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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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Nation Religion King
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អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

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

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

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**DECISION ON NUON CHEA DEFENCE REQUEST REGARDING TRIAL CHAMBER PRACTICES
WHEN EXAMINING CIVIL PARTIES AND WITNESSES**

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1. INTRODUCTION AND BACKGROUND

1. The Trial Chamber is seised of a request by the NUON Chea Defence Team (“Defence”) regarding certain practices for the examination of witnesses and Civil Parties.¹ The NUON Chea Request addresses practices both in general and in specific regard to the hearing of 2-TCCP-271.
2. Concerning general practices, the Defence requests that during the Case 002/02 trial proceedings, the Trial Chamber: (i) disallow witnesses and Civil Parties from being shown prior statements before appearing for testimony; (ii) prohibit parties from asking witnesses, Civil Parties and experts leading questions intended to have them confirm the accuracy of their prior written statements; (iii) 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 (iv) 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.²
3. In respect of the hearing of 2-TCCP-271 in particular, the Defence requests that the Trial Chamber: (i) require 2-TCCP-271 to testify under oath, with examination led by the Co-Prosecutors; (ii) prohibit 2-TCCP-271 from reviewing prior statements before appearing for testimony; and (iii) 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.³
4. On 21 January 2015, the Civil Party Lead Co-Lawyers filed a response to the NUON Chea Request, requesting that it be rejected in its entirety.⁴ The Co-Prosecutors responded on 26 January 2015, also requesting that the NUON Chea Request be denied.⁵
5. As 2-TCCP-271 was scheduled to appear before the Trial Chamber soon after the request was made, the Trial Chamber delivered an oral ruling on 2 February 2015 in which it

¹ 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 2016 (“NUON Chea Request”).

² NUON Chea Request, para. 20.

³ NUON Chea Request, para. 20.

⁴ Civil Party Lead Co-Lawyers’ Response to NUON Chea Defence Request Re Certain Trial Practices Concerning Examination of Witnesses and Civil Parties, E336/1, 23 January 2015 (“Civil Party Lead Co-Lawyers’ Response”), paras 13, 17, 27, 32, 39.

⁵ 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, E336/2, 26 January 2015, paras 3, 8 (“Co-Prosecutors’ Response”).

dismissed the NUON Chea Request.⁶ The Trial Chamber hereby renders the full reasons for its decision.

2. SUBMISSIONS

2.1 The practices of permitting witnesses and Civil Parties to (1) review prior statements before testifying and (2) answer leading questions in order to confirm the accuracy of their statements

6. The Defence submits that “[e]very relevant applicable legal source prohibits” the practice of showing witnesses their prior statements, “including Cambodian law and civil law procedures at the international level”.⁷ It asserts that international courts have recognised that this practice is inconsistent with inquisitorial practice and that it creates a risk of distorting the truth where long time-lapses are at issue.⁸ It submits that the Chamber’s reasons for adopting this practice – that witnesses may have difficulty recalling their statements and to avoid a waste of valuable in-court time – are unpersuasive and that the time required to verify the prior statements would be minimal.⁹ The Defence further submits that allowing witnesses to testify by confirming the contents of documents read to them by the Co-Prosecutors is a prohibited practice which was “never justified by any reasons or legal authority, all of which prohibit this practice, or considerations of efficiency or ascertainment of the truth”.¹⁰ Accordingly, they request that these practices be abandoned during the Case 002/02 trial, including during the hearing of 2-TCCP-271.¹¹

7. The Civil Party Lead Co-Lawyers respond that the practice of permitting Civil Parties to review their prior statements is not improper and that it is unclear from the NUON Chea Request “what the challenges are” or “why such a practice is improper”.¹²

8. The Co-Prosecutors respond that these practices should apply in Case 002/02 until such time as the Supreme Court Chamber rules upon it.¹³ They further respond that the Defence misstates the Trial Chamber’s practice with respect to the use of prior statements.¹⁴

⁶ T. 2 February 2015, p. 78. 2-TCCP-271 subsequently appeared before the Chamber on 4-6 February and 25 March 2015.

⁷ NUON Chea Request, para. 7. *See also* F16, NUON Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, paras 138-144.

⁸ NUON Chea Request, para. 7. *See also* T. 8 January 2015, pp. 32-33.

⁹ NUON Chea Request, para. 7.

¹⁰ NUON Chea Request, para. 8.

¹¹ NUON Chea Request, paras 6, 20.

¹² Civil Party Lead Co-Lawyers’ Response, para. 28.

2.2 Restriction of the scope of Defence cross-examination

9. The NUON Chea Defence submits that throughout the Case 002/01 trial, the Trial 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, often in relation to the manner in which evidence in Written Records of Interview was obtained during the judicial investigation. They request that the Trial Chamber abandon this alleged practice.¹⁵

10. The Civil Party Lead Co-Lawyers do not make any submissions on this point, limiting their response to measures concerning Civil Parties.¹⁶

11. The Co-Prosecutors respond that the NUON Chea Defence has failed to demonstrate that the Chamber has prevented or unduly restricted the Defence’s ability to question witnesses or Civil Parties in Case 002/02.¹⁷

2.3 Civil Party testimony

12. The Defence requests that the Chamber require Civil Parties giving evidence on facts other than victim impact or reparations to testify under oath and be led primarily by the Co-Prosecutors.¹⁸ The Defence advances several reasons in support of this request. First, it submits that under Cambodian law and the Internal Rules, a Civil Party can never be heard as a witness.¹⁹ Second, it alleges that the procedures pursuant to which Civil Parties appear before the Chamber lack safeguards for the protection of the integrity of the evidence, such as a requirement to take an oath or a prohibition on meeting with lawyers prior to giving evidence.²⁰ Third, the Defence asserts that as Civil Parties are not required to take an oath,

¹³ Co-Prosecutors’ Response, para. 4.

¹⁴ Co-Prosecutors’ Response, para. 5.

¹⁵ NUON Chea Request, paras 9-10. *See also* F16, NUON Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, paras 148-153.

¹⁶ Civil Party Lead Co-Lawyers’ Response, para. 1.

¹⁷ Co-Prosecutors’ Response, para. 6.

¹⁸ NUON Chea Request, para. 20.

¹⁹ NUON Chea Request, para. 13.

²⁰ NUON Chea Request, para. 14. *See also* F16, NUON Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, paras 201-206.

they have a “reduced incentive to tell the truth” and their evidence should accordingly be considered less reliable.²¹

13. The Civil Party Lead Co-Lawyers respond that the issues of whether the Civil Parties should take an oath before testifying and whether the Trial Chamber should accord probative value to Civil Party testimony have already been ruled upon by the Trial Chamber.²² Further, they submit that the Internal Rules and Trial Chamber jurisprudence provide for a unique status for Civil Parties which differs from that of witnesses and, accordingly, the requests for Civil Parties to take an oath and be prevented from reviewing their prior statements are unfounded.²³

14. In relation to the Trial Chamber’s reliance on Civil Party evidence to substantiate Judgement findings, the Co-Prosecutors respond that the NUON Chea Defence has not demonstrated any error in the Chamber’s approach in Case 002/02 and that the ultimate weight and probative value to be attributed to Civil Party evidence is a matter for the Trial Chamber to determine at the conclusion of the trial, in view of the totality of the evidence on record.²⁴

3. LEGAL FRAMEWORK AND FINDINGS

15. As a preliminary matter, the Chamber notes that the Defence’s requests and submissions in respect of the hearing of 2-TCCP-271 overlap with its requests and submissions in respect of trial practices more generally. The Chamber addresses the general practices below, which also apply to the hearing of 2-TCCP-271.

3.1 The practices of permitting witnesses and Civil Parties to (1) review prior statements before testifying and (2) answer leading questions in order to confirm the accuracy of their statements

16. The Chamber has previously decided in Case 002 that witnesses and Civil Parties are permitted to review their prior statements before testifying and that witnesses may be asked to

²¹ NUON Chea Request, paras 15-16. *See also* F16, NUON Chea’s Appeal Against the Judgment in Case 002/01, 29 December 2014, paras 201, 205.

²² Civil Party Lead Co-Lawyers’ Response, paras 2, 6-13.

²³ Civil Party Lead Co-Lawyers’ Response, para. 2.

²⁴ Co-Prosecutors’ Response, para. 7.

confirm the accuracy of their prior statement.²⁵ The Chamber notes that no relevant new facts or circumstances have been identified by the Parties which would warrant departure from this practice.²⁶

17. The Chamber reminds the Parties that under the ECCC legal framework, most individuals are provided copies of their statements at the time they are made. Internal Rule 25(2) requires the Co-Investigating Judges to provide individuals they question with a copy of their statement in cases where the interview is not audio or video-recorded. A survey of Written Records of Interview on the 002 Case File indicates that this is a common, if not uniform, practice.²⁷ Further, as noted by the Civil Party Lead Co-Lawyers,²⁸ 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. The practice of WESU providing individuals appearing before the Chamber with their prior statements is therefore consistent with the rules and merely accounts for the fact that, on many occasions, such prior statements have been lost or misplaced by the individual who made them. The Chamber then asking these individuals to indicate whether they have reviewed the statements and whether they confirm they are true prevents significant in-court time being wasted on needless repetition of statements already made before the Co-Investigating Judges.²⁹

18. The Chamber notes that despite its assertion that “[e]very relevant applicable legal source prohibits” the practice of providing witnesses with their prior statements, the NUON Chea Defence has failed to identify any legal source which in fact prohibits the practice. In the *Lubanga* case at the ICC, which the NUON Chea Defence relies upon in support of its

²⁵ 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. 2; Trial Chamber memorandum entitled: “Notice to the 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.

²⁶ The Chamber notes that it addresses in E355/3 the Defence Teams’ joint request for the Trial Chamber to adopt the Supreme Court Chamber’s directions for the conduct of its hearing. This request was received after the date on which the Chamber took its oral decision concerning the NUON Chea Request and is accordingly not taken into account here.

²⁷ See, eg, Written Record of Interview of LIM Sat, E3/4601, 18 November 2009, p. 5; Written Record of Interview of SUM Alat, E3/4637, 10 June 2008, p. 7; Written Record of Interview of IENG Phan, E3/419, 23 November 2009, p. 7; Written Record of Interview of SUONG Sim, E3/4657, 9 July 2009, p. 9.

²⁸ Civil Party Lead Co-Lawyers’ Response, para. 31.

²⁹ 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.

position, Trial Chamber I found that allowing a witness to read his or her past statements would aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth. Accordingly, it directed the Victims and Witnesses Unit to make prior statements available to witnesses in order to refresh their memory.³⁰ Similarly, in the *Ruto and Sang* and *Muthaura and Muigai* cases before the ICC, the Trial Chambers issued Witness Preparation Protocols, which directed questioning lawyers to provide witnesses with an opportunity to review their previous statements prior to their appearance before the court.³¹ The practice at the ICTY has been similar, with the Trial Chamber in the *Milutinović* case finding that the review of a witness's evidence prior to testimony can be a "useful practice", is permissible and does not *per se* prejudice the rights of the Accused.³² The Trial Chamber considers, based upon its review of international jurisprudence, that providing witnesses with their prior statements before they appear in court is consistent with international practice.

3.2 The alleged restriction of the scope of Defence cross-examination

19. The Chamber considers that the Defence has failed to demonstrate that the Chamber has unduly restricted the Defence's ability to question witnesses or Civil Parties in Case 002/02.

20. The Trial Chamber reminds the Parties that in Case 002/02, in accordance with Internal Rules 85 and 87, the Chamber will exclude proceedings and lines of questioning that unnecessarily delay the trial or are not conducive to ascertaining the truth. Further, the Chamber will monitor the scope of questioning by all Parties to ensure that their questioning remains relevant while at the same time guaranteeing the free exercise of defence rights.

3.3 Civil Party testimony

21. Civil Party participation before the ECCC enables victims to participate as parties within the criminal trial of an Accused and to seek collective and moral reparations for harm attributable to the crimes for which an Accused is convicted.³³ As the Lead Co-Lawyers for the Civil Parties have noted, the ECCC legal framework provides a unique status for Civil

³⁰ *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-10/06, 30 November 2007, paras 50, 55.

³¹ *Prosecutor v. Ruto and Sang*, Annex: Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, 2 January 2013, para. 17; *Prosecutor v. Muthaura and Muigai*, Annex: Witness Preparation Protocol, ICC-01/09-02/11-588-Anx, 2 January 2013, para. 17.

³² *Prosecutor v. Milutinović et al*, Decision on Ojdanić Motion to Prohibit Witness Proofing, IT-05-87-T, 12 December 2006, paras 20, 22. See also *Prosecutor v. Haradinaj et al*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, IT-04-84-T, 23 May 2007, paras 8, 14.

³³ Internal Rule 23(1).

Parties which differs from that of witnesses. Internal Rules 23(4), 24 and 31 indicate those individuals appearing before the ECCC for whom an oath must be administered under the ECCC legal framework. There is no such requirement for Civil Parties (or other parties to the proceedings including the Accused and their close relatives).³⁴ This has been an established practice throughout Cases 001 and 002.³⁵ This constitutes a specific feature of Cambodian law and of many other domestic laws of countries which have adopted victims' representation through a civil party system.³⁶

22. In relation to the Defence assertions that the integrity and probative value of Civil Party evidence may be compromised by a lack of procedural safeguards, such as the requirement to take an oath, the Chamber notes that it will decide upon the weight and probative value of Civil Party testimony on a case-by-case basis in light of the credibility of that testimony at the appropriate stage of the case.³⁷ This practice allows the Chamber to evaluate, in all the circumstances, the sufficiency and quality of the evidence and to use the testimony of Civil Parties in support of particular findings as appropriate. The Chamber accordingly finds the Defence submissions on this point unpersuasive.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DISMISSES the NUON Chea Defence Request in its entirety.

Phnom Penh, 9 October 2015

President of the Trial Chamber



NH Nonn

³⁴ Trial Chamber memorandum entitled: "Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following Trial Management Meeting of 5 April 2011", E74, 8 April 2011, p. 1.

³⁵ See, eg, T. 19 October 2012, p. 2, pp. 72-121.

³⁶ For example, Articles 93 and 317 of the Senegalese Code of Criminal Procedure, applicable before the Extraordinary African Chambers.

³⁷ 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, E267/2), E267/3, 2 May 2013, para. 22.