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ព្រះរាជាណាចក្រកម្ពុជា
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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

TRIAL CHAMBER

TO: All parties, Case 002

Date: 17 November 2011

FROM: Susan Lamb, Trial Chamber Senior Legal Officer

CC: All Trial Chamber Judges

SUBJECT: Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011

On 17 October 2011 by email, the parties were requested to raise informally with the Trial Chamber Senior Legal Officer by Tuesday 1 November 2011 any remaining issues that they consider to require resolution and which may impede the efficiency of the first session of the hearing of the substance in Case 002 (5-16 December 2011). This memorandum addresses the following responses since received from the parties, in addition to sundry other filings received to date:

- Co-Prosecutor's Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 21 October 2011 (E132) (supported by the IENG Sary Defence (E132/1));
- IENG Sary Defence's Letters of 17 October 2011 (E132/1.3) (responded to in part in E124/7, E131/1 and by email from the Senior Legal Officer to the parties on 25 October 2011), 21 October 2011 (E132/1.2) and 1 November 2011;
- Advance courtesy copy of letter to Senior Legal Officer from Deputy Co-Prosecutor of 1 November 2011; and
- Civil Party Request for Trial Management Meeting and Regular Trial Status Meetings for Case 002 and for Clarification on Trial Scheduling and Preparation of 2 November 2011 (E132/2).

General information

Some of the information sought by the parties has since been provided within recent memoranda and decisions of the Chamber (*see e.g.* E131, E101/5, and E124/7), in particular addressing the trial session between 5-16 December 2011 (E131/1, including Confidential Annexes A and B (E131/1.1 and E131/1.2, respectively)). The Trial Chamber rejected the Lead Co-Lawyers' request to make brief preliminary remarks on

behalf of the Civil Parties after the Co-Prosecutor's opening statement (E131/4) on 15 November 2011 (E131/4/1).

With the exception of public holidays, trial proceedings will be normally be held between Monday to Thursday (inclusive) from 9am until 4pm.

Further information regarding subsequent trial sessions in Case 002/01, and later trials, will be communicated to the parties in due course.

Order for examination of topics

Case 002 is now severed and questioning at trial should follow the topics indicated to the parties in Annex E124/7 to ensure that there is a logical sequence to the examination of all Accused, witnesses, Experts and Civil Parties.

Questioning of the Accused will commence with the first segment of the trial in Case 002/001, namely, historical background. Paragraphs 18-32 of the Closing Order will therefore be read out, and, in relation to each Accused, the additional relevant paragraphs:

NUON Chea: paras 862-868 and 1577-1580;
IENG Sary: paras 994 - 1000, 1091 and 1585-1588; and
KHIEU Samphan: paras 1126-1130 and 1598-1600.

The Chamber notes the Co-Prosecutors' request for clarification of scope of the first trial of 4 November 2011 (E124/9). Regarding the examination of policies other than those relating to forced evacuation, the purpose of including reference to them in the first trial is to enable the manner in which policy was developed to be established. What is therefore envisaged is presentation in general terms of the five policies, although the material issue for examination in the first trial is limited to the forced movement of the population (phases one and two). It follows that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two).

The above specified paragraphs of the Closing Order relevant to the first segment of the trial pertain to the historical background and do not concern the five policies. If it is considered that the implementation of these policies commenced before April 1975, questions on these matters are expected to arise during this first trial segment only incidentally.

In sum, the parties are requested to focus their detailed questioning of each Civil Party and witness to facts relevant to the first trial segments. No examination of topics to be included in later trials will be permitted. Further guidance will be provided to the parties as the trial proceeds, where necessary.

Providing the public with information from the Closing Order

Before the questioning under each topic commences, the relevant paragraphs of the Closing Order shall be read out publicly by a Greffier. Subject to any order to the contrary, the documents or other sources referred to in the footnote to each such

paragraph shall, without further order, be deemed to be placed before the Chamber (Internal Rule 87(2) and (3)).

Conduct of proceedings

Pursuant to Internal Rule 90, the President may allocate certain Accused, witnesses, Civil Parties or experts to Trial Chamber judges who will then have primary responsibility for questioning that person. In addition, the President may, by memorandum, assign to the Co-Prosecutors, individual Defence teams or Lead Co-Lawyers the primary responsibility for examining specified witnesses, experts or Civil Parties. Such assignment shall be notified to the party concerned well in advance of the witness, expert or Civil Party's testimony to enable the parties to prepare adequately.

Questioning of the Accused

Pursuant to Internal Rule 90, the President, Judges of the Trial Chamber, the parties and their lawyers have the right to question the Accused. The Accused may decline to answer questions (Internal Rule 21(1)(d)).

After the Trial Chamber judge assigned by the President to conduct the examination of each Accused has concluded, the floor will be given to other judges and then to the parties in the following order: the Co-Prosecutors, Lead Co-Lawyers, and the Defence teams in the order they are set out in the Indictment (NUON Chea, IENG Sary and KHIEU Samphan), with the lawyer representing the Accused being questioned having the final opportunity to ask questions.

Unless otherwise decided, the Chamber will question each Accused in the order set out in the Indictment (E101/5). The Trial Chamber retains the right at any relevant time to put questions to an Accused to provide an opportunity for comment. The parties will then be given an opportunity to put questions. Questions to be put to the Accused on 5 December 2011 and subsequent days shall commence with questions relevant to historical background (above). In any case, this questioning shall be limited to topics relevant to the scope of Case 002/01.

The Chamber takes note of the IENG Sary Defence indication that the Accused IENG Sary will not be testifying in connection with Case 002 (E101/4 and E101/4.1). The Chamber thanks the IENG Sary Defence for this indication, which assists the Chamber and other parties in planning for the early stages of trial. Indications from the NUON Chea and KHIEU Samphan Defence teams would further assist the Chamber and the other parties in estimating how soon the questioning of the first witnesses and Civil Parties at trial is likely to commence and enable them to prepare accordingly.

Hearing of witnesses, Experts and Civil Parties

After the questioning of all Accused concludes on the historical background (above), the Chamber and the parties shall then examine witnesses and experts relevant to that topic. In order to avoid asking witnesses or experts to return during Case 002/01, they should be examined on all topics included in Case 002/1 that are within their knowledge, using the same topic sequence (as set out in Annex E124/7.1) to guide the questioning.

Where the President has assigned the primary responsibility for questioning a witness, expert or Civil Party to the Co-Prosecutors, a Defence team or to the Lead Co-Lawyers, the judges will introduce the witness or civil party and conduct preliminary questioning before inviting the party to continue the examination. The same practice will be observed for Civil Parties. It would be preferable to guide their statements by asking each Civil Party to focus sequentially on topics as set out above, followed at the end by a statement concerning the harm suffered by them.

Witness order for first trial session

The Chamber will hear the Civil Parties and witnesses listed in Annex B (E131/1.2) in the order to be notified shortly.

The Witness and Expert Support Unit (“WESU”) has advised the Chamber that of the eight witnesses and Civil Parties listed in Annex B (E131/1.2), Witness TCW-297 is deceased.¹ WESU has contacted all remaining witnesses in Confidential Annex B (E131/1.2). The hearing of TCW-395’s testimony by video-link is presently being considered. The parties will be advised further in due course.

Any individuals in Confidential Annex B (E131/1.2) not able to be heard by the Chamber before 16 December 2011 will be heard upon the resumption of the proceedings on 9 January 2011 and subsequently. The Chamber will in due course provide the parties with a list of the next witnesses, Experts or Civil Parties to be heard.

Witnesses, experts and Civil Parties will be questioned by the parties in the same order as for the Accused (above). As not all witnesses, Civil Parties and Experts will be of equal relevance at trial, the Chamber considers it inappropriate to issue time limits to the parties for questioning at this stage. The parties, however, are expected to confine their questioning to relevant areas and the Defence teams and Civil Party Lead Co-Lawyers must avoid repetitive questioning. Time limits will be imposed by the Chamber where this is considered necessary.

Witness, Civil Party and Expert preparation

The Chamber agrees that the efficiency of proceedings may be enhanced if prior to testimony, witnesses are given the opportunity to refresh their memories by reviewing their prior statements. The Chamber will ensure that WESU is provided with the prior statements of each witness so that they may review them in advance of their testimony. The Chamber relies on the Lead Co-Lawyers to ensure that Civil Parties, in the interests of the expeditiousness of proceedings, limit the information they provide to the Chamber to that which is relevant to Case 002/01. Directions to guide the required scope of expert testimony in relation to Case 002/01 will be provided by the Chamber where considered necessary.

¹ Although not called in the first trial session, WESU has further advised that Witness TCW-604 – who is listed in E131/1 Annex A and thus relevant to later stages of Case 002/01 – is also deceased.

Measures concerning self-incrimination

WESU has advised that similar modalities as those used in Case 001 regarding the protection against self-incrimination will also be available and utilized in Case 002.

Objections to Documents

Deadlines and modalities for objections to documents to be admitted during the first trial session were provided in E131/1. These documents were recently identified in various filings of the parties on or before the deadline of 1 November 2011. By email to the parties on 25 October 2011, the deadline for the filing of documents relevant to those individuals who might be called during the first trial session was extended by the Chamber to 11 November 2011. Some parties availed themselves of this additional time. As this day was a public holiday, this deadline instead fell on 14 November 2011. The Chamber will rule on these objections, and any previously filed relevant to the first trial, in due course.

Reference to documents during proceedings

The Chamber notes the Co-Prosecutor's request of 3 November 2011 to establish an efficient system for admitting documentary evidence at trial (E136). In accordance with accepted practice in Case 001, the Chamber confirms that the parties will be permitted to submit documents directly to the Trial Chamber in addition to tendering documents through witnesses. In Case 001, admission of documents not relevant to particular witnesses took place at the end of the presentation of evidence. The Chamber will provide guidelines to the parties on the timing of the admission of these documents in due course. Also in accordance with the Trial Chamber's practice in Case 001, documents included in parties' document lists that are not objected to by an opposing party are considered to be admitted into evidence without further enquiry. It follows that this can only occur following the Chamber's resolution of all recently-filed and relevant objections (above). The Chamber and the parties, when referring to documents on the case file during proceedings shall use the filing reference (for example E124) and only if referring to a limited or specific part of the document, shall also indicate the ERN in all three languages for that part. The Chamber will therefore allocate specified time during proceedings to enable the parties, in the interests of efficiency, to place before the Chamber all documents not admitted in connection with the testimony of a particular witness or Civil Party. Oral argument in relation to objections to documents will also be scheduled by the Chamber, where required.

Display of documents and audio-visual material

At present, display of documents and audio-visual materials can only occur from the Greffier's bench. Documents and audio-visual materials that the parties wish to display during trial must therefore be communicated and made available to the court officer in advance of the court session in question. The Court Management Section is presently exploring modalities to permit the parties to display documents instead from their own monitors in the courtroom. Updates will be provided as soon as possible.

Preliminary Objections

As the Trial Chamber has previously indicated, the sole decision that the Chamber does not intend to render before or very soon after the commencement of trial concerns the preliminary objection of the KHIEU Samphan Defence regarding personal jurisdiction (E46). As resolution of this objection entails a mixed assessment of fact and law, it will accordingly be decided at a later stage of the trial (E51/7).

As the Trial Chamber rendered its decision on the IENG Sary Defence preliminary objection concerning amnesty and *ne bis in idem* on 3 November 2011 (E51/15), the IENG Sary Defence's request to stay the commencement of trial until the final determination of this preliminary objection (E135) is moot. The Chamber has prioritized and since issued all preliminary objections with implications for trial management, and disposition of the small number of remaining preliminary objections was not considered by the Chamber to constitute a barrier to the commencement of the trial of the substance in Case 002 on 21 November 2011. The Chamber does not intend to stay proceedings in the event any of its preliminary objections decisions are appealed to the Supreme Court Chamber. This constitutes the Chamber's official response to the IENG Sary Defence's letter to the Senior Legal Officer of 4 November 2011 requesting information concerning outstanding preliminary objections.

Prosecution Motion E127 and IENG Sary Defence response (E127/1)

The Chamber does not presently possess the statements in question but is currently considering the options available to it in order to obtain them. The Chamber will issue directions in relation to this motion in due course. It notes that none of the statements in question originate from the witnesses and Civil Parties in the Chamber's list of witnesses and Civil Parties to be called during the first trial session (Annex B, E131/1.2).

Request for Trial Management Meeting and informal meeting with Senior Legal Officer

This memorandum addresses, to the extent possible, all issues raised by the parties relevant to the first trial session. The Chamber accordingly does not consider a further Trial Management Meeting to be required in advance of the commencement of trial. However, the Trial Chamber Senior Legal Officer will hold an informal meeting for the parties on Friday 18 November 2011 at midday in Room 416 to address any remaining practical issues. Due to space constraints, each party is requested to limit their attendance to two persons. The meeting will be conducted in English.

Further informal meetings with the Senior Legal Officer will be scheduled as required.