

Trial Chamber Considers Implications of Accused's Refusal to Testify

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As evidentiary proceedings draw to a close, both former senior Khmer Rouge leaders on trial in Case 002/01 at the Extraordinary Chambers in the Courts of Cambodia (ECCC) have informed the Court that they are no longer willing to testify or answer questions, and the Prosecution is asking the Trial Chamber to draw adverse inferences from their silence.¹

Both accused have made statements during the course of trial and on rare occasion responded to questions from either the judges or testifying civil parties. Most often they have refused to speak, stating that they would be willing to do so only after all the Prosecution's evidence had been presented. Until earlier this month, it appeared that both would soon be willing to participate in multiple days of questioning by both the Prosecution and Civil Party lawyers.²

Two weeks ago Khieu Samphan announced that he was no longer willing to testify or be examined, citing five concerns: “1. The chamber ha[d] refused to issue Khieu Samphan a list of topics that would be covered in his examination; 2. Similarly, no list of documents had been provided to the accused; 3. A request to have three weeks of preparatory time had been rejected; 4. Issues in relation to counsel's access to detention, particularly over weekends, ha[d] not been resolved; and 5. A request to give evidence [] over half-days rather than full days had not been addressed.” Although arguing that these demands exceeded Khieu Samphan's rights under international practice, the Prosecution said it would not object to them in the interest of securing his testimony. Khieu Samphan then clarified that his refusal to testify was not limited to these issues but was rooted in more general fair trial concerns:

My reasons are that the court has failed to respect my rights and the rights of my defense counsel. At the beginning, I had faith in this court, but after that until the last moment I have no faith in the court. ... There have been attempts to stop my counsel fully and meaningfully representing me[.]”³

¹ Co-Prosecutors' Response to Khieu Samphan's Withdrawal from Testifying and a Request for Adverse Inferences to be Drawn (July 16, 2013) [hereinafter Co-Prosecutors' July 2013 Response]; Cambodia Tribunal Monitor Blog, *Nuon Chea Announces Decision on Responding to Questions as Stephen Heder Testimony Continues* (July 17, 2013), at <http://www.cambodiatribunal.org/blog/2013/07/nuon-chea-announces-decision-responding-questions-stephen-heder-testimony-continues> (reporting an oral application by the Prosecution for this motion to apply also to Nuon Chea) [hereinafter CTM July 17, 2013 Blog]. Court transcripts of Case 002 hearings after July 3, 2013, are not yet publicly available.

² See, e.g., Memorandum from Trial Chamber President Nil Nonn, Schedule for the Final Document and Other Hearings in Case 002/01, for the Questioning of the Accused and Response to Motions E263 and E288/1 (June 17, 2013).

³ Cambodia Tribunal Monitor Blog, “*Selective Decisions on Testimony*”: *Parties Debate Khieu Samphan's Decision Not to Testify after Nuon Chea Responds to Key Documents* (July 9, 2013), at <http://www.cambodiatribunal.org/blog/2013/07/selective-decisions-testimony-parties-debate-khieu-samphan-s-decision-not-testify>. Neither the Khieu Samphan July 8 filing nor the formal July 9 transcript discussing these objections is yet publicly available. See also Letter to the Editor by Anta Guissé, Kong Sam Onn & Arthur Vercken,

Similarly, last week Nuon Chea unexpectedly announced in Court:

As I have always reiterated that this court has failed to respect principles of a fair and just trial, and through my observation, I observe that the treatment of the accused and of my defense team is getting worse. I therefore have no confidence in this court, and this is a similar position to Khieu Samphan.

The treatment by the court towards me is unbalanced as it seems to favor the prosecution. For example, recently my defense counsel was prohibited from asking substantive questions in order to defend my case. It is an example of injustice that my counsel is prohibited from performing his defense duty to his full capacity. This is a case of life and death for me; it is not just for an expeditious process to punish me.

With such lack of confidence and unbalanced treatment by the chamber, I would like to therefore notify that, in order to respond to the question put by the prosecution and Civil Parties, I decline to do so due to this nature of injustice by this very court.⁴

The Prosecution argues that by making statements and responding selectively to questions during trial the accused have provided evidence, waiving their right to remain silent. Last year it emphasized:

It is clearly not an acceptable practice for an accused to waive his right to remain silent and make a statement to the Court — in which he affectively says, “I did not do it”, “I had nothing to do with S-21”, “my accuser, Duch, is a liar” — to make a — for him to make an assertion like that and then to refuse to answer any questions to test his assertion. ... [T]here are consequences when an accused attempts to engage in gamesmanship like this. There certainly can be no weight afforded to his exculpatory assertions, and it is also our position ... that negative inferences can be drawn when an accused refuses to answer.⁵

The Prosecution is consequently now asking that the accused’s previous oral statements be given little or no evidentiary weight and that “negative inferences should be drawn in the consideration of evidence against [them].” The Prosecution further seeks the opportunity to present the “topics and facts on which they would have questioned Khieu Samphan and “on which they will request the Chamber to draw adverse inferences in their final trial brief.”⁶

As Cambodian law apparently does not address this matter,⁷ the Prosecution cites international

Khieu Samphan Is Forced to Remain Silent, Phnom Penh Post (July 19, 2013), available at <http://www.phnompenhpost.com/analysis-and-op-ed/khieu-samphan-forced-remain-silent>.

⁴ CTM July 17, 2013 Blog, *supra* note 1.

⁵ Trial Transcript—Case 002, at 8-9 (Apr. 18, 2012).

⁶ Co-Prosecutors’ July 2013 Response, *supra* note 1, ¶ 30.

⁷ Co-Prosecutors’ Request for Notice to Be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial, ¶ 2 (Feb. 17, 2012) [hereinafter Co-Prosecutors’ Feb 2012 Request].

jurisprudence, and in particular two cases of the International Criminal Tribunal for the former Yugoslavia (ICTY), in support of its arguments. In the first case, the *Gotovina et al* Trial Chamber noted in the abstract: “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.”⁸ In the other, the *Blagojevic & Jokic* Trial Chamber informed an accused that he had three options under the Tribunal’s rules: To remain silent with no negative inferences; to offer an unsworn statement without being examined (with reduced weight but no negative inferences); or to take a solemn declaration and testify as a witness in the case. If the latter option were selected, although the accused could invoke the right to silence on any matters raised, “this could possibly lead to, in some circumstances, less favorable consideration of that aspect of testimony[.]”⁹

The ECCC Prosecution appears to be seeking even broader ramifications for the Case 002 accused by asking that negative inferences be drawn not only regarding topics they explicitly deferred discussing until the end of trial but also from their failure to answer questions they have not yet been asked. The potential for unlimited adverse implications arises from the fact that ECCC procedure is not identical to that of the ICTY. The rules of both the ECCC and the ICTY provide an opportunity for accused to make an unsworn statement at the start of trial without being confronted. However, unlike the common law-based ICTY, the civil law-based ECCC has “no provision for accused to swear an oath” and testify as witnesses. Instead, if willing, they may be questioned throughout the proceedings.¹⁰ The ECCC accused thus did not “take the stand” for circumscribed testimony but were theoretically available for questioning during a year and a half of trial on any topics that arose.

Last year when the Prosecution filed its first submission asserting that the accused had waived their right to silence by offering selective testimony, the Khieu Samphan team disagreed. It argued that international practice is inapplicable because it governs situations when an accused is called as a sworn witness, which is not procedurally possible at the ECCC. Moreover, they highlight that international courts “make a clear distinction between the statements the accused make in court [about which they may not be examined] and the statements they make when they appear as witnesses in their own defence[,]” about which they may be examined.¹¹ This distinction is significant, but also imperfect, because the ICTY appears to allow one unsworn statement, generally at the start of proceedings, but not repeated statements during the course of trial as occurred in Case 002.¹² Complicating matters, the practice of allowing the Case 002 accused to make statements outside of formal questioning does not appear to be foreseen by the

⁸ Prosecutor v. Gotovina et al., Decision on Joint Defense Motion to Prohibit Use of Defence Documents by the Prosecution, ¶ 9 (Dec. 5, 2008).

⁹ Prosecutor v. Blagojevic & Jokic, Decision on Vidoje Blagojevic’s Oral Request, at 7 (July 20, 2004).

¹⁰ ECCC Internal Rules, R.90(2):

The Co-Prosecutors and all the other parties and their lawyers shall also have the right to question the Accused. All questions shall be asked with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber and in the order as determined by him.

¹¹ Response to the “Co-Prosecutors’ Request for Notice to Be Given to Accused Khieu Samphan on the Consequences of a Refusal to Respond to Questions at Trial,” ¶¶ 2, 12-19 (Mar. 2, 2012).

¹² See Prosecutor v. Blagojevic & Jokic, *supra* note 9, at 7 (“While under the exact language of the rule, an unsworn statement is generally made after the opening statement of the parties, the Trial Chamber does not find any reason to deny you the opportunity to make an unsworn statement at a later time”).

ECCC's own rules.

The exact legal consequences of the accused's decision not to testify have not yet been determined. However, at the request of the Prosecution, the Trial Chamber has reaffirmed its April 18, 2012, oral ruling on the implications of selective testimony,¹³ which adopted the Prosecution's view that selective responses during the course of trial are analogous to witness testimony. Noting that ECCC Law 35new(g) protects the accused's right "not to be compelled to testify against themselves or to confess guilt," the Chamber ruled:

[I]n assessing the guilt or innocence of the Accused in its verdict, the Chamber shall consider all of the evidence that has been put before it and subject to examination, including the testimony of the Accused and manner in which he testifies. In this regard and where the Accused elects to alternate between silence and giving testimony, this may be noted by the Chamber when assessing his credibility. The relevant international jurisprudence indicates that adverse inference from selective decisions to remain silent may be drawn. In any case, the Chamber shall not base a finding of guilt exclusively on an adverse inference from — drawn from silence.¹⁴

Yet unanswered is the scope of "topics and facts" for which adverse inferences will be drawn.

¹³ See Cambodia Tribunal Monitor Blog, *Objections Fly as Cross-Examination of Stephen Heder Begins* (July 16, 2013), at <http://www.cambodiatribunal.org/blog/2013/07/objections-fly-cross-examination-stephen-heder-begins> (reporting this announcement).

¹⁴ Trial Transcript—Case 002, at 40 (Apr. 18, 2012).