

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**INTERNATIONAL CO-PROSECUTOR'S REQUEST TO BE HEARD ON
THE PROTECTIVE MEASURES FOR WITNESSES**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. For the reasons set out herein, the International Co-Prosecutor (“Co-Prosecutor”) requests to be informed of the reasons communicated by the International Co-Investigating Judge (“ICIJ”) to the Trial Chamber indicating that 2-TCW-938 and 2-TCW-894 are Category C witnesses, and therefore must be heard in closed session. The Co-Prosecutor requests that the parties be given the opportunity to make informed submissions on the issue in relation to these witnesses, and in relation to future witnesses who may be heard in closed session, prior to any final ruling by the Trial Chamber.
2. On 20 October 2015, the Trial Chamber issued Amended Guidelines on the use of Case 003 and Case 004 Written Records of Interview in the course of Case 002 trial hearings (“Amended Guidelines”), which provide *inter alia* that any witness called in Case 002/02 who has been interviewed in Cases 003 or 004 “shall be heard in closed session”.¹
3. On 26 October 2015, Khieu Samphan requested reconsideration of the Amended Guidelines.² On 29 October 2015, the Co-Prosecutors responded to Khieu Samphan’s request, emphasizing *inter alia* the importance of a public trial³ and arguing that the restrictions set out in the Amended Guidelines were disproportionate.⁴
4. On 6 November 2015, the ICIJ issued a confidential memorandum (E319/35) in which he

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ E319/7/3 Amended Guidelines on the use of Case 003 and 004 WRIs, 20 October 2015 (hereinafter “Amended Guidelines”), at para. 3.

² E376 Demande de réexamen des modalités amendées d’utilisation des procès-verbaux d’audition recueillis dans le cadre des dossiers 003 et 004, 26 October 2015.

³ E376/1 Co-Prosecutors’ Response to Khiaeu Samphan’s Request to Reconsider the Amended Terms of Use of Records Collected as Part of the Case 003 and 004 Investigations, 29 October 2015, para. 9-19.

⁴ *Ibid.*, para. 25

- [REDACTED]⁵
- [REDACTED]
5. On 8 January 2016, the Presiding Judge informed the parties that, “on 5 January 2016, the International Co-Investigating Judge has indicated that 2-TCW-938 and 2-TCW-894 are Category C witnesses. See E319/35, paragraph 3(c). In keeping with the instructions set out in the memo of the International Co-Investigating Judge, E319/35, the Chamber is awaiting to receive from the Co-Investigating Judge an indication of the condition of use that will be requested.”⁶
 6. On 13 January 2016, the Trial Chamber informed the parties through email that 2-TCW-938 and 2-TCW-894 will be heard in closed session, with written reasons to follow.⁷
 7. The OCP was not copied on, nor later provided with a copy of, the communication from the ICIJ to the Trial Chamber of 5 January 2016. The OCP is currently unaware of any reason why 2-TCW-938 or 2-TCW-894 should testify in closed session. The parties have not yet been heard as to whether 2-TCW-938 or 2-TCW-894 should testify in closed session.
 8. Due to the fact that the first of the two relevant witnesses is scheduled to begin testimony on 14 January 2016, and in view of the circumstances set out above, the Co-Prosecutor respectfully requests leave to submit the present filing in English only, with a Khmer version to follow at the first opportunity.⁸

II. ARGUMENTS

9. The Co-Prosecutor respectfully submits that all communications between the Trial Chamber and the ICIJ regarding whether witnesses are to testify with protective measures in the present trial should be copied to the Co-Prosecutors, the Defence and the Civil Parties. This would permit the parties to consider the reasons provided by the ICIJ, and, if necessary, to make submissions to the Trial Chamber as to the necessity of the protective measures suggested by the ICIJ.

⁵ E319 Confidential memorandum: “Disclosure of material from Cases 003 and 004 to Case 002”, ICIJ, 6 November 2015, para. 3(c). Emphasis in original.

⁶ Draft Transcript, 8 January 2016, p. 26 at 10.35.09 - 10.36.48.

⁷ Email on behalf of the Trial Chamber to the parties, 13 January 2016, 12:24 pm.

⁸ This request is made pursuant to Article 7.2 of the Practice Direction on Filing Documents before the ECCC (Rev. 8).

10. In the present circumstances, it would be unfortunate and unnecessary if witnesses 2-TCW-938 and 2-TCW-894 were to testify in closed session. This would deprive the public of some of the most important evidence establishing the CPK's genocidal policy towards the Cham.
11. The presumption that hearings will be held in public, and the right of the parties to be heard prior to decisions by the Trial Chamber affecting their interests, are fundamental principles in the legal framework of the ECCC and in human rights law generally.

A. The Importance of a Public Trial

12. The Co-Prosecutors have previously observed⁹ that the presumption that trial will be held in public is a cornerstone principle of human rights law and is contained, *inter alia*, in the ECCC Law,¹⁰ the ECCC Agreement,¹¹ the ECCC Internal Rules,¹² the Cambodian Code of Criminal Procedure (CCCP),¹³ the International Covenant on Civil and Political Rights (ICCPR),¹⁴ the European Convention on Human Rights (ECHR),¹⁵ the Universal Declaration of Human Rights (UDHR),¹⁶ the Rome Statute of the International Criminal Court,¹⁷ the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁸ and the Statute of the International Criminal Tribunal for Rwanda (ICTR).¹⁹
13. A commentary on the Rome Statute has observed that:

Free access for the public and the press to the courtroom contributes to the fairness of the trial, by enabling third parties to assure themselves of the quality of the proceedings. In this sense, the principle of publicity is a guarantee for the accused, and is as such mentioned in Article 67 dealing with the rights of the accused, which provides in particular that the accused is entitled to a public

⁹ **E376/1** Co-Prosecutors' Response to Khieu Samphan's Request to Reconsider the Amended Terms of Use of Records Collected as Part of the Case 003 and 004 Investigations, 29 October 2015, paras. 9-19.

¹⁰ ECCC Law, Article 34 new.

¹¹ ECCC Agreement, Article 12(2)

¹² ECCC Internal Rules, Rule 79(6).

¹³ CCCP, Article 316.

¹⁴ ICCPR, Article 14(1). (Article 14 of the ICCPR is explicitly applicable through Article 12 of the ECCC Agreement).

¹⁵ ECHR, Article 6(1).

¹⁶ UDHR, Article 10.

¹⁷ Rome Statute, Article 64(7), 67(1) and 68(2).

¹⁸ ICTY Statute, Articles 20(4), 21(2).

¹⁹ ICTR Statute, Article 19(4).

hearing. The same principle also guarantees freedom of information for the public on the functioning of a public and international institution.²⁰

14. The European Court of Human Rights places great importance on transparency as a means of enhancing public confidence in the administration of justice:

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.²¹

15. Chambers of the ICTY have expressed the same concern, emphasising that the right to a public trial belongs not only to the accused, but also to the public. It is a vital element of the public's right to monitor the work of the Court. In *Tadić*, the Trial Chamber noted:

The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. As the European Court of Human Rights noted: "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of ... a fair trial, the guarantee of which is one of the fundamental principles of any democratic society ... " In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal.²²

16. In *Delalić et al.*, the Trial Chamber held:

The principal advantage of permitting the public and the press access to a hearing is that their presence contributes to ensuring a fair trial. ... [P]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered.²³

²⁰ *The Rome Statute of the International Criminal Court: a commentary*. A. Cassese and others (Oxford: 2002), page 1281.

²¹ *Werner v. Austria*, Judgment of 24 November 1997, para. 45, citing *Diennet v. France*, Judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, para. 33.

²² *Prosecutor v. Tadić*, (ICTY) Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1996, para. 32 (internal citation omitted).

²³ *Prosecutor v. Zejnil Delalić et al.*, (ICTY) Decision on the Motion by the Prosecution for Protective measures for the Prosecution witnesses pseudonymed "B" through "M", Trial Chamber, 28 April 1997, para. 34 (internal quotations omitted).

17. Extensive use of closed sessions harms all of the aforementioned interests. It is important for the people of Cambodia, and members of the Cham community in particular, to have the greatest possible access to oral evidence concerning the alleged genocide of the Cham.
18. The hearing of testimony in closed session prevents the general public, representatives of NGOs, monitoring organizations, the diplomatic community, and the Cambodian and international media, from following proceedings in person from the public gallery, or online via live-stream. Conducting proceedings in closed session also has the compounding effect of requiring that portions of the parties' closing submissions and the Chamber's Judgment concerning witnesses heard in closed session will potentially be confidential, rather than public.
19. The Co-Prosecutor recognizes that there are occasions where it is necessary to derogate from the "fundamental principle"²⁴ of the public character of court hearings.²⁵ There must, however, be good cause for doing so, and the language utilized in allowing such derogations in relevant instruments emphasizes the exceptional nature of closed hearings and the significant demonstration of necessity that must be met. Any decision to close proceedings must be reasoned, with the fundamental right to a public trial weighed against any demonstrated negative consequences that are tangible and substantial.
20. This principle is reflected in the ECCC instruments themselves. Article 34 *new* of the ECCC law states that trial shall be public "unless in *exceptional circumstances* the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice."²⁶ Article 12(2) of the ECCC Agreement states that closed session "shall only be *to the extent strictly necessary* in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice."²⁷ And Rule 79(6) of the ECCC Rules states that "[w]here the Chamber considers that a public hearing *would be prejudicial to public order*, or to give effect to

²⁴ *Hakansson & Sturesson v. Sweden*, ECHR, 21 Feb. 1990, para. 66.

²⁵ *See, e.g.*, ICCPR, Article 14(1).

²⁶ Emphasis added.

²⁷ Emphasis added.

protective measures ordered under these IRs, it may, by reasoned decision, order that all or part of the hearing be held *in camera*.”²⁸

21. The principle that closed session should only be used sparingly in exceptional circumstances is also reflected in other relevant instruments. Article 316 of the CCCP allows for closed session where the court “considers that a public hearing will cause a *significant danger* to the public order or morality.”²⁹ The Rome Statute allows for exceptions to a public hearing where “special circumstances” exist necessary to protect confidential or sensitive information or to protect victims and witnesses and their participation in proceedings.³⁰
22. As this Chamber has noted, it is necessary to “find a balance between the public discussion of evidence at trial and the need to protect the integrity of the investigations and safeguard the relevant victims and witnesses.”³¹ The Co-Prosecutor acknowledges the existence of a legitimate interest to preserve the confidentiality of investigations of the Co-Investigating Judges pursuant to Cambodian and ECCC procedure, but submit that any restriction on the public character of the proceedings must be confined to that which is strictly necessary.

B. The Right to be Heard in Criminal Proceedings

23. This duty of a trial chamber to seek the views of the parties prior to making any decision which might adversely affect their interests is also a fundamental principle of criminal proceedings.
24. Even where a trial chamber has the power to make a decision *proprio motu*, it should first seek the views of the party or parties who might be adversely affected by its ruling. The Supreme Court Chamber in the present case has emphasized the importance of seeking “the views of the parties” before issuing a *proprio motu* decision on severance, in order “to respect the right to be heard in criminal proceedings”.³²

²⁸ Emphasis added.

²⁹ Emphasis added.

³⁰ Rome Statute, Article 64(7).

³¹ **E319/7** WRI Use Decision, para. 11.

³² **E163/5/1/13**, “Decision on the Co-Prosecutors’ immediate appeal of the Trial Chamber’s decision concerning the scope of case 002/01”, Supreme Court Chamber, 8 February 2013. In declaring the invalidity of the initial severance of case 002, the SCC said: “With respect to the right to be heard, the Supreme Court Chamber *notes with concern that the Severance Order was issued without having sought the views of the parties*. While a plain reading of Rule 89*ter* of the Internal Rules does suggest that the Trial Chamber enjoys a certain breadth of discretion to decide on its own motion that a given case should be severed and in what order the cases as

25. The ICTY Appeals Chamber in *Jelisić* – in a ruling concerning the prosecution’s right to be heard – also emphasised the importance of hearing from a party before making a decision adverse to that party’s interests, even where the Trial Chamber is exercising *proprio motu* power:

In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.³³ Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.³⁴

26. Decisions on protective measures are of considerable importance to the interests of the parties. This is reflected in Internal Rule 104(4), which provides that decisions of the Trial Chamber on protective measures under Rule 29(4)(c) are among the limited categories of decisions subject to immediate appeal.
27. In the present circumstances, the Co-Prosecutor requests the Trial Chamber to recognise the right of the parties to be heard before any decision is taken by the Trial Chamber which might harm public access to the proceedings and the Accused persons’ right to a public trial.
28. In order for the parties to make informed submissions on the question of whether witnesses should testify in closed session or with other protective measures, the parties must know the reasons why the ICIJ considers this to be appropriate. Having considered those reasons, it might well be that all parties will agree with the protective measures suggested by the ICIJ. However, before the Trial Chamber makes a final decision, the parties must be given the opportunity to consider the ICIJ’s reasons and to make informed submissions to the Chamber

separated should be tried, it does not necessarily suggest a similarly broad discretion to determine what form the cases as separated should take, *especially without hearing the parties on the matter first*. [...] *The need to respect the right to be heard in criminal proceedings* and the consideration of the possibility to sever a criminal case such that the cases as severed are reasonably representative of an indictment, particularly where there is real concern about having more than one case arrive at a judgment on the merits, *is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards*”. *Ibid.*, paras. 40 and 42. Emphasis added.

³³ The ICTY Appeals Chamber said in footnote 53: “See generally *R. v. Barking and Dagenham Justices*, ex parte *Director of Public Prosecutions* [1995] Crim LR 953 (“*Barking case*”), and *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000 (“*Cosier case*”).”

³⁴ *Prosecutor v. Goran Jelisić*, (ICTY) Judgement, Appeals Chamber, 5 July 2001, para 53. The ICTY Appeals Chamber said in footnote 55: “See *Cosier case*, *supra*. For a more general observation on the importance of not deciding without first hearing counsel’s arguments, see Judge *ad hoc* Barwick’s dissenting opinion in *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 442.”


regarding whether the protective measures suggested by the ICIJ are “strictly necessary,”³⁵ and whether “good cause” exists for depriving the public of access to the proceedings.³⁶

III. CONCLUSION

29. For the reasons stated above, the Co-Prosecutor respectfully requests the Trial Chamber to:

- (a) inform the parties of the reasons provided by the ICIJ to the Trial Chamber concerning why 2-TCW-938 and 2-TCW-894 are Category C witnesses; and
- (b) give the parties an opportunity to make concise oral submissions on the issue prior to making a final decision as to whether 2-TCW-938 and 2-TCW-894 should testify in closed session; and
- (c) follow this procedure in the future should the ICIJ identify any other witnesses that he believes should testify in the present trial in closed session.

Respectfully submitted,

Date	Name	Place	Signature
13 January 2016	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

³⁵ ECCC Agreement, Article 12(2).

³⁶ ECCC Law, Article 34 *new*.