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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

TRIAL CHAMBER

Date: 28 June 2013

TO: All Parties, Case 002

FROM: NIL Nonn, Trial Chamber President

CC: All Trial Chamber Judges, Trial Chamber Senior Legal Officers
Witness/Expert Support Unit ("WESU")



SUBJECT: Disposition of all Requests for Protective Measures sought in Case 002/01 and response to Co-Prosecutors' Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures (E286)

Introduction

1. Over the course of proceedings in Case 002, the Chamber was seized of requests for protective measures for ten Civil Parties (TCCP-18, TCCP-19, TCCP-62, TCCP-86, TCCP-87, TCCP-104, TCCP-109, TCCP-176, TCCP-177 and TCCP-178). These requests were made by the Co-Prosecutors or the Lead Co-Lawyers in connection with their initial lists of proposed witnesses and Civil Parties to be heard at trial (E9/4.3.1, E9/4.6, E9/4/3.3, E9/4/3.5, E9/4/3/3 and E9/4/3/3.1).

2. The Chamber identified a further six Civil Parties who had indicated a need for protective measures on their victim information forms (applications to be admitted as Civil Parties), often without particularizing the type of protective measures sought or the reasons why they were required. As no party requested to hear these Civil Parties at trial, these individuals were not assigned a pseudonym and are identified instead by the document reference number of their Civil Party applications (namely, D22/1749, D22/2404, D22/2441, D22/2585, D22/2649 and D22/3246).

3. The Chamber is also seized of a request by the Co-Prosecutors for a reassessment of the need for protective measures for Civil Party SAR Sarin (TCCP-186), who testified in Case 002/01 on 29 April 2013, and for his recall for further questioning before the Chamber (E286). The KHIEU Samphan Defence opposes this request for recall (E286/1).

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Steps taken by WESU and the Chamber to date in relation to protective measures

4. In relation to all requests for protective measures, the Chamber requested the Witness/Expert Support Unit (“WESU”) to conduct strictly confidential risk assessments for the above individuals in accordance with Internal Rule 29(3), in consultation with the Civil Party lawyers representing these Civil Parties. Following the issue of this memorandum, these assessments, as well as the initial requests for protective measures, will be notified to all parties. WESU also undertook a number of other enquiries in response to issues arising at trial (both on the Chamber’s request or upon their own initiative (*see e.g.* E219/3 of 22 November 2012, para. 15)) but none were considered to require the grant of protective measures or otherwise to warrant the active intervention of the Trial Chamber.

5. In keeping with the practice of other internationalized tribunals, individuals called to give evidence in Case 002/01 were, prior to their testimony, identified in court only by their pseudonyms, principally to protect against press intrusion. Following their testimony in open session, all individuals may be identified in court by name.

Legal framework

6. Pursuant to Internal Rule 29(3), the Trial Chamber may, on its own motion or on request, and following consultation with WESU, order appropriate measures to protect victims and witnesses whose appearance before the Chamber is “liable to place their life or health or that of their family members or close relatives in serious danger.” Protective measures available under the ECCC legal framework include using a pseudonym when referring to the protected person in-court, testimony in closed session or by remote means, and distortion of the person’s voice or physical features (Internal Rule 29(4)). The Chamber may also, where necessary, order the physical protection of a victim or witness in safe residence in Cambodia or abroad (Internal Rule 29(7)).

7. Protective measures are granted on a case-by-case basis when accompanied by information to substantiate the risk or threat of harm to the applicant or their relatives. 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.¹ It follows that the subjective perceptions of the applicant alone are insufficient for the grant of protective measures, and it is necessary to demonstrate a genuine risk of harm to the applicant or his or her family.² The relevant international jurisprudence has recognized the particular vulnerabilities of certain groups, such as individuals testifying about instances of sexual

¹ *Case 001, KAINING Geuk Eav*, Decision on Protective Measures for Civil Parties, E71, 2 June 2009, para. 7; *Case 001, KAINING Geuk Eav*, Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009, para. 3; *see also Prosecutor v Gatete*, Decision on Defence Motion for Protection of Witnesses, Case No. ICTR-2000-61-I, 10 April 2007, para. 2; *Prosecutor v Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses, Case No. ICTR-96-7, 1 September 2003, para. 2; *Prosecutor v. Stanisić and Simatović*, Decision on Protective Measures for Witnesses DST-051 for Personal Reasons, Case No. IT-03-69-T, 21 July 2011, para. 4.

² *Prosecutor v. Milošević*, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, 18 June 2002, para. 7; *Prosecutor v. Rukundo*, Decision on Prosecutor’s Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS and BLJ, Case No. ICTR-2001-70-T, 29 November 2006, para. 3.

violence, which has warranted protective measures such as conducting part of the proceedings in closed session.³ The types of protective measures ordered are tailored to the specific risks confronted by the applicant, in cooperation with the appropriate national authorities, where necessary. When assessing the type and degree of protection to be granted, the Chamber must balance the seriousness of the risk confronting the applicant, the measures most appropriate to address it and any infringement of the rights of the Accused. This assessment shall be reasoned.

Protective measures requests for Civil Parties proposed to be heard at trial

8. These Civil Parties sought protective measures only in the event they were called to testify. The measures sought by these ten individuals included testimony in closed session or via video-link, and in-court identification by pseudonym. Having met with WESU representatives, Civil Parties TCCP-18, TCCP-62 and TCCP-87 withdrew their requests for protective measures, and TCCP-104, TCCP-176, TCCP-177 and TCCP-178 also expressed willingness to testify in open session if called to testify at trial. As none of these ten Civil Parties were in the event called to testify in Case 002/01, all these requests for protective measures in Case 002/01 are accordingly moot.

Requests for protective measures for Civil Parties not proposed to be heard at trial

9. Civil Parties D22/2585, D22/2441 and D22/3246 have since formally withdrawn their requests for protective measures, while Civil Party D22/1749 has indicated to WESU his intention to withdraw his request. In their Civil Party applications, the remaining Civil Parties (D22/2404 and D22/2649) do not identify the risks or fears that formed the basis of these requests. Nor do they indicate which specific protective measures are sought. No further particulars of these requests or the circumstances giving rise to them have been forthcoming from their Civil Party lawyers. The Chamber has therefore been unable to evaluate the nature of these requests or their conformity with Internal Rule 29(3) and consequently dismisses them.

Co-Prosecutors' request to recall Civil Party SAR Sarin (TCCP-186)

10. During his testimony on 29 April 2013, Civil Party SAR Sarin indicated that he was fearful of reprisals from Khmer Rouge forces. He then claimed to be unable to provide further information to the Chamber unless extensive protective measures were granted to him, namely the provision of a police escort for the remainder of his life (T., 29 April 2013, pp. 37-42, 52 and 54).

11. Prior to his testimony, Civil Party SAR Sarin was interviewed by WESU specifically in relation to his security on two occasions (9 July 2010 and 9 August 2011). SAR Sarin advised WESU that he had no security concerns, was willing and able to cooperate fully with the Chamber, and voluntarily withdrew his request for protection

³ Internal Rule 29(4)(e); see also *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, paras 46-47; *Prosecutor v. Delalić*, Decision on Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", Case No. IT-96-21-T, 28 April 1997, paras 40-45.

measures. The WESU Witness Protection Officer did not identify any specific risks to this Civil Party. Following SAR Sarin's in-court request, WESU undertook a renewed assessment of this Civil Party. WESU indicates in its report, which will shortly be notified to the parties, that it conducted extensive conversations with the Civil Party. After he made his request, he indicated that he had kept his intention to request protective measures in-court secret from WESU and his lawyers because, had he not done so, the Civil Party believed that he would not have been invited to appear. SAR Sarin indicates he has a generalised fear about the possibility of reprisals by former or surviving Khmer Rouge members who remain loyal to the leaders and he states that he is not prepared to provide further information to the Chamber unless specific protective measures (either the provision of a police escort for the remainder of his life, or an international relocation for himself and his family) are granted. He further indicated that he did not wish to avail himself of any alternative measures of protection, such as testimony in closed session.

12. Despite the subjective concerns expressed by this Civil Party, WESU was unable to identify any tangible or objective basis for these fears. The Chamber therefore concludes that the measures sought by the Civil Party are unwarranted.

13. The Chamber further considers that the recall of SAR Sarin is unlikely to be conducive to ascertaining the truth or otherwise in the interests of justice. As the Civil Party has indicated unwillingness to return to provide evidence and as SAR Sarin cannot be compelled to testify under the ECCC legal framework (Internal Rule 23(4)), the Co-Prosecutors' request is accordingly rejected.

14. This constitutes the Chamber's official response to motion E286.