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du dossier:..... **SANN RADA**

E367/6

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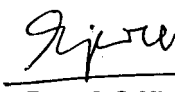
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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

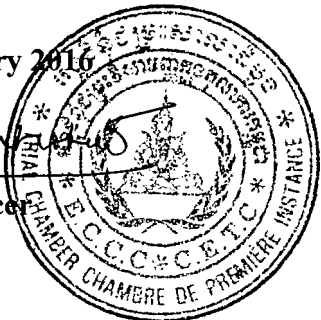
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Nation Religion King
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សាធារណៈ / Public

TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 5 February 2016

FROM: NIL Nonn, President of the Trial Chamber 

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

SUBJECT: Modalities of Testimony for 2-TCE-95

1. On 21 September 2015, the Trial Chamber decided to call YSA Osman (2-TCE-95) as an expert on the treatment of the Cham, based upon specialist knowledge which he developed through the authorship of two books while previously employed as a researcher for DC-Cam (E367, para. 10). YSA Osman is currently employed as an analyst with the Office of the Co-Investigating Judges.
2. On 24 September 2015, the International Co-Investigating Judge requested that the Trial Chamber: (1) inform the parties in advance that YSA Osman may not be questioned specifically on the information gathered during the Case 004 investigation; and (2) permit an OCIJ Legal Officer to be present in the courtroom during YSA Osman’s testimony, so that if any questions regarding the proper scope of his testimony should arise, the expert may consult the Legal Officer in the presence of the Trial Chamber and the Parties (E367/1, p. 2).
3. The Parties made oral submissions on the measures requested by the International Co-Investigating Judge on 30 September 2015. The Co-Prosecutors and Civil Party Lead Co-Lawyers do not object to the measures (T. 30 September 2015, p. 85-86). The NUON Chea Defence submits that the presence of an OCIJ Legal Officer in the courtroom is problematic from the perspective of standing and in relation to whether this individual should be allowed to intervene in the proceedings (T. 30 September 2015, p. 86-94). The KHIEU Samphan Defence submits that the expert should answer questions without any assistance and the OCIJ Legal Officer should not be permitted to suggest answers to the expert (T. 30 September 2015, pp. 89-91).
4. By e-mail of 13 January 2016, in response to an inquiry from the Trial Chamber, an OCIJ Legal Officer informed the Chamber that Judge Bohlander “does not consider the

charging exercises of December to have had any impact on the need to preserve the confidentiality of the investigations, including its strategy and methodology. As such both the previously imposed conditions listed by you in the email of 5 January 2016 continue to apply. He considers that the legal officer's role is to advise Ysa Osman to decline to answer questions that may go to information gathered or matters under investigation in Case 004. The legal officer is not meant to address the court or the parties. Any queries arising from instances when Ysa Osman should decline to answer a question should be directed directly to him, not the advising officer who is the Judge's representative and acting on the Judge's instructions.”

5. Pursuant to Internal Rule 56(1), YSA Osman has a duty to “maintain confidentiality” in respect of his work on the Case 004 investigation. In the absence of a specific legal provision addressing whether a representative of another ECCC office may be present in the courtroom to safeguard the work of that office, the Trial Chamber, while noting that the Office of the Co-investigating Judges is an entity specific to the ECCC legal framework, has looked to the closest scenarios in international tribunal jurisprudence for guidance. Based upon a review of that jurisprudence, the Trial Chamber considers this to be a matter within the Chamber’s discretion¹ and grants permission for an OCIJ Legal Officer to be present in the courtroom during YSA Osman’s testimony. The OCIJ Legal Officer will be present to represent the interests of the OCIJ in maintaining the confidentiality of its investigations and not as a legal representative of the expert. Taking into consideration the integrity of the proceedings before the Trial Chamber, the concerns of the Defence teams and the conditions stipulated by the International Co-Investigating Judge, the Chamber directs that the OCIJ Legal Officer must not intervene unless matters concerning the confidentiality of the Case 004 investigation arise.

6. The Chamber notes that the scope of testimony for this expert has been determined by its decision E367. In accordance with this decision, YSA Osman “may be questioned on all matters within his knowledge or expertise relevant to the Treatment of the Cham in Case 002/02”, notably special knowledge gained through his work and research in producing two books (E367, para. 10 and Disposition). The ultimate responsibility for determining the relevance of questions and evidence lies with the Trial Chamber.

¹ *Prosecutor v. Slobodan Milošević*, ICTY Trial Chamber, IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 33; followed in *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Application for a Witness Pursuant to Rule 70(B), 30 October 2003 (“the Trial Chamber has discretion to allow the presence of representatives of an information provider in court whilst the evidence is given”); *see also, Prosecutor v. Dragomir Milošević*, ICTY Trial Chamber, IT-98-29/1-T, Decision on Prosecution’s Application for Rule 70 Conditions for Testimony of Witness W-46, 12 March 2007, p. 4 (“a representative of the Government of Witness W-46 is allowed to be present during the testimony of the witness but should not intervene unless matters of national security arise”); *Prosecutor v. Milutinović et al*, ICTY Trial Chamber, IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend its Rule 65ter List to Add Michael Phillips and Shaun Byrnes (12 March 2007), para. 35; *Prosecutor v. Mladic*, ICTY Trial Chamber, IT-09-92-T, Decision on Urgent Motion for Protective Measures and Conditions for Witness RM-401 Pursuant to Rule 70, 18 October 2013, para. 10 (“the presence of a representative of the Rule 70 provider in court may be conducive to promptly resolving any matters in relation to whether, *inter alia*, particular questions may be answered by the Witness in open session.”)

7. If during the proceedings concerns are raised by the expert on whether answering questions in public may lead to a breach of the confidentiality of OCIJ investigations, the Chamber will decide whether it is appropriate to, *inter alia*, go into closed session.