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E397/1  
**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

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

សាធារណៈ / Public

**TRIAL CHAMBER**

**TO:** All Parties, Case 002 **Date:** 25 April 2016

**FROM:** NIL Nonn, President of the Trial Chamber *[Signature]*

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

**SUBJECT:** Decision on Co-Prosecutors' Filing regarding National Counsel KONG Sam Onn's Prior Representation of Trial Witnesses



1. The Trial Chamber is seised of a Co-Prosecutors' request filed on 18 April 2016 regarding KHIEU Samphan's National Counsel KONG Sam Onn's prior representation of witnesses ("Request", E397). The Co-Prosecutors assert that no conflict of interest has risen to the level that KONG Sam Onn should be removed as National Counsel for KHIEU Samphan but rather that "it is significant enough to warrant additional safeguards". They submit that there are a number of inherent risks that arise from KONG Sam Onn's prior representation of Case 002/02 witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906 and 2-TCW-816 in Case 001, and that an appearance of possible conflict damaging the integrity of the proceedings remains even if those risks never come to fruition. The Co-Prosecutors request the Chamber to direct the KHIEU Samphan Defence to seek a written waiver by KHIEU Samphan and direct that examination of the witnesses be conducted only by International Counsel Anta Guissé (Request, paras. 6-8).

2. At the hearing of 19 April 2016, the Parties made oral submissions in response. Neither the Lead Co-Lawyers for the Civil Parties nor the NUON Chea Defence raised concerns about a possible conflict of interest and referred the matter to the Chamber's discretion. National Counsel for KHIEU Samphan submits that there is no conflict of interest arising out of his prior work as Duty Counsel for witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906 and 2-TCW-816 in Case 001. National Counsel notes that there is no relation between his client and the witnesses as none of them made factual allegations that KHIEU Samphan was their supervisor or that they had any other relationship with the Accused. He further notes that he has had no contact with any of the witnesses since 2009 and no opportunity to influence them ever since. He submits that the Co-Prosecutors' request for a written waiver by KHIEU Samphan is unnecessary given that KHIEU Samphan was aware of his National Counsel's prior role as Duty Counsel of these witnesses before seeking his representation. He finally submits that, as duly reiterated by the KHIEU Samphan Defence in their e-mail of 29 March 2016 and by the

Trial Chamber e-mail of 8 April 2016, he remains bound by his obligations of confidentiality (Draft T. 19 of April 2016, pp. 67-83).

3. Witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906 and 2-TCW-816, who are scheduled to be heard soon by the Chamber, were assisted by Mr KONG Sam Onn when they testified during Case 001 proceedings. Mr KONG Sam Onn was then appointed in order to ensure that their right against self-incrimination was protected. The Trial Chamber recalls that further to an e-mail of 29 March 2016 by the KHIEU Samphan Defence Team, it notified the parties via e-mail of 8 April 2016 that it would require the Witness and Expert Support Unit (WESU) to contact these witnesses to inform of the fact that Counsel KONG Sam Onn is now National Counsel for KHIEU Samphan, to reiterate that Counsel is bound by his obligations of confidentiality, and finally ask them whether they take issue at being examined by him in Court. WESU has informed the Trial Chamber that the witnesses have been duly contacted and while no objection to being examined by KONG Sam Onn has been expressed by witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906, witness 2-TCW-816 has only consented to being examined by Counsel Anta Guissé (e-mail of 11 April 2016; e-mail of 20 April 2016).

4. The Trial Chamber observes that a full discussion of the legal issues arising out of KONG Sam Onn's prior representation took place during the hearing of 19 April 2016 in the presence of KHIEU Samphan and both his Defence Counsel, with no objections or questions being made by the Accused. On the contrary, KHIEU Samphan's Defence Counsel reiterated that their client was fully aware of the situation and entirely confident of the ethical qualities of his legal representative. Noting that this is an issue which would need to be contested immediately, and that KHIEU Samphan did not raise it at the relevant time, the Chamber considers that a written waiver is not necessary.

5. The Trial Chamber considers that while the concurrence of KONG Sam Onn prior role as Duty Counsel of witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906 and 2-TCW-816 and his current role as National Counsel for the Accused KHIEU Samphan might not necessarily amount to a conflict of interest that merits stronger action, the-said situation may lead to a misleading public perception. In addition, given the objection expressed by witness 2-TCW-816, the Trial Chamber, in line with its position communicated to the parties via e-mail on 8 April 2016, endorses the suggestion put forward by the KHIEU Samphan Defence and understands that International Counsel Anta Guissé will be the only one in charge of the examination of this witness. However the Chamber considers that in order to preserve the integrity of the proceedings, it is preferable for Counsel KONG Sam Onn to abstain from examining his former clients on the behalf of his current client.

6. Accordingly, the Trial Chamber hereby

- a) Rejects the Co-Prosecutors' request to seek a written waiver from KHIEU Samphan of any future conflict of interest;
- b) Recommends that International Counsel Anta Guissé examine all four witnesses 2-TCW-898, 2-TCW-931, 2-TCW-906 and 2-TCW-816; and
- c) Reiterates that National Counsel KONG Sam Onn is bound by his obligations of confidentiality.

7. This constitutes the Chamber's official response to E397.