



PROCEDURAL DECISION OPENS A CAN OF WORMS

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The Trial Chamber for Kaing Guek Eav (Duch) convened later than usual this morning only to announce that a decision had not yet been reached regarding co-prosecutor Alex Bates' request for guidance on the implementation of Internal Rule 87.3, which in relevant part reads, "Evidence from the case file is considered put before the Chamber if its contents has been summarised or read out in court." Given that Bates wished to put before the Chamber 148 documents cited in Dr. Craig Etcheson's expert report on Democratic Kampuchea, Bates requested permission yesterday to list the documents individually in index form and to summarize the documents by type in the interest of time. Citing the complexity of the issue and the need for serious discussion, the Chamber adjourned.

Hours later, President Nonn effectively denied Bates' request. He explained that Internal Rule 87 is fundamental to a fair trial and as such only documents read in full or summarized would be considered "put before the Chamber." Further, only portions of documents or books specifically summarized would be considered. In light of this ruling, Judge Cartwright asked Dr. Etcheson to summarize all portions of his expert report that had not yet been covered.

The President then turned over the floor to Bates to question Dr. Etcheson. Before Bates could speak a word, defense counsel Francois Roux was on his feet pleading that Bates be instructed to focus his questions on disputed areas given that Duch had accepted most facts. Roux suggested that the co-prosecutors cover three or four documents related to disputed facts in the interest of time. Judge Cartwright asserted that the expert could illuminate even those facts already agreed upon. Roux responded that Dr. Etcheson, given his work in the ECCC Office of Co-Prosecutors, was a voice of the prosecution and not really an expert in the traditional sense. Judge Cartwright insisted it is not the judges' role to tell any party which documents to put before the Chamber and reminded Roux he could object to individual documents for appropriate reasons.

After a brief break, Bates asked Dr. Etcheson a series of questions about his methodology and the documents cited in his report with the aim of establishing a basis for putting before the Chamber 148 of 161 cited documents. Noting that Roux had labeled Dr. Etcheson a mouthpiece of the prosecution, Bates argued that the Chamber must itself

assess the reliability of Dr. Etcheson's conclusions by reviewing the documents upon which his report was based.

At 3:38 p.m., Bates began reading a summary of document 1 of 148. I wrote down the time so I could calculate how many hours or days I would be listening to such summaries. At 3:43 p.m., Bates began reading a summary of document 2 of 148, which was a report from Norway to the United Nations regarding human rights violations in Democratic Kampuchea. As part of the document 2 summary, expropriation of property in communes was mentioned and Roux immediately objected. He argued expropriation has nothing to do with the crimes for which Duch was indicted. The President, appearing persuaded by Roux's remarks, allowed Bates to respond. At this point, the courtroom got pretty heated. Bates reiterated his previous reasons for putting these documents before the Chamber, and then added that for crimes against humanity, the prosecution must establish that crimes occurred in a widespread or systematic manner throughout the country and Duch's crimes were part of this larger pattern. Noting the defense's "constant interruptions," Bates acknowledged it was in the defense's best interest to limit the number of documents in play and reminded the Chamber of its duty to educate the public and demonstrate that this international tribunal put on a fair trial according to the evidence. He insisted evidence must be made public. Given reports swirling about corruption and a lack of transparency at the ECCC, Bates asked the Chamber, "What do we want to achieve in this process?"

Before allowing others an opportunity to speak, the judges conferred in a heated discussion with a great deal of dramatic gesturing, particularly on the part of Judge Lavergne. Lawyers for the civil parties strongly supported the prosecution. They reminded the Chamber that the Chamber itself called Dr. Etcheson as an expert to discuss matters outside the scope of S-21 and that in the interest of fairness and the ascertainment of truth full evidence is essential. Roux had the last word. He agreed the expert report was important and suggested that the ECCC post the report on its website to educate the public. In contrast with common law, he argued that in the civil law system it is unnecessary for judges to see all documents in order to establish their convictions. He further insisted that the judges are bound by the facts in the indictment. Again, the judges conferred, but did not reach a decision. The President stated that the debates had been intense and adjourned for the day.

The prosecution and the defense both passionately delivered convincing arguments today. In the process, both sides delivered some verbal punches. I do not know how the Chamber will rule on this one, but I am pretty sure Bates and Roux are not having dinner together tonight.