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du dossier: Sann Rada

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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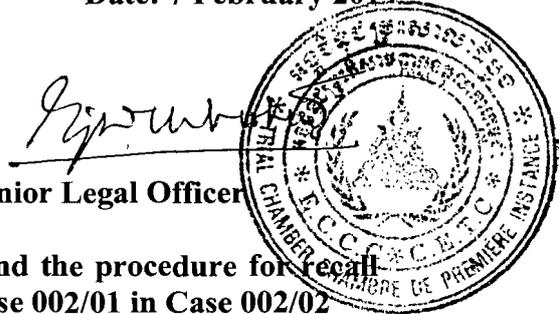
Date: 7 February 2014

TO: All parties, Case 002

FROM: President NIL Nonn, Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer

SUBJECT: Clarification regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02



1. The Chamber is seized of the Co-Prosecutors' submissions regarding the use of evidence and procedure for recall of witnesses from Case 002/01 in Case 002/02 (E302). The Co-Prosecutors request the Trial Chamber to determine that all of the evidence admitted in Case 002/01 is automatically available and placed before the Chamber in Case 002/02 (E302). The Co-Prosecutors further request that the Trial Chamber determine that witnesses, civil parties and experts heard in Case 002/01 may be recalled during the trial in Case 002/02 only where the requesting parties satisfy the court that further questioning is in the interests of justice. The Civil Party Lead Co-Lawyers support both of the Co-Prosecutors' requests (E302/3).
2. The Nuon Chea defence concurs with the Co-Prosecutors' request that all of the evidence admitted in Case 002/01 be automatically available and placed before the Chamber in Case 002/02, but submits that no special criteria should apply to witnesses, civil parties and experts heard in Case 002/01 and the Chamber should instead consider whether each witness serves the Chamber's objective of assessing criminal liability for crimes at issue in Case 002/02 (E302/2).
3. The Khieu Samphan defence opposes both of the Co-Prosecutors' requests. It submits that the severance of Case 002 created two distinct trials, requiring a duplication of all procedural steps undertaken in Case 002/01 including with respect to the admissibility and relevance of evidence (E302/1, paras 4, 7, 9, 15-16). It also opposes the application of an elevated standard for the recall of witnesses in Case 002/02, instead requesting the Chamber to apply the standards in Internal Rule 87 (E302/1, paras 33-36).
4. The Co-Prosecutors submitted a reply on 6 February 2014 (E302/4).
5. Regarding the status of evidence from Case 002/01 and the Khieu Samphan Defence submission that Case 002 is now two separate and distinct trials, the Chamber recalls that severance is "exclusively a trial management tool", the only purpose of which is to modify the order in which the charges in the Indictment are adjudicated (E284, para. 98). Since the

outset of trial in Case 002, the parties have been on notice that Case 002/01 would serve as a foundation for the trial of the remaining charges in Case 002 (E124/7, para. 10; E284, para. 15). The effect of the Trial Chamber's severance of Case 002 was to separate the charges which would normally be adjudicated in a single trial into two or more manageable phases, not to create two separate and distinct trials. Indeed, the Supreme Court Chamber (SCC) conceives of Case 002 as a single trial with multiple parts for the purposes of severance (E284/4/8, paras 43, 70). The Khieu Samphan defence assertion on this point is therefore without merit.

6. The Khieu Samphan defence further asserts that a repeat of all procedural and evidentiary steps is necessary in view of the SCC's last decision on severance. In that decision, the SCC reviewed the jurisprudence of international tribunals considering the severance of charges and noted the possibility that certain evidence would need to be repeated or certain procedural steps duplicated (E284/4/8, paras 38-40). Contrary to the Khieu Samphan defence assertion, neither the SCC's decision nor any of the other decisions cited therein reached the conclusion that a court must repeat all procedural and evidentiary steps in the second part of a severed trial. Indeed, that issue was not squarely presented.

7. As stated above, proceedings in Case 002/02 are a continuation of those in Case 002/01. The evidence put before the Chamber in Case 002/01 has undergone extensive examination by the parties and has been subject to the requirements of Internal Rule 87. It would serve no purpose to repeat these same procedural steps within the same trial. Based on the foregoing, the Chamber reiterates that the Case 002 Case File remains the same for both phases of the trial and the evidence already put before the Chamber in Case 002/01 shall serve as a foundation for Case 002/02. E3 numbers assigned to evidence during the proceedings in Case 002/01 will remain the same for Case 002/02. The Chamber notes that the use of evidence already heard in a case involving the same parties before the same Chamber and based on the same case-file satisfies the requirement of fair and adversarial proceedings (Internal Rule 21(1)(a)).

8. As to an "interests of justice" standard for the recall of witnesses, civil parties and experts who testified in Case 002/01, the Trial Chamber considers that such a standard is unnecessary because the Internal Rules already establish a legal framework for the recall of witnesses, civil parties and experts, in particular Rules 87(3) and 87(4). In this regard the Chamber will consider whether the parties were prevented or did not have an opportunity to fully examine an individual they intend to recall in court, because of the limited scope of case 002/01. The Trial Chamber reminds the parties that the Chamber may reject a request for evidence which it finds irrelevant or repetitious under Internal Rule 87(3)(a).

9. This constitutes the Chamber's official response to E302, E302/1, E302/2, E302/3, and E302/4.