

**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:** 10 August 2015

**CLASSIFICATION**

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

**Classification by:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**




---

**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN AND NUON CHEA'S JOINT  
REQUEST IN RELATION TO MODALITIES OF QUESTIONING WITNESSES**

---

**Filed by:**

**Co-Prosecutors**  
CHEA Leang  
Nicholas KOUMJIAN

**Distribute to:**

**Trial Chamber**  
Judge NIL Nonn  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara  
Judge Claudia FENZ  
Judge YA Sokhan

**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

1. On 29 July 2015, Khieu Samphan and Nuon Chea (“Defence”) filed a joint request objecting to the application in Case 002/02 of certain practices that have been applied to date throughout the trial proceedings in Case 002/01 and 002/02 (“Request”). The Defence object to the Trial Chamber’s practice of: (i) permitting witnesses to review their prior statements before testifying; (ii) asking witnesses at the start of their testimony to confirm the accuracy of the content of those prior statements; and, (iii) allowing the parties to read out passages of witnesses’ prior statements and asking them to confirm the content of these excerpts.<sup>1</sup>
2. For the reasons stated below, the Co-Prosecutors submit that the Request should be dismissed. First, the practice of allowing witnesses to review their previous statements prior to testifying promotes the efficiency, fairness and expeditiousness of the proceedings. Recognizing this, all of the international criminal tribunals adopt this practice. Second, since the ECCC operates in a civil law system and the Written Records of Interview are part of the Case File and are evidence that the Chamber has the right to rely upon in its deliberations, it serves the interests of justice, the search for the truth, and the efficiency of the proceedings for the Chamber to ask witnesses at the start of their testimony to confirm that their prior statements are true and accurately recorded in the OCIJ written records and provide them an opportunity to correct any inaccuracy. Third, contrary to the Accused’s position, the procedures adopted by the Trial Chamber never permitted parties to simply read aloud witness statements in order to have the witness confirm them or merely repeat their contents. However, the Chamber has allowed Parties, in order to save valuable time, to ask a witness about their prior statements to clarify or provide further details on the statement contents, refresh the witness’ recollection or to confront the witness with inconsistencies between the statement and testimony, or otherwise test the witness’ credibility.

### II. Procedural History

3. On 30 May 2012, the Co-Prosecutors submitted a request relating to the use of documents during witness testimony at trial.<sup>2</sup> On 13 June 2012, the Trial Chamber issued a “Notice to parties regarding revised modalities of questioning and Response to Co-Prosecutors’

---

<sup>1</sup> E355, Demande conjointe des équipes de Défense visant à revenir sur certaines pratiques relatives aux dépositions à la barre, 29 July 2015, paras 2 and 12.

<sup>2</sup> E201, Co-Prosecutors’ Request for Clarification Regarding the Use of Documents During Witness Testimony, 30 May 2012.

Request for Clarification Regarding the Use of Documents During Witness Testimony.” The Chamber stated that “[w]here the witness indicates that s/he does recall [his or her] 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 [...] or in posing specific challenges to the credibility of the statement or the witness' evidence.”<sup>3</sup>

4. On 3 August 2012, the Trial Chamber reiterated its position and concluded that “[w]here a witness declares that their prior statements are true and accurately recorded in the OCIJ written records, parties will be authorized to ask further questions only where there is a need for clarification of relevant matters that are insufficiently covered by these statements, or not dealt with during questioning before the OCIJ. The parties therefore have the right to test the witness' credibility on areas within or beyond their prior statements, where grounds exist to do so.”<sup>4</sup>
5. On 29 December 2014, Nuon Chea filed an appeal against the Judgement in Case 002/01, arguing *inter alia* that the Trial Chamber erred in law by permitting witnesses to review prior statements before testifying and answer purported leading questions based on those statements.<sup>5</sup> In his appeal on the same day, Khieu Samphan recalled his objection to the Trial Chamber's practice of providing witnesses with their prior statements to refresh their recollection and asking them to generally confirm their content at the start of their testimony. Khieu Samphan also argued that such practices are an infringement of the adversarial principle and have ultimately caused prejudice to the appellant.<sup>6</sup>
6. On 16 January 2015, Nuon Chea requested that the Trial Chamber: (i) “disallow witnesses and civil parties in Case 002/02 from being shown prior statements before appearing for

---

<sup>3</sup> **E201/2**, Notice to parties regarding revised modalities of questioning and Response to Co-Prosecutors' Request for Clarification Regarding the Use of Documents During Witness Testimony (E201), Trial Chamber, 13 June 2012, p. 1.

<sup>4</sup> **E218**, Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, Trial Chamber, 3 August 2012, para 7.

<sup>5</sup> **F16**, Nuon Chea's Appeal Against the Judgement in Case 002/01, 29 December 2014, paras 135-147

<sup>6</sup> **F17**, Khieu Samphan's Appeal Against the Judgement in Case 002/01, 29 December 2014, para 26.

*testimony*”; and (ii) “*prohibit parties from asking witnesses, civil parties and experts leading questions intended to have them confirm the accuracy of their prior written statements*”.<sup>7</sup>

7. On 26 January 2015, the Co-Prosecutors responded that the Defence had misstated the Trial Chamber's ruling regarding the use of prior witness statements, and recalled that “*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.*”<sup>8</sup>
8. On 2 February 2015, the Trial Chamber orally rejected Nuon Chea’s written request<sup>9</sup> On 17 June 2015, the Supreme Court Chamber issued directions on the conduct of the appeal hearings to be held in early July 2015. After “*emphasizing that the directions hereby adopted [...] have no bearing on any of the grounds of appeal raised by the Defence*”, it: (i) instructed WESU “*not to provide the witnesses, prior to their testimony in court, with copies of their previous statements*”; (ii) declared that “*the parties may not ask leading questions in contentious subject areas, unless so authorised by the Chamber*”; and (iii) clarified that “*the questioning of witnesses shall not be conducted by merely reading out passages of their prior statements to them and then seeking confirmation thereof. However, prior statements may be used, inter alia, to test witnesses’ credibility or clarify discrepancies between different statements.*”<sup>10</sup>
9. During the hearing on 27 July 2015, the Trial Chamber orally informed the parties that it “*understands this recommendation coming from the Supreme Court Chamber*”, but that the parties still have the possibility to refer to passages of previous witness statements with the aim of refreshing the witness' memory or testing their credibility.<sup>11</sup>

### III. Argument

*(1) Witnesses should be allowed to review their prior statements before testifying in court*

<sup>7</sup> **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.

<sup>8</sup> **E336/2**, 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, 26 January 2015, p. 2, para 5 (internal quotations marks omitted).

<sup>9</sup> **E1/255.1**, TC Transcript, 2 February 2015, [15.04.40 - 15.05.49].

<sup>10</sup> **F26**, SCC Directions on the Conduct of the Hearing, 17 June 2015, p. 4

<sup>11</sup> **E1/323.1**, TC Transcript, 27 July 2015, after [14.34.24]. On 28 July 2015, the Trial Chamber gave further clarification. See **E1/324.1**, TC Transcript, 28 July 2015, [14.30.37 – 14.33.23].

10. Witnesses of the Court are obliged under oath to provide answers to the best of their recollection, as to what they personally know, have seen or heard. The current trial concerns events dating back four decades. The prior interviews of these witnesses often took place years ago, some as early as 2007. Affording witnesses the means and opportunity to refresh their recollections before their examination in court, enables witnesses to provide more accurate and complete evidence.<sup>12</sup> Allowing witnesses to review their prior statements before testifying in court is conducive to ascertaining the truth without occasioning unfairness to any party. Conversely, denying this right to witnesses would be unfair, as many are unlikely to recall the entirety of their statements generally given several years before their testimony in court.
11. Furthermore, denying witnesses access to their prior statements would only slow the pace and hinder the efficiency of the proceedings. At some point in the examination of every witness, the parties will make use of the witness' prior statements, whether to refresh their recollection, ask about inconsistencies or seek clarifications about their prior testimony. When the statement is submitted to the witness, they will first need to confirm that the document is indeed one of their prior statements, and then be given a reasonable opportunity to review that statement so they can fully and accurately respond to the pending question. Accordingly, all the Defence Request would achieve, in the end, would be to waste considerable time in Court while witnesses to re-acquaint themselves with their prior written records of interview.
12. International criminal tribunals endorse the practice of providing witnesses with their prior statements before testifying,<sup>13</sup> as it assists witnesses in refreshing their memories and saves valuable time. This view was adopted by the ICC Trial Chambers in the *Bemba* and *Lubanga* cases, as they found that allowing witnesses to review their prior statements before

---

<sup>12</sup> See **E201**, Co-Prosecutors' Request for Clarification Regarding the Use of Documents During Witness Testimony, 30 May 2012, p. 7, para 16.

<sup>13</sup> See *Bemba* Witness Preparation Decision, paras 21-25; *Lubanga* Decision on Witness Proofing, paras 50, 55. In addition, the ICTR Appeals Chamber found that the Trial Chamber acted within its discretion when it allowed witnesses to be shown their prior statements before testifying and noted that "a practice of witness proofing has developed and has been accepted in various cases". See *Karemera* AC Decision on Witness Proofing, Case No. ICTR-98-44-AR73.8, 11 May 2007, paras 8-9, citing the *Gacumbitsi* AJ, para 74. See also *Karemera* AC Decision on Witness Proofing, para 10, referring to the *Simba*, *Bagosora*, *Rwamakuba*, *Milutinović*, *Limaj*, *Blagojević*, and *Krstić* cases, which either implicitly or explicitly condone the practice of witness proofing; *Karemera* TC Witness Proofing Decision, Case No. ICTR-98-44-T, 15 December 2006, para 15.

testifying would help to ascertain and establish the truth.<sup>14</sup> In the *Bemba* decision, the Chamber decided that to refresh their memory, “*witnesses should be allowed to read, look at and/or listen to tape recordings of their interviews, and to any previous statements and documents generated or provided by them.*”<sup>15</sup> The Chamber added that “*the witnesses should have sufficient time to enable them to read, look at or listen to their previous statements, documents and/or information generated or provided by them at the time any previous statement was given.*”<sup>16</sup> Moreover, the ICTY Appeals Chamber concluded in *Hadžihasanović* that refreshing witnesses’ memory was permitted in both examination-in-chief and cross-examination.<sup>17</sup>

13. In fact, common law and the international criminal tribunals generally go much further than merely allowing a witness to review her or his prior statements. It is a standard practice in both common law and international tribunals to allow parties to “proof” their witnesses prior to their hearing appearance – which includes discussing the prior statements with the witness. In the United States, Section 116 of the Restatement of the Law Governing Lawyers provides that “[a] lawyer may interview a witness for the purpose of preparing the witness to testify”, and that such preparation may include “*discussing the witness’s recollection [...] and reviewing documents or other physical evidence that may be introduced*”.<sup>18</sup> Further, in its decision *State v. Earp*, a Maryland court held that “[i]t is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior

<sup>14</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Trial Chamber I, ICC-01/04-01/06, 30 November 2007 para 50: “The Trial Chamber considers that allowing a witness to read his past statements will aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth. Witnesses may well have given their original statements a year or more in advance of their in-court testimony. The Trial Chamber is aware that it can be difficult to remember events in their exact detail and the order in which they occurred, particularly when those events were traumatic. Thus, greater efficiency may be achieved by providing past statements to a witness in advance to assist that witness with his recollection. Overall, this process will clarify for the witness events that occurred some time previously”; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, Trial Chamber III, ICC-01/05-01/08, 18 November 2010. See also F17/1, Co-Prosecutors’ Response to Case 002/01 Appeals, 24 April 2015, para 82.

<sup>15</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, Trial Chamber III, ICC-01/05-01/08, 18 November 2010, para 21.

<sup>16</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, Trial Chamber III, ICC-01/05-01/08, 18 November 2010, para 23.

<sup>17</sup> *Prosecutor v Enver Hadžihasanović and Amir Kubura*, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, Case No. IT-01-47-AR73.2, Ap. Ch., 2 April 2004, p. 3.

<sup>18</sup> Restatement (Third) of the Law Governing Lawyers, § 116.

*testimony that a witness has given.*”<sup>19</sup> Similarly, in Canada, lawyers are encouraged to take witnesses through the evidence to which they will testify, and “*review with witnesses any exhibits or documents that they will have to identify, interpret or testify about during the course of their examination.*”<sup>20</sup> Although the ICC Trial Chambers I and III concluded in the *Bemba* and *Lubanga* cases that parties were not allowed to “proof” their witnesses before they testified (although these decisions instructed the Victims and Witness Unit to allow witnesses to review their prior statements, as noted above), Trial Chamber V reversed this position in 2013 in two different decisions. In *Ruto*, the Chamber concluded that “*judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function.*”<sup>21</sup> In the *Muthaura* case, Trial Chamber V “*is of the view that, properly conducted, witness preparation is also likely to enhance the efficiency, fairness and expeditiousness of the present trial.*”<sup>22</sup> Should witness proofing not be allowed, “*there is an increased likelihood that witnesses will give testimony that is incomplete, confused or ill-structured.*”<sup>23</sup>

14. Before the ECCC and in civil law systems, witnesses are not proofed by parties but interviewed by independent and impartial investigating judges or their investigators. The nature of a civil law Investigative Judge system is that, while the investigations are procedurally more complicated and lengthy than in common law systems (or those of the *ad hoc* Tribunals and ICC) where investigations are conducted solely by police and prosecutors, the subsequent trial should be more expeditious as the results of the investigation, particularly witness interviews, carry more weight as they were conducted by a judicial body. Written records of witness interviews, which are an integral part of the Case File, are the basis of the in-court questioning of witnesses testifying before professional judges. It is unnecessary to have the witness repeat all statements in the prior interview. Rather, the

<sup>19</sup> *State v. Earp*, 319 Md. 156, 170-72 (1990).

<sup>20</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on witness preparation, Partly dissenting opinion of Judge Eboe-Osuji, Trial Chamber V, ICC-01/09-01/11, 2 January 2013, para 26 (internal quotation marks omitted).

<sup>21</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on witness preparation, Trial Chamber V, ICC-01/09-01/11, 2 January 2013, para 50.

<sup>22</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on witness preparation, Trial Chamber V, ICC-01/09-02/11, 2 January 2013, p. 15, para 39.

<sup>23</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on witness preparation, Trial Chamber V, ICC-01/09-02/11, 2 January 2013, p. 15, para 40.

parties and judges seek further details or clarifications of these prior interviews, which often requires a party to refer to or quote these written records.

*(2) The Chamber's practice to ask the witness to confirm the accuracy of the previous statements is lawful and useful*

15. The Trial Chamber's practice of asking each witness at the start of their testimony whether the witness is familiar with the statements he or she gave before the Co-Investigating Judges and whether the record of interview is an accurate statement of their evidence, is a sound practice that promotes the search for the truth and the efficiency of the proceedings. The practice removes the necessity for the parties to repeat every detail of the prior interview while providing the witness a chance to correct any inaccuracy.<sup>24</sup> Nothing in this practice deprives the parties of their right to test the witness' credibility on areas within or beyond their prior statements during their questioning.

*(3) The Chamber has never allowed the parties to quote witness statements in order to have the witness simply confirm them or merely repeat their contents*

16. Nuon Chea and Khieu Samphan request that the Trial Chamber copy the practices utilized by the Supreme Court Chamber for hearings of witnesses on appeal. In directions issued on 17 June 2015, at the request of Nuon Chea, the Supreme Court Chamber directed that these witnesses not be provided with copies of their statements before testifying. Further, the Supreme Court Chamber directed the parties refrain from merely reading out passages of prior statements to witnesses and then seeking confirmation thereof.<sup>25</sup>

17. Contrary to the Defence's argument, the Supreme Court Chamber's directions on the use of a witness' prior statement in court are not in contradiction with the practice adopted by the Trial Chamber since 2012, which allows parties to read out passages of previous statements in order to ask new or further questions on the same topics, clarify relevant matters that were

---

<sup>24</sup> In interviews by the Co-Investigating Judges or their investigators, the witnesses are read the record of their interview and asked to confirm the accuracy and authenticity of their statement by signing. The witnesses receive an official copy of their statement, which they can access and read at their convenience, including before their testimony in court. Owing to the fact that many Trial Chamber witnesses are illiterate or cannot read their previous statements anymore, WESU's assistance is rendered necessary to refresh their memory.

<sup>25</sup> E355, paras. 9 & 11 referring to F26, SCC Directions on the Conduct of the Hearing, 17 June 2015, p.4.



insufficiently covered by these statements, or pose specific challenges to the credibility of the statement or the witness' evidence.<sup>26</sup> Just as the Trial Chamber instructed the parties not to ask witnesses to merely confirm or repeat the contents of previous statements,<sup>27</sup> the Supreme Court Chamber similarly stated that “*the questioning of witnesses shall not be conducted by merely reading out passages of their prior statements to them and then seeking confirmation thereof.*” Further, the Supreme Court Chamber’s directions were clearly intended to be used only for witness questioning at its own hearings (which only involved three witnesses over four trial days, versus the vastly larger number of witnesses and Civil Parties that will be called in the course of Case 002/02 and require hundreds of trial days). The Supreme Court Chamber emphasized that the directions were not a ruling on the merits on the procedural issues challenged in the Defence Appeals and did not characterize these directions as either instructions or recommendations to the Trial Chamber. Indeed, the Supreme Court Chamber did not cite or address any jurisprudence in making its determination not to have WESU provide witnesses with their statements before testifying, further emphasizing the purely managerial nature of their decision.

#### IV. Relief Requested

18. For the foregoing reasons, the Co-Prosecutors submit that the Request should be denied and that, therefore, in the interests of the fairness, expeditiousness and efficiency of the trial proceedings:
- (i) witnesses continue to be allowed and encouraged to review their prior statements before testifying;
  - (ii) the Chamber continues to ask witnesses at the start of their testimony whether they are familiar with their previous written record of interview and whether it is an accurate statement of their evidence; and

---

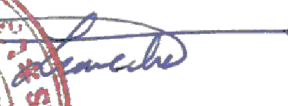
<sup>26</sup> E201/2, para.1; E218, para 7.

<sup>27</sup> E201/2, para.1. In E218, para.7, the Trial Chamber stated: “*the Chamber considers this to be vital to ensuring that significant in-court time is not wasted by needless repetition by witnesses of sworn statements already made before OCIJ.*”

002/19-09-2007-ECCC/TC

(iii) parties continue to be allowed to use and read excerpts of witnesses' previous statements in order to ask them further questions, clarify matters insufficiently covered in the previous statements or test the credibility of the witnesses.

Respectfully submitted,

Date	Name	Place	Signature
10 August 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		