



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

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Judge Claudia FENZ  
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**DECISION ON KHIEU SAMPHAN DEFENCE REQUEST FOR DISCLOSURE OF AUDIO RECORDINGS OF WITNESS STATEMENTS FROM CASES 003 AND 004**

**Co-Prosecutors**  
CHEA Leang  
Nicolas KOUMJIAN

**Accused**  
NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**  
PICH Ang  
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SON Arun  
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## 1. INTRODUCTION

1. The Trial Chamber is seised of a KHIEU Samphan Defence request, filed on 12 September 2016, that the Chamber confirm the existence of audio records of witnesses' and civil parties' interviews with OCIJ investigators that correspond with written records of interview ("WRIs") from Cases 003 and 004 which have been or will be admitted as evidence in Case 002/02; instruct the Co-Prosecutors to disclose any such audio recordings; admit into evidence all such recordings; and sanction the Co-Prosecutors for failing to disclose the audio recordings as they constitute potentially exculpatory evidence.<sup>1</sup> The International Co-Prosecutor responded on 23 September 2016.<sup>2</sup>

2. Due to the impending testimony of two witnesses whose WRIs formed part of the KHIEU Samphan Request, the Chamber, by email of 27 September 2016, directed the International Co-Prosecutor to seek leave from the International Co-Investigating Judge to disclose the audio recording of the interviews corresponding to one WRI of 2-TCW-960 and to three WRIs of 2-TCW-1065.<sup>3</sup> The International Co-Investigating Judge granted leave to disclose these four audio recordings and they were notified to the parties on 12 and 13 October 2016.<sup>4</sup>

## 2. SUBMISSIONS

### 2.1. KHIEU Samphan Request

3. The KHIEU Samphan Defence submits that it only discovered the existence of audio recordings of interviews corresponding to Case 003 and 004 WRIs at the end of August 2016 when a WRI was disclosed by the Co-Prosecutors in which an investigator refers to a September 2015 order of the International Co-Investigating Judge requiring that all interviews should be audio recorded.<sup>5</sup> The Defence was under the impression that no such audio

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<sup>1</sup> *Demande de la Défense de M. KHIEU Samphân de communication et d'admission d'enregistrements audio des dossiers 003 et 004*, E441, 12 September 2016 ("KHIEU Samphan Request").

<sup>2</sup> International Co-Prosecutor's Response to KHIEU Samphan's Request for the Disclosure and Admission of Audio Recordings from Cases 003 and 004, E441/1, 23 September 2016 ("ICP Response").

<sup>3</sup> Email from Trial Chamber Legal Officer to International Co-Prosecutor, E441/2.1, 27 September 2016.

<sup>4</sup> Decision on International Co-Prosecutor's Request to Disclose One Case 004 Audio Recording into Case 002, D193/101 (Case 004), 12 October 2016 ("Authorisation to Disclose Case 004 Audio Recording"); Decision on International Co-Prosecutor's Request to Disclose Three Case 003 Audio Recordings into Case 002, D100/36 (Case 003), 13 October 2016.

<sup>5</sup> KHIEU Samphan Request, paras 3, 5-6.

recordings existed in Cases 003 and 004.<sup>6</sup> This is because (1) it had previously requested an audio recording of a Case 004 WRI and was informed that such recording did not exist; (2) the box indicating that an audio recording was made during the interview was not checked with respect to WRIs from Cases 003 and 004 for witnesses testifying in Case 002/02; and (3) the Co-Prosecutors never informed the Defence that such audio recordings existed again despite Defence complaints about the absence of audio recordings of Case 003 and 004 WRIs.<sup>7</sup> The KHIEU Samphan Defence submits that audio recordings of interviews corresponding to WRIs may affect the credibility of witness evidence and therefore must be disclosed to the Defence pursuant to Internal Rule 53(4) and Supreme Court Chamber and Trial Chamber decisions.<sup>8</sup>

4. The KHIEU Samphan Defence further submits that it should have an opportunity to raise potential contradictions between WRIs and the audio recordings of these interviews in responding to motions to admit the WRIs.<sup>9</sup> After the trial proceedings conclude, the disclosure of the audio recordings will remain important to permit the Defence to raise in their Closing Briefs potential contradictions between the recordings and WRIs.<sup>10</sup> The KHIEU Samphan Defence therefore requests the disclosure of these audio recordings as soon as possible. It also requests that the Defence be given sufficient time to review the recordings in order to raise potential contradictions and to determine whether to seek the recall of certain individuals who have testified.<sup>11</sup> After they are disclosed, the audio recordings should also be admitted pursuant to Internal Rule 87(4) because they are conducive to the ascertainment of the truth and intrinsically linked to evidence already on the Case File.<sup>12</sup>

5. Finally, the Defence submits that the Co-Prosecutors should be sanctioned for the failure to disclose the audio recordings based on the international procedural rules developed by the ICTY, namely RPE 68*bis*.<sup>13</sup> It is because of this failure that the Defence are only now in a position to file the present request.<sup>14</sup> The presumption that the Co-Prosecutors act in good

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<sup>6</sup> KHIEU Samphan Request, paras 7-8.

<sup>7</sup> KHIEU Samphan Request, paras 8-9.

<sup>8</sup> KHIEU Samphan Request, para. 10.

<sup>9</sup> KHIEU Samphan Request, paras 11-13.

<sup>10</sup> KHIEU Samphan Request, para. 13.

<sup>11</sup> KHIEU Samphan Request, paras 13-14 and FN 14.

<sup>12</sup> KHIEU Samphan Request, para. 14.

<sup>13</sup> KHIEU Samphan Request, para. 16 and FN 16.

<sup>14</sup> KHIEU Samphan Request, para. 16.

faith in fulfilling their duty of disclosure does not stand up to the numerous failures in relation to the disclosure of the audio recordings.<sup>15</sup>

## **2.2. International Co-Prosecutors' Response**

6. The International Co-Prosecutor does not object to the disclosure of audio recordings requested by the KHIEU Samphan Defence, submitting that he has consistently supported a policy of open and transparent disclosure of materials sought by the Defence or Chambers and has spent much time and effort reviewing Case 003 and 004 evidence to identify exculpatory and other relevant material.<sup>16</sup> He further submits that the disclosure of a large number of documents is based primarily on the Prosecution's duty to disclose evidence that might affect the reliability of other evidence and that a wide variety of evidence could be considered potentially exculpatory for this reason.<sup>17</sup>

7. The International Co-Prosecutor submits that the duty to disclose evidence is limited to materials which in the actual knowledge of the Co-Prosecutors are exculpatory.<sup>18</sup> Because the contents of WRIs are read back and certified by witnesses, it is submitted that there is no cogent reason to infer that the audio recordings differ in substance from evidence contained in the WRI. Therefore, the International Co-Prosecutor submits that he did not have actual knowledge that the audio recordings could be exculpatory.<sup>19</sup>

8. The International Co-Prosecutor opposes the admission of the audio recordings at this time, noting that they would be repetitive of other material on the Case File absent a showing that the recordings differ materially from the related WRIs.<sup>20</sup> The WRIs are presumed to be reliable until such presumption is rebutted by other evidence.<sup>21</sup> It would also be time-consuming and place a strain on the resources of the ECCC to transcribe and translate all of the recordings, a process that would likely be a prerequisite to their admission.<sup>22</sup>

9. Finally, the International Co-Prosecutor submits that the KHIEU Samphan Defence fails to establish bad faith on the part of the Prosecution for not alerting the KHIEU Samphan

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<sup>15</sup> KHIEU Samphan Request, para. 16.

<sup>16</sup> ICP Response, paras 16, 23

<sup>17</sup> ICP Response, para. 17.

<sup>18</sup> ICP Response, para. 17.

<sup>19</sup> ICP Response, para. 18.

<sup>20</sup> ICP Response, paras 19, 23.

<sup>21</sup> ICP Response, para. 19.

<sup>22</sup> ICP Response, para. 20.

Defence to the existence of audio recordings. Where interviews were recorded, the existence of an audio recording is indicated in the WRIs which were disclosed to the Defence. Although the Defence may not have noted this information, this does not establish a failure of the Co-Prosecutors to fulfil their disclosure obligations.<sup>23</sup>

### 3. APPLICABLE LAW

10. Internal Rule 53(4) imposes a continuing obligation on the Co-Prosecutors to disclose to the parties (through the Trial Chamber) any material in its possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of evidence, inculpatory or otherwise.<sup>24</sup> The duty to disclose exculpatory material from Cases 003 and 004 falls on the Co-Prosecutors because they have access to the ongoing investigations in those cases whereas the Accused in Case 002 do not.<sup>25</sup>

11. The Chamber has clarified that the Co-Prosecutors need not speculate as to Defence theories as the Co-Prosecutors' duty is limited to disclosing material that "in the actual knowledge of the Co-Prosecutors" is exculpatory.<sup>26</sup> It is the exclusive responsibility of the Co-Prosecutors to determine in good faith which information may in fact be exculpatory.<sup>27</sup>

12. WRIs recording witness statements taken during the ECCC judicial investigations are entitled to a presumption of reliability because they are prepared under the judicial supervision of the Co-Investigating Judges with safeguards as to their authenticity and reliability. This is particularly, though not exclusively, true of WRIs cited in a Closing Order issued by the Co-Investigating Judges. The presumption may be rebutted only where cogent reasons are provided by the parties, supported by clear evidence that the statements contained in the WRIs are unreliable or inaccurate.<sup>28</sup>

13. The Chamber has previously indicated that it will consider on a case-by-case basis challenges to the testimony of witnesses at trial based on inconsistencies between their prior

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<sup>23</sup> ICP Response, paras 21-22.

<sup>24</sup> Disclosure of witness statements for witnesses who may testify in Case 002, E127/4, 24 January 2012 ("First Disclosure Decision"); Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, E363/3, 22 October 2015 ("Decision on Requests to Limit Disclosures"), paras 15-16; Decision on Requests Regarding Internal Rule 87(4) Deadlines, E421/4, 21 September 2016 ("Decision on New Evidence Deadlines"), para. 9.

<sup>25</sup> Decision on New Evidence Deadlines, para. 9.

<sup>26</sup> Decision on Requests to Limit Disclosures, para. 24.

<sup>27</sup> Decision on Requests to Limit Disclosures, para. 24.

<sup>28</sup> Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation, E251, 7 December 2012, para. 22.

statements and audio recordings of interview, where relevant. However, it will entertain allegations of inconsistency between the audio recording and written records of interview only where these are identified with sufficient particularity and pertain to alleged discrepancies on the substance which have clear relevance to the trial. Any party raising such a challenge further bears the burden of clearly identifying the alleged inconsistency and give timely advance notice to the Chamber and the other parties of these allegations and the documents relevant to them. In order to avoid overwhelming the sections of the court responsible for translation and transcription with large volumes of material whose relevance to the trial has not been demonstrated, the Chamber has previously advised that transcription and translation requests in support of these objections must specifically identify and be limited to the portions of the relevant statement and audio recording containing the alleged inconsistency. Blanket requests for transcription and translation of entire, voluminous audio recordings or transcripts will therefore not be entertained.<sup>29</sup>

#### 4. **FINDINGS**

##### **4.1. Request for Disclosure and Admission of Audio Recordings**

14. The Chamber is not persuaded by the KHIEU Samphan Defence contention that audio recordings of interviews which correspond to judicially-created WRIs should automatically be considered as evidence that may be exculpatory within the meaning of Internal Rule 53(4). As the Chamber has previously noted, WRIs are created by the Office of the Co-Investigating Judges which is an independent and impartial judicial body. Furthermore, the witness or Civil Party interviewed is asked at the conclusion of the interview to review the contents of the WRI and to attest to its accuracy. Accordingly, the WRIs at issue are presumptively reliable and there is no basis for assuming that the audio recording would differ significantly in substance from the WRI. Accordingly, the Chamber finds that the Co-Prosecutors are not obliged to check for inconsistencies between the statements reported in the WRI and the audio recordings of these interviews. The Chamber thus considers that there is no evidence that the Co-Prosecutors had actual knowledge that the audio recordings contained any exculpatory evidence. As such, there is no obligation pursuant to Internal Rule 53(4) for the Co-Prosecutors to automatically disclose such recordings.

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<sup>29</sup> Decision on NUON Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, E142/3, 30 May 2012 (“Decision on Audio Record Inconsistencies”, para. 12.

15. Nonetheless, the Chamber has indicated that it will entertain allegations of inconsistency between the audio recording and written records of interview where these are identified with sufficient particularity and pertain to alleged discrepancies on the substance which have clear relevance to the trial.<sup>30</sup> Practically speaking, such demonstration can only be made after listening to the audio recording, which requires access to them.<sup>31</sup> Therefore, the Chamber considers the Defence must have an opportunity to review the audio recordings of Case 003 and 004 WRIs admitted in Case 002/02.

16. As a corollary, since the Defence do not have access to the Case 003 and 004 Case Files, they must be made aware that such audio recordings exist. In this regard, the Chamber notes that the Defence were on notice as early as 18 March 2015 that there existed audio recordings for certain WRIs disclosed from Cases 003 and 004. Case 003 and 004 WRIs previously disclosed to the Defence include a checkbox to indicate when an audio or video recording is made of the interview. This box was checked on at least 61 WRIs which have been admitted or sought for admission in Case 002.<sup>32</sup> Fourteen of these WRIs were disclosed to the Defence on 18 March 2015 and sought for admission in May 2015.<sup>33</sup> Although these 14 WRIs formed part of a large disclosure, the trial proceedings were adjourned for one week to permit the parties to review these disclosures.<sup>34</sup> The Defence also had sufficient time during the subsequent eighteen months to review the WRIs to identify those which were audio recorded. Furthermore, at least four of these audio records correspond with WRIs of witnesses who testified in Case 002/02 which the KHIEU Samphan Defence submit they reviewed.<sup>35</sup> The Chamber therefore finds that the Defence had sufficient opportunity since March 2015 to identify and request those audio records of which it was made aware. In this instance, the Co-Prosecutors' fulfilled their obligation which extended no further than to disclose the Case 003 and 004 WRIs which on their face indicate whether an interview was recorded.

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<sup>30</sup> Decision on Audio Record Inconsistencies, para. 12.

<sup>31</sup> Cf. ICTY Rule of Procedure and Evidence 66B ("The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.")

<sup>32</sup> ICP Response, para. 13; The Chamber requested this list be provided by the Co-Prosecutors to assist in the drafting of this decision. The Chamber attaches a modified table to this decision. This information was available to any of the parties upon a review of the individual WRIs.

<sup>33</sup> E319/19.3.3; E319/19.3.58; E319/19.3.55; E319/19.3.56; E319/19.3.2; E319/19.3.54; E319/19.3.61; E319/19.3.57; E319/19.3.73; E319/19.3.1; E319/19.3.53; E319/19.3.219; E319/19.3.65; E319/19.3.217; The remaining WRIs that were audio recorded were subsequently disclosed in June 2015, January 2016, April 2016, July 2016, August 2016 and September 2016.

<sup>34</sup> T. 19 March 2015, pp. 38-40.

<sup>35</sup> T. 20 August 2015 (Testimony of TAK Buy); T. 11 and 12 January 2016 (Testimony of MUY Vanny); T. 5 and 6 October 2015 (Testimony of BAN Siek); T. 30 November 2015 (Testimony of PAN Chhuong); T. 1 and 2 December 2015 (Testimony of PAN Chhuong); KHIEU Samphan Request, paras 8-9.

17. As to the KHIEU Samphan Defence request to admit the audio recordings, the Chamber considers that it is premature at this stage of the proceedings. The Defence will have an opportunity to review the disclosed audio recordings and to identify any possible contradictions between these recordings and the corresponding WRIs. If contradictions exist, it may be necessary to transcribe, translate and admit the specifically relevant parts of the recording at issue.<sup>36</sup> But the Chamber does not consider that the Defence have established a general need to admit all existing recordings in their entirety when the Defence and the Chamber have not yet had the opportunity to review them.

18. The KHIEU Samphan Defence also suggests that it should have an opportunity to oppose the admission of WRIs on the basis of contradictions found in the interviews of audio recordings once those have been disclosed.<sup>37</sup> As noted above, the Defence have been on notice since March 2015 that such audio records exist. The Chamber previously granted the Defence request for an extension of time until 30 September 2016 to respond to the Co-Prosecutors' latest requests to admit documents, which include many of the WRIs at issue here.<sup>38</sup> Therefore, the Chamber considers the Defence have had adequate time to seek any audio recordings it deems material to its case. The Chamber declines to reopen and to further extend the deadline to file responses regarding the admissibility of these WRIs based on information that may be contained within the audio recordings. Finally as previously noted the presumption of reliability and authenticity attached to WRIs satisfies the standard for admission of evidence. Therefore any submissions filed by the Defence based on possible discrepancies between audio recordings and WRIs will be considered by the Chamber in determining what probative value to accord to the WRIs that are admitted.

19. Although the Defence request adequate time to review the audio recordings, they make no submission as to how much time may be required. The Chamber therefore reserves ruling on whether additional time is merited.

#### **4.2. Request for Sanctions**

20. The Chamber finds that the Co-Prosecutors were not under a duty to automatically disclose to the Defence all existing audio records corresponding with Case 003 and 004 WRIs

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<sup>36</sup> Decision on Audio Record Inconsistencies, para. 12.

<sup>37</sup> KHIEU Samphan Request, para. 13.

<sup>38</sup> Decision on Requests Regarding Internal Rule 87(4) Deadlines, E421/3, 26 August 2016; Decision on Requests Regarding Internal Rule 87(4) Deadlines [Full Reasons], E421/4, 21 September 2016.



proposed for admission or already admitted. Any duty to provide notice of the existence of such recordings was fulfilled by providing to the Defence the WRIs which indicated whether the interview was recorded. The request for sanctions is consequently denied.

#### **4.3. Authorisation to Disclose**

21. The Chamber notes that requests pursuant to Internal Rule 87(3) and (4) are currently pending before it to admit a number of Case 003 and 004 WRIs for which there exist audio recordings.<sup>39</sup> Noting that four audio recordings have already been authorised for disclosure, and in order to reduce the burden on the Office of the Co-Investigating Judges of having to review multiple requests for authorisation to disclose audio records,<sup>40</sup> the Chamber directs the Co-Prosecutors to seek authorisation from the International Co-Investigating Judge to disclose all of the audio recordings of WRIs admitted or sought for admission in Case 002/02.<sup>41</sup>

#### **FOR THE FOREGOING REASONS, THE TRIAL CHAMBER**

**ORDERS** the Co-Prosecutors to seek authorisation from the International Co-Investigating Judge, and to disclose, the audio recordings of all Case 003 and 004 WRIs admitted or sought for admission in Case 002/02;

**REJECTS** the KHIEU Samphan Defence request to admit all such audio recordings upon their disclosure without prejudice however to later requests to admit specific portions of the audio recordings where they tend to show that the corresponding WRI is unreliable or inaccurate; and

**REJECTS** the KHIEU Samphan Defence request to sanction the Co-Prosecutors for disclosure violations.

**Phnom Penh, 17 November 2016**  
**President of the Trial Chamber**



**Nil Nonn**

<sup>39</sup> International Co-Prosecutor's Request to Admit Documents Pursuant to Rules 87(3) and 87(4), E319/52, 25 July 2016; International Co-Prosecutor's Request to Admit Documents Pursuant to Rules 87(3) and 87(4), E319/56, 23 August 2016; International Co-Prosecutor's Request to Admit Documents From Cases 003 And 004 Pursuant To Rules 87(3) and 87(4), E319/58, 1 September 2016.

<sup>40</sup> Authorisation to Disclose Case 004 Audio Recording, para. 9 ("I do, however, note that this Request for one single audio recording is being approved on an exceptional basis. I shall require the OCP to submit further requests for audio recordings in a more comprehensive manner, and only after having conducted a thorough search and analysis of the audio material available to them.")

<sup>41</sup> The Chamber notes that a limited portion relating to the waiver of counsel was recorded of the WRI of 2-TCCP-223 (E3/9477, p. 3). This audio recording should also be disclosed.