. During his years as a chief he met Ta Mok several times. Interviewee P remembers that many members of his cell died of starvation, disappeared or were executed. Interviewee R was staff of the Ministry of Foreign Affairs and worked at the Chinese and Korean Embassies during the years of Democratic Kampuchea. He was assigned as a driver and guard and joined various meetings between Khieu Sampan and foreign representatives.

2.2.3 Khmer Rouge Combatants and Security Personnel

Interviewees A, D, F, G, H, K and L worked at the Southwest District Re-education centre as guards or performed other duties. Interviewee A has been a messenger of Kraing Tachan prison since 1975 and operated between the prison and the chiefs of villages, sub districts and districts in the region. He stated that most of the prisoners in Kraing Tachan were killed and explained the basic structures of the prison. According to the research by Mr. Meng-Try Ea and based on the documents found by DC-Cam, interviewee D was Deputy Chief and Interrogator at Kraing Tachan prison.[18] During his interview interviewee D did not clarify his position within the Kraing Tachan prison. Although he seemed to be well informed, he did not reveal any details about his personal history and the policies within the Kraing Tachan prison.[19] Interviewee F declared that he was a Lon Nol agent and was captured by the Khmer Rouge. After his arrest he joined the Khmer Rouge, fought soldier and worked as a guard of Kraing Tachan prison since 1977. Interviewee F revealed the names of the other guards at Kraing Tachan and seemed to remember details of the prison policies. Interviewee G worked as a prison guard of Kraing Tachan from 1976 till 1978. He was appointed as a guard of the gates and stated that he was not involved or informed on the executions that took place in Kraing Tachan. According to the information of DC-Cam and statements of some of the interviewees, interviewee H has been a guard of the Kraing Tachan prison. He, however, rejected the request to conduct an interview with him for personal reasons.

[18] Meng-Try Ea, "The Chain of Terror: The southwest Zone Security System", Documentation Series No. 7, Documentation Centre of Cambodia 2005, page 62.
[19] Interviewee D at first rejected the request for an interview. He allowed the interview on the condition that the interview was not recorded.

Interviewee L worked from 1975 till 1977 as a messenger of prison S-21 but did not explain his duties and work in great detail. After his work at Tuol Sleng he was sent to work in a working unit and in the final years he joined the Khmer Rouge army and fought against both White Khmer and the Vietnamese army in the jungle.

Interviewee K was trained as a soldier in 1973 and became chief of squad in the Khmer Rouge army. He fought two years but got injured in 1975. After his recovery interviewee K was sent to fight at the Thai border and became the chief of a platoon of thirty soldiers. It was his responsibility to arrest people within his platoon whom he thought to be a traitor or enemy of Angkar. Interviewee K also remembered that many soldiers were killed during the battles with the Thai and Vietnamese armies.

2.2.4 Base people

Interviewees E, I, M, N, O, Q and S represent the group of base people. The first category of base people includes the people who have been working as medical staff in one of the hospitals of Democratic Kampuchea. Interviewee E was assigned to work in Angponarey Pagoda and the P6 Hospital in Phnom Penh. During her assignment as medical staff interviewee E met Ieng Sary and Ta Mok a view times on their visits to the hospital. Although she knows now what happened during the years of the Khmer Rouge, she has never witnessed any killings or acts of torture. Interviewee M worked as a member of a workers unit from 1975 till 1977 after which she was assigned to work at the P1 Hospital in Phnom Penh. Although she never received medical education, she was assigned to treat the patients by her chief Menh, the daughter of Ieng Sary. After the Vietnamese invasion, the hospital was evacuated to the jungle in the Northwest Zone. Interviewee M has never witnessed acts of torture or executions. Interviewee N is the cousin of the former Chief of the Southwest Zone, Ta Mok and worked as medical staff in a hospital in Takéo provincial town. He was never educated as medical staff but was assigned to treat injured soldiers and other people. He met Pol Pot several times on his visits to the hospital and appeared to be in close contact with his uncle Ta Mok. Interviewee N explained that his medical unit and the patients were evacuated to the jungle after the Vietnamese invasion. Interviewee Q worked as medical staff for some years in various hospitals in Sra Nger, Angkanh and Phnom Penh. She received short medical education after which she was assigned to treat the injured Khmer Rouge soldiers. After the invasion of the Vietnamese interviewee Q was evacuated with all patients of the P6 hospital in Phnom Penh to Battambang and the jungle.

Interviewee O was member of the cooperative and was assigned to perform various tasks, such as building dams, working on the rice fields and taking care of the cattle. People who did not work hard enough were often accused of being an enemy of Angkar after which they were arrested and often killed. After the invasion of the Vietnamese all members of his cooperative were ordered to flee to the jungle where many people died of starvation. Interviewee S was member of a women's workers unit in various places, such as Srer Ambil and Posatt. Together with her co-members she was forced to work in harsh conditions and witnessed the arrest and execution of various people in her unit. Before the Vietnamese invasion interviewee S was forced to marry by a Khmer Rouge cadre but they separated after the Khmer Rouge were defeated.

2.3 Government representatives in Takéo Province

In order to assess the atmosphere within a certain society one must not only consult the inhabitants of that society. Governmental representatives and officials can give a valuable insight in a society, as they are the ones who are confronted with possible tensions on a daily basis. Moreover, they are ones that may have the responsibility to protect their citizens against certain threats. As part of the fear assessment various officials on village, sub district, provincial level, representatives of the police, representative of the judiciary and representatives of the Ministry of Interior have been interviewed. Their names and positions are listed below:

Representatives on village and sub district level in Takéo province

- Mr. Khien Chhann (M, 77 years old), chief of Toek Thla village. Interviewed on the 25th of August 2006.
- Ms. Som Pov (F, 61 years old), chief of Tram Kak sub district, Tram Kak district, Takéo province. Interviewed on the 25th of August 2006.
- Mr. Un Sim (M, 59 years old), chief of Rosey Thmey village. Interviewed on the 27th of August 2006 during the DC-Cam ECCC Tour.
- Mr. Yann Koy (M, 70 years old), chief of Tipatt village. Interviewed on the 27th of August 2006 during the DC-Cam ECCC Tour.
- Mr. Long Chan (M, 55 years old), chief of Ta Toeum village. Interviewed on the 27th of August 2006 during the DC-Cam ECCC Tour.

Representatives of provincial authorities Takéo

- Mr. Yous Nasy, Chief of Provincial Cabinet. Interviewed on the 3rd of October 2006.
- Mr. Vuth Phally, Chief Commander of the Takéo Provincial Police. Interviewed on the 3rd of October 2006.
- Mr. Chin Pok, Deputy Commander of the Takéo Provincial Police. Interviewed on the 3rd of October 2006.
- Mr. Suon Phon, Deputy Commissioner of the Criminal Unit of the Takéo Provincial Police. Interviewed on the 3rd of October 2006.
- Mr. Chey Sophal, Chief Prosecutor Takéo Province. Interviewed on the 4th of October 2006.
- Mr. Hean Rith, Deputy Prosecutor Takéo Province. Interviewed on the 4th of October 2006.

Representatives of the Cambodian Judiciary

- Mr. Hing Thirith, Judge of Phnom Penh Municipal Court. Interviewed on the 11th of July and the 15th of September 2006 at DC-Cam.
- Mr. Tith Sothy, Chief of the Takéo Provincial Court. Interviewed on the 4th of October 2006.
- Mr. Sok Lieng, Judge of the Takéo Provincial Court. Interviewed on the 4th of October 2006.

Representatives of the Ministry of Interior

- Mr. Mao Dara, Chief of the Office of Serious Crimes, Department of National Police, Ministry of Interior. Interviewed on the 26th of September 2006 at DC-Cam.
- Mr. Nun Samnang, Chief of Section, Department of National Police, Ministry of Interior. Interviewed on the 26th of September 2006 at DC-Cam.
- Ms. Ay Sokhema, Deputy Office Chief, Department of National Police, Ministry of Interior. Interviewed on the 26th of September 2006 at DC-Cam.
- Ms. Put Sao Sirana, Department of National Police, Ministry of Interior. Interviewed on the 26th of September 2006 at DC-Cam.

Chapter 3 Response regarding the Khmer Rouge Tribunal

Victims of the Khmer Rouge have often expressed their support for the tribunal and their hopes that it will find justice for their lost relatives and friends. As part of this assessment people have been asked as well to share their thoughts and ideas on the Khmer Rouge Tribunal. In order to provide a broader picture of the response in Takéo province this chapter includes the thoughts of the interviewees regarding the Extraordinary Chambers.

3.1 Supporting the Extraordinary Chambers

One of the first questions during the interviews was whether or not people are familiar with the Khmer Rouge Tribunal. In addition, the interviewees have been asked whether they support the tribunal and what the tribunal will bring for the people of Cambodia. The outcomes of the interviews show that the vast majority of the interviewees in Takéo province are familiar with the Khmer Rouge Tribunal and its purpose. Only two interviewees, both medical staff during Democratic Kampuchea, have never heard about the tribunal before their interview. The majority of the interviewees expressed their support for the tribunal and referred to the sufferings they have gone through as their primary reason. The outcomes and statistics of the interviews in this regard have been explicated in the following table.

Support for the ECCC

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Interviewees who are informed and support the ECCC[20]	8	4	6	2	**20**
Interviewees are not informed on the existence of the ECCC[21]				2	**2**
Interviewees who do not support the ECCC[22]				1	**2**
Interviewees are not familiar but want to know more about the details of the ECCC law and the position of the witnesses[23]		1	1	1	**3**

With respect to the meaning of the tribunal for Cambodia various possibilities have been brought forward. The widely held conviction is that the Extraordinary Chambers will find justice, more specifically, retributive justice,[24] for the victims of Democratic Kampuchea. The people who have been interviewed have expressed their believes that the perpetrators must be punished for their deeds. The Chief Commander of the Takéo Provincial Police has stated in this respect that according to the Cambodian criminal law people who have committed crimes should be held responsible for their acts. In his opinion there is no reason why this should not apply for those who are responsible for the

[20] Brought forward by interviewees 1, 2, 3, 4, 5, 7, 8, 9, B, J, R, P, A, D, F, G, K, L, M and O.
[21] Brought forward by interviewees E and Q.
[22] Brought forward by interviewee N.
[23] Brought forward by interviewees P, D and M.
[24] Retributive justice focuses on punishing criminal offenders as opposed to restorative justice that focuses more on compensation and restoration after a crime has been committed.

crimes committed during Democratic Kampuchea.[25] A similar explanation was given by one of the survivors of the Kraing Tachan prison who stated that justice means that your acts will be judged within the Courts of Cambodia.[26] In total three victims, three cadres, one security guard and one of the base people have expressed their hopes and believe in retributive justice by the Khmer Rouge Tribunal. None of the interviewees have referred to possible restorative aspects of the tribunal.

The Extraordinary Chambers are often believed to have an important role in educating the younger and future generations of Cambodia. This possible asset of the Chambers to Cambodia has also been pointed out by some of the interviewees, as for instance the Chief of the Provincial Cabinet of Takéo.[27] In his interview he has explained that the prosecution of the most responsible leaders of the Khmer Rouge will show the leaders of the future that this horrendous manner of governing the country will no longer be tolerated. Moreover, it will take away the doubt of the younger generation that the tragedy has indeed been inflicted on their parents and grandparents. Another interviewee, one of the Kraing Tachan guards, confirmed the educating feature of the tribunal by recognising that the tribunal is essential in preventing genocide from happening again.[28]

Besides references to the accountability process within Cambodia, a lot of interviewees referred to their individual and the national process of reconciliation. One of the S-21 survivors believes that reconciliation with the past can only be achieved when criminal law is applied.[29] His opinion was supported by one of the base people, who worked as medical staff under the Khmer Rouge. She stated in this respect that prosecuting the most responsible leaders may relief many victims from their pain and sufferings.[30]

Significance of the ECCC

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
ECCC will find justice for the people of Cambodia[31]	3	3	1	1	**8**
ECCC is the only proper response to the crimes that have been committed and the people who have suffered[32]	2			1	**3**
Leaders must be held responsible for the crimes they have committed[33]	2				**2**
ECCC is valuable asset in reconciliation process of the Cambodian people[34]	1			1	**2**
ECCC is significant in educating the younger and next generation of			1		**1**

[25] Brought forward by official interviews VII, VIII and IX.
[26] Brought forward by interviewee 2.
[27] Brought forward by official VI.
[28] Brought forward by interviewee F.
[29] Brought forward by interviewee 8.
[30] Brought forward by interviewee S.
[31] Brought forward by interviewee 2, 7, 9, B, P, C, A and M.
[32] Brought forward by interviewee 5, 7 and O.
[33] Brought forward by interviewee 1 and 4.
[34] Brought forward by interviewee 9 and S.

Cambodia about the Khmer Rouge history. The process is significant in preventing genocide from ever happening again.[35]					
ECCC will have supportive influence on the development and political climate in Cambodia[36]			1		1

3.2 Personal jurisdiction of the Extraordinary Chambers

Article 1 and 2 of the ECCC law define the personal jurisdiction of the Extraordinary Chambers by stating that the only the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed during the years of Democratic Kampuchea will be tried. The Khmer Rouge Tribunal lacks jurisdiction with respect to the lower cadres or other people who have committed crimes during the years of the regime. Although the matter of personal jurisdiction was not specifically questioned during the interviews, several interviewees have shared their opinion in this respect.

Four of the victims have declared that the tribunal should not only prosecute the senior leaders but also the lower cadres of the Khmer Rouge. One of the survivors of the Kraing Tachan prison stated that everybody has made a choice during the Khmer Rouge. If that choice has made somebody to commit serious crimes, than that person must face the consequences of these acts.[37] Another survivor of the Kraing Tachan prison has stated that reconciliation with the past cannot be achieved if only four or five people will be held responsible. The small number of convictions does not stand in the right proportion to the crimes that have been committed and will lack sufficient impact in the Cambodian society.[38]

Personal jurisdiction of the ECCC

Considerations	**Victims**	**Cadres**	**Combatants and Security**	**Base people**	**Total**
Those who to be held accountable is up to ECCC[39]	2	1			**3**
Lower cadres must be prosecuted by the ECCC as well[40]	4				**3**
Only most responsible Khmer Rouge leaders must be prosecuted. (Lower cadres did not know the intention of their orders, acted out of fear for their own lives or were uneducated people)[41]		1	5	4	**10**

[35] Brought forward by interviewee F.
[36] Brought forward by interviewee L.
[37] Brought forward by interviewee 1.
[38] Brought forward by interviewee 8.
[39] Brought forward by interviewees 3,9 and C.
[40] Brought forward by interviewees 1, 2, 5 and 8.
[41] Brought forward by interviewees C, D, G, F, L, M, N, O and S.

In comparison to the victims point of view, a lot of the cadres, combatants, security personnel and base people have declared to support the limited personal jurisdiction of the tribunal. Some of these interviewees have stated that the lower cadres just followed the orders and have not been informed on the intentions of the Khmer Rouge policies.[42] A former combatant and messenger of S-21 has stated in this regard that a broader jurisdiction is unfeasible. The interviewee stated that the people of Cambodia broadly supported the Khmer Rouge and everybody was involved in the revolution. If the Khmer Rouge Tribunal has the jurisdiction to bring lower cadres and less responsible people to trial, everybody would be convicted.[43]

The outcomes of the interviews with respect to the personal jurisdiction of the Extraordinary Chambers clearly reflect the opinions of the victims on the one hand and the opinions on Khmer Rouge involved persons on the other hand. This discrepancy most probably originates in the fear of former lower cadres, security personnel and combatants that the trials have direct consequences for them as well.

3.3 Willingness and motives to be a witness

Twenty interviewees have declared to be willing to appear as a witness before the Extraordinary Chambers. Amongst them were nine victims[44], four cadres,[45] five combatants and security personnel[46] and two base people[47]. Three interviewees have explained that they are not willing to be a witness and two of the interviewees will await a request by the Extraordinary Chambers before they make a decision in this matter.

Willingness to be a witness

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Willing to be a witness[48]	6	2	1	1	**10**
Willing but aware of possible threats[49]	2	2	4	1	**9**
Interviewees are only willing to be a witness if the government provides proper protection[50]	1				**1**
Not willing to be a witness[51]	1			2	**3**
Interviewees have not decided yet[52]			1	1	**2**

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42 See for instance remarks made by interviewee D.
43 Brought forward by interviewee L.
44 Brought forward by interviewees 1, 2, 3, 5, 6, 7, 8, 9 and 10.
45 Brought forward by interviewees B, C, P, and J.
46 Brought forward by interviewees A, F, G, K and L.
47 Brought forward by interviewees E and S.
48 Brought forward by interviewees 1, 2, 5, 7, 8, 10, B, P, G and S.
49 Brought forward by interviewees 6, 9, J, C, A, F, K, L and E.
50 Brought forward by interviewee 3.
51 Brought forward by interviewees 4, N and O.
52 Brought forward by interviewee D and Q.

The willingness and wishes of the interviewees to testify as a witness before the Extraordinary Chambers are based on a variety or reasons. Some interviewees feel it is their duty to contribute and want to help the tribunal in finding the truth and justice for the people of Cambodia.[53] In a similar context other interviewees expressed their wish to contribute to the process of reconciliation for themselves but also to the process within Cambodia. One of the survivors of Kraing Tachan and a former medical staff stated, for instance, that their testimony would release their pain and help them in dealing with their memories.[54] One of the victims explained that a testimony as a witness would finally give her an opportunity to ask the leaders of the Khmer Rouge why they killed so many people.[55] In some cases it has appeared that the hatred towards the Khmer Rouge regime is an important motivation for people.[56]

Motives[57]

Considerations	**Victims**	**Cadres**	**Combatants and Security**	**Base people**	**Total**
Willing because being a witness would be a personal contribution to the Khmer Rouge tribunal in finding the truth and justice[58]	3	1	2	1	**7**
Willing because being a witness will help personal process of reconciliation with the past[59]	1		1		**2**
Willing out of hatred towards the leaders of the Khmer Rouge Regime[60]	1	1			**2**
Willing out of support of the Khmer Rouge Tribunal[61]		1			**1**
Willing because being a witness would grant the opportunity to ask the Khmer Rouge leaders why they have killed so many people[62]	1				**1**
Willing out of sense of duty as one of the victims to contribute, but will not volunteer as a witness[63]	1				**1**
Not willing because testimony as a witness does not comply with Buddhist believes[64]		1			**1**
Not willing because interviewee does not have valuable information as a witness[65]	1			1	**2**
Not willing out of fear to speak in public[66]				1	**1**
Not willing to be involved in the work of the				1	**1**

[53] Brought forward by interviewees 3 and 5.
[54] Brought forward by interviewees 5 and L.
[55] Brought forward by interviewee 7.
[56] Brought forward by interviewees 5 and 6.
[57] Interviewees 1, 2, 8, 10, B, A, E, F and C have not explained their reasons willingness to be a witness before the Extraordinary Chambers.
[58] Brought forward by interviewees 3, 5, 9, G, P, S and K.
[59] Brought forward by interviewees 5 and L.
[60] Brought forward by interviewees 5 and J.
[61] Brought forward by interviewee J.
[62] Brought forward by interviewee 7.
[63] Brought forward by interviewee 6.
[64] Brought forward by interviewee B.
[65] Brought forward by interviewees 5 and O.
[66] Brought forward by interviewee O.

ECCC[67]					

A number of village chiefs have explained that their villagers are only informed on the general aspects of the tribunal. Therefore, it is difficult for them to assess whether his villagers are willing to appear as a witness.[68]

The Chief commander of the Takéo provincial police and his staff explained that everybody in Cambodia who is older than thirty years has suffered under the reign of the Khmer Rouge. With the intention to show the meaning of his statement, the Chief Commander shared some of his personal experiences with the team. He added that his story is not unique but that it resembles the sufferings of most of the people in Cambodia. Anybody who has survived this regime and these agonies will be willing to appear as a witness and contribute in finding justice for all its victims, thus stated by the Chief Commander of police in Takéo province.[69] The Chief prosecutor in Takéo province seemed to have a similar point of view and stated that all Cambodians are victims and therefore willing to testify. The agonies they have gone through are probably the most important motivation to testify before the Chambers. According to the Takéo prosecutor it is, however, important to be aware that the personal involvement and the sensitive nature of the testimonies may influence the perspective of the witnesses. Judges should be alerted that the witnesses may be biased or exaggerate their testimonies.[70] The Deputy Prosecutor in Takéo and some of the village and commune chiefs have brought forward similar views.[71]

Most of the representatives seemed to believe that there is no lack of people who are willing to testify as a witness. The decision to be a witness, however, does not just depend on their enthusiasm. A judge from the municipal court in Phnom Penh has explained that witnesses may encounter various obstacles on their way to the Extraordinary Chambers. These possible obstacles will be discussed in the following chapters.

[67] Brought forward by interviewee N, the cousin of former Security Chief of the Southwest Zone Ta Mok.
[68] Brought forward by the chief of Ta Toeum village, Takéo province and the chief of Tipatt village, Takéo province.
[69] Brought forward by officials VII, VIII, IX.
[70] Brought forward by official X.
[71] Brought forward by chief of Tram Kak sub district, chief of Toek Thla village and chief of Rosey Thmey village.

Chapter 4 The position of witnesses in Takéo

The primary objective of the threat assessment is to give insight in the attitude towards the people who may appear as a witness before the Extraordinary Chambers. The interviewees have been asked to share their views on the vulnerability of witnesses within their communities. This chapter presents an overview of the thoughts and remarks that have been brought forward by the interviewees and official representatives.

4. 1 Factors of influence

Before discussing the possible threats and the societal attitude in Takéo province towards the witnesses of the ECCC, it is important to note the following. First of all, it has appeared that the topic of the assessment is quite sensitive. In most of the villages in Takéo province victims and perpetrators live side by side, work together in mutual aid teams on the rice fields or meet each other during other occasions in their community. Although the former adversaries may still be a long way from rebuilding mutual trust underneath, they have found ways to live in their shared community. Since the establishment of the Khmer Rouge Tribunal the personal backgrounds of the members of these communities come once again to the surface. NGO's, reporters, journalists and investigators are getting more interested in establishing the facts of what actually has happened during the years of Democratic Kampuchea. This increasing attention has an impressing impact on the minds of many Cambodians. It reminds the people once again about the past of their neighbours or raises questions regarding the possible consequences of the Khmer Rouge Tribunal. For some people it seems that the more or less secure lives they have built in the last years are in jeopardy, as nobody really can tell them what will happen. Most people in the provinces have been informed about the Khmer Rouge Tribunal, but only a few of them have learned about the exact content of the law. The lack of information raises questions as "Who will be prosecuted?" or "Is there a chance they will prosecute me or my neighbour after I have testified as a witness before the tribunal?" The aforementioned questions lead to insecurity and confirm the sensitive nature of the threat assessment. These matters have had some affect on the response during the interviews in Takéo province. It is therefore important to take into account that the answers of the interviewees may not always have been the whole truth, but most probably just the tip of a complicated iceberg.

In addition to the sensitive character of the fear assessment, it is important to realise that it is not part of Cambodian culture to express fears and feelings of distrust openly. Too direct and sudden questions may raise suspicion and in those cases chances are slim that people will share their honest opinion. During the threat assessment the questionnaires have been adjusted several times and a lot of effort has been put into finding the appropriate approach. Nevertheless, it is again important to note that is has been quite a challenge to unveil the exact attitude towards witnesses in Takéo province.

4.2 Expected vulnerability of ECCC witnesses

As stated in the previous paragraph, the willingness of people to appear as a witness may be influenced by various dynamics within their society. The eagerness to contribute to the healing

process of Cambodia may fade when one will put the safety of his family in jeopardy. It is therefore important to know how the society may respond to witnesses and what may take away the possible tensions or suspicion. Only by providing proper support it is possible to comfort the people and encourage them to contribute to the process of finding justice in Cambodia.

With respect to the position of ECCC witnesses eight interviewees expect that witnesses run certain risks and will not be safe in their communities. Six interviewees stated that witnesses will have nothing to fear and one interviewee did not refer to any matters of safety.

Position of the witnesses[72]

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Interviewees who believe ECCC witnesses run certain risks and are not safe[73]	2	3	3		**8**
Interviewees who believe ECCC witnesses will have nothing to fear[74]	5				**5**
Interviewees who did not refer to possible threats or personal safety[75]				1	**1**

4.2.1 Non-vulnerable position of witnesses

With respect to the vulnerability of witnesses, five interviewees have expressed their beliefs that witnesses will have nothing to fear. These interviewees are all victims of the Khmer Rouge and declared to believe in the protection of the law in present-day Cambodia. Others have mentioned that the Khmer Rouge have lost the support of most of the people in Cambodia. One of the survivors of Kraing Tachan prison thinks that the organisation is demolished and that supporters will not dare to take revenge.[76]

Some official representatives have brought similar views forward. The Chief of the Provincial Cabinet has explained that the Khmer Rouge Trials will not challenge the stability of the present Cambodian society. He expects that the people who will contribute to the trials as a witness will have nothing to fear and are perfectly safe in their communities.[77] The chief added that people in Cambodia are tired of warfare and just want to live in peace with one and other. Likewise the Deputy Prosecutor of Takéo province has declared that ECCC witnesses will not be vulnerable in their communities.[78] The Chief Commander of the Takéo Provincial Police has explained in this regard that present Cambodia is built

[72] Interviewee N, one of the base people and a cousin of Ta Mok, stated that he did not have an idea about whether witnesses may be in danger. Interviewee E, did not have a clear idea whether ECCC witnesses will be safe or unsafe. Interviewees F, G, L, M, N did not share his opinion on whether witnesses are safe or unsafe. Interviewee S did not express her thought on the question whether witnesses are safe or unsafe. She did, however, mention that people are probably so angry about their sufferings that they will not care about their safety anymore.
[73] Brought forward by interviewees 3, 4, A, B, C, D, J and L. Interviewee B stated at first that it will not be in lines with Buddhist believes to take revenge, based on which people will have not so much to fear.
[74] Brought forward by interviewees 1, 2, 7, 8 and 10.
[75] Brought forward by interviewees O.
[76] Other considerations with respect to the position of the Khmer Rouge in present society will be discussed in paragraph 4.4.2.
[77] Brought forward by official VI.
[78] Brought forward by official XI.

on laws that prohibit any acts of revenge and protect the ECCC witnesses.[79] People who intimidate or threaten the witnesses of the ECCC will be punished based on these laws.

A number of the official representatives have referred to situation of Cambodia directly after the invasion by Vietnam. The Chief of the Takéo Provincial Court has explained that during those first years many survivors of Democratic Kampuchea have taken revenge on the lower Khmer Rouge cadres. The anger towards people who have been involved with the Khmer Rouge is gone and witness testimonies will most probably not stimulate new forms of aggression.[80]

4.2.2 Vulnerable position of ECCC witnesses

Besides the abovementioned point of view eight interviewees expressed their concern that ECCC witnesses will be vulnerable in their communities. The Deputy chief and interrogator at Kraing Tachan prison expressed his serious concern about the ECCC witnesses and believes that they will be most vulnerable and confronted by serious threats.[81] Another former Khmer Rouge cadre, who is presently a member of FUNCINPEC, referred to one of the DC-Cam ECCC tours on Monday the 26th of June 2006. The programme included a speech and explanation on the Extraordinary Chambers by a Member of Parliament, Mr. Maon Sophan. The interviewee recalled that most of his villagers were frightened by his presence and did not feel comfortable with his explanation. Their fearful response is a valuable indicator of the vulnerable position of the ECCC witnesses, thus stated by the former Khmer Rouge cadre.[82]

Three representatives of the Ministry of Interior, the judge of the Phnom Penh Municipal Court and the judge of the Takéo Provincial Court expressed their concerns with respect to the witnesses as well. The judge from Phnom Penh has explained that the involvement in the Khmer Rouge trials as an ECCC witness will have an important impact on the personal living conditions of the people in question. Most people in Cambodia are dependent on their relationship with the chiefs of village and chiefs of commune. The local representatives often support the villagers by means of water supply, food supply and other ways of assistance. The Judge indicated that a great number of chiefs are still supporters of the Khmer Rouge. How would it be possible for people to testify against the leaders of the Khmer Rouge when those who they depend on are still firm believers of the Khmer Rouge policies? Thus rhetorically questioned by the Municipal Judge. He added that various government officials, amongst whom one minister in the ruling government, have been Khmer Rouge cadres during Democratic Kampuchea. It is not hard to imagine how witnesses will be affected when they reveal important information on these officials on the stand. The judge is, therefore, convinced that ECCC witnesses will be quite vulnerable.

A judge of the Takéo Provincial Court has supported the abovementioned views and explicitly stated that ECCC witnesses will not be safe. He explained that uneducated people are easily impressed and

[79] Brought forward by officials VII, VII and IX.
[80] Brought forward by official XIII.
[81] Brought forward by interviewee D.
[82] Brought forward bye interviewee J.

pressured by rumours within their community. The increasing uncertainty about the Khmer Rouge trials will provoke tensions and witnesses must therefore receive high-level protection.[83] As mentioned before, the representatives of the Ministry of Interior have brought similar views forward. They believe that as long as people are not informed on the exact consequences of the witness testimonies, there will be a considerable chance of increasing tensions and witnesses will be vulnerable targets for acts of vengeance.[84]

4.3 Individual response

Out of all interviewees in Takéo province, eleven interviewees have stated that they are not afraid to appear as a witness before the Extraordinary Chambers. Six victims, one cadre, one combatant and three base people support this approach. One of the former guards of the Kraing Tachan prison has stated that he is an old man now and is willing to find justice for the victims of the Khmer Rouge. Possible threats will not hurt him anymore and he is not afraid to face them.[85] Another interviewee, who has been the member of a women's unit, has stated that she cannot imagine how it would affect her safety if she appears as a witness. She will only tell the truth and does not understand how this may affect her personal safety.

In comparison with the eleven interviewees who stated not to be afraid, twelve interviewees expressed their fear to testify as a witness for the Khmer Rouge Tribunal.[86] Four victims, three Khmer Rouge cadres, four security personnel, combatants and one of the base people are part of this group.

Fear of being a witness

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Interviewees who are not afraid to appear as a witness of the ECCC[87]	6	1	1	3	**11**
Interviewees who are afraid to appear as a witness of the ECCC[88]	4	3	4	1	**12**

At a first glance the outcome presented above seem to represent an equal division of both approaches amongst the interviewees. A closer look, however, gives an interesting impression of the underlying dynamics.

As mentioned before four victims, three Khmer Rouge cadres, four security personnel, combatants and one of the base people have stated not to be afraid to testify. [89] Three victims have been

[83] Brought forward by interviewee XII.
[84] Brought forward by interviewees I, II, III, IV.
[85] Brought forward by interviewee G.
[86] The explanation for their fears will be discussed more in depth in the next paragraph.
[87] Brought forward by interviewees 1, 2, 4, 7, 8, 10, G, M, P, Q and S.
[88] Brought forward by interviewees 3, 5, 6, 9, A, C, E, F, J, K, L and R. Interviewee C has changes his statements on possible threats various times during the interview. On the one hand he stated that it would be unsafe but at the end of the interview he added that witnesses were perfectly safe. He seemed insecure about being a witness and declared that he did not make up his mind yet.
[89] Brought forward by interviewees 1, 2, 4, 7, 8, 10, G, M, P, Q and S.

imprisoned in Kraing Tachan prison, one has been imprisoned in prison S-21 and two other victims have been affected by Democratic Kampuchea in other ways. The former Khmer Rouge cadre was appointed as commune chief and the security guard of the Kraing Tachan prison claimed not to be appointed as a high ranking guard of the prison. The three base people who have declared that they are not afraid have been working as medical staff in the Khmer Rouge hospitals. Compared to other interviewees these people have not revealed a close association with the dreadful aspect of the Khmer Rouge policies. The victims have not claimed to be tortured; the former sub district chief mainly worked as a farmer; the security guard was appointed outside the prison and the medical staff performed their tasks at a lower level within the hospitals. This is not to show that their sufferings are less impressive than the sufferings of other interviewees, but it does resemble a certain level of involvement and awareness of the performed Khmer Rouge policies.

The interviewees who have expressed their fears are three prisoners of the Kraing Tachan prison, two guards of Kraing Tachan, one S-21 survivor, a S-21 messenger, a commune chief, a chief of cooperative, a Chief of Platoon in the army force of the Khmer Rouge, a staff member of the Ministry of Foreign Affairs and one medical staff. The first victim was a village chief in Democratic Kampuchea and claimed to be arrested for his criticism on the Khmer Rouge policies.[90] He indicated that the prison guards executed most of the prisoners in the Kraing Tachan prison and explained that he is a member of the opposition party FUNCINPEC. The second prisoner of the Kraing Tachan prison was imprisoned for reasons of his involvement with the Lon Nol regime. During his imprisonment he has undergone severe methods of torture and witnessed the execution of other prisoners from close by.[91] The third prisoner of Kraing Tachan claimed to be imprisoned from 1975-1979. He revealed the names of the prison guards and expressed his concern about the fact that they live in the same communities or even just across the road. This interviewee is well aware of the personal involvement of the prison guards and the performed policies within the Kraing Tachan prison.[92]

As mentioned before, two of the people who expressed their fears have been involved with the S-21 prison, either as a former prisoner or as a S-21 messenger. The former prisoner has undergone methods of torture through electric shocks during the interrogations. His fear of appearing as a witness for the ECCC is related to a case intimidation by one of the police officers of the Ministry of Interior. According to the S-21 survivor, the officer wanted to make sure that he would not reveal the Khmer Rouge involvement of certain members of the Cambodian People's Party.[93]

The other interviewees who have expressed their fears have a close connection to the events that occurred within region 13 of the Southwest Zone. The Kraing Tachan prison guards claimed to be well aware or even involved in the execution of prisoners; some cadres have had a position of authority; others have been informed through their rank in the Khmer Rouge bureaucracy and one of interviewees is more aware of the Khmer Rouge military strategies.

[90] Interviewee 3.
[91] Interviewee 5.
[92] Interviewee 6.
[93] Interviewee 9.

In comparing the consideration on matters of safety one must not fail to notice the differences in the level of involvement and awareness of the performed Khmer Rouge policies amongst the interviewees. The analysis shows that people who are well aware of what happened or have witnessed dreadful policies from close by are more concerned about the consequences of their testimonies than the other interviewees.

4.3.2 Willing to take a risk

After comparing the outcomes of the questions whether people are willing and whether people are afraid to testify, it has appeared that fear will not withhold interviewees from testifying before the Extraordinary Chambers. The Chief of the Takéo Provincial Court shared his view that the victims of the Khmer Rouge want to speak as a witness in order to show they have courage and are proud, even if they feel they run certain risks. The only matters that may withhold them from being a witness are their Buddhist beliefs or financial considerations, thus stated by the judge from Takéo province.[94]

Besides anger and courage, the age of the witnesses can fulfil an important factor in accepting certain risks. A former prison guard of Kraing Tachan has explained that he is of old age and does not have so much to lose. His wish to contribute to the healing process of Cambodia is far more important to him.[95] Two former prisoners of Kraing Tachan have expressed similar perspectives.[96] One of both, a member of FUNCINPEC, has declared that he is willing to take the risks in order to contribute to the trials and that he is not afraid to die.[97]

A final important motive to accept the risks ECCC witnesses may run, originates from the hatred of some interviewees towards the Khmer Rouge leaders and their support for the Khmer Rouge Tribunal. One of the Khmer Rouge cadres has revealed this standpoint by stating that hatred towards the leaders is the most important reason for him to accept the risks he may run.[98]

Individual response to possible vulnerability as a witness

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Interviewees are willing to accept possible threats while they are of an old age now[99]			1		1
Interviewees are willing to accept possible threats out of hatred towards the Khmer Rouge and support for the Khmer Rouge Tribunal[100]		1			1

[94] Brought forward by official XIII.
[95] Brought forward by interviewee G.
[96] Brought forward by interviewees 2 and 3.
[97] Interviewee 3.
[98] Brought forward by interviewee J.
[99] Brought forward by interviewee G.
[100] Brought forward by interviewee J.

Interviewees acknowledge threats but regard their contribution to justice and reconciliation more important[101]	2				**2**

4.4 Indicated threats

The previous paragraph has shown that the witnesses of the Extraordinary Chambers can feel quite vulnerable. The important question in this respect is of course which risks and threats will be posed to them and by whom. The following paragraphs will present the expectations of the assessment interviewees in this regard.

4.4.1 Threatening parties in Takéo province

The interviewees in Takéo province and the government representatives have been asked to share opinion on who would pose the greatest threats to the people who will appear as a witness of the ECCC. The outcomes of the interviewees have indicated the following parties in Takéo and Cambodia: senior Khmer Rouge leaders, government officials, relatives of the accused, former lower Khmer Rouge cadres and victims. The views and concerns of the interviewees and official representatives will be clarified in the following paragraphs.

4.4.1.1 Accused and their relatives

During the assessment it has become clear that some of the interviewees expect pressure from the accused Khmer Rouge leaders or their relatives towards the witnesses. The interest of the leaders on trial in the evidence that will be brought forward by the witnesses is quite obvious, for the witnesses can reveal burdening and unburdening information. The interest of the relatives of the accused is clearly connected, as the outcomes of the trial can have an important impact on their lives as well.

One survivor of Kraing Tachan prison has stated that although he has faith in the present government, he fears the senior leaders of the Khmer Rouge. Unfortunately he has not explained his thoughts in detail.[102]

With respect to the relatives of the leaders one former cadre, who worked at the Ministry of Foreign Affairs, has indicated that they may want take revenge if he reveals his experiences and knowledge as a witness of the Extraordinary Chambers.[103] Unfortunately he did not seem willing to explain his thoughts in great detail as well. A former guard of Kraing Tachan prison initially stated that he did not fear for his safety. In the course of the interview he changed his statement and expressed his concern that family members of the accused might want to take revenge. In this respect he did not indicate whether he really has information that may be burdening for the accused.[104] One of the Kraing Tachan survivors is afraid that family members of the persons on trial want to take revenge and even thinks that they would want to kill him after he has revealed his story before the KRT.[105]

[101] Brought forward by interviewees 2 and 3.
[102] Brought forward by interviewee 3.
[103] Brought forward by interviewee R.
[104] Brought forward by interviewee F.
[105] Brought forward by interviewee 5.

The Chief Commander of the Takéo Provincial Police does not seem to agree with the abovementioned considerations. In his view there is no reason to fear the family members of the senior leaders who will be on trial.[106]

4.4.1.2 Present government officials

A second group of people who have been brought forward as a possible threat to the ECCC witnesses is related to a quite sensitive topic in Cambodia: the Khmer Rouge involvement of high officials in the present government. Their alleged involvement may come once again to the surface when the prosecution and defence teams present their evidence before the Chambers. The interest of present government officials in the outcomes of the trials may challenge them to influence the witnesses and manipulate their testimonies in various manners.

In this respect two interviewees in Takéo have revealed their concerns. One of the former prison guards of Kraing Tachan has expressed his concern with respect to the present government. Although he has not explained his thoughts in detail, he seems to be worried that the government will pose a threat to him when he reveals the information that he has.[107] A S-21 survivor, who has been confronted with intimidation by a government official a few years ago, has revealed a similar concern. According to the former prisoner a representative of the Ministry of Interior intimidated him to assure he would not reveal the Khmer Rouge involvement of present members of the Cambodian People's Party.[108]

The judge of the Municipal Court of Phnom Penh explained that most government officials and local authorities are members of the Cambodian People's Party. According to the judge many of these government officials still support the Khmer Rouge or have been involved with the Khmer Rouge during the years of the regime. The witnesses of the Extraordinary Chambers cannot rely on the government representatives and there may be even a risk of revenge. The representative of the judiciary did not explain his concern in further detail.[109]

The suspicion of the involvement of present government officials has also brought to light during the interview with the Deputy Prosecutor of the Takéo Provincial Court. The official stated that only a few government representatives still support the ideas of the Khmer Rouge. This small amount of people will not form a threat to the witnesses.[110]

4.4.1.3 Former Khmer Rouge cadres on a lower level

In a number of interviews it has been indicated that those who have been involved in the Khmer Rouge killings on a lower level can form a significant threat for the witnesses of the Extraordinary

106 Brought forward by official VII, VIII and IX.
107 Brought forward by interviewee A.
108 Brought forward by interviewee 9.
109 Brought forward by official V.
110 Brought forward by official XI.

Chambers as well.[111] The messenger of S-21 has declared that he is more than willing to testify and explain about the horrors that occurred within the prison of the Khmer Rouge. He added, however, that he would not share this willingness with his community. Former Khmer Rouge cadres to whom his testimony may concern can get suspicious and may want to take preventive measures or revenge.[112] A survivor of the Kraing Tachan prison expressed his deep concerns with respect to his personal safety and the safety of his family. He lives in the same village and district as most of the Kraing Tachan prison guards and is afraid that his testimony invokes their suspicion. He is afraid that the prison guards or their families will take revenge if he appears as a witness and reveals the information he has before the Extraordinary Chambers.[113]

4.4.1.4 Victims and survivors

The arguments in the previous paragraph have also been presented the other way around. According to this line of reasoning victims may pose a threat as well to those who share their experiences before the tribunal. The Chief of the Provincial Cabinet pointed towards the position of the witnesses of the defence. Their testimonies may reveal their personal involvement in the crimes that occurred during the years of Democratic Kampuchea. Once victims and survivors are reminded of their sufferings and confronted by the involvement of witnesses herein, their resentment towards these witnesses may increase. In most extreme cases victims may still be willing to take revenge for their lost relatives and friends.[114]

The representatives of the Ministry of Interior have indicated as well that threats towards the ECCC witnesses may arise from victims and survivors. These people may want to take revenge on the lower cadres who have killed during the years of Democratic Kampuchea. Unfortunately the representatives have not explained their expectations in great detail.[115]

Threatening parties in Takéo province

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Witnesses will face acts of revenge and intimidation[116]	3		1		4
Fear of reprisal by the senior Khmer Rouge leaders or their families[117]	1	1	2		4
Fear of reprisal by former cadres or Khmer Rouge soldiers living in the same community[118]	1		1		3
Present government officials form a threat towards the witnesses of the ECCC[119]			1		1

[111] See for instance the statements by interviewee L.
[112] Brought forward by interviewee L.
[113] Brought forward by interviewee 6.
[114] Brought forward by official VI.
[115] Brought forward by official III.
[116] The interviewees who expressed their fear of revenge of intimidation often did not specify who in their society would want to take revenge. Brought forward by interviewees 6, 8, 9 and K.
[117] Brought forward by interviewees 5, R, A and F.
[118] Brought forward by interviewees 6 and L.
[119] Brought forward by interviewee A.

No clarification on who would want to take revenge and how[120]	1		1		2

4.4.2 Present supporters of the Khmer Rouge

During the assessment the present position of the Khmer Rouge have been discussed from two standpoints. A number of interviewees have on the one hand stated that the Khmer Rouge still have a significant position within the present Cambodian society. On the other hand it has been stressed that the Khmer Rouge leaders will not pose any threat to the ECCC witnesses, while their organisation has been demolished. In this respect one of the survivors of Kraing Tachan has stated that the former Khmer Rouge leaders do not have the same position and power as they had during the DK period. Nowadays, the roles have reversed and the former Khmer Rouge leaders have to fear him when he will tell his story before the international tribunal.[121] Likewise another Kraing Tachan survivor explained that the Khmer Rouge does have as much power as it used to have will not dare to take to revenge.[122]

Amongst the official representatives several interviewees have asserted a similar point of view. The Chief Commander of the Takéo police explained that there is no reason to fear the senior leaders on trial or their relatives. The structure of the Khmer Rouge has been destroyed and the cadres who have survived do not have a leader anymore. Chances or revenge by Khmer Rouge supporters and former Khmer Rouge cadres are therefore slim. The Chief Prosecutor, the Deputy Prosecutors and Chief Judge of the Takéo Provincial Court revealed a similar point of view in this regard.[123] According to Chief Judge there are no conflicts of interests anymore in Cambodian society. Justice will be found based through democratic means.[124]

Present position of the Khmer Rouge

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Khmer Rouge does not have power anymore in present Cambodian society[125]	2				2
Khmer Rouge has still a lot of power and is supported in present Cambodian society[126]			1	1	2

4.4.4 Risks of revenge and reprisal

In view of the sensitive character of this study, it will be no surprise that some of the interviewees have found it difficult to share their expectation on who will be the greatest threat to the witnesses of the Extraordinary Chambers. The tendency to secrecy and uncertainty in this regard has become clear

[120] Brought forward by interviewees 3 and K.
[121] Brought forward by interviewee 2.
[122] Brought forward by interviewee 8.
[123] Brought forward by official X and XI.
[124] Brought forward by official XIII.
[125] Brought forward by interviewees 1, 2 and 8.
[126] Brought forward by interviewees A and E.

in various ways. The Chief Prosecutor of the Takéo Court has stressed that it is impossible to predict who will pressure the witnesses before the processes have begun. The possible threats will come to the surface during the Khmer Rouge trials and depend for an important part on the testimony and position of the witnesses, for it has than appeared who is directly affected by the witness testimonies.

The most serious threat that has been brought forward during the assessment is the risk to be killed out of revenge. One of the victims who has been imprisoned in Kraing Tachan and was severely tortured, expressed his fear that the relatives of the persons on trial want to kill him after he has revealed his story before the KRT.[127] In a similar context a Kraing Tachan prisoner has brought forward that he is not afraid to die. As a member of FUNCINPEC he stated to be fully aware of the risks he may run.[128] Another FUNCINPEC member has pointed to the risk that people may be killed for reasons of their testimony. As a member of the opposition party, this former Chief of Cooperative, is aware of the threats regarding his personal safety. He has explained that ECCC witnesses may be confronted by sudden accidents, such as armed robberies and traffic accidents, as a cover up for the acts of revenge. He concluded by stated that is willing to testify even if this may lead to his death.[129]

Possible threats and risks

Considerations	**Victims**	**Cadres**	**Combatants and Security**	**Base people**	**Total**
Witnesses face a risk of being killed[130]	2	2			**4**
Reprisals may be taken through for instance armed robberies or traffic accidents[131]		1			**1**
Fear of revenge or other threats is based on previous cases of intimidation[132]	1				**1**

[127] Brought forward by interviewee 5.
[128] Brought forward by interviewee 3.
[129] Brought forward by interviewee J.
[130] Brought forward by interviewees 3, 5, B and J.
[131] Brought forward by interviewee J.
[132] Brought forward by interviewee 9.

Chapter 5 Vulnerable witnesses

As mentioned in the introduction, the purpose of the threat assessment is to learn more about the attitude towards the witnesses of the Extraordinary Chambers. The Khmer Rouge has affected the witnesses in different ways and all witnesses represent different manners of involvement with the regime. It is important to acknowledge that the societal attitude towards the witnesses may depend on these differences. The role of a witness within the trials, the position of a witness within the Khmer Rouge regime or for instance the position of a witness in present-day Cambodian society may influence the response of their communities and leave one witness more vulnerable than the other. This chapter presents an assessment of possible vulnerable witnesses as brought forward by the interviewees. The outcomes indicate the following groups of witnesses who may be more vulnerable than others: witnesses of the defence, members of the opposition parties and persons who have valuable information regarding the trials.

5.1 Witnesses of the defence

One group that has clearly been identified as a vulnerable group amongst the ECCC witnesses are the people who appear as the witnesses of the defence. During the threat assessment people have been questioned on their opinion regarding these witnesses. The outcome of this assessment is quite clear. Fifteen out of twenty-eight interviewees seemed not to be willing to share their opinion on this issue. Thirteen interviewees stated that nobody would support the Khmer Rouge leaders or expressed their disapproval towards the witnesses of the defence. Only one of the victims, a former prisoner of the Kraing Tachan prison, has expressed his belief that many people still support the Khmer Rouge and will be willing to testify on the part of the Khmer Rouge leaders.[133] This interviewee did not state to be willing to appear as witness of the defence himself.

A large majority of the people who have expressed their opinion in this regard expected that most people in Cambodia would not be willing to appear as witness of the defence.[134] The Deputy Prosecutor at the Provincial Court of Takéo explained that the sufferings of the people would restrain them from being such a witness.[135] Although the Chief of the Provincial Cabinet seems to be convinced that witnesses are completely safe, he suspected that in comparison with others the witnesses of the defence are most vulnerable. The survivors and victims may feel some resentment towards them once they are reminded of their experiences during the Khmer Rouge years.[136] An affirmative remark was made by one of the medical staffs. She has added that the Khmer Rouge was an awful regime and that she could not imagine why people would be willing to support the most responsible leaders of such a regime.[137] A security guard of Kraing Tachan has made the most far-reaching remark by stating that witnesses who support the accused on trial betray the nation.[138]

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[133] Brought forward by interviewee 5.
[134] Brought forward by interviewees 3, C, D and G.
[135] Brought forward by official XI.
[136] Brought forward by official VI.
[137] Brought forward by interviewee E.
[138] Brought forward by interviewee F.

Some official representatives have brought forward similar perceptions and expect that most people are not willing to appear as a witness of the defence. In this respect it has been stated by the representatives of the Ministry of Interior that witnesses of the defence will probably be hard to find, as nobody is willing to support the senior Khmer Rouge leaders on trial.[139] In addition the representatives have stated that the identity of the witnesses of the defence should be confidential. In order to protect their safety they should testify without revealing their identity, either in another room or by using microphones.

5.2 Members of the opposition party

A second vulnerable group brought forward by the interviewees include the witnesses who are also member of the political opposition parties Sam Rainsi and FUNCIPEC. The Judge of the Phnom Penh Municipal Court has indicated that members of the opposition parties are more vulnerable as a witness than other witnesses.[140] The judge referred in this respect to the members of Sam Rainsi, but other interviewees have pointed towards the vulnerability of FUNCIPEC supporters as well. Two interviewees, one survivor of Kraing Tachan and one former chief of cooperative, have based their statements on their experiences as a opposition member in Cambodia. Both have explained to be aware of the serious threats than can come to the surface once opposition members appear as a witness of the ECCC. They would increase their protective measures once they are requested to appear as a witness for the Extraordinary Chambers.[141]

5.3 Khmer Rouge involved and well-informed witnesses

In addition to the abovementioned vulnerable witnesses, the fear assessment has shown that the vulnerability may also cohere with the Khmer Rouge history of witnesses themselves. On the one hand it is possible that witnesses themselves have participated in the crimes that are to be judged by the Extraordinary Chambers. These witnesses may have had a higher or lower level position within the Khmer Rouge structures. On the other hand it is possible that people have valuable information because they have either witnessed the atrocities from close by or because they have been closely connected to the senior leaders of the Khmer Rouge.

The Khmer Rouge trials may have impact on the first category based on the following reasons. As the trials of the tribunal will be public and broadcasted throughout the whole country, people in Cambodia will learn who has been a killer during Democratic Kampuchea. The tribunal has jurisdiction regarding those who are most responsible and the senior leaders of the Khmer Rouge and therefore these killers will not be prosecuted. It has already been pointed out in paragraph 5.4.1.4 that victims may feel strong resentment towards these witnesses. The identity of the killers will be known, which emphasises their vulnerable position in the Cambodian society.[142] In this respect the Chief of the

[139] Brought forward by official I.
[140] Brought forward by official V.
[141] Brought forward by interviewees 3 and J.
[142] Brought forward by officials I, II, III and IV.

Provincial Cabinet has pointed out that the disclosure of their history may lead to a discriminatory relationship within the community of the witnesses.[143]

The vulnerability of the second category will be demonstrated on the basis of two examples. The first example in this regard refers to one of the Kraing Tachan survivors who has been imprisoned for more than three years. During his time at the prison he has closely witnesses the prison policies and the involvement of the prison guards who nowadays live in the same village or district. It is not difficult to imagine that the former prison guards have a certain interest in the testimony of the former prisoner, for he may reveal their involvement in the executions in Kraing Tachan.[144] The Judge of the Municipal Court in Phnom Penh has presented another example, which refers to the situation of two regions in Battambang province during Democratic Kampuchea. During those years the two regions have been governed in different ways. The Khmer Rouge ruling in the first region was far stricter than the ruling by the cadres in the other region. An important indicator in this regard is the fact that all teachers in the first region have been executed, whereas ninety percent of the teachers in the other region have survived. These differences in ruling show that lower Khmer Rouge cadres have followed superior orders in various ways. It also indicates that cadres have been involved in the crimes on various levels. Nowadays, some of these cadres fulfil positions within the local authority and in the ruling government.[145] Most of the people in Battambang are well aware of their Khmer Rouge backgrounds. It is not hard to imagine how witnesses can be affected once they reveal this information during the processes, thus stated by the Judge.[146]

Both examples show that witnesses who either witnessed the atrocities from close by may become quite vulnerable once they reveal important information during their testimonies.

[143] Brought forward by official VI.
[144] Brought forward by interviewee 6.
[145] The official referred to the involved of one of the present ministers in Battambang province.
[146] Brought forward by official V.

Chapter 6 Impact

Most of the representatives seem to believe that there is no lack of people who are willing to testify as a witness. The decision to be a witness, however, does not just depend on their eagerness to contribute to the Khmer Rouge Trials. Witnesses may encounter various obstacles on their way to the Extraordinary Chambers. Some of the obstacles have already been discussed in the previous chapter, but those obstacles mainly involved the personal safety of the witnesses. This chapter will touch upon other obstacles that have been brought forward by the interviewees of the threat assessment.

6.1 Financial impact for the ECCC witnesses

One of the questions during the interviews has specifically been focussed on the anticipated financial impact for those who will appear as a witness for the Extraordinary Chambers. As most of the candidate witnesses live in the rural areas and provinces of Cambodia, it was assumed that their visits to Phnom Penh would have some financial consequences. In view hereof people have been asked whether they would need financial compensation for their visits to the Extraordinary Chambers.

Out of all interviewees who agreed with the interview, three victims and one former Khmer Rouge cadre have pointed out that they would not have sufficient means of their own to cover the costs. Four interviewees expect financial compensation not to be necessary as they have sufficient means of the own. In addition to these interviewees, eight other interviewees have attributed the financial impact to their loss of income, as it would be necessary for them to interrupt their work. Only one of them specifically expressed that he expects the tribunal to cover the costs, compared to four other interviewees who explained that they won't ask but will accept if financial compensation is offered. Most of the interviewees have not referred to the consequences if financial expenses will not be compensated.

Financial compensation

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Financial compensation is necessary as interviewee does not have sufficient recourses to cover the costs[147]	3	1			**4**
Financial compensation is needed to cover the loss of income[148]		1	4	3	**8**
Interviewee expects the tribunal to cover the costs of the witnesses[149]				1	**1**
Financial compensation would not be necessary as interviewee can cover the financial costs[150]	3			1	**4**
Interviewee does not expect the tribunal to cover the costs of the witnesses[151]		1	1		**2**

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[147] Brought forward by interviewees 4, 5, 9 and B. Interviewee B did not refer to his own situation or preference, but explained that most people in Takéo province are poor and will need financial compensation.
[148] Brought forward by interviewees A, E, F, G, L, M, R and S.
[149] Brought forward by interviewee O.
[150] Brought forward by interviewees 1, 2, 8 and N.

Interviewee does not expect the tribunal to cover the costs but will accept financial compensation[152]	3			1	4
Interviewee prefers financial compensation but will not refuse to be a witness if compensation is not granted[153]		1			1

Interviewees 6, C and D did not share their opinion in this regard.

The outcomes of the interviews as explicated above do not present a convincing plea for financial compensation. The official representatives, however, regard financial compensation very important. Especially the Deputy Prosecutor of the Court in Takéo has emphasised the importance of financial compensation. He explained in this regard that people in Takéo province are poor and that the financial impact may be a grand obstacle for them to be a witness before the Extraordinary Chambers. In his career as a prosecutor he has often experienced that witnesses do not show up for they are not willing to spend any money for their testimony.[154]

One of the Takéo judges has expressed similar views and shares similar experiences as a judge in Takéo province. He has learned that the financial impact often withholds people from being a witness in procedures for the courts. He also mentioned that witnesses may look for other ways to fund their expenses. In this respect the judge alerts the Extraordinary Chambers that these sponsors may try to influence their testimonies.[155] The vast majority of the official representatives have supported the view that financial compensation is essential.[156]

6.2 Impact on the situation of ECCC witnesses

During the fear assessment interviewees have been questioned what impact their testimony would have on their personal living situations. Some interviewees have mentioned that their testimonies as a witness will affect their personal living conditions or their work as a farmer. In addition, some of the official representatives have addressed the possible impact on the status of witnesses within their communities.

6.2.1 Personal living situation

For most of the people in Cambodia it may be a problem to leave their homes for a couple of days in order to appear as a witness before the Khmer Rouge Tribunal. The vast majority of the Cambodians is farmer whose life depends on their daily efforts in their families and communities.

Eighteen of the interviewees in Takéo province have affirmed that being a witness of the Khmer Rouge Tribunal will affect their daily lives and personal living conditions. Nine of these witnesses, amongst whom two victims, two former cadres, two combatants and security personnel and three base people have attributed the impact to the interruption of their work. One of the S-21 survivors,

151 Brought forward by interviewees J and K.
152 Brought forward by interviewees 3, 7, 10 and Q.
153 Brought forward by interviewee P.
154 Brought forward by official XI.
155 Brought forward by official XII.
156 See also interview with official V and VI.

who is currently a village chief, has explained that his job entails great responsibility. It would be rather difficult for him to leave his village for a longer period of time.[157] Two former medical staff, who are farmers nowadays, have made it clear that there would be nobody to take care of their children, the animals and the required work on the rice fields.[158] In a similar context a former guard of the Kraing Tachan prison has pointed out that his family would not be protected during his absence.[159]

Personal living situation

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Testimony as a witness will have impact on the family situation[160] of the interviewee[161]	1	4	2	2	**9**
Testimony as a witness will have impact on the work as a farmer[162] or in any other way[163]	2	2	2	3	**9**
Testimony as a witness will not have impact on the family situation of the interviewee[164]	5				**5**
Testimony as a witness will have impact on the secure situation of the family as the home and relatives will be unprotected[165]			1	1	**2**

Interviewees 3, 5, 9, B, K and Q did not share a specific opinion in this regard.

6.2.2 Status in the communities

Most of the official representatives have placed the possible impact in a broader picture. During their interviews it has mainly been considered whether the status of the witnesses in their communities will be affected. The Judge from the Municipal Court has expressed his deep concern which is addressed in paragraph 5.2. The Judge has explained that most people in Cambodia are dependent on their relationship with the chiefs of village and chiefs of commune. The local representatives often support the villagers by means of water supply, food supply and other ways of assistance. The Judge indicated that a great number of chiefs are still supporters of the Khmer Rouge. How would it be possible for people to testify against the leaders of the Khmer Rouge when those who they depend on are still firm believers of the Khmer Rouge policies?[166]

[157] Brought forward by interviewee 10.
[158] Brought forward by interviewee E and M.
[159] Brought forward by interviewee F.
[160] The interviewees who have not specified their concerns have been grouped in this category.
[161] Brought forward by interviewees 6, A, C, D, G, J, O, P and S.
[162] This category refers to the interviewees who have stated that being a witness will have impact on their work as a farmer, as the cattle will be unattended and the work at the rice fields has to be stopped for a few days.
[163] Brought forward by interviewees 6, 10, C, E, F, I, L, M and R.
[164] Brought forward by interviewees 1, 2, 4, 7 and 8
[165] Brought forward by interviewees F and N.
[166] Brought forward by official V.

The representatives of the Ministry of Interior explained that people are willing but may find it difficult to share their history before the Extraordinary Chambers. In this respect they have pointed towards victims of rape for whom it may be more difficult to share their experiences in public. Another group that may find it more difficult to testify are the people that will appear as witnesses of the defence.[167]

The outcomes of the interviews show that being a witness is expected to have important impact on the individual lives of the witnesses. Especially the official representatives have pointed out the ways in which the lives of witnesses may be affected. Based on these interviews financial support and possible obstacles in the community should play an important role in the creating proper ways of response and assistance. This will be further explained in the following chapter.

[167] Brought forward by officials I, II, III and IV.

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Chapter 7 Supportive and protective measures

This fear assessment has been conducted in order to outline supportive measures that can be taken by DC-Cam and perhaps the Extraordinary Chambers and NGO's. The measures that have been proposed by the interviewees of the fear assessment can be categorised in protective, informative, logistic, supportive and financial measures.

7.1 Informative measures

Over the last years more and more outreach programmes have been initiated by DC-Cam and NGO's in Cambodia in order to inform the people in Cambodia about the tribunal that is dedicated to find justice for them and their lost relatives. The establishment and purpose of the Extraordinary Chambers have been explained to them in numerous booklets, pamphlets, through seminars, radio and television. As mentioned in the third chapter, these sources of information have reached the interviewees and most of them have been informed on the establishment of the Khmer Rouge Tribunal. It has appeared, however, that besides the basics regarding the tribunal people are not informed on relevant details. The vast majority is not familiar with the possible consequences of witness testimonies. The representatives of the Ministry of Interior, the Chief of Provincial Cabinet, the Chief Prosecutor of the Takéo Court, the Chief Commander of the Takéo Provincial Police, the Deputy Prosecutor of the Takéo Court and a Judge of the Takéo Provincial Court have emphasised the importance of this lack in information.

The representatives of the Ministry of Interior stated that inadequate knowledge on the possible consequences of being a witness will encourage uncertainty and tension within the society. An example brought forward in paragraph 6.3 may be used to enlighten this line of reasoning. The example referred to the vulnerable position of a former Kraing Tachan prisoner with respect to the former cadres who live in the same village and sub district. If the prisoner is requested to be a witness, the former cadres may feel threatened by his position as a witness. As long as the former lower cadres are not informed on the actual scope of the "most responsible", they will feel uncertain about the consequences of the testimony by the former prisoner can have.

Uncertainty will not only raise doubt and tension in society, it may also discourage the people to appear as. Another Ministry representative has explained in this regard that that it will be hard for people to measure the value of their testimony if they are not properly informed. People may think their testimony is useless and will therefore not be encouraged to interrupt their work. By being informed, people will gain confidence in the process and will be more willing to make certain sacrifices.[168] The Chief Prosecutor of the Takéo Court has explained that the Extraordinary Chambers have to inform the people in Cambodia about the objective of the tribunal in order to encourage them to speak out.[169] In addition to these views a Judge of the Municipal Court in Phnom Penh added that the people in Cambodia will not learn from the lessons of the tribunal if they are not properly

[168] Brought forward by officials I, II, III and IV.
[169] Brought forward by XI.

informed. The judge has added that the tribunal can only achieve the anticipated educational value if the people of Cambodia are enlightened about the proceedings.[170]

With respect to the lack of information on the tribunal, the official representatives have emphasised the importance of outreach. The programmes that already exist are too limited in number and do not reach enough people throughout Cambodia. The officials have suggested that the programs should not only be intensified, but that they should include comprehensive information on the UN agreement and the ECCC law as well.[171] One of the representatives of the Ministry of Interior has proposed to form a billboard, which explains the relevant details of the tribunal laws. These sources of information are easy to distribute in the provinces and can increase the level of outreach. The Chief of the Provincial Cabinet has suggested that more detailed and relevant information should be broadcasted by radio and television.[172] Nowadays, most of the people who live in the rural areas of Cambodia have access to one of both media. A representative of the Ministry of Interior has referred in this regard to the short documentaries on HIV/AIDS and bird flue, successfully broadcasted by radio and television in Cambodia.[173]

7.2 Protective measures

Even though most of the interviewees have expressed their wish to be a witness before the tribunal, many interviewees are aware that there may be some threats to their personal safety. For most of the interviewees it appeared to be difficult to explain why they were afraid and what they feared the most. It often occurred that interviewees have started the interview by saying there is nothing to fear and have concluded by saying they would not testify without sufficient safety measures by the government.[174] The interviewees have been questioned how DC-Cam or the Extraordinary Chambers could best support the witnesses and whether they had any suggestions for protective measures. As a result of the hesitance earlier described, only a few interviewees in Takéo suggested detailed measures. These suggestions and the suggestions of the official representatives will be described in the following paragraphs.

7.2.1 Selection and pre-trial procedures

In answer to the question whether the interviewees have any suggestions to support and protect the witnesses, only a few have referred to measures that have to be taken before they will appear before the Extraordinary Chambers. One of the former cadres stated for instance that the identity of the witnesses should be kept confidential from the moment a person is requested as a witness.[175]

The Judge of the Municipal Court in Phnom Penh explained that the process of requesting witnesses should fulfil at least three requirements. First of all, the tribunal should carefully chose who they want

[170] Brought forward by official V.
[171] Brought forward by officials I, II, III and IV.
[172] Brought forward by officials I, II, III, IV and VI.
[173] Brought forward by officials I, II, III and IV.
[174] Interviewees C and F.
[175] Brought forward by interviewee B.

to request as a witness before their process has started. Once people are selected, the tribunal should provide them with a document confirming that the Extraordinary Chambers will provide protection for them and their families. A third requirement is that the document should include the declaration that the United Nations will provide a visa to one of their member states once it has appeared that the witness is in serious danger. The last proposal of the Judge is based on his presumption that witnesses who feel seriously threatened may want to flee from Cambodia. Most of the people, however, believe that this option will have far-reaching consequences and expect that the UNHCR will not assist them. The judge explained that this insecure prospect withholds people from testifying. The international relocation option as proposed by the Judge will in reality not be executed, but it will increase the confidence of the witnesses and encourage them to share their experiences on trial.[176]

7.2.2 Measures with respect to the identity of the witnesses

The interviewees of the assessment have provided various suggestions to protect the witnesses during the trials. One of the most indicated measures is related to the confidentiality of the ECCC witnesses. One former cadre and three Khmer Rouge combatants and security personnel expressed their preference to be an anonymous witness.[177] A former guard at Kraing Tachan prison has explained that he is afraid that relatives of the Khmer Rouge leaders on trial will take revenge once they know his identity.[178] Another guard of the same prison explained that he would like to be anonymous, but that most of the people in his village already know about his role during the Khmer Rouge regime.[179] Three victims, one cadre and one of the base people have explained that they will not have a problem to reveal their identity in public.[180] One of the S-21 survivors explained in this regard that the fact that he has already been pressured indicates that people are familiar with his history anyway.[181]

Anonymity

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Preference to be anonymous witness[182]		1	3	1	5
No problem to make identity public[183]	3	1		1	5

With respect to the confidential identity of the ECCC witnesses the official representatives have expressed various views. The representatives of the Ministry of Interior have given a thorough explanation and indicated that witness protection must be divided in two phases, pre-trial and during the trial. One of them explained that it is important to maintain confidentiality on the witnesses in the first phase and that the Extraordinary Chambers cooperate with the local authorities to support them.

176 Brought forward by official V.
177 Brought forward by interviewees F, G, J, K, N and O.
178 Brought forward by interviewee F.
179 Brought forward by interviewee G.
180 Brought forward by interviewees 7, 8, 9, B and M.
181 Interviewee 9.
182 Brought forward by interviewees F, G, J, K, N and O
183 Brought forward by interviewees 7, 8, 9, B and M.

After the prosecutor of the Extraordinary Chambers has decided who will appear as a witness, the prosecutor should request assistance of the police. Only the police and local authorities may be informed on the identity of the people and the information cannot be made public.[184] One of the representatives of the Ministry of Interior has stated in this regard that especially the identity of the witnesses of defence should be confidential. The Khmer Rouge Trials will be broadcasted throughout Cambodia and in order to protect their safety the identity should not be revealed to the public. In this regard it has been suggested to let the witnesses testify in another room or by using microphones.[185] The Judge from the Municipal Court in Phnom Penh explained in this regard that provisions regarding the anonymity of a witness have been provided in the Criminal Code of 1993.[186]

Not all official representatives supported the view that witnesses should not reveal their identity for the public. In line of their believe that witnesses have nothing to fear, the Chief of the Provincial Cabinet, the Chief Commander of the Takéo Provincial Police and the Deputy Prosecutor Takéo Province explained that there is no reason for witnesses to keep their identity confidential.

7.2.3 Additional protective measures

During the interviews various measures have been brought forward that are relevant for different stages in the process. Some measures, such as those mentioned in the previous paragraph, have to be endorsed during the whole process of the Khmer Rouge Trials. Other measures are relevant to a certain stage, such as the trial or post-trial stages.

With respect to the trial stage a number of interviewees have brought forward valuable suggestions. An important measure in this respect refers to the housing arrangements of the witnesses. The representatives of the Ministry of Interior have stressed the importance of safe housing facilities.[187] In their opinion the ECCC witnesses cannot stay in Phnom Penh without protection. The police in Phnom Penh should accompany them during the trials and the safe housing provisions are important assets to their safety.

With respect to the safety measures after the trial it appeared to be more difficult for the interviewees and representatives to suggest protective measures. One of the representatives of the Ministry of Foreign Affairs explained that it the national police does not have enough resources to protect the witnesses the rest of their lives. The official did, however, point out that people should not forget the rule of present laws in Cambodia, as the laws will safeguard the position of the witnesses.[188] The Chief Commander of the Takéo Provincial Police stressed as well that the present Cambodian society is built on laws that prohibit any acts of revenge. Those who will intimidate or take revenge will be punished, so witnesses will have nothing to fear.[189] A final reference is made to the remarks of the Deputy

[184] Brought forward by officials I, II, III and IV. Supported by official X.
[185] Brought forward by interviewees I, II, III and IV. The reasons to believe that witnesses of the defence are more vulnerable have been explained in paragraph 5.2.
[186] Brought forward by official V.
[187] Brought forward by officials I, II, III and IV.
[188] Brought forward by officials I, II, III and IV.
[189] Brought forward by official VII, VIII and IX.

Prosecutor of Takéo. The Deputy has explained that the government will facilitate the process of the tribunal. All witnesses should realise that the current government has protected and supported them over the last years and there is no reason to doubt the abilities of the strong present government.[190]

In comparison to the above explained confidence in the society, some representatives expressed their disbelief in the secure position of the ECCC witnesses after the trials. The Chief Prosecutor of Takéo province suggested that the military authorities on district level should assist the local authorities in protecting the witnesses after they have returned to their homes.[191] One of the Takéo judges conformed this suggestion and stressed that the level of protection should be very high. According to the judge, the local authorities will not be capable to provide this level of protection and the district military police should assist. He has added that proper measure of protection can only be provided if the international community assists the Cambodian government.[192]

7.3 Logistic and supportive measures

The purpose of this assessment is not only to give insight in the attitude of society towards witnesses, it is also to provide suggestion for DC-Cam, the Extraordinary Chambers and NGO's on how to support and assist the ECCC witnesses. It has appeared in the previous paragraph that the primary responsibility for the protection of the witnesses rests on the shoulders of the Extraordinary Chambers in cooperation with the Cambodian government. The role of DC-Cam and NGO's will become more apparent in this paragraph, which describes the logistic and supportive measures that have been suggested by the interviewees.

One of the measures brought forward by a number of interviewees refers to their preference to be accompanied on their trip to the Extraordinary Chambers in order to testify before the court. Seven interviewees indicated that they would like to be accompanied by their villagers. One of the interviewees expressed his wish to be accompanied by his son and three interviewees hope staff of DC-Cam can accompany them. A prisoner of the Kraing Tachan prison explained in this regard that the staff of DC-Cam is familiar with his history and personal situation. This would make him more comfortable and confident to appear as a witness of the Extraordinary Chambers.[193] A guard of the same prison has expressed a similar view and stressed that witnesses should be accompanied by someone who they trust and know.[194] The messenger of S-21 has expresses a similar view and stated that he would like to be accompanied by staff of the Extraordinary Chambers.[195]

[190] Brought forward by official XI.
[191] Brought forward by official X.
[192] Brought forward by official XII.
[193] This consideration is brought forward by interviewee 5.
[194] This consideration is brought forward by interviewee F.
[195] This consideration is brought forward by interviewee L.

Assistance and support

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Interviewee prefers to be accompanied by some of his villagers[196]	4	1		2	**7**
Interviewee prefers to be accompanied by family members[197]		1			**1**
Interviewee prefers to be accompanied by DC-Cam staff who are familiar with personal background and situation[198]	2		1		**3**
Interviewee prefers to be accompanied by staff of NGO's working in the field of the ECCC				1[199]	**1**
Interviewee prefers to be accompanied by ECCC staff			1[200]		**1**
Interviewee prefers to be accompanied by someone who can keep her safe				1[201]	**1**
Interviewee prefers to travel alone		1	1[202]		**2**
Interviewee does not want to travel alone, but does not have any preference who should accompany him or her[203]	2	1		1	**4**

Interviewees 1,2, 6, A, C, D, K and N did not share their opinion on this issue.

Another issue that has been brought forward by both the interviewees in Takéo province as the official representatives is related to the residence of the witnesses in Phnom Penh and relative supportive measures. The deputy chief and interrogator at Kraing Tachan prison has stated that ECCC witnesses must be supported in ways of financial support, travel arrangements, food and housing.[204] The considerations regarding financial support have been discussed in paragraph 6.1. The remarks with respect to the travel arrangements, food and housing have not been very detailed, but the main suggestions have been categorised in the table below.

Accommodation and travel

Considerations	Victims	Cadres	Combatants and Security	Base people	Total
Accommodation[205]	2	3			**5**
Food[206]		4		1	**5**
Transport to Phnom Penh[207]		3			**3**

196 This consideration is brought forward by interviewees 5, 7, 8, 9, J, O and M.
197 This consideration is brought forward by interviewee R.
198 This consideration is brought forward by interviewees 3, 5 and F.
199 This consideration is brought forward by interviewee S.
200 This consideration is brought forward by interviewee L.
201 This consideration is brought forward by interviewee E.
202 This consideration is brought forward by interviewees G and P.
203 Brought forward by interviewees 4, 10, B, Q and official interviewee II. Interviewee B stated that he would not mind to travel alone or to be accompanied by someone.
204 Brought forward by interviewee D.
205 Brought forward by interviewees 8, B, C and D.
206 Brought forward by interviewees B, C, D, S and P.
207 Brought forward by interviewees B, C and D.

Witnesses prefer to stay with relatives in Phnom Penh				1[208]	**1**
Compensation of accommodation and travel expenses	1	3		1[209]	**4**
ECCC should provide the supportive arrangements				1[210]	**1**

Interviewees 1, 2, 3, 4, 6, 10, A, E and R did not have any suggestions in this regard.

7.4 Suggested role of DC-Cam and NGO's

The important role that DC-Cam and NGO's can play in supporting the witnesses was stressed by some of the official representatives. One of the judges of the court in Takéo explained that the support of NGO's is a very important asset in the process of the Khmer Rouge Tribunal. NGO's should support the government by facilitating the transport of the witnesses to Phnom Penh and they should assist in informing the witnesses on the exact procedures regarding their testimonies. The judge added that NGO's and local authorities should cooperate closely in order to gather as much valuable information needed in the processes as possible.[211] The Chief of the Takéo Provincial Court has explained that DC-Cam and NGO's can have an important role in accompanying the witnesses during the trials and help them to speak frankly and open before the Extraordinary Chambers. He also stressed that it is important to make sure that the NGO's only support them and will not tell the witnesses what they should tell during their testimony.[212] The third judge from Phnom Penh suggested that NGO's should assist the ECCC witnesses when their rights have been violated and create ways to be a watchdog. He added that these cases should be made public by the supporting NGO's.[213]

Besides the proposed guiding role of DC-Cam one of the representatives of the Ministry of Interior added that witnesses must receive physical and mental support as well. The impact of the testimonies on the minds of the witnesses must not be underestimated and DC-Cam and NGO's can play a valuable role in this regard.

[208] Brought forward by interviewee Q.
[209] Brought forward by interviewees 8, B, C, D and S.
[210] Brought forward by interviewee M.
[211] Brought forward by official XII.
[212] Brought forward by official XIII.
[213] Brought forward by official V.

Chapter 8 Conclusions and suggestions

The fear assessment in Takéo province originates from the shortage of information on the status of ECCC witnesses in Cambodia. There is no doubt that witnesses will be a valuable asset to the Khmer Rouge trials, but the possible consequences of their contribution have not yet been examined. This study presents the results of an enquiry in Takéo province, with the purpose to identify the obstacles that witnesses of the Extraordinary Chambers may face. Forty-seven inhabitants and official representatives of Takéo province have expressed their views on the basis of which the following conclusions and suggestions can be drawn.

The assessment has shown that witnesses of the Extraordinary Chambers may face a variety of barriers as a result of their contribution to the Khmer Rouge Trials. The indicated consequences vary from the impact on the personal safety of the witnesses and their families, financial consequences, the impact on the position of the witnesses in their communities and possible consequences with respect to the personal living situations of the witnesses.

With respect to matters of personal safety it has been a great challenge to unveil the true fears and thoughts of the interviewees and to identify the imminent attitude within Takéo province. The topic of the assessment has appeared to be very sensitive and most of the interviewees have found it difficult to share their views in detail. Nevertheless, after reading between these lines it can be concluded that the witnesses of the Extraordinary Chambers are expected to be a vulnerable target of pressure or revenge. The majority of the interviewees is willing to appear as a witness but more than half of them have stated to be afraid to testify. Especially those who have had a position in the Khmer Rouge structures and those who have witnessed the crimes from close by expressed their fears in this regard.

The assessment has shown that witnesses can feel threatened by the senior Khmer Rouge leaders, government officials, relatives of the accused, former lower cadres and victims. Some interviewees expect that their testimony invokes the anger of the accused and their relatives. Other people believe that the position of present government officials may be challenged by information brought forward by ECCC witnesses. Again others are afraid that victims of the regime want to take vengeance on those who have been responsible for the killings on higher or lower levels within the Khmer Rouge structure.

The outcomes of the interviews indicate that some witnesses may be more vulnerable for acts of revenge than others. Especially with respect to the witnesses of the defence it has become clear that they are expected to be a vulnerable target within their community. Both the interviewees in Takéo province and the official representatives have expressed their disapproval regarding those who support the accused Khmer Rouge leaders. A good indication of their condemning views is the statement of an interviewee who feels that witnesses of the defence betray the nation. Other vulnerable witnesses are the members of opposition parties and former Khmer Rouge cadres.

As stated in the introduction it is only possible to form a proper response when there is a clear understanding of the fears and thoughts of the parties involved. The broad ranging outcomes indicate that a proper response depends on the individual situation of the witnesses and their contribution to the trials. The Extraordinary Chambers and local authorities should, therefore, cooperate in forming protective measures that connect to the individual situation of the witnesses. General measures that have been suggested are safe housing facilities, measures to conceal the identity of the witnesses and close watch by the police. Only when the witnesses are provided with these or comparative measures, they will feel confident enough to appear as a witness and contribute to the Khmer Rouge trials.

In addition to the impact on the personal safety of the ECCC witnesses, the assessment has indicated that their contribution to the trials have financial consequences, impact on their status within their communities and possible consequences with respect to the personal living situations of the witnesses. It was especially stressed by the official representatives that financial considerations often withhold people from testifying in cases before the Courts in Cambodia. Most ECCC witnesses may not able to cover the expenses themselves. In order to encourage people to contribute to the trials as a witness, they should receive financial compensation for their expenses. With respect to the status of witnesses within their communities, reference is made to the alleged support of local authorities and the government for the Khmer Rouge. Although most interviewees believe that the Khmer Rouge does not have important power in Cambodia anymore, others are afraid that especially the relationship between witnesses and their chiefs of village or sub district may be disturbed once they testify against the senior leaders of the Khmer Rouge. To conclude, it is important to realise that most witnesses are part of close family communities and their testimony as a witness may have impact on their personal situation. In this respect especially the interruption of their work and the impact on the security of their families have been brought forward as most important considerations.

Suggestions

The abovementioned conclusions indicate that there is a need to establish a set of informative, protective, logistic and supportive measures. Some of these measures fall clearly within the responsibility of the Extraordinary Chambers and the government, but others seem to connect with the field of expertise and experiences of DC-Cam and NGO's in Cambodia.

The first category in which DC-Cam can play an important role is providing more detailed information on the ECCC law and the (legal) consequences of witness testimonies before the Extraordinary Chambers. During the assessment it has appeared that none of the interviewees are informed on the details of the law and that people do not know what consequences witness testimonies may have. The lack of thorough information in this regard has appeared to cause insecurity and tensions within Takéo province. As long as people do not know how broad the personal jurisdiction of the Extraordinary Chambers is interpreted, people may fear that the Khmer Rouge Tribunal has consequences for them as well. This applies especially to those who have been involved in the crimes committed during Democratic Kampuchea on lower levels. It is important to remember that 'the only thing we have to fear is fear itself'. A proper response in this regard is therefore to reduce the fears

by informing people in Cambodia on the relevant details of the law. Once people realise that the consequences of witness testimonies are not as far-reaching as they thought, they will feel more confident to appear as a witness. In addition, it will hopefully change the suspicious approach regarding the witnesses of the Extraordinary Chambers.

With respect to the abovementioned dynamics DC-Cam can provide various forms of support. In the first place it suggested to adjust the existing or create additional outreach programmes and focus on more detailed information on the status of ECCC witnesses and their possible impact. Some of the official representatives have stressed the value of broadcasting informative programmes through television or through radio programmes. DC-Cam could for instance call for attention on these matters through their existing radio programme. The magazine "Searching for the Truth" is another possible source for the people to learn more about the issues and the outreach teams could perhaps devote special attention on ECCC witnesses as well.

The second category of suggestions is related to the sensitive and impressive nature of the Khmer Rouge trials for those who will appear as a witness. The vast majority of the interviewees have expressed their wish to be accompanied by someone who they trust and with whom they feel comfortable. The presence of such parties will increase the confidence of the witnesses and can be a valuable asset to the witness support.

Compared to the staff of the Extraordinary Chambers, DC-Cam and NGO's may probably represent more independence and impartiality for the witnesses. They may feel more comfortable in their presence, which leads to the suggestion for these independent parties to be involved in this aspect of witness support. In this respect it is, however, important to realise that the primary initiative and responsibility rests with the ECCC Witness Unit. In view of witness protection it may also be necessary to limit the execution of these supportive measures to that Unit. Nevertheless, the appeal of the interviewees for a secure environment makes it worth to look at the possibilities to cooperate and achieve a proper response in this regard.

The last suggestion is related to possible post-trial protective measures. During the assessment a number of interviewees have declared to be afraid and they stressed the need for protective measures during the trials but also after the trials have been completed. In this respect an appeal has made to the local authorities to provide additional measures to assure the safety of the ECCC witnesses and their families. Some have even suggested that these measures should be of a high level and that the international community should assist Cambodia in this regard. Surprisingly, a number of local representatives have declared that ECCC witnesses will have nothing to fear and that there is no need to take extra protective measures. Given the sensitive nature of this issue it difficult to know which of these parties are closest to reality. Nevertheless, the chances that witnesses are confronted with acts of revenge after the Khmer Rouge trials should be reduced as much as possible. In this respect the following suggestions may provide a solution.

DC-Cam has experience in providing police and other trainings related to the field of work of the Extraordinary Chambers. With respect to witness support and protection it is suggested to adjust these trainings and provide them to local authorities in regions where protective measures are most needed. In cooperation with the Extraordinary Chambers and perhaps the NGO Working Group on the Extraordinary Chambers, these trainings could raise awareness of the vulnerable situation of the ECCC witnesses and provide a basis a protective network throughout Cambodia. The parties involved should share their expertise and know-how in order to reduce the chances that tensions in some communities arise and witnesses are confronted with threatening situations. As mentioned by one of the interviewees, it will not be possible to protect ECCC witnesses the rest of their lives and probably such far-reaching measures are not necessary. A supportive network between the ECCC, the government, NGO's and DC-Cam is perhaps, however, a solution from which not only the witnesses but also other people in Cambodia can benefit. If it seems possible to work with this suggestion it is of course necessary to investigate the possibilities and take adequate steps to realise an effective network.

The voices of Takéo are the foundation of the abovementioned supportive suggestions with respect to the witnesses of the Extraordinary Chambers. Witnesses are those who have survived the Khmer Rouge regime and those who witnessed important events that provide links to the people who are most responsible for the crimes committed. Hopefully, DC-Cam and all other parties involved can use these outcomes in developing the supportive and protective response these witnesses need.

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ANNEX 1 Total List of Interviewees from Takéo province

	Name	Position	Address
1	Hun Nhor (F)	Victim: Former prisoner at Kraing Tachan prison	Srey Kruo village, Cheang Torng sub-district, Tram Kak district
2	Meas Sammang (M) Interviewed on the 7th of August	Victim: Former prisoner at Kraing Tachan prison	Srey Kruo village, Cheang Torng sub-district, Tram Kak district
3	Neang Damm (M) Interviewed on the 8th of August	Victim and perpetrator: Former perpetrator and then a prisoner	Prap Siem village, Odam Sorya sub-district, Tram Kak district
4	Vann Seurn aka Sann (M) Interviewed on the 8th of August	Perpetrator: Former security guard at Kraing Tachan prison	Chre village, Leay Bo sub district, Tram Kak district
5	Am Han (F) Interviewed on the 8th of August	Victim	Trapeang Ku village, Leay Bo sub district, Tram Kak district
6	Chhay Chrunn (M) Interviewed on the 9th of August	Perpetrator:	Ang Roneab village, Tramkak sub district, Tram Kak district
7	Nuth Nov (M) Interviewed on the 9th of August	Perpetrator: Former Commune chief during DK	Ang Roneab village, Tramkak sub district, Tram Kak district
8	Iep Duch (M) Interviewed on the 9th of August	Perpetrator: Chief of Youth Unit	Chrey Thnoth village, Tramkak sub district, Tram Kak district
9	Keo Mao (M) Interviewed on the 10th of August	Victim: Former Lon Nol soldier and a prisoner of KR	Trapeang Sok village, Kus sub-district, Tram Kak district
10	Nhem Khann (F) Interviewed on the 10th of August	Perpetrator: Medical Staff	Trapeang Pring village, Kus sub-district, Tram Kak district

11	Soy Sen (M) Interviewed on the 10th of August	Victim: Former prisoner at Kraing Tachan	Trapeang Thmor village, Kus sub-district, Tram Kak district
12	Soth Saing (M) Interviewed on the 11th of August	Perpetrator: Former Security guard at Kraing Tachan prison	Trapeang Thmor village, Kus sub-district, Tram Kak district
13	Sang Sim (M) Interviewed on the 11th of August	Perpetrator: Cadre at Tram Kak re-education center.	Kraing Ta Chang village, Kus sub district Tram Kak district
14	Tuy Duch (M) Interview requested but denied on the 11th of August	Perpetrator: Former security guard at Kraing Tachan Prison	Trav Em village, Popel sub district, Tram Kak district
15	Khien Chhann (M) Interviewed on the 25th of August 2006	Present official Takeo: Village chief Toek Thla village	Toek Thla village, Trapeang Krasaing sub-district, Bati district
16	Ms. Un Vuth (F) Interviewed on the 25th of August 2006	Perpetrator: Medical staff	Ta Reab village, Cheang Tong sub district, Tram Kak district
17	Som Pov (F) Interviewed on the 25th of August 2006	Present official Takeo: Now chief of sub district	Trapeang Kes village, Tramkak sub district, Tram Kak district
18	Hu Hum (M,) Interviewed on the 26th of August 2006	Perpetrator: Former chief of cooperative	Ang Roneab village, Tramkak sub district, Tram Kak district
19	Touch Thy (M) Interviewed on the 26th of August 2006	Perpetrator: Former KR soldier who invade into Vietnam territory	Ang Roneab village, Tramkak sub district, Tram Kak district
20	Nuon Mom (F) Interviewed on the 26th of August	Victim	Thnong Roleung village, Leay Bo sub district, Tram Kak district
21	Un Sim (M) Interviewed on the 27th of August	Village Chief	Rosey Thmey village, Champa sub district, Prey Kabas district
22	Yann Koy (M)	Village Chief	Tipatt Village, Cheang

	Interviewed on the 27th of August		Torng sub district, Tram Kak district
23	Long Chan (M) Interviewed on the 27th of August	Village Chief	Ta Toeum village, Cheang Torng sub district, Tram Kak district
24	Kim Saroeun (M) Interviewed on the 4th of September	Perpetrator: Messenger at Tuol Sleng prison	Krasaing village, Kandoeng sub district, Bati district
25	Koem Phalla (F) Interviewed on the 4th of September	Perpetrator: Medical Staff	Ang Krasaing village, Prey Lvea sub distict, Prey Kabas district
26	Chim Nha (M) Interviewed on the 5th of September	Perpetrator: Medical Staff (cousin of Ta Mok)	Tatai village, Nheng Nhang sub district, Tram Kak district
27	Pech Sean (M) Interviewed on the 5th of September	Victim: Prisoner at Kraing Tachan	Trapeang Kes, Tram Kak sub district, Tram Kak district
28	Bou Saoy (M) Interviewed on the 6th of September	Perpetrator: Staff of cooperative	Prakieb village, Trapeang Thom sub district, Tram Kak district
29	Nhem Sal (M) Interviewed on the 6th of September	Victim: Prisoner at Tuol Sleng	Yuthka village, Daung sub district, Bati district
30	Duy Tem (M) Interviewed on the 10th of September	Victim: Prisoner at Tuol Sleng	Thmei village, Tnaot sub-district, Bati district
31	Bun Thean (M) Interviewed on the 10th of September	Perpetrator: Sanlung sub-district Chief	Trapeang Thom village, Rorneam sub-district, Treang district
32	Kim Sy (F) Interviewed on the 11th of September	Perpetrator: Medical Staff	Trapeang Klaut village, Angkanh sub-district, Treang district
33	Khim Ngorn (M) Interviewed on the 11th of September	Perpetrator: Staff at the Ministry of Foreign Affairs	Ta Ying village, Dambauk Khpuos sub-district, Borei Chulsa district
34	Chiem Nha (F) Interviewed on the 11th of September	Perpetrator: Member of Women's Unit	Trapeang Leu village, Prambei Mum sub-district, Treang district

35	Hing Thirith (M) Interviewed on the 14th of September 2006	Judge Phnom Penh Municipal Court	Phnom Penh
36	Mao Dara (M) Interviewed on the 26th of September 2006	Chief of the Office of Serious Crimes, Department of National Police, Ministry of Interior	Phnom Penh
37	Nun Samnang (M) Interviewed on the 26th of September 2006	Chief of Section, Department of National Police, Ministry of Interior.	Phnom Penh
38	Ay Sohkema (F)	Deputy Office Chief, Department of National Police, Ministry of Interior	Phnom Penh
39	Put Sao Sirana (F) Interviewed on the 26th of September 2006	Department of National Police, Ministry of Interior	Phnom Penh
40	Yous Nasy (M) Interviewed on the 3rd of October 2006	Official: Chief of provincial Cabinet	Doun Keav town, Takéo province
41	Vuth Phally (M) Interviewed on the 3rd of October 2006	Chief Commander Takéo Provincial Police	Doun Keav town, Takéo province
42	Chin Pok (M) Interviewed on the 3rd of October 2006	Deputy Commander Takéo Provincial Police	Doun Keav town, Takéo province
43	Suon Phon (M) Interviewed on the 3rd of October 2006	Deputy Commissioner of the Criminal Unit Takéo Provincial Police	Doun Keav town, Takéo province
44	Chey Sophal (M) Interviewed on the 4th of October 2006	Chief Prosecutor Takéo Province	Doun Keav town, Takéo province
45	Hean Rith (M) Interviewed on the 4th of October 2006	Deputy Prosecutor Takéo Province	Doun Keav town, Takéo province
46	Tith Sothy (M) Interviewed on the 4th of October 2006	Chief of the Takéo Provincial Court	Doun Keav town, Takéo province
47	Sok Lieng (M)	Judge Takéo Provincial	Doun Keav town,

	Interviewed on the 4th of October 2006	Court	Takéo province

ANNEX 2 Summary of interviews with victims

1. Hun Nhor

F, age unknown
Prisoner of Kraing Tachan prison
Interviewed on Monday the 7th of August 2006.

DC-Cam staff has interviewed Ms. Nhor various times before and she did not seem to feel uncomfortable with our presence. She shared her experiences during DK years with us, but seemed somewhat emotional while talking about it. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

Ms. Hun Nhor was a farmer during the DK years and lived in the same village as present, Srey Kruo. She and her family were sent to the Kraing Tachan prison where she was imprisoned for 23 months. During her time at the prison it was not clear to her on which grounds the prisoners were arrested. Most of the prisoners were killed after three or four days, but most of her relatives were spared. According to Ms. Nhor she was probably spared because she was very honest to and a great cook for the prison guards. Her husband was murdered by the regime, but Ms. Nhor did not tell about the reasons of his death.

According to Ms. Nhor the Khmer Rouge were a very hard regime and people involved must be held responsible for their acts. She, therefore, supports the KRT and is very interested in who will be brought to trial. In her opinion, both top leaders and the lower cadres, such as village chiefs must be brought to trial. It was the choice of the people themselves to join the Khmer Rouge, so their decision must be judged by the KRT as well. It is than up to the Tribunal to decide who has been wrong or right during the DK years. She has faith in the international and national judges within the KRT.

Ms. Nhor confirmed the opinion of her son and stated not to be afraid and believe in her protection by her rights. She would like to be a witness before the KRT and in this regard she declared that there is nothing to fear about the Khmer Rouge in present society. This time they should be scared of her as she will tell her story before the KRT.

Ms. Nhor referred to the statement of her son in relation to her thoughts on general response towards the witnesses. Her son, Mr. Sammang (the second interviewee) stated the following: He told about his neighbour who is a perpetrator and explained that he is afraid regarding the KRT. Earlier his neighbour has rejected the invitation of C-Cam to come to the ECCC tour because he did not trust DC-Cam. Mr. Sammang stated that perpetrators are more frightened than victims. Barang asked Mr. Sammang why he is not afraid and referred to Ieng Sary's son who is an official

of the present government. Mr. Sammang repeated that he believes in his rights in the present Cambodian community and believes in the international assistance.

Ms. Nhor did not share any of her thoughts with regard to the witnesses of the defence. With reference to the possible impact she stated that a trip to Phnom Penh to be a witness before the tribunal would not effect the situation of their family. Moreover, she stated that financial compensation would not be necessary if would be requested to appear as a witness before the tribunal. Ms. Nhor did not have any suggestions for DC-Cam.

2. Meas Sammang

M, 38 years old
Prisoner of Kraing Tachan prison
Interviewed on Monday the 7th of August 2006

DC-Cam staff has interviewed Mr. Sammang various times before and he did not seem to feel uncomfortable with our presence. Mr. Sammang shared his experiences during the DK years with us and did not seem to feel uncomfortable. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

Mr. Sammang shares the same history as Ms. Hun Nhor who is his mother. After the Khmer Rouge came to power he was sent to a children force unit where he lived with his brother. He ran away from this unit and was reunited with his mother. During the DK years, Mr. Sammang too has been imprisoned in Kraing Tachan prison for 23 months. In prison he was responsible for taking care of the cows and guard them in the rice fields during the day. During these years he lost his father and two of his brothers and sisters. His siblings died of starvation.

Mr. Sammang supports the KRT as it will find justice for the people in Cambodia. According to Mr. Sammang, justice means that the court will tell whether your actions were wrong or right. He is very interested in who will be brought to trial. In his opinion both top Khmer Rouge leaders and lower cadres must be prosecuted. Mr. Sammang has a lot of faith in the international and national judges.

Mr. Sammang is willing to be a witness before the KRT in Phnom Penh. He does not care about his personal safety in this regard and wants to contribute to the work of the KRT. Moreover, he thinks that being a witness before the KRT will not be dangerous. Former Khmer Rouge leaders do not have the same position and power as they had during the DK period. Nowadays, the roles have reversed and the former Khmer Rouge leaders will fear him as he will tell his story before the international tribunal. In present day Cambodian society he will have rights as a witness and he has faith in his protection by the government of Cambodia.

Mr. Sammang told about his neighbour who is a perpetrator and explained that he is afraid regarding the KRT. Earlier his neighbour has rejected the invitation of C-Cam to come to the ECCC tour because he did not trust DC-Cam. Mr. Sammang stated that perpetrators are more frightened than victims. Barang asked Mr. Sammang why he is not afraid and referred to Ieng Sary's son who is an official of the present government. Mr. Sammang repeated that he believes in his rights in the present Cambodian community and believes in the international assistance.

Mr. Sammang did not share his thoughts with respect to witnesses of the defence. He stated that a trip to Phnom Penh to be a witness before the tribunal would not effect the situation of their

family. Moreover, he stated that financial compensation would not be necessary if would be requested to appear as a witness before the tribunal. Mr. Sammang did not have any suggestions for DC-Cam.

3. Neang Damm

M, 73 years old
Village chief and prisoner of Kraing Tachan prison
Interviewed on Tuesday the 8th of August 2006

DC-Cam staff has interviewed Mr. Damm more often and Mr. Damm did not seem to feel uncomfortable during our interview. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

During the first years of Democratic Kampuchea Mr. Damm was a chief of village. As he was accused of sexual abuse, often referred to culture wrong doings, he was pointed as deputy chief. After his appointment as deputy chief the Khmer Rouge arrested him based on his criticism regarding the shortage of food for the people in his village. Mr. Damm was sent to Kraing Tachan prison. The translation does not clarify the period of imprisonment. Mr. Damm stated that most of the people in Kraing Tachan prison were killed, except for women, Mr. Sang and himself.

According Mr. Damm the Khmer Rouge was a hard and bad regime. He seemed to support the KRT but did not explain his opinion in this regard very detailed. According to Mr. Damm it is up to the tribunal to decide how many Khmer Rouge Leaders will be prosecuted. Other aspects, such as the duration of the proceedings, are also up to the tribunal to decide upon. He has learned about the top leaders of the Khmer Rouge, such as Khieu Sampan, Ieng Sary and their brothers. Mr. Damm did not know about the details of their revolution policies and the policies within for instance Tuol Sleng until after the Vietnamese defeated the regime.

Mr. Damm is willing to testify before the KRT and contribute to the tribunal by explaining about his experiences during the DK years. Although he is somewhat afraid for the top leaders of the Khmer Rouge he has a lot of faith in the Cambodian government. He believes in present-day Cambodian society and the law of Cambodia, which will protect his position as a witness before the tribunal. If the government in cooperation with NGO's will protect him and provide sufficient safety measures, he is willing to testify as witness. During the interview, Mr. Damm did not specify the risks that may occur regarding the witnesses of the KRT. He declared to be willing to take the risks and compares them with the risks he is running as a member of the opposition party. He is not afraid to die.

Mr. Damm does not know the opinion of people in his village and neighbourhood regarding the issue of being a witness before the tribunal. He could not think of any danger regarding people who will be a witness before the KRT. This statement seems somewhat contradicting to his previous statement on possible threats regarding his personal safety.

Mr. Damm has not heard about people in his village and neighbourhood who would be willing to support the accused before the KRT in Phnom Penh.

Mr. Damm will not explicitly ask for financial support, but if it is offered he will not reject it. Mr. Damm wants to be accompanied by an NGO during his trip to Phnom Penh, if he will be asked as a witness. In this regard he prefers to be accompanied by staff members of DC-Cam as they already know his background and have helped him before. Mr. Damm did not suggest any other ways of support.

4. Am Han

F, 60 years old

Victim

Interviewed on Tuesday the 8th of August 2006

DC-Cam staff has interviewed Ms. Am Han various times before and she did not seem to feel uncomfortable with our presence. She shared her experiences during DK years with us, but seemed somewhat emotional while talking about it. Ms. Han especially hesitated while answering the questions on possible threats and risks. The questions regarding her history and experiences she answered without hesitating and made a lot of jokes. Ms. Am Han was a bit distracted by her grandchildren who apparently wanted a lot of attention from their grandmother. The distraction did not affect the interview too much.

During the years of Democratic Kampuchea, Ms Am Han has lived in Takéo province as part of a women's unit. According to KR policy this unit was meant for women who has lost their husband due to Khmer Rouge killings and violence. As the women were separated from their children, Ms. Am Han's children did not live with her in this group. Most probably her husband was killed because he was a wealthy and rich man. The translation is unclear on the other details of her history. Waiting for the transcript. At the end of the interview Ms. Am Han added that she wants to meet the perpetrators and especially the one that has killed her husband. She would like to ask him what happened to him, where he was killed and why.

According to Ms. Am Han the Khmer Rouge regime was a hard regime. During the DC-Cam ECCC tour she was informed on policies of the Khmer Rouge that she did not know before. Those who are responsible for these crimes must be brought to justice and imprisoned for the rest of their life. She does however not know who have been the top leaders of the Khmer Rouge. To conclude she added that the process of the tribunal should no longer be delayed. In this respect she referred to the death of Ta Mok.

Ms. Am Han is not willing to be a witness before the KRT as she is convinced she does not have valuable information for the Tribunal on the Khmer Rouge. Nevertheless, if she is requested to be a witness before the KRT she does not feel threatened. According to Ms. Han, the tribunal will be a safe place for witnesses. The reasons for this point of view have not been specified during the interview.

Ms. Am Han thinks that some of the people in her village and neighbourhood are willing to be a witness before the KRT. They, are however afraid and concerned about their personal safety. She could not specify what these people fear the most and what in her opinion is the greatest risk regarding witnesses.

Ms. Am Han has not explained her opinion with respect to the people who will appear as witness for the defence. If Ms. Am Han is asked as a witness before the KRT, it will not have any affect on their family situation. It is possible for her to leave her home for a couple of days. Ms. Am Han would need to be financially supported, as she does not have sufficient resources to cover for her trip to Phnom Penh. If Ms. Am Han is requested to be a witness before the KRT, she prefers someone to accompany her to Phnom Penh. She did not clarify whether this person should be a family member or someone from an NGO. Ms. Am Han did not suggest any other ways of support.

5. Keo Mao

M, 56 years old
Lon Nol soldier and prisoner of the Kraing Tachan prison
Interviewed on Friday the 10th of August 2006

The interview with Mr. Keo Mao was conducted in his quiet home and as the interview continued it seemed as if he no longer noticed Sophal and me were present. It was clear that Mr. Keo Mao found it hard to talk about his experiences. He has obviously thought about this issue and seems to have valuable information about the policies within Kraing Tachan and prison 204. Mr. Keo Mao was not distracted during the interview.

In 1974 Mr. Keo Mao was arrested (together with two of is colleagues) as a Lon Nol soldier and brought to the Kraing Tachan prison. He stated that the Khmer Rouge suspected him to be a CIA agent as well. He has been imprisoned here for 8 months and severely tortured, suffocated by plastic bags until he was unconscious and regularly interrogated. The first four months of his imprisonment, Mr. Mao was shackled with three handcuffs on his arms and his legs. After these months the prison guards removed one of the handcuffs. During the months at Kraing Tachan he has witnessed the killing of the prisoners by the prison guards and could her the screaming of the prisoners before they died. The prisoners were called one by one from their cells after which they were killed. After four months in Kraing Tachan prison he was sent to another prison unit (prison 204) were he witnessed killings of the prisoners as well. The Chief of Kraing Tachan at that time was Manre An and the chief of prison 205 was Ta Chen. He has been in prison 204 for a short period of time after which he was released and worked in a Mobile Unit from 1977 to 1979. A few months before the invasion by the Vietnamese Mr. Mao was forced to marry a Khmer Rouge woman. Mr. Keo Mao is reminded of his experiences in the Kraing Tachan every day. He has often nightmares and is afraid that he will be arrested again.

Mr. Keo Mao supports the KRT as he thinks it is the only right response to the many deaths during the Khmer Rouge Regime. He has been informed on the fact that the KRT will only prosecute the most responsible leaders of the Khmer Rouge. In his opinion lower cadres should be prosecuted as well, as they have committed serious crimes as well.

Mr. Keo Mao is willing to be a witness before the tribunal and thinks it is his duty to contribute to finding the truth about what has happened during the DK years. His testimony before the KRT will release him from some of his pain and hopefully make him feel free again. He stated that he hates the Khmer Rouge and volunteers to be a witness during their prosecuting trials. He is however afraid that family members of the persons on trial want to take revenge and even thinks that they would want to kill him after he has revealed his story before the KRT.

According to Mr. Keo Mao some people in his village and neighbourhood still support the Khmer Rouge. They however often do not express their support and public, but they may be willing to testify in defending the accused leaders of the Khmer Rouge.

Mr. Keo Mao would need to be financially supported, as he does not have sufficient resources to cover for his trip to Phnom Penh. Mr. Keo Mao wants to be accompanied by some people of his village to Phnom Penh if he is requested to be a witness. DC-Cam and especially the people from Searching for the Truth know his history and his experiences during the regime. Therefore, he prefers to be accompanied by them as well. Mr. Keo Mao has suggested that the witnesses would be housed in well-protected accommodation in Phnom Penh.

6. Say Sen

M, unknown
Prisoner of the Kraing Tachan prison
Interviewed on Thursday the 10th of August 2006

Mr. Say Sen has been interviewed more often and is used to the situation. Mr. Say Sen was not distracted during the interview.

As Mr. Say Sen has told his history and experiences during the Khmer Rouge Regime several times to the staff of DC-Cam, he was not asked to explain his background once more. Mr. Say Sen was a prisoner of Kraing Tachan prison from 1974-1979. In the beginning of these years he was ordered to make palm juice for the prison guards. In addition he was assigned to carry and burry the bodies of the death prisoners to the mass graves. His father was killed in this prison as well and buried in a mass grave of approximately hundred bodies. Nowadays some of the guards live in his village or Tram Kak district, but he thinks that some of the guards are in hiding at the moment. The names of the prison guards are Saing (interviewed on the 11th of August 2006), Saunn (interviewed on the 8th of August 2006), Sim (interviewed on the 11th of August 2006), big Iep Duch (interviewed on the 9th of August 2006), Tuy Duch (rejected our request for an interview on the 11th of August), Damm (probably interviewed but not certain if it is the same person), Touch Thy (interviewed on the 26th of August 2006) and Ourk (living in Kampong Speu). Mr. Soy Sen knows important details on the policies within and valuable information regarding the Kraing Tachan prison.

It was very clear that Mr. Say Sen fears for the his personal safety and the safety of his family. He will therefore, not volunteer as a witness but if the KRT needs his statements and testimony he won't reject their request. In the village of Mr. Sen live a lot of the former guards of Kraing Tachan prison and other former cadres. He is afraid that they or their families will try to take revenge on him or his family if he reveals the information he has before the tribunal. He needs the help of the government in order to make sure that he and his family are protected against these and other threats. This protection must last longer than his presence on Phnom Penh as a witness, as he is afraid that the people may take revenge after he has returned to his village.

At the end of our interview Mr. Say Sen added that he regrets telling his story to DC-Cam and other NGO's and people. Although he supports the KRT in a way, he is also afraid that it will bring back the bad times. People who will be a witness at the tribunal are not safe and must realise that they may put their lives in danger. If he had known his testimony to NGO's would lead to being a witness before the tribunal he would never have shared his experiences.

Mr. Say Sen stated that his testimony before the KRT in Phnom Penh would have some impact on his family situation and his work. The translation did not mention in what way or how much impact it would have.

Mr. Say Sen did not share is opinion with regard to witnesses of the defence. He also did not mention any measures of support or protection that must be taken in his view.

7. Nuon Mon

F, 52 years old
Wife of a former Lon Nol soldier
Interviewed on the 26th of August 2006

Socheat has interviewed Ms. Nuon Mom various times before and Ms. Mom did not seem to feel uncomfortable with our presence. Ms. Nuon Mom was not distracted during the interview.

Before the Khmer Rouge came to power in Cambodia, Ms. Nuon Mom was a worker at a Christian Church. During that period she lived with her husband in Takéo provincial town. Her husband was a Lon Nol soldier for which he was killed in 1975. Ms. Nuon Mom witnessed the murder of her husband at the Ta Leu pagoda and decided to **conceal** her background out of fear for the Khmer Rouge. During the Khmer Rouge Regime Ms. Mom worked at a workers unit that produced bricks. She was forced to work under extreme conditions for almost twenty-four hours a day. She was afraid that the Khmer Rouge soldiers would kill her if she did not obey their demands. She has witnessed the killings of Lon Nol soldiers and some of their wives who worked at the workers unit as well. Some of the women were sexually abused and some disappeared for unknown reasons. During her time at the unit between 1976 and 1978 she has met Ta Mok for whom she had a lot of respect.

While answering the question on her opinion regarding the KRT, Ms. Nuon Mom recalled her experiences during the Khmer Rouge Regime. She witnessed the death of her husband, her relatives and many others. Ms. Nuon Mom found a body of a person whose hart and liver had been cut out by Khmer Rouge soldiers. When she heard about the tribunal, she was very happy and she considers the KRT as the only proper response to the horrible things that happened during the Khmer Rouge Regime. The KRT will bring justice for the people in Cambodia. She questions, however, the value of the KRT now Ta Mok has died and cannot be prosecuted anymore.

Ms. Nuon is willing to be a witness before the KRT and would like to take that opportunity to ask the leaders of the Khmer Rouge why they killed so many people. She is not afraid to be a witness and has confidence in protection through the present laws in Cambodia. It is in her opinion the basic responsibility of the government to protect the witnesses before the KRT. The government should be supported by NGO's.

Ms. Nuon Mom stated that witnessed of the Khmer Rouge Tribunal will be protected by the present laws of Cambodia. People in her neighbourhood are willing to be a witness and do not fear for their safety in this regard. She thinks it will benefit the trials if as much people as possible will testify before the Khmer Rouge Tribunal.

Ms. Nuon Mom stated that the Khmer Rouge had some advantages. The lands and resources of Cambodia were equally distributed amongst the people of Cambodia. Moreover, the people of Cambodia were living on equal standards. These advantages however, do not add up to the horrible events that happened during the Khmer Regime as well. In general Ms. Nuon Mom has no good words for the leaders of the regime and she will not consider supporting them on trial. She is only willing to tell her story as a victim and support the prosecution with her testimony. The translation does not mention any remarks of Ms. Nuon on the possible threats regarding the witnesses of defence.

Ms. Nuon Mom will be able to leave her home for two or three days in order to go the tribunal. Her contribution to justice is most important. Ms. Nuon Mom will not explicitly ask for financial support, but if it is offered he will not reject it.

Ms. Nuon Mom would like her villagers to accompany her during the trip even if they will not be witnesses themselves. She feels most comfortable if some of them will be in Phnom Penh to support her during testimony. Ms. Nuon Mom is not afraid to make her identity public. As mentioned earlier it is in her opinion the basic responsibility of the government to protect the witnesses before the KRT. The government should be supported by the NGO's.

8. Pech Sean

M, 73 years
Prisoner of the Kraing Tachan prison
Interviewed on Tuesday the 5th of September 2006

Mr. Pech Sean did not seem uncomfortable with our presence and was not distracted during the interview.

Mr. Pech Sean has twelve children, five sons and seven daughters. In 1975 he was assigned as a militiaman by the Khmer Rouge and joined the other communist followers. Mr. Pech Sean was asked to join the campaign to promote the Khmer Rouge regime, which would bring a prosperous Cambodian society. He did not support and approve the ideas of the Khmer Rouge. The Khmer Rouge suspected him of being a capitalist and arrested him, after which he was sent to one of the sections of the Kraing Tachan prison. On his way to the prison and during his imprisonment Mr. Sean was tortured and interrogated several times. The main goal of the interrogation seemed to get his confession on his involvement with the capitalist enemies or the CIA. One of his friends was beaten to death by one of the guards and others were mostly selected and sent to kill in the night. The prisoners were put in crowded cells. The prison chief of this section was Ta Kel but Mr. Sean does not remember the names of other guards. Kraing Tachan was divided in several sections and he has forgotten the most details. In total Mr. Sean has spent six months in the Kraing Tachan prison after which he was part of a working unit, building dams. After the Vietnamese invaded Cambodian territory he fled to the jungle around Chum Kiri Mountain. The Vietnamese sent him back to his home village.

Mr. Pech Sean has told his children about the horrible things that happened during the Khmer Rouge regime. He supports the Khmer Rouge tribunal but wants to wait and see if the tribunal will be able to bring justice to the people of Cambodia. Mr. Sean joined the ECCC tour and enjoyed learning more about the proceedings and the trials. The tribunal will prosecute the most senior and responsible leaders of the Khmer Rouge but Mr. Sean thinks that lower cadres must be prosecuted as well. He realises that the senior leaders have given the most important orders. Prosecuting only four or five senior leaders will however lack a sufficient impact within Cambodian society and reconciliation with the past will not be reached. Moreover, he thinks that one or two persons from each sub district should go to the tribunal in order to increase its impact.

Mr. Pech Sean thinks that revenge still exist within Cambodian society and will impede the reconciliation process of Cambodia. He is willing to be a witness and does not believe there would be any threats to his personal safety. In the present Cambodian society, the Khmer Rouge does have as much power as it used to have. The Khmer Rouge leaders have less supporters and they will not dare to take to revenge. The local authorities should provide the necessary protection to the people.

ANNEX 1 Total List of Interviewees from Takéo province

	Name	Position	Address
1	Hun Nhor (F)	Victim: Former prisoner at Kraing Tachan prison	Srey Kruo village, Cheang Torng sub-district, Tram Kak district
2	Meas Sammang (M) Interviewed on the 7th of August	Victim: Former prisoner at Kraing Tachan prison	Srey Kruo village, Cheang Torng sub-district, Tram Kak district
3	Neang Damm (M) Interviewed on the 8th of August	Victim and perpetrator: Former perpetrator and then a prisoner	Prap Siem village, Odam Sorya sub-district, Tram Kak district
4	Vann Seurn aka Sann (M) Interviewed on the 8th of August	Perpetrator: Former security guard at Kraing Tachan prison	Chre village, Leay Bo sub district, Tram Kak district
5	Am Han (F) Interviewed on the 8th of August	Victim	Trapeang Ku village, Leay Bo sub district, Tram Kak district
6	Chhay Chrunn (M) Interviewed on the 9th of August	Perpetrator:	Ang Roneab village, Tramkak sub district, Tram Kak district
7	Nuth Nov (M) Interviewed on the 9th of August	Perpetrator: Former Commune chief during DK	Ang Roneab village, Tramkak sub district, Tram Kak district
8	Iep Duch (M) Interviewed on the 9th of August	Perpetrator: Chief of Youth Unit	Chrey Thnoth village, Tramkak sub district, Tram Kak district
9	Keo Mao (M) Interviewed on the 10th of August	Victim: Former Lon Nol soldier and a prisoner of KR	Trapeang Sok village, Kus sub-district, Tram Kak district
10	Nhem Khann (F) Interviewed on the 10th of August	Perpetrator: Medical Staff	Trapeang Pring village, Kus sub-district, Tram Kak district

11	Soy Sen (M) Interviewed on the 10th of August	Victim: Former prisoner at Kraing Tachan	Trapeang Thmor village, Kus sub-district, Tram Kak district
12	Soth Saing (M) Interviewed on the 11th of August	Perpetrator: Former Security guard at Kraing Tachan prison	Trapeang Thmor village, Kus sub-district, Tram Kak district
13	Sang Sim (M) Interviewed on the 11th of August	Perpetrator: Cadre at Tram Kak re-education center.	Kraing Ta Chang village, Kus sub district Tram Kak district
14	Tuy Duch (M) Interview requested but denied on the 11th of August	Perpetrator: Former security guard at Kraing Tachan Prison	Trav Em village, Popel sub district, Tram Kak district
15	Khien Chhann (M) Interviewed on the 25th of August 2006	Present official Takeo: Village chief Toek Thla village	Toek Thla village, Trapeang Krasaing sub-district, Bati district
16	Ms. Un Vuth (F) Interviewed on the 25th of August 2006	Perpetrator: Medical staff	Ta Reab village, Cheang Tong sub district, Tram Kak district
17	Som Pov (F) Interviewed on the 25th of August 2006	Present official Takeo: Now chief of sub district	Trapeang Kes village, Tramkak sub district, Tram Kak district
18	Hu Hum (M,) Interviewed on the 26th of August 2006	Perpetrator: Former chief of cooperative	Ang Roneab village, Tramkak sub district, Tram Kak district
19	Touch Thy (M) Interviewed on the 26th of August 2006	Perpetrator: Former KR soldier who invade into Vietnam territory	Ang Roneab village, Tramkak sub district, Tram Kak district
20	Nuon Mom (F) Interviewed on the 26th of August	Victim	Thnong Roleung village, Leay Bo sub district, Tram Kak district
21	Un Sim (M) Interviewed on the 27th of August	Village Chief	Rosey Thmey village, Champa sub district, Prey Kabas district
22	Yann Koy (M)	Village Chief	Tipatt Village, Cheang

	Interviewed on the 27th of August		Torng sub district, Tram Kak district
23	Long Chan (M) Interviewed on the 27th of August	Village Chief	Ta Toeum village, Cheang Torng sub district, Tram Kak district
24	Kim Saroeun (M) Interviewed on the 4th of September	Perpetrator: Messenger at Tuol Sleng prison	Krasaing village, Kandoeng sub district, Bati district
25	Koem Phalla (F) Interviewed on the 4th of September	Perpetrator: Medical Staff	Ang Krasaing village, Prey Lvea sub distict, Prey Kabas district
26	Chim Nha (M) Interviewed on the 5th of September	Perpetrator: Medical Staff (cousin of Ta Mok)	Tatai village, Nheng Nhang sub district, Tram Kak district
27	Pech Sean (M) Interviewed on the 5th of September	Victim: Prisoner at Kraing Tachan	Trapeang Kes, Tram Kak sub district, Tram Kak district
28	Bou Saoy (M) Interviewed on the 6th of September	Perpetrator: Staff of cooperative	Prakieb village, Trapeang Thom sub district, Tram Kak district
29	Nhem Sal (M) Interviewed on the 6th of September	Victim: Prisoner at Tuol Sleng	Yuthka village, Daung sub district, Bati district
30	Duy Tem (M) Interviewed on the 10th of September	Victim: Prisoner at Tuol Sleng	Thmei village, Tnaot sub-district, Bati district
31	Bun Thean (M) Interviewed on the 10th of September	Perpetrator: Sanlung sub-district Chief	Trapeang Thom village, Rorneam sub-district, Treang district
32	Kim Sy (F) Interviewed on the 11th of September	Perpetrator: Medical Staff	Trapeang Klaut village, Angkanh sub-district, Treang district
33	Khim Ngorn (M) Interviewed on the 11th of September	Perpetrator: Staff at the Ministry of Foreign Affairs	Ta Ying village, Dambauk Khpuos sub-district, Borei Chulsa district
34	Chiem Nha (F) Interviewed on the 11th of September	Perpetrator: Member of Women's Unit	Trapeang Leu village, Prambei Mum sub-district, Treang district

35	Hing Thirith (M) Interviewed on the 14th of September 2006	Judge Phnom Penh Municipal Court	Phnom Penh
36	Mao Dara (M) Interviewed on the 26th of September 2006	Chief of the Office of Serious Crimes, Department of National Police, Ministry of Interior	Phnom Penh
37	Nun Samnang (M) Interviewed on the 26th of September 2006	Chief of Section, Department of National Police, Ministry of Interior.	Phnom Penh
38	Ay Sohkema (F)	Deputy Office Chief, Department of National Police, Ministry of Interior	Phnom Penh
39	Put Sao Sirana (F) Interviewed on the 26th of September 2006	Department of National Police, Ministry of Interior	Phnom Penh
40	Yous Nasy (M) Interviewed on the 3rd of October 2006	Official: Chief of provincial Cabinet	Doun Keav town, Takéo province
41	Vuth Phally (M) Interviewed on the 3rd of October 2006	Chief Commander Takéo Provincial Police	Doun Keav town, Takéo province
42	Chin Pok (M) Interviewed on the 3rd of October 2006	Deputy Commander Takéo Provincial Police	Doun Keav town, Takéo province
43	Suon Phon (M) Interviewed on the 3rd of October 2006	Deputy Commissioner of the Criminal Unit Takéo Provincial Police	Doun Keav town, Takéo province
44	Chey Sophal (M) Interviewed on the 4th of October 2006	Chief Prosecutor Takéo Province	Doun Keav town, Takéo province
45	Hean Rith (M) Interviewed on the 4th of October 2006	Deputy Prosecutor Takéo Province	Doun Keav town, Takéo province
46	Tith Sothy (M) Interviewed on the 4th of October 2006	Chief of the Takéo Provincial Court	Doun Keav town, Takéo province
47	Sok Lieng (M)	Judge Takéo Provincial	Doun Keav town,

ANNEX 1 Total list of interviewees

	Interviewed on the 4th of October 2006	Court	Takéo province

ANNEX 2 Summary of interviews with victims

1. Hun Nhor

F, age unknown
Prisoner of Kraing Tachan prison
Interviewed on Monday the 7th of August 2006.

DC-Cam staff has interviewed Ms. Nhor various times before and she did not seem to feel uncomfortable with our presence. She shared her experiences during DK years with us, but seemed somewhat emotional while talking about it. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

Ms. Hun Nhor was a farmer during the DK years and lived in the same village as present, Srey Kruo. She and her family were sent to the Kraing Tachan prison where she was imprisoned for 23 months. During her time at the prison it was not clear to her on which grounds the prisoners were arrested. Most of the prisoners were killed after three or four days, but most of her relatives were spared. According to Ms. Nhor she was probably spared because she was very honest to and a great cook for the prison guards. Her husband was murdered by the regime, but Ms. Nhor did not tell about the reasons of his death.

According to Ms. Nhor the Khmer Rouge were a very hard regime and people involved must be held responsible for their acts. She, therefore, supports the KRT and is very interested in who will be brought to trial. In her opinion, both top leaders and the lower cadres, such as village chiefs must be brought to trial. It was the choice of the people themselves to join the Khmer Rouge, so their decision must be judged by the KRT as well. It is than up to the Tribunal to decide who has been wrong or right during the DK years. She has faith in the international and national judges within the KRT.

Ms. Nhor confirmed the opinion of her son and stated not to be afraid and believe in her protection by her rights. She would like to be a witness before the KRT and in this regard she declared that there is nothing to fear about the Khmer Rouge in present society. This time they should be scared of her as she will tell her story before the KRT.

Ms. Nhor referred to the statement of her son in relation to her thoughts on general response towards the witnesses. Her son, Mr. Sammang (the second interviewee) stated the following: He told about his neighbour who is a perpetrator and explained that he is afraid regarding the KRT. Earlier his neighbour has rejected the invitation of C-Cam to come to the ECCC tour because he did not trust DC-Cam. Mr. Sammang stated that perpetrators are more frightened than victims. Barang asked Mr. Sammang why he is not afraid and referred to Ieng Sary's son who is an official

of the present government. Mr. Sammang repeated that he believes in his rights in the present Cambodian community and believes in the international assistance.

Ms. Nhor did not share any of her thoughts with regard to the witnesses of the defence. With reference to the possible impact she stated that a trip to Phnom Penh to be a witness before the tribunal would not effect the situation of their family. Moreover, she stated that financial compensation would not be necessary if would be requested to appear as a witness before the tribunal. Ms. Nhor did not have any suggestions for DC-Cam.

2. Meas Sammang

M, 38 years old
Prisoner of Kraing Tachan prison
Interviewed on Monday the 7th of August 2006

DC-Cam staff has interviewed Mr. Sammang various times before and he did not seem to feel uncomfortable with our presence. Mr. Sammang shared his experiences during the DK years with us and did not seem to feel uncomfortable. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

Mr. Sammang shares the same history as Ms. Hun Nhor who is his mother. After the Khmer Rouge came to power he was sent to a children force unit where he lived with his brother. He ran away from this unit and was reunited with his mother. During the DK years, Mr. Sammang too has been imprisoned in Kraing Tachan prison for 23 months. In prison he was responsible for taking care of the cows and guard them in the rice fields during the day. During these years he lost his father and two of his brothers and sisters. His siblings died of starvation.

Mr. Sammang supports the KRT as it will find justice for the people in Cambodia. According to Mr. Sammang, justice means that the court will tell whether your actions were wrong or right. He is very interested in who will be brought to trial. In his opinion both top Khmer Rouge leaders and lower cadres must be prosecuted. Mr. Sammang has a lot of faith in the international and national judges.

Mr. Sammang is willing to be a witness before the KRT in Phnom Penh. He does not care about his personal safety in this regard and wants to contribute to the work of the KRT. Moreover, he thinks that being a witness before the KRT will not be dangerous. Former Khmer Rouge leaders do not have the same position and power as they had during the DK period. Nowadays, the roles have reversed and the former Khmer Rouge leaders will fear him as he will tell his story before the international tribunal. In present day Cambodian society he will have rights as a witness and he has faith in his protection by the government of Cambodia.

Mr. Sammang told about his neighbour who is a perpetrator and explained that he is afraid regarding the KRT. Earlier his neighbour has rejected the invitation of C-Cam to come to the ECCC tour because he did not trust DC-Cam. Mr. Sammang stated that perpetrators are more frightened than victims. Barang asked Mr. Sammang why he is not afraid and referred to Ieng Sary's son who is an official of the present government. Mr. Sammang repeated that he believes in his rights in the present Cambodian community and believes in the international assistance.

Mr. Sammang did not share his thoughts with respect to witnesses of the defence. He stated that a trip to Phnom Penh to be a witness before the tribunal would not effect the situation of their

family. Moreover, he stated that financial compensation would not be necessary if would be requested to appear as a witness before the tribunal. Mr. Sammang did not have any suggestions for DC-Cam.

3. Neang Damm

M, 73 years old
Village chief and prisoner of Kraing Tachan prison
Interviewed on Tuesday the 8th of August 2006

DC-Cam staff has interviewed Mr. Damm more often and Mr. Damm did not seem to feel uncomfortable during our interview. During the interviews with Mr. Sammang and Ms. Hun Nhor other people were present and caused a bit of distraction. It has not affected the interview too much.

During the first years of Democratic Kampuchea Mr. Damm was a chief of village. As he was accused of sexual abuse, often referred to culture wrong doings, he was pointed as deputy chief. After his appointment as deputy chief the Khmer Rouge arrested him based on his criticism regarding the shortage of food for the people in his village. Mr. Damm was sent to Kraing Tachan prison. The translation does not clarify the period of imprisonment. Mr. Damm stated that most of the people in Kraing Tachan prison were killed, except for women, Mr. Sang and himself.

According Mr. Damm the Khmer Rouge was a hard and bad regime. He seemed to support the KRT but did not explain his opinion in this regard very detailed. According to Mr. Damm it is up to the tribunal to decide how many Khmer Rouge Leaders will be prosecuted. Other aspects, such as the duration of the proceedings, are also up to the tribunal to decide upon. He has learned about the top leaders of the Khmer Rouge, such as Khieu Sampan, Ieng Sary and their brothers. Mr. Damm did not know about the details of their revolution policies and the policies within for instance Tuol Sleng until after the Vietnamese defeated the regime.

Mr. Damm is willing to testify before the KRT and contribute to the tribunal by explaining about his experiences during the DK years. Although he is somewhat afraid for the top leaders of the Khmer Rouge he has a lot of faith in the Cambodian government. He believes in present-day Cambodian society and the law of Cambodia, which will protect his position as a witness before the tribunal. If the government in cooperation with NGO's will protect him and provide sufficient safety measures, he is willing to testify as witness. During the interview, Mr. Damm did not specify the risks that may occur regarding the witnesses of the KRT. He declared to be willing to take the risks and compares them with the risks he is running as a member of the opposition party. He is not afraid to die.

Mr. Damm does not know the opinion of people in his village and neighbourhood regarding the issue of being a witness before the tribunal. He could not think of any danger regarding people who will be a witness before the KRT. This statement seems somewhat contradicting to his previous statement on possible threats regarding his personal safety.

Mr. Damm has not heard about people in his village and neighbourhood who would be willing to support the accused before the KRT in Phnom Penh.

Mr. Damm will not explicitly ask for financial support, but if it is offered he will not reject it. Mr. Damm wants to be accompanied by an NGO during his trip to Phnom Penh, if he will be asked as a witness. In this regard he prefers to be accompanied by staff members of DC-Cam as they already know his background and have helped him before. Mr. Damm did not suggest any other ways of support.

4. Am Han

F, 60 years old

Victim

Interviewed on Tuesday the 8th of August 2006

DC-Cam staff has interviewed Ms. Am Han various times before and she did not seem to feel uncomfortable with our presence. She shared her experiences during DK years with us, but seemed somewhat emotional while talking about it. Ms. Han especially hesitated while answering the questions on possible threats and risks. The questions regarding her history and experiences she answered without hesitating and made a lot of jokes. Ms. Am Han was a bit distracted by her grandchildren who apparently wanted a lot of attention from their grandmother. The distraction did not affect the interview too much.

During the years of Democratic Kampuchea, Ms Am Han has lived in Takéo province as part of a women's unit. According to KR policy this unit was meant for women who has lost their husband due to Khmer Rouge killings and violence. As the women were separated from their children, Ms. Am Han's children did not live with her in this group. Most probably her husband was killed because he was a wealthy and rich man. The translation is unclear on the other details of her history. Waiting for the transcript. At the end of the interview Ms. Am Han added that she wants to meet the perpetrators and especially the one that has killed her husband. She would like to ask him what happened to him, where he was killed and why.

According to Ms. Am Han the Khmer Rouge regime was a hard regime. During the DC-Cam ECCC tour she was informed on policies of the Khmer Rouge that she did not know before. Those who are responsible for these crimes must be brought to justice and imprisoned for the rest of their life. She does however not know who have been the top leaders of the Khmer Rouge. To conclude she added that the process of the tribunal should no longer be delayed. In this respect she referred to the death of Ta Mok.

Ms. Am Han is not willing to be a witness before the KRT as she is convinced she does not have valuable information for the Tribunal on the Khmer Rouge. Nevertheless, if she is requested to be a witness before the KRT she does not feel threatened. According to Ms. Han, the tribunal will be a safe place for witnesses. The reasons for this point of view have not been specified during the interview.

Ms. Am Han thinks that some of the people in her village and neighbourhood are willing to be a witness before the KRT. They, are however afraid and concerned about their personal safety. She could not specify what these people fear the most and what in her opinion is the greatest risk regarding witnesses.

Ms. Am Han has not explained her opinion with respect to the people who will appear as witness for the defence. If Ms. Am Han is asked as a witness before the KRT, it will not have any affect on their family situation. It is possible for her to leave her home for a couple of days. Ms. Am Han would need to be financially supported, as she does not have sufficient resources to cover for her trip to Phnom Penh. If Ms. Am Han is requested to be a witness before the KRT, she prefers someone to accompany her to Phnom Penh. She did not clarify whether this person should be a family member or someone from an NGO. Ms. Am Han did not suggest any other ways of support.

5. Keo Mao

M, 56 years old
Lon Nol soldier and prisoner of the Kraing Tachan prison
Interviewed on Friday the 10th of August 2006

The interview with Mr. Keo Mao was conducted in his quiet home and as the interview continued it seemed as if he no longer noticed Sophal and me were present. It was clear that Mr. Keo Mao found it hard to talk about his experiences. He has obviously thought about this issue and seems to have valuable information about the policies within Kraing Tachan and prison 204. Mr. Keo Mao was not distracted during the interview.

In 1974 Mr. Keo Mao was arrested (together with two of is colleagues) as a Lon Nol soldier and brought to the Kraing Tachan prison. He stated that the Khmer Rouge suspected him to be a CIA agent as well. He has been imprisoned here for 8 months and severely tortured, suffocated by plastic bags until he was unconscious and regularly interrogated. The first four months of his imprisonment, Mr. Mao was shackled with three handcuffs on his arms and his legs. After these months the prison guards removed one of the handcuffs. During the months at Kraing Tachan he has witnessed the killing of the prisoners by the prison guards and could her the screaming of the prisoners before they died. The prisoners were called one by one from their cells after which they were killed. After four months in Kraing Tachan prison he was sent to another prison unit (prison 204) were he witnessed killings of the prisoners as well. The Chief of Kraing Tachan at that time was Manre An and the chief of prison 205 was Ta Chen. He has been in prison 204 for a short period of time after which he was released and worked in a Mobile Unit from 1977 to 1979. A few months before the invasion by the Vietnamese Mr. Mao was forced to marry a Khmer Rouge woman. Mr. Keo Mao is reminded of his experiences in the Kraing Tachan every day. He has often nightmares and is afraid that he will be arrested again.

Mr. Keo Mao supports the KRT as he thinks it is the only right response to the many deaths during the Khmer Rouge Regime. He has been informed on the fact that the KRT will only prosecute the most responsible leaders of the Khmer Rouge. In his opinion lower cadres should be prosecuted as well, as they have committed serious crimes as well.

Mr. Keo Mao is willing to be a witness before the tribunal and thinks it is his duty to contribute to finding the truth about what has happened during the DK years. His testimony before the KRT will release him from some of his pain and hopefully make him feel free again. He stated that he hates the Khmer Rouge and volunteers to be a witness during their prosecuting trials. He is however afraid that family members of the persons on trial want to take revenge and even thinks that they would want to kill him after he has revealed his story before the KRT.

According to Mr. Keo Mao some people in his village and neighbourhood still support the Khmer Rouge. They however often do not express their support and public, but they may be willing to testify in defending the accused leaders of the Khmer Rouge.

Mr. Keo Mao would need to be financially supported, as he does not have sufficient resources to cover for his trip to Phnom Penh. Mr. Keo Mao wants to be accompanied by some people of his village to Phnom Penh if he is requested to be a witness. DC-Cam and especially the people from Searching for the Truth know his history and his experiences during the regime. Therefore, he prefers to be accompanied by them as well. Mr. Keo Mao has suggested that the witnesses would be housed in well-protected accommodation in Phnom Penh.

6. Say Sen

M, unknown
Prisoner of the Kraing Tachan prison
Interviewed on Thursday the 10th of August 2006

Mr. Say Sen has been interviewed more often and is used to the situation. Mr. Say Sen was not distracted during the interview.

As Mr. Say Sen has told his history and experiences during the Khmer Rouge Regime several times to the staff of DC-Cam, he was not asked to explain his background once more. Mr. Say Sen was a prisoner of Kraing Tachan prison from 1974-1979. In the beginning of these years he was ordered to make palm juice for the prison guards. In addition he was assigned to carry and burry the bodies of the death prisoners to the mass graves. His father was killed in this prison as well and buried in a mass grave of approximately hundred bodies. Nowadays some of the guards live in his village or Tram Kak district, but he thinks that some of the guards are in hiding at the moment. The names of the prison guards are Saing (interviewed on the 11th of August 2006), Saunn (interviewed on the 8th of August 2006), Sim (interviewed on the 11th of August 2006), big Iep Duch (interviewed on the 9th of August 2006), Tuy Duch (rejected our request for an interview on the 11th of August), Damm (probably interviewed but not certain if it is the same person), Touch Thy (interviewed on the 26th of August 2006) and Ourk (living in Kampong Speu). Mr. Soy Sen knows important details on the policies within and valuable information regarding the Kraing Tachan prison.

It was very clear that Mr. Say Sen fears for the his personal safety and the safety of his family. He will therefore, not volunteer as a witness but if the KRT needs his statements and testimony he won't reject their request. In the village of Mr. Sen live a lot of the former guards of Kraing Tachan prison and other former cadres. He is afraid that they or their families will try to take revenge on him or his family if he reveals the information he has before the tribunal. He needs the help of the government in order to make sure that he and his family are protected against these and other threats. This protection must last longer than his presence on Phnom Penh as a witness, as he is afraid that the people may take revenge after he has returned to his village.

At the end of our interview Mr. Say Sen added that he regrets telling his story to DC-Cam and other NGO's and people. Although he supports the KRT in a way, he is also afraid that it will bring back the bad times. People who will be a witness at the tribunal are not safe and must realise that they may put their lives in danger. If he had known his testimony to NGO's would lead to being a witness before the tribunal he would never have shared his experiences.

Mr. Say Sen stated that his testimony before the KRT in Phnom Penh would have some impact on his family situation and his work. The translation did not mention in what way or how much impact it would have.

Mr. Say Sen did not share is opinion with regard to witnesses of the defence. He also did not mention any measures of support or protection that must be taken in his view.

7. Nuon Mon

F, 52 years old
Wife of a former Lon Nol soldier
Interviewed on the 26th of August 2006

Socheat has interviewed Ms. Nuon Mom various times before and Ms. Mom did not seem to feel uncomfortable with our presence. Ms. Nuon Mom was not distracted during the interview.

Before the Khmer Rouge came to power in Cambodia, Ms. Nuon Mom was a worker at a Christian Church. During that period she lived with her husband in Takéo provincial town. Her husband was a Lon Nol soldier for which he was killed in 1975. Ms. Nuon Mom witnessed the murder of her husband at the Ta Leu pagoda and decided to **conceal** her background out of fear for the Khmer Rouge. During the Khmer Rouge Regime Ms. Mom worked at a workers unit that produced bricks. She was forced to work under extreme conditions for almost twenty-four hours a day. She was afraid that the Khmer Rouge soldiers would kill her if she did not obey their demands. She has witnessed the killings of Lon Nol soldiers and some of their wives who worked at the workers unit as well. Some of the women were sexually abused and some disappeared for unknown reasons. During her time at the unit between 1976 and 1978 she has met Ta Mok for whom she had a lot of respect.

While answering the question on her opinion regarding the KRT, Ms. Nuon Mom recalled her experiences during the Khmer Rouge Regime. She witnessed the death of her husband, her relatives and many others. Ms. Nuon Mom found a body of a person whose hart and liver had been cut out by Khmer Rouge soldiers. When she heard about the tribunal, she was very happy and she considers the KRT as the only proper response to the horrible things that happened during the Khmer Rouge Regime. The KRT will bring justice for the people in Cambodia. She questions, however, the value of the KRT now Ta Mok has died and cannot be prosecuted anymore.

Ms. Nuon is willing to be a witness before the KRT and would like to take that opportunity to ask the leaders of the Khmer Rouge why they killed so many people. She is not afraid to be a witness and has confidence in protection through the present laws in Cambodia. It is in her opinion the basic responsibility of the government to protect the witnesses before the KRT. The government should be supported by NGO's.

Ms. Nuon Mom stated that witnessed of the Khmer Rouge Tribunal will be protected by the present laws of Cambodia. People in her neighbourhood are willing to be a witness and do not fear for their safety in this regard. She thinks it will benefit the trials if as much people as possible will testify before the Khmer Rouge Tribunal.

Ms. Nuon Mom stated that the Khmer Rouge had some advantages. The lands and resources of Cambodia were equally distributed amongst the people of Cambodia. Moreover, the people of Cambodia were living on equal standards. These advantages however, do not add up to the horrible events that happened during the Khmer Regime as well. In general Ms. Nuon Mom has no good words for the leaders of the regime and she will not consider supporting them on trial. She is only willing to tell her story as a victim and support the prosecution with her testimony. The translation does not mention any remarks of Ms. Nuon on the possible threats regarding the witnesses of defence.

Ms. Nuon Mom will be able to leave her home for two or three days in order to go the tribunal. Her contribution to justice is most important. Ms. Nuon Mom will not explicitly ask for financial support, but if it is offered he will not reject it.

Ms. Nuon Mom would like her villagers to accompany her during the trip even if they will not be witnesses themselves. She feels most comfortable if some of them will be in Phnom Penh to support her during testimony. Ms. Nuon Mom is not afraid to make her identity public. As mentioned earlier it is in her opinion the basic responsibility of the government to protect the witnesses before the KRT. The government should be supported by the NGO's.

8. Pech Sean

M, 73 years
Prisoner of the Kraing Tachan prison
Interviewed on Tuesday the 5th of September 2006

Mr. Pech Sean did not seem uncomfortable with our presence and was not distracted during the interview.

Mr. Pech Sean has twelve children, five sons and seven daughters. In 1975 he was assigned as a militiaman by the Khmer Rouge and joined the other communist followers. Mr. Pech Sean was asked to join the campaign to promote the Khmer Rouge regime, which would bring a prosperous Cambodian society. He did not support and approve the ideas of the Khmer Rouge. The Khmer Rouge suspected him of being a capitalist and arrested him, after which he was sent to one of the sections of the Kraing Tachan prison. On his way to the prison and during his imprisonment Mr. Sean was tortured and interrogated several times. The main goal of the interrogation seemed to get his confession on his involvement with the capitalist enemies or the CIA. One of his friends was beaten to death by one of the guards and others were mostly selected and sent to kill in the night. The prisoners were put in crowded cells. The prison chief of this section was Ta Kel but Mr. Sean does not remember the names of other guards. Kraing Tachan was divided in several sections and he has forgotten the most details. In total Mr. Sean has spent six months in the Kraing Tachan prison after which he was part of a working unit, building dams. After the Vietnamese invaded Cambodian territory he fled to the jungle around Chum Kiri Mountain. The Vietnamese sent him back to his home village.

Mr. Pech Sean has told his children about the horrible things that happened during the Khmer Rouge regime. He supports the Khmer Rouge tribunal but wants to wait and see if the tribunal will be able to bring justice to the people of Cambodia. Mr. Sean joined the ECCC tour and enjoyed learning more about the proceedings and the trials. The tribunal will prosecute the most senior and responsible leaders of the Khmer Rouge but Mr. Sean thinks that lower cadres must be prosecuted as well. He realises that the senior leaders have given the most important orders. Prosecuting only four or five senior leaders will however lack a sufficient impact within Cambodian society and reconciliation with the past will not be reached. Moreover, he thinks that one or two persons from each sub district should go to the tribunal in order to increase its impact.

Mr. Pech Sean thinks that revenge still exist within Cambodian society and will impede the reconciliation process of Cambodia. He is willing to be a witness and does not believe there would be any threats to his personal safety. In the present Cambodian society, the Khmer Rouge does have as much power as it used to have. The Khmer Rouge leaders have less supporters and they will not dare to take to revenge. The local authorities should provide the necessary protection to the people.

Mr. Sean's opinion on general threats towards witnesses has been summarised in the previous paragraph. He does not believe that the former Khmer Rouge leaders have enough followers in order to form a serious threat to Cambodian society.

If Mr. Pech Sean would be asked as a witness before the KRT, it would not affect his family situation too bad. It is possible for him to leave her home for a couple of days.

Mr. Pech Sean will not ask for financial compensation, as it is not necessary for him. It will, however, not be possible for more poor people to leave their home without any financial compensation. Mr. Pech Sean would like to be accompanied by some of his villagers.

The most proper ways of support will vary for each individual. The witnesses could probably be supported by compensation of travel expenses and accommodation. The building of the KRT would be a good place for the witnesses to stay. Mr. Pech Sean would not be afraid to share his name and address in public. If any threats may exist, the local authorities will provide protection very quickly.

9. Nhem Sal

M, 51 years old
Prisoner of the Tuol Sleng prison
Interviewed on Wednesday the 6th of September 2006

Mr. Nhem Sal has interviewed before and seemed not to be uncomfortable with our presence. At the end of the interview he stated however that more and more foreign reporters and researchers have come to him for interviews. Their presence and questions frighten him a bit. Mr. Nhem Sal was not distracted during the interview.

Mr. Nhem Sal was a Khmer Rouge soldier before 1975 but got injured during the fighting. After his recovery in a hospital in Kampong Speu, Mr. Sal was sent to fight in Ratanak Kiri. In 1976 Mr. Sal and his unit members were accused of being White Khmer but managed to escape from the Khmer Rouge. After his escape the KR police in Stung Treng province arrested him and sent him to Kratie where he managed to escape once again. Mr. Sal was arrested in Prek Kdam and sent to Koh Kor prison in Kandal province. There he was interrogated every day and he tried to answer their questions as consistently as possible. Many prisoners in this prison were killed by the beatings of the guards or after the torture during the interrogations. At the end of 1976 Mr. Sal was sent to Tuol Sleng prison in Phnom Penh. At that moment he did not know that he was captured in this prison but he recognised it during his visit as part of the DC-Cam ECCC tour. Prisoners were interrogated five times a day through which the Khmer Rouge tried to reveal information about their traitorous activities. In total Mr. Sal was imprisoned for one year in 1977 at Tuol Sleng. The guards at the prison interrogated him around six or seven times a day and gave him electric shocks in order to force him to give the right answers. Among the guards were some gentle persons who warned him that those who would be killed would be sent to Choeung Ek Killing Fields first. Each guard had the responsibility of bringing one prisoner to be killed and one day Mr. Sal was put in a truck as well. This truck, however, did not bring him to Choeung Ek but to Prey Sa. He has never known the reason for his replacement.
At Prey Sa Mr. Sal was assigned to work at the rice fields but after two nights he run away with one of his friends. He lived in the rice fields for a few days and arrived at his home village after three days. He met with his sub-district chief who confirmed that many cooperative people were killed as they were suspected to have connections with traitors. He was volunteered to join the army again and was sent to the battlefield at Den Mountain. He fought during 1978 and 1979 until the Vietnamese captured his regiment. He regrets that he did but he joined the KR army out of fear to be killed if he decided to stay at the cooperative. After the Vietnamese invasion he fled to the Cambodian Thai border and noticed that the Khmer Rouge had made thorough preparations for their stay in the jungle. These preparations included medicines, food and military facilities. After spending three or four months in the jungle, Mr Sal was captured by the Vietnamese who sent him to Neak Loeung. Here he was trained in politics and finally sent home.

Mr. Nhem Sal hopes that the tribunal will succeed in finding justice for the people of Cambodia with the help of the United Nations. He believes that reconciliation with the past can be realised with the help of the law and therefore with the help of the tribunal. He regrets the fact that the most important Khmer Rouge leaders have died. With regard to the prosecution of lower cadres, Mr. Sal stated that it is up to the KRT and he does not hold a strong opinion in this regard. It is hard to know whether the low cadres only acted conform the orders of their top leaders and whether the top leaders were the only ones that gave the orders. Therefore he thinks it is up to the tribunal.

Mr. Nhem Sal is willing to be a witness although he has been afraid of revenge for a long time. This fear was mostly based on the time that he was threatened by one of the police officers of the Ministry of Interior. The officer wanted to make sure that Mr. Sal would not reveal the KR past of people related to the Cambodian People's Party. Nowadays he is not afraid anymore and stated that he will only tell the truth in order to find justice and reconciliation for the people of Cambodia. The protection of the people who will testify before the KRT is the primary responsibility of the Cambodian government.

It would be hard for Mr. Sal to cover the costs of a trip to Phnom Penh and he would therefore prefer as much compensation for his trip as possible. Mr. Nhem Sal would like to be accompanied by some of his villagers. Mr. Nhem Sal would not be afraid to tell his make his name and address public.

10. Duy Them

M, age unknown
Prisoner of S-21
Interviewed on Sunday the 10th of September 2006
The interview has not been recorded

Mr. Tem was not comfortable with our presence. Like Mr. Nhem Sal, many reporters and researchers have visited him before and he does not feel comfortable with their interviews. Barang and Charya explained the purpose of our interview and Mr. Tem allowed us to interview him. The interview is however not recorded. During the interview an accident happened on the road before Mr. Tem's house. Fortunately the accident was not serious but Mr. Tem assisted the man that was injured. A lot of people, especially children, gathered at Mr. Tem's home and caused some distraction. Mr. Tem was not focussed on our interview and did not seem willing to share his thoughts very detailed.

Mr. Duy Tem shares a similar history during the Khmer Rouge regime as Mr. Nhem Sal. Mr. Tem was sent to fight as a KR soldier at Ratanak Kiri and Mondul Kiri, where he managed to escape and fled to Kratie. He met Mr. Sal in the jungle and both were arrested at Kohkrabei pagoda and sent to Office 15 (Champas Ek) where many people were tortured and killed. After his imprisonment in this prison, he was sent to Tuol Sleng, which was also referred to as the Big Prison. In Tuol Sleng Mr. Tem was handcuffed in his cell and interrogated once a week. The Khmer Rouge accused him of being a CIA agent, but Mr. Tem denied his involvement repeatedly. He explained that he wanted to escape so he could go home and meet his parents again. The guards at Tuol Sleng used to beat him but they did not apply electric shocks. Mr. Tem has been interrogated three times, which does not seem to fit with his statement that he has been imprisoned for three months and interrogated once a week. After his imprisonment in Tuol Sleng he was sent to Prey Sar prison where he stayed in a cell on his own. Mr. Sal and Voeun were sent to Prey Sar as well and all three of them managed to escape from this place. They fled to their homes and arrived after one day and one night of walking. After his arrival in his home village, the people of the cooperative did not beat him or send him back, but just questioned him.

Mr. Duy Tem did not share his opinion regarding the Khmer Rouge tribunal in great detail. He stated that he did not hear about the progress of the tribunal since he visited Phnom Penh during the ECCC tour. Moreover, he feels more confident about the tribunal because the United Nations are involved in the process.

Mr. Duy Tem thinks it will be safe for people to be a witness before the Khmer Rouge tribunal and therefore is willing to testify. He will not volunteer, but if the tribunal approaches him he will fulfil his duty. He will feel more comfortable if other people are called as a witness as well.

Mr. Duy Tem thinks that people in his village are probably willing to be a witness if the tribunal requests them to testify. It will be safe for them to be a witness. In his opinion it is the responsibility of the United Nations to provide proper protection of the witnesses. Mr. Tem think the Cambodian government is not capable to provide proper protection and has more faith in the United Nations.

Mr. Duy Tem is village chief of Thmei village, Tnoat sub district, Bati district. As a chief he bears a lot of responsibility and it will be difficult for him to leave his home for a longer period of time. Mr. Tem did not mention the maximum of days he could leave his village.

Mr. Duy Tem thinks it is not appropriate to ask for financial support, as it would be too much to ask for. He would be satisfied with all kinds of support whether it is money or not.

Mr. Duy Tem would like to be accompanied by three people, but he did not specify who these people would be. Mr. Duy Tem will accept the support of DC-Cam and does not mind whether they will provide the transport or cover his travel costs. He does not have any suggestions and will accept the ways of support offered by DC-Cam.

ANNEX 3 Summary of interviews with cadres, security personnel, combatants and base people

Security personnel

A. Saunn
M, 49 years old
Security guard of Kraing Tachan prison
Interviewed on Tuesday the 8th of August 2006

Mr. Saunn was a security guard at Kraing Tachan prison since 1975 and mostly operated as a messenger between the prison and chiefs of village, commune, etc. With regard to the structure of the prison Mr. Saunn stated that it was divided into two parts. One part was meant for the people who committed minor crimes, such as stealing or ethical offences. Most of these prisoners were not killed. The second part of the prison was meant for the people who committed serious crimes or were regarded as enemies or traitors of Angkar. Their status as an enemy of Angkar or alleged relationship to Lon Nol or the CIA often lead to their execution. Mr. Saunn found it was difficult to work at the prison, but if he would not cooperate and kill the prisoners, the Khmer Rouge would kill him. The Khmer Rouge killed some of his relatives. In this regard reference is made to sexual abuses of the family members as a reason for their killings.

Mr. Saunn supports the Khmer Rouge Tribunal and hopes it will bring justice to the people of Cambodia finally. He has faith in the national and international judges and hopes they will succeed in finding justice for Cambodia.

Mr. Saunn declared to be willing to testify as a witness before the KRT. It was apparent that he has certain fears in this regard. During the interview it seemed however difficult for him to talk about his fears in detail. He mentioned that he was afraid of the government and other top leaders of the Khmer Rouge. It is up to the tribunal, if they call him as a witness he will go to Phnom Penh.

Mr. Saunn holds the opinion that most of the people in his neighbourhood would not like to be a witness, as they are afraid to testify. He knows a chief of another village is willing, but he could not tell us where he lives at the moment.

Mr. Saunn explained that the trip to Phnom Penh would probably have a little effect on his family situation. In this regard he added that he would like to get financial compensation for the costs he makes and the times he is not able to work.

Cadres

B Chhay Chrun

M, age unknown

Exact position unknown

Interviewed on Wednesday the 9th of August 2006

Mr. Chhay Chrun stated that he was a soldier of King Sihanouk. He explained the changes during the Khmer Rouge Regime and the way people from the cities were moved to the countryside. At first, both base and new people lived in the same villages but in a later stage both groups were separated. From the very first beginning he noticed that some of his neighbours disappeared and never returned to their homes. He has never witnessed but knew the Khmer Rouge killed a lot of villagers. During the DK years some of Mr. Churn's siblings have been killed. His five children lived separated from Mr. Chrun in a children facility. He added that his village chief was known for his mistreatment and sexual abuse of women. He remembers the invasion of the Vietnamese in Cambodia after which he returned to his home village.

Mr. Chrun declared that the Khmer Rouge regime had both advantages and disadvantages. Regarding the advantages of the regime he stated that the trees, forest, rice crops and animals were protected by the regime. Moreover, he and his family had enough to eat during that period.

Regarding the KRT Mr. Chhay Chrun has stated that it will find justice for the people in Cambodia. In his point of view the tribunal must prosecute only the most responsible leaders. He expressed his concern regarding the death of Ta Mok and stated that the same will happen to other senior leaders if the work of the tribunal is delayed much longer. In addition he stated that the tribunal most consider both advantages and disadvantages of the Khmer Rouge regime.

At first Mr. Chhay Chrun declared that he would not be willing to testify as a witness as it does not fit within the believes of Buddhism. According to his religion people should try to have a quiet mind, forgive and live in peace with everything that happened during their lives. During the interview Mr. Chhay Chrun changed his position in this regard and stated in the end that he would be willing to testify before the KRT.

Regarding the situation of witnesses Mr. Chhay Chrun stated that these people would not be safe. The biggest threat in his opinion is the fact that witnesses will be killed, but he did not clarify who would want to kill them. As far as he could tell, he thought people in his neighbourhood would be willing to testify before the tribunal.

According to Mr. Chhay Chrun, the tribunal should financially support the witnesses as most of them are poor and do not have sufficient recourses to pay for the costs themselves.

Chhay Chrun stated that he would be willing to travel to Phnom Penh, either with someone or alone.

Regarding specific arrangements Mr. Chhay Chrun thinks that DC-Cam has to arrange his travel to and stay in Phnom Penh. DC-Cam should support the witnesses in ways of financial support, travel arrangements, food and housing. In order to secure their safety DC-Cam should provide temporary and secured housing facilities for the witnesses. The location of the housing facility should not be revealed to the public. In addition, Mr. Chrun stated that witnesses should not reveal their identity while testifying before the Khmer Rouge Tribunal. Revealing their identity would in his opinion increase the risks.

Cadres

C Noth Now

M, 66 years old

Chief of commune

Interviewed on Wednesday the 9th of August 2006

During the introduction Mr. Noth Now explained that his wife did not survive a traffic accident a couple of years ago. At the time of Democratic Kampuchea Mr. Noth Now was chief of commune. He witnessed the march of the new people to the countryside on the 17th of April 1975. At first base and new people lived amongst each other. After a while the Khmer Rouge separated them in different groups. He explained that the main goal of the recruitment of soldiers by Pol Pot was to defeat the enemies of the revolution, such as Lon Nol and CIA agents. Within his commune a meeting was held with other commune chiefs every ten days. Mr. Ta Chim chaired these meetings and issues. During these meetings the chiefs were educated on the values of the revolution and the proper way to live according these values. He noticed that some of the villagers did not support the values of the revolution and worked against Angkar. The people who were arrested by the Khmer Rouge in his commune were sent to the Kraing Tachan prison. During the DK years Mr. Now has moved from villages and commune for several times. At a certain point, Mr, Now was accused of sexual abuse with women in his commune and the Khmer Rouge tried to arrest him. In general, people who committed sexual offences were sent to the Kraing Tachan prison. These people were tortured but often not killed. Mr. Now did not explain why the Khmer Rouge did not arrest him. He added in the end that the Khmer Rouge regime had both advantages and disadvantages. He, however, did not explain this matter in detail.

Mr. Noth Now stated that the Khmer Rouge leaders were responsible for the killings, while the lower cadres only followed orders and did not know the purpose of their actions. Regarding the prosecution of the most responsible leaders, he does not have a clear opinion and he thinks it is up to the government to decide in this matter. He has faith in the tribunal and believes it will bring justice to the people of Cambodia, as present national laws are correct.

The statements of Mr. Now regarding testifying as a witness before the tribunal have changed during the interview. At first Mr. Noth Now stated that he would be willing to testify before the tribunal as a witness. In a later stage he stated, however, that he thought about this issue but had not decided yet. It would be unsafe for people to be a witness before the KRT. Finally, he concluded by saying that he would not be afraid, as he did not know who would want to kill him.

Mr. Noth Now stated that most people in his neighbourhood would probably not be willing to testify before the tribunal. The most important explanation he gave was their fears regarding their personal safety. He did not specify what the people consider as possible threats.

Noth Now is convinced that nobody in his neighbourhood would be willing to testify in favour of the persons on trial.

In respect to his family situation Mr. Noth Now declared that his situation has changed as his wife had an accident. If he would be called as a witness before the tribunal, it would have an important impact on his family situation. In addition, he stated that the trip to Phnom Penh would have some effect on his work.

Mr. Noth Now suggested that DC-Cam should support the witnesses in ways of financial support, travel arrangements, food and housing.

Cadres

D Iep Duch

M, age unknown

Deputy chief and interrogator at Kraing Tachan prison

Interviewed on Wednesday the 9th of August 2006.

Mr. Iep Duch hesitated at first regarding our request to interview him on the topic of witnesses before the tribunal. Barang and Sophal managed to persuade him to answer some of our questions although he did not allow us to record the interview. Mr. Duch did not seem willing to reveal too much about his personal history but did share his thoughts regarding the Tribunal with us. He stated that although the regime has been defeated in 1979, the Khmer Rouge are still part of and have a lot of power within the Cambodian society. Although everybody in Cambodia state they hate the KR Regime, a lot members of one of the present political parties (probably the CPP) still support the Khmer Rouge.

Mr. Iep Duch seemed well informed about the history and developments regarding the KRT. He stated that some of the legal aspects of the Tribunal are, however, not completely clear to him and he would like to know more about it. As we were no lawyers, he thought that we would not be able to answer his questions.

One of his primary thoughts regarding the tribunal relate to the death of Ta Mok. The loss of Ta Mok has a big impact on the work of the tribunal and he is afraid that the tribunal has lost a lot of its value for the people of Cambodia. Ta Mok could have revealed important information that now has been buried with Ta Mok. The other leaders of the Khmer Rouge, who are still alive, don't have as much as information as Ta Mok. In this regard Mr. Duch stated that a lot of people in Cambodia do not believe Ta Mok died a natural death. In their opinion Ta Mok was murdered. The people of Cambodia have faith in the tribunal as it is based on both national and international law. According Mr. Duch it is important to inform them on the proceedings and the developments within the Tribunal. Mr. Duch approves the fact that only the most responsible persons of the Khmer Rouge will be tried. The lower cadres did not know the intention of their leaders and only followed the orders.

In answer to the question whether Mr. Iep Duch would be willing to testify before the tribunal, he stated that he did not decide yet. He will make a decision when the tribunal will actually approach him and request him to be a witness. If he decides to be a witness, he will reveal all the information he has.

Mr. Duch thinks the people within his village are willing to be a witness and tell their story before the tribunal, but he worries about their safety. According to Mr. Duch witnesses are most vulnerable and there are important threats in Cambodian society regarding their safety. As an example he refers to the death of Ta Mok who did not die a natural death but was killed in his opinion.

Iep Duch recalls that people in his village were relieved when the Tribunal was established and he thinks most of them will not be willing to support the accused KR leaders on trial.

If Iep Duch would be called as a witness before the KRT, it would have some effect on his family situation. Nevertheless, he would go, as he feels obliged to contribute to the tribunal.

According to Mr. Iep Duch NGO's can support the witnesses and protect them from any threat regarding their personal safety. In addition he stated that witnesses must be supported in ways of financial support, travel arrangements, food and housing.

Base People

E Nhem Khann
F, 45 years old
Medical Staff
Interviewed on Thursday the 10th of August 2006

Ms. Nhem Khann was selected as the only one in her village to work as part of the staff of the medical facilities. At first she worked at the Angponarerey Pagoda and her main task was to distribute medicine to patients. Here she worked for nearly a year before she was sent to Section P6 in Phnom Penh. Together with four other staff members, Ms Khann was responsible for the treatment of the patients on the second floor of the facility. Once in a while Ieng Sary visited the hospital to support the patients and the staff of the hospital. Ms. Khann met Ta Mok once when she was in the jungle. After the Vietnamese defeated the Khmer Rouge, Ms. Khann returned to her home village were she was reunited with her mother. During the revolution Ms. Khann never witnessed killings by the Khmer Rouge. It was only after their defeat when she learned about the tragedy and in her opinion the Khmer Rouge was a bad regime.

Ms. Nhem Khann was not familiar with the tribunal but she supported it after we explained the most important aspects of the KRT.

Ms. Nhem Khann is willing to tell about her experiences before the tribunal, but fears the Khmer Rouge is still present in the Cambodian society. She fears for her personal safety and expects the government to protect her.

As Ms. Nhem Khann was not informed on the KRT she did not talk about it with her neighbours or people from her village. Therefore, she could not tell whether people would be willing to testify.

Ms. Nhem Khann does not approve with people who support the Khmer Rouge on trial. As the Khmer Rouge was an awful regime, she cannot imagine why people would be willing to support the most responsible leaders.

If Ms. Nhem Khann would be called as a witness before the Tribunal, it would have some effect on her family situation. During her absence, no one would be home to take care of her children, the animals and the work on the rice fields. Ms. Nhem Khann does not have sufficient resources for a trip to Phnom Penh as a witness. Therefore, she suggests that she will be financially supported if she would be asked as a witness before the Tribunal. Ms. Nhem Khann wants to be accompanied by somebody that can keep her safe during her trip to Phnom Penh.

Security personnel

F Soth Saing
M, 51 years old
Security guard at Kraing Tachan prison
Interviewed on Friday the 11th of August 2006

Mr. Soth Saing is the son of Mr. Layman who was a Lon Nol agent and arrested by the Khmer Rouge regime. From 1973 to 1974 Mr. Saing fought at the battlefield, after which he was appointed as youth guard of the district in 1975. At the end of 1977 he was sent to the Kraing Tachan prison to work as a guard. He was responsible for the harvest and worked under his chief Chim and Nhorn. In total seven people, Sorn, Touch, Ourk, Duch, Damm, Sim and himself, guarded Kraing Tachan. According to Mr. Saing around 100.000 people have been killed in the prison. He was responsible for finding food and taking care of the harvest. In Kraing Tachan prison people were mostly killed if they were thought to be involved with the enemies of the revolution such as CIA and Lon Nol. New people and people who committed lesser crimes were not killed. He told some of the guards have been known for their moral offences, an example of which is Mr. Damm. Mr. Saing has never committed these offences and only followed KR orders. In his opinion, the Khmer Rouge has been a very cruel regime and was based on non-democratic pillars.

Mr. Soth Saing supports the KRT and hopes that justice will be found for the victims. In his opinion the tribunal should only prosecute those most responsible for the crimes and not the lower cadres. The top leaders of the Khmer Rouge are the only persons who have committed the crimes and gave the orders to the lower cadres. Mr. Saing does not think that the tribunal can compensate the losses of the victims and families and everything that has happened during the DK period in any way. It can, however, fulfil an important role in educating the next generation and preventing genocide from happening again.

Mr. Soth Saing wants to be a witness before the Khmer Rouge Tribunal, but cannot look in the hearts of his neighbours and predict if they would be willing to be a witness as well. He did not state explicitly that he fears for his safety, but revealed some of his fears in a more indirect manner during the interview. Mr. Saing insisted, for instance, on personal protection during his testimony by someone who knows his history and his situation. Moreover, he declared he did not want to reveal his name on the stand, as he fears that family members of the accused would want to take revenge.

Mr. Soth Saing did not explain his opinion on general threats regarding witnesses before the Khmer Rouge Tribunal. He did express his faith in the present government and believes that the people of Cambodia have the right to speak out, express their opinion and can live in freedom, which was not possible during the Khmer Rouge regime.

Mr. Soth Saing holds the opinion that people who support the accused with their testimony before the KRT would betray the Nation.

If Mr. Soth Saing would be called as a witness before the tribunal, it would have some effect on his family situation. During his absence nobody would be home to protect his family during the night and take care of his animals. Mr. Soth Saing stated that the budgetary aspect of his trip to Phnom Penh as a witness would have some affect on his personal life.

Mr. Soth Saing does not want to be accompanied by his family members, but would like the staff of DC-Cam to support him during his testimonies. Only people who know his history can take care of him and assure his safety. Mr. Soth Saing does not want to reveal his name as a witness, while he is afraid that the family of the persons on trial would want to take revenge.

Security personnel

G Sang Sim

M, 51 years old

Security guard at Kraing Tachan prison

Interviewed on Friday the 11th of August 2006

Mr. Sang Sim has been a guard at Kraing Tachan prison in Region 13. In 1976 his chief of Unit, Mr. Nhorn, ordered him to work at central district but he was sent to Kraing Tachan prison. In Kraing Tachan prison twelve other guards worked and everybody had different tasks within the prison. He was not appointed as a killer but guarded the outside gate. Mr. Sim was not informed about the killings that occurred in the Kraing Tachan prison before he was sent to work there. After he learned about this, he wanted to work at the central district but his chief did not let him go. During his time at the prison he has seen that some of his relatives were imprisoned at Kraing Tachan. They asked Mr. Sim to help them to get out of the prison, but he couldn't. In the end his father was released from the prison. He worked at the prison from late 1976 until 1978 after which he requested to work at the battlefield to fight the Vietnamese. After the invasion by the Vietnamese he fought in the jungle for three months. During his appointment at the Kraing Tachan prison, Mr. Sim did not know about the total numbers of killings by the Khmer Rouge regime. He only learned about this when he was in Anlong Khneav hospital for his injuries of the battlefield.

Mr. Sang Sim supports the KRT and holds the opinion that only the most responsible leaders must be prosecuted.

Mr. Sang Sim stated that he would not have a problem to tell his story as a witness before the KRT. He does not fear his safety, while he is an old man and he will help to find justice for the people in Cambodia.

Mr. Sang Sim stated that he does not expect that there will be villagers willing to support the Khmer Rouge leaders on trial. If he would be called as a witness before the KRT it would have some effect on the family situation of Mr. Sang Sim. Mr. Sang Sim does not earn a lot of money and can, therefore, not afford to go to Phnom Penh without financial support. Mr. Sang Sim stated that he could go alone to Phnom Penh.

Mr. Sang Sim is not sure whether he would be willing to reveal his name before the tribunal. In this regard he also stated that most of the villagers already know about his roll during the Khmer Rouge regime.

H Tuy Duch **Security personnel**

M, age unknown

Security guard at Kraing Tachan prison

We have tried to reach Mr. Duch on Tuesday the 8th of August several times, but he was working the whole day unfortunately. On our way to Phnom Penh we tried one more time and finally met him at his house. His reaction regarding our interview request was however very tensed and he rejected the request. Mr. Duch stated that he did not want to be reminded to the horrible things that happened during the Khmer Rouge but also the Lon Nol regime and under Vietnamese occupation. He was ashamed for what happened and did not want his son to hear him telling the terrible stories. His son was better off learning the countries history in school. On our comment the schools in Cambodia do not teach about Khmer Rouge and both victims and perpetrators had an important roll to play he answered again he did not want to talk about it. Barang and Sophal tried to ease his upset feelings and tried to talk to him, but his pain and hurting was very clear. We respected his choice and left his home.

Ung Vuth Base people

F, 67 years old

Medical staff

Interviewed on Friday the 25th of August 2006.

Cadre

J Hu Hum
M, 54 years old
Chief of cooperative
Interviewed on Saturday the 26th of August 2006

During 1972 and 1973 the Khmer Rouge trained Mr. Hu Hum as a village chief. One of the most important topics during his training concerned the policies against the capitalist systems. In 1975 he was instructed to evacuate the villagers of Ang Rorneap to Treang district, district number 107. People who were against the guidelines of Angkar were purged but Mr. Hu Hum was known as a relatively good village chief. He never reported one of his villagers to the Khmer Rouge and he did not mistreat his villagers like other chiefs had done. He was however under great pressure by some of the Khmer Rouge Cadres. During that time he lost three of his relatives, amongst whom his younger brother who died in the battlefield. His wife was sent to Kampong Luong prison in Kampong Speu province. The translation does not clarify however whether she was sent as a prisoner or to work at the prison. The translation also mentions some details on the guidelines that had to be followed, but it is not very clear.

Mr. Hu Hum fully supports the Khmer Rouge Tribunal and is willing to be a witness before the tribunal and will tell his story as one of the victims before the tribunal. His hatred towards the leaders of the Khmer Rouge regime and his support for the KRT are the most important reasons for his willingness to testify. He will accept the risks he may run as a witness before the KRT.

In this regard he refers to his membership of one of the opposition parties, the FUNCINPEC party. He believes that his commitment to one of the opposition parties will increase the risks concerning his personal safety. Even regardless of the KRT Mr. Hu Hum is extra careful. He will for instance never travel during night time and is aware that many 'accidents' may happen to him. With regard to the KRT Mr. Hu Hum has stated that he is willing to be a witness even though this may lead to his death. On the safety issue related to the KRT he has stated that there are various ways people may be threatened. They could for instance be killed at night and armed robberies or accidents are common ways to cover up possible acts of revenge.

Mr. Hu Hum has discussed the KRT with his neighbours and relatives after he visited the DC-Cam ECCC tour. They support the thought of a tribunal but do not believe this tribunal will actually try the most responsible leaders of the Khmer Rouge. His explanation of the KRT did not convince them so it is hard for him to know whether his neighbours would be willing to testify as a witness. His remarks regarding possible threats have been mentioned in the previous paragraph. It is interesting to note that Mr. Hu Hum stated that the Member of Parliament during the ECCC tour of DC-Cam frightened some of his villagers. During the tour Mr. Maon Sophan held a speech on the KRT and stated that senior leaders and those most responsible were to be judged. The translation does not mention further details in this regard.

If Mr. Hu Hum would be called as a witness before the tribunal, it would have some effect on his family situation. This would however not hold him back to fulfil his duty of being a witness before the KRT.

According to Mr. Hu Hum it is up to the tribunal whether it wants to provide financial compensation to the people who will be a witness. He just wishes that the KRT would bring justice to the people of Cambodia and thinks this and the safety of the witnesses are the most important responsibilities of the Khmer Rouge Tribunal.

Mr. Hu Hum wants to be accompanied by some of his villagers to the tribunal. He does not want to travel alone to Phnom Penh for his testimony as a witness.

The translation did not mention any specific supporting arrangements proposed by Mr. Hu Hum. He stated that he would prefer to keep his identity hidden. It is the responsibility of the local government to protect the people who will be a witness before the tribunal. The local government has to guarantee of not only the witnesses but also their relatives. Mr. Hu Hum Has faith in the NGO's such as DC-Cam and believes they should play an important part in the protection of witnesses as well.

Combatant

K Touch Thy

M, age unknown

Khmer Rouge soldier

Interviewed on the 26th of August 2006

Mr. Touch Thy joined the youth group from 1970-1972 after he was introduced by one of his commune members. In 1973 he voluntary joined the first division in the South West Zone, which was based in Kampong Chhnang province. During the first months he was trained as a soldier and became chief of a squad in the Khmer Rouge army. From 1973-1975 Mr. Thy fought at the battlefield but got injured. In 1975 his regiment was sent to repair national road three at Tany, Kampot province. In December 1975 he was sent to the Thai border in order to defend DK where he was promoted in early 1978 to Chief of Platoon. As chief he supervised thirty men. His responsibility was to patrol the Thai and Cambodia border. Mr. Thy explains in great detail about his activities of his platoon and his experiences. He also mentioned that he was ordered to purge people based on their alleged involvement with Lon Nol, CIA and other possible enemies of the Revolution. After his return in 1978 he noticed that many of former soldiers were missing and most probably killed during the fights with the Thai and Vietnamese.

Mr. Thy declared that the Khmer Rouge regime had both advantages and disadvantages. Regarding the advantages of the regime he stated that the trees, forest, rice crops and animals were protected by the regime. Moreover, he and his family had enough to eat during that period. The biggest disadvantage in his view was the fact the Khmer Rouge killed so much people.

Mr. Thy supports the thought of a tribunal but is afraid that the judges of the KRT are connected to former Khmer Rouge leaders. The fact that Pol Pot cannot be tried anymore is according to his view a great loss for the tribunal, as he was the only real superior leader. He is afraid that the KRT will not succeed in finding justice for the people in Cambodia.

Mr. Thy is not afraid to tell the truth about his experience during the KR period as a witness before the KRT. He is willing to testify but fears for his safety as there will people who would want to take revenge. In this regard he could not specify who would want to take revenge and who would form a potential threat to him. Mr. Kim Saroeun stated that other people might be willing to be a witness if they are invited.

As mentioned before, the Khmer Rouge had both advantages and disadvantages according to Mr. Thy. He is however not willing to support the Khmer Rouge leaders with his story. Further details on this issue are not mentioned in the translation.

With respect to his testimony as a witness Mr. Thy stated that he would like to be anonymous. It is the duty of the NGO's to protect him during his trip to Phnom Penh and he prefers to inform nobody when he is approached to be a witness. He wants to conceal his address and he prefers that no

pictures will be taken. With regard to his testimony he stated that he would need supportive documents on the Khmer Rouge in order to refresh his memory.

L Kim Saroeun aka Chuk Saroeun **Security personnel**

M, 50 years old
Messenger at S-21 and Khmer Rouge soldier
Interviewed on Monday the 4th of September 2006

Before 1975 Mr. Saroeun worked as a soldier in division 703. From 1975 – 1977 Mr. Saroeun was a messenger at the Tuol Sleng prison under supervision of deputy chief Mr. Hor. According to Mr. Saroeun Hor worked directly under Duch, the chief of Tuol Sleng prison. Mr. Saroeun himself was not informed on the agenda of their meetings and he was not allowed to have contact with the prisoners in Tuol Sleng prison. According to the translation of the interview the prisoners in Tuol Sleng were mostly soldiers, people and cadres. In 1977 he was fired for he had a car accident with one of the cars of Tuol Sleng. Moreover, the KR suspected him of being a KGB agent. Hereafter, he was sent to Prey Sa where he worked in a working unit on the rice fields. Some of his group members went missing during their work on the fields and they never returned. Mr. Phal was the chief of Prey Sar. The ration of rice for the working unit was only two meals a day and working hours were very long. Out of fear to be killed he joined the KR army on their move to the jungle after the Vietnamese invaded DK territory. In the jungle Mr. Saroeun fought both White Khmer and Vietnamese and he witnessed many people die of starvation and during the fights. In 1980 the Vietnamese seized his weapons and sent him back to his village. Since his work at Tuol Sleng he had not been back to his village and he was not informed about the situation there. He never supported the Khmer Rouge regime but had to work for them because he would have been killed if he rejected. During his work at the Tuol Sleng prison, Mr. Saroeun met Duch a few times during the officials meetings at the prison. On these occasions the food rations were much better. Mr. Saroeun also joined self-criticism meetings with his superiors. The purpose of these meetings was to criticise Mr. Saroeun on his performance and the work of the other messengers (12) of Tuol Sleng prison.

Mr. Kim Saroeun supports the tribunal as he suffered as well during the Khmer Rouge regime. The KRT should only prosecute the senior leaders of the Khmer Rouge and he supports that life imprisonment is the heaviest sentence possible within the tribunal. If the KRT had the jurisdiction to prosecute lower cadres as well, all people of Cambodia would have been prosecuted, as everybody was involved. The people of Cambodia will benefit from the KRT in many ways and it will affect the political climate in and financial position of the country. Mr. Saroeun believes that the KRT will find justice for the people in Cambodia especially because international judges are involved in the trials.

Mr. Kim Saroeun cannot think about one advantage of the Khmer Rouge regime. In order to reconcile with the horrible things that happened during this regime he would be willing to appear for the tribunal as a witness. He would however never make this public, as he is afraid that is life may be in danger. The KR cadres who killed people during the regime may want to take revenge at him. Mr. Saroeun has not specified the specific in which they may want to take revenge. In his opinion it is the responsibility of the government to protect the witnesses if their lives may indeed be in danger.

Mr. Kim Saroeun thinks that probably none of the people in his village will be willing to support the Khmer Rouge leaders in court. The translation does not mention any other details in this regard.

If Mr. Kim Saroeun would be asked as a witness before the KRT it would have some affect on his personal situation. It will mostly affect his work and therefore have financial consequences. Details have been summarised in the following paragraph.

As mentioned in the previous paragraph, a trip to Phnom Penh as a witness would affect the work of Mr. Kim Saroeun. He works as a guard in a mental institution and if he has to leave his work his salary may be reduced. Therefore, he would need some financial compensation.

Mr. Kim Saroeun would like to be accompanied by the staff of the KRT and does not prefer to travel by moto to Phnom Penh. Mr. Kim Saroeun did not mention any specific arrangements that can be taken by the tribunal, government or NGO's. It is the primary responsibility of the government of Cambodia to protect the witnesses if their lives may be in danger. NGO's can play another supportive role by providing financial compensation for travel expenses and work compensation.

Base people

M Koem Phala
F, 46 year old
Worker at mobile unit and medical staff
Interviewed on the 4th of September 2006

Ms. Phala is divorced and lives with her two children. Before Ms. Phala worked as medical staff she worked from 1975 for two years in a working unit. The main task of this unit was to build dams. After two or three years later she was sent to Kampong Sam to work at a rubber plantation. In this unit she worked with fifty other members. Most of the times there was a serious shortage of food and many people died from starvation, snake bites or drowned. Like most of the women in her unit, Ms. Phalla was sent to Phnom Penh to work at Calamet Hospital (P1) as medical staff. At first she worked in the kitchen but in the end she also took medical care of the patients. She never got medical education before she started working as medical staff at the hospital. At the hospital, she worked under supervision of the daughter of Ieng Sary, Menh. After the invasion by the Vietnamese, Menh ordered all members of the medical staff to evacuate the patients to the Northwest Zone in one night. The patients were brought to the Bavel hospital in Battambang. After the evacuation of the patients, most of the staff fled to the jungle and most of them died of starvation. In May 1979 Ms. Phalla returned with only three members of the medical staff to her home village.
Nowadays, she never uses the medical skills she practised as a medical staff during the Khmer Rouge regime. She knew that the regime killed a lot of people but never knew the acts that occurred in the prisons such as Tuol Sleng. The Khmer Rouge was a very cruel regime.

Ms. Koem Phala is not well informed on the tribunal and does not listen to the radio to learn more about the developments in Phnom Penh. She supports the tribunal and she wants the KRT to find justice for the people in Cambodia. There is no need to bring all the lower cadres to court and she supports the fact that only the most responsible leaders will be prosecuted. She does not have an opinion on the sentences that should be given and thinks this depends on the Cambodian government. Ms. Phala does not know whether justice will be done in Cambodia if the international judges will not be involved in the prosecutions. The trials will inform the people of Cambodia on the truth of everything that happened during the Khmer Rouge regime. She is however not sure if the tribunal will succeed in reconciling the victims and perpetrators.

Ms. Koem Phala is no afraid to tell her story as a witness before the tribunal. She cannot imagine why she would have to be afraid because she will just tell the truth to the judges of the tribunal. There is no reason in hurting her for that. If there would be any safety threats, the government will guarantee the safety of the witnesses.

Ms. Koem Phala has declared that none of the people in her village will be willing to support the Khmer Rouge leaders on trial with their testimony. The translation does not mention any other details in this regard.

Ms. Koem Phala lives alone with her two children. A trip to Phnom Penh as a witness before the KRT would have an important affect on her living situation. As she earns her own income by working in the fields, the trip to Phnom Penh would affect her income. The affect of the trip to the Phnom Penh also depends on the help that her children can offer her. They will take care of their home and perhaps could need some help.

As described in the previous paragraph, a trip to Phnom Penh as witness would have impact on the income of Ms. Koem Phala. Therefore, it would not be able for her to be a witness without financial compensation.

If she is called, Ms. Phala will travel to Phnom Penh for her testimony as a witness. During her stay in Phnom Penh she would like be accompanied by some of her villagers.

Ms. Koem Phala stated that it would not be a problem for her to share her name and address in public. With regard to the ways of support she stated suggested that witness will need the help of the KRT. She would like to ask for financial and logistic support, such as accommodation and travel arrangements.

Base people

N Chhim Nha

M, 55 years old

Medical staff, cousin of Ta Mok

Interviewed on Tuesday the 5th of September 2006

Mr. Chim Nha is the cousin of former Khmer Rouge leader Ta Mok. During the years of the Khmer Rouge regime Mr. Nha has worked as medical staff in the second hospital in Takéo. This hospital treated both injured soldiers as normal people. Especially after attacks of the Vietnamese there would be many patients in the hospital. The chief of the hospital were Moeun and Touch, who are still alive. Mr. Nha was never trained as medical staff and at first produced the medicine for the patients. During his work at the hospital he noticed that some of his colleagues disappeared and never returned to Phnom Penh. According to Mr. Nha, some of the disappearances were related to moral offences by the medical staff. These people were sent to Sanlong prison, which was meant for cadres.
During his appointment at the hospital he saw Pol Pot and Ta Mok several times during their visits to the hospital. Mr. Nha lived next to Ta Mok and kept close contact to his uncle (every day). From the central logistical unit the medicines were sent to the hospital where he worked. After the invasion by the Vietnamese, the hospital unit was evacuated to the jungle. He also witnessed Ta Mok fleeing to the jungle by means of cars and elephants. The provisions for the patients were not as good in the jungle as in Phnom Penh. Therefore, it was decided to leave the patients behind in Oral mountain and travel further without the patients. In 1979 he returned home. Mr. Nha described Ta Mok as a simple, talkative and gentle man.

Mr. Nha has lost all his siblings during the Khmer Rouge regime and witnessed the killings of many people at Prey Kduoch. The regime was not correct, but Mr. Nha had no choice but to serve it. If he had not followed the regime he would be killed as well. The regime brought nothing but destruction and tragedy to Cambodia. Justice will be done for the people in Cambodia by the tribunal but he does not support it himself. He wishes not to be involved. Issues such as sentences, depend on the law and Mr. Nha does not have a strong opinion in this regard. He supports the fact the tribunal will prosecute the most responsible leaders only. The people who have been involved with the regime as a lower cadre are trying to change and live their lives as good people nowadays.

Mr. Chim Nha wishes not to be involved in the trials of the KRT and is not willing to be a witness. He explicitly stated that does not have an idea on safety issues and appeared not willing to explain his opinion on these issues. Subsequent remarks of Mr. Nha, however, were related to issues of personal safety. He stated for instance that he would insist to keep his name and address hidden for reasons of safety.

Mr. Chim Nha did not share his opinion in this regard. In general he would refuse to be a witness, he referred us to his neighbours for their opinions and he did not have any idea on safety issues.

If Mr. Chim Nha would go to Phnom Penh as a witness, it would affect his family situation. The house would be unattended and there would be a greater risk of robberies.

Beside the safety concerns, a trip to Phnom Penh as a witness would not cause any financial problems for Mr. Chim Nha.

Mr. Chim Nha did not explain his opinion on this matter as he is not interested in being a witness and does not want to have anything to do with the tribunal.

Mr. Chim Nha stated that he would prefer to be an anonymous witness as it would be necessary for his safety. With respect to ways of support, Mr. Nha stated that he did not have any faith in the KRT, the government or the NGO's. He would prefer to take care of his own safety, as he doesn't trust anyone but himself.

Base people

O Bou Saoy
M, 77 years old
Member of cooperative
Interviewed on Wednesday the 6th of September 2006

Mr. Bou Saoy worked from 1975 for the Prakieb cooperative under supervision of the cooperative chief Mr. Yang Yan succeeded by Mr. Pok Pao. On the 17th of April people of the cities arrived at his cooperative and were order to build dams or work in the rice fields. The new people were given the same ration of rice as base people. Mr. Soay was ill and could not continue his work at the cooperative. During 1976 and 1977 he was assigned to work as a cow keeper. He noticed that the people who did not fulfil their tasks sufficiently were heavily criticised by the Khmer Rouge and some were accused of being spies and traitors and got killed. Ta Mok seemed to protect the people in his cooperative as the sub-district was his homeland. Mr. Saoy lost his two sisters, one brother, his mother, his father in law and his brother in law, who was a Lon Nol, is still missing.
After the invasion of Vietnam all members of cooperative were ordered to flee into the jungle. In the jungle he met the younger brother of Ta Mok, Ta Cham. Although rice was given to the members, many of them died from starvation. He was given rice by Vietnamese soldiers and allowed to back to his home village in Takéo in June or July 1979.

The Khmer Rouge was a brutal regime and killed many people. Mr. Soay saw all the skulls at Kraing Tachan prison, which made him very emotional. He supports and has a lot of confidence in the Khmer Rouge Tribunal as the present Cambodian government established it. Justice can be done and people will be satisfied only if the processes will be conducted properly. Mr. Soay does not think it is necessary to prosecute lower cadres beside the most responsible KR leaders. The lower cadres just obeyed the orders of the most Khmer Rouge leaders. In addition to the tribunal, the lower cadres should confess and explain their acts at sub-district level. This would be a valuable addition with regard to the reconciliation process in Cambodia. It would not be part of judicial proceedings and the lower cadres should not be prosecuted after their confessions.

Mr. Soay is not willing to be a witness before the tribunal for he is afraid to speak in public, is unable to speak for longer time and does not remember all the details of what happened during the KR. According to Mr. Saoy it is not according the Buddhist believe to take revenge. People in his village would not be afraid to be a witness but he does not know about other people in his sub-district. The witnesses before the tribunal will be safe if the government and NGO's protect and support them. The protection would have to be provided at village and sub district level.

Mr. Soay stated that people in his village do not support the Khmer Rouge any more and will not be willing to testify for the Khmer Rouge leaders before the tribunal.

Mr. Saoy himself is not willing to testify but he can imagine that people in his village would need some money and rice in compensation for the trip to Phnom Penh. The trip would affect their lives and the compensation is the proper solution.

Mr. Bou Saoy thinks witnesses before the tribunal should be given some financial compensation for their trip to Phnom Penh. If Mr. Saoy is called as a witness, it would be better for him to be accompanied by other villagers. With regard to the safety of the witnesses, Mr. Saoy thinks if their names and address would not be revealed.

mo/Nr-D12/65

Cadre

P Bun Thean
M, 61 years old
Deputy chief of Sanlung sub district
Interviewed on the 10th of September 2006

In 1975 Mr. Bun Thean lived in Kraom village and was deputy chief of Sanlung sub district. He worked from 1974 –1977 as part of a cell on the rice fields and mainly worked as a farmer. His working cell consisted of both base and new people. Mr. Thean saw Ta Mok several times during his visits to the rice fields. During a visit of Ta Mok the people had to stop their work and were beaten by their chiefs if they continued their work. Ta Mok used to beat the chiefs of the cells if they appeared to have something wrong. The leader did not visit the working fields often. Mr. Thean remembers that the rice ration was enough for the people in December, January, February and March and that there was a serious shortage of food during the rest of the year, due to which many new people died. During these years many people who were accused of being a CIA agent or did something wrong disappeared and never returned. Mr. Thean knew that some of the people in his cell stole rice, but he understood as they were very hungry and did not punish them. As he was very tired himself he did not force his people to do work too hard. From October 1977 / December 1978 Mr. Thean was reassigned as a deputy chief of the sub district to Prambei Mom Village. After his arrival the chief accused him of being a traitor and the fact that the workers in his cell did not produce enough rice. Mr. Thean stated that there was too much work and the working load was extremely heavy. Because of the accusations, Mr. Thean was almost killed. He did not explain the reason why he was not killed. Many of the other chiefs of sub district were accused of being a Vietnam ally and killed for that reason. After the invasion of Vietnam Mr. Thean fled to Battambang and later returned to his hometown. On his way home he stayed near Kravanh Mountain for twenty-eight days and saw many death people lying beside the road. He feared the Vietnamese but they, did not come after him.

Mr. Bun Thean lost one of his siblings and 3 of his cousins during the Khmer Rouge period. His relatives were killed for their involvement with the Lon Nol regime. He did not support the Khmer Rouge and mentioned that the regime separated most families in Cambodia. Advantages of the regime were the prohibition of gambling and prostitution. During the Khmer Rouge years, he heard the names of the Khmer Rouge leaders and thought that Pol Pot was the secretary of the party. Mr. Thean is not well informed on the Khmer Rouge tribunal yet but thinks it may bring justice for the people in Cambodia. He has almost hundred percent confidence in the tribunal because international judges are involved in the process. If the tribunal would be Khmer, he would not have faith in that tribunal as he does not have faith in the present government. He stated that the present punishments are not enough and is in favour of capital punishments and the death penalty.

Mr. Bun Thean is willing to be a witness before the tribunal with or without financial or other support. He will tell the truth on the stand and does not know whether family of the ones he will speak about in court would want to take revenge. He declared not to worry about his safety. With regard to

protection by the government he stated that he does not believe in the present government. He only has faith in the Khmer Rouge tribunal because the international community is involved.

If Mr. Bun Thean would be asked as a witness before the tribunal it would affect its family situation. He did not explain in what ways his testimony would affect his situation.

Mr. Bun Thean stated that he prefers to be supported financially but would not refuse to go if there is no compensation.

Mr. Bun Thean would not mind to travel alone to Phnom Penh to be a witness. He stated not to care so much anymore, as he is an old man.

Mr. Bun Thean could not make any suggestions for financial compensation or other ways to support the witnesses of the Khmer Rouge tribunal. For him it would be enough if there is food in Phnom Penh.

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Base people

Q Kim Sy
F, 48 years old
Medical staff
Interviewed on the 11th of September 2006

In 1975 Ms. Kim Sy worked as medical staff at the Angkanh hospital and worked there for almost two years. Before she started to work as medical staff she was trained for a short period of time. Together with many other people Mr. Sy was changed to Sra Nger in 1977. Here she worked for two months and performed some farming activities as well. During her time in Sra Nger she got two bowls of porridge every day. After two months she was reassigned to 6 Makara Hospital in Phnom Penh, situated near Wat Phnom. Before she started her work at this hospital, she did not have to work for one week and was educated by Mr. Sok. Ms. Sy and her staff members mostly treated injured soldiers from the army forces during day and nighttime. Her group of staff was headed by Ms. Phat and a Chinese doctor was working at the hospital as well. One of her colleagues made an ethnical mistake with one of the patients and was send away to look after the pigs. At the hospital Mr. Sy often witnessed the Khmer Rouge leaders during their visits to the hospital but she does not remember their names. After the Vietnamese invaded Cambodia, she left to Battambang with the patients by train. As there was no railway connection all the way to Battambang, the staff and patients had to continue their travel by foot. After three months in Battambang Ms. Sy returned to her hometown in order to look after her parents while her two brothers had joined the Khmer Rouge army before 1975. As she has never seen them again she thinks they may have died on the battlefield. After the Vietnamese invasion she met her cousins and in the end her parents as well.

Ms. Kim Sy did not support the Khmer Rouge and thinks it was an awful regime. The present regime is much better and she hopes the Khmer Rouge will never come back. Although she has a radio at home, Ms. Sy did not here about the tribunal in Phnom Penh before. After our short explanation of the tribunal she stated to support the tribunal and agrees with the fact that only the Khmer Rouge leaders will be tried.

Ms. Kim Sy does not know whether other people will be willing to be a witness before the tribunal. She is not sure whether she would be willing to be a witness, but is not afraid. Firstly she will only be telling the truth and who would want to hurt her for that. Secondly, people of Cambodia enjoy freedom of speech nowadays, which will protect them from people taking revenge. If any problem would rise, it is the responsibility of the government to solve it.

Ms. Kim Sy stated that these days people are offered financial support and she would accept it. Ms. Kim Sy would like to be accompanied by someone, but she did not specify with whom. Ms. Kim Sy stated that witnesses could be supported either financially or by materials. She suggested staying at the house of her relatives.

Cadre

R Khim Ngorn
M, 51 years old
Staff at the Ministry of Foreign Affairs
Interviewed on the 11th of September 2006

In 1975 Mr. Khim Ngorn was selected by his sub district chief to work for the Ministry of Foreign Affairs. At that time Mr. Hong was the chief of the ministry. He worked at the Chinese and Korean Embassies as a guard and driver until the Vietnamese invaded Cambodia. If anybody who was working at the Ministry would make a mistake regarding a political issue, they were sent to Prey Sar prison and most of them did not survive their imprisonment. Mr. Ngorn often joined meetings between Khieu Sampan and his foreign guests on foreign political issues.
Around 1977 Mr. Ngorn worked at the Vietnamese Embassy for three months under the supervision of Mr. Hong. After the Vietnamese invasion he fled to Baseth Mountain where he fought against Vietnamese troops for one month. Finally the Vietnamese arrested him and sent him to Kampong Tram prison where he was imprisoned for three months. During his imprisonment both Vietnamese and Khmer Rouge soldiers interrogated him.

Mr. Khim Ngorn is familiar with some of the Khmer Rouge leaders, such as Pol Pot, Ieng Sary and Khieu Sampan. During the Khmer Rouge period he lost some of his cousins. Mr. Ngorn thinks the present regime is much better than the Khmer Rouge regime. With regard to the tribunal he stated that it is up to the National Assembly and the government to decide whom they will prosecute. He has more confidence in the process now foreign judges and the United Nations are involved. If the only Khmer Government leaded the tribunal, the process would probably not work. The tribunal would help the victims to relief their pain and losses.

Unfortunately the translation of Mr. Khim Ngorn's opinion in this regard is quite short. Mr. Ngorn stated that there is a chance that relatives of the Khmer Rouge leaders may take revenge. It is the responsibility of the present government to protect the people who will testify before the tribunal.

Mr. Khim Ngorn thinks it is impossible for people to be a witness on the side of the Khmer Rouge but thinks there are still many supporters of the Khmer Rouge living in Cambodian society.

Being a witness before the tribunal would affect his personal situation as Mr. Ngorn is a farmer and his help with farming is needed. As his travel to Phnom Penh would affect his family and working situation Mr. Khim Ngorn would accept financial support. Mr. Khim Ngorn would like to be accompanied by his son when travelling to Phnom Penh.

S **Chiem Nha** **Base people**

F, 52 years old

Member of women's unit

Interviewed on the 11th of September 2006.

In 1975 Ms. Chiem Nha worked as a farmer in Ang Knol sub district and Prey Malob village. The people who she worked with would be punished or taken away when they made mistakes or did not work hard enough. If people committed an ethical offence they would be killed. As there was a lack of workers in Srer Ambil, Ms. Nha was reassigned to work there under supervision of chief Ta Pon. She had to work whole day, sometimes during night as well but she had enough food to eat. Around three hundred people worked in her workers unit, but many of them disappeared for unknown reasons. In 1977 Ms. Nha was sent to Po Satt to work in a women's unit with around hundred other women. Again she witnessed people being arrested and killed. In Po Satt people did not have enough food (only porridge) and many of them died of starvation. People were punished if they had done something wrong in a separate office at the working site. They were never allowed to eat individually and everything was collective property. Ms. Nha worked at Po Satt for one year until the Vietnamese invaded Cambodia and returned to her home in 1980. She was forced to marry a man by the Khmer Rouge but does not live with him anymore.

Ms. Chiem Nha regards the Khmer Rouge as a terrible regime for they killed many people. She supports the government and thinks it will relief the victims from their pain in a way if the Khmer Rouge leaders will be prosecuted. Ms. Nha wants justice done and is still afraid the Khmer Rouge regime will come back again. Matters as punishment are for the government to decide.

Ms. Chiem Nha is willing to testify as a witness and tell her story before the tribunal. She will only tell the truth and does not know how this could affect her personal safety. It is up to the government to take care of these matters.

Ms. Chiem Nha thinks that people will be willing to tell their story because they are angry with the Khmer Rouge leaders for what happened under their regime. According to Ms. Nha they are probably so angry that they do not care anymore about their safety.

Ms. Chiem Nha does not think people in her village still support the Khmer Rouge. She did not share her thoughts regarding the witnesses of the defence.

Being a witness before the tribunal would affect the family situation of Ms. Chiem Nha. As the residence in Phnom Penh would affect her family and working situation Mr. Chiem Nha would accept financial support.

Ms. Chiem Nha would like to be accompanied by someone who understands the problem and is educated on issues related to the Khmer Rouge and the tribunal. As she does not trust outsiders, she

hopes someone she knows would accompany her. Perhaps someone from DC-Cam or another NGO she can trust. Ms. Chiem Nha suggests that witnesses would not only be financially supported but also would be provided food during their stay in Phnom Penh.

ANNEX 4 Summary of the interviews with official representatives

I. Mr. Mao Dara
Chief of the Office of Serious Crimes
Department of National Police, Ministry of Interior.
Interviewed on the 26th of September 2006 at DC-Cam.

II. Mr. Nun Sammang
Chief of Section
Department of National Police, Ministry of Interior.
Interviewed on the 26th of September 2006 at DC-Cam.

III. Ms. Ay Sokhema
Deputy Office Chief
Department of National Police, Ministry of Interior.
Interviewed on the 26th of September 2006 at DC-Cam.

IV. Ms. Put Sao Sirana
Department of National Police, Ministry of Interior.
Interviewed on the 26th of September 2006 at DC-Cam.

What is your opinion on the Khmer Rouge Tribunal that will prosecute the most responsible leaders of the Khmer Rouge? What do you think are the advantages of the tribunal? What do you think are the disadvantages of the tribunal?

Mr. Dara stated that the tribunal corresponds with the international standards and many people in Cambodia support and are interested in the process. The purpose of the tribunal is to prosecute the most responsible leaders of the Khmer Rouge. The biggest problem regarding these proceedings is that people are not well informed on the details of the law. Their inadequate knowledge causes uncertainty about the consequences and impact of the tribunal and affects the atmosphere in the society. People may flee to the jungle out of uncertainty and fear.

Mr. Sammang explained that the conflict within Cambodia differs from most conflicts in or between other countries. In most conflicts one nation fights another, but in Cambodia the killings and fighting were performed between Cambodians themselves. The most important advantage of the tribunal is that the perpetrators of the crimes finally will get punished for their crimes. The tribunal will be a good lesson for the responsible leaders and in addition a valuable asset to the rule of law in Cambodia. Mr. Sammang cannot think of any disadvantages and repeated that the Khmer Rouge Tribunal is what most people in Cambodia have been waiting for.

Ms. Sokhema expressed her opinion that the tribunal is valuable, as it will bring justice for the people in Cambodia. Cambodia will show the world that the trials are happening and the responsible leaders will be prosecuted. The biggest disadvantage of the Khmer rouge tribunal will be that the witnesses will have to share their personal experiences before the tribunal.

Ms. Sirana agrees with the statements of her colleagues and adds that the tribunal will present a valuable lesson for the generations to come. The biggest disadvantage is related to the situation of the witnesses, as they will be frightened to tell their story as a witness. The most important problem is the lack of outreach and the fact that people are not well informed. There should be more information broadcasting by TC and radio, especially in the rural areas.

Do you think many people living in the provinces or in Phnom Penh are informed about the tribunal?

The general answer to this question was that the people of Cambodia are informed on the existence of the tribunal. Most of them are however not familiar with the details of the law and the issue who will be prosecuted. Ms. Sirana brought forward that most of the low ranking Khmer Rouge cadres are not well informed and may be afraid for the consequences of the trials towards them.
The representatives suggested various measures that can be taken in order to resolve this problem. Ms. Sokhema stated that more attention should be given to outreach programs and inform the people about the details of the law. Radio and TV should dedicate their programs to the developments in this field and present the information on the UN agreement and the ECCC law. Mr. Dara suggested to create a billboard that shows all the details of the tribunal and exactly explains the people what will happen. The billboard is a convenient source of information that can be spread out in the countryside. The representatives are familiar with the booklet published by the ECCC, but think the number is too limited to reach enough people throughout Cambodia. The billboard, TV and radio broadcasting are three suggested measures that can be taken.

As I have explained in my introduction both the prosecution as the defence will use the testimonies of witnesses to support their positions. Would people living within your village/district/province/Cambodia be willing to tell their story before the Khmer Rouge tribunal? Can you indicate why people would be or would not be willing to be a witness before the tribunal?

Mr. Sammang stated that most of the people in Cambodia will be willing because everybody has suffered during the regime either through the hard work or through starvation.

Mr. Dara has explained that two kinds of witnesses will appear for the ECCC: witnesses of the prosecution on the one hand and the witnesses of the defence on the other hand. Some of the victims may be hesitant to testify and reveal their history in public. Especially the rape survivors may find it

difficult to share their stories in public. The witnesses of the defence will probably be hard to find, as nobody is willing to testify in support for the Khmer Rouge leaders.

Ms. Sokhema has explained that people may have reasons to be or not to be an ECCC witness. Some people will think it is useless because the regime ruled thirty years ago and people do not want to be reminded about the past anymore. Others will be reluctant to testify, as it does not fit in Buddhist believes to a witness and some may be find it unfair that only the senior leaders will be prosecuted.

Ms. Sirana has added that those who have been victims of torture in prisons such as S-21 will probably more eager to testify than others. Other people may be more hesitant which emphasises the importance of outreach once again. If people are informed, they may be convinced to be a witness.

Do you think it is safe or unsafe for people to be a witness before the Khmer Rouge tribunal? Can you explain why it would be safe or unsafe for people to tell their story before the tribunal?

Ms. Sirana has stated that the people who will harm the witnesses must be punished. She referred once again to the importance of outreach in order to convince people they should not take revenge on witnesses. Ms. Sirana did not give a specific answer to the question whether witnesses will be safe or not. She indicated that the Khmer Rouge tribunal will not harm the people of Cambodia and that they must be informed in this regard.

Ms. Sokhema has indicated that witnesses may be in danger when they are not well protected. Danger may specially arise after the witnesses have returned to their homes. People may want to take revenge on the cadres who have killed during the Khmer Rouge regime. Ms. Sokhema did not specify her expectations in great detail.

Mr. Dara explained that most Cambodians are victims of the Khmer Rouge. It would not be a problem for the victims to appear as a witness and share their experiences for the ECCC. With respect to the witnesses of the defence there may be more difficulties. The hearings of the Khmer Rouge Tribunal will be public and everybody can attend the process in Phnom Penh. The victims who attend the hearings will learn who has been a killer during Democratic Kampuchea. The identity of the killers will be known and victims may easily take revenge.

Mr. Dara added that the identity of the witnesses of the defence should be confidential. In order to protect their safety they should testify without revealing their identity, either in another room or by using microphones. Confidentiality is most important, as the hearings will be broadcasted all over the country. This is the most important aspect of protection of the defence witnesses. The victims who testify do not face these problems.

Mr. Sammang referred to the importance to educate people on the value of their testimonies. People will think it is useless to testify and may therefore reluctant to interrupt their work. As it will have an

impact on the personal situation for most of the people it is important to enlighten them on the value of their contribution.

People with various backgrounds will be witnesses before the Khmer Rouge Tribunal. Who are the most vulnerable witnesses and need the most protection or support? Can you explain why these people will be vulnerable as a witness?

According to Mr. Dara the people who will appear as a witness of the defence are most vulnerable and most in need of protective measures.

Mr. Sammang has stated in this regard that people who live far away are the least educated on the issues of the tribunal. They will not have a good understanding of what will happen and may therefore be more sensitive and vulnerable.

Have you heard about any cases of intimidation towards people in the past for reasons of their position during the Khmer Rouge years, either as a victim or as a former cadre? If so, can you explain what happened in those cases?

Mr. Dara indicated that people seem to have released their anger and do not feel pressure in society anymore. A good number of victims have taken revenge right after Democratic Kampuchea was occupied by the Vietnamese. Mr. Sammang supported the remarks made by Mr. Dara and added that the regime has occurred too long ago and there are no recent examples of intimidation or threats.

Can you name certain safety measures that must be taken in order to protect the witnesses during their testimony in Phnom Penh?

Ms. Sokhema suggested that every witness must receive physical, mental and economic support. It is important that the protection of witnesses is realised without great public attention in the home villages of the witnesses. Protection must be provide by the provincial police in secrecy. Too much public attention and revealing the involvement of people with the ECCC will increase their vulnerability.

Ms. Sirana affirmed that the laws of Cambodia are important in protecting the witnesses. People sometimes forget that these laws already provide the bases to stop revenge and violence and punish those who do assert these kinds of actions. The measures to support and protect the witnesses should involve counselling and outreach programs as explained earlier in the interview.

Mr. Dara explained that witness protection must be divided in two phases. The protective process should involve preventive measures before people have appeared as a witness of the tribunal. In addition the measures should provide for protection and support during the testimonies and residence of witnesses in Phnom Penh. In the first phases it is important to maintain confidentiality on the witnesses and cooperate with the local authorities to support them. After the prosecutor has decided who will appear as a witness, the prosecutor should request assistance of the police. Only the police and local authorities may be informed on the identity of the people and the information cannot be made public.

During their residence in Phnom Penh witnesses should be provided with safe housing facilities. Witnesses cannot move in freedom but must be accompanied by the police to assure their safety. The preventative measures after the trials cannot last very long. The national police will not have enough resources to provide long-term protection. Again it was pointed out that the present laws already fulfil an important role in safeguarding the witnesses. People who intimidate them will be held accountable and punished.

Mr. Sammang agreed with Mr. Dara and stated that it will not be possible to protect the witnesses during the rest of their lives. It is also important to broadcast information of the trials to educate the people through Radio and Television.

What role do you think NGO's should have in protecting the witnesses during their testimonies before the Khmer Rouge Tribunal and their stay in Phnom Penh?

As pointed out before, Mr. Dara emphasised the importance of outreach and stressed the importance for NGO's to assist in outreach programs. NGO's, the government, the ECCC should all work together in educating the people in Cambodia on the details of the law. In this respect Mr. Dara referred to the informative television spots on HIV and bird flue.

Ms. Sokhema and Sirana stressed the important role of NGO's in support the witnesses in the area of their mental health. Victims should be provided with counselling. Moreover, they should be guided with respect to their testimonies, as they are old and perhaps forgot some of the details. The witnesses come mostly from the provinces and will be impressed by the appearance of the tribunal. Therefore, they must visit the tribunal before their testimonies in order to feel more confident and less impressed.

Mr. Sammang agreed with the suggested measures and repeated the importance of outreach, publication and education. TV and radio are accessible for everybody in Cambodia including the illiterate people.

Concluding remarks

At the end of the interview it was stressed once more that education on the law is most important in Cambodia. People do not know who will be prosecuted and are therefore insecure. This may lead to tensions in the country again, especially around Pailin. In this region many people still support Khmer Rouge and most of them do not have access to information sources as radio and television. Fear may be the greatest source for the revival of tensions and rebel actions.

After the recorder was turned off, Mr. Sammang has predicted that violence will most probably occur with respect to the ECCC witnesses.

V. Interview Mr. Hing Thirith

Judge of Phnom Penh Municipal Court

15th of September 2006

What is your opinion on the Khmer Rouge Tribunal that will prosecute the most responsible leaders of the Khmer Rouge?

The Khmer Rouge tribunal will prosecute the senior leaders of the Khmer Rouge and those who are most responsible for the crimes committed during the DK years. The prosecution and the judges will eventually establish the scope of this qualification. Until that time it is difficult to predict the outcomes of the trials.

What do you think are the advantages of the tribunal? What do you think are the disadvantages of the tribunal?

The greatest advantage of the tribunal is that the former leaders will finally be held accountable and found guilty. On of the disadvantages is however that the international judges are smaller in number than the national judges. Although the judicial system is strengthened, the Cambodian judges still receive a lot of criticism. The people of Cambodia do not have a lot of faith in the national judges and they may lose confidence in the tribunal, as the national judges are the majority. Judge Thirith has added that the processes may lack transparency.

Do you think many people living within your village/district/province/Cambodia are informed about the tribunal?

Judge Thirith answered by stating that people of Cambodia will not learn about the processes if they are not properly informed. It is up to the villagers to support the tribunal and if they are not content with the proceedings or their outcomes they will have the right to protest.

As I have explained in my introduction both the prosecution as the defence will use the testimonies of witnesses to support their positions. Would people living within your village/district/province/Cambodia be willing to tell their story before the Khmer Rouge tribunal? Can you indicate why people would be or would not be willing to be a witness before the tribunal?

Judge Thirith stated in this regard that is hard for people in Cambodia to be a witness in criminal proceedings. Being a witness will have an important financial impact and additionally affect their personal living conditions. Judge Thirith explained his comments by referring to the position of witnesses in The Netherlands. Witnesses in the Netherlands are well protected and their position does

not influence the relationship with the local authorities. In this respect he added that the people in the Netherlands are not as dependent on this relationship as are people in Cambodia. If people in Cambodia are a witness it influence the relationship between them and their authorities as for instance their village or commune chiefs. Chiefs may interrupt their ways of support such as rice and water supply or other forms of assistance. In addition the judge added that many village and commune chiefs are still supporters of the Khmer Rouge. How would it be possible for people to testify against the leaders of the Khmer Rouge when those who they depend on are firm believers of the Khmer Rouge policies? He expects that it will be hard to find witnesses for the Extraordinary Chambers.

As clarification of the abovementioned point of view, Judge Thirith referred to the situation of Battambang during the Khmer Rouge. During those years Battambang was divided in various regions, amongst which region three and region four. The situation in both regions was very different. The Khmer Rouge cadres in region four were known to be stricter and more violent than the cadres is region three. People who fled from region four to three were often protected by the authorities, which never occurred the other way around. Another comparison referred to the fact that ninety percent of the teachers survived in region three, whereas all teachers were executed in region four. The example shows that the way lower cadres followed the orders of their superiors in various ways. People in Battambang are familiar with the example of region three and four and may talk about this situation. Various government officials in Battambang, amongst whom one minister in the ruling government, have been Khmer Rouge cadre in region four. Judges Thirith stated that it is not hard to imagine how people will be effected if they share this information on trial.

Do you think it is safe or unsafe for people to be a witness before the Khmer Rouge tribunal? Can you explain why it would be safe or unsafe for people to tell their story before the tribunal?

Judge Thirith stated that the local authorities mostly are members of the Cambodian Peoples Party. There is too much support and involvement amongst the local representatives for the Khmer Rouge. People cannot rely on the representatives and there may be even a risk of revenge. Judge Thirith in this regard has not brought any details forward.

People with various backgrounds will be witnesses before the Khmer Rouge Tribunal. Who are the most vulnerable witnesses and need the most protection or support?

With respect to this question, judge Thirith answered that especially the members of the Sam Rainsi party are in the most vulnerable position. The witnesses of the prosecution and the defence are equally vulnerable, although the last group of witnesses may be more afraid to testify. As an example to indicate the vulnerability of certain witnesses, judge Thirith told about a play in Battambang during which the actors who played the role of Khmer Rouge cadre were offended in public.

Have you heard about any cases of revenge or threats related to the Khmer Rouge history of Cambodia? If so, could you tell me what happened in those cases?

Judge Thirith confirmed this question but did not give a clear explanation in this regard. He referred to the difference positions between those who live in a cottage and those who live in stone houses. People will be afraid that their situation is affected and that they are not safe after they return to their homes. Without proper protection it will be hard to testify as a witness.

During our last interview you have mentioned that the protection of witnesses is the main responsibility of NGO's. What role do you think the government should have in protecting or supporting the people who will be a witness before the Khmer Rouge Tribunal? What role do you think the local authorities should have in protecting the people who will be a witness before the Khmer Rouge Tribunal?

Even though the Cambodian government will be willing to provide measures of safety, the government will not have enough financial means. Three steps must be taken in requesting people to be a witness before the tribunal. First of all the tribunal should establish who will be a witness. The people who are requested to be a witness should receive a written document that states that they will get protection of the Extraordinary Chambers. In addition, the United Nations should provide visas to those witnesses who may be in serious danger. The visas will provide access to one of the Member States of the United Nations. Without such guarantees people will not feel protected.

Judge Thirith explained the underlying reasons of his suggestion by stating the following. It will be impossible to put locks on all the buildings and around all the people who will testify as a witness before the tribunal. If people are not safe within their communities, the chances are that the will flee from Cambodia. The UNCHR will however not support them if they do not have any authorisation of the United Nations. People are therefore afraid that there will be no way out if they indeed appear to be in serious danger. This will withhold them from testifying as a witness. If the United Nations provide documents that guarantee their safety in the abovementioned way, it will encourage them to testify as a witness. In practice the actual measure will only in the most serious and seldom cases.
Judge Thirith has stated that the names and particulars of the witnesses will not be made public. According to the criminal code of 1993 only lawyers involved have access to information about the witnesses. Within the ECCC law no such provision is included. It is therefore hard to predict what the guidelines in this regard will be.

What would be the impact on the family economic situation of people if they have to leave their homes for some days to be a witness in Phnom Penh?

The alleged impact on the personal situation of the witnesses has already been explained under question 4.

What would the financial impact be for people who have to leave their homes or work in order to be a witness in Phnom Penh?

Costs for travel, accommodation and food will be the probable expenses for the witnesses. Most of the people may not be able to afford this.

Do you have any suggestions for DC-Cam and NGO's on how to assist and support the witnesses before the Tribunal?

The government and the ECCC should cooperate in providing the witnesses accommodation and food. The NGO's should assist in those cases where their rights have been violated and create ways to be a watchdog. Cases of violations should be made public by the supporting NGO's.

VI. Mr. Yous Nasy

Chief of Provincial Cabinet

Interviewed on the 3rd of October 2006. Mr. Nasy did not allow us to record the interview.

Mr. Yous Nasy supports the Khmer Rouge Tribunal and thinks the tribunal is very important for the people in Cambodia. The tribunal will be an important lesson in the education of the younger generation in Cambodia. Most of the people who have not experienced the Khmer Rouge regime do not believe that the atrocities have taken place. The tribunal will finally show the young generation that it happened and show the leaders of the future that this way of leading the country will not be tolerated any longer. In addition, Mr. Nasy stated that the laws during the Khmer Rouge regime were not of a human kind. The tribunal will show that Cambodia needs development in which human consent forms an important priority. Without the Khmer Rouge tribunal Cambodia will be in chaos. The disadvantages are far less important than the advantages. In this regard Mr. Nasy refers to people who say that it has taken too long to establish the tribunal.

Mr. Nasy stated that government officials are well informed but that there is a gap in informing the people of Takéo. Most of the people in Takéo province are familiar with the tribunal as they are informed through various media such as the TV and radio. The information on the tribunal is however not very detailed and people do not know the exact content of the law and responsibilities of the tribunal.

Mr. Nasy is informed on the possibility of both the prosecution as the defence to call for witnesses. He agrees with this aspect of the rules of evidence but stated that the defence should not have as much witnesses as the defence. Most of the people in Cambodia and Takéo will be willing to testify as a witness before the ECCC. In this regard Mr. Nasy stated that probably two groups will be afraid to testify as a witness. First of all, he referred to the group of lower cadres who have been part of the regime from the very beginning before the Lon Nol regime was overthrown. These cadres were very active within the regime and are well informed on the policies of the regime. The establishment of the Khmer Rouge Tribunal may invoke some uncertainty on the way the tribunal may affect them individually. Second of all, Mr. Nasy refers to the cadres who had an important position in the regime and where closely connected to the leaders of the Khmer Rouge. As these people will not be considered as most responsible leaders, they will probably not be tried. Nevertheless, their involvement may come to the surface once again which may lead to a discriminatory relationship within their community. In this regard Mr. Nasy emphasised that these are the considerations of the people themselves but will not lead to any tensions in the society in reality. People are just afraid and do not know what to expect. Mr. Nasy is convinced that in reality there is nothing to fear for them and that being a witness will be completely safe. There will be no threats with regard to both witnesses of the prosecution and witnesses of the defence.

Mr. Nasy stated that present-day Cambodia is much more stable than years ago. The tension has decreased and will not arise towards people who will testify before the Khmer Rouge Tribunal. In comparison he refers to the situation of Iraq where two parties are fighting each other, which has

resulted in the unstable society of Iraq. Cambodia is not divided in that way anymore and the tribunal will not challenge the atmosphere of the Cambodian society. Mr. Nasy is convinced that witnesses have nothing to fear and are completely safe. There will be no threats with regard to both witnesses of the prosecution and witnesses of the defence. People of Cambodia have lived in warfare for too long and are tired of those tensions within the Cambodian society. People are more educated on the consequences of warfare and just want to live in peace with one another. Due to this attitude throughout Cambodia there will be no hostile attitude towards the witnesses of the Extraordinary Chambers.

Mr. Nasy repeated his believe that the witnesses of the ECCC will be safe. If he has to compare the situation of the witnesses he thinks the witnesses of the defence are most vulnerable. Survivors and victims may feel some resentment towards them once they are reminded of their experiences during the Khmer Rouge years.

Mr. Nasy stated there are no tensions within Takéo province. He has never heard about or witnessed any cases of intimidation or revenge related to the Khmer Rouge history of persons over the last years. In addition, he stated that nobody in Takéo supports the believes of the Khmer Rouge.

Being a witness before the ECCC would not have any impact on the position of people in their community. Their testimony would not affect their status and they will not lose their property. This is a result of the win-win policy of Hun Sen. With respect to the personal living conditions Mr. Nasy stated that the impact will differ according to the position of the witnesses. If the witness is the head of a family, the testimony may have a considerable impact. The main problem for the witnesses will be the financial impact.

Mr. Nasy stated that it won't be necessary to take precaution measures towards the witnesses during and after their testimonies. The witnesses of the ECCC will be safe so there is no need for such measures during or after their testimonies in Phnom Penh.

Mr. Nasy repeated that people are only familiar with the general aspects of the tribunal and not on the content of the laws. Therefore, it is most important for the government to educate them on the details of the law through various means of the media. As people of Cambodia do not like to read, Mr. Nasy suggests informing them through TV or radio. In addition he stated that there is no need for NGO's to organise an open forum to educate people. It won't be necessary for the NGO's to accompany the witnesses during their testimonies in Phnom Penh. The people are only interested in financial compensation. People in Cambodia prefer the support of NGO's that will increase the development of Cambodia, as these organisations will help to improve their individual living conditions as well. They are not so much interested in the support of NGO's in field of the law and the tribunal.

VII. Mr. Vuth Phally

Chief Commander of the Takéo Provincial Police

Interviewed on the 3rd of October 2006 and joined by Mr. Chin Pok and Mr. Suon Phon. Mr. Vuth Pally did not allow us to record the interview.

VIII. Mr. Chin Pok

Deputy Commander of the Takéo Provincial Police

Interviewed on the 3rd of October 2006.

IX. Mr. Suon Phon

Deputy Commissioner of the Criminal Unit of the Takéo Provincial Police.

Interviewed on the 3rd of October 2006.

Mr. Vuth Pally expressed his support for the Khmer Rouge tribunal and stated that justice has to be done for the people who have died during the years of Democratic Kampuchea. He referred to the normal ways of procedure when somebody has committed a crime as for instance a robbery. In these cases it is the responsibility of the police in Takéo province to find and punish the person who has committed the crime. Mr. Pally does not know why it should be different in the case of the crimes committed during the Khmer Rouge years. The biggest advantage of the KRT is that justice will be found for the victims and the people of Cambodia. Moreover, the next generation will be educated and warned that such crimes will not go unpunished any longer in Cambodia. Mr. Pally could not think of any disadvantages of the tribunal, as everybody in Cambodia wants justice. The only disadvantage may be the relationship between the present government and the most responsible leaders who will be prosecuted. He did not explain these last remarks in detail.

With respect to the knowledge of the people on the tribunal, Mr. Pally stated that people are not well informed. He does not even know exactly about the details of the law and what will happen once the tribunal will start to work. It is hard to understand the work of the tribunal and the media only broadcast insufficient and too basic information.

In reaction to the question if people would be willing to testify, Mr. Pally posed the question whether I had heard about the atrocities that occurred during the Khmer Rouge years. Everybody older than thirty years old has suffered during these years and can be considered as a victim. He explained some cases he witnessed during the years as an example of what happened. Anybody who had survived this would be willing to tell about it in court and help to find justice for the victims. Even after thirty years people are angry about what happened and want to testify in order to make sure the most responsible will be punished.

The present Cambodian society is built on laws that prohibit any acts of revenge. Those who will intimidate or take revenge will be punished, so witnesses will have nothing to fear. Everybody in Cambodia wants to find justice and will support those who contribute to this process. In addition, Mr.

Phally stated that many victims have taken revenge after the Vietnamese invasion. Most of the Chiefs of cooperatives have been killed in the years right after the Khmer Rouge. This has taken away much of the anger and tensions in the society of Cambodia. There is no reason to fear the family members of the leaders who will be on trial. The structure of the Khmer Rouge has been destroyed and the cadres who have survived do not have a leader anymore. Chances or revenge by KR supporters and former cadres are therefore slim.

Mr. Phally did not express his opinion on who may be most vulnerable as a witness, as he is convinced that there will be no threats to any of the witnesses.

As mentioned earlier, Mr. Pally explained that most cases of revenge have occurred during the first years after the Khmer Rouge. After the Vietnamese invaded Democratic Kampuchea, most people took revenge on those who killed their relatives. No such cases of revenge and intimidation have occurred recently. There is no such tension in Takéo and the present laws will protect the people. The structure of the Khmer Rouge has been destroyed and chances or revenge by KR supported are slim.

The financial impact of being witness depends on the individual situation of the witnesses. In this regard Mr. Phally expects that many people will be willing to accept the financial consequences in order to contribute to the process of finding justice.

Mr. Phally has not yet been informed on the measures that will be taken by the government to protect the witnesses. The measures will form only a small part of the daily responsibilities of the police. Proper ways of protection depend on the situation of the witnesses. High officials will have their own ways of protection. People living near a police station are easy to protect and if people live far from the police station it is possible to guard their house. All these measures will probably not be necessary as there are no threats. The structure of the Khmer Rouge has been destroyed and chances or revenge by KR supported are slim.

Mr. Phally does not have any suggestions to DC-Cam, as it is not his responsibility.

X. Mr. Chey Sophal
Chief Prosecutor Takéo Province
Interviewed on the 4th of October 2006

Mr. Chrey Sophal was on his way to lunch when we met him at eleven o'clock in the morning. The interview was conducted under time pressure and not all questions have been asked. Mr. Chey Sophal did not allow us to record the interview.

Mr. Sophal stated that the greatest advantage of the Khmer Rouge tribunal is the contribution in finding justice for the victims of the Khmer Rouge. Without the tribunal there is a chance that the tragedies of the Khmer Rouge would happen again in Cambodia. Although some people are afraid that tensions will rice again in Cambodia, Mr. Sophal does not think there are any disadvantages about the tribunal.

As a way of clarification, Mr. Sophal has explained that the Khmer Rouge regime controlled the country for three years, eight months and twelve days. All the people who are older than thirty years have suffered and everybody is a victim of the Khmer Rouge. People in Cambodia would be more than willing to testify as a witness before the Extraordinary Chambers. The Judges should, however, take into consideration that people may be biased or will exaggerate their story on the stand. With reference to the witness of defence, Mr. Sophal stated that lower cadres may be willing to testify for the defendants.

Mr. Sophal shortly stated that the Khmer Rouge has no power in Cambodian society anymore. Everybody has been a victim of the Khmer Rouge and there is no reason to believe that people would hurt or intimidate the people who testify as a witness. It is impossible to predict who will pose pressure on the witnesses before the processes have begun. Possible threats will come to the surface during the trials and depend on the testimony and position of the witnesses. Threats may appear after people are affected by the information that is revealed by the witnesses.

All the people have been informed about the establishment of the tribunal and only a small group of people are left out. The information on the tribunal does not include a detailed explanation of the law. Therefore, people are not well informed on these matters.

Mr. Sophal stated that those who have important information on the internal policies of the Khmer Rouge will be vulnerable if they reveal this confidential information on the stand.

Mr. Sophal stated that the military authorities should assist in the protection of the witnesses. Information on who will be a witness should be kept confidential before, during and after the trials until the situation has been restored. Police should accompany witnesses when they are in public.

XI. Mr. Hean Rith

Deputy Prosecutor Takéo Province.

Interviewed on the 4th of October 2006.

Mr. Hean Rith supports the Khmer Rouge Tribunal. The victims of the Khmer Rouge will find justice and the perpetrators will finally face the law. He has learned from the media that the trials will take three years. Mr. Rith thinks this will be too short and hopes the tribunal can perform their duties in a proper way. The time limit is the only disadvantage that he can think of. Mr. Hean Rith did not allow us to record the interview.

The people of Takéo have probably only general information on the tribunal. The means to inform the people on the tribunal are not sufficient. In this respect he referred to the limited coverage of the radio.

The victims of the Khmer Rouge will only be willing to testify as a witness of the prosecution. Their sufferings during the years of Democratic Kampuchea will withhold them from testifying as a witness of the defence. Only the people who are closely related or who have been closely involved with the leaders of the Khmer Rouge may testify as a witness of the defence. As there will be many victims willing to testify it is necessary to chose representatives. It is impossible to call everybody as a witness.

Mr. Rith stated in this regard that the organisation of the Khmer Rouge has fallen apart and has no real power in Cambodia anymore. Those who still support the Khmer Rouge believes do not form any threat to the witnesses.

As there are no real threats in Cambodian society towards the witnesses, Mr. Rith thinks nobody will be vulnerable. The only obstacle may be the financial consequences.

Although many lower cadres have survived the Khmer Rouge regime, most of them have been killed right after the invasion of the Vietnamese. Mr. Rith has not heard about any cases of revenge or intimidation in this way during recent years. The Khmer Rouge organisation has been destroyed and only a few government representatives still support the ideas of the Khmer Rouge. This small amount of people will not form a threat to the witnesses.

Mr. Rith thinks it will have a great impact on the personal situations of people if the testify as a witness. People in Cambodia and Takéo province are very poor and financial compensation is essential. The financial impact will form the greatest obstacle for people to testify as a witness. As a prosecutor Mr. Rith has experienced that many witnesses do not show up because they are not willing to spend any money for their testimony.

The KRT has to inform the people about the objective of the tribunal in order to encourage them to speak out. The accommodation of the people in Phnom Penh is very important and people should receive financial compensation for their expenses. There is no need for people to be an anonymous witness, as all witnesses will be representatives of the victims and people of Cambodia. Mr. Rith did not suggest any measures to protect the witnesses. All policemen older than thirty years are victims of the Khmer Rouge and are therefore willing to support the tribunal in the best way they can. The government will facilitate the process of the tribunal. All witnesses should realise that the current government has protected and supported them over the last years as well. There is no reason to doubt the abilities of the strong present government.

Mr. Rith did not have any advise for DC-Cam or NGO's. The supporting role in witness protection depends on the work of the organisations.

XII. Mr. Sok Lieng

Judge of the Takéo Provincial Court

Interviewed on the 4th of October 2006.

Mr. Sok Lieng did not allow us to record the interview.

Remarks by Mr. Sok Lieng, Judge of the Takéo Provincial Court.

Before starting the interview, Mr. Sok Lieng proposed to explain the position of the witnesses according to the criminal law of Cambodia. Witness testimonies are very important sources of evidence in both civil and criminal cases. There are three types of witnesses: witnesses of the prosecution, witnesses of the defence and witnesses of clarification. It is the responsibility of the prosecution to gather information and evidence that will support their case. In this respect the prosecution can use the testimony of witnesses, but it is the responsibility of the prosecutor to find a suitable witness. The representatives of the defence have the same right and responsibility to ask for a witness who can support their point of view. In addition to these witnesses people in authority such as the police can be asked as a witness of clarification to present their findings on the event to the court.

The position of witnesses is based on the criminal code in the UNTAC law of 1993. Article 24 of the UNTAC law states that persons can be fined for the amount of 10.000 – 1 million Riel if they do not appear as a witness. In practice it is hard to find witnesses. People are not willing to interrupt their work in order to be a witness and often do not show up. The consequence of the lack of witnesses is that many criminal cases are delayed.

With respect to possible threats Mr. Lieng stated that witnesses are only vulnerable in the most serious crimes, such as human trafficking, kidnapping and terrorism. During his appointment as a judge of the Takéo court he has never experienced cases of intimidation towards witnesses. Most of the criminal cases are small and involve robberies, theft or cases of abuse. Witnesses in these cases are not intimidated or vulnerable.

In most of the criminal cases, judge Lieng is confronted with various types of witnesses. Some witnesses tend to lie during their testimony and others have forgotten many details of the event. In these cases people often do not remember the face and identity of the perpetrator. Some witnesses exaggerate their story and others are influenced by their fear of telling the truth before the court. The judges have a responsible task to define whether a witness is loyal and sincere. Based on this judgement they will decide the importance and role of the witness testimony in their final judgement of the criminal case. The parties of the case often influence witnesses. To conclude judge Lieng stated that witnesses are protected by article 55 of the UNTAC criminal law. According to this article people who intimidate or threaten the witnesses can be punished and may face sentence to jail for on or two years.

After his clarification judge Lieng answered our questions of the interview

Mr. Sokh Lieng has stated that the prosecution of the most responsible leaders will benefit Cambodia and restore the confidence of the victims who are still alive. He is a great supporter of the KRT and is very happy to see that justice will finally be found. He is not well informed on the present developments but knows the judges and prosecutors have been appointed. At the moment it is hard to think of any disadvantages, as they will probably appear during the process itself. He really hopes that all the evidence will be used carefully and will serve its purpose in finding justice for the people of Cambodia.

Judge Lieng stated that most people in Takéo province have learned about the Khmer Rouge Tribunal through the government broadcastings on the TV. No matter how people are, nowadays everybody has a television. The people are not well informed on the details of the law but are only familiar with the most general aspects of the tribunal.

Judge Lieng does not have a clear view on the willingness of the people to testify as a witness before the Extraordinary Chambers. He only knows that most of the people in Takéo support the tribunal.

Judge Lieng clearly stated that the witnesses of the ECCC are not safe. In answer to the question whom in the Cambodian society might pressure or intimidate the witnesses, Judge Lieng did not give a clear answer. He stated that uneducated people might easily be pressured and impressed through stories and rumours in their community. In reality there will be no threats, but rumours and suspicion about the witnesses will lead to a tensed atmosphere in the society of Takéo.

Judge Lieng stated that those people who have witnessed the crimes closely and have important information are the most vulnerable. They must receive high-level protection.

Judge Lieng has never heard about cases of intimidation or revenge based on the Khmer Rouge position of a person. He has only heard about cases of intimidation in the cases he mentioned during his introduction, such as human trafficking, kidnapping and terrorism. Mr. Lieng does not know whether people still support the Khmer Rouge. As everybody in Cambodia, no matter their position or backgrounds, has suffered during the years of the Khmer Rouge, he guesses that not many people will support the Khmer Rouge these days.

Most of the people in Takéo province are very poor and have only little money to spend. During his career as a Judge, Mr. Lieng has learned that the financial aspect often withholds people of being a witness. Financial compensation is therefore essential according to judge Lieng. In this regard it is important to be aware of the possibility that those who financially support the witnesses may influence them.

During the testimonies in Phnom Penh, the witnesses should be provided with safe and secured accommodation. The impact on the individual living conditions should be taken into account and the

protection should be well prepared. The measures will have to be adjusted to each case. It is up to the witnesses themselves if they want to be anonymous as a witness or not.

In order to give them proper protection the Cambodian government should be assisted by the international community assisting in the trials. The standard of protection should be very high as Cambodian local authorities are not capable of dealing with this issue by themselves. The district military police should assist the lower levels of police in protecting the witnesses as well.

The support of NGO's is a very important asset in the processes of the tribunal. NGO's should support the government by facilitating the transport of the witnesses to Phnom Penh. In addition they could assist in informing the witnesses on the exact procedures regarding their testimonies. NGO's and the local authorities need to cooperate closely in order to gather as much valuable information needed in the processes as possible.

XIII. Mr. Tith Sothy

Chief of the Takéo Provincial Court

Interviewed on the 4th of October 2006.

Mr. Tith Sothy did not allow us to record the interview.

Judge Tith Sothy stated that he does not have an opinion regarding the Khmer Rouge Tribunal. The process is not related to his personal life, as he is not involved in the process. It is up to the appointed judges to make decisions and we should ask them for the exact details of the process. He does have his doubts about the fact that all the judges are sworn in but still perform their normal jobs as judges in other Cambodian courts. The judges are waiting for the first indictments and operate as normal judges as well. Judge Sothy find this very strange. In addition he has raised his disapproval of the difference in salaries for the Cambodian and international judges. The international judges receive full and high salaries, whereas the Cambodian only receive compensation for the hours worked at the KRT. Their salary is much lower, which will lead to biased attitudes amongst the Cambodian judges. Judge Sothy added that the Khmer Rouge Tribunal is very important in avoiding impunity and punishing those who have committed the genocide. Without the trial there will be no justice for the people in Cambodia.

During the interview Judge Sothy stated that the tribunal would have limited impact, as the most responsible leaders are not alive anymore. He supports the fact that only the most responsible leaders will be on trial. He realises that the lower cadres have had an important role in the killings and followed their orders in many different ways. The Khmer Rouge have however used the uneducated people of Cambodia and the cadres themselves are not to blame for this and cannot be held accountable for their acts. During the Khmer Rouge regime people were killed for reasons of their status and minor offences as well. If one made a mistake, the Khmer Rouge regarded him as an enemy of Angkar, which lead in most cases to the execution of people. During those years one could only hope to be alive the next day.

Judge Sothy does not know whether people are well informed or not, as it is not his responsibility. He is not involved in this matter in his daily life. He mentioned however that people from Kampong Cham have already been approached as a witness and have been transported to the Khmer Rouge Tribunal to testify.

Nobody but the close family members of the Khmer Rouge leaders will be willing to testify as witness of the defence. Mr. Sothy gave various examples and told about his personal experience in order to show how people in Cambodia have suffered due to the Khmer Rouge regime. All people elder than thirty years old have gone through the same experiences and will be willing to tell the truth as a witness of the prosecution. They are so angry about the things that have happened to them that they are not afraid to testify. The victims of the Khmer Rouge want to speak as a witness in order to show

they have courage and are proud. The only matters that may withhold them from being a witness are their Buddhist believes or financial considerations.

According to Judge Sothy witnesses will be safe and nobody wants to intimidate them. The organisation of the Khmer Rouge is gone and there are no conflicts of interests anymore in Cambodian society. Justice will be found based on democratic means. The government and the Khmer Rouge tribunal have to cooperate in finding witnesses for both the prosecution and the defence.

Judge Sothy did not express his opinion regarding vulnerable witnesses and is convinced that there will be no threats to any of the witnesses.

Judge Sothy has explained that the risks of revenge will be slim with regard to the people who testify as a witness before the ECCC. Most people have already taken revenge during the first years after the Vietnamese invasion. During the first years many victims and relatives of those who died have killed many Khmer Rouge cadres. The anger towards the lower cadres is gone and Judge Sothy has never heard about new cases of intimidation during recent years.

Judge Sothy does not have a good idea on how much financial impact it would have for people to be a witness before the ECCC. People in Cambodia are poor and the tribunal cannot expect them to testify without any financial compensation. In addition it is very important to make a survey of those who will be a witness in order to assess the impact it can have on the witnesses.

Judge Sothy explained that there is no need for specific safety measures. There are no threats towards the witnesses and these measures will not be necessary.

NGO's should support and assist the witnesses during their presence in Phnom Penh. Around ten or twenty organisations should assist in providing the witnesses food, accommodation and transport. Judge Sothy added that the NGO's should accompany the witnesses to Phnom Penh and help them to speak frankly and open before the tribunal. It is important to make sure that the NGO's only support them and will not tell the witnesses what they should tell during their testimony.

Judge Sothy added that the government has given the right to the tribunal to trial the most responsible leaders of the Khmer Rouge. This valuable process may however be obstructed by the unequal relationship between the Cambodian and international judges. He is very happy with the tribunal, as it will educate the younger generation.

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APPENDIX B

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PORNOGRAPHY: Sex education by video and phones

SOUTH EASTERN

GLOBE

CAMBODIA'S ENGLISH MAGAZINE

Corporate Responsibility

The CARLSBERG Approach

SECOND SIGHT

Takeo's Eye Clinic Brin

The Light Back

EXCLUSIVE

East Timor's New PM

XANANA GUSMAO

CLIMATE CHANGE

WHAT DOES IT MEAN FOR CAMBODIA?

KARAOKE Inside Your Favourite Industry

NEW PHOTO COMPETITION

1837H

00148496

POST TRAUMATIC STRESS DISORDER

A legacy of pain and violence

Cambodian's are still haunted by the ghosts of the past: for some, the repercussions of mass brutality never seem to end

As many as 600,000 killed by American bombing; up to 2 million murdered or starved in Pol Pot's frenzied attempt to build an agrarian utopia; and the brutalisation of those survivors who became the unwanted residents of Thailand's refugee camps - the Cambodian people have faced trauma on an unimaginable scale, and for a handful of the nation's mental health

Violence can break out at any time, fuelled by nightmares, alcohol, or difficult situations

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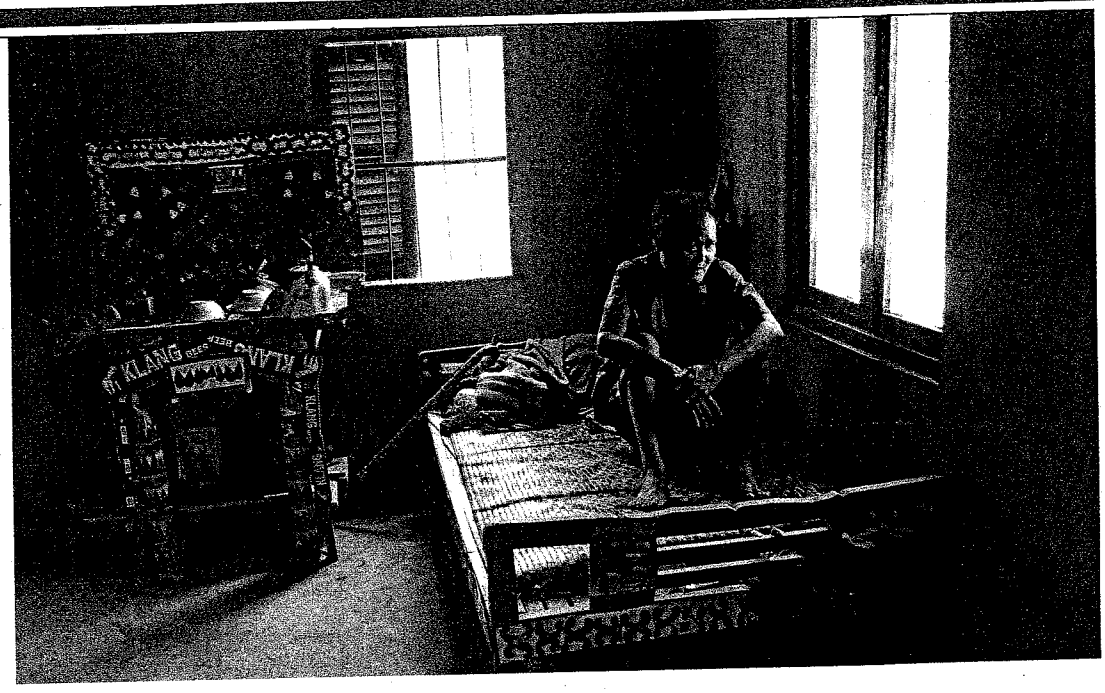

Near Dang Kaek (Kandal province), a KR interrogation centre spread fear and brutality. Helping alleviate the symptoms and allowing people to cope with their past is the minimum goal for a disease that few doctors understand

practitioners the long-term consequences of the violence, starvation and separation of the family unit have given rise to psychosocial problems that run deep through the layers of Cambodian society. Although its usual public image may be one of the battle-scarred veteran, Post Traumatic Stress Disorder (PTSD) is also a civilian problem, with its origins lying as much in the post Second World War diagnosis of Concentration Camp Syndrome (CCS) as they do in military's studies of combat fatigue and shellshock.

of Cambodia's first generation of post-war psychiatrists, and a leading expert on PTSD, Dr Sotheara Chhim works out of the bustling offices of the Transcultural Psychosocial Organization (TPO) in Phnom Penh's Khan Chamcarmorn district. As a young medical doctor, Dr Chhim practised in Cambodia's provinces and it was here that he began to come across symptoms and complaints that he was at a loss to explain. "I saw many people committing suicide and so many problems that my medical training didn't explain. I saw people who were suffering from psychological problems like hallucinations and delusions, and at the time I didn't even know this terminology. I began to ask myself is this an evil curse in the traditional belief or is this a medical problem?" When a team of psychiatrists from the Norwegian Council for Mental Health came to Cambodia in 1994, Dr Chhim was one of ten Khmer doctors who volunteered to study with them. "I learnt so much about the problems I had seen, and began to feel encouraged that I could pursue these studies and understand that the Khmer Rouge years had left illnesses like post traumatic stress disorder." The legacy that the conflict years had left was profound. The first study of the prevalence of PTSD conducted in 2001, revealed an incidence rate of 28.4% in the survivor population. A subsequent study by the TPO, headed by Dr Chhim, in collaboration with the Documentation Centre of Cambodia, found a comparable rate of up to 30% in a survey of the residents of Kampot and Kandal provinces.

The highest risk factor in PTSD is the extreme trauma experienced when witnessing violent events. Khmer civilians were being exposed to combat even before the overthrow of the Lon Nol regime and the establishment of Democratic Kampuchea. The American bombing campaign of the late 1960's and early 1970's saw a bombardment three times more intensive than the wartime bombing of Japan. Attacks on public spaces in cities were regular events and the Khmer Rouge were already committing atrocities in the provinces that they controlled. Then, between 1975 and 1979, civilians witnessed crimes against humanity on an unprecedented scale. From the routine cruelty of life in the work camps to the murder of those called to 'meetings' for minor infractions, or simply because of their previously urban lives, violence and the threat of violence were a daily part of Khmer life for almost 4 years. And it did not stop with the ousting of the Khmer Rouge. Cambodian civilians began to cross the Thai border in their thousands in 1979 and were often met with harsh treatment from the Thai camp guards. So great was the cruelty of the Thai Taskforce

Originally known as "Concentration Camp Syndrome", PTSD has developed into one of the main symptoms of Cambodia's violent past. Many Khmers will never forget what they had to see during the war years

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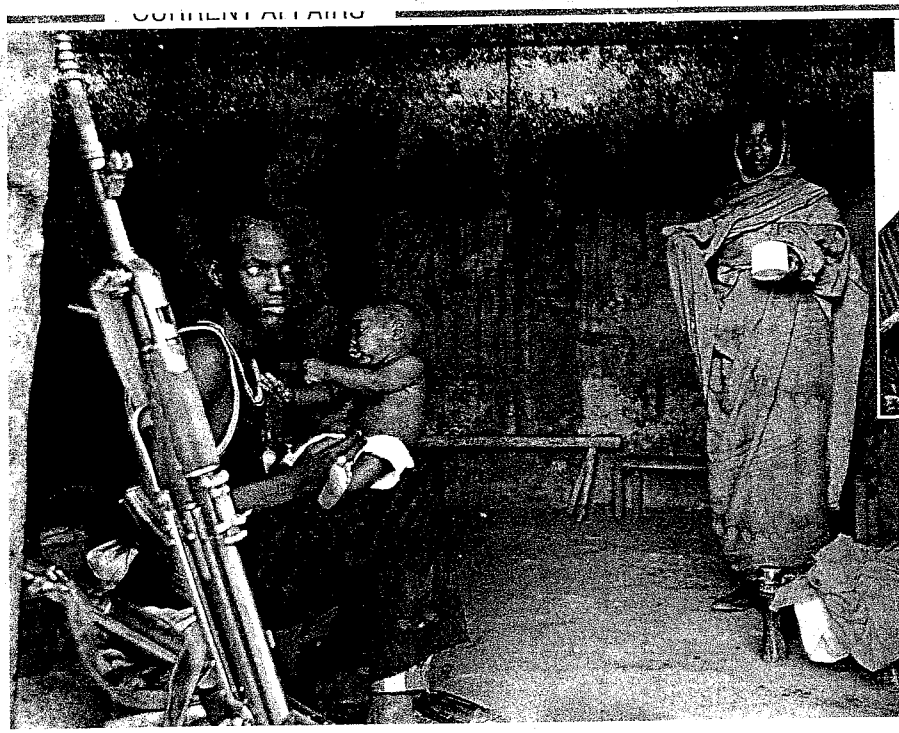

War, terror and famine make for a difficult life in Darfur, west Sudan (left). Hutu children awaiting deportation having fled from Rwanda's killing fields (above). PTSD is a common ailment, especially among the young, in continually violent societies

80 Ranger camp guards that international outrage led to their withdrawal. Thousands more Khmer refugees were victims of the Thai military's 'pushbacks' - where refugees were forced back into heavily mined Cambodian territory at gunpoint. Even in the relative safety of the United Nations' refugee camps, civilians were not spared from the horrors of warfare as camps were often used as military bases and were regularly attacked by rival factions during the long period of civil war.

Significant as its impact may be, the emphasis on violence masks other, equally important contributors to the trauma experience. After World War II, it soon became clear that starvation and overwork, all of which saw their parallel in the experience of the Khmers throughout the 1970's and 1980's, could also give rise to severe psychological consequences. Survivors of POW and Nazi concentration camps were soon suffering from depression, headaches, fatigue, premature aging, social problems, reduced resistance to disease; as well as the avoidance situations they associated with their trauma, flashbacks, and numbing of responsiveness - the three hallmarks of post traumatic stress disorder. Just as did the doctors who treated these patients, Dr Chhim encounters all of these symptoms on a daily basis and believes that the trauma inflicted by the Khmer Rouge is more than just the physical violence inflicted upon, or witnessed by, the individual.

"The KR tried to destroy the Khmer people on three levels: the society level - the destruction of infrastructure. The family level – they did not allow families to stay together, to connect with each other, and the individual level – people were not allowed to talk, they were forced to work hard, they were tortured, they were deprived of sleep and healthcare. These have all severely impacted Cambodia, from the macro to micro level."

But for all the personal anxiety that is caused by PTSD Dr Chhim and the TPO are also concerned by the latent effects on Cambodian society as a whole. "You cannot think only about reaction to violent acts when considering PTSD. I classify visible problems, but another big part of the reaction is the hidden social problems: the lack of trust, feelings of hopelessness, domestic violence and alcohol abuse. I think these are even the bigger problems. The visible part of the iceberg is PTSD, but these are the hidden symptoms of trauma." The coping strategies used by survivors can often have dire consequences for those around them. Alcohol abuse was found to run at extraordinarily high levels in concentration camp survivors; not surprising when a load of medical literature has been published describing the use of alcoho to cope with depression and anxiety. Al though there have been no explicit stud ies of the relationship between alcoho abuse and Khmer Rouge survivor's men tal state, NGO's and health practitioner anecdotally report levels of alcoholisn in survivors that mirror the findings o studies in which concentration camp sur vivors were shown to be ten times mor likely to be hospitalised for alcohol-re lated disorders than were th general population. Han in hand with alcohol abus comes domestic violence and you need not look mucl further than the local news papers for examples. Exac erbated by alcohol abuse an part of the cycle of survivor re-enacting their traumati experiences in their ow home, domestic violence i a disturbing phenomena i Cambodia. A study by th Ministry of Women's Affair and the Project Against Do mestic Violence found tha as many as a quarter of million Cambodian women had been se riously injured in incidents of domesti violence and the problem has quite right ly been described as being one of 'epi demic proportions'.

> "The Khmer Rouge tried to destroy the Khmer People on three levels: society, family, individually. This has severely impacted Cambodia"
>
> Dr. Sotheara Chhim

People, for the most part with the hel of their families and through the re-es

Photos: Corbis

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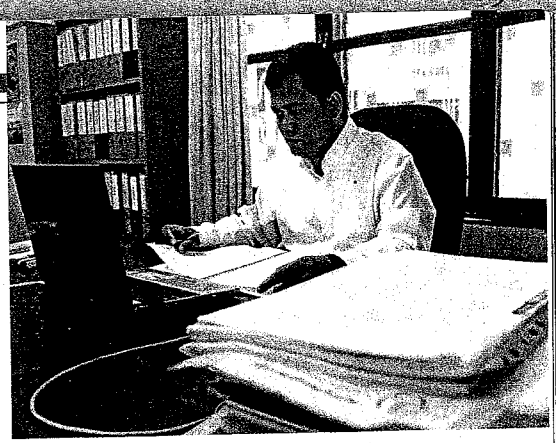
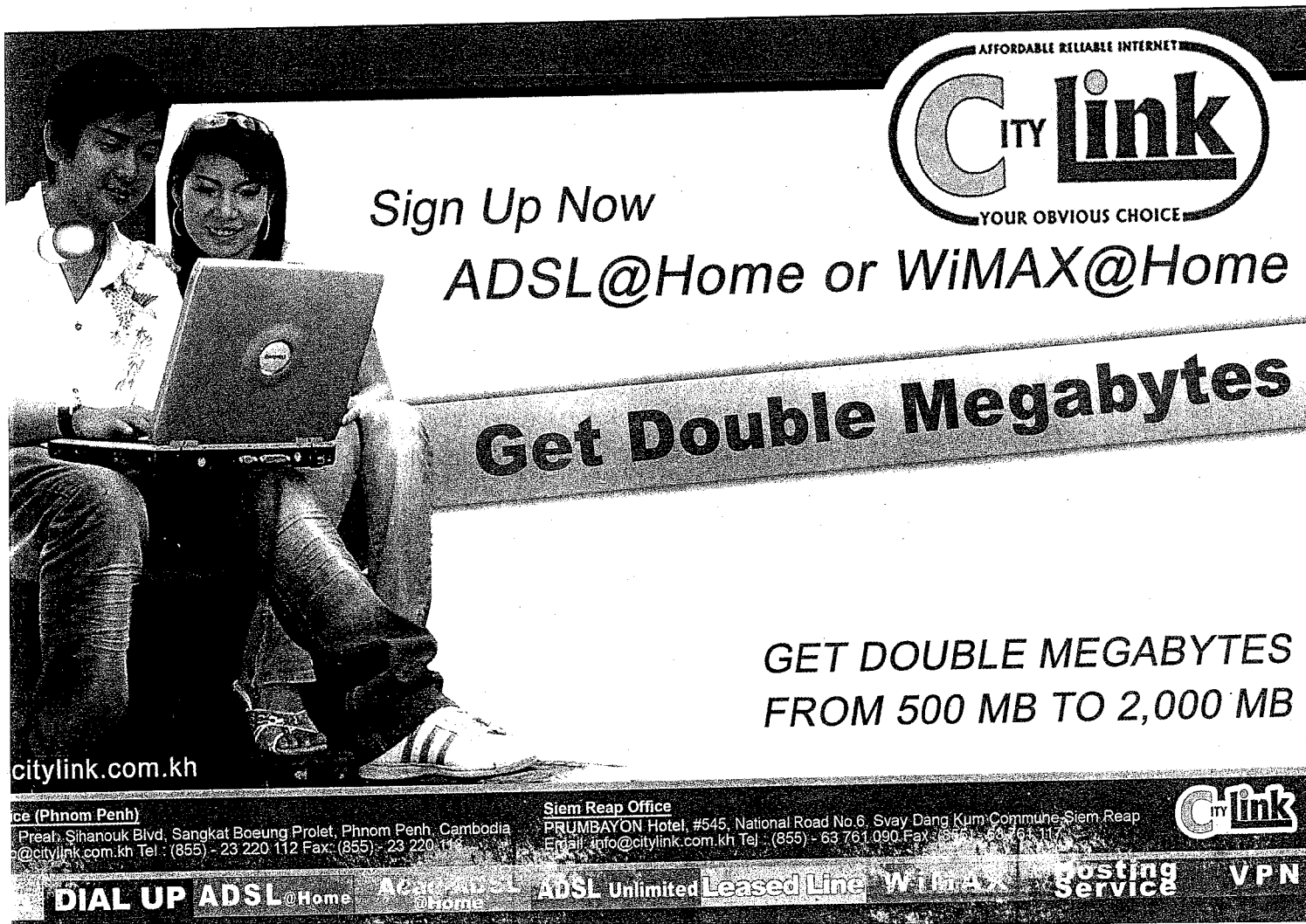


Dr. Sotheara Chhim in his office in Phnom Penh. He is worried about the impact of PTSD on Cambodian society as a whole

ıblishment of community and religious fe, have found ways of coping with their ıaumatic memories over the years. But ır Chhim believes that the approaching ıhmer Rouge Trials (KRT) pose a fresh sk to Cambodian society. Despite the caıarsis and reconciliation that is promised f the KRT, Dr Chhim and other health ractitioners fear that exposure to images f the nation's violent past may lead to ıe resurfacing of anxieties and a rise in ıe negative social consequences that can ccompany them. "If you talk to people nvolved in the trial] regarding retraumasation they disagree but I think it's riicul[illegible]ot to accept the fact that the KR ıibu[illegible] may retraumatise the people and ıat it is necessary to provide support. To rstly raise public awareness of the probem, to tell people that a reaction is normal o that people don't panic. I think people vill start having nightmares again as they ee the TV showing the tribunal." Despite ıeeting resistance and funding problems, Dr Chhim is pressing ahead with his plans to raise money from overseas donors to make support available to provide pre and post counselling to witness-victims, a service that was available at the International Tribunals for former Yugoslavia and Rwanda. TPO are also trying to secure funds to promote awareness among the general public. They have already produced a leaflet listing the symptoms, and reassuring people that their feelings are normal. People are also informed where they can get help if they think they need it. TPO also plan to set up a telephone counselling hotline. Dr Chhim dismisses claims that people will not seek help and is perhaps in a better position than many to understand the anxieties that bringing back memories of the horrors of the work camps can raise. "Just about myself, in my work I have talked to journalists, I have made presentations about the Khmer Rouge trauma, and every night I returned home and had nightmares. I had the black shadows chasing me. I was back living in the Khmer Rouge camp again and the sorrow would come. For me as a professional I can understand that it is normal, that it is going to be okay. But what about the people? They need someone to help them understand this." His message for those that do have a reaction to seeing these images is this: "It is normal to have a reaction, it is going to subside, it won't last. You are not going crazy. Talk"

Rob Savage



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APPENDIX C

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មជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គម

THE CENTER FOR SOCIAL DEVELOPMENT

ក្បាច់ទី ១ លេខ ០២ ខែសីហា ឆ្នាំ២០០៤ Volume 1, No. 02, August 2004

ព្រឹត្តិបត្រអ្នកឃ្លាំមើលតុលាការ

COURT WATCH BULLETIN

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តុលាការ សាក្សី និង សិទ្ធិ

អវត្តមានសាក្សីនៅពេលសវនាការជំនុំជំរះក្តី ជាបញ្ហាធំមួយដែលតុលាការខ្មែរកំពុងប្រឈមសព្វថ្ងៃនេះ ។ ភាគច្រើននៃសវនាការជុំជំរះក្តី មិនមានវត្តមានសាក្សីដាក់បន្ទុក

COURTS, WITNESSES AND RIGHTS

The absence of witnesses at trials is a grave problem for the Cambodian judiciary. Often, neither witnesses for the prosecution nor

វត្តមាន សិទ្ធិរបស់ជនជាប់ចោទដែលគ្មានទោសដើម្បីបង្ហាញនូវការការពារខ្លួននឹងត្រូវបានបំពាន ហើយភាពអយុត្តិធម៌ធ្ងន់ធ្ងរនឹងកើតមាន ។ នេះនឹងមិនគ្រាន់តែឱ្យជនល្មើសពិតប្រាកដរស់នៅដោយគ្មានទោសពៃប៉ុណ្ណោះទេ តែនឹងធ្វើឱ្យអន្តរាយដល់ទស្សនៈដែលថា តុលាការជាអ្នកអាជ្ញាកណ្តាលមិនលំអៀង និង យុត្តិធម៌ក្នុងការអនុវត្តច្បាប់ ។

defendant to present a defense will be violated, and a grave injustice will be done. Not only will this allow the real perpetrator to live with impunity, but it will severely damage the perception of the judiciary as a fair and impartial arbiter of the law.

២. *ការអនុវត្តនៅក្នុងតុលាការខ្មែរ : សាក្សីមិនមកបង្ហាញខ្លួន*

2. *Practice in Cambodian Courts:*

Non-appearance of Witnesses

ថ្មីៗនេះ អ្នកសង្កេតការណ៍តុលាការនៃមជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គមបានធ្វើការសិក្សាអំពីសវនាការដើម្បីកំណត់ថា តើសាក្សីច្រើនប៉ុណ្ណាបានមកបង្ហាញខ្លួន ។ ទោះជាវិធីសាស្ត្រនៃការសិក្សានេះ មានលក្ខណៈមិនវិទ្យាសាស្ត្រ

CSD court monitors recently undertook an informal study of trials to determine how often witnesses appeared. While the methodology of this study is unscientific and the sample is not

តារាងទី១ : ស្ថិតិសង្ខេបអំពីសាក្សី *

	សរុប	%
សវនាការមានសាក្សី	៩	២៣.៧០%
សវនាការគ្មានសាក្សី	២៩	៧៦.៣០%
សរុប	៣៨	១០០.០%

* *តែតុលាការដំបូង និង ឧទ្ធរណ៍ប៉ុណ្ណោះ*

Table 1: Summary Statistics on Witnesses *

	Totals	%
Trials with Witnesses Present	9	23.70%
Trials without Witnesses	29	76.30%
Totals	38	100.0%

* *Trial and Appeals courts only*

និង ចំនួនករណី ដែលច្បិចយកមកពិនិត្យមិនបានជ្រើសរើសដោយព្រាវៗក៏ដោយ ក៏មជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គមជឿថា ការសិក្សានេះឆ្លុះបញ្ចាំងភាពពិត និង ទម្លាប់នៅក្នុងបន្ទប់សវនាការរបស់តុលាការខ្មែរដែរ ។

random, CSD believes that it reflects the reality and common practice in Cambodian court rooms.

ដូចដែលឆ្លុះបញ្ចាំងតាមរយៈតារាងទី១ មានតែ ២៣.៧% នៃសវនាការទាំងអស់ប៉ុណ្ណោះ ដែលអ្នកសង្កេតការណ៍នៃមជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គមបានសង្កេត បានដំណើរការដោយមានវត្តមានសាក្សី ។ ភាគរយនេះប្រហាក់ប្រហែលគ្នា សំរាប់តុលាការសាលាដំបូង និង

As reflected in Table 1, only 23.7% of the trials attended by CSD court monitors were conducted with the presence of witnesses. This percentage was similar for both trial courts and appeals courts. The only significant variation could be found in the

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សាលាឧទ្ធរណ៍ ។ ការខុសប្លែកគ្នាដ៏គួរឱ្យចាប់អារម្មណ៍ ដែលបានជួបប្រទះ គឺនៅតុលាការកំពូលដែលទាំង៥ សវនាការដែលបានសង្កេត មានការសួរដេញដោលសាក្សី ។ ប៉ុន្តែ យោងតាមមាត្រា ២០៧ នៃ*ច្បាប់ស្តីពីនីតិវិធីព្រហ្មទណ្ឌ* តុលាការកំពូល គឺគ្រាន់តែធ្វើសវនាការតែលើអង្គច្បាប់ ។ ការដេញដោលសួរសាក្សីគ្រាន់តែទាក់ទងនឹងអង្គហេតុប៉ុណ្ណោះ ។ វត្តមានរបស់សាក្សីនាពេលសវនាការនៅតុលាការកំពូល គឺបំពាន*ច្បាប់នីតិវិធីព្រហ្មទណ្ឌ* ហើយយោងតាមនេះ សវនាការទាំង៥នេះមិនត្រូវបានបញ្ចូលក្នុងស្ថិតិនេះទេ ។

Supreme Court, where all 5 of 5 attended trials involved the examination of witnesses. However, the Supreme Court, according to Article 207 of the *Law on Criminal Procedure*, is supposed to hear only questions of law. As witness testimony would only be relevant to questions of fact, the presence of witnesses at Supreme Court hearings is a violation of the *Law on Criminal Procedure*, and accordingly, these 5 hearings have been excluded from the statistics.

មូលហេតុមួយដែលបានសង្កេតឃើញជាញឹកញាយនៃអវត្តមានសាក្សីនាពេលសវនាការ គឺថា ដីកាកោះមិនបានបញ្ជូន ។ ព្រះរាជអាជ្ញា ឬ មេធាវី ជនជាប់ចោទប្រើប្រាស់ដីកាកោះដើម្បីបង្គាប់ឱ្យសាក្សីចូលរួមសវនាការ ។ ដីកាកោះទាំងនេះ ដែលមិនពិបាកសសេរឡើងជាគោល គឺជាទំរង់លិខិតដែលជូនដំណឹងដល់សាក្សីនូវកាលបរិច្ឆេទ ទីកន្លែងនៃសវនាការ និង កាតព្វកិច្ចចូលរួម ។ យោងតាមមាត្រា ២៤ វាក្យខណ្ឌទី៥ នៃ*ច្បាប់ព្រហ្មទណ្ឌអ៊ុនតាក់* សាក្សីទាំងអស់នឹងត្រូវបានអញ្ជើញមកចូលរួមចំពោះមុខសវនាការដោយដីកាកោះ ។ ការខកខានមិនបានប្រគល់ដីកាកោះដោយព្រះរាជអាជ្ញាក្តី ដោយមេធាវីជនជាប់ចោទក្តី គឺជាការធ្វេសប្រហែសក្នុងការបំពេញតួនាទី ហើយត្រូវយកធ្វើជាមូលហេតុសំរាប់ពន្យារពេលសវនាការ ក៏ដូចជាដាក់វិន័យទៅលើភាគីទទួលខុសត្រូវ ។

One frequently observed reason that witnesses fail to appear is that a summons was not issued. A summons may be used by the prosecutor or defense lawyer to compel a witness to appear in court. The summons, which is essentially a slip of paper informing the witness of the date and location of trial and their obligation to attend, can be easily procured. According to Article 24, §5 of *UNTAC Law*, all witnesses may be summoned to appear before the court by subpoena. The failure of either the prosecutor or the defense attorney to subpoena a witness is a dereliction of duty, and should be grounds for postponing a trial, as well as discipline for the responsible parties.

ប៉ុន្តែសាក្សីខ្លះដែលបានទទួលដីកាកោះហើយ នៅតែខកខានមិនបានចូលសវនាការ ។ ជាទូទៅ សាក្សីទាំងនេះផ្តល់នូវហេតុផលបីយ៉ាង ដែលពួកគេមិនបានចូលខ្លួននាពេលសវនាការ ។ ទីមួយ គឺសាក្សីខ្លះអះអាងថា សុវត្ថិភាពរបស់គេ ឬ សុវត្ថិភាពរបស់គ្រួសាររបស់គេនឹងទទួលការគំរាមកំហែង ជាពិសេសពីសំណាក់មិត្តភក្តិ ឬ គ្រួសាររបស់ជនជាប់ចោទ បើសិនជាគេឆ្លើយនាពេលសវនាការ ។

However, some witnesses who do receive summons still fail to appear in court. These witnesses generally give three reasons for why they have not come to the trial. First, some witnesses argue that their security or the security of their families will be threatened if they testify at trials, especially by the defendant's friends or family.

នេះជាការពិត ជាពិសេសក្នុងករណីអំពើហិង្សាក្នុងគ្រួសារ ឬ អំពើលួចសពាក់ព័ន្ធផ្លូវភេទនៅកន្លែងណាដែលជនជាប់ចោទមានអំណាចច្រើនជាងជនរងគ្រោះ ។ ផ្ទុយទៅវិញ សាក្សីរបស់ជនជាប់ចោទអាចភ័យខ្លាចរដ្ឋអំណាចធ្វើបាប បើសិនជាពួកគេឆ្លើយជំទាស់នឹងចំលើយរបស់នគរបាលយុត្តិធម៌ ឬ ព្រះរាជអាជ្ញា ដែលច្រើនតែជាសមាជិកមានអំណាចនៅក្នុងតំបន់រស់នៅរបស់គេ ។ សាក្សីជនជាប់ចោទអាចភ័យខ្លាចថា គាត់នឹងបាត់ការការពារដ៏ពេញលេញរបស់នគរបាលយុត្តិធម៌ បើសិនជាបង្ហាញជាសាធារណៈថានគរបាលនោះខុស ។ បញ្ហាទាំងនេះជាបញ្ហាធ្ងន់ធ្ងរ ហើយត្រូវដោះស្រាយ បើចង់បានឱ្យសាក្សីច្រើនទៀតមកតុលាការ ។

This is especially true in cases of domestic abuse or sexual assault, where the defendant may have more power in the community than the victim. Conversely, witnesses for the defendant may fear retribution by the state if they contradict the statements of judicial police or prosecutors, often powerful members in a community. A defense witness may fear that he will lose the full protection of the judicial police if he or she shows that they are wrong in public. These problems are serious, and must be addressed if more witnesses are to appear in court.

បញ្ហាមួយទៀត ដែលជាញឹកញាប់ សាក្សីបានលើកឡើងដែរ គឺការចំណាយ និង ពេលវេលាដែលចាំបាច់សំរាប់ធ្វើដំណើរទៅតុលាការ ។ សាក្សីដែលអាចជាអ្នកដែលទន់ខ្សោយខាងសេដ្ឋកិច្ច មិនត្រឹមតែត្រូវចំណាយ

Another problem often cited by witnesses is the expense and time required to travel to court. Witnesses, who may be members of an economically disadvantaged group, face not only

តារាង២ : វត្តមានសាក្សីតាមតុលាការនីមួយៗ

	តុលាការខេត្ត-ក្រុង				សាលាឧទ្ធរណ៍
	បាត់ដំបង	ភ្នំពេញ	កំពង់សោម	កំពង់ចាម	
សវនាការដែលមានវត្តមានសាក្សីចូលរួម	៤	២	១	0	២
សវនាការដែលមិនមានវត្តមានសាក្សីចូលរួម	៤	១៥	៥	២	៣
សរុប	៨	១៧	៦	២	៥

Table 2: Witness Appearance by Court

	Provincial / Municipal Courts				Appeals Court
	Battam-bang	Phnom Penh	Kampong Cham	Kampong Som	
Trials With Witnesses Present	4	2	1	0	2
Trials Without Witnesses	4	15	5	2	3
Totals	**8**	**17**	**6**	**2**	**5**

ដើម្បីធ្វើដំណើរទៅមកតុលាការតែប៉ុណ្ណោះទេ គឺថែមទាំងខាតបង់ប្រាក់ចំណូលដោយខាតពេលរកស៊ី ដោយរវល់តែឡើងតុលាការនេះទៀតផង ។ ការវិភាគលើស្ថិតិដែលប្រមូលបានដោយមជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គមមិនស៊ីគ្នានឹងការអះអាងអំពីមូលហេតុនេះទេ ។ តារាង២ បង្ហាញការបំបែកអត្រាវត្តមានសាក្សីតាមតុលាការ ។ គ្រាន់តែវិភាគភ្លាម គេឃើញថា នៅតុលាការក្រុងភ្នំពេញដែលមានដែនសមត្ថកិច្ចលើតំបន់ជិតៗ មានអត្រាសាក្សីចូលរួមសវនាការ

the costs of traveling to and from a far-away courthouse, but also opportunity costs of lost working time. A brief examination of statistics gathered by CSD would belie this argument. Table 2 shows the breakdown of witness appearance rates by court. A quick examination of the statistics shows that in Phnom Penh Municipal Court, which has jurisdiction over a relatively small area, had

ទាបជាងអត្រានៅតុលាការខេត្តបាត់ដំបង ដែលគ្របដណ្ដប់ដែនដីធំជាង ។ នេះចង្អុលបង្ហាញថា ពេលវេលាមិនជារឿងសំខាន់សំរាប់វត្តមានសាក្សីទេ ទោះបីជាត្រូវមានទិន្នន័យច្រើនទៀត ដើម្បីបញ្ជាក់សេចក្ដីសន្និដ្ឋាននេះក៏ដោយ ។ ទោះជាយ៉ាងណាក៏ដោយ ពេលវេលា និង ការចំណាយអាចពិតជាបញ្ហាមួយ យ៉ាងហោចណាស់សំរាប់សាក្សីដែលត្រូវមកបំភ្លឺមួយចំនួន ហើយជំនួយរបស់រដ្ឋ រួមជាមួយការផ្ដួចផ្ដើមគំនិតរបស់តុលាការអាចជួយដោះស្រាយនូវបញ្ហានេះ ។

worse witness attendance rates than Battambang Provincial Court, which covers far more territory. This would indicate that time is not as important of a factor for witness appearance, although more data will be needed to verify that conclusion. In any case, it is likely that time and cost do pose a problem for at least some potential witnesses, and a combination of government assistance and court initiative can help remedy this problem.

មូលហេតុទីបី ដែលលើកឡើងជាញឹកញយ គឺសាក្សីមិនយល់អំពីសារៈសំខាន់នៃវត្តមានរបស់ខ្លួននាពេលសវនាការ ។ មនុស្សច្រើនគ្នាយល់ថា វត្តមានគ្រាន់តែជាការបង្ក្រប់កិច្ចតែប៉ុណ្ណោះ មិនមែនជាអ្វីដែលត្រូវមានសារៈសំខាន់សំរាប់សវនាការនោះទេ ។ អ្នកខ្លះប្រហែលជាស្រពិចស្រពិលអំពីតួនាទីរបស់សាក្សីនាពេលសវនាការ ហើយ ខ្លះអាចខ្លាចប្រព័ន្ធយុត្តិធម៌តែម្ដង ។ ប៉ុន្តែអ្នកខ្លះទៀតអាចនៅមិនដឹងអំពីផលវិបាកដែលអាចកើតមាន ដូចជាអាចត្រូវគេពិន័យដូចដែលមានចែងក្នុង *ច្បាប់ព្រហ្មទណ្ឌអ៊ុនតាក់* មាត្រា ២៤ វាក្យខណ្ឌទី៥ ។ គេអាចអះអាងថាភាគច្រើននៃជំនឿនេះកើតមានដោយការខ្វះខាតកាតព្វកិច្ចជាពលរដ្ឋក្នុងវប្ប:ធម៌ប្រទេសកម្ពុជា ។ បើសិនជាមានវប្ប:ធម៌បែបនេះ មនុស្សជាច្រើននឹងមានអារម្មណ៍ថា ការទៅតុលាការក្នុងនាមជាសាក្សី គឺជាកាតព្វកិច្ចរបស់ពួកគេដែលជាពលរដ្ឋរបស់ប្រទេស ។ យ៉ាងណាក៏ដោយ ភាគច្រើននៃបញ្ហាទាំងនេះ ជាបញ្ហាធម្មតានៅក្នុងប្រទេសអភិវឌ្ឍ និង ប្រទេសកំពុងអភិវឌ្ឍ ហើយអាចនឹងដោះស្រាយបានតាមរយៈកម្មវិធីអប់រំ ។

A third reason often cited is that witnesses do not understand the importance of appearing in court. Many feel that it is a formality, rather than something that is important for a trial. Others may be confused about the role of a witness in a trial, and some may be intimidated by the legal system. Yet others may not be aware of the potential consequences, such as the possibility of fines mentioned in *UNTAC Law*, Article 24, §5. One could argue that many of these beliefs exist because there is a lack of a "civic responsibility" culture in Cambodia. If such a culture existed, many people would feel that going to court as a witness is their "civic duty." Nevertheless, many of these issues are common in many developed and developing countries, and can be addressed through education programs.

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APPENDIX D

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មជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គម

THE CENTER FOR SOCIAL DEVELOPMENT

ចុះផ្សាយ លេខ ១២ ខែមករា ឆ្នាំ២០០៦ Volume 3, No. 12, January 2006

ព្រឹត្តិបត្រអ្នកឃ្លាំមើលតុលាការ

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USAID FROM THE AMERICAN PEOPLE

មជ្ឈមណ្ឌលអភិវឌ្ឍន៍សង្គមមិនទទួលខុសត្រូវចំពោះការយកពត៌មានក្នុងអត្ថបទទាំងឡាយទៅប្រើប្រាស់ជាបន្តឡើយ ។
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ចោទបានធ្វើសំនូមពរជាចុងក្រោយរបស់ខ្លួនដែលភាគច្រើន នៃសំនូមពរនោះ គឺផ្តោតទៅលើការសុំលើកលែងចោទខ្លះសុំរួចទោស ព្រោះខ្លួនជាប់ឃុំច្រើនឆ្នាំរួចមកហើយ ខ្លះសុំអោយតុលាការសំរេចសេចក្តីនៅថ្ងៃនេះតែម្តងទៅ។ល។

reported to the prosecutor or examining judge about the use of violence. In the end, the accused made their final suggestions the meaning of which focused either partially on the request to dismiss the charges, or partially on a final court decision on their case that day.

ក្រោយពីសួរដេញដោលទៅកាន់ជនជាប់ចោទទាំង ៤ រួចមក ចៅក្រមក៏បន្តសាកសួរទៅកាន់ដើមបណ្តឹងដែលមានវត្តមាននាពេលសវនាការទៀត ដែលសំនួរនោះលក្ខណៈប្រហាក់ប្រហែលគ្នាដូចជា ឈ្មោះ អាយុ មុខរបរ រៀបរាប់ ព្រឹត្តហេតុ ទំហំ នៃការខូចខាតដែលខ្លួនរងគ្រោះ ហើយនិងសំណូមពរជាដើម ។

After questioning the four accused the judge started asking the plaintiffs who were present at the hearing with similar questions, such as their name, age, occupation, the occurrence of such events, the losses and damages they suffered and their final suggestions.

ក_៣_សេចក្តីសន្និដ្ឋាននិងសន្និដ្ឋានតបរបស់មេធាវីជនជាប់ចោទ

A.3. Final Conclusions and Counter-Claims by the Defense counsel

មេធាវីបានធ្វើសេចក្តីសន្និដ្ឋានដូចតទៅ៖

តុលាការបានចាត់តាំងខ្ញុំ អោយធ្វើជាមេធាវីស្របច្បាប់អោយជនជាប់ចោទទាំង៤នាក់ ។ ទាក់ទងនឹងអង្គហេតុខាងលើ ជនជាប់ចោទទាំង ៤ មិនបានសារភាពទេ ផ្អែកលើ **ថ្ងៃថ២ ខែខ២ ឆ្នាំឆ២** កើតនៅក្នុងសម័យខ្មែរក្រហម ហើយដើមបណ្តឹងរដ្ឋប្បវេណីថា (មានកងកម្លាំង) ៧០ទៅ ៨០ នាក់ ។ ជនជាប់ចោទឈ្មោះ **ជជ០៤** ឆ្លើយថាមិនបានប្រព្រឹត្តទេ ។ ការឆ្លើយសារភាព គឺធ្វើឡើងដោយបង្ខំអោយបន្ទុកលើជនជាប់ចោទ៣នាក់ទៀត ។

The defense counsel made the following conclusions:

I have been assigned legal defense counsel for the four accused by the court. According to facts cited above, the four accused did not plead guilty of such offenses and based on day DD2, month MM2, year YY2, they were born during the DK regime. The civil plaintiffs said that there were about 70 to 80 armed men at that time. The accused A4 said he did not commit the act and he admitted the offenses under duress by placing the burden of proof on the three accused.

ចំពោះការចោទរបស់ព្រះរាជអាជ្ញា ជនជាប់ចោទមិនបានសារភាពទេ ព្រោះនៅថ្ងៃទី**ថ២ ខែខ២ ឆ្នាំឆ២** ខ្លួនទៅទិញអង្ករ ។ ដូចដែលលោកមេធាវីមុនរៀបរាប់ហើយ ចម្លើយដែលឆ្លើយនៅកន្លែងនគរបាលយុត្តិធម៌ គឺវាយដំបង្ខំអោយសារភាព ។ ចំណែកនៅកន្លែងព្រះរាជអាជ្ញាមាននគរបាលយុត្តិធម៌នៅក្បែរធ្វើអោយជនជាប់ចោទមានការភ័យខ្លាច ។

As to the charges by the prosecutor, the accused did not admit the charges because on day DD7, month MM2, year YY2, they went to buy the rice. As the previous defense counsel mentioned, replies at the judicial police department were made under duress; they were compelled to plead guilty under ill-

treatment, and when questioned by the prosecutor, the replies were the same because they were afraid of the judicial police standing behind the prosecutor.

តាមរយៈអង្គហេតុ ដែលដើមបណ្តឹងរដ្ឋប្បវេណីបាននិយាយថា មានអ្នកចូលទៅសំលាប់មានគ្នាពី ៧០ ទៅ ៨០ នាក់ ប៉ុន្តែនៅពេលនគរបាលយុត្តិធមិចាប់បានជនជាប់ចោទទៅហើយ ទើបដើមបណ្តឹងរដ្ឋប្បវេណីមកឆ្លើយដាក់បន្ទុក។ ដោយសារតែអ្នកប្រព្រឹត្ត មានគ្នាពី ៧០ ទៅ ៨០នាក់ ហើយធ្វើសកម្មភាពនៅពេលយប់ទៀតនោះ គាត់មើលមិនឃើញថាអ្នកណាជាអ្នកណាទេ ។ កូនក្តីខ្ញុំសារភាពថា មិនបានប្រព្រឹត្តទេ ខ្លះនៅដេក ខ្លះនៅ នេសាទ ។ ខ្ញុំនៅតែរក្សាការប្តឹងសុំលើកលែងចោទតាមមាត្រា ៣៤ និង ៥២ ព្រោះផ្អែកតាមមាត្រា ៣៨ នៃរដ្ឋធម្មនុញ្ញសុំដោះលែងកូនក្តីខ្ញុំតទៅ ។

According to facts cited by civil plaintiffs, there were about 70 to 80 armed men, and just only at the time when the judicial police apprehended the four accused, the plaintiffs came to place the burden of proof on them. The plaintiffs clarified that among 70 to 80 armed men performing activities at night, they were able to identify none of them. My clients confessed that they did not commit the acts; some of them were sleeping at night, some at the fishing, and I still insist on requesting to acquit the charges under Articles 34 and 52 by being based on Article 38 of the Constitution.

ក_៤_ សេចក្តីសន្និដ្ឋាននិងសន្និដ្ឋានតបរបស់តំណាងមហាអយ្យការ

តំណាងមហាអយ្យការបានធ្វើសេចក្តីសន្និដ្ឋានដូចទៅ៖

ជនជាប់ចោទ២រូប បានសារភាពនៅចំពោះមុខសវនាការ ហើយជនជាប់ចោទ ២រូបទៀតថា នគរបាលយុត្តិធមិវាយដំអោយសារភាព តែនៅអយ្យការមិនមានការបង្ខំអោយឆ្លើយទេ ។ ជនជាប់ចោទមិនដឹងពីមេធាវីប្តឹងសារទុក្ខផង ។ ចំពោះចំលើយនៅចំពោះមុខចៅក្រមថា មានការបង្ខិតបង្ខំរហូតដល់មានស្លាកស្នាមនោះ គឺពុំមានភស្តុតាងទេ ។

A.4 Final Conclusions and counter-claim by the prosecutor to the Supreme Court.

The prosecutor to the Supreme Court concludes as follows:

Two of the accused pleaded guilty at the hearing and the other two said they were compelled and ill-treated to self-incriminate by the judicial police, but when questioned by the prosecutor there was no coercion to plead guilty; the accused even did not know about the appeal to the Supreme Court initiated by their defense counsel. There is no proof to justify the harm and ill-treatment by the examining judge, such as some wound or scars left behind on their skin.

ក_៥_ការប្រកាសសាលដីកា និងការផ្តន្ទាទោស

ក្រោយពីចប់ការសួរដេញដោល ចៅក្រមជំរះបានថយទៅពិភាក្សាអស់រយៈពេល៣៥នាទី ហើយចូលមកបន្ទប់សវនាការវិញ និងប្រកាសសាលដីកាជាសាធារណៈដែលមានសេចក្តីរៀបរាប់ដូចខាងក្រោម៖

ក្រោយពីបានស្តាប់ការសួរដេញដោញដោល តុលាការយល់ឃើញថាៈ

១_បណ្តឹងសារទុក្ខរបស់មេធាវីធ្វើឡើងក្នុងការកំណត់ច្បាប់

២_មានពិរុទ្ធភាពច្បាស់លាស់លើជនជាប់ចោទទាំង៤រូបពីបទ "អំពើមនុស្សឃាតដោយចេតនា ប្លន់ និង បំផ្លិចបំផ្លាញទ្រព្យសម្បត្តិ "នៅភូមិ **ភ** ឃុំ **ឃ** ស្រុក **ស** ខេត្ត **ខត** កាលពី[illegible]**ថ២** ខែ**ខ២** ឆ្នាំ**ឆ២**

៣_ចំពោះការលើកឡើងរបស់មេធាវីថា ចំលើយសារភាពមានការបង្ខិតបង្ខំនោះពុំត្រឹមត្រូវទេ ព្រោះនគរបាលយុត្តិធម៌បានឆ្លើយនៅចំពោះមុខចៅក្រមស៊ើបអង្កេតថា មិនបានវាយដំអោយសារភាពទេ ហើយក៏ពុំមានភស្តុតាងនៃការវាយដំដែរ

៤_សាលដីកាលេខ **សដក** ចុះថ្ងៃទី**ថ៦** ខែ**ខ៤** ឆ្នាំ **ឆ៣** របស់សាលាឧទ្ធរណ៍មានលក្ខណៈត្រឹមត្រូវហើយ ។

ហេតុនេះតុលាការសំរេច ÷

តំកល់សាលដីកាលេខ **សដក** ចុះថ្ងៃទី**ថ៦** ខែ**ខ៤** ឆ្នាំ **ឆ៣** របស់សាលាឧទ្ធរណ៍ទុកជាបានការទាំងមូលតទៅ ។

តុលាការប្រកាសបិទសវនាការ ។

A.5 Announcement of the Court Decision and Sentences of the Accused

Upon terminating inquiries and cross-examination, the trial panel withdrew for deliberating on the findings and on the sentences of the accused for 35 minutes and came back to the court room to announce its decision publicly, the meaning of which is as follows:

Upon hearing replies and cross-examination, the court holds that:

1. Action in appeal to the Supreme Court initiated by the defense counsel is brought within the legal framework.

2. There exist exact guilt of willful murder, plundering and extensive destruction of property of other to be imposed on the four accused and committed by them at V village, C Commune, D district, P province, on day DD2, month MM2, year YY2.

3. The argument raised by the defense counsel, such as self-incrimination under duress or ill-treatment, is not true because the judicial police said before the examining judge that they did not ill-treat or compel the accused to plead guilty, and there is no proof to prove such ill-treatment.

4. The decision of the Court of Appeal, number N and dated day DD6, month MM4, year YY3, is substantially grounded according to law.

Therefore the Court regards the decision of the Court of Appeal dated day DD6, month MM4, year YY3, as valid entirely..

The court declares its hearing closed.

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ខ_ការវិភាគរឿងក្តី

ខ_១_ការយកកំណត់ហេតុនគរបាលយុត្តិធម៌ជាភស្តុតាងដាក់បន្ទុកសំរាប់សំរេចសេចក្តី

ជនជាប់ចោទត្រូវបានចោទប្រកាន់តាំងពី ដំណាក់កាលដំបូង ជាពិសេសតាំងពីពេលចាប់ខ្លួនមកម្លេះ ។ នគរបាលបានប្រាប់ជនជាប់ចោទថា បទចោទ គឺអំពើ«មនុស្សឃាតដោយចេតនា ប្លន់ និង បំផ្លិចបំផ្លាញទ្រព្យ សម្បត្តិ» តែមិនបានប្រាប់ថាបំពានច្បាប់អ្វីតាមមាត្រាណាទេ ។ ម្យ៉ាងទៀត បទល្មើសនេះជាបទល្មើសមិនជាក់ស្តែង ក្រោយពេលចាប់ខ្លួនហើយ ទើបសមត្ថកិច្ចនាំខ្លួនទៅទីស្នាក់ការដើម្បីធ្វើកំណត់ហេតុសួរយកចំលើយ ។ ក្រោយមក ទើបឃុំខ្លួននៅ ថ្ងៃទី**ថ៤ ខែ៩២ ឆ្នាំឆ២** ។ ជនជាប់ចោទ និងមេធាវីបានលើកថាមានការវាយដំបង្ខំអោយសារភាព នូវអ្វីដែលខ្លួនមិនបានប្រព្រឹត្ត ទាំងនៅកន្លែងប៉ូលីស ទាំងនៅព្រះរាជអាជ្ញា និង ចៅក្រមស៊ើបអង្កេត ។ នៅពេលនគរបាលសរសេរកំណត់ហេតុមិនបានអានអោយខ្លួនស្តាប់ ហើយបង្ខំអោយខ្លួនផ្តិតមេដៃ ។ ខ្លួនសារភាពថា មិនបានប្រព្រឹត្តតែនគរបាលយុត្តិធម៌មិនសរសេរតាមទេ ។ ជនជាប់ចោទនៅតែនិយាយដដែលៗនៅគ្រប់ដំណាក់កាលសវនាការថា ខ្លួនមិនបានប្រព្រឹត្តដូចការចោទទេ តែតុលាការបានទាមទាររកភស្តុតាងផ្ទុយថា តើនគរបាលមួយណាដែលធ្វើការវាយដំ ហើយមានរបួសស្នាមអ្វីខ្លះ តើមានភស្តុតាងបញ្ជាក់ពីរបួសស្នាមទេ ។ បើនគរបាលយុត្តិធម៌បង្ខំះចំលើយនៅដំណាក់កាលអយ្យការ តើមានអ្នកណាបង្ខំឱ្យឆ្លើយ ។ ចំនុចនេះមានការលំបាកដោយហេតុថា បើនគរបាលយុត្តិធម៌ជាអ្នកសួរចំលើយ ហើយជាអ្នកវាយដំបង្ខំអោយឆ្លើយជាអ្នកសរសេរចំលើយរបស់ជនជាប់ចោទ តើជនជាប់ចោទអាចប្តឹងទៅអាជ្ញាធរណាទៀត ?

B. Analysis of the Case

B1. Court Decisions to Be Solely Founded on Judicial Police Records

A charge was made upon the accused from the initial stage the criminal process, meaning from their apprehension, because the judicial police told them that they had been charged with "voluntary manslaughter, robbery, and wrongful damage to property," but they failed to mention the law under which the acts are subject to. Moreover, these offenses are not flagrant offenses, because the accused were not caught red-handed; they were brought to the police station after their apprehension simply for inquiries and compilation of records and subsequently placed in custody on day DD4, month MM2, year YY2. The accused together with their defense counsel argued they were compelled to plead guilty of what they did not commit when questioned respectively by the police, the prosecutor and the examining judge. When the police made their record, they did not read it to the accused, but rather compelled them to apply their fingerprint on the record; they told the police that they did not admit the commission of the acts, but the police did not listen to them and wrote what the accused told them. The accused kept on saying the same at every stage of the hearing that they did not commit the acts as they had been accused, but the court required proof to prove such ill-treatment, the name of the police who committed it and whether there exists any wound or scar left behind on their skin If we admit that the police ill-treated the accused, what about the replies when questioned by

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APPENDIX E

Searching for the Truth disseminates sensitive information which might otherwise not reach the public domain, sometimes with unintended consequences. During a public forum in Pailin in March 2006, one participant, Mr In Li claimed that his brother Mr In Long had been "killed by people" when his name was linked to the S-21 centre in one particular issue.[1] In Li used the occasion to ask about justice for his brother.

[1] Statement by In Li, Centre for Social Development Forum on Issues of National Importance, Pailin City 16 March 2006, Verbatim record by Neil Wilford, para 29. 8.

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APPENDIX F

Chek Sâm

A wartime member of a children's transport unit in Kampung Chhnang who was transferred into Centre Division 703 in Phnom Penh after 17 April 1975 said he was demobilised from the army in early 1976 when he was chosen for training as a cinematographer, in which capacity he was assigned to the ministry of foreign affairs in perhaps February or March 1976. He noted the training was at the Central Market, and that some trainees disappeared, this being when he first became aware of S21, to which the victims were sent. He stated that the foreign ministry film team comprised 31 persons, whose work Ieng Sary periodically inspected. It filmed visiting Chinese delegations, including that of "Da Zhai" (Chen Yonggui). Then, sometime in 1977, an elderly foreign ministry cadre named Vân reassigned him to courier work, which meant going to the Vietnamese border, carrying messages for Ieng Sary, and sending battlefield intelligence reports back to the ministry, which he believed went to Sary. He was responsible for reporting on events in Kampot, where Division 502 was engaged, and about which the ministry prepared summaries to be sent to Pol. According to this source, there were two key Foreign Ministry couriers: himself and Cheuan, who went with Ieng Sary in 1979 and whose current whereabouts are unknown. He also took many messages from Ieng Sary to Duch at the latter's residence, messages sometimes originating with Pol or Son Sen, but going to Duch via Ieng Sary, while others originated with Sary himself. Duch acknowledged receipt of these messages by radio. Some of them were heavy packages, which might have been "confessions." This source identified Duch's courier as Chhen, who took messages to Pol, Son Sen and Ieng Sary, all three of whose names were sometimes on a single packet, for them to view -- in that order -- one after the other, indicating they were the three key decision-makers in S-21 matters. Furthermore, by his account, Pol, Son Sen and Duch participated in Foreign Ministry meetings. He believed Sary probably visited S21.

He insisted that everyone in Phnom Penh knew where and what S21 was, and that everyone was threatened with being sent there if they misbehaved. Everyone also knew about Duch and his function, especially after his wedding to Rom, the former chair of the 389 hospital, in around 1976 or 1977, which was attended by all the higher ups in Phnom Penh, including Nuon Chea and Ieng Sary, although not Pol, who was absent.[1] He added that although no one ever explicitly stated that persons sent to S21 were killed, it was universally presumed this was the case. One time, Duch warned him that if he talked to anyone about what he saw when delivering messages to S21 -- which included witnesses the transfer of prisoners -- Duch would report him to Ieng Sary to have him killed. He added that personnel working at the Foreign Ministry disappeared, as did returnees from abroad, amidst checks on people's biographies that began during the time he was a courier, checks that included research in their villages of origin, such as his own, where his parents were questioned. Everyone was scared.

1 Chek Sâm alias Saom Sâm-ol alias Saom Sâm KHI0037/K08565, subject of the biography, interviewed aged 45, resident of Krang Skear village, Krang Skear commune, Toek Phoh district, Kampung Chhnang province; currently commander of the Baribaur district military subregion, Kampung Chhnang province; interviewed on 12 July 2002, by Ysa Osman, Phann Sochea, Vanthan Peou Dara.

Finally, he said that on the border he witnessed pre-battle meetings during which commanders instructed their troops to kill every last Vietnamese they encountered, "shooting to wipe them out completely," thus women, children and other civilians were massacred. He also recalls that frontline troops were ordered to send all captured Vietnamese to Duch, although some -- such as those who behaved recalcitrantly after capture -- were killed on the spot.[2]

2 Chek Sâm alias Saom Sâm-ol alias Saom Sâm KHI0037/K08565, subject of the biography, interviewed aged 45, resident of Krang Skear village, Krang Skear commune, Toek Phoh district, Kampung Chhnang province; currently commander of the Baribaur district military subregion, Kampung Chhnang province; interviewed on 12 July 2002, by Ysa Osman, Sochea, Vanthan Peou Dara.

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APPENDIX G

[redacted]

Tape ID: Theam Soeur
Place: Phum Snay, Taches Commune, Kompong Tralach District, Kompong Chhnang Province
Date: March 14, 2002
Interviewer: Craig Etcheson
Interpreter: Khieu Kola
Interviewee: Theam Soeur
Gender: male
Age: 40

Q: Where were you born?

A: This village.

Q: What is this village?

A: Phum Snay.

Q: Phum Snay? S-N-A-Y? Snay? And how old are you?

A: 40.

Q: 40? And you were recruited into the Khmer Rouge when you were what age?

A: 13.

Q: 13 years old? And what kind of training did you have?

[my phone begins ringing... small delay; then a long conversation between subject and KK]

A: He joined the Khmer Rouge after the 1975 revolution.

Q: That's all that came out of him talking for five minutes?

(KK:) Yes.

Q: Could you try to translate everything he says for me please? That would be helpful.

A: I left home in the year... At that time, B-52's dropped bombs in my village, it seemed to be 1973.

Q: 1973, yes. Um, and, you left home and joined the Khmer Rouge at that time, or did you join later?

A: I joined the cadres in 1973.

Q: 1973. And did you have any training?

A: Not any training. At first I was a cook, bringing food to soldiers in the front line.

Q: And what did you do after the liberation of Phnom Penh and the end of the war?

A: After 1975, I was still very young, 13 or 12 years old, but they took me as a full-rights soldier.

Q: Were you a member of the communist party?

A: They used the word Khmer Rouge troops, Pol Pot troops.

Q: Pol Pot troops? But you were not inducted into the communist party, the Communist Party of Kampuchea?

A: No, I didn't join the party.

Q: OK, oh, uh, during the Pol Pot regime, what jobs did you do?

A: A soldier.

Q: A soldier? Who was your commander?

A: I did not know the big commander. I just knew Huy, and I heard the name Mr. Peng, but I never saw Peng's face.

Q: You never saw Peng, but you reported to Huy. Was that Him Huy or You Huy?

A: I think that Huy was the commander, I was just a boy soldier.

Q: Where were you stationed, what was your duty post?

A: They called me comrade. I am not a section chief or anything.

Q: Yes, but where were you physically located? Where was your job? Where did you carry out your duties?

A: Security guard. At nighttime. Around Phnom Penh city. I guarded around Tuol Sleng.

Q: Around the area of Tuol Sleng? The outer perimeter of the Security Office?

A: Yes, we have Wat Tuol Tum Poun pagoda, and a road from Wat Tuol Tum Poun to Tuol Sleng. I guarded around there.

Q: Uh-huh. And, uh, how long did you work at Tuol Sleng.

A: I was there for eight months. After that, they kicked me out, sent me to work as a farmer, because they thought I was too young.

Q: And where did you go to work as a farmer?

A: Near the radio station outside Phnom Penh, near the (Last Victory?)

Q: Near Prey Sor?

A: I do not know Prey Sor.

Q: OK, uh, what are your strongest memories from the time you worked at Tuol Sleng?

A: I do not remember... Anything. I myself did not kill anybody. But I just saw one American person who had been tortured. I was a security guard, along the road from Tuol Sleng to Wat Tuol Tum Poun pagoda. One day, I saw an American person, they ordered him to sit. An American person, he sat like this, they used car tires, and they put the tires on his head, around him, and they poured gasoline around the car tires, and they burned him.

Q: And this person was alive during this?

A: The person was still alive. I saw, but I did not dare to stay around.

Q: So they burned them alive?

A: Yes.

Q: What gave you the... What did he say?

A: I remember this guy, at that time I was very young.

Q: What gave you the idea that they were Americans?

A: I asked the guard, the security guard who was confining the people. I asked, who is he? They said, "American." They told me American. I saw the guy, he was a tall man, he had white skin, but after that they went across from me.

Q: Do you remember when this happened?

A: I think maybe... Late 1976.

Q: Late 1976? Um, uh, and that was during the eight months that you were a guard?

A: I was a guard for eight months. I do not know the name of my chief. I just knew that I had to prepare myself to go to the border.

Q: To fight against the Vietnamese?

A: Yes.

Q: Can you remember what month and year it was that you began as a guard at Tuol Sleng and what month and year it was when you finished as a guard there?

A: I just remember that I was in Tuol Sleng before Khmer New Year, and I stayed there for eight months.

Q: You finished working there before Khmer New Year? What year?

A: 1977. And the American guy was killed in late '76.

Q: OK. Uh... Do you... Um... Do you know what they did with the ashes after they finished burning him?

A: I just saw the fire, during the burning. After that, I do not know where they brought it to.

Q: And this was just one person who was burned? That you saw?

A: Only one person.

Q: If we went back to Wat Tuol Tum Poun sometime, could you show me the spot where this happened?

A: I remember that the road is, uh, in the west of Tuol Sleng museum, and from the west or behind Tuol Sleng, it goes straight to Tuol Tum Poun pagoda.

Q: Uh-huh. But I'm talking about the spot where they poured gasoline on him and burned him. Wat Tuol Tum Poun is very big, and I wonder where inside the compound, where inside the wat, this happened.

A: He was burned in the middle of the road, near the corner. I still remember the place, in the four-place.

Q: At the intersection, where the roads come together?

A: Yes, in the middle of the road.

Q: Was it right by the corner of Wat Tuol Tum Poun?

A: It seemed to me that I have been to the place, and there is a road from the west of Tuol Sleng that goes to Tuol Tum Poun pagoda.

Q: So, right there on that road, by the pagoda?

A: Yes.

[we draw a map on the ground in the dirt, there is much discussion in Khmer]

A: If I went down there, I would remember the place.

[much more discussion with no translation from Kola]

Q: What did he say?

A: I do not know where is the place.

Q: That's OK. So, after you finished being a guard at Tuol Sleng, you were sent to the front to fight the Vietnamese?

A: Yes.

Q: And how long did you fight the Vietnamese?

A: Until 1979.

Q: Until 1979?

A: Until Vietnam entered Cambodia.

Q: During the invasion? Why did you stop fighting the Vietnamese after they invaded?

A: I missed my mother. I was in the jungle. I saw the mountains. I was starving. I miss my home so much. So I decided to come back home.

Q: Uh, and, uh, you came back here, to this village?

A: Yes. I came here. After I came home, I knew that my father died during the Pol Pot time. My mother and my father died during the Pol Pot time.

Q: Uh-huh. Did you find any relatives when you came back home?

A: I saw my siblings, who joined Heng Samrin troops. And in Anlong Veng, one has become handicapped, an invalid.

Q: He was a Khmer Rouge in Pailin?

A: He was a Heng Samrin troop after 1979.

Q: Ah. What did you do during the Heng Samrin time?

A: I joined the Heng Samrin troops.

Q: And did you fight the Khmer Rouge?

A: Yes, I fought the Khmer Rouge.

Q: And where did you go to fight?

A: Along the Tonle Sap river. In Kompong Thom, in the mountains, there are many mountains over there.

Q: How many years did you do that?

A: Until a little bit after UNTAC arrived in Cambodia.

Q: Uh...

A: I was demobilized.

Q: So, from 1981 to 1992, maybe twelve years?

A: Yes.

Q: Hmmm! Long time! When you joined the Heng Samrin troops, did they ask you about your background?

A: No. They did not ask. They just knew that I was a former Khmer Rouge soldier, and they assigned me to work as a member of the special team.

Q: Uh-huh. What were the duties of the special team?

A: The special team, well, sometimes they sent me, two people, to investigate, to do espionage.

Q: Espionage?

A: Yes, to spy. To do espionage, to get information on the Khmer Rouge, the way of the Khmer Rouge.

Q: Uh-huh. Did you tell the Heng Samrin people that you had worked at Tuol Sleng?

A: Nobody asked me about that. And I did not tell them.

Q: You did not volunteer this information?

A: They did not ask me, and I also did not tell them.

Q: Did your family know?

A: No. They just knew that I was a Khmer Rouge soldier.

Q: Uh, do they know now that you used to work at Tuol Sleng?

[end of side 1]
[begin side 2]

A: They bring this, and they published it in "The Truth" document.

Q: The magazine, "The Truth"?

A: The people know, some people published the story, and so they know that I worked for Division 703, which was the security for Tuol Sleng.

Q: Um...

A: Before, some people liked me, and gave me money. But now when I go out, people seem to be different from before.

Q: Different from before?

A: Me, now I am afraid, too.

Q: They are not as friendly as they were before they found this out?

A: They don't want to talk to me.

Q: What about your family?

A: My family, no problem. My wife, no problem.

Q: What about your siblings, what do they think?

A: They still like me, no problem. But the villagers...

Q: Do you have any problems with the local authorities since this information was revealed?

A: No! No! Not any problem! They knew that I was a former Khmer Rouge, now it seems that they, the big commander, there is no problem.

Q: The villagers who act differently towards you now, do they ever say why? Does anyone ever say anything to you about this, do they criticize you or scorn you?

[another KK phone call interruption]

Q: Do any of the people who seem to have changed their attitude about you say anything? Do they tell you why they feel different, do they criticize you or scorn you?

A: No, nobody criticizes me, but some people here, after they knew that I was a former Tuol Sleng guard, some people seem to be ignoring me, don't want to talk to me. Just some people, not all.

Q: Um, how has that affected your life here? Are you still able to live in the community OK? Any problems?

A: No, no problems. I have the same job as before. If we have something to talk about, we talk. If not, we don't. I am quiet, with no need to talk to everybody.

Q: Does this bother you, that people treat you this way? Does it bother you that some people now ignore you and don't want to talk to you?

A: Yes, there are some, it seems like there are 100 who like me, and 10 who hate me. One in ten.

Q: Ten percent. Hmmm. Do you think there is anything you could do or say that would change the feelings of the ten percent who hate you?

A: I just know that before they knew about my history in Tuol Sleng, and after they knew, it seemed like their attitude changed. Before, they talked to me in a friendly way, and after they knew, they talk to me in an unfriendly way. This makes me understand about myself.

Q: Uh, you know, uh, that there were very many Khmer Rouge cadre who were recruited from this commune and this district, and many of those also ended up working at Tuol Sleng. We know of 35 people who come from around here who worked at Tuol Sleng, but only a few have come back to live here. Um, uh, the others, do you think they should come back and live here too?

A: Yes, I want to see them come back. I hope that they are still alive. If they are still alive,

they can come back to see their families like me.

Q: Do you think they would be happy here, that they would be accepted by most of the community?

A: The parents would be very happy. The parents feel very happy when they see their children come back, because then they know that their children are still alive. This makes them very happy, to see their children come back home.

Q: Um, hmmm. All of the politicians, they always talk about national reconciliation, but it sounds to me like some of the members of the community here treated you differently when they find out that you were Khmer Rouge security, so maybe reconciliation is not finished here yet.

A: I am not sure about this subject. Now, my concentration is thinking about my wife's living conditions, my children's living conditions, how to find rice to eat. But I do not know in their minds, in their hearts, who loves me, who hates me. We were living, we were rescued by the front of Heng Samrin, Hun Sen, and we came back together with the community. If someone still hates us, because of our past history, we don't know what to say about this, it is up to them.

Q: The king has decided that there will be trials for the Khmer Rouge leaders. I wonder what is your thought on this idea. Do you think it is a good thing for national reconciliation, or a bad thing? These trials?

A: I am a Khmer person, I am a simple farmer. This question is up to ministers, to the leaders of the country. My idea is, you know, Ta Mok, Pol Pot, in the Khmer language we say that those who do bad things will get bad things. Those who do good things will get good things.

Q: Uh, so, do you think it should be up to Buddha to decide this, or should it be up to Hun Sen?

A: It is up to the King. So, who killed the people? We don't know. It is up to the King and Samdech Hun Sen. If they decide to kill those guys, or put them on trial, or if they think that all those guys are Khmer people and they have to find another way, whatever, it is up to them.

Q: You mention that you don't know who killed the Khmer people, and yet you worked at Tuol Sleng. Do you know what happened at Tuol Sleng, what went on there?

A: I really don't know. I was not a part of the company that killed those guys, I was living separately from them.

Q: So, you don't know if there was killing at Tuol Sleng or not?

A: I really don't know. My job was security guard, and they told me, 'You have to guard the enemy.' And the enemy is inside the prison. I am not sure who was the enemy. So my job was only to defend and protect, to make sure that the enemy did not go out of the prison.

Q: To keep the prisoners from escaping, uh-huh.

A: So they stayed inside, and I was outside. I guarded outside.

Q: Like, uh, you know, Ches?

A: Yes. In Tuol Sleng, he was called Peou...

Q: Which is the opposite of what he told us this morning, but that's OK. Um, now-a-days, do you ever think about when you used to work at Tuol Sleng?

A: No, I don't think about it. I just think about my living conditions, the life of my wife, and try to find rice for my family to eat. Even when I am sick, I still work to find money to get some rice.

Q: Do you ever have dreams about that time?

A: I don't have any dreams. But one point disappoints me. I served the organization of Pol Pot, but when I came back, my parents were dead. That makes me disappointed.

Q: You are unhappy that you never got to see your parents again?

A: Yes.

Q: This would make anyone unhappy, I think.

A: We followed them and tried to work hard, and we think maybe the interests of our parents are protected, but after all that, when we get back, our parents have died. And we had no right to follow our religious ceremonies. They died because of starvation.

Q: OK, I think that is about it... Um, anything else you can think of?

(KK:) Maybe we should ask if he himself is a part of national reconciliation or not? Does he understand about this?

Q: OK, that's a good question, go ahead and ask him about that.

A: There are two different kinds of people. One group of people is happy with me, and another group of people that is unhappy with me. I think the group that is unhappy with me, it seems to me that they do not understand about how to reunite, how to achieve national reconciliation. So, I came back home, I try to work hard, earn a living, so they should consider me to be trustworthy, they should not ignore me. Now I have come back into the community, and I try to be a good citizen.

Q: And... What, uh, why do you think that group of people who doesn't like you, why are they that way? What is it about them that makes them have that attitude?

A: It seems to be because of, oh, maybe those guys think that Mr. Soeur used to be a Tuol Sleng security guard, he is not a good man. They do not torture me, they do not look down on me, but I think maybe in their hearts, they think, oh, this guy is a former security guard in Tuol Sleng, so he is not good, he is bad.

Q: Well, everybody else knows that you were a former security guard, so why is it that the other group accepts you, and one group doesn't?

A: They just knew, when a reporter, when some foreigner came to my home to ask me, then some people changed their attitude. It seemed to be, because of, they said, oh, this guy worked for Tuol Sleng. They already knew that Tuol Sleng was a very bad place. I go to get the water, but I dare not to walk at night, I quickly come home at night. I dare not to walk at nighttime.

Q: Because you do not feel safe? Maybe someone will take revenge against you?

A: Yes, I have to protect, I have to provide security for myself, because a human being, it is not normal.

Q: Because the human being is what?

A: Because the human being... There are two kinds of human beings. Some are bad human beings, bad people, so I have to take care about this.

Q: That's a good place to end. Thank you.

[end tape]

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APPENDIX H

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THE CENTER FOR SOCIAL DEVELOPMENT

CSD Discovers Only Woman Survivor of Tuol Sleng

Press Release

PHNOM PENH, 1 August 2007: The Center for Social Development (**"CSD"**) is pleased to say that the sole female survivor of the notorious Tuol Sleng S-21 torture center was discovered and has agreed to come forward to tell her story as a result of a CSD Public Forum funded by the German Development Service and Diakonia.

CHIM Math was believed to be deceased for over thirty years along with at least 14,000 other prisoners who were tortured at Tuol Sleng. But on 17 July 2007, her neighbors from Kampong Thom province who visited Tuol Sleng as part of CSD's Public Forum's Provincial Tour to Phnom Penh (ECCC, Tuol Sleng, Choeung Ek) confirmed that she was still alive. (Members of Pol Pot's relatives were on this same Provincial Tour.) They recognized her from her photograph that was displayed at Tuol Sleng and immediately alerted CSD's CHUON Sokunthy.

CSD has since located CHIM Math who has told us that while she did not come forward all these years in order to avoid reliving her traumatic experience, she is now prepared to do her part in helping Cambodia and the international community ascertain the truth of what happened at Toul Sleng.

CSD's team of psychologists and social workers has and will continue to provide CHIM Math with the psychological support she requires and will assist in documenting her account of what she went through at the hands of the Khmer Rouge.

CSD is confident that CHIM Math's case will be thoroughly investigated by the police and judicial authorities at the Extraordinary Chambers in the Courts of Cambodia (**"ECCC"**). CSD is prepared to assist the ECCC in this process as best it can and is committed to ensuring that that CHIM Math is afforded the full measure of protection available to her under the law.

CSD's Executive Director, SENG Theary, and the sponsors of CSD's Public Forum on "Justice & National Reconciliation" are heartened that CHIM Math has come forward as a result of a CSD Public Forum.

CHIM Math's case reaffirms their belief that public forums are an important tool to reach out to the Cambodian people in all the provinces, involve them in the ongoing process of achieving justice and national reconciliation and, most importantly, to uncover the truth through their first-hand accounts.

For further information, please contact:

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About the Center for Social Development

The Center for Social Development (**"CSD"**) is a non-profit, non-governmental organization. CSD was established in Phnom Penh since 1995 (recognized by the Council of Ministers in 1995 and the Ministry of Interior in 2001) and seeks to promote democratic values and improve the quality of life of the Cambodian people.

The mission of CSD is to encourage broad participation (at both national and local levels) in public affairs, develop a respect for human rights and the rule of law, enhance transparency and accountability in the public sphere, and raise awareness of issues of national concern through all forms of media. CSD has five main operational units and 3 new projects to carry out this mission: **(i)** Legal, **(ii)** Governance, **(iii)** Public Forum, **(iv)** Elections & Parliamentary, **(v)** Research & Publications, **(vi)** i-REACH Kep Pilot Project, **(vii)** *Voice of Justice* Program, **(viii)** *Youth Leadership Challenge* television series.

The upcoming trials of the alleged former leaders of the Khmer Rouge, is a significant component of this reconciliation process which CSD will address through its public forums on "Justice & National Reconciliation". The main goals of the forums are **(i)** to disseminate information regarding the Khmer Rouge Tribunal and **(ii)** to help manage the expectations of the participants as to what the Khmer Rouge Tribunal can achieve in terms of peace, justice and reconciliation. To achieve these goals, CSD will provide a safe venue for open dialogue and discussions amongst the provincial and Phnom Penh participants.

CSD has been conducting public forums on issues of national concern at the grassroots across Cambodia since 1996.

In **pre-ECCC 2000**, CSD conducted the 1st series on "***Justice & National Reconciliation***" in:

(i) **Battambang,**
(ii) **Phnom Penh**, and
(iii) **Sihanoukville.**

CSD conducted its 2nd series of forums in **2006** in:

(i) former Khmer Rouge stronghold **Pailin,**
(ii) **Kampot** (with participants from Phnom Voar, Koh Sla, Kampong Trach, Anlong Kropoh, Kep and Sihanoukville), and
(iii) **Kratie** (ethnic minority participants from Mondolkiri, Rattanakirri, and Stung Treng).

For the next three years, CSD plans to conduct at least 6 public forums per year across Cambodia, including arranging for some 50 provincial participants to tour the ECCC and other Phnom Penh sites prior to each forum, and culminating in a Phnom Penh conference at the end of each year.

Since January 2007, CSD has conducted forums in:

(i) **Siem Reap,**
(ii) **Mondolkiri** (ethnic minority tribal groups),
(iii) Svay Rieng (province of ECCC public affairs officer REACH Sambath and CSD executive director Theary SENG, where both lost their respective parents), and
(iv) **Kampong Thom** (provincial birthplace of Pol Pot, where his relatives attended CSD tour and public forum).