

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' REQUEST FOR EXTENSION OF TIME
TO QUESTION TCW-277 AND TCW-84**

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I. INTRODUCTION

1. Pursuant to Internal Rules 21(1), 85, 91, 91*bis* and 92, the Co-Prosecutors respectfully request that the Chamber extend the total time allocated to the Parties to question Witnesses TCW-277 and TCW-84 (“Witnesses”) from one and a half to three hours. This is on the basis that these Witnesses are likely to have direct knowledge of facts that will provide relevant and reliable evidence of material facts in this case that go beyond matters solely relating to the character of the Accused. These further matters are likely to assist the Chamber to ascertain the truth of the allegations in the Indictment.
2. ECCC law and practice at the international level establish that a party may question a witness on all matters within the scope of trial where a witness is likely to provide relevant and reliable evidence as to those matters. Relevant areas of questioning include evidence of facts that arose before or after the temporal scope of an indictment to establish: (i) the background and context of the crimes; (ii) similar prior conduct of the Accused; (iii) the commission of similar crimes; and (iv) the pre-existing or continuing character of an element of crime or a legal requirement of a mode of liability such as evidence of an ongoing criminal plan in the context of joint criminal enterprise. Considering the information – albeit limited – available regarding the areas of direct knowledge of these Witnesses, the Co-Prosecutors submit, for the reasons below, that an extension of time is in the interests of justice.

II. PROCEDURAL BACKGROUND AND FACTS

3. On 24 April 2013 the Trial Chamber (the “Chamber”) ordered that witnesses TCW-277 and TCW-84 appear before the Chamber by video-link pursuant to Internal Rule 26.¹ The Chamber indicated that these Witnesses “will testify solely as to the character of the Accused”² and considered it “unnecessary to transport these two witnesses [...] to Cambodia merely to hear character testimony of such limited duration.”³ The Chamber allocated a total of one and a half hours to all the Parties to question each of the Witnesses.⁴ In accordance with the standard practice of the Chamber, half of the total allocated time for questioning, that is, 45 minutes, would be afforded to the Co-Prosecutors and the Lead Co-Lawyers to the Civil Parties with the other half to be allocated to the two Defence teams combined.

¹ E236/5/4 Memorandum to the Parties, “Order for Video-Link Testimony of Khieu Samphan Character Witnesses TCW-277 and TCW-84”, 24 April 2013.

² E236/5/4 *Ibid.*

³ E236/5/4 *Ibid.*

⁴ E236/5/4 *Ibid.*

4. Both Witnesses were proposed to be heard by the Chamber at the request of the Defence for Accused Khieu Samphan (“Defence”) in February 2011. Concerning TCW-277, the “Summary of Proposed Testimony” provided by the Defence states:

*[TCW-277] knew Mr Khieu Samphan in Paris from 1957 to 1958 and in 1959, during his studies in France. He attended a talk in Paris given by Mr Khieu Samphan and is in a position to speak about Mr Khieu Samphan's proposals for social and economic development, his political position and his popularity. Having married a Cambodian woman in 1967, [TCW-277] lost part of his wife's family and many of his friends under the Khmer Rouge regime. Given the extent of his knowledge and his status as an indirect victim of the Khmer Rouge regime, [TCW-277] will appear both as witness of that period and as a character witness.*⁵

5. Concerning TCW-84, the Defence states: “*He has known Khieu Samphan since the 1960s, as an intellectual with ideals and integrity, who cared about his country. He will testify on his character then and after 1979.*”⁶
6. The Defence indicates that both Witnesses will provide testimony relevant to the portions of the Closing Order concerned with the character of Accused Khieu Samphan. The Defence additionally identifies TCW-277’s proposed testimony as relevant to the “roles and functions” of Accused Khieu Samphan, and TCW-84’s proposed testimony as relevant to factual findings concerning the “historical background” of the events described in the Closing Order.⁷
7. On 21 January 2013, responding to the Co-Prosecutors’ objections to the admissibility of a letter authored by TCW-277 in the absence of his oral testimony before the Chamber, counsel for the Defence stated that: *[...] these individuals who have known him over the years and [...] are able to testify to his personality and to the context in which he was living and working; all of this is very important to us and we ask that these individuals be called before the Chamber to testify [...].*⁸ Counsel for the Defence continued: *This is an issue that concerns respect of the rights of the Defence. We made it absolutely clear that we are talking both about the historical context and the personality of Khieu Samphan. We have not tried to deceive anybody on that issue and*

⁵ E9/11.2 Annex 1: Witness summaries with points of the indictment – Khieu Samphan, 15 March 2011 at p. 2 [emphasis added].

⁶ E9/11.2 *Ibid.* at p. 1

⁷ E9/11.2 *Ibid.* at pp. 1-2.

⁸ E1/161.1 Transcript, 21 January 2013 at p. 36, ln. 18-22 [emphasis added].

*the aspects of that that are on -- described by these witnesses, belong to the historical context [...].*⁹

8. On 18 February 2013, the Chamber heard oral arguments on the scope of questioning of “character witnesses”, where Judge Lavergne provided the following guidance to the Parties: “*These witnesses had been labeled as character witnesses, and yet, from what I gather, I think everyone would agree that these witnesses may also have questions put to them concerning the facts contained in the Closing Order and relative to all [...] Accused.*”¹⁰ Both the Co-Prosecutors¹¹ and counsel for Ieng Sary¹² advanced substantially similar views.

III. APPLICABLE LAW

a. General Principle Relating to the Questioning of Witnesses

9. The fundamental principle guiding the quality and quantity of witness questioning permitted at the ECCC and other international tribunals is the ability of the questioning to ascertain the truth of the facts contained in the Indictment in an efficient manner. Rule 90 (f) of the ICTY, ICTR and SCSL Rules of Procedure and Evidence allows the Chamber to place limits on questioning so as to ensure the effective ascertainment of the truth and avoid the needless consumption of time.¹³ The ICC Regulations of the Court adopt the same approach.¹⁴
10. The time allocated to questioning witnesses may be extended if it is in the interests of justice to do so. Before the ICTY, in *Stanišić and Župljanin* for example, the Prosecution argued more time was needed to ensure “all topics relevant to issues in this case are explored to provide relevant and probative value of the essential elements of the crimes and modes of liability”.¹⁵ The Chamber allowed extensions of time to question particular witnesses on the basis that “it would be in the interest of justice to allow an extension of the time permitted under Rule 73 *bis*(F) for the presentation of

⁹ **E1/161.1** Transcript, 21 January 2013 at p. 37, ln. 4-9 [emphasis added].

¹⁰ **E1/171.1** Transcript, 18 February 2013 at p. 66, ln. 2-6.

¹¹ **E1/171.1** *Ibid.* at p. 71 ln. 10-22

¹² **E1/171.1** *Ibid.* at p. 70, ln. 17-22 and p. 74 ln. 10-18.

¹³ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, 19 November 2012 at Rule 90 (f); International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, 9 Feb 2010 at Rule 90 (f).

¹⁴ International Criminal Court, Regulation of the Courts, 26 May 2004, Regulation 43.

¹⁵ *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Decision partially granting prosecution’s motions seeking additional time for witnesses to be called pursuant to Rule 92ter (ICTY Trial Chamber II), Case No. IT-08-91-T, 8 June 2010.

the Prosecution's case corresponding to the extensions allowed by this decision.”¹⁶ During the course of trial proceedings in Case 002, this Chamber has also allowed extensions of time to question witnesses.¹⁷

b. Witnesses to Character are the Same as Ordinary Witnesses

11. Under the ECCC Law and the Internal Rules there are no specific legal provisions that refer to, define or limit the questioning of character witnesses. Internal Rule 87(1), which enshrines the principle of free evaluation of evidence,¹⁸ allow the Chamber to hear any person as a witness. The purpose of admitting both documentary and witness evidence is “ascertaining the truth.”¹⁹
12. Similarly, the procedural rules of international courts provide no distinction or limitations to the questioning of character witnesses. Rule 89(c) of the ICTY and ICTR Rules of Evidence and Procedure states: “A Chamber may admit any relevant evidence which it deems to have probative value”.²⁰ The SCSL adopts a substantially-similar rule.²¹
13. In *Kupreškić*, an ICTY Trial Chamber held that it had discretion to allow questioning of witnesses beyond the questions relating to character even where the initial examination focused only on issues of character. In that case, the Defence requested the Trial Chamber to enter an order limiting the Prosecution’s examination of one of its witnesses to “what was asked on direct examination in keeping with the limited and narrow scope of the character testimony”.²² The Chamber affirmed that it had the discretion to permit enquiry into additional matters.²³
14. More generally, international practice does not limit the questioning of witnesses by parties to the questions asked in the examination in chief. At the ICTY, in *Perišić* for example, the prosecution sought an order precluding the defence from cross-examining

¹⁶ *Ibid.* at para 33.

¹⁷ **E1/71.1** Transcript, 2 May 2012, pp. 54-47 (granting extension of time to question witness Pean Khean).

¹⁸ *Code of Criminal Procedure* (Cambodia), Art. 321; *Code de procédure pénale* (France), Art. 427 ; see also J Pradel *Procédure pénale*, 13th ed (2006/7), s. 408.

¹⁹ Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Internal Rules”) at Rule 87(4).

²⁰ ICTY Rules of Procedure and Evidence, *supra* note 13 at Rule 89(c); ICTR Rules of Procedure and Evidence, *supra* note 13 at Rule 89(c).

²¹ Special Court for Sierra Leone, Rules of Procedure and Evidence, 27 May 2008, Rule 89 (c).

²² *Prosecutor v. Zoran Kupreškić et al.*, Decision on limitation of scope of cross-examination of character witnesses. Case No. IT-95-16 Case No. IT-09-92-PT (ICTY Trial Chamber II), 26 February 1999 at para. 2.

²³ *Ibid.* at para. 2.

the witness on the substance of allegations against him.²⁴ The Chamber, relying on *Krajišnik*,²⁵ held that – subject to the overriding requirement of relevance – the Rules of Procedure and Evidence do not limit the matters that may be raised during cross-examination.²⁶ While this decision arose in a procedural setting somewhat different from that of the ECCC, it is submitted that, in substance, the same principle applies here – a witness proposed by one party should be open to questioning by other parties on all relevant topics that are within their knowledge. Indeed, this has been the practice of the Trial Chamber with respect to the Defence’s questioning of all witnesses who were proposed and examined first by the Co-Prosecutors.

c. Questioning Regarding Relevant Facts Both Before and After the Indictment Period is Necessary to Adduce Evidence Probative to the Allegations in the Indictment

15. A witness can provide evidence of facts arising before and after the period covered by the Indictment for a number of permitted purposes. For example, in this case, relevant evidence would include an Accused’s participation in the development of policies and plans which led to the commission of crimes on 17 April 1975. To state the obvious, the planning of crimes committed on 17 April 1975 occurred during the period (weeks, months and years) preceding that date. In that sense, “historical background” evidence goes to the heart of this case. Equally, the conduct of an Accused after the commission of the crimes is relevant in several respects – this would include conduct constituting admissions of participation in the crimes, or conduct that would be relevant to sentencing (e.g. continued leadership of the Communist Party of Kampuchea and association with co-perpetrators).
16. For example in *Bagosora et al.*, an ICTR Trial Chamber held that evidence of the existence of legal elements of crimes both before or after the indictment period can be adduced to assist in proving the elements of those crimes during the indictment period. The Chamber identified the central difference “between the legal elements of a crime and other legal requirements” on the one hand, and the “evidence of their existence” on the other hand.²⁷ The Chamber held that whilst the prosecution bears the onus of

²⁴ *Prosecutor v Momčilo Perišić*, Case No. IT-04-81-T, Decision on prosecution motion for an advance ruling on the scope of permissible cross-examination. (ICTY Trial Chamber I), 12 June 2009.

²⁵ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović (ICTY Trial Chamber I), 15 December 2005 at para 8.

²⁶ *Prosecutor v Momčilo Perišić*, *supra* note 24 at 33.

²⁷ *Prosecutor v Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (ICTR Trial Chamber I), 18 September 2003 at para. 6.

proving the elements of crimes and legal requirements of modes of liability were present “at the time of the commission of the crimes charged in the indictment”,²⁸ this does not mean that evidence of facts before and after the period covered by the indictment (“extra-temporal facts”) is not relevant or may not be properly adduced for certain purposes.

17. More particularly the Chamber held that these prior extra-temporal facts can be adduced to prove the *pre-existing or continuing character of elements of crimes* when there is an ongoing criminal act.²⁹ For example, if a crime charged includes elements relating to the systematic nature of the criminal conduct (such as crimes against humanity), facts pre-dating the indictment become probative to the existence of the crime itself during the period of the indictment. Similarly, extra-temporal facts may be used as evidence of the *pre-existing or continuing character of the legal requirements relating to modes of liability*, such as proof of an ongoing criminal plan in the context of a joint criminal enterprise, where the common criminal plan originated before the crimes charged in the indictment, but continued during the time covered by the indictment.³⁰
18. Prior criminal conduct of an accused, arising before the indictment period, can be adduced to prove the mental element of intent and also to refute defences, particularly those negating mental elements of the crime. In *Ngeze and Nahimana*, evidence of *similar acts* committed prior to the period covered by the indictment may be admissible under certain circumstances. As Judge Shahabuddeen points out: “evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense.”³¹ In other words, similar fact evidence may possess sufficient relevance when adduced to prove intent, or to disprove coincidence or mistake.³²
19. More broadly, in relation to matters of background or context beyond the indictment period, evidence can be adduced to provide a Chamber with a better understanding of the crimes charged. In *Gatete and Bagosora*, an ICTR Trial Chamber held that

²⁸ *Ibid.*

²⁹ *Prosecutor v Théoneste Bagosora et al.*, *supra* note 27 at para. 9.

³⁰ *Ibid.* at para. 31.

³¹ *Prosecutor v Hassan Ngeze and Ferdinand Nahimana*, Case No. ICTR-99-52-T, Décision sur les Appels Interlocutoires (Decision on the Interlocutory Appeals), Separate Opinion of Judge Shahabuddeen (ICTR Appeals Chamber), 5 September 2000 at para. 20.

³² *Prosecutor v Théoneste Bagosora et al.*, *supra* note 27 at para. 13.

providing additional information relevant to the *background or the context* of the allegations against an accused may properly be adduced, even when it concerns evidence of facts outside the temporal scope of the indictment.³³ For example, a given event may not be part of the crime charged in itself, but may be indispensable to a complete understanding of the crime. In such as case, a Chamber should admit evidence of facts outside the temporal scope of the indictment.³⁴

IV. ARGUMENT

20. It is clear from: (i) the summaries of the Witnesses' proposed testimony; (ii) statements of the Khieu Samphan Defence; (iii) statement of the Co-Prosecutors; and (iv) prior guidance of the Trial Chamber that these Witnesses are likely to provide evidence relevant to many facts contained in the Closing Order and within the scope of Case 002/01, including the roles and functions of Khieu Samphan before, during and after the Indictment period, as well as the historical background more generally.
21. Therefore, the Parties should be allowed to question these Witnesses on areas of the Closing Order where the Witnesses have an ability to provide answers on the basis of their prior experiences and direct knowledge. The ECCC Law and international practice support and encourage this approach to ensure that Trial Chambers can most effectively ascertain the truth of the allegations contained in an Indictment.
22. The concept of a "character" witness is an imported term from national jurisdictions that deal with crimes occurring within a comparatively short time frame. In this context, a "character" witness typically provides evidence of the Accused's reputation. Usually, the witness has little knowledge of the circumstances leading up to the commission of the crimes, the crimes themselves or the circumstances of the Accused's association with co-Accused and other co-perpetrators or accessories following the commission of the crimes. Such a "character" witness only has the ability to testify to the Accused's reputation outside the factual circumstances that may lead to evidence that would assist in proving or disproving the crimes themselves.

³³ *Prosecutor v Jean-Baptiste Gatete*, Case No. ICTR-2000-61-PT, Decision on Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009 (ICTR Trial Chamber III), 2 October 2009 at para. 24; *Prosecutor v Jean-Baptiste Gatete*, Case No. Case No. ICTR-2000-61-T, Decision on Defence Motion for Exclusion of Evidence and Delineation of the Defence Case (ICTR Trial Chamber III), 26 March 2010 at para. 25; *Prosecutor v Théoneste Bagosora et al.*, *supra* note 27 at para. 10.


³⁴ *Ibid.*

23. The labelling of witnesses as “character” witnesses is less useful in trial proceedings concerning an alleged large-scale joint criminal enterprise. This is particularly evident where: (i) the joint criminal enterprise is alleged to have come into existence prior to the Indictment period; and (ii) evidence of the existence of that joint criminal enterprise and the role the Accused therein is also found in the conduct of the Accused following the Indictment period.
24. Restricting the questioning of Khieu Samphan “character” Witnesses to character alone, and excluding the substance of the allegations contained in the Closing Order is all the more problematic in that these witnesses were not interviewed in the judicial investigation phase. These Witnesses have been approached solely by the Defence. Other Parties have a legitimate right to explore the knowledge of these Witnesses on their knowledge of the crimes and the Accused’s involvement therein, beyond what has been provided by the Accused himself through his lawyers. It clearly would not be appropriate for a party to exclude from examination the facts that are relevant to the allegations before the Chamber.
25. Therefore, the questioning of these Witnesses should not be limited to issues of character alone. The Parties should be afforded modest extensions of time already allocated, in the interests of justice, to question these Witnesses on all relevant issues within their knowledge.

V. RELIEF SOUGHT

26. For these reasons, the Co-Prosecutors request the Chamber to permit an examination of these Witnesses on all relevant issues within their knowledge, and extend the time afforded to the Parties to question them to a total of three hours per Witness.

Respectfully submitted,

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