



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

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

Date: **4 March 2016**
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DECISION ON DESIGNATION OF 2-TCE-88

Co-Prosecutors
CHEA Leang
Nicolas KOUMJIAN

Accused
NUON Chea
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSSE

1. INTRODUCTION

1. The Co-Prosecutors and the Civil Party Lead Co-Lawyers propose to call 2-TCE-88 as an expert in Case 002/02 primarily in relation to the trial topics concerning the treatment of the Vietnamese and the treatment of the Buddhists.¹ The KHIEU Samphan Defence generally observes that a number of experts, including 2-TCE-88, cannot be considered as independent and impartial due to their work with the Documentation Center of Cambodia (DC-Cam). During the Further Initial Hearing held on 30 July 2014, the Trial Chamber invited the Parties to comment on the observations made by the KHIEU Samphan Defence.²

2. SUBMISSIONS

2. The Co-Prosecutors submit that 2-TCE-88 will be examined on the following subjects:

The origins and evolution of CPK policies towards the Vietnamese and Buddhists; the implementation and evolution of these policies during the DK period; use of CPK and DK propaganda and language generally in the context of genocidal violence; CPK and perpetrator motivations; and the operation of the S-21 Security Centre.³

3. In support of 2-TCE-88's qualification as an expert, the Co-Prosecutors point to his current positions as a Professor of Anthropology and Global Affairs at Rutgers University, and as Director of the Centre for the Study of Genocide and Human Rights and UNESCO Chair in Genocide Prevention, as well as to his former position of President of the International Association of Genocide Scholars (2011-13). The Co-Prosecutors further note that he is the author or editor of numerous important books relating to genocide, both generally and specifically in the context of Cambodia. They also point to the fact that 2-TCE-88 has conducted extensive anthropological field research in Cambodia since the mid-1990s, "focusing on policy makers' and perpetrators' motivations during the DK regime, as well as the social impacts in the aftermath". They submit that he has developed extensive expertise on the psychological, sociological and cultural motivations for individuals to participate in mass killings in Cambodia. Finally, the Co-Prosecutors note that prior to the establishment of the

¹ Annex I: Co-Prosecutors' revised Combined, Witness, Civil Party and Expert List for Case 002/02 in Recommended Order of Trial Segments and Appearance (July 2014), E307/3/2.2, 28 July 2014; Annex IV: Proposed Order of Segments, E305/7.1.4, 9 May 2014; Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, pp. 46-47; Annex III – Updated Summaries of Witnesses, Civil Party and Expert Summaries (no protective measures) – Civil Party Lead Co-Lawyers, E305/7.1.3, p. 42.

² T. 30 July 2014 (Further Initial Hearing), pp. 59, 63-65.

³ Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, p. 46; see also Annex I: Co-Prosecutors' revised Combined, Witness, Civil Party and Expert List for Case 002/02 in Recommended Order of Trial Segments and Appearance (July 2014), E307/3/2.2, 28 July 2014.

ECCC, he conducted extensive interviews with CPK cadres who subsequently provided statements to investigators of the Court.⁴

4. The Civil Party Lead Co-Lawyers propose that 2-TCE-88 be examined on the following subjects:

[T]he history of the CPK, the origins and evolution of the CPK policies towards the Vietnamese and Buddhist, the implementation and evolution of these policies during the DK regime. Also [...] on the use of CPK and DK propaganda and language generally and in the context of genocidal violence and the operations of S-21.

5. In support of 2-TCE-88's qualification as expert, the Lead Co-Lawyers also point to his positions as Professor of Anthropology and Global Affairs at Rutgers University and as Director of the Centre for the Study of Genocide and Human Rights, as well as to his positions as Academic Advisor to DC-Cam and on the International Advisory Boards of the Journal of Genocide Research and Genocide Studies and Prevention. They also note that he is writing a book on Case 001 at the ECCC and that he concluded extensive anthropological field research in Cambodia since the mid-1990s, focusing the policies of the DK regime and the perpetrators' motivations during DK regime, as well as the social impacts in the aftermath.⁵

6. The KHIEU Samphan Defence submits that 2-TCE-88 cannot be regarded as an independent and impartial expert because of his association with DC-Cam, which the KHIEU Samphan Defence submits is a clearly biased organisation. Should the Chamber nevertheless decide to hear this expert, the KHIEU Samphan Defence requests the Chamber to take into consideration this argument when assessing the value to be attributed to the evidence of the expert.⁶

7. The Co-Prosecutors note that the Trial Chamber previously held that "the mere fact that an expert has a previous association with an external organization does not disqualify him or her from being called as an expert" and that it would consider any specific and reasoned challenges to an expert's testimony, arising from the expert's affiliation with an external

⁴ Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, p. 47.

⁵ Confidential Annex III – Updated Summaries of Witnesses, Civil Party and Expert Summaries (no protective measures) – Civil Party Lead Co-Lawyers, E305/7.1.3, pp. 41-42.

⁶ *Opposition de la Défense de M. KHIEU Samphan à la comparution de certaines personnes proposées aux fins d'audition au cours du procès 002/02 et demande de clarification sur la portée exacte des débats suite à la nouvelle décision de disjonction E301/9/1*, E305/9, 30 May 2014, pp. 9-10.

organization when evaluating his or her the evidence.⁷ The Co-Prosecutors further submit that 2-TCE-88 would provide highly valuable evidence that would assist the Chamber in ascertaining the truth in a manner consistent with his oaths and obligations to provide information with the utmost neutrality and objectivity.⁸

8. The Lead Co-Lawyers support the remarks made by the Co-Prosecutors.⁹ The NUON Chea Defence made no submissions with respect to the request to hear 2-TCE-88.¹⁰

3. APPLICABLE LAW

9. The Chamber recalls that Internal Rule 31 establishes that a Chamber may seek expert opinion “on any subject deemed necessary to [...] proceedings before the ECCC” (IR 31(1)) and shall appoint the expert by order setting out the exact assignment of the expert (IR 31(3)). Pursuant to Internal Rule 80*bis* (2): “Where the Chamber considers that the hearing of a proposed [...] expert would not be conducive to the good administration of justice, it shall reject that such person be summoned.” The Internal Rules do not provide a definition of expert or set out the minimum qualifications or experience an individual must possess in order to be appointed as expert before the ECCC.¹¹

10. According to international jurisprudence, an expert is an individual that has specialised knowledge, experience or skills that could assist a Chamber in its understanding of specific issues in dispute requiring special knowledge in a specific field.¹² Experts provide clarification, context, or additional assistance for the purpose of a Chamber’s assessment of the evidence.¹³

11. It is for the Trial Chamber to decide whether an individual may be called to testify as an expert. The question before the Chamber is whether the proposed expert has relevant skill or

⁷ T. 30 July 2014 (Further Initial Hearing), p. 64 (referring to Decision on Assignment of Experts, E215, 5 July 2012, para. 15 (Decision on Assignment of Experts)).

⁸ T. 30 July 2014 (Further Initial Hearing), p. 65.

⁹ T. 30 July 2014 (Further Initial Hearing), p. 84.

¹⁰ T. 30 July 2014 (Further Initial Hearing).

¹¹ Decision on Designation of 2-TCE-95, E367, 21 September 2015, para. 6 (Decision on Designation of 2-TCE-95).

¹² See Decision on Designation of 2-TCE-95, para. 7; Decision on Assignment of Experts, para. 16; *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* notice regarding Prosecution Expert Witness Richard Butler, 19 September 2007, (Decision on Richard Butler ICTY), para. 23; *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, (*Nahimana* Appeal Judgement), para. 198.

¹³ Decision on Designation of 2-TCE-95, para. 7; Decision on Assignment of Experts, para. 16.

knowledge that might assist the Chamber as finder of fact in understanding the evidence before it.¹⁴ In determining whether the proposed expert possesses the relevant skill or knowledge of an expert, the Trial Chamber may consider the individual's curriculum vitae, articles, publications or other information, including the proposed expert's former and current positions.¹⁵ Further, the fact that a proposed expert has had previous association with an external organisation or is currently employed by an office within the ECCC does not disqualify him or her from being called as an expert.¹⁶

12. Challenges regarding bias or lack of independence of an individual called as an expert are matters that are relevant to the weight of the evidence to be given by him or her rather than to its admissibility.¹⁷

4. ANALYSIS

13. The Chamber notes that 2-TCE-88 holds a Ph.D. in anthropology from Emory University (Atlanta, US). He is Professor of Anthropology and Global Affairs at Rutgers University, Newark, former President of the International Association of Genocide Scholars, holds the UNESCO Chair in Genocide Prevention and is an Academic Advisor to DC-Cam. The Chamber further notes that 2-TCE-88 has extensive experience of anthropological and ethnographic field research in Cambodia since the mid-1990s, and that his areas of specialisation include sociocultural anthropology, "genocide and political violence" in Southeast Asia and in Cambodia.¹⁸ 2-TCE-88 is also author and editor of numerous publications on the events that unfolded during the DK regime, exploring and researching from an anthropological perspective, amongst other events, the killings that occurred in

¹⁴ Decision on Designation of 2-TCE-95, para. 8; *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Decision on Protective Measures for Witnesses and Experts and on Parties' Request to Hear Witnesses and Experts Reasons, E40/1, 10 April 2009, para. 26; *see also* Decision on Assignment of Experts, para. 16.

¹⁵ Decision on Designation of 2-TCE-95, para. 8; Decision on Assignment of Experts, para. 15. *See also* *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Admission of Expert Report of Ratko Skrbic with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012, para. 14; Decision on Richard Butler ICTY, paras 23-24; *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Decision on expert status of Reynaud Theunens, 12 February 2008, (Decision Reynaud Theunens ICTY), para. 28.

¹⁶ Decision on Designation of 2-TCE-95, para. 8; Decision on Assignment of Experts, para. 15; Decision on Designation of TCE-33, para. 13; *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Decision on Protective Measures for Witnesses and Experts and on Parties' Request to Hear Witnesses and Experts Summary, E40, 3 April 2009, p. 5; Decision Reynaud Theunens ICTY, para. 29.

¹⁷ Decision on Designation of 2-TCE-95, para. 9; Decision on Assignment of Experts, para. 15; Decision on Designation of TCE-33, para. 13; *see also* Decision on Richard Butler ICTY, para. 26; Decision Reynaud Theunens ICTY, paras 28-29.

¹⁸ Curriculum Vitae and List of Publications of Alexander Laban Hinton, accessible at <http://dga.rutgers.edu/index.php/faculty/member/alexander-hinton/>.

Cambodia between 1975 and 1979. His research and writings focus on the motivations of the policy makers and perpetrators during the DK regime, as well as the social impacts in the aftermath. His work also analyses and describes the process through which the perpetrators “manufactur[ed] difference” that would allow identifying, and eventually target, the “enemy”.¹⁹ The Chamber also notes the numerous works he authored, co-authored or edited on the psychological, sociological and cultural motivations for individuals to participate in mass killings in Cambodia, including on the notion of disproportionate revenge within the context of the Khmer Buddhist tradition.²⁰

14. The Chamber is therefore satisfied that 2-TCE-88 is qualified as an expert on the basis of the specialised knowledge and experience described above, gained through his work and extensive research in the proposed field of expertise.

15. The Chamber notes that both the Co-Prosecutors and the Lead Co-Lawyers anticipate that 2-TCE-88 will also provide testimony on the operation of S-21. While the Trial Chamber will not disallow a limited number of questions to the expert concerning the operation of S-21, the Chamber reminds the Parties that a specific trial topic is dedicated to this security centre for which the Parties have proposed other individuals with direct knowledge of the operation of S-21. For this reason, the Chamber decides to call 2-TCE-88 to be questioned primarily on matters concerning the Treatment of the Vietnamese and Buddhists.

16. Regarding the concerns raised by the KHIEU Samphan Defence as to 2-TCE-88’s potential bias due to his association with DC-Cam, the Chamber recalls that challenges to the impartiality and independence of an expert are matters primarily related to the evaluation of the evidence and not to its admissibility,²¹ and finds that the Parties will be able to test the expert’s impartiality and independence during his testimony.

17. Finally, the Chamber notes that 2-TCE-88 uses the term “genocide” in most of his writings when referring to mass killings. The Chamber recalls that it is only for the Chamber to determine whether any legal elements of genocide, or any other crimes charged, as defined in the Law on the ECCC exist and/or have been proven. The Chamber also recalls that it is

¹⁹ Book by Alexander Hinton entitled “Why did they kill?”, E3/3346, EN ERN 00431653-00431693,

²⁰ Curriculum Vitae and List of Publications of Alexander Laban Hinton, accessible at <http://dga.rutgers.edu/index.php/faculty/member/alexander-hinton/>; see Book by Alexander Hinton entitled “Why did they kill?”, E3/3346, EN ERNs 00431487-00431537, 00431694-00431717.

²¹ See *supra*, para. 12.

not bound by the evidence or conclusions given by an expert,²² and that these will be subject to the same rules and open to the same scrutiny as any other piece of evidence put before the Chamber.

18. In light of all of the above the Chamber finds that it is in the interests of justice to call 2-TCE-88 as an expert.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

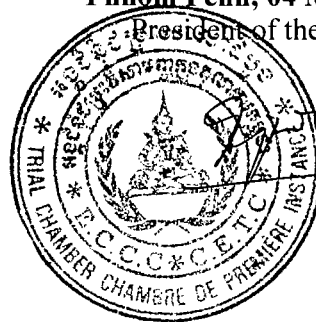
AFFIRMS that it will hear evidence from 2-TCE-88 as an expert;

DETERMINES that 2-TCE-88 may be questioned primarily on all matters within his knowledge or expertise relevant to the Treatment of the Vietnamese and the Treatment of the Buddhists in Case 002/02; and

DIRECTS the Co-Prosecutors to lead the in-court questioning of 2-TCE-88 pursuant to Internal Rules 91 and 91 *bis*.

Phnom Penh, 04 March 2016

President of the Trial Chamber



Nil Nonn
Nil Nonn

²² See Decision on Designation of 2-TCE-95, para. 11; Decision on Assignment of Experts, para. 16.