

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S "APPLICATION FOR
REVIEW OF THE DECISION NOT TO RECALL CIVIL PARTY TCCP-187, AND TO
AMEND THE PROCEDURE FOR HEARING CIVIL PARTIES"**

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I. INTRODUCTION

1. On 7 December 2012, the defence for Khieu Samphan (“Defence”) filed a request concerning the modalities for the questioning of Civil Parties, and which alleged violations of Khieu Samphan’s fair trial rights¹ (“Request”). As relief, the Defence seeks to have the Trial Chamber: (1) recall Civil Party Chau Ny; and (2) alter the order of Civil Party testimony and party questioning that has been utilized to date in Case 002.²
2. The Co-Prosecutors hereby respond. The Co-Prosecutors support the request to recall Civil Party Chau Ny, however they disagree that there has been any violation of Khieu Samphan’s rights and oppose the request to alter the sequence of questioning of the Civil Parties.

II. ARGUMENT

A. Support of the Request to Recall Civil Party TCCP-187, CHAU Ny

3. The Co-Prosecutors support the request to recall Civil Party Chau Ny to appear. The Co-Prosecutors submit that information contained in Chau Ny’s statement of suffering merited further questioning by the parties³, and it is therefore in the interests of justice to recall him.

B. The Questioning Sequence for Civil Parties Need Not be Altered

4. The Co-Prosecutors oppose the request to alter the sequence of questioning of Civil Parties, and submit that such an alteration is not required to protect the fair trial rights of the Accused. The Co-Prosecutors acknowledge that information contained in statements of suffering that are not subject to adversarial examination may not be entitled to the same probative value regarding the acts and conduct of the Accused as testimony that has been subject to examination.⁴ As Mr. Abdulhak noted in court when this issue arose “it’s for Your Honours to weight the probative value of any statement given in court.”⁵
5. Nevertheless, the Co-Prosecutors respectfully submit that the Trial Chamber should allow the parties to make requests to examine a Civil Party further should the statement of suffering raise issues the party or parties believe merit further exploration. The Trial Chamber could then decide in its discretion whether such further examination is warranted. Judge Lavergne appeared to endorse this approach when he stated: “*If the*

¹ E250 Requête en reconsideration de la décision de ne pas rappeler la partie civile TCCP-187 et en modification des modalités des auditions des parties civiles, 7 December 2012 (notified 7 December 2012) (hereinafter “Request”).

² E250 Request at paras. 23-25.

³ Specifically, Chau Ny indicated that he may have additional knowledge regarding the acts and conduct of Khieu Samphan. E1/146.1 Transcript of Trial Proceedings, 23 November 2012, p. 93.

⁴ See Rule 87(2).

⁵ E1/146.1 Transcript of Trial Proceedings, 23 November 2012, p. 93.

*civil party's statement was going to bring up issues about which the defence might have wanted to ask questions, then indeed, we could have heard a request from [the Defence] to that effect, and we might have perfectly well given [the Defence] the floor ...*⁶ The Co-Prosecutors respectfully submit that any statement of suffering that is subject to further questioning through this procedure should then be considered on an evidentiary par with the Civil Party's prior testimony.

6. Finally, the Co-Prosecutors note that the Defence allude to a claimed "right to speak last"⁷ in relation to questioning Civil Parties. While it is true that the Rules require, in relation to *closing statements*, that "[i]n all cases, the Accused and his or her lawyers shall always be entitled to make the final statement"⁸, the Rules impose no similar requirement in relation to the questioning of witnesses or Civil Parties. In fact, under Rule 91 *bis* "[t]he President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties." Thus, the sequence of questioning Civil Parties established by the President is within the purview of his prerogative under the Rules.

C. Observations Regarding Khieu Samphan's Right to Remain Silent

7. Both in court during the relevant exchanges and in the Request, reference is made to the Accused's invocation of the right to remain silent granted him under Rule 21(1)(d). The Co-Prosecutors find it necessary to note, as Mr. Abdulhak stated in court, that "Mr. Khieu Samphan is not exercising his right to remain silent, but rather choosing to give statements, at particular stages in the trial and decide a particular time at which [he] may answer questions, in later stages of proceedings."⁹ The Co-Prosecutors have previously brought this issue, and its implications, before the Trial Chamber¹⁰, and the Accused himself acknowledged that he was not invoking his right to silence, but instead would answer questions at a later date, stating: "I will eventually respond to all the questions."¹¹

D. Observations Regarding the Questioning of Khieu Samphan

8. The Defence allege that the President's interactions with the Accused rather than with the Accused's counsel violated the Accused's fair trial rights. Although the Defence do not request any relief in regards to this point, the Co-Prosecutors note that under the Rules, the judges of the Trial Chamber have the right to question the Accused, and the

⁶ E1/146.1 Transcript of Trial Proceedings, 23 November 2012, p. 104.

⁷ E250 Request para. 15.

⁸ Rule 94.

⁹ E1/146.1 Transcript of Trial Proceedings, 23 November 2012, p. 93.

¹⁰ E174 Co-Prosecutors' Request for Notice to be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial, 17 February 2012.

¹¹ E1/146.1 Transcript of Trial Proceedings, 23 November 2012, p. 94.

President has the right to question the Accused on behalf of the Civil Parties, as he was doing for Chau Ny.¹² Similarly, under the French code of criminal procedure the president of the court has the power to directly questioned the Accused.¹³ When Khieu Samphan indicated he did not desire to respond to the President's question, the President ceased to question him.¹⁴ Thus, no violation of Khieu Samphan's rights took place.

III. CONCLUSION

9. For the reasons set out above, the Co-Prosecutors respectfully request the Chamber to recall Civil Party Chau Ny, dismiss the request to alter the sequence of Civil Party questioning, and consider the Co-Prosecutors' further observations.

Respectfully submitted,

Date	Name	Place	Signature
17 December 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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¹² Rule 90.

¹³ French Code of Criminal Procedure, 2012, Article 328 (“Le président interroge l’accusé et reçoit ses déclarations”).

¹⁴ **E1/146.1** Transcript of Trial Proceedings, 23 November 2012, p. 98.