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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: **24 December 2015**
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DECISION ON INTERNATIONAL CO-PROSECUTOR'S REQUEST TO CALL ADDITIONAL WITNESSES DURING THE CASE 002/02 TRIAL SEGMENT ON TREATMENT OF THE CHAM

Co-Prosecutors
CHEA Leang
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Accused
NUON Chea
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1. INTRODUCTION

1. The Trial Chamber is seised of a request by the International Co-Prosecutor to call two previously-proposed¹ witnesses (2-TCW-938, 2-TCW-894) and one additional witness (2-TCW-988) during the trial topic on the treatment of the Cham and to admit into evidence a Written Record of Interview of 2-TCW-988 (“ICP Request”).² The KHIEU Samphan Defence and the NUON Chea Defence object to the ICP Request and put forward additional requests of their own.³

2. On 5 October 2015, the Chamber issued a memorandum granting the ICP Request, with reasons to follow.⁴ The Chamber hereby provides reasons for its decision.

2. SUBMISSIONS

3. The International Co-Prosecutor submits that 2-TCW-938 and 2-TCW-894 may offer critical evidence on the existence of a policy or plan to systematically destroy the Cham as a group and on the implementation of such plan, from the Sector to the District and Commune levels.⁵ It is submitted that the significance of 2-TCW-938’s testimony has increased since the witness was first proposed due to five additional WRIs that have become available.⁶

4. The International Co-Prosecutor contends that 2-TCW-988 may give evidence relevant to the arrests carried out against Cham families and their subsequent transfer to Wat Au Trakuon Pagoda security centre,⁷ and requests the admission into evidence of 2-TCW-988’s WRI.⁸ It is submitted that this document was not available prior to the start of Case 002/02 trial as this witness was first interviewed by OCIJ in August 2014 and his WRI was disclosed

¹ Co-Prosecutors’ Proposed Witnesses, Civil Party and Expert List and Summaries for the Trial in Case File 002/02, E305/6.4, 9 May 2014, Annex III, p. 26.

² International Co-Prosecutor’s Request to Call Additional Witnesses During the Case 002/02 Trial Segment on Treatment of the Cham, E366, 15 September 2015.

³ Réponse de la Défense de M. KHIEU Samphân à la demande du co-Procureur international d’entendre trois témoins supplémentaires sur le traitement des Chams et demande incidente d’avoir la liste globale des témoins à comparaître dans 002/02, E366/1, 25 September 2015 (“KHIEU Samphan Defence Response”); NUON Chea’s Response to the International Co-Prosecutor’s Request to Call Additional Witnesses on Treatment of the Cham, E366/2, 25 September 2015 (“NUON Chea Defence Response”).

⁴ Decisions on E368, E366 and the KHIEU Samphan Defence request to postpone the appearance of 2-TCE-95 (E366/1), E372, 5 October 2015, para. 2.

⁵ ICP Request, paras 2, 6-8, 10-12.

⁶ ICP Request, para 5.

⁷ ICP Request, para. 3.

⁸ ICP Request, paras 15-16.

to Case 002/02 only in March 2015.⁹ Witness 2-TCW-988's WRI is relevant to Case 002/02 and it satisfies the remainder of the requirements of Internal Rules 87(3) and (4).¹⁰

5. The KHIEU Samphan Defence opposes the ICP Request.¹¹ It contends that the ICP Request is late, coming more than five weeks after the notification by the Chamber of the list of witnesses to be called to testify during the relevant topic,¹² and that the International Co-Prosecutor has not exercised due diligence.¹³ Concerning the two previously-requested witnesses, the KHIEU Samphan Defence submits that they were unable to oppose the admission of their WRIs because of the volume of documents disclosed at the time. As for the additional witness, the KHIEU Samphan Defence contends that the International Co-Prosecutor was aware of 2-TCW-988's WRI since between August 2014 and January 2015 and yet only requested to admit into evidence his WRI on 15 September 2015.¹⁴

6. In the event that the Chamber grants the ICP Request, the KHIEU Samphan Defence asks the Chamber to both adjourn the hearings in order to provide the Defence with sufficient time to prepare for the testimony of these witnesses and, accordingly, to postpone the testimony of 2-TCE-95, the expert on the treatment of the Cham.¹⁵ It further reiterates previous requests for the Chamber to: (i) provide the parties with the list of all witnesses that it intends to call during the trial in Case 002/02; (ii) call seven individuals that the Defence originally proposed on 7 May 2014; and (iii) exclude from Case 002/02 all documents originating from investigations in Cases 003 and 004 unless such material contains exculpatory information or it relates to witnesses due to appear before the Trial Chamber.¹⁶

7. The NUON Chea Defence submits that the ICP Request should be rejected as void and without effect on the basis that it was not signed by the National Co-Prosecutor, in violation of the ECCC Law and the ECCC Agreement.¹⁷ In the first alternative, it requests the Chamber to delay any decision on scheduling witnesses in respect of whom any relevant evidence is drawn from Cases 003 and 004 until the Defence receives all disclosure documents from these

⁹ ICP Request, para. 15.

¹⁰ ICP Request, para. 15.

¹¹ KHIEU Samphan Defence Response, paras 5, 28.

¹² KHIEU Samphan Defence Response, paras 5, 12.

¹³ KHIEU Samphan Defence Response, para. 18.

¹⁴ KHIEU Samphan Defence Response, para. 16.

¹⁵ KHIEU Samphan Defence Response, para. 19.

¹⁶ KHIEU Samphan Defence Response, paras 10, 22-28.

¹⁷ NUON Chea Defence Response, paras 15-19, 33.

cases and to be given a reasonable opportunity to review the totality of this evidence.¹⁸ It submits that this would be a remedy to the ongoing violation of NUON Chea's fair trial rights caused by the disclosure of these documents.¹⁹

8. In the second alternative, the NUON Chea Defence submits that the Chamber should not summons 2-TCW-938 as her evidence is irrelevant and unsuitable to prove the facts it purports to prove in relation to the treatment of the Cham.²⁰ The NUON Chea Defence also requests the Chamber to postpone the testimony of 2-TCW-894 as the bulk of her evidence concerns the regulation of marriage and internal purges and only a minimal part relates to the treatment of the Cham. It is submitted that it would be more appropriate to schedule this witness in the course of the trial topic dedicated to the regulation of marriage.²¹

3. APPLICABLE LAW

9. The Trial Chamber recalls that it is within the discretion of the Chamber to hear the witnesses, Civil Parties and experts in the order it considers useful.²² The Chamber further recalls that pursuant to Internal Rule 87(3), the 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.²³

10. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber will determine the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the

¹⁸ NUON Chea Defence Response, para. 33.

¹⁹ NUON Chea Defence Response, paras 21-26.

²⁰ NUON Chea Defence Response, paras 27-29, 33.

²¹ NUON Chea Defence Response, paras 30-33.

²² Internal Rule 91. See Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, E312, 7 August 2015 ("Witness Decision"), para. 22.

²³ Internal Rule 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).

opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together; where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice; or where the other parties do not object to the evidence.²⁴

4. FINDINGS

4.1. Preliminary Issues

11. Before turning to the substance of the ICP Request, the Chamber considers it necessary to first address a number of different requests raised by the Defence teams in their respective responses.

12. The KHIEU Samphan Defence requests to be provided with the list of all witnesses for Case 002/02 and to exclude from this case certain documents originating from investigations in Cases 003 and 004 have already been addressed and dismissed by the Chamber.²⁵ The Chamber remains seised of the KHIEU Samphan Defence request to call seven witnesses and will inform the parties as and when it decides to call any of these individuals and in respect of which trial topic.²⁶

13. With regard to the request by the NUON Chea Defence to reject the ICP Request as void and without effect, the Chamber notes that it was signed and filed only by the International Co-Prosecutor without delegation from his Cambodian counterpart. As acknowledged by the NUON Chea Defence, however, there is no provision in the Internal Rules requiring that a filing submitted in the course of the trial proceedings must be considered void and without effect absent the signature of both Co-Prosecutors.²⁷ Whereas the Internal Rules provide that certain submissions must be signed and filed by both Co-Prosecutors, there is no such

²⁴ Decision on Co-Prosecutors' Request To Correct and Supplement Documents Relating to Sector 5 Mobile Chief Ta Val and Sector 5 Secretary Heng Rin, E357/1, 30 September 2015, para. 2; Trial Chamber memorandum entitled "Response to the Internal Rule 87 (4) requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1)", E276/2, 10 April 2013.

²⁵ Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations (Disclosure Decision), E363/3, 23 October 2015, paras 26, 35-42, pp. 18-19.

²⁶ See in this regard Disclosure Decision, paras 26-27.

²⁷ NUON Chea Defence Response, para. 15, where according to the NUON Chea Defence the Internal Rules are silent on the issue of the validity of a motion submission by the International Co-Prosecutor without the signature or endorsement of the National Co-Prosecutor.

provision in relation to all of the written submissions filed during the course of a trial. Internal Rule 1(2) clarifies that references in the Internal Rules to the Co-Prosecutors include both of them acting jointly and each of them acting individually, whether directly or through delegation.²⁸ Internal Rule 13(3) foresees that except for actions that must be taken jointly under the ECCC Law and Internal Rules, the Co-Prosecutors “may” delegate power to one of them, by a joint written decision, to accomplish an action individually. This provision expressly applies to cases where joint actions are not required in the first place (“except for actions taken jointly”). Delegating power by one Co-Prosecutor to the other is not mandatory (“may delegate” rather than “must”). As the NUON Chea Defence has not identified any provision which would require that the ICP Request be submitted jointly, the Chamber considers it to have been submitted in accordance with the rules.²⁹

14. Concerning the NUON Chea Defence’s first argument in the alternative, the Chamber notes that the NUON Chea Defence request to postpone hearing any witness from Cases 003 and 004 until it receives all documents originating from investigations thereof has already been addressed in a manner that satisfactorily takes into account fair trial concerns and

²⁸ Consistent with this, the relevant Practice Direction on the Filing of Documents before the ECCC provides (at Article 3.16) that a document “shall be signed with a clear indication of the name of the person who signed it.” The Practice Direction does not state that both Co-Lawyers need to sign a written filing in order for the Trial Chamber to consider it.

²⁹ Indeed, the Trial Chamber has previously considered written submissions from the NUON Chea Defence which were not signed by its Cambodian Co-lawyers. See for example Application for Summary Action Against Hun Sen Pursuant to Rule 35, E176, 22 February 2012. The Trial Chamber addressed this submission in its Decision on Rule 25 Applications for Summary Action, E176/2, 11 May 2012. The Chamber has also previously considered submissions from the Office of the Co-Prosecutors which were not signed by the National Co-Prosecutor and which neither Defence team opposed on that basis. See for example a series of motions for disclosure of documents from Cases 003 and 004: International Co-Prosecutor’s Disclosure of Documents From Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/43 and Case 004-D194/44, E319/33, 29 September 2015; International Co-Prosecutor’s Disclosure of Two Documents From Case File 004 Relevant To Case 002 Pursuant To Case 004-D193/37, E319/29, 12 August 2015; International Co-Prosecutor’s Disclosure of Documents From Case File 004 Relevant to Case 002 Pursuant To Case 004-D193/34, E319/28, 12 August 2015; International Co-Prosecutor’s Disclosure of Documents From case File 003 and Case File 004 Relevant to Case 002 Pursuant To Case 003-D100/12 and Case 004-D193/33, E319/27, 10 August 2015; International Co-Prosecutor’s Disclosure of Documents From case File 004 Relevant to Case 002 Pursuant To Case 004-D193/30, E319/26, 3 August 2015; International Co-Prosecutor’s Disclosure of Documents From Case File 004 Relevant to Case 002 Pursuant To Case 004-D193/28, E319/25, 23 July 2015. See also oral ruling on the International Co-Prosecutor’s Request to Admit Written records of Interview Pursuant to Rules 87(3) & (4) and To Call Four Additional Witnesses for Upcoming Case 002/02 Segments, E319/36, 7 December 2015; Decision on International Co-Prosecutor’s Request Pursuant to Rules 87(3) and 87(4) to Admit Documents and To Hear an Additional Trial Witness Relating to the Tram Kak District/Kraing Ta Chan Segment of Case 002/02, E319/17/1, 8 April 2015; Decision on International Co-Prosecutor’s Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre Pursuant to Rules 87(3) and 87(4), E319/11/1, 26 February 2015.

provides sufficient notice to both Defence teams to review the totality of Cases 003 and 004 past and future documents.³⁰

4.2. Merits

4.2.1. 2-TCW-938 and 2-TCW-894

15. That the Trial Chamber had not selected 2-TCW-938 or 2-TCW-894 to testify during the trial topic of the treatment of the Cham did not signify that these persons would not be called at all, or that if called in future that their testimony would be restricted to topics other than the treatment of the Cham. The Trial Chamber has previously emphasised that no clear lines can be drawn between topics into which this trial is divided and it is highly possible that a witness called to testify on one particular topic will also give evidence in relation to one or more other topics.³¹ The selection and order of witnesses is a matter that the Trial Chamber keeps under review, based on a range of factors including the parties' submissions, witness availability and logistical factors.

16. The Chamber considers that Witness 2-TCW-938, in her capacity as [REDACTED], may offer evidence about events in that area after her arrival there. In particular, Witness 2-TCW-938 might give evidence about the chain of communication in Sector 41, including in Kang Meas District, where the Wat Au Trakuon security office was located. 2-TCW-938's more recent WRIs confirm that this witness can testify about the implementation of the orders with regard to the treatment of the Cham, including their identification by the commune chiefs.³² The Chamber accordingly dismisses the submission from the NUON Chea Defence that the evidence of 2-TCW-938 is irrelevant and unsuitable to prove the facts it purports to prove in relation to the treatment of the Cham. Considering the submissions from the ICP, logistical considerations relating to the availability of witnesses and the upcoming trial schedule, the Trial Chamber accepts the request to hear evidence from 2-TCW-938 during the topic allocated to the treatment of the Cham rather than a later trial topic.

17. As to Witness 2-TCW-894, the Chamber considers that this witness may provide evidence concerning the forthcoming topic of regulation of marriage and internal purges. By

³⁰ Disclosure Decision, paras 35-42.

³¹ See Decision on Sequencing of Trial Proceedings in Case 002/02, E315, 12 September 2014, para. 7.

³² E319/15.3.1, E319/15.3.2, E319/15.3.3, E319/15.3.4 and E319/15.3.5.

virtue of her position as Witness 2-TCW-938's ██████████ at the relevant time, 2-TCW-894 may also provide evidence in relation to matters addressed by 2-TCW-938.³³ In light of the above and recalling its prerogative pursuant to Internal Rule 91(1) to decide the order in which it considers useful to hear Civil Parties, witnesses and experts, the Chamber considers it more appropriate to call these two witnesses in the context of the same trial topic since this should facilitate the parties' and the Chamber's preparations. The NUON Chea Defence's request to hear this witness in the trial topic dedicated to the regulation of marriage is therefore dismissed.

4.2.2. *2-TCW-988 and document E319/19.3.95*

18. The Chamber notes that the newly proposed Witness 2-TCW-988 was not interviewed by the OCIJ in Case 002, but he was interviewed in Case 004 on 6 August 2014.³⁴ His WRI was placed on the Case File in Case 004 on 12 August 2014 and subsequently disclosed to the other parties in Case 002/02 on 18 March 2015.³⁵ The evidence sought for admission by the International Co-Prosecutor was therefore not available prior to the start of the trial in 2011. However, the Chamber notes that the ICP Request was made more than one year after the International Co-Prosecutor became aware of the existence of this witness and approximately six months after the relevant WRI was disclosed in Case 002/02. The International Co-Prosecutor provides no explanation for this delay. Accordingly, the Chamber considers that the ICP Request is not timely.

19. Nonetheless, the Chamber considers that it is in the interests of justice to hear 2-TCW-988 and to admit WRI E319/19.3.95 into evidence. 2-TCW-988's alleged high rank in the ██████████ together with his apparent knowledge of the manner in which Cham were identified and arrested makes his evidence relevant and conducive to ascertaining the truth, militating in favour of calling him to testify during the topic on the treatment of the Cham.

20. With regard to 2-TCW-988's WRI, the Chamber recalls that consideration of the prior statements of witnesses called to testify will assist in evaluating their credibility and that it is in the interests of ascertaining the truth that the Chamber and parties have access to all of the

³³ E319/19.3.83 and E319/21.3.51.

³⁴ E319/19.3.95.

³⁵ International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/15, Annex K, 18 March 2015, E319/19.3.

statements of witnesses and Civil Parties who will be heard in Case 002/02.³⁶ They should be put before the Chamber to permit a complete assessment of their testimony.³⁷ Accordingly, the Chamber considers that it is in the interests of justice to admit 2-TCW-988's WRI into evidence. The Chamber reminds the parties that the use of this WRI is subject to the procedural requirements set out in the Chamber's decision E319/7 as modified by its oral decision of 30 November 2015.³⁸

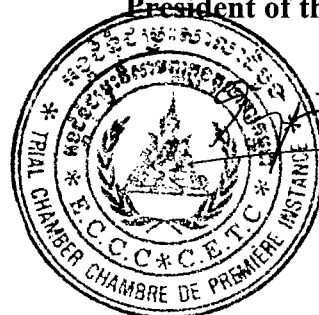
21. In view of recent and upcoming adjournments of proceedings due to judicial recesses, the need for the Chamber to work on outstanding decisions and the scheduling of Supreme Court Chamber hearings, it is not anticipated that any of these three witnesses will be scheduled for hearing prior to January 2016. The Chamber considers that this sufficiently accommodates the KHIEU Samphan Defence request for sufficient time to prepare for the testimony of these witnesses. The Chamber has already granted the KHIEU Samphan Defence request to postpone the testimony of 2-TCE-95.³⁹

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the International Co-Prosecutor's Request to call 2-TCW-938, 2-TCW-894 and 2-TCW-988;

GRANTS the International Co-Prosecutor's Request to admit E319/19.3.95 into evidence and assigns document number E3/9660 to it.

Phnom Penh, 24 December 2015
President of the Trial Chamber



Nil Non

³⁶ Disclosure Decision, para. 25. See also Disclosure of witness statements for witnesses who may testify in Case 002, E127/4, 24 January 2012; Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02, E319/14/2, para. 5 (ordering the disclosure of Civil Party Applications of "individuals who have been heard or are likely to be heard in Case 002/02").

³⁷ Disclosure Decision, para. 25.

³⁸ Decision on International Co-Prosecutor's Request To Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, E319/7, pp. 6-7; Memorandum on Reclassification of Cases 003/004 Disclosures in Case 002/02, 14 December 2015, E319/35/3, para. 3.

³⁹ Decisions on E368, E366 and the KHIEU Samphan Defence request to postpone the appearance of 2-TCE-95 (E366/1), E372, 1 October 2015, para. 4.