



**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

<b>ឯកសារដើម</b>
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**Before:** Judge NIL Nonn, President  
Judge Jean-Marc LAVERGNE  
Judge YA Sokhan  
Judge Claudia FENZ  
Judge YOU Ottara

**Date:** 18 September 2015  
**Original language(s):** Khmer/English/French  
**Classification:** Confidential Public

**DECISION ON DESIGNATION OF 2-TCE-95**

**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  
Arthur VERCKEN  
Anta GUISSSE

## **1. INTRODUCTION**

1. The Co-Prosecutors propose to call 2-TCE-95 as an expert in relation to the trial topic concerning the Treatment of the Cham in Case 002/02.<sup>1</sup> The KHIEU Samphan Defence opposes the designation of 2-TCE-95 as an expert. During the Further Initial Hearing held on 30 July 2014, the Trial Chamber invited the Parties to comment on the objections raised by the KHIEU Samphan Defence.<sup>2</sup>

## **2. SUBMISSIONS**

2. The Co-Prosecutors request that 2-TCE-95 be examined before the Chamber on the following subjects:

Religious suppression of the Cham by the Khmer Rouge from 1970 onward; the 1975 Cham rebellions; the execution of male and female Cham rebels; the forced movements of the Cham; the execution of Cham in Kroch Chhmar District in 1978; the execution of Cham prisoners at S-21 Security Center; and estimated numbers of Cham killed as a result of the policies of the Khmer Rouge.<sup>3</sup>

3. In support of 2-TCE-95's qualification as an expert, the Co-Prosecutors point to the numerous interviews conducted by 2-TCE-95 with victims and witnesses in preparation of two books he authored on the treatment of the Cham during the Khmer Rouge period. They also highlight that 2-TCE-95 was a researcher with the Documentation Center of Cambodia (DC-Cam), and is currently employed as an analyst in the Office of the Co-Investigating Judges of the ECCC (OCIJ).<sup>4</sup>

4. The KHIEU Samphan Defence responds that no information has been offered by the Co-Prosecutors as to 2-TCE-95's academic degrees or the academic institutions where they were supposedly obtained.<sup>5</sup> It also raises concerns about 2-TCE-95's impartiality considering both his work with DC-Cam, the approach of which to historical truth is alleged to be questionable, and his current employment with the OCIJ.<sup>6</sup> Finally, the KHIEU Samphan Defence objects to

<sup>1</sup> Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, pp. 47-48; *see also* Annex II - OCP Expert List, E9/4.2, 28 January 2011, p. 5.

<sup>2</sup> T. 30 July 2014 (Further Initial Hearing), p. 59.

<sup>3</sup> Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, pp. 47-48

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

<sup>5</sup> *Opposition de la Défense de M. KHIEU Samphân à la comparution de certain 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, (KHIEU Samphan Objection), paras 41, 42.

<sup>6</sup> KHIEU Samphan Objection, paras 41- 42; *see also* T. 30 July 2014 (Further Initial Hearing), p. 110.

the designation of 2-TCE-95 as an expert because his status as a victim and witness of certain events is incompatible with that of an expert.<sup>7</sup>

5. The Co-Prosecutors reply that the research that led to the publication of the two books written by 2-TCE-95, both included in the list of documents for Case 002/02, “is the credential that ... [2-TCE-95] is an expert qualified to testify on this issue.”<sup>8</sup> They also submit that questions of impartiality are matters relevant to the weight to be given to the evidence rather than its admission.<sup>9</sup>

### 3. APPLICABLE LAW

6. 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 80bis (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.

7. 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.<sup>10</sup> Experts provide clarification, context, or additional assistance for the purpose of a Chamber’s assessment of the evidence.<sup>11</sup> The Chamber has found that where an expert also has personal knowledge of facts relevant to the Democratic Kampuchea period, in addition to being called as expert, he or she may be questioned on those facts.<sup>12</sup>

<sup>7</sup> KHIEU Samphan Objection, para. 42.

<sup>8</sup> T. 30 July 2014 (Further Initial Hearing), p. 75.

<sup>9</sup> T. 30 July 2014 (Further Initial Hearing), p. 75.

<sup>10</sup> Decision on Assignment of Experts, E215, 5 July 2012, (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.

<sup>11</sup> Decision on Assignment of Experts, para. 16.

<sup>12</sup> Decision on Assignment of Experts, para. 18; Decision on Designation of TCE-33, E283, 26 April 2013, (Decision on Designation of TCE-33), para. 16.

8. 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 knowledge that might assist the Chamber as finder of fact in understanding the evidence before it.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

9. 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.<sup>16</sup> Further, the extent of a proposed expert's involvement in investigations or the preparation of the prosecution's case, or the impact of personal knowledge as a witness or of suffering experienced as victim of events relevant to the field of expertise can be explored during questioning, thus giving the Accused full opportunity to challenge the expert's evidence.<sup>17</sup> The assessment of a proposed expert's qualifications and bias are made on a case-by-case basis in light of all the circumstances.<sup>18</sup>

<sup>13</sup> *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.

<sup>14</sup> 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, para. 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.

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> *See* Decision on Designation of TCE-33, paras 13-15; *Nahimana* Appeal Judgement, para 199; Decision Reynaud Theunens ICTY, paras 28-29.

<sup>18</sup> Decision on Designation of TCE-33, para. 14 and citations therein. Here, the Chamber noted that in two cases before the ICTY, the same individual was denied expert status because his involvement with the investigations was such that his opinion could not be regarded as having the appearance of impartiality on which findings crucial to the guilt or innocence of the accused could be made. The same person was however called as expert in two other cases before the ICTY.

#### 4. ANALYSIS

10. The Chamber recalls that proof of an academic qualification is not a prerequisite for an individual to be qualified as expert. As noted above, a Trial Chamber may consider the individual's curriculum vitae, articles, publications or other information, including the proposed expert's former and current positions in order to determine whether it will hear him or her as expert.<sup>19</sup> The Chamber notes that 2-TCE-95 has worked for several of years as a researcher at DC-Cam, an organisation specialised in cataloguing and analysing documentary materials on the Khmer Rouge regime for historical purposes, and currently works as an analyst with the OCIJ. While working as researcher for DC-Cam, 2-TCE-95 authored two books based on his research into the history of the Cham during the Khmer Rouge regime, both of which are on the Case File and have been relied upon in the Closing Order.<sup>20</sup> One of the books also sets out the research methodology employed by 2-TCE-95 for the preparation of the book.<sup>21</sup> The Chamber notes that 2-TCE-95 conducted detailed research and numerous interviews with victims and witnesses in conjunction with the preparation of these books.<sup>22</sup> It further notes that some excerpts of these books have already been used in court by various Parties, including by both Defence teams.<sup>23</sup> One of the books provides a collection of eyewitness accounts of the events that unfolded in the Kroch Chhmar district from 1970 to 1979, gathered by 2-TCE-95 over a period of three years. Based on these accounts and documentary material, 2-TCE-95 provides an analysis of the Khmer Rouge policy towards the Cham and how it was implemented from 1970 until 1979.<sup>24</sup> This book also deals with two Cham rebellions against the Khmer Rouge in September and October 1975 that are referred to in the Closing Order.<sup>25</sup> The other book authored by 2-TCE-95 profiles 13 Cham imprisoned at S-21. For each of them, he compares data on arrest, imprisonment and

<sup>19</sup> See *supra*, para. 8.

<sup>20</sup> Annex III – OCP Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, p. 47; Osman YSA, *Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime* (Phnom Penh: Documentation Center of Cambodia, 2002), E3/1822; Osman YSA, *The Cham Rebellion: Survivors' Stories from the Villages* (Phnom Penh: Documentation Center of Cambodia, (2006), E3/2653; see Closing Order paras 748-789.

<sup>21</sup> Osman YSA, *Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime* (Phnom Penh: Documentation Center of Cambodia, 2002), E3/1822, pp. v, 149-151.

<sup>22</sup> Osman YSA, *Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime* (Phnom Penh: Documentation Center of Cambodia, 2002), E3/1822, pp. 101-117, 149-151.

<sup>23</sup> See T. 7 September 2015 (IT Sen), pp. 70-72, 83-84; T. 9 September 2015 (SOS Min), pp. 10-11, 21, 34, 36-38, 41, 44, 46-47.

<sup>24</sup> Osman YSA, *The Cham Rebellion: Survivors' Stories from the Villages* (Phnom Penh: Documentation Center of Cambodia, (2006), E3/2653.

<sup>25</sup> Osman YSA, *The Cham Rebellion: Survivors' Stories from the Villages* (Phnom Penh: Documentation Center of Cambodia, (2006), E3/2653, pp. 53-112; Closing Order, paras 758-759.

execution from S-21 documents, with information supplied by family members and other witnesses interviewed by the author.. Later in the book, he analyses the Democratic Kampuchea policies towards Islam based on these 13 profiles as well as other documents.<sup>26</sup> The Chamber finds that the special knowledge that 2-TCE-95 gained through his work and the research he conducted in support of these two books may assist the Chamber in understanding the evidence before it on the topic of the Treatment of the Cham.

11. Regarding concerns as to 2-TCE-95's potential bias, the Chamber recalls that challenges to the impartiality and independence of an expert are matters related to the evaluation of the evidence and not to its admissibility,<sup>27</sup> and finds that the Parties will be able to test the expert's impartiality and independence during his testimony. This will further assist the Chamber in assigning appropriate weight to 2-TCE-95's expert testimony as well as those documents on the record authored by him. Further, the Chamber recalls that it is not bound by the evidence or conclusions given by an expert, 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.

12. Finally, the Chamber finds that 2-TCE-95's status as a victim and factual witness of the Khmer Rouge is not in itself sufficient to exclude him being heard as an expert. The Chamber will nevertheless take his status as victim and factual witness into consideration when assessing his evidence. As per the practice of this Chamber, considering that 2-TCE-95 may be able to testify on matters of fact, the Chamber will hear him on any relevant factual evidence.<sup>28</sup>

13. In light of all of the above the Chamber finds that it is in the interests of justice to call 2-TCE-95 as an expert.

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<sup>26</sup> Osman YSA, *Oukoubah: Justice for the Cham Muslims under the Democratic Kampuchea Regime* (Phnom Penh: Documentation Center of Cambodia, 2002), E3/1822, pp. 11-75, 77-100.

<sup>27</sup> *See supra*, paras 8-9.

<sup>28</sup> *See* Decision on Assignment of Experts, para. 18; Decision on Designation of TCE-33, para. 16.

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

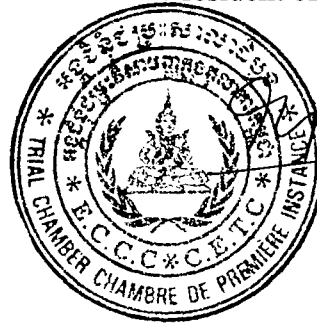
**DISMISSES** the KHIEU Samphan Defence's objections;

**AFFIRMS** that it will hear evidence from 2-TCE-95 as an expert;

**DETERMINES** that 2-TCE-95 may be questioned on all matters within his knowledge or expertise relevant to the Treatment of the Cham in Case 002/02; and

**DIRECTS** the Co-Prosecutors to lead the in-court questioning of 2-TCE-95 pursuant to Internal Rules 91 and 91 *bis*.

Phnom Penh, 18 September 2015  
President of the Trial Chamber



*[Handwritten signature]*

**Nil Nonn**