

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: Co-Prosecutors

Filed to: Trial Chamber

Original Language: English

Date of Document: 26 January 2015

CLASSIFICATION

**Classification of the document
suggested by the filing party:**

PUBLIC

Classification of the Trial Chamber:

សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' RESPONSE TO 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**

Filed by:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Distribute to:

Trial Chamber

Judge NIL Nonn, President
Judge Claudia FENZ
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Accused

NUON Chea
KHIEU Samphan

Lawyers for the Defence

SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Copied to:

Civil Party Lead Co-Lawyers

PICH Ang
Marie GUIRAUD

I. Introduction & Procedural History

1. On 16 January 2015, Nuon Chea filed a motion objecting to the application in Case 002/02 of three practices that were applied in Case 002/01, including the Trial Chamber's: (i) practice of permitting witnesses to review their prior statements before testifying and allowing leading questions to be asked to the witnesses based on that statement; (ii) undue restriction of the scope of the Nuon Chea's Defence's ("Defence") cross-examination; and (iii) reliance on civil party testimony.¹ The Defence refers to the appeal it filed before the Supreme Court Chamber in Case 002/01, incorporating into the Request, *mutatis mutandis*, its submissions in relation to these exact same issues.² The Defence requests that the Request be dealt with as a matter of urgency, given the impending evidence to be provided by Civil Party 2-TCCP-271, and the impact of the Case 002/01 practices on the manner in which this civil party will testify.³
2. Nuon Chea requests that the Trial Chamber ("Chamber") generally: (i) prohibit witnesses and civil parties in Case 002/02 from examining their prior statement(s) before testifying; (ii) prohibit parties from asking leading questions to confirm the accuracy of their prior statements; (iii) grant the Defence "leeway" to challenge the veracity of witnesses, civil parties and experts on cross-examination, including with respect to reliability and credibility; and (iv) require that civil parties who are called to provide evidence in Case 002/02 to facts other than impact or reparations, do so under oath.⁴ Nuon Chea further requests that the Chamber: (i) require that Civil Party 2-TCCP-271 testify under oath; (ii) prohibit Civil Party 2-TCCP-271 from reviewing prior statements prior to testifying; and (iii) grant the Defence "leeway" to challenge the veracity of Civil Party 2-TCCP-271's evidence on cross-examination.⁵
3. For the reasons stated below, the Co-Prosecutors submit that the Request should be dismissed.

¹ **E336** 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, 16 January 2015 ("Request"). Nuon Chea filed the Request having been directed by the Trial Chamber on 8 January 2015 to file the oral objections he raised during the course of the proceedings in writing. See T. 8 January 2015, pp. 33-34.

² *Ibid.* para. 5, referring to **F16** Nuon Chea's appeal against the Judgement in Case 002/01, 29 December 2014 ("Appeal"), paras. 135-153, 187-193.

³ *Ibid.* paras. 3, 17-19.

⁴ Request, para. 20.

⁵ *Ibid.*

II. Argument

4. The Co-Prosecutors note at the outset that the Chamber has already considered and ruled in Case 002/01 regarding: (i) witnesses being provided their prior statements before testifying;⁶ (ii) leading questions that incorporate and seek follow-up on prior statements;⁷ and (iii) civil parties testifying without taking an oath.⁸ Nuon Chea has appealed these issues to the Supreme Court Chamber following the rendering of the Trial Judgment in Case 002/01,⁹ and the Co-Prosecutors intend to respond in detail thereto in a filing before the Supreme Court Chamber. The Co-Prosecutors submit that until such time as the Supreme Court Chamber rules on these matters, the Case 002/01 practices to which Nuon Chea objects should apply in Case 002/02, including with respect to Civil Party 2-TCCP-271's testimony.
5. The Co-Prosecutors further observe that the Defence have misstated the Trial Chamber's ruling regarding the use of prior witness statements. Contrary to the Defence motion, the Trial Chamber does not permit the Co-Prosecutors to "examine witnesses by reading witnesses the content of parts of these statements in order to seek confirmation of their accuracy."¹⁰ The established procedure with respect to the use of prior statements was stated by the Chamber as follows:

"The Trial Chamber reminds the parties that in the interests of ensuring the expeditiousness of proceedings, it has recently commenced the questioning of each witness by asking whether the witness is familiar with the statement they gave before the Co-Investigating Judges (OCIJ) and whether this represents an accurate statement of their evidence. Where the witness indicates that s/he does

⁶ See, e.g., **E141** Memorandum to the Parties, "Response to issues raised by the parties in advance of the trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011", 17 November 2011 [paragraph titled "Witness, Civil Party and Expert preparation"]; **E141/1** Memorandum to the Parties, "Provision of prior statements to witnesses in advance of testimony at trial", 24 November 2011; **E292/2/1** Memorandum to the Parties, "Decision on Nuon Chea's request that the Chamber not provide prior statements to Tuol Po Chrey witnesses before testifying (E292/2)", 27 June 2013.

⁷ **E201/1** Trial Chamber Memorandum to the Parties, "Notice to parties regarding revised modalities of questioning and Response to Co-Prosecutors' Request for Clarification Regarding the Use of Documents During Witness Testimony," 13 June 2012.

⁸ See, e.g., **E74** Memorandum to the Parties, "Trial response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following trial management meeting of 5 April 2011", 8 April 2011; **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, E250, E250/1, E267, E267/1 and E267/2), 2 May 2013, para. 21-22. See also **E1/17.1** T. 6 December 2011, pp. 34-35; **E1/164.1** T. 24 January 2013, p. 76; **E1/2.1** T. 5 April 2011, p. 100; **E188 Kaing Guek Eav** Trial Judgment, 26 July 2010, paras. 52-53. The Co-Prosecutors refer to their prior submissions in Case 002/01 regarding these matters. See, e.g., **E267** Co-Prosecutors' Rule 92 submission regarding civil party testimony, 21 February 2013, paras. 11-22.

⁹ See Appeal, paras. 135-153, 187-193. See also **E313** Case 002/01 Judgment, 7 August 2014.

¹⁰ Request, para. 6.

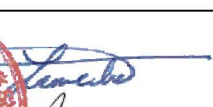
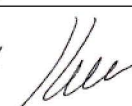
recall their statement and that its contents as recorded in the OCIJ written record are true, parties shall not repeatedly request the witness to confirm this fact or otherwise attempt to force the witness to merely repeat the contents of that statement. The parties should instead focus their efforts on other questions (for instance, on matters beyond the contents of the statement) or in posing specific challenges to the credibility of the statement or the witness' evidence."¹¹

6. In regards to the issue of so-called "cross-examination," the Defence again incorporate unsubstantiated, meritless arguments from their Case 002/01 Appeal Brief, and fail to make any showing that the Chamber has prevented or unduly restricted the Defence's ability to question witnesses or civil parties in Case 002/02.¹² As was the case throughout the Case 002/01 trial, the Defence will be given a fair opportunity to examine witnesses and contest their evidence, in accordance with the rules and practices of this Court, and no specific relief or order is necessary here.
7. Similarly, Nuon Chea refers only to the Chamber's alleged errors in relying too heavily on civil party evidence to substantiate its findings in the Judgment, without demonstrating any error in the Trial Chamber's approach to civil party evidence in Case 002/02.¹³ The Co-Prosecutors observe that their 21 February 2013 Rule 92 submission on the use of Civil Party testimony in Case 002/01 was unopposed by the Nuon Chea Defence. The ultimate weight and probative value to be attributed to Civil Party evidence is a matter for this Chamber to determine at the conclusion of the trial, in view of the totality of the evidence on the record. Any argument to the contrary should be dismissed.

III. Relief Requested

8. For the foregoing reasons, the Co-Prosecutors submit that the Request should be denied.

Respectfully submitted,

Date	Name	Place	Signature
26 January 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

¹¹ **E201/1** Trial Chamber Memorandum to the Parties, "Notice to parties regarding revised modalities of questioning and Response to Co-Prosecutors' Request for Clarification Regarding the Use of Documents During Witness Testimony," 13 June 2012.

¹² See Request, paras. 9-10.

¹³ See Request, paras. 9-15.