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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

សាធារណៈ / Public

TRIAL CHAMBER

TO: All Parties, Case 002

Date: 23 February 2016

FROM: NIL Nonn, President of the Trial Chamber

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

SUBJECT: Ruling on Closed Session for Witnesses 2-TCW-894 and 2-TCW-938



1. On 13 January 2016, the Chamber notified the Parties that witnesses 2-TCW-894 and 2-TCW-938, both of whom were interviewed in the context of the ongoing investigations in Cases 003 and 004, would be heard in closed session in accordance with the model provided by the International Co-Investigating Judge (ICIJ) in his memorandum E319/35 of 6 November 2015 (Email from Senior Legal Officer, 13 January 2016). The parties were informed that written reasons for this decision would follow in due course. The Chamber subsequently received a confidential memorandum from the ICIJ maintaining his previous stance on conditions of use for witnesses, as set out in E319/35 (E319/35/4). Following repeated requests from the International Co-Prosecutor to be heard on this issue (including E384), the Chamber heard oral submissions from the Parties on 14 January 2016. On the same day, the Chamber issued an oral ruling confirming its decision to proceed in closed session for these two witnesses (T., 14 January 2016 (Public Version), pp. 6-7). The reasons for this decision are set out below.

2. The Chamber recalls that on 20 November 2015, in a memorandum concerning the disclosure of material from Cases 003 and 004 to Case 002 (E319/35), the ICIJ informed the Trial Chamber that, after a review of the evidence provided by witnesses and Civil Parties, he would request for a small number of witnesses who are “central to live matters in ongoing investigations in Cases 003 or 004” (E319/35, para. 3.c), in addition to the use of pseudonym, the use of closed session and other measures necessary “to ensure the integrity of the evidence, and by extension of the investigation” (E319/35, para. 3.c). These witnesses are referred to as “Category C Witnesses”. Memorandum E319/35 was not limited to evidence the disclosure of which was authorized by Judge Bohlander but pertains generally to all evidence disclosed from Cases 003 and 004.

3. On 5 January 2016, the Chamber was informed that the ICIJ has indicated that 2-TCW-938 and 2-TCW-894 are Category C Witnesses. As set out in E319/35, para.

3.c), the conditions of use for Category C witnesses are the use of pseudonym and testimony held in closed session.

4. The Chamber recalls that, pursuant to Article 34 new of the ECCC Law and Internal Rule 79(6), trials shall be public. However, as recognised both in the ECCC Law and under international law, the right to a public hearing is not absolute. In exceptional circumstances where the interests of justice so require, a court may decide to close the proceedings from the public (Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party, provides that the public may be excluded from all or part of a trial “to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”). Article 34 new of the ECCC Law establishes that the Chamber may close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice. Pursuant to Internal Rule 79(6)(b), the Chamber may order that hearings be held in camera where, among other reasons, a public hearing would be prejudicial to public order.

5. The Chamber considers that maintaining the confidentiality of an ongoing judicial investigation may amount to ‘good cause’ for closing proceedings. In the instant case, the confidentiality of ongoing judicial investigations can only be guaranteed by hearing 2-TCW-894 and 2-TCW-938 in closed session. The Chamber bases this finding on the assertion of the ICIJ that the “disclosure of their evidence in open session, even under a pseudonym, would be detrimental to ongoing investigations for it could endanger future interviews with them or with leads generated by them.” (E319/35, para. 3.c). At this stage the Office of the Co-Investigating Judges is the only office which can make this assessment within a reasonable time, given its access to the case file and knowledge of investigation strategy. The Chamber has no reason to believe that this is not an accurate assessment and accordingly relies upon it.

6. Noting that good cause for proceeding in closed session exists, the Chamber recalls that Internal Rule 56(1) requires that investigations remain confidential and considers that violations of said confidentiality may amount to interference with the administration of justice, which is prejudicial to public order (E319/7/3). The Chamber therefore finds that the testimony of 2-TCW-938 and 2-TCW-894 should be heard entirely in closed session pursuant to Article 34 new of the ECCC Law and Internal Rule 79(6)(b). The Chamber considers that in evaluating the fundamental principle that a criminal trial should be held in public trial, and the need to maintain the confidentiality of investigations, any restriction to the public nature of the proceedings must be limited to those strictly necessary in the interests of justice. In order to maximize the public nature of these hearings, the Chamber will redact the closed session transcripts in consultation with the International Co-Investigating Judge (see E319/35/2, para. 4) so that they can be made public. Further, the confidential portions of these transcripts may be reclassified as public at a later stage, should the reasons justifying their redaction cease to exist.