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E1/151

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

WRITTEN RECORD OF PROCEEDINGS

PUBLIC

Case File N° 002/19-09-2007-ECCC/TC

11 December 2012

Substantive Hearing on evidence - Day 138

Prepared by:

Roger PHILLIPS and DUCH Phary

<u>Attendance Record</u>
Before: Judge NIL Nonn (President), Judge Jean-Marc LAVERGNE, Judge YA Sokhan, Judge YOU Ottara, Judge Silvia CARTWRIGHT.
Reserve Judges: Judge THOU Mony, Judge Claudia FENZ.
Greffiers: Mr. DUCH Phary, Mr. Roger PHILLIPS.
OCP: Mr. HUOT Veng, Mr. Tarik ABDULHAK, Mr. Vincent DE WILDE D'ESTAMEL
Accused: Mr. KHIEU Samphan, Mr. NUON Chea.
Defence for the Accused: Mr. SON Arun, Mr. Jasper PAUW, Mr. KONG Sam Onn, Ms. Anta GUISSÉ, Mr. ANG Udom, Mr. Michael KARNAVAS.
Civil Parties: Ms. Elisabeth SIMONNEAU-FORT, Mr. PICH Ang, Mr. SAM Sokong, Mr. LOR Chunthy, Mr. HONG Kimsuon, Mr. KIM Mengkhy.
Civil Party: HUN Chhunly (TCW-247), PHAN Van (TCW-307).
Others: Ms. Laura GRETZ, Mr. MAM Rithea (Duty Counsel).

General court times		
Day	Start time: 9:05	Finish time: 16:10
Recess am	Start time: 10:40	Finish time: 11:00
Recess	Start time: 12:05	Finish time: 13:30
Recess pm	Start time: 14:40	Finish time: 15:00
	Total Court Time:	5 hours and 0 minutes

Proceedings			
Type of Issue	Raised By	Start time	Finish time
Oral Ruling on Request for Oral Hearing	TC	9:05	9:07
Testimony of Mr. HUN Chunly (TCW-247)	IS Defence	9:12	10:39
Testimony of Mr. PHAN Van (TCW-307)	TC OCP	11:02 11:11 13:44 15:02	11:11 11:59 14:39 16:06
Waiver of the Accused's right to be present in the courtroom on 12 December 2012	NC Defence TC	11:59 12:02	12:02 12:04
Oral Ruling on Request for Testimony of TCCP-1	TC	13:32	13:43
Oral Order on all Accused's presence in the courtroom on 12 December 2012	TC	16:07	16:08

Summary of Proceedings

Oral Ruling on Request for Oral Hearing

The IENG Sary Defence requested an oral hearing to make submissions on the permissibility of audio-recording the Accused and his treating physician in the holding cell. The Trial Chamber ruled that an oral hearing was not required as it has requested written submissions citing appropriate legal authorities on this issue. The Chamber also noted that the Pre-Trial Chamber Decision of 11 June 2010 does not appear to provide guidance regarding the specific practices at issue here. Therefore, the Chamber reiterated that the IENG Sary Defence must seek leave to resume the audio-recording of the Accused pursuant to Internal Rule 92 and the request for oral hearing was denied.

Testimony of Mr. HUN Chhunly (TCW-247)

The IENG Sary Defence began and finished its questioning of the witness.

Waiver of the Accused's right to be present in the courtroom

The Accused NUON Chea waived his right to be present in the courtroom for the afternoon session. The Chamber also noted that the medical check-up of the Accused NUON Chea is left to the discretion of the Court doctor and not to the counsel of the Accused.

Testimony of Mr. PHAN Van (TCW-307)

The Trial Chamber began its questioning of the witness followed by the Co-Prosecutor.

Oral Ruling on Request for Testimony of TCCP-1

The Trial Chamber issued a ruling on the IENG Sary Defence Motion to call TCCP-1 to testify in court as opposed to by video-link from France.

Record of Rule 87(3) Proceedings

TC No	OCIJ No	ERN	Title	Class	Note in Khmer	Note in English	Note in French
E3/3351	D313/1.2.8	00678744-00678942-00369669-00369820-00700301-00700309	សៀវភៅនិពន្ធដោយលោក HUN Chunly មានចំណងជើងថា "ជីវិតគ្រូពេទ្យម្នាក់ក្នុងរបបខ្មែរក្រហម" Book by HUN Chunly entitled "The Life of a Physician under the Khmer Rouge Regime" Livre de HUN Chunly intitulé "The Life of a Physician under the Khmer Rouge Regime"	P	00678756-00678757, 00678751, 00678941-00678942, 00678900	00369681, 00369675, 00369820, 00369787	
E3/58	D125/160	00239934-00239940-00250086-00250092-00283912-00283918	កំណត់ហេតុនៃការស្តាប់ចម្លើយសាក្សី ជាន់ វ៉ាន់ PHAN Van, Alias KHĂM Phăn Written Record of Interview of PHAN Van, Alias KHĂM Phăn Procès verbal d'audition de PHAN Van, Alias KHĂM Phăn	P	00239935, 00239937	00250087, 00250088, 00250089	00283913, 00283915
E3/57	D200/4	00287700-00287709-00290503-00290511-00353098-00353108	កំណត់ហេតុនៃការស្តាប់ចម្លើយសាក្សី KHAM Phăn ខាំ ជាន់ [Corrected 1] Written Record of interview of KHAM Phăn ខាំ ជាន់ Procès verbal d'audition de témoin KHAM Phăn ខាំ ជាន់	P	00287701-00287702, 00287704-00287706	00290505, 00290506-508	00353099, 00353100, 00353104
E3/3974	D22/36	00323540-00323556-00856467-00856481-00279622-00279632	ពាក្យសុំតាំងខ្លួនជាដើមបណ្តឹងរដ្ឋប្បវេណីរបស់លោកស្រី AFFONCO Denise Civil party application of Ms. Affonco Denise Demande de constitution de partie civile de Mme. Affonco Denise	P			

E3/3975	D22/ 36.2	00279633- 00279641	Annexe 2: Livret de famille et photos avec un atlas du Cambodge	P			
E3/3976	D199 /15	00349104- 00349122 00346929- 00346937 00342178- 00342185	កំណត់ហេតុនៃការស្តាប់ចម្លើយ AFFONCO Denise Written Record of Interview of AFFONCO Denise Procès verbal d'audition de AFFONCO Denise	P			
E3/1645	D175 /3.31	00230386- 00230394 00809627- 00809639 00809998- 00810017	ឈ្មោះអ្នកចូលថ្ងៃ២៣.១១.៧៧ Name who entered on 23.11.77 Nom des prisonniers arrivés le 23 novembre 1977	P			
E3/2597	D175 /3.78	00231237- 00231331 00820641- 00820653 00800646- 00800659	ការទាក់ទងបងប្អូនចម្លើយ សូ គីមអាណ ហៅ ម៉ី អនុសេនាតំបន់ ១០៥ [Partial T.] Relate to Brother Ya: Confession of So Kim An deputy secretary Region 105 [Partial T.] Aveux de So Kim An, secrétaire adjoint de la région 105, lié à Bong Ya	P			
E3/1191	D366 /7.1.7 78	00021530- 00021530 00539058- 00539058 00531062- 00531062	ជូនមិត្ត ខឿន ជាទីស្នេហានិងរលឹក To beloved and missed Comrade Doeun To beloved and missed Comrade Doeun	P	00021530	00539058	00531062
E3/1192	D366 /7.1.7 79	00021529- 00021529 00508560- 00508560 00499961- 00499961	ទូរលេខ ២ ជូនបង នួន Telegram No. 2 : To Dearest Brother Nuon Télégramme 2: Cher frère Nuon	P	00021529	00508560	00499961

Oral Orders/Decisions:

- On 19 October 2012, the Chamber received a memorandum from the Witness and Expert Support Unit indicating that Civil Party TCCP-1, age 68, requested to testify by video-link, and indicating that: (1) she had “significant anxiety about traveling to Phnom Penh”; (2) she “continues to suffer from distressing memories of events that befell her before she left Cambodia”; (3) she has lost everyone she once knew in Cambodia; and (4) her husband was unable to travel with her to Cambodia in a supporting role (E236/1/1). The Chamber granted the request by Civil Party TCCP-1 to testify via video-link from France and scheduled her testimony for 12-13 December 2012 (E236/1/1/1). The Chamber noted that TCCP-1 is not an expert, would not likely implicate a large number of documents, and therefore video-link testimony would be feasible. It further noted that TCCP-1’s emotional and physical fragility are such that testimony by video-link is required. At that time, the parties were not aware

of TCCP-1's request and therefore had not lodged any objection.

The IENG Sary Defence moved the court to provide further reasoning to support its decision because "the Trial Chamber has not demonstrated" that TCCP-1's request is justified and requests that TCCP-1 appear in court to testify (E236/1/1/2 (the "Request"), para. 17). The Chamber noted that it has broad discretion to permit evidence by video-link whenever necessary, so long as such measures are not "seriously prejudicial to, or inconsistent with defence rights." See ICC Decision in *Prosecutor v. Bemba* of 3 February 2012, para. 5 [*Prosecutor v. Jean-Pierre BEMBA GOMBO*, Trial Chamber (Case No. ICC-01/05-01/08), Public redacted decision on the "Prosecution request to hear Witness CAR-OTP-PPPP-0036's testimony via video-link", 3 February 2012]; See also, Internal Rule 26(1).

The Defence submitted that accepting TCCP-1's testimony by video-link would "prejudice" the rights of the Accused because "it is not unreasonable to assume that TCCP-1's testimony was inculpatory" during the Accused IENG Sary's 1979 trial (Request, para. 15). This is undermined by the Defence submission that TCCP-1's testimony is not vital to establishing the guilt of the Accused (Request, para. 13). Although the Accused maintained his right to object to witnesses testifying in his absence where the testimony "directly or indirectly touch[es] upon me or any alleged conduct or crimes attributed to me in the Closing Order," the Accused IENG Sary previously waived the Accused's right to attend the in-court testimony of TCCP-1 (E237) when IENG Sary and his lawyers had access to various documents which contained a clear description of the experiences of this Civil Party during the Democratic Kampuchea era including the loss of her husband, her daughter and many other relatives (D22/36, D22/36.2, D199/15). After the Chamber found the Accused IENG Sary fit to stand trial, that waiver was withdrawn (E237/2) and the IENG Sary Defence subsequently submitted that video-link testimony will not permit Mr. IENG Sary or his Lawyers to fully assess the Civil Party testimony (Request, para. 16). As noted by the OCP, this assertion runs counter to international procedural rules established by the ICTY, which has held that an Accused does not lose materially from the fact of the physical absence of the witness when testifying by video-link.

The Defence further submitted that TCCP-1's physical and emotional fragility is not adequately supported by evidence (Request, para. 11). The Chamber noted that video-link testimony is fully justified to "protect the psychological well-being and dignity of its witnesses, subject to the fundamental dictates of a fair trial." See ICC Decision in *Lubanga* of 9 February 2010, paras 15-16 [*Prosecutor v. Thomas LUBANGA DYILO*, Trial Chamber (Case No. ICC-01/04-01/06), Redacted Decision on the defence request for a witness to give evidence via video-link", 9 February 2010.] In addition to the communications from TCCP-1 through WESU, TCCP-1's civil party application makes clear that she suffered physical, material or psychological injury on the basis of at least one of the crimes alleged in Case 002/01 (Internal Rule 23 bis). Indeed the acceptance of her civil party application by the OCJ, which was not appealed by the

IENG Sary defence, supports this fact. Furthermore, the Chamber possesses a medical certificate attesting to TCCP-1's inability to travel to Phnom Penh due to her health status.

For the foregoing reasons, the Chamber rejected the IENG Sary Defence motion to summons Civil Party TCCP-1 to testify in Cambodia.

- Order denying the IENG Sary Defence request for an oral hearing to make submissions on the permissibility of audio-recording the Accused and his treating physician in the holding cell.
- Order allowing the Accused NUON Chea to participate from his holding cell during the afternoon session (waiver of the Accused is attached to this written record) and to return the Accused KHIEU Samphan to the courtroom at 13:30 for the duration of the hearing.
- Order to bring KHAM Phan (TCW-307) back to his accommodations and to return him to the courtroom for the hearing on 12 December 2012.
- Order to bring all Accused back to the detention facility and have them returned to the courtroom by 9:00 on 12 December 2012, except the Accused IENG Sary who was ordered to be brought only to his holding cell to observe the proceedings through remote participation.

Orders for Adjournment of Hearing

The hearing will resume on 12 December 2012 at 9:00 am.

Phnom Penh, 11 December 2012

Greffier  Greffier



Roger Phary