



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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Nation Religion King
Royaume du Cambodge
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អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
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Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
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DECISION ON MOTIONS TO HEAR ADDITIONAL WITNESSES ON THE TOPIC OF THE TREATMENT OF THE VIETNAMESE AND TO ADMIT RELATED WRITTEN RECORDS OF INTERVIEW (E380, E381, E382) (FULL REASONS)

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1. INTRODUCTION

1. The Chamber is seised of three motions filed respectively by the NUON Chea Defence, Co-Prosecutors, and International Co-Prosecutor on 22, 23, and 24 December 2015, in which the parties seek to hear additional witnesses on the trial topic of the treatment of the Vietnamese and to admit twelve related written records of interview (WRIs).¹ It heard oral responses on 6 January 2016.² The Chamber informed the parties of the disposition of its decision on the requests to hear witnesses by email of 11 January 2016 and by memorandum of 12 January 2016.³ During the hearing of 25 January 2016, the Chamber also admitted two new documents (of the above twelve) put forward by the Co-Prosecutors with reasons to follow.⁴ The Chamber now provides the full written reasons for its decisions.

2. SUBMISSIONS

2.1. NUON Chea Defence Request (E380)

2. Pursuant to Rule 87(4), the NUON Chea Defence seeks to hear 2-TCW-1008, 2-TCW-823 and 2-TCW-1009, submitting they are relevant to the treatment of Vietnamese people at sea by the military forces of Division 164, and to admit the witnesses' ten WRIs.⁵ It further submits that the relevance of this evidence was "enhanced" by the Chamber's oral decision to hear 2-TCW-1000 on the treatment of the Vietnamese by the DK military forces (particularly Division 164) at sea.⁶

¹ NUON Chea's First Rule 87(4) Request to Call Additional Witnesses for Case 002/02 Trial Segment on the Treatment of the Vietnamese and to Admit Written Records of Interview of the Witnesses, E380, 22 December 2015 ("NUON Chea Defence Request"); Co-Prosecutors' Request to Summon 2-TCW-843, 2-TCW-957, 2-TCCP-245, 2-TCW-939, 2-TCW-849, and 2-TCW-905 in Relation to the Vietnamese Segment of Case 002/02, E381, 23 December 2015 ("Co-Prosecutors' Request"); International Co-Prosecutor's Request pursuant to Rules 87(3) & 87(4) to Admit Documents and to Hear an Additional Trial Witness Relating to the Vietnamese Segment of Case 002/02, E382, 24 December 2015 ("ICP Request").

² T. 6 January 2016, pp. 4-25.

³ Decision on motions to hear additional witnesses on the topic of the treatment of the Vietnamese, with reasons to follow (E380, E381, E382), E380/1, 12 January 2016 ("Decision of 12 January 2016"); E-mail from Senior Legal Officer to Parties, E380/2.2, 11 January 2016.

⁴ T. 25 January 2016, pp. 72-73 (admitting E319/23.3.34 and E319/23.3.36).

⁵ NUON Chea Defence Request, paras 1, 18; Seven of these WRIs have since been admitted by the Chamber. See Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & (4) and to call Four Additional Witnesses for Upcoming Case 002/02 Segments, E319/36/2, 25 May 2016 ("Decision on ICP Request to Admit WRIs").

⁶ NUON Chea Defence Request, para. 17; See also, Trial Chamber's oral decision to hear 2-TCW-1000, T. 7 December 2015, pp. 47-49.

3. The NUON Chea Defence submits that 2-TCW-1008, who served in the military within the Southwest Zone, would provide testimony that Division 164 forces cooperated to capture Thai and Vietnamese fishing boats. He would further testify that the forces distinguished between civilian and military boats and civilian boats would not be fired upon. The NUON Chea Defence submits that the relevance of 2-TCW-1008's evidence became apparent only with the disclosure of five WRIs on 3 June 2015 on these subjects, and that therefore his testimony on this issue was not available before the opening of the trial in Case 002.⁷

4. The NUON Chea Defence submits that 2-TCW-823 was a member of Division 164 and would testify that fishing boats that entered Cambodian waters but remained close to the border should be left alone. Most boats coming from Vietnam were armed and there were often incidents as the witness was ordered to attack those that remained in Cambodian territorial waters for long. Although 2-TCW-823's DC-Cam statement from 2007 was available to the parties previously, it is submitted that he gave little information on the treatment of the Vietnamese at sea. Four new WRIs were disclosed to the parties on 3 June 2015 which contained the relevant information.⁸ Therefore, it is submitted that his testimony on this issue was not available before the opening of the trial.⁹

5. The NUON Chea Defence submits that 2-TCW-1009 was a commander of a vessel within Division 164 and would testify that Vietnamese boats contained both refugees and soldiers; the refugees were released and the soldiers were arrested, interrogated, and some sent to security centres. Although 2-TCW-1009's DC-Cam statement was available prior to trial (E3/9113), the Defence submits that it is in the interests of justice to hear his testimony as it is potentially exculpatory.¹⁰

6. The Co-Prosecutors do not object to hearing 2-TCW-1008 and 2-TCW-823.¹¹ Furthermore, in his motion of 24 December 2015, the International Co-Prosecutor supports hearing 2-TCW-1009 because the witness establishes a link between the crimes committed at Kampong Som and S-21. He further submits that this witness is important to the charges of

⁷ NUON Chea Defence Request, paras 8-10 (E319/23.3.29; E319/23.3.30; E319/23.3.31; E319/23.3.32; E319/23.3.33).

⁸ E319/23.3.19; E319/23.3.20; E319/23.3.21; E319/23.3.22.

⁹ NUON Chea Defence Request, paras 11-12.

¹⁰ 2-TCW-1009 also provided a statement in Case 003 which the NUON Chea seeks to admit (E319/23.3.54). This document is also part of the International Co-Prosecutor's request E319/36 and was admitted by the Chamber during the hearing of 26 January 2016. *See also*, footnote 40.

¹¹ T. 6 January 2016, pp. 4-5.

genocide and to war crimes regarding Vietnamese arrested at the border.¹² The Lead Co-Lawyers rely on the Chamber's discretion regarding the NUON Chea Defence Request.¹³

7. The KHIEU Samphan Defence responds that the Chamber opened a "can of worms" when it decided to hear 2-TCW-1000 on the treatment of Vietnamese at sea and that it would be unfair to hear new witnesses on topics that were not the subject of the Case 002 investigation.¹⁴

2.2. Co-Prosecutors Request (E381)

8. The Co-Prosecutors renew their prior request to hear five witnesses and one Civil Party (2-TCW-843, 2-TCW-957, 2-TCCP-245, 2-TCW-939, 2-TCW-849, 2-TCW-905) based on the relevance of their testimony to events in Prey Veng and Svay Rieng Provinces and to the national policy regarding the treatment of the Vietnamese.¹⁵

9. The Co-Prosecutors submit that only three witnesses have testified at trial on events in Svay Rieng and Prey Veng Provinces, namely 2-TCW-805, 2-TCW-820 and 2-TCW-886, with a fourth (2-TCW-848) scheduled to testify.¹⁶ They submit that the charges of genocide against the Vietnamese in Case 002/02 only concern the crimes committed in Prey Veng and Svay Rieng that are part of the Closing Order and that charges of crimes against humanity are primarily focused on events in these two provinces. While evidence on the treatment of the Vietnamese in other provinces is relevant to issues such as genocidal intent, the chapeau elements of crimes against humanity, joint criminal enterprise and charges of Grave Breaches at security centres, the Co-Prosecutors submit that greater priority should be accorded to testimony concerning events in Svay Rieng and Prey Veng.¹⁷ The Lead Co-Lawyers rely on the Chamber's discretion as to the Co-Prosecutors' Request.¹⁸

¹² T. 6 January 2016, pp. 4-5; ICP Request, paras 10-12.

¹³ T. 6 January 2016, p. 5.

¹⁴ T. 6 January 2016, pp. 13-14.

¹⁵ Co-Prosecutors' Request, paras 1, 23; *See* Annex II, OCP Updated Witness, Civil Party and Expert Lists, E305/6.2, 9 May 2014, nos. 48, 49, 50, 53, 57; *See* Annex III, OCP Updated Witness, Civil Party and Expert Lists, E305/6.4, 9 May 2014, no. 9; The Chamber notes that the OCP withdrew its request to hear 2-TCCP-245. *See* Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, E307/3/2, 28 July 2014, paras 23, 57.

¹⁶ T. 6 January 2016, p. 23; Co-Prosecutors' Request, para. 11, FNs 37, 38. The Chamber notes that 2-TCW-848 testified on 6 January 2016.

¹⁷ Co-Prosecutors' Request, paras 9-12.

¹⁸ T. 6 January 2016, p. 6.

10. The KHIEU Samphan Defence respond that the Co-Prosecutors seek “to fill *lacunae*” and to delay the proceedings by requesting additional witnesses.¹⁹ It submits that the request is repetitive because the Chamber has already rejected the Co-Prosecutors’ requests to hear these witnesses. The Chamber already heard one witness from Prey Veng (2-TCW-886) and two from Svay Rieng (2-TCW-848, 2-TCCP-869).²⁰ The Chamber also heard 2-TCW-805 and 2-TCW-820 in December related to events in Svay Rieng. It submits that the only reason the Co-Prosecutors seek to call additional witnesses on the topic of the treatment of Vietnamese is to present inculpatory evidence instead of evidence which is conducive to ascertaining the truth. The KHIEU Samphan Defence submits that the Chamber cannot continue granting requests to hear witnesses until they obtain the evidence that they want.²¹

11. The NUON Chea Defence agrees completely with the KHIEU Samphan Defence response to the Co-Prosecutors’ Request. The NUON Chea Defence submits that it only filed its own request to hear additional witnesses because of the initial decision of the Trial Chamber to call 2-TCW-1000 which “opened a can of worms.”²²

12. The Co-Prosecutors reply that the reason the requests come at this time is because the Trial Chamber’s list of proposed witnesses was constantly changing. Some selected witnesses died and others were not available or were being medically assessed. The requests are not repetitive because the Trial Chamber has not yet rejected these witnesses. In addition, the burden is on the Co-Prosecutors to prove numerous charges including genocide, and this task is complicated by the fact that very few Vietnamese survived from 1975-1979 in Cambodia. Finally, it submits that the Case 003 statements of witnesses were disclosed to the parties fairly with sufficient time to review them.²³

2.3. International Co-Prosecutor’s Request (E382)

13. The International Co-Prosecutor requests to hear 2-TCW-1010, a former member of Division 164, submitting that he can provide direct evidence regarding the fate of hundreds of Vietnamese brought to the island of Koh Rong Sanloem as well as the arrest and execution of Vietnamese at sea, important for establishing the DK policy against the Vietnamese and

¹⁹ T. 6 January 2016, p. 8.

²⁰ T. 6 January 2016, pp. 9-11.

²¹ T. 6 January 2016, pp. 13-14.

²² T. 6 January 2016, p. 19.

²³ T. 6 January 2016, pp. 24-25.

demonstrating genocidal intent.²⁴ The International Co-Prosecutor also supports the NUON Chea Defence's request to hear 2-TCW-1009, a Company Chief and chief of ship in the RAK Navy, as the witness can assist the Chamber to better understand DK policies regarding the arrest and forwarding to S-21 of Vietnamese captured at sea as well as the general DK policy against the Vietnamese.²⁵ In conjunction with the request to hear 2-TCW-1010, the International Co-Prosecutor requests the admission of two Case 003 statements of 2-TCW-1010 (E319/23.3.34; E319/23.3.36) on the basis that they are relevant to these same facts and were not available until after the start of the Case 002 trial as they were authorised for disclosure on 18 May 2015.²⁶

14. The KHIEU Samphan Defence objects to this motion as untimely and submits that it should have been filed at the same time as the Co-Prosecutors' request to hear 2-TCW-1000, in November 2015, as he was proposed to testify on similar facts.²⁷ The decision to hear 2-TCW-1000, to which the KHIEU Samphan Defence objected, brought into evidence facts which the Co-Investigating Judges failed to investigate in Case 002 concerning Division 164 and the arrest of Vietnamese at sea. It is submitted that including such facts in Case 002/02 would violate the Accused's right to have notice of the charges and to equality of arms, particularly since the Case 003 investigation is on-going. The KHIEU Samphan Defence further submits that granting the requests for additional witnesses and experts would delay the proceedings and affect the rights of the accused.²⁸ It also appears to oppose the admission of the documents proposed by the Co-Prosecutor on the basis that they arise from the continuing investigations in Case 003.²⁹

²⁴ ICP Request, paras 6-8.

²⁵ ICP Request, para. 10.

²⁶ ICP Request, paras 3-4, Annex K-New Witness Statements Relevant to the Treatment of the Vietnamese, E382.2, 24 December 2015.

²⁷ T. 6 January 2016, pp. 15-16.

²⁸ T. 6 January 2016, pp. 17-19.

²⁹ T. 6 January 2016, pp. 13-15 ("The International Co-Prosecutor also requested to hear two witnesses [...] And also to --- they requested to admit two WRIs from Case 003, that is, document E382, in order to reinforce the testimony of 2-TCW-1000 [...] The Trial Chamber cannot grant every request and proceed with all those requests in the trial under the pretext of policy against the Vietnamese [...] Today, we ourselves, is in a situation where we concerns the request to admit additional documents from the International Co-Prosecutors from Case 003 where the investigation is ongoing [...] The Trial Chamber needs to close this can of worms to hear additional witnesses, in particular in relation to additional witnesses concerning 2-TCW-1000."); *See also*, T. 25 January 2016, pp. 72 ("We are orally opposed to the Co-Prosecutor's motion and the appearance of the witness in regard to the statement. I still do not understand the reasons for your decision, and I would like to point out to the Chamber that the Khieu Samphan defence team is against both the statement and the appearance of the witness in question.").

15. The NUON Chea Defence responded to the International Co-Prosecutor's request jointly with its response to E381, agreeing completely with the KHIEU Samphan Defence response.³⁰ The Lead Co-Lawyers rely on the Chamber's discretion.³¹

16. With regard to the submission of both defence teams that hearing any further witnesses regarding the treatment of Vietnamese captured at sea is unfair, the Co-Prosecutors note in reply that the NUON Chea Defence is also proposing three witnesses regarding this same topic. The Co-Prosecutors explain that the reason the requests come at this time is because the Trial Chamber's list of proposed witnesses was changing. Finally, it submits that the Case 003 statements of witnesses were disclosed to the parties fairly in due course with sufficient time to review them.³²

3. APPLICABLE LAW

17. The Trial Chamber recalls that it is within the discretion of the Chamber to hear the witnesses, Civil Parties and experts in the order it considers useful.³³ The Chamber further recalls that pursuant to Internal Rule 87(3), the Chamber may decline to hear evidence that is (a) irrelevant or repetitious; (b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports to prove; (d) not allowed under the law; or (e) intended to prolong proceedings or frivolous.³⁴

18. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber will determine the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable

³⁰ T. 6 January 2016, p. 19.

³¹ T. 6 January 2016, p. 6.

³² T. 6 January 2016, pp. 24-25.

³³ Internal Rule 91. See Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, E312, 7 August 2015 ("Witness Decision"), para. 22.

³⁴ Internal Rule 87(3) and 87(4); see also, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, E188, 26 July 2010, para. 41; *Prosecutor v. Karemera et al.*, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, ICTR Appeals Chamber (ICTR-98-44-AR73.14), 30 January 2009, para. 25 (finding that the repetitive nature of testimony is to be considered as a factor in determining whether hearing it is necessary).

diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice.³⁵

4. FINDINGS

4.1. NUON Chea Defence Request (E380)

19. On a preliminary note, the Chamber considers that the submissions of the NUON Chea Defence at the hearing of 6 January 2016 create some confusion as to the status of this request. The NUON Chea Defence have requested that the Chamber hear three witnesses. However, following the KHIEU Samphan Defence's objection to hearing any further witnesses on the topic of the treatment of the Vietnamese, the NUON Chea Defence agreed "literally, with every word the KHIEU Samphan Defence team has just said." Nonetheless, as the NUON Chea Defence did not explicitly withdraw its request to hear additional witnesses, the Chamber considers the merits of the request (E380).

20. The statements of 2-TCW-1008 and 2-TCW-1009 concerning the treatment of Vietnamese at sea were not available until after the start of Case 002/02 as they were disclosed in June 2015. Although the NUON Chea Defence request comes six months after the disclosure of these statements, the Trial Chamber considers that its decision in December 2015 to hear 2-TCW-1000 brought renewed focus to the issue of targeting of Vietnamese at sea and that the Defence acted with reasonable diligence upon being informed of the Chamber's decision to hear 2-TCW-1000. The Chamber therefore considers the NUON Chea Defence request to call these witnesses is timely.

21. As to the substance of the proposed testimony, the Chamber considers that the testimony of 2-TCW-1008 and 2-TCW-1009 is relevant to the policy of the treatment of the Vietnamese. The policy on the treatment of the Vietnamese throughout Cambodia clearly forms part of

³⁵ Decision on Co-Prosecutors' Request To Correct and Supplement Documents Relating to Sector 5 Mobile Chief Ta Val and Sector 5 Secretary Heng Rin, E357/1, 30 September 2015, para. 2; Trial Chamber memorandum entitled "Response to the Internal Rule 87 (4) requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1)", E276/2, 10 April 2013.

Case 002/02.³⁶ Facts concerning the treatment of Vietnamese at sea likewise form part of the facts set forth in the Closing Order.³⁷ Accordingly, the proposed testimony is relevant to findings within the Closing Order and it may be conducive to ascertaining the truth to hear 2-TCW-1008 and 2-TCW-1009. The request to hear these witnesses is therefore granted.

22. The Chamber notes that the 2007 DC-Cam statement of 2-TCW-823 was available prior to the start of Case 002/02 and contains significant elements pertaining to the treatment of the Vietnamese at sea.³⁸ Although 2-TCW-823 later provided additional statements to the OCIJ which were disclosed to the Defence on 3 June 2015, these documents expanded upon the information in the DC-Cam statement rather than alerting the parties to wholly new information. Nonetheless, as noted above, the Chamber considers that its decision in December 2015 to hear 2-TCW-1000 brought renewed focus to the issue of targeting of Vietnamese at sea and the Defence's request to hear 2-TCW-823 on this issue filed in December 2015 may be considered as timely in that context.

23. The Chamber notes that the substance of 2-TCW-823's proposed testimony is relevant to facts contained in Case 002/02, namely the treatment of Vietnamese at sea, but considers that it would likely be repetitious in view of the testimony of 2-TCW-1008 and 2-TCW-1009. The Chamber recalls that prior to the start of trial the Co-Prosecutors proposed to hear 2-TCW-823 in Case 002/02 in relation to the role of the Accused.³⁹ Although the Chamber will not hear 2-TCW-823 at this time, it will consider hearing this witness when it assesses which witnesses to hear of those put forward for this latter trial topic. It therefore defers its decision on whether to hear 2-TCW-823.

24. The Chamber next considers the WRIs proposed for admission. One of the ten Case 003 WRIs proposed by the NUON Chea Defence was admitted at the hearing of 26 January 2016.⁴⁰ An additional six of these Case 003 WRIs were proposed for admission by the Co-Prosecutors in November 2015 and admitted by the Chamber in its Decision (E319/36/2).⁴¹ The request to admit these seven documents is therefore moot. The three remaining WRIs

³⁶ Case 002 Closing Order, paras 214-215; Annex: List of Paragraphs and Portions of the Closing Order relevant to Case 002/02, E301/9/1.1, 4 April 2014, paras 2(iv)(b), 3(xii), 5(i)(b), 5(ii)(b)(1), (2), & (9).

³⁷ Case 002 Closing Order, para. 816, FN 3487 *citing* Confidential Telephone Messages on 1.4.78, E3/928, 1 April 1978.

³⁸ Interview with MA Chhoeun, Documentation Center of Cambodia, E3/9069, 18 May 2007, ERN 0096934-0096936, 0096940, 0096944.

³⁹ Co-Prosecutors' Updated Witness, Civil Party and Expert Summaries, E305/6.4, 9 May 2014, #15.

⁴⁰ *See* Written Record of Hearing of 26 January 2016, E1/380 (admitting E319/23.3.54); T. 26 January 2016, p. 57.

⁴¹ E319/23.3.19; E319/23.3.21; E319/23.3.29; E319/23.3.30; E319/23.3.31 and; E319/23.3.33.

were disclosed in June 2015.⁴² Considering the large number of statements disclosed by the International Co-Prosecutor at the time, the Chamber finds that due diligence has been exercised in submitting this request and that it is timely.⁴³

25. Of the three WRIs under consideration here, one is from 2-TCW-1008 whom the Chamber has selected to testify.⁴⁴ The Chamber recalls that in order to assess the credibility of a witness it is important to consider all available prior statements along with his or her testimony.⁴⁵ It is therefore conducive to ascertaining the truth to admit this document. The final two WRIs are from interviews with 2-TCW-823 for whom the Chamber has deferred its decision.⁴⁶ This does not prevent the Chamber from admitting the statements.⁴⁷ These documents are relevant to the treatment of Vietnamese at sea which is under consideration by the Chamber and they meet the requirement of reliability since they were produced by the Office of the Co-Investigating Judges. The Chamber therefore admits all three documents proposed by the NUON Chea Defence.

4.2. Co-Prosecutors' Request (E381)

26. All six individuals proposed by the Co-Prosecutors were requested by them before the start of Case 002/02. The Chamber has considered all individuals proposed to testify on this topic, including the six put forward by the Co-Prosecutors, and has informed the parties of the list of witnesses and Civil Parties scheduled to testify on the treatment of Vietnamese. The process of selecting individuals to testify is an evolving one, dependant on the exigencies of trial, the availability of witnesses and other unforeseeable circumstances. The Chamber therefore clarifies that notification of this list does not foreclose the possibility of calling other witnesses and Civil Parties who have been proposed for a topic. The Chamber has adopted a phased approach to selecting witnesses, Civil Parties and experts to testify in this case and, as in Case 002/01, will issue a fully reasoned decision on witnesses in due course.⁴⁸

⁴² E319/23.3.20 ; E319/23.3.22; E319/23.3.32;

⁴³ Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Relating to Treatment of Cham Pursuant to Rules 87(3) & 87(4), E319/32/1, 18 February 2016, para. 7.

⁴⁴ E319/23.3.32.

⁴⁵ Disclosure of witness statements for witnesses who may testify in Case 002, E127/4, 24 January 2012; Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, E363/3, 22 October 2015 ("Disclosure Obligations Decision"), para. 25; Decision on Civil Party Lead Co-Lawyers' request to admit victim information forms and related documents, E319/31/2, 12 November 2015, para. 6.

⁴⁶ E319/23.3.20; E319/23.3.22.

⁴⁷ See Decision on ICP Request to Admit WRIs, para. 23.

⁴⁸ Disclosure Obligations Decision, para. 26.

27. The Chamber nonetheless recalls that the crimes charged in Case 002/02 relating to the treatment of the Vietnamese are based, to a large extent, on underlying crimes alleged to have been committed in Svey Rieng and Prey Veng provinces. In this regard, the Chamber selected four witnesses and two Civil Parties to testify on the treatment of Vietnamese in these two provinces (Prey Veng: 2-TCCP-869, 2-TCCP-844 and 2-TCW-886; Svey Rieng: 2-TCW-848, 2-TCW-805, and 2-TCW-820). The Chamber later selected and heard a further witness to be heard on events in Svey Rieng, namely 2-TCW-849, as proposed by the Co-Prosecutors, for a total of seven individuals. The Co-Prosecutors' concern that only 3-4 individuals would testify concerning the events in these provinces is therefore no longer valid and does not substantiate the need to hear further witnesses or Civil Parties from Prey Veng and Svey Rieng on the treatment of the Vietnamese.

28. In its Decision of 12 January 2016, the Chamber initially deferred its decision on whether to hear 2-TCW-843, 2-TCW-957, and 2-TCCP-245 until after 2-TCCP-844 and 2-TCCP-869 testified.⁴⁹ Having now heard five witnesses and two Civil Parties on events in Prey Veng and Svey Rieng (2-TCCP-869, 2-TCCP-844, 2-TCW-886, 2-TCW-848, 2-TCW-805, 2-TCW-820, and 2-TCW-849), including one proposed by the Co-Prosecutors in E381, the Chamber considers that it need not hear any further witnesses on this topic as they would be repetitious, and now rejects the remainder of the Co-Prosecutors' request.

4.3. International Co-Prosecutors' Request (E382)

29. The Chamber first notes that the statements of 2-TCW-1010 were disclosed in June 2015, after the start of the trial in Case 002/02. The Chamber notes that the Co-Prosecutors were on notice of the relevance of 2-TCW-1010's testimony already in November 2015 when they filed their request to hear 2-TCW-1000 on similar facts, and considers that it would have been more efficient to bring all related requests at that time. Nonetheless, in view of the minimal one-month delay before filing this request and its close temporal proximity to the NUON Chea Defence Request on the same issue, the Chamber considers the ICP Request to be timely.

30. The Chamber recalls that it granted the request to hear 2-TCW-1000 and decided to hear two further witnesses on the treatment of Vietnamese at sea, namely 2-TCW-1008 and 2-

⁴⁹ Decision on motions to hear additional witnesses on the topic of the treatment of the Vietnamese, with reasons to follow (E380, E381, E382), E380/1, 12 January 2016, para. 4.

TCW-1009. Therefore, it would very likely be repetitious to hear a further witness on this same topic and the Chamber rejects the International Co-Prosecutors' request to hear 2-TCW-1010 on this topic.

31. The Chamber now turns to the documents proposed by the International Co-Prosecutor, E319/23.3.34 and E319/23.3.36, which were admitted with reasons to follow. These two documents are the written records of interview of 2-TCW-1010 obtained by the Office of the Co-Investigating Judges in Case 003. They were disclosed on 3 June 2015 and were not available prior to the start of the trial in Case 002/02. Although the Co-Prosecutors were on notice of the importance of statements relevant to the treatment of the Vietnamese at sea when they filed their request to hear 2-TCW-1000 in November, the Chamber considers that a one-month delay in requesting the admission of two documents is reasonable in these circumstances and finds the request to be timely.

32. The KHIEU Samphan Defence objects to the admission of these documents as they arise from an on-going investigation. The Chamber recalls its prior ruling that the disclosure of additional materials from Cases 003 and 004 does not in itself constitute a violation of the Accused's rights.⁵⁰ After disclosure, the parties have an opportunity to object to the document's admissibility. In this case, the KHIEU Samphan Defence provides no ground to reject the documents based on the factors in Internal Rule 87(3), instead relying solely on the fact that the documents originate from Case 003. The Chamber does not consider this a valid basis, on its own, to reject a document that is relevant and may be conducive to ascertaining the truth.

33. The Chamber considers that the statements are relevant to the treatment of the Vietnamese at sea and reliable as they were obtained by the International Co-Investigating Judge. Although the Chamber has found that it would very likely be repetitious to hear the testimony of 2-TCW-1010, the admission of these WRIs does not cause any undue delay to the trial. Furthermore, while cognisant of the limits to which witness statements may be put absent live testimony, the Chamber considers that it may be in the interests of justice to admit statements which may corroborate evidence already on the Case File or need to be assessed

⁵⁰ Disclosure Obligations Decision, paras 31-32.

together with such evidence.⁵¹ Accordingly, the Chamber admits the two documents proposed by the Co-Prosecutors.⁵²

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DECIDES to hear 2-TCW-1008, 2-TCW-1009 and 2-TCW-849 and **DIRECTS** the Witness and Expert Support Unit to determine their availability;

REJECTS the requests to hear 2-TCW-939, 2-TCW-905 and 2-TCW-1010;

HAVING DEFERRED its decision on whether to hear 2-TCW-843, 2-TCW-957, and 2-TCCP-245, until after 2-TCCP-844 and 2-TCCP-869 have testified;

NOW REJECTS the Co-Prosecutors' Request to hear 2-TCW-843, 2-TCW-957 and 2-TCCP-245;

DEFERS its decision on whether to hear 2-TCW-823 until the topic on the role of the Accused;

ADMITS WRIs E319/23.3.20, E319/23.3.22, E319/23.3.32, E319/23.3.34, and E319/23.3.36, according them E3 numbers in the annex to this decision (E380/2.1); and

REJECTS as moot the request to admit E319/23.3.19, E319/23.3.21, E319/23.3.29, E319/23.3.30, E319/23.3.31 and E319/23.3.33.

Phnom Penh, 25 May 2016
President of the Trial Chamber



Nil Nonn
Nil Nonn

⁵¹ Decision on ICP Request to Admit WRIs, para. 28.

⁵² E319/23.3.34, E319/23.3.36.