

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

**FILING DETAILS**

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**NUON CHEA'S REQUEST REGARDING CERTAIN PRACTICES TO BE  
UNDERTAKEN WHEN EXAMINING UPCOMING CIVIL PARTY 2-TCCP-271 AND  
OTHER CASE 002/02 WITNESSES AND CIVIL PARTIES GENERALLY**

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Pursuant to Rule 92<sup>1</sup> and a direction given by the Trial Chamber during trial proceedings on 8 January 2015,<sup>2</sup> the Co-Lawyers for Mr. Nuon Chea (the “Defence”) submit this request in relation to certain practices to be undertaken in the examination of Civil Party 2-TCCP-271 as well as other Case 002/02 witnesses and civil parties generally (the “Request”):

## I. BACKGROUND

### A. Procedural History

1. On 7 August 2014, the Trial Chamber issued its judgement in Case 002/01 (the “Judgement”).<sup>3</sup> On 29 December 2014, the Defence filed its appeal against that Judgement (the “Appeal”).<sup>4</sup> In its Appeal, the Defence advanced several grounds alleging that practices that the Trial Chamber undertook in the examination of witnesses and civil parties during Case 002/01 were erroneous and violated Nuon Chea’s right to a fair trial.
2. On 8 January 2015, the first witness for the first Case 002/02 trial segment,<sup>5</sup> Meas Sokha, began testifying. Responding to a question from the Trial Chamber, the witness confirmed that he had previously given an interview to the OCIJ; he had read the associated written record of interview (“WRI”) prior to entering the courtroom to ‘refresh his memory’; and the WRI was accurate according to his knowledge.<sup>6</sup> This exchange elicited an objection from the Defence who had appealed the pursuit of these practices in Case 002/01. The Defence added that it intends to maintain its objection not only to this practice but to others which it had appealed from Case 002/01 relating the examination of witnesses and (in particular) civil parties.<sup>7</sup> The Trial Chamber subsequently directed the Defence to file its objections in writing and to refer to relevant paragraphs or arguments from its Appeal.<sup>8</sup>

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<sup>1</sup> The Defence challenged the constitutionality of the Internal Rules in its appeal: *see* **F16**, ‘Nuon Chea’s Appeal against the Judgment in Case 002/01’, 29 Dec 2014 (“Appeal”), paras. 15-17. Thus, all references to the Internal Rules as applicable law are made in the event that the Supreme Court Chamber dismisses this appeal ground.

<sup>2</sup> ‘Transcript of Proceedings’ (released only in draft at this stage and without an E1 number as yet), 8 Jan 2015 (“Draft Transcript – 8 Jan 2015”), p. 33, ln. 18 – p. 34, ln. 5.

<sup>3</sup> **E313**, Case 002/01 Judgement, 7 Aug 2014.

<sup>4</sup> **F16**, Appeal.

<sup>5</sup> Trial Segment A relates to the Tram Kok Cooperatives (including the Treatment of Buddhists) and the Kraing Ta Chan Security Centre: *see* **E315**, ‘Decision on Sequencing of Trial Proceedings in Case 002/02’, 12 Sep 2014, p. 5.

<sup>6</sup> Draft Transcript – 8 Jan 2015, p. 30, ln. 12 – p. 31, ln. 5.

<sup>7</sup> Draft Transcript – 8 Jan 2015, p. 32, ln. 9 – p. 33, ln. 1.

<sup>8</sup> Draft Transcript – 8 Jan 2015, p. 33, ln. 18 – p. 34, ln. 5.

## B. Urgent Nature of this Request

3. As indicated above and elaborated below, this Request relates to practices undertaken not only with respect to witnesses and civil parties appearing throughout the Case 002/02 trial generally, but specifically with respect to Civil Party 2-TCCP-271, who is scheduled to appear imminently. In this regard, the Defence notes that all practices to which it objects in this Request would, if applied, likely result in irremediable harm to Nuon Chea. Therefore, since Civil Party 2-TCCP-271 is likely to appear on or around 29 January 2015,<sup>9</sup> the Defence requests that the Trial Chamber consider and respond to this Request on an urgent basis and before 2-TCCP-271 appears.

## II. APPLICABLE LAW

4. Rule 85 provides that the Trial Chamber President presides over trial proceedings and, in consultation with the other trial judges, ‘maintain[s] good order during the trial’. At the same time, Rule 85 obliges the President to ‘guarantee the free exercise of defence rights’. In other words, the Trial Chamber must ensure Nuon Chea enjoys his right to a fair trial, which is protected under Cambodian law,<sup>10</sup> the ECCC Law,<sup>11</sup> the ECCC Agreement,<sup>12</sup> and the *International Covenant on Civil and Political Rights*.<sup>13</sup>

## III. ARGUMENT

### A. Objectionable Practices Applied in Case 002/01

5. The Defence objects to the application in the Case 002/02 trial of three practices which the Trial Chamber applied in Case 002/01: the Chamber’s (i) practice of permitting witnesses to review prior statements before testifying and then to answer leading questions based on those statements; (ii) undue restriction of the scope of Defence cross-examination; and (iii) unduly heavy reliance on civil party testimony. In its Appeal, the Defence argued that all of these practices amount to errors of law. The Defence

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<sup>9</sup> This assessment is based on the Defence’s assessment of information provided in the following documents: **E328/1**, Email from Trial Chamber Senior Legal Officer to Parties regarding Scheduling and Seating Arrangement, 13 Jan 2015 (concerning the adjournment of hearings until 21 January 2015); **E328.1**, ‘Tram Kok Cooperatives and Kraing Ta Chan Security Centre: Witnesses, Civil Parties and Experts’, 17 Dec 2014 (assigning time allocations to each witness); **E328.2**, ‘Hearing Schedule for Case 002/02: January-March 2015’, 17 Dec 2014 (scheduling hearing days); and **E329**, ‘Order Assigning Experts to Assess the Accused’s Fitness to Stand Trial’, 18 Dec 2014 (scheduling a medical examination and hearing).

<sup>10</sup> Constitution of the Kingdom of Cambodia, Arts. 31, 38.

<sup>11</sup> ECCC Law, Art. 35 *new*.

<sup>12</sup> ECCC Agreement, Art. 12(2).

<sup>13</sup> ICCPR, Art. 14.

incorporates into this Request, *mutatis mutandis*, the detailed arguments in its Appeal against these practices and provides specific references to and brief summaries of these arguments below.

***(i) Permitting Witnesses to Review Prior Statements Before Testifying and Answer Leading Questions Based on those Statements***

6. Throughout the Case 002/01 trial, the Trial Chamber erroneously permitted witnesses and civil parties to review their prior statements before testifying, and then permitted the Co-Prosecutors to examine witnesses by reading witnesses the content of parts of these statements in order to seek confirmation of their accuracy. These practices should be abandoned in the Case 002/02 trial.
  
7. The Defence refers the Chamber to the arguments in Section VI(C) (paragraphs 135 to 147) of its Appeal<sup>14</sup> and summarises them as follows. The practice of showing witnesses their prior statements was established through a 24 November 2011 Trial Chamber decision in which the Chamber held that the practice would ‘avoid a waste of valuable in-court time’.<sup>15</sup> In so deciding, the Chamber committed several errors. Every relevant applicable legal source prohibits this practice, including Cambodian law and civil law procedures at the international level. International courts recognise that witness preparation is inconsistent with inquisitorial practice and creates a considerable risk of distorting the truth where long time lapses are at issue. While the ICC in *Lubanga* did allow witnesses to review their prior statements, its reasoning in support of that practice<sup>16</sup> in fact supports the practice’s prohibition before the ECCC. The Chamber also relied on irrelevant considerations. Its primary justification, that witnesses may have difficulty recalling their statements, is in reality a powerful argument to *avoid* this practice. Its secondary justification, conserving time by having witnesses ‘attest that they made these statements’ – is manifestly unpersuasive. The time required for a witness to verify a signature or thumbprint is at most a matter of minutes – the time required of a single question at the outset of an examination-in-chief.

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<sup>14</sup> **F16**, Appeal, Section VI(C) (‘Grounds 15-16: The Trial Chamber erred in law in permitting witnesses to review prior statements before testifying and answer leading questions based on those statements’), paras. 135-147.

<sup>15</sup> **E141/1**, ‘Provision of Prior Statements to Witnesses in Advance of Testimony at Trial’, 24 Nov 2011.

<sup>16</sup> *Prosecutor v. Lubanga*, ‘Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial’, ICC-01/04-01/06, 30 Nov 2007, para. 50.

8. The Chamber's decision to allow witnesses to 'testify' by confirming the contents of documents read to them by the Co-Prosecutors was never justified by any reasons or legal authority, all of which prohibit this practice, or considerations of efficiency or ascertainment of the truth. The only possible effect of this practice was to ensure that live testimony artificially corroborates prior statements while obscuring the witness's actual, contemporaneous recollection.

***(ii) Unduly Restricting the Scope of Defence Cross-Examination***

9. Throughout the Case 002/01 trial, the Chamber continuously and improperly interfered with the ability of the Defence to confront witnesses against Nuon Chea by challenging, *inter alia*, the credibility and reliability of their evidence. This practice should be abandoned in the Case 002/02 trial and far greater leeway granted to the Defence to challenge the veracity of evidence on cross-examination.
10. The Defence refers the Chamber to the arguments in Section VI(D) (paragraphs 148 to 153) of its Appeal<sup>17</sup> and summarises them as follows. The Chamber frequently held that Defence questions challenging the credibility and reliability of evidence were irrelevant or that no further questioning on a given subject was necessary. In doing so, the Chamber consistently failed to recognise Nuon Chea's right as an accused of the most serious international crimes to an adequate opportunity to confront the evidence against him, especially in light of the numerous improper restrictions in that regard imposed by both the CIJs and the Trial Chamber. Many of the Chamber's rulings concerned the manner in which evidence in WRIs was obtained during the judicial investigation. In this regard, the Defence argued that it 'was prohibited from exploring whether witnesses had been [...] coached, shown documents, coerced, intimidated or influenced, misunderstood or misquoted, or interviewed multiple times without audio records being prepared'.<sup>18</sup> The Chamber also curtailed counsel's ability to probe the reliability of the evidence where the methods employed during the investigation were not at issue. These rulings were clearly erroneous and constituted repeated violations of Nuon Chea's right to confrontation.

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<sup>17</sup> **F16**, Appeal, Section VI(D) ('Grounds 11-12: The Trial Chamber erred in law in unduly restricting the scope of cross-examination'), paras. 148-153.

<sup>18</sup> **E295/6/3**, Nuon Chea's Closing Submissions in Case 002/01, 26 Sep 2013 (footnotes omitted), cited in **F16**, Appeal, para. 149.

***(iii) Relying Unduly Heavily on Civil Party Testimony***

11. Throughout the Case 002/01 trial, civil parties testified in the course of the substantive hearings. The Judgement subsequently confirmed that the Trial Chamber considered civil party testimony extremely relevant to the determination of criminal liability and that it failed to make any distinction between the probative value of civil parties and witnesses. This erroneous and undue reliance should be abandoned in the Case 002/02 trial. Evidence relevant to the criminal liability of the accused should be given by witnesses testifying under oath, led only by the Co-Prosecutors without any opportunity to consult prior to or during testimony.
12. The Defence refers the Chamber to the arguments in Section VI(H)(ii) of its Appeal<sup>19</sup> and summarises them as follows. The Trial Chamber erred in law in deciding, in response to a request from the Co-Prosecutors, to assess ‘the weight to be given to Civil Party testimony [...] on a case-by-case basis in light of the credibility of that testimony’.<sup>20</sup> The reasoning for this decision was virtually non-existent: a mere two paragraphs which failed to address detailed legal arguments from defence teams or cite a single relevant authority. The Chamber then proceeded to cite *indiscriminately* to civil party testimony throughout the Judgement. The 31 civil parties who testified before the Chamber were cited a total of 787 times and on average, *more frequently than witnesses*. Civil parties were heavily relied upon, sometimes as the sole evidence, for numerous contentious conclusions, including as to conditions during both population movements, and numerous murder convictions which were based on the uncorroborated, unsworn testimony of a single civil party. Indeed, in the Judgement, the Trial Chamber also relied extensively on civil parties’ victim impact testimony and statements of suffering – which were referenced an astonishing 255 times in the Judgement – not simply with regard to reparations and sentencing, but as material evidence, especially in connection with the conditions of the evacuation of Phnom Penh and the Phase II population movement.<sup>21</sup>

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<sup>19</sup> **F16**, Appeal, Section VI(H)(ii) (‘Ground 34: The Trial Chamber erred in law and fact in its assessment of the probative value of civil party statements in the Judgment: ii- Civil party testimony’), paras. 185-186, 194-206.

<sup>20</sup> **E267/3**, ‘Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure Concerning Civil Parties’ Statements on Suffering and Related Motions and Responses (E240, E240/1, R250, E250/1, E267, E267/1 and E267/2), 2 May 2013, para. 22.

<sup>21</sup> See **E313**, Judgement, fns. 1394, 1397 1401, 1457, 1459, 1461-2, 1470, 1472-3, 1789, 1807, 1832, 1862, 1902, and **F16**, Appeal, Section VI(H)(i) (‘Ground 34: The Trial Chamber erred in law and fact in its assessment

13. The distinction between a civil party and a witness under both Cambodian law and the Internal Rules is unambiguous: they can never be heard as a witness. Their role is limited to ‘principally the pursuit of reparations’<sup>22</sup> and is ‘subsidiary – not alternative – to the Co-Prosecutors’.<sup>23</sup> This restrictive view is intended in part to protect the rights of the accused to the equality of arms. Thus, (lawyers of) civil parties cannot ‘transform [...] into additional prosecutors’.<sup>24</sup> However, in Case 002/01, evidence given by civil parties *and* led by civil party lawyers was afforded as prominent a role by the Trial Chamber in establishing guilt as evidence introduced by the Co-Prosecutors – and often, considerably more.
14. Civil parties furthermore appear before the Chamber pursuant to procedures which lack the safeguards intended to protect the integrity of the evidence. They are not required to take an oath, and while defence counsel and the Co-Prosecutors are prohibited from having any contact with witnesses prior to testimony, civil party lawyers are entitled to meet freely with their clients, and civil parties themselves are allowed to and even *encouraged* to meet with other civil parties, since they are invited to conferences and gatherings where the very purpose is to discuss and share their DK experiences. Nor are they restricted from attending trial and hearing the evidence of other witnesses and civil parties (even on matters to which they themselves subsequently testify in courts).
15. These restrictions do not apply to civil parties *precisely because* their evidence is not intended to establish the guilt of the accused but intended for their ‘principal’ role of seeking reparations. Civil party testimony which does concern the guilt of the accused is therefore *ipso facto* less reliable. However, this is anathema to the manner in which civil party evidence was used in the Judgement: as the principal evidence upon which a substantial number of the convictions entered against Nuon Chea were based.

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of the probative value of civil party statements in the Judgment: i- Victim impact testimony and statements of suffering’), paras. 187-193.

<sup>22</sup> Case 001, **E72/3**, ‘Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character’, 001/18-07-2007/ECCC/TC, 9 Oct 2009 (“Civil Party Sentencing Submissions Standing Decision”), para. 33.

<sup>23</sup> **F10/2**, ‘Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01’, 26 Dec 2014, para. 12.

<sup>24</sup> Case 001, **E72/3**, Civil Party Sentencing Submissions Standing Decision, para. 26.

16. Evidence given under oath is entitled to probative value because it entails a risk of ‘sanctions for false testimony’.<sup>25</sup> The ICC Trial Chamber has accordingly held that while victims may express their views and concerns without giving an oath, any evidence which concerns criminal responsibility must be given by victims as a witness appearing before the Chamber under oath.<sup>26</sup> Civil parties testifying at the ECCC without taking an oath are not at risk of charges for perjury and accordingly have a reduced incentive to tell the truth.<sup>27</sup>

### **B. Upcoming Testimony of Civil Party 2-TCCP-271**

17. The Defence objects to these practices not merely as a matter of principle but because the implementation of these practices in Case 002/02 would cause irreparable harm to Nuon Chea and violate his right to a fair trial. Once a witness reviews his past statement, and once a civil party appears without taking an oath (and after having been briefed and instructed by his lawyer), the resulting harm cannot be undone. Similarly, it would be so impractical as to be impossible for the Defence to later be permitted to re-question every witness and civil party who appears in order to challenge the credibility and reliability of their evidence.
18. The impact of these practices is highlighted most starkly when considered in the context of upcoming civil party 2-TCCP-271. The evidence of this civil party, who has given numerous interviews to the CIJs, is especially important to proof of events which are alleged to have occurred at Kraing Ta Chan Security Centre. Civil Party 2-TCCP-271 is the most-referenced witness in both the Closing Order<sup>28</sup> and the OCP’s Final Submission’s<sup>29</sup> respective sections on Kraing Ta Chan. Eleven times in the Closing Order, 2-TCCP-271 is cited as the *only* source for an alleged fact in relation to Kraing Ta Chan, and twenty times he is one of at most three sources for an alleged fact (with the other sources overwhelmingly being other witnesses or civil parties). The Kraing Ta Chan Site Identification Report relies extensively and nearly exclusively on 2-TCCP-

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<sup>25</sup> *Prosecutor v. Prlić et al.*, ‘Decision on Praljak Defence Notice Concerning Opening Statements under Rules 84 and 84 Bis’, IT-04-74-T, 27 Apr 2009, p. 9.

<sup>26</sup> *Prosecutor v. Lubanga*, ‘Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence during the Trial’, ICC-01/04-01/06-2032-Anx, 26 Jun 2009, para 25.

<sup>27</sup> See Rule 36 (providing for sanctions against a ‘witness’ for giving false testimony ‘under Solemn Declaration’).

<sup>28</sup> **D427**, ‘Closing Order’, 15 Sep 2010, pp. 125-133.

<sup>29</sup> **D390**, ‘Co-Prosecutors’ Rule 66 Final Submission’, 16 Aug 2010, pp. 160-167.



271's evidence.<sup>30</sup> 2-TCCP-271 also purports to give critical evidence substantiating allegations of torture and establishing linkages between those crimes and Ta Mok, an alleged JCE participant with Nuon Chea.

19. It is patently obvious that Civil Party 2-TCCP-271's evidence will be of critical importance to the Trial Chamber's ability to establish the alleged facts at Kraing Ta Chan beyond reasonable doubt. Accordingly, Civil Party 2-TCCP-271 should be required to testify under oath, first examined by the Co-Prosecutors, and prohibited from reviewing prior statements before appearing, while the Defence should be given leeway to challenge the veracity of 2-TCCP-271's evidence during cross-examination.

#### IV. RELIEF

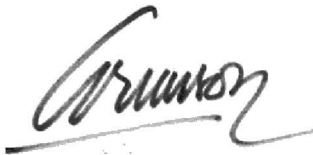
20. For the reasons stated above, the Defence requests that:
- (i) with respect to the upcoming testimony of Civil Party 2-TCCP-271, the Trial Chamber urgently:
    - (a) require that 2-TCCP-271 testify under oath, with examination led by the Co-Prosecutors;
    - (b) prohibit 2-TCCP-271 from reviewing prior statements before appearing for testimony; and
    - (c) grant leeway to the Defence to challenge the veracity of 2-TCCP-271's evidence on cross-examination, including with respect to his credibility and reliability; and
  - (ii) with respect to the Case 002/02 trial generally, the Trial Chamber:
    - (a) disallow witnesses and civil parties in Case 002/02 from being shown prior statements before appearing for testimony;
    - (b) prohibit parties from asking witnesses, civil parties and experts leading questions intended to have them confirm the accuracy of their prior written statements;

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<sup>30</sup> D125/220, 'Site Identification Report: Kraing Ta Chan Security Centre', 17 Mar 2009.

- (c) grant leeway to the Defence to challenge the veracity of the evidence of witnesses, civil parties and experts on cross-examination, including with respect to credibility and reliability; and
- (d) require that where civil parties are called to give evidence in Case 002/02 relevant to facts other than victim impact or reparations, they must testify under oath and give evidence led primarily by the Co-Prosecutors.

## CO-LAWYERS FOR NUON CHEA



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