



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: ០០១/១៨ កក្កដា ២០០៨/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

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Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: 2 June 2009

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DECISION ON PROTECTIVE MEASURES FOR CIVIL PARTIES

Co-Prosecutors

CHEA Leang
Robert PETIT

Accused

KAING Guek Eav alias "DUCH"

Lawyers for the Civil Parties

KONG Pisey	TY Srinna
HONG Kimsuon	Pierre Olivier SUR
YUNG Panith	Alain WERNER
KIM Mengkhy	Brianne McGONIGLE
MOCH Sovannary	Annie DELAHAIE
Silke STUDZINSKY	Elizabeth RABESANDRATANA
Martine JACQUIN	Karim KHAN
Philippe CANONNE	

Lawyers for the Defence

KAR Savuth
François ROUX



E9L

THE TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);

BEING SEISED of Case File No. 001/18-07-2007-ECCC/TC pursuant to the “Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch,” rendered orally by the Pre-Trial Chamber on 5 December 2008 and filed in Khmer on 9 December 2008;

RECALLING the Chamber’s “Direction Setting Deadline for Civil Parties’ Request for Protective Measures and for Parties’ Outline of Preliminary Objections” of 22 January 2009 (“Direction of 22 January 2009”);¹

HAVING RECEIVED the “Clarification on Existing Protective Measures for Civil Parties” filed by Civil Party Group 1 on 10 February 2009, in which protective measures are sought in relation to all civil parties represented by that group (“Request”);²

A. INTRODUCTION

1. A total of 93 civil party applications are currently filed in Case File No. 001. 28 applications were received by the Office of the Co-Investigating during the investigation phase. A further 66 civil party applications were received by the Trial Chamber prior to the Initial Hearing. The Chamber has since declared one such application to be inadmissible.³

2. Seven of the civil party applications filed before the Trial Chamber contain specific requests for various protective measures with regards to the public and other Parties of the proceedings. The Witness and Expert Support Unit (“WESU”) has completed its risk assessment in relation to all these applicants, recommending in particular no protective measures for 5 of them.⁴ The Chamber will rule on the two remaining requests at a later date.⁵ The remaining 59 civil party applications contain no specific requests for protective measures.

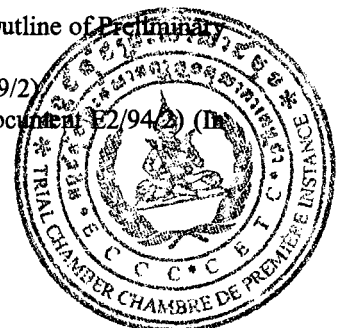
¹ “Direction Setting Deadline for Civil Parties’ Request for Protective Measures and for Parties’ Outline of Preliminary Objections”, 22 January 2009 (Document E9).

² “Clarification on Existing Protective Measures for Civil Parties”, 10 February 2009 (Document E9/2).

³ “Direction on the Civil Party Status of Applicants E2/36, E2/51 and E2/69”, 4 March 2009 (Document E2/94/2) (in relation to Civil Party Application E2/36).

⁴ Civil Parties E2/61, E2/63, E2/64, E2/65 and E2/66 (filed strictly confidential).

⁵ Civil Parties E2/62 and E2/89 (filed strictly confidential).



E71

3. In its Direction of 22 January 2009, the Chamber ordered the then existing Civil Parties (namely the 28 Civil Parties who joined the case file during the investigation phase) who intended to apply for protective measures at the trial stage of the proceedings to do so no later than 28 January 2009. No such submission was received by the Chamber within this deadline. It further directed any new civil party applicant who intended to do so to apply for protective measures no later than 10 February 2009. Civil Party Group 1 filed its Request on this date. No other Civil Party Group filed a written submission within the prescribed time-limit.

4. At the Initial Hearing on 17 February 2009, the Chamber granted a further opportunity to all Civil Parties and Civil Party applicants to make submissions regarding protective measures. Civil Party Group 1 reiterated its written request.⁶ Civil Party Group 3 recalled its request for protective measures in relation to Civil Party Applicant E2/89,⁷ for whom a decision of the Chamber remains pending.⁸ The other Civil Party Groups advanced no request for protective measures requiring a decision of the Chamber at this stage.⁹ At this hearing, the Chamber decided that all civil parties and applicants would, as an interim measure, be referred to by the document reference number of their original civil party applications.¹⁰

B. SUBMISSIONS

5. In its Request, Civil Party Group 1 submits that all Civil Parties should benefit from the protective measures ordered by the Office of the Co-Investigating Judges (“OCIJ”). Such measures should continue to apply *mutatis mutandis* throughout the trial proceedings unless specifically waived by the Civil Party or varied or revoked by the Chamber.¹¹ In support of this request, Civil Party Group 1 cites Article 4.1 and 4.4 of the Practice Direction on Protective Measures.¹²

6. According to Civil Party Group 1, previous decisions of the OCIJ granted a variety of measures, including orders preventing the public disclosure of identifying information. These apply to all Civil Parties, irrespective of when their applications were filed.¹³ Should the Chamber find

⁶ Transcript (“T.”), 17 February 2009 (Initial Hearing) pp. 18-19 and 23-24.

⁷ T., 17 February 2009 (Initial Hearing), p. 22, lines 15-15, 24.

⁸ Above, para. 2, footnote 5.

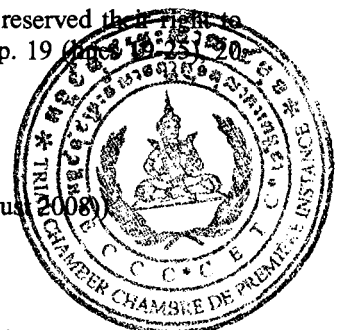
⁹ Whilst Civil Party Groups 2 and 4 advanced no request for protective measures, the former reserved the right to request future measures should circumstances require (T., 17 February 2009 (Initial Hearing), pp. 19 (lines 6-7) and 23 (lines 18-12)).

¹⁰ T., 17 February 2009 (Initial Hearing), p. 15, lines 21-25.

¹¹ Request, para. 4.

¹² Practice Direction ECCC/03/2007/Rev. 1.

¹³ Request, paras. 7-8 (citing orders D6 (30 July 2007), D12/VI (9 October 2007) and D98 (4 August 2008)).



that not all Civil Parties benefit from the protective measures ordered by the OCIJ, identical measures should in that case be imposed by the Trial Chamber.¹⁴

C. DELIBERATIONS

7. The OCIJ's "Decision on Protective Measures" rejected the Co-Prosecutors' request for protective measures in respect of a wide range of victims, witnesses and third persons referred to in the Introductory Submission of 18 July 2007. Although all appropriate measures must be taken to ensure the protection of victims and witnesses, the OCIJ noted that indiscriminate measures in relation to an unlimited number of individuals, absent a clear justification, jeopardised the fundamental rights of the accused in a criminal trial.¹⁵ Whilst that order did not preclude a party or individual from requesting any necessary protective measures, the OCIJ clarified that in support of such a request, an application must contain the identity of the parties or individuals benefiting from the measures sought, and how, in the absence of the measures, the lives and wellbeing of these persons or their families would be imperilled.¹⁶ The established jurisprudence of other international criminal tribunals also indicates that protective measures are granted on a case by case basis when supported by information regarding the identity of the applicant and a particularized risk or threat of harm to the applicant or their relatives. In addition, a genuine fear on the part of the applicant or their relatives is required, as well as the existence of an objective justification for this fear.¹⁷ Although referring to the protection of witnesses appearing at trial, the Chamber finds that this case law may provide guidance in respect also to the protection of Civil Parties before the ECCC.

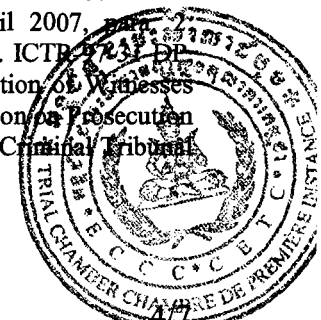
8. Subsequent decisions of the OCIJ have also reiterated the minimum criteria for the grant of protective measures, and demonstrate that protective measures are usually granted in favour of designated persons on the basis of a specified risk. In its Additional Decision on Motion for Protective Measures (D12/VI), the OCIJ rejected a renewed request from the Office of the Co-Prosecutors on grounds that it did not reach the required level of specificity and failed to show how

¹⁴ *Ibid.*, para. 5.

¹⁵ "Decision on Protective Measures" 30 July 2007 (Document D6), p. 1 (noting that the request did not specify the names of the individuals concerned, or how the failure to provide protective measures would endanger the lives and security of hundreds of individuals referenced in the request.).

¹⁶ *Id.*

¹⁷ See, e.g., *Prosecutor v. Gatete*, Decision on Defence Motion for Protection of Witnesses, (Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR TC)), Case No. ICTR-2000-61-I, 10 April 2007; *Prosecutor v. Renzaho*, Decision on Defence Request for Protective Measures, (ICTR TC) Case No. ICTR-2001-7-PT, 12 March 2007, para. 4; *Prosecutor v. Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (ICTR TC), Case No. ICTR-96-7, 1 September 2003, para. 2; *Prosecutor v. Milosevic*, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia), 18 June 2002..



the absence of protective measures would place the life or security of each applicant in danger.¹⁸ It also noted the objective criteria applied by the United Nations in assessing the current security phase in Cambodia, and the length of time that has elapsed since the commission of alleged crimes within the jurisdiction of the Court to which the witnesses and victims in question could be called to testify.¹⁹ It further assessed the alleged fear and reluctance on the part of some victims and witnesses to testify before the ECCC as inconclusive.²⁰ Finally, it noted that the WESU came to a different view regarding both the generalised risks for the security of potential witnesses and victims, as well as current danger. This assessment instead showed that a number of witnesses were ready to testify publicly and that, for the majority, the risk level was low.²¹ In its Protective Measures Order D98, the OCIJ similarly dismissed various requests for protective measures in relation to seven Civil Parties, noting *inter alia* the high public profile of some of these Civil Parties, absence of any threats to date due to their involvement as Civil Parties or indication of current threats to them, as well as the recommendation by WESU that no protective measures were required.²²

9. The OCIJ decisions cited in support of the Request accordingly contain no protective measures which could be presumptively applied to the benefit of any Civil Party before the Trial Chamber in the present case. Although the OCIJ has consistently reiterated that persons with access to the case file are professionally bound to not publicly divulge information obtained from it, particularly where that information might permit the identification and location of witnesses, this follows instead from the confidential nature of judicial investigations.²³ The confidentiality of judicial investigations is distinguishable from trial proceedings, which are instead presumptively public. Further, the OCIJ itself did not envisage that measures adopted by it would continue in effect throughout the trial phase. Instead, it stressed that it is for the Trial Chamber and the Trial Chamber alone to determine whether to impose limits on the right to a public hearing at the trial stage, in accordance with the adversarial principle and with respect for defence rights.²⁴

¹⁸ “Additional Decision on Motion for Protective Measures”, 9 October 2007 (Document D12/VI), para. 7.

¹⁹ *Id.*, para. 13.

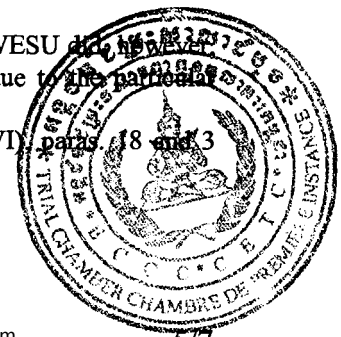
²⁰ *Id.*, para. 14.

²¹ *Id.*, para. 15 (noting that many potential witnesses were already well known to the public through earlier public declarations in the media, and that inclusion of their names in the case file as potential witnesses was unlikely to create additional risk for them).

²² “Order on Protective Measures”, 8 August 2008, (Document D98), paras. 1.2.1-1.2.6 and 2.6. WESU did not recommend that the identity of a small number of Civil Parties not be released to the public due to the particular subjective characteristics of these parties (*ibid.*, paras. 1.2.3-1.2.5).

²³ “Additional Decision on Motion for Protective Measures”, 9 October 2007 (Document D12/VI), paras. 18 and 3 (disposition) and Order on Protective Measures (D98), OCIJ, 8 August 2008, para. 2.3.

²⁴ “Order on Protective Measures”, 8 August 2008 (Document D98) para. 2-7.



10. It follows from the rejection of all requests for protective measures by the OCIJ in this case that Articles 4.1 and 4.4 of the Practice Direction on Protective Measures are inapplicable.²⁵

11. In the absence of any protective measures applicable pursuant to OCIJ decisions, the Chamber will determine whether any protective measures should be imposed pursuant to the Request. The Chamber finds that no information regarding both the identity of each Civil Party represented by Group 1 or the specific circumstances warranting protective measures for these Civil Parties has been provided within the Request. Nor have the Civil Party Lawyers for Group 1 adduced any material to show that any safety concerns of particular Civil Parties are well-founded. Accordingly, the Chamber finds that no necessity for protective measures has been demonstrated in relation to the Civil Parties represented by Group 1.

12. With regard to the applications for protective measures for Civil Parties E2/61, E2/63, E2/64, E2/65 and E2/66, the Chamber also finds these applications to furnish insufficient particulars regarding the specific circumstances warranting such orders. Further, the risk assessments of WESU in relation to these Civil Parties do not indicate or identify specific threats or security concerns and recommend no protective measures. No necessity for the measures sought has been demonstrated before the Trial Chamber.

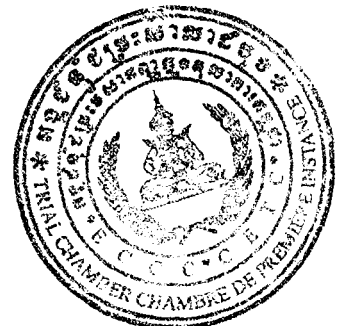
13. In conclusion, the Chamber therefore **FINDS** that protective measures are not warranted in relation to Civil Parties in Case File 001 for whom protective measures are sought (namely Civil Parties represented by Group 1 and E2/61, E2/63, E2/64, E2/65 and E2/66) and **NOTES** that protective measures have not been sought in relation to any other Civil Party in Case File 001;

D. DECISION

FOR THE FOREGOING REASONS, the Trial Chamber DECIDES THAT:

DENIES the Request;

RESERVES its decision in relation to Civil Parties E2/62 and E2/89;



²⁵ Articles 4.1 and 4.4 of this Practice Direction provide that protective measures, once ordered, shall continue to apply *mutatis mutandis* throughout the entire proceedings in the case concerned unless cancelled or varied by the Co-Investigating Judges or seized Trial Chamber.

E21

ORDERS the Court Management Section to re-classify Civil Party applications E2/61, E2/63, E2/64, E2/65 and E2/66 from strictly confidential to confidential and notify them to the other Parties in the proceedings;

ORDERS, in relation to public proceedings before the Trial Chamber in Case File 001, that all Civil Parties (with the exception of Civil Parties E2/62 and E2/89) will henceforth be referred to by name, together, where necessary, with the relevant Civil Party application document reference number. *[Signature]*

Phnom Penh, 2 June 2009

President of the Trial Chamber

