



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Before: Judge NIL Nonn, President
Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

Date: 12 June 2015
Original language(s): Khmer/English/French
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DECISION ON KHIEU SAMPHÂN'S REQUEST FOR CONFRONTATION AMONG WITNESS SREY THAN AND CIVIL PARTIES SAY SEN AND SAUT SAING AND DISCLOSURE OF AUDIO RECORDINGS OF INTERVIEWS OF SAY SEN

Co-Prosecutors
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Accused
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1. INTRODUCTION

1. The Trial Chamber is seized of KHIEU Samphan's request for confrontation among witness SREY Than (2-TCW-944) and Civil Parties SAY Sen (2-TCCP-271) and SAUT Saing (2-TCCP-304) and disclosure of audio recordings of interviews of Say Sen.¹
2. Civil Party SAY Sen testified on 4-6 February and 25 March 2015.² Witness SREY Than testified on 19, 23 and 24 February 2015.³ Civil Party SAUT Saing testified on 24 and 25 March 2015.⁴

2. SUBMISSIONS

3. The KHIEU Samphan Defence submits that in the course of his testimony, SAY Sen, who identifies himself as a former detainee of Kraing Ta Chan Security Centre, made allegations against SAUT Saing and SREY Than, who were both staff members of the same security centre at the time relevant to the charges.⁵ These allegations concerned: (i) the responsibility of SAUT Saing and SREY Than for the killing of two children; (ii) the perpetration by SAUT Saing and SREY Than of the rape and the subsequent killing of two female prisoners; (iii) the particularly violent inclinations of SAUT Saing and SREY Than; (iv) their attempts to interfere with the testimony of SAY Sen; and (v) the role of SAUT Saing as supervisor of the guards at Kraing Ta Chan security centre.⁶ It is submitted that SAUT Saing and SREY Than categorically refuted the above allegations in the course of their testimony before the Trial Chamber.⁷ Accordingly, pursuant to Internal Rules ("IR") 91 and 93, the KHIEU Samphan Defence requests that the Chamber recall SAY Sen, SAUT Saing and SREY Than and hear them together in order to clarify the contentious issues identified in the Request.⁸

¹ "Requête aux fins de confrontation de la partie civile SAY Sen avec le témoin SREY Tân et la partie civile SAUT Saing et de communication de l'enregistrement audio de ses déclarations devant les co-Juges d'instruction" ("Request"), E348, 23 April 2015. Following the oral presentation of this request on 25 March 2015, the Trial Chamber instructed the KHIEU Samphan Defence to file its submissions in writing (see T. 25 March 2015, at 107-109).

² T. 4 February 2015; T. 5 February 2015; T. 6 February 2015; 25 March 2015.

³ T. 19 February 2015, T. 23 February 2015 and 24 February 2015.

⁴ T. 24 March 2015; T. 25 March 2015.

⁵ Request, para. 2.

⁶ Request, paras 6-10.

⁷ Request, paras 2, 6-10.

⁸ Request, paras 4, 11, 20.

4. The KHIEU Samphan Defence further contends that SAY Sen's credibility is called into question by testimony before the Trial Chamber which varied significantly from previous testimony or statements before DC Cam and the Co-Investigative Judges, specifically with respect to whether a certain female prisoner at Kraing Ta Chan was raped.⁹ To allow the Trial Chamber to properly assess the Civil Party's credibility and avoid infringing the rights of the defence, the KHIEU Samphan Defence requests that the Trial Chamber obtain from the Office of the Co-Investigative Judges ("OCIJ") the audio recordings of the interviews with SAY Sen.¹⁰

5. The Co-Prosecutors respond that sufficient opportunity has been provided to the parties to question SAY Sen, SAUT Saing and SREY Than and that the Trial Chamber is already in a position to assess the reliability and credibility of these witness and civil parties on the issues outlined in the Request.¹¹ In addition, they submit that some issues are either irrelevant to the charges against the Accused or have been already touched upon in other testimonies and contemporaneous documents.¹² The Co-Prosecutors therefore submit that confronting the witness and civil parties in court on the issues proposed in the Request would "unduly delay the trial without substantially contributing to the search for the truth".¹³ Further, the Co-Prosecutors contend that granting access to the audio recordings of the interviews of SAY Sen before the Co-Investigative Judges is either unnecessary, as all parties have already access to them, or impossible, to the extent that the request encompasses recordings which do not exist.¹⁴ Accordingly, the Co-Prosecutors request that the Trial Chamber deny the Request.¹⁵

6. The Civil Party Lead Co-Lawyers respond that "there is no right of confrontation as between or amongst witnesses and/or civil parties"¹⁶ and that any inconsistency in the evidence can be pleaded in the final submissions at trial.¹⁷ They contend that a confrontation among the witness and civil parties is unlikely to assist the Chamber in ascertaining the truth, and may both negatively impact the goal of an expeditious trial and jeopardize reconciliation

⁹ Request, paras 3, 17. (referring to E3/4846, at 6 and E319.1.24, at 16).

¹⁰ Request, para. 19.

¹¹ Co-Prosecutors' Response to «Requête aux fins de confrontation de la partie civile SAY Sen avec le témoin SREY Than et la partie civile SAUT Saing et de communication de l'enregistrement audio de ses déclarations devant les Co-Juges d'instruction», E348/1, 30 April 2015 ("Co-Prosecutors' Response"), paras 4-5.

¹² Co-Prosecutors' Response, para. 4.

¹³ Co-Prosecutors' Response, para. 5.

¹⁴ Co-Prosecutors' Response, para. 6.

¹⁵ Co-Prosecutors' Response, para. 7.

¹⁶ Civil Party Lead Co-Lawyers' Response to the Khieu Samphan Defense's Motion of 23 April 2015 (E348), E/348.2, 1 May 2015 ("Civil Party Lead Co-Lawyers' Response"), para. 7.

¹⁷ Civil Party Lead Co-Lawyers' Response, paras 7-8

in the community.¹⁸ They accordingly request that the Trial Chamber deny the Request for a confrontation, while leaving the disclosure of the audio recording of SAY Sen's interviews to the Chamber's discretion.¹⁹

7. The Civil Party Lead Co-Lawyers inform the Trial Chamber that they have consulted with the legal representatives of Civil Party SAY Sen and Civil Party SAUT Saing. As a result, the Civil Part Lead Co-Lawyers submit that there is no conflict of interest between the consolidated group of civil parties in the case and the individual interests of SAY Sen and SAUT Saing.²⁰

3. APPLICABLE LAW AND FINDINGS

8. The Trial Chamber recalls its discretion pursuant to IR 91 to hear witnesses, Civil Parties and experts in the order it considers useful. Pursuant to IR 87(3), the Trial Chamber may decline to hear evidence that is (a) irrelevant or repetitious; (b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports to prove; (d) not allowed under the law; or (e) intended to prolong proceedings or frivolous.²¹

9. The Trial Chamber recalls that there is no specific provision on confrontation of witnesses, Civil Parties or experts at the trial stage²². However, the Trial Chamber is of the view that it may decide to organize a confrontation, including between witnesses and civil parties, when justified and warranted based on the circumstances, as it falls within the Chamber's discretion pursuant to IR 87.4 and 91 to take any action conducive to ascertaining the truth.

10. Nevertheless, the Trial Chamber considers that even when serious allegations made by a witness, a Civil Party or an expert are denied or contradicted by other testimonies, this does not necessarily justify, by itself, a confrontation among them, especially when all the parties

¹⁸ Civil Party Lead Co-Lawyers' Response, paras 8-9.

¹⁹ Civil Party Lead Co-Lawyers' Response, para. 1 and p. 5.

²⁰ Civil Party Lead Co-Lawyers' Response, para. 10. This submission responds to the request by the NUON Chea Defence (see e-mail of 28 April 2015 from the NUON Chea Defence to the Senior Legal Officer of the Trial Chamber) to clarify the issue of conflict of interests concerning the legal representation of Civil Party SAY Sen and Civil Party SAUT Saing.

²¹ IR 87(3) and 87(4); *see also*, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, E188, 26 July 2010, para. 41; *Prosecutor v. Karemera et al.*, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, ICTR Appeals Chamber (ICTR-98-44-AR73.14), 30 January 2009, para. 25 (finding that the repetitive nature of testimony is to be considered as a factor in determining whether hearing it is necessary).

²² For a confrontation decided by Co-Investigative Judges at pre-trial stage see IR 59(3)-(4) and 60.

had an opportunity to question them including on possible discrepancies or variations in their statements.

11. The Chamber notes that the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan Security Centre. It further notes that on 25 April 2014 it rejected a request by the Lead Co-Lawyers for the Civil Parties to add charges of rape (outside the context of forced marriage) committed within Security Centres.²³ In this respect, the Co-Investigating Judges found that rape occurred in Kraing Ta Chan Security Centre, among other places.²⁴ However, the Co-Investigating Judges found that, outside the context of forced marriage, it could not be considered that rape was one of the crimes used by the CPK leaders to implement the alleged common purpose in the context of a joint criminal enterprise.²⁵ Nor did the Closing Order allege that the Accused bear criminal responsibility for rape in Kraing Ta Chan Security Centre on the basis of any other mode of liability.²⁶

12. In the current case, the parties had ample opportunity to identify and bring to the attention of these Civil Parties and this witness the alleged inconsistencies between their in court testimonies and their prior statements on all of the issues raised in the Request. Civil Parties SAY Sen and SAUT Saing and witness SREY Than were confronted in court with their respective statements and declarations.²⁷ Therefore, the process of in-court examination of each of these individuals adequately protected the rights of the Accused. The evidence heard in court, including contradictions between testimonies, will be assessed by the Chamber at the appropriate stage. In the circumstances, the Trial Chamber is not persuaded that a further confrontation between these individuals is necessary.

13. The Trial Chamber notes that the Request has been filed at a time close to the conclusion of the presentation of evidence on the trial segment concerning Tram Kak district. Nevertheless, the nature and content of the allegations that are object of the Request were mostly available to the parties since the pre-trial stage. All individuals concerned were already heard by the OCIJ investigators during the investigative phase of Case 002. Consequently, the

²³ Trial Chamber Memorandum, Further information regarding remaining preliminary objections, E306, 25 April 2014, para. 3.

²⁴ Case 002, Closing Order, D427, 15 September 2010, para. 1426.

²⁵ Case 002, Closing Order, D427, 15 September 2010, para. 1426.

²⁶ See Case 002, Closing Order, D427, 15 September 2010, paras 1545 (planning), 1548 (instigating), 1551 (aiding and abetting), 1554 (ordering), 1559 (superior responsibility).

²⁷ The Chamber refers to some excerpts from the transcripts of the testimonies of SAY Sen, SREY Than and SAUT Saing, in which they were confronted with the issues raised in the Request: T. 23 February 2015 (SREY Than), pp. 40-41, 92-96; T. 24 March 2015 (SAUT Saing), pp. 16-17, 61, 68; T. 25 March 2015 (SAY Sen), pp. 71-72; T. 25 March 2015 (SAUT Saing), pp. 8, 11-12, 14-15, 50-52.

written records of their interviews, as well as the Civil Party applications of SAY Sen and of SAUT Saing, were part of the investigation Case File.²⁸ Therefore, the testimony of SAY Sen did not bring these allegations to the attention of the Trial Chamber and the parties for the first time, but merely put them forward orally rather than in writing. Lastly, the Chamber also takes into consideration its duty to ensure the expeditiousness of the trial. In this regard it notes that recalling these Civil Parties and witness at this advanced stage of the proceedings would require checking their availability for the same hearing days, making new arrangements for their transportation to and from the ECCC and ensuring their protection. The implementation of these measures would be extremely time-consuming. This has to be balanced against the limited benefits, if any, from a potential confrontation.

14. In light of the foregoing, the Chamber considers that a confrontation would not contribute further to assessing the credibility of the witness and Civil Parties. Nor would a confrontation be conducive to ascertaining the truth. Thus, in accordance with IRs 87(3) and 91 and in view of present circumstances, the Trial Chamber denies this request.

15. With regard to the request to disclose the audio recordings of SAY Sen's interviews with the OCIJ, the Trial Chamber first notes that the audio recording of interviews E3/5129 and E3/5214 are already available in the record of Case 002/02 and, as such, are accessible to the parties in accordance with IRs 55(6) and 86. Conversely, the OCIJ indicated that the audio recordings of E319/20.2 and E319.1.24 do not exist.²⁹

16. In light of the above, the Chamber considers that the request advanced by the KHIEU Samphan Defence to obtain the audio recording of interviews of SAY Sen is moot. With regard to the inconsistencies alleged between SAY Sen's previous statements and the oral evidence provided in court the Trial Chamber recalls that, as a general principle, these are best assessed by the Chamber when determining the probative value and weight to be accorded to that evidence.³⁰

²⁸ See Written Records of Interview of Witness SAY Sen: E3/5129, 30 October 2007, E3/5214, 1 September 2008, and DC Cam interview annexed to SAY Sen's Civil Party application, E3/4846 filed on 6 May 2009; Written Records of Interview of Witness SREY Than; D125/129, 16 September 2008 and D232/93, 29 December 2009; Written Record of Interview of Witness SAUT Saing: D40/21, 28 November 2007 and SAUT Saing's Civil Party application, D22/88 15 September 2009.

²⁹ See E-mail Exchange between the Trial Chamber and the OCIJ dated 19 May 2015, E348/4.1.

³⁰ Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred during the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E/241/1), E251, 7 December 2012, para. 28.

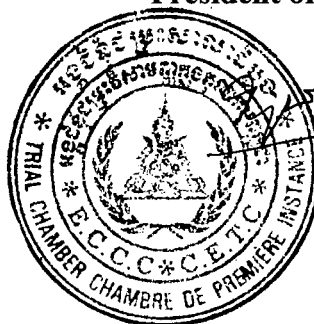
17. Finally, the Trial Chamber notes the arrangements made to provide Civil Party SAY Sen and Civil Party SAUT Saing with separate legal representation,³¹ with a view to addressing the potential conflict of interest identified by the Chamber.³² Given the circumstances, the Trial Chamber considers that the measures taken satisfactorily addressed the potential conflict of interest and ensure proper legal representation of these two civil parties, consistent with IRs 21 and 23*ter*.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the KHIEU Samphan Request to recall SAY Sen, SAUT Saing and SREY Than and to hear them simultaneously; and

DENIES as moot the KHIEU Samphan Request to obtain the audio recording of OCIJ interviews of SAY Sen.

Phnom Penh, 12 June 2015
President of the Trial Chamber



Chrothun
Nil Nonn

³¹ E-mail from Civil Party Lead Co-Lawyers to Senior Legal Officer of the Trial Chamber, 23 February 2015, E339/1; E-mail from Senior Legal Officer of the Trial Chamber to Civil Party Lead Co-Lawyers, 23 February 2015, E339/2. *See also* Withdrawal from representing Civil Party SAUT Saing (2-TCCP-304) and SAY Sen (2-TCCP-271), E339/3 and E339/4, respectively.

³² E-mail from Senior Legal Officer of the Trial Chamber to Civil Party Lead Co-Lawyers, 6 February 2015, E339.