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ព្រះ រាជាណាចក្រ កម្ពុជា
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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០១/១៨-កក្កដា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 001/18-07-2007-ECCC/SC

Before:

- Judge KONG Srim, President**
- Judge Chandra Nihal JAYASINGHE**
- Judge SOM Sereyvuth**
- Judge Agnieszka KLONOWIECKA-MILART**
- Judge MONG Monichariya**
- Judge Florence Ndepele MWACHANDE-MUMBA**
- Judge YA Narin**

Date: 21 December 2015

Language(s): Khmer/English

Classification: ~~CONFIDENTIAL~~ PUBLIC REDACTED

**DECISION ON RECLASSIFICATION OF VIDEO RECORDING E3/247R AND
 ON VARIATION OF RELATED PROTECTIVE MEASURES**

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Convicted Person

KAING Guek Eav alias
Duch

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively);

HAVING RECEIVED a request by the Public Affairs Section of the ECCC (“Request”) to reclassify as public a confidential video recording of an on-site investigative action carried out by the Co-Investigating Judges on 26 February 2008 at the Choeung Ek Memorial in Kandal province (“Video”);¹

NOTING that the confidential classification of the Video has been thus far maintained in order to comply with the protective measures [REDACTED]

NOTING that the Witness and Expert Support Unit (“WESU”), upon this Chamber’s request, conducted a reassessment of the potential risk that the disclosure of the Video would pose [REDACTED] and submitted a report on 15 December 2015 (“Report”);³

NOTING that the Report [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] taking into account the passage of time from the conclusion of

¹ Video Recording of Crime Scene Reenactment at CH[O]EUNG Ek (All), 26 February 2008, E3/247R (Confidential). *See* Report of Crime Scene Reenactment at CH[O]EUNG Ek on 26 February 2008, 17 June 2009, E3/243 (Confidential).

² [REDACTED]

³ Witness and Expert Support Unit (WESU) Report on Risk Assessment [REDACTED] 16 December 2015, F31 (Strictly confidential).

⁴ Report, paras 6-11.

those proceedings and the fact that no other Case 001 witness has reported serious negative consequences materialising after having appeared in court, “[m]uch of the impetus for the original granting of the protection measures has diminished”;⁵

NOTING that the Report observes, however, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RECALLING sub-sections 3 and 4 of Article 4 of the Practice Direction on Protective Measures,⁷ which empower the Co-Investigating Judges or the Chambers that are “seized of the matter” to “vary orders for protective measures on their own motion, or at the request of one of the parties”, provided that a number of procedural steps are taken, including the consultation of the WESU and the attempt to obtain, whenever possible, the consent of the person in relation to whom the variation is sought;

RECALLING sub-sections 2 and 4 of Article 12 of the Practice Direction on Classification,⁸ which task the “last judicial office sei[z]ed of a case” to carry out a review of the security classification of the records in the case file, establishing, as appropriate, general guidelines to be followed in the process; and further **RECALLING**, in this regard, that the Supreme Court Chamber, upon conclusion of Case 001, established such guidelines and conducted the prescribed review,⁹ holding, *inter alia*, that all documents shall in principle be reclassified as public, except where certain reasons for non-disclosure continue to remain valid, such as in case of protective measures,¹⁰ and that “[a]ny concerned party, including [...] the Public

⁵ Report, paras 14-16.

⁶ Report, paras 17, 19-20.

⁷ Practice Direction on Protective Measures, ECCC/03/2007/Rev.1, 29 April 2008 (“Practice Direction on Protective Measures”).

⁸ Practice Direction on Classification and Management of Case-Related Information, ECCC/004/2009/Rev.2, 24 April 2014 (“Practice Direction on Classification”).

⁹ Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, F30/2 (“Guidelines on Reclassification”). *See also* Order from the President of the Supreme Court Chamber entitled “Reclassification of Documents in the Case 001 Case File”, 6 September 2012, F30/3 (Strictly confidential).

¹⁰ Guidelines on Reclassification, para. 7(c)(i) *read in conjunction with* Practice Direction on Protective Measures, Article 4.1.

Affairs Section, may seek reclassification of any document which retains its Confidential or Strictly Confidential status following the conclusion of the reclassification procedure”;¹¹

CONSIDERING that the recalled legal framework is to be interpreted so as to endow the last judicial office seized of a case with jurisdiction not only to reclassify documents in the case file, but also to vary protective measures that are still in place following conclusion of the case in which they were ordered, given that the matters are often intertwined and should therefore be dealt with by the same judicial organ, and that, as confirmed by sub-section 2 of Article 12 of the Practice Direction on Classification and implied by sub-section 3 of Article 4 of the Practice Direction on Protective Measures, the last judicial office seized of a case is normally best placed to undertake a full assessment of the relevant circumstances and may also, where necessary, request “all relevant information from the proceedings in which the protective measure was first ordered”;¹²

CONSIDERING, therefore, that the Supreme Court Chamber, being the last judicial office seized of Case 001, has jurisdiction to hear the Request, including the power to vary protective measures ordered in Case 001;

CONSIDERING that the need to order protective measures must be carefully assessed on a case-by-case basis in light of all relevant facts, bearing in mind that subjective feelings of fear and anxiety, however sincere, must be underpinned by objective elements justifying the personal perception, so as to strike a judicious balance between the demand of protection of victims and witnesses and the overall fairness of proceedings;¹³ and that, therefore, protective measures must be proportional to the potential risk to which an individual and his or her family is or will likely be exposed;¹⁴

CONSIDERING that, according to information conveyed by the WESU, [REDACTED] [REDACTED] [REDACTED] no serious negative consequences were reported by witnesses appearing in Case 001, and a considerable time span has elapsed without any act of violence or harassment having been brought to the attention of the Chamber;¹⁵

¹¹ Guidelines on Reclassification, para. 7(g).

¹² Practice Direction on Protective Measures, Article 4.3.

¹³ See Internal Rules 21(1), 29(1)-(3); Practice Direction on Protective Measures, Article 1.3, 1.4.

¹⁴ See Practice Direction on Protective Measures, Article 1.4.

¹⁵ Report, paras 8-10, 15.

CONSIDERING that the protective measures granted at the time by the Trial Chamber did not appear to be based on objective threats, but were provided as a “preventative mechanism”, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁶

CONSIDERING [REDACTED]
[REDACTED]
[REDACTED]¹⁷

CONSIDERING, however that, in the Supreme Court Chamber’s opinion and consistent with the recommendations of the WESU, it is more prudent to order that the release of the Video not be associated with the release of any additional information [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

PURSUANT TO Internal Rule 29 and Article 4.3 of the Practice Direction on Protective Measures;

HEREBY:

GRANTS the Request;

ORDERS that the protective measures [REDACTED] are varied as follows:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁶ Report, paras 12, 14-16.

¹⁷ Report, para. 11.

[REDACTED]

DIRECTS the Records and Archive Unit to reclassify the Video as public;

DIRECTS the Case File Officer to notify the instant decision to the Trial Chamber, Pre-Trial Chamber, Co-Investigating Judges, Co-Prosecutors, Defence Support Section, WESU and Public Affairs Section.

Phnom Penh, 21 December 2015

President of the Supreme Court Chamber



KONG Srim