

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' REQUEST FOR NOTICE TO BE GIVEN TO ACCUSED
KHIEU SAMPHAN ON THE CONSEQUENCES OF A REFUSAL TO
RESPOND TO QUESTIONS AT TRIAL**

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INTRODUCTION AND RELEVANT FACTS

1. Pursuant to Internal Rules 21(1), 85 and 90, and in the interests of the rights of the Accused and efficient trial management, the Co-Prosecutors respectfully request the Trial Chamber (the “Chamber”) to advise Khieu Samphan: 1) that his oral statements before the Chamber are unlikely to be accorded significant evidentiary weight unless he agrees to be examined by the Chamber and the parties; and further 2) that negative inferences may be drawn by the Chamber against him, if he refuses to answer questions.
2. Fundamentally, it is the Co-Prosecutors’ submission that, since Khieu Samphan has not exercised his right to remain silent and has elected to give evidence before the Chamber, it is not open to him to refuse to answer questions from the Judges and the parties. While Cambodian legislation and rules are silent on this matter, principles established at the international level clearly indicate that, where an accused has elected to give evidence, any refusal on his/her part to answer questions can lead to negative inferences in the trial court’s assessment of the evidence as regards the accused.
3. Since well before the start of the trial, Khieu Samphan has made it clear that he intends to participate in these proceedings by giving evidence, and that he is not exercising his right to remain silent. In a filing dealing with the issue of agreed facts, the Defence for Khieu Samphan stated:

*“Whilst Mr KHIEU Samphan does not intend to take a position on any of the facts as described in the Closing Order, he will nonetheless actively contribute to the work of justice by presenting his version of the facts at trial, in the interests of historical and legal **Truth** for the international community and the people of Cambodia.”*¹ (original emphasis)

4. At the start of the evidentiary proceedings in November 2011, the Accused made a statement following the Co-Prosecutors’ opening statements, as provided in Rule 89 *bis*.² The Co-Prosecutors do not take the position that this amounted to

¹ E9/17 Uncontested Facts, 23 March 2011, p. 2; see also E1/2.1 Trial Management Meeting Transcript, 8 April 2011, p. 20.

² E1/15.1 Transcript, 23 November 2011, pp. 8-18.

the giving of evidence. However, as illustrated below, in subsequent proceedings, the Accused has confirmed that he will give evidence, and has, in fact, done so.

5. The issue of the Accused's intentions with respect to testifying was raised by the National Co-Prosecutor at the conclusion of the opening statements on 23 November 2011. When Khieu Samphan and his counsel were asked to state their position, the following exchange took place:

[MR. PRESIDENT]

Does counsel for Khieu Samphan wish to make any clarification on this?

MR. KONG SAM ONN:

Your Honours, Mr. Khieu Samphan will be testifying.

MR. PRESIDENT:

Thank you.

MR. KHIEU SAMPHAN:

I just wish to clarify that, in the following hearings, I will - I will not yet respond, but I wait until I have heard what the prosecutors would be saying, and it only with the right moment, an appropriate moment, that I will respond, because the burden of proof is at the Co-Prosecutor's side. Whatever accusations they could come up with, they can really present in this Court; I will listen to them attentively and I will see when the opportunity fits for me to respond.³

6. Earlier during the same session, Khieu Samphan had stated:

Despite everything I have said, I continue to hope that this trial will at least give me an opportunity to explain to the Cambodian public how it is possible for me to have occupied an official senior position in Democratic Kampuchea without having been a part of the decision-making process and without having been informed of all that was happening in our country, of all the horrors that Madam Co-Prosecutor told us about on Monday the 21st of November.

I have pledged before my nation that I will do my best to participate in this proceeding, and I will try to live up to that pledge.⁴

7. On 13 December 2011, when the Judges were carrying out their examination of the Accused with respect to the Historical Background section of the Closing Order, Nuon Chea elected to answer questions while Ieng Sary made a statement

³ E1/15.1 Transcript 23 November, pp.48: 9-23.

⁴ E1/15.1 Transcript 23 November, p.17-18.

indicating clearly and explicitly that he would exercise his right to remain silent and would not answer any questions during the entire course of the trial.⁵ Khieu Samphan, on the other hand, chose to give evidence but refused to answer questions from the Judges and the parties. Immediately prior to the questioning of Khieu Samphan by the Chamber, his counsel stated the following:

*As Judge Lavergne said just now, [Khieu Samphan] intends to react to and comment upon the paragraphs of the Closing Order that were read out in this Chamber as belonging to the first part of this trial. On the other hand, as regards the questions that could be put to him he intends to use his right to be silent for the moment, pending presentation by the prosecution of proofs for those parts of the trial that concern us for the moment. So, for the moment, he will be reacting only to those parts of the Closing Order that concern this part of the case.*⁶

8. While counsel used the phrase “right to be silent,” this was clearly not a reference to the right to remain silent in relation to the charges, but rather an indication that Khieu Samphan intended to first give his own evidence, and answer questions at a later stage of the trial. That position is clear from the following exchange between the President of the Chamber and Khieu Samphan at the same hearing:

MR. PRESIDENT:

Thank you.

Now, do you wish to exercise your right to remain silent or you would respond to the question by the Chamber as well as by the parties throughout the proceedings now?

...

MR. KHIEU SAMPHAN:

I have one suggestion, Mr. President. I would like to comment on the various paragraphs in the Closing Order which were read out on the 5th of December. But I understand fully that this is my trial and the prosecution has their own views relating to those paragraphs and particularly their understanding of the contextual elements relating to the Closing Order, and I strongly oppose against their view. And, as a matter of fact, the prosecution must prove the evidence beyond reasonable doubt.

...

That's why I am suggesting, with your permission, with the Bench permission -- I would like to inform the Bench of the --

⁵ E1/21.1 Transcript 13 December 2011, p.59: 11-16.

⁶ E1/21.1 Transcript 13 December 2011, pp.61-62.

*of my own view, particularly on the context, historical context, and I would respond to question only when I could examine the evidence presented by the prosecution in order to support their assertion. Would Your Honours allowed me to proceed in this manner? Thank you.*⁷ (emphasis added)

9. When asked to clarify his position further, Khieu Samphan again confirmed that he was not exercising a right to remain silent, but rather choosing the time at which he would respond to questions:

*Mr. President, Your Honours, I would like to make comments in relating to the various paragraphs read out by the Chamber on Monday the 5th of December, but I would like to reserve my right not to answer any question asked for now -- the question from any parties -- because I have to wait until the prosecution brings forth the evidence supporting their views because I think that the views is contradicting with mine.*⁸ (emphasis added)

10. He then proceeded to make a detailed statement with respect to the alleged facts stated in the historical background section of the Closing Order.⁹ By doing this, he essentially testified as to his version of the events and, with the Chamber's permission, deferred his examination by the parties until a later time.
11. On 12 January 2012, by which time the Historical Background segment of the trial was entering its final stages, Judge Lavergne asked Khieu Samphan to answer a series of questions (or invited him to provide comments) with respect to certain documents on the case file which the Chamber considered relevant. At this juncture, Khieu Samphan's counsel indicated that "Mr. Khieu Samphan has maintained that he would not respond to the questions."¹⁰ Khieu Samphan again clarified that he intended to answer questions at a later point in the trial:

"[I]f the questions are relevant to the historical background of Democratic Kampuchea I perhaps may not respond to such questions. I made it clear already that I would not be responding to questions; only I had to wait after the prosecutors have put all their questions and I believe that such

⁷ E1/21.1 Transcript 13 December 2011, pp. 67-68.

⁸ E1/21.1 Transcript 13 December 2011, p. 69: 5-11.

⁹ E1/21.1 Transcript 13 December 2011, pp. 70-80.

¹⁰ E1/26.1 Transcript, 12 January 2012 at p. 55: 6-8.

position has already been made clear and my counsel already echoed my position."¹¹

12. He then responded to a question from Judge Lavergne relating to an earlier statement about his membership of the CPK Central Committee¹² and proceeded to confirm his authorship of a book which has been placed on the Case File.¹³ Khieu Samphan and his counsel were then asked if the Accused intended to answer questions as part of the next segment of the trial (dealing with Administrative Structures).¹⁴ In response, the counsel stated that he was "convinced that by then Mr. Khieu Samphan will be ready to respond to questions."¹⁵ For his part, Khieu Samphan stated that he was unable to give an indication as to whether or not he will answer questions.¹⁶
13. While Khieu Samphan's counsel have occasionally made reference to the Accused's exercise of a right to remain silent,¹⁷ the Co-Prosecutors submit that this is not the correct *legal* position with respect to Khieu Samphan. The Accused has waived his right to remain silent by: 1) indicating that he intended to participate actively in the trial by presenting his version of the facts at trial and giving explanations with respect to his membership of the CPK/DK leadership; 2) actually giving evidence in the course of the proceedings; and 3) indicating that he would answer questions from the Judges and the parties once he has heard the evidence.
14. The Accused's (apparent) decision to answer questions at a later stage appears to be intended to put him in the best position to respond to the evidence. This is a tactical decision which, in the Co-Prosecutors' submission, has little to do with the ascertainment of the truth (which the Accused has stated to be one of his objectives), but which is perfectly within the Accused's right to take. However, the developments summarised above also indicate that there is a distinct possibility that the Accused will continue to give evidence by making statements as the trial unfolds, but otherwise refuse to answer any questions whatsoever. It is

¹¹ E1/26.1 Transcript, 12 January 2012 at p. 56: 2-7.

¹² E1/26.1 Transcript, 12 January 2012 at p. 67:17-25.

¹³ E1/26.1 Transcript, 12 January 2012 at p. 71:18-22.

¹⁴ E1/26.1 Transcript, 12 January 2012 at pp. 78-80.

¹⁵ E1/26.1 Transcript, 12 January 2012 at p. 80: 20-22.

¹⁶ E1/26.1 Transcript, 12 January 2012 at p. 82: 10-14.

¹⁷ See the reference in the text above, and also: E1/26.1 Transcript, 12 January 2012 at p. 74: 24-25.

for this reason that the Co-Prosecutors submit that the Accused must now be informed of the consequences of such a decision for the assessment of the evidence against him.

BRIEF SUBMISSIONS ON THE APPLICABLE LAW

15. The Internal Rules and Cambodian procedural law are silent on the issues of: (1) the evidentiary weight that should be given to statements by an accused who refuses to answer questions from the Chamber or the parties; and (2) adverse inferences that may flow from an accused's decision to refuse to answer questions once he/she has elected to testify. Accordingly, the Chamber may seek guidance from procedural rules established at the international level.¹⁸

A. Probative Value of Untested Statements

16. ECCC Internal Rules provide for statements by an Accused at the opening and conclusion of the trial.¹⁹ There is no provision for other statements by accused, other than through testifying once evidentiary proceedings commence.²⁰
17. The Rules of the ICTY make provision for unsworn statements by an accused during the course of trial. Rule 84bis of the ICTY Rules of Procedure and Evidence ("ICTY RPE") provides:

(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

(B) The Trial Chamber shall decide on the probative value, if any, of the statement.

18. In practice, a Rule 84bis statement is "generally given somewhat less weight than testimony given under oath, which is subject to cross-examination and inquiry

¹⁸ Article 33 new, ECCC Law.

¹⁹ Internal Rules 89 bis (2) and 94(1).

²⁰ Internal Rule 90; See also the wording of Internal Rule 89 bis (2): "Before any Accused is called for questioning..."

from the Bench.”²¹ It is entirely within a Trial Chamber’s discretion to accord no weight to an unsworn and untested statement.²²

19. The probative value of any piece of evidence is a matter to be “ultimately assessed by the Chamber”²³ in accordance with the principle of free evaluation of the evidence reflected in Internal Rule 87. Nonetheless, the evidential assessment of Khieu Samphan’s statements (should Khieu Samphan continue to refuse to answer questions) should follow the principles which the ICTY has applied in assessing Rule 84*bis* statements – if untested, the statements cannot be given significant evidentiary weight.
20. The Co-Prosecutors submit that it would be in the interests of the truth-seeking function of the Chamber, and in the interests of the Accused himself, for Khieu Samphan to be advised at this early stage in the proceedings that his oral statements before the Chamber are unlikely to be accorded significant evidentiary weight unless they are tested through questioning by the Chamber and the parties.

B. Adverse Inferences from a Refusal to Answer Questions

21. As indicated above, at the ECCC, where an accused makes statements in the course of evidentiary proceedings, he/she is effectively giving evidence. These statements are distinct from opening and closing statements. They are given during the questioning of the accused by the judges and the parties. While (if untested) they may have reduced evidentiary weight, they nevertheless signify a decision by an Accused to waive his right to silence and to testify before the Chamber.
22. The ICTY Appeals Chamber has held that an adverse inference may not be drawn from the invocation of the privilege against self-incrimination utilised to avoid testifying at all.²⁴ However, both the ICC and the ICTY have held that, once an Accused chooses to give evidence, he or she waives the privilege against self-

²¹ *Prosecutor v Fatmir Limaj et al.*, IT-03-66-A, Judgment, 27 September 2007 (Appeals Chamber) at para. 75; *Prosecutor v Jadranko Prlić*, Decision on Praljak defence notice concerning opening statements under Rules 84 and 84*bis*, 27 April 2009 at p. 9 (“Prlić”).

²² See, e.g. *Prosecutor v Milan Martić*, IT-95-11-T, Judgment, 12 June 2007 (Trial Chamber I) at para. 23.

²³ Case No. 001/18-07-2007/TC, **E188** Judgment at para. 42.

²⁴ *The Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, at paras. 781-783.

incrimination, and may not invoke it piecemeal. A Trial Chamber of the ICC stated:

[A]ccording to article 67(l)(g) of the Statute, the accused has the right to remain silent and cannot be compelled to testify. However, once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating. The testimony of the accused may thus be used as evidence against them in the present case. Moreover, if they decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate.²⁵ (emphasis added)

23. Similarly, a Trial Chamber of the ICTY stated:

The scope of [the Accused's right to be protected against self-incrimination] is limited. According to the Statute, an accused may not be compelled to testify against himself or to confess guilt. An accused is furthermore under no general obligation to disclose documents in his possession to the Prosecution or to the Trial Chamber. However, certain procedural consequences may result from procedural positions the accused adopts in his defence. For example, once an accused has decided to take the stand as a witness, he is under an obligation to answer questions, even if the answers may be self-incriminating.²⁶

24. There is no provision for accused to swear an oath before the ECCC. Nevertheless, as demonstrated above, Khieu Samphan's position is analogous to that of an accused who has voluntarily elected to testify and taken an oath before the ICTY / ICC.

25. In this situation, Khieu Samphan's refusal to answer questions (should he refuse to answer questions at any stage of the proceedings) may lead to negative inferences in the assessment of evidence against him, and the Co-Prosecutors intend to make submissions to this effect at the conclusion of the trial. It is therefore appropriate that the Accused be notified now that, since he has elected to testify, a refusal to answer any questions may have adverse consequences for him.

²⁵ *The Prosecutor v. Katanga and Chui*, No.: ICC-01/04-01/07, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, 13 September 2011, at paras. 7, 8.

²⁶ *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution, 5 December 2008, at para. 9 (footnotes omitted).

REQUEST

26. For the reasons set out above, the Co-Prosecutors respectfully request the Chamber to notify the Accused that, should he refuse to answer questions at trial:
- (a) his oral statements before the Chamber are unlikely to be accorded significant evidentiary weight; and
 - (b) the Chamber may draw negative inferences from such a refusal in assessing the evidence on the issue of his involvement in, and responsibility for, the crimes alleged in the Closing Order.
27. Finally, in the interest of orderly trial management and fairness to all the parties, the Co-Prosecutors respectfully request the Chamber to direct Khieu Samphan to state, now: 1) whether he intends to answer questions at all; and 2) if he does intend to answer questions, whether he will do so during each segment, or only at the end of the proceedings, once evidence has been presented on all the segments and phases of the trial.

Respectfully submitted,

Date	Name	Place	Signature
17 February 2012	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
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