



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

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

Date: 20 October 2015
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DECISION ON JOINT DEFENCE TEAM REQUEST TO REVISIT CERTAIN PRACTICES RELATED TO STATEMENTS

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Nicolas KOUMJIAN

Accused
NUON Chea
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
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Lawyers for the Defence
SON Arun
Victor KOPPE
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1. INTRODUCTION

1. The Trial Chamber is seised of a joint request by the KHIEU Samphan and NUON Chea Defence Teams regarding certain practices for the examination of witnesses (“Joint Request”).¹ The Defence Teams request that the Trial Chamber adopt the directions issued by the Supreme Court Chamber concerning the conduct of its July 2015 appeals hearing and, consequently: (i) order the Witness and Expert Support Unit (“WESU”) not to provide witnesses with copies of their prior statements before they appear before the Chamber; (ii) require the parties to refrain from asking witnesses leading questions on points of controversy; and (iii) require the parties to refrain from reading out passages of witnesses’ prior statements and asking them to confirm the contents of these extracts.²

2. BACKGROUND AND SUBMISSIONS

2. On 17 June 2015, the Supreme Court Chamber issued directions for the conduct of the July 2015 appeals hearings in Case 002/01, in which it instructed WESU not to provide witnesses with copies of their previous statements prior to their testimony in court³ and adopted the following directions on the use of witnesses’ prior statements:

Unless otherwise directed by the Chamber, 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.⁴

In relation to the questioning of the witnesses by the parties, the Supreme Court Chamber directed that the parties “may not ask leading questions in contentious subject areas, unless so authorised by the Chamber”.⁵ The Joint Request asserts that the Trial Chamber should comply with the procedures prescribed by the Supreme Court Chamber and put an immediate end to practices to the contrary.⁶

¹ *Demande conjointe des équipes de Défense visant à revenir sur certaines pratiques relatives aux dépositions à la barre*, E355, 29 July 2015.

² Joint Request, para. 12.

³ Directions on the Conduct of the Hearing (SCC), F26, 17 June 2015, p. 4.

⁴ Directions on the Conduct of the Hearing (SCC), F26, 17 June 2015, p. 4.

⁵ Directions on the Conduct of the Hearing (SCC), F26, 17 June 2015, p. 4.

⁶ Joint Request, para. 11.

3. The Co-Prosecutors respond that the Joint Request should be dismissed because the practice of permitting witnesses to review their prior statements before they testify, which has been adopted by “all” of the international criminal tribunals, promotes the efficiency, fairness and expeditiousness of the proceedings.⁷ They further submit that the Chamber’s practice of asking witnesses to confirm the accuracy of their previous statements is both lawful and useful.⁸ Finally, the Co-Prosecutors assert that the Chamber has only allowed the parties to refer to prior statements for the limited purposes of clarifying or providing further details on the statement contents, refreshing the witness’s recollection, confronting the witness with inconsistencies or otherwise testing witness credibility.⁹

4. The Civil Party Lead Co-Lawyers respond that the Chamber should reject the Joint Request and maintain its current practice of permitting witnesses and Civil Parties to review their prior statements before they testify, as well as clarify the procedure on the use of prior statements during the examination of witnesses.¹⁰ The Civil Party Lead Co-Lawyers submit that the Supreme Court Chamber’s directions were unreasoned and were issued without prejudice to the grounds of appeal raised by the Defence Teams.¹¹ They further submit that prohibiting witnesses from reading their prior statements before they appear in court would cause unnecessary delays and that a blanket prohibition on leading questions would dilute the ECCC’s inquisitorial practice.¹² The Civil Party Lead Co-Lawyers submit that to the extent that the Defence Teams are requesting that the parties be permitted to make reasoned objections to leading questions, such practice has already been put in place by the Trial Chamber and the Defence Teams have not shown how such practice prejudices the Defence.¹³

3. LEGAL FRAMEWORK AND FINDINGS

5. As the Chamber has repeatedly stated in Case 002, witnesses are permitted to review their prior statements before testifying and may be asked to confirm the accuracy of their prior statements at the beginning of their testimony.¹⁴ On 4 February 2015, the Trial Chamber

⁷ Co-Prosecutors’ Response to KHIEU Samphan and NUON Chea’s Joint Request in Relation to Modalities of Questioning Witnesses, E355/1, 10 August 2015 (Co-Prosecutors’ Response), paras 2, 10-14.

⁸ Co-Prosecutors’ Response, paras 2, 15.

⁹ Co-Prosecutors’ Response, paras 2, 16-17.

¹⁰ Civil Party Lead Co-Lawyers’ Response to the Joint Request by the Defence Teams on Certain Practices Concerning Witnesses and Experts (Civil Party Lead Co-Lawyers’ Response), E355/2, 10 August 2015, p. 13.

¹¹ Civil Party Lead Co-Lawyers’ Response, para. 14.

¹² Civil Party Lead Co-Lawyers’ Response, paras 17, 25.

¹³ Civil Party Lead Co-Lawyers’ Response, paras 20, 25-26.

¹⁴ Trial Chamber memorandum entitled: “Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011”, E141, 17 November 2011, p.

rejected a request by the NUON Chea Defence for the Chamber to abandon this practice.¹⁵ The Defence Teams' Joint Request again asks the Chamber to abandon this practice, this time on the basis of the Supreme Court Chamber's directions for the conduct of the July appeal hearings.

6. While the Supreme Court Chamber shall make final decisions of law and fact,¹⁶ the Trial Chamber is responsible for the conduct of its own proceedings and is not bound to apply Supreme Court Chamber directions specifically formulated for the hearing of witnesses on appeal. The Supreme Court Chamber's instructions were not directed at the Trial Chamber and it emphasised that they had "no bearing on any of the grounds of appeal raised by the Defence".¹⁷ The Trial Chamber finds that the Supreme Court Chamber's issuance of directions for the conduct of its own appeal hearings is not a persuasive reason for the Trial Chamber to abandon its established practice of permitting witnesses to review their prior statements before testifying and to be asked questions to confirm the accuracy of their prior statements at the beginning of their testimony, which conforms to the ECCC's legal framework.¹⁸

7. The Chamber further notes that providing witnesses with their prior statements before they appear in court is consistent with both the ECCC legal framework (including Internal Rule 25(2)) and international practice, and adopts its reasoning in its Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses in this regard.¹⁹

4; Trial Chamber memorandum entitled: "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)", E201/2, 13 June 2012, p. 1; Trial Chamber memorandum entitled: "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", E218, 3 August 2012, para. 7; Case 002/01 Judgement, E313, 7 August 2014, para. 31. *See also* Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, E336/3, 9 October 2015, para. 17 concerning the right of the Civil Parties to review their prior statements: "Civil Parties and their lawyers have the right to examine and obtain copies of the Case File pursuant to Internal Rule 86, including prior statements of Civil Parties."

¹⁵ T. 2 February 2015, p. 78. *See also*, 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, E336, 16 January 2015; Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, E336/3, 9 October 2015.

¹⁶ ECCC Law, Article 36.

¹⁷ Directions on the Conduct of the Hearing (SCC), F26, 17 June 2015, p. 3.

¹⁸ Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, E336/3, 9 October 2015, paras 16-22.

¹⁹ Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, E336/3, 9 October 2015, paras 17-18.

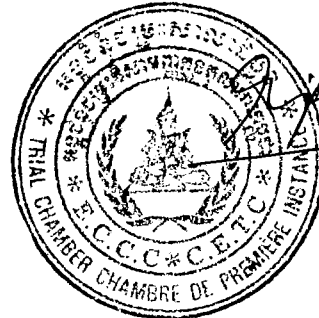
8. In relation to the Civil Party Lead Co-Lawyers' request that the Trial Chamber clarify the procedure on the use of prior statements during the examination of witnesses, the Chamber clarifies that witnesses and Civil Parties shall be provided with copies of their prior statements made to the Office of the Co-Investigating Judges in advance of their appearance before the Chamber. Before they give evidence, the Chamber will ask witnesses and Civil Parties whether they have reviewed their prior statements and whether they confirm that they are true.²⁰ Subsequent to this, the parties should not repetitively or extensively read from such statements in court and should only refer to prior statements for limited purposes such as clarifying or supplementing the information in the statements, refreshing a witness or Civil Party's memory and testing the credibility of a witness or Civil Party.²¹

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DISMISSES the Joint Request in its entirety.

Phnom Penh, 20 October 2015

President of the Trial Chamber



Nil Nonn

²⁰ Trial Chamber memorandum entitled: "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", E218, 3 August 2012, para. 7.

²¹ T. 27 July 2015, p. 56. *See also* Trial Chamber memorandum entitled: "Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011", E141, 17 November 2011, p. 4; Trial Chamber memorandum entitled: "Provision of Prior Statements to Witnesses in Advance of Testimony at Trial", E141/1, 24 November 2011, p. 1.