BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 30 May 2012

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by the Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

CO-PROSECUTORS' REQUEST FOR CLARIFICATION REGARDING THE USE OF DOCUMENTS DURING WITNESS TESTIMONY

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
IENG Sary
KHIEU Samphan

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Arthur VERCKEN
Anta GUISSE
Jacques VERGES

I. INTRODUCTION

1. The Co-Prosecutors submit the following request relating to the use of documents during witness testimony at trial. By its oral ruling of 21 March 2012, the Trial Chamber ("Chamber") held that if a witness has no knowledge of a document, could not identify a document or had never seen it before, such document should be taken from the witness and not displayed on the screen.[1] The Chamber further ruled that, even if the document could not be shown or displayed to the witness, parties could still put questions to the witness regarding the subject-matter of the document.[2] Since that ruling, the Chamber has allowed a number of modifications or exceptions to this general rule.[3]

2. The Co-Prosecutors anticipate reliance on trial documents with future witnesses, Civil Parties and experts who will testify in the trial proceedings in Case 002/01. This submission outlines the Co-Prosecutors' anticipated use of such trial documents, so as to provide advance notice to the Chamber and parties of the justification for the Co-Prosecutors' position, while duly considering the prior rulings of the Chamber. Reference is made, also, to procedural rules established at the international level and, for illustrative purposes, to practice from domestic legal systems. The purpose of this submission is to avoid further delays and disruptions during the testimony of witnesses, by seeking clarification from the Chamber, in advance, of the permissible purposes for which witnesses may be shown documents during the course of their testimony.

3. The Co-Prosecutors submit, that following the procedural rules and practice of other international criminal tribunals, documentary evidence can properly be introduced in the course of witness testimony to fulfil at least four purposes: (1) to **refresh the memory** of a witness; (2) to **authenticate** a given document *prima facie*; or to aid the Chamber to assess the **weight** that should finally be attributed to that document; (3) to **corroborate** the substance of, or extrapolate from, the substance of the document, based on the witness' direct knowledge; and (4) to test the **credibility** of the witness. The Co-Prosecutors submit that such uses of documentary evidence are both necessary and appropriate in the context of a

---

1 **E1/52.1** Transcript of Trial Proceedings, 21 March 2012 (Trial Day 40) at pp 62, 67.
2 **E1/52.1** *Ibid.* at p. 67.
3 **E1/56.1** Transcript of Trial Proceedings, 29 March 2012 (Trial Day 44), pp. 72-75; **E1/68.1** Transcript of Trial Proceedings, 25 April 2012 (Trial Day 56), pp. 1-3, 8-9; **E1/73.1** Transcript of Trial Proceedings, 17 May 2012 (Trial Day 61), pp. 67-70, 72-76.

complex criminal trial assessing the veracity of facts arising three decades ago. The proposed approach also reflects the intent of the Chamber's prior oral rulings on the circumstances in which a witness will be found to have sufficient knowledge of a document to allow its use in the course of testimony. These rulings are set out below.

4. The Co-Prosecutors anticipate that requests concerning such uses of documentary evidence with witnesses will arise in the course of scheduled testimony in Case 002/01 as well as during later stages of the proceedings. In particular, the Co-Prosecutors envisage presenting forthcoming witnesses with documents having a sufficient nexus to their direct knowledge – but not necessarily authored personally by them – such as telegrams, minutes of meetings, publications, reports and transcripts of speeches.

II. PROCEDURAL HISTORY

5. On 21 March 2012, in response to objections by the Defence during the testimony of Kaing Guek Eav *alias* Duch, the Chamber ruled that if the witness "has no knowledge of the document" and "cannot identify it or says he has never seen it before, the document must be removed from him and from the screen in front of him."[4] The Chamber added that, even if a particular document cannot be shown or quoted to a witness, the parties nevertheless "can ask questions based on the subject matter in the document."[5]

6. On 29 March 2012, the Co-Lawyer for Khieu Samphan objected, based on this ruling, to an S-21 interrogation record that the Co-Prosecutors sought to show to witness Duch. The Trial Chamber overruled the objection, finding that although Duch did not recall seeing that particular document before, he was sufficiently familiar with, or knowledgeable about, the general type or class of document (a standard form of record used at S-21 relating to interrogations of prisoners) that it was appropriate for him to be shown that document and respond to related questions in the course of his testimony.[6]

7. On 17 May 2012, during the testimony of witness Pean Khean, the Trial Chamber allowed the Nuon Chea Defence to show the witness two summaries of interviews of other witnesses

---

4 **E1/52.1** Transcript of Trial Proceedings, 21 March 2012 (Trial Day 40) at p. 62, p. 67 ("If a witness is not familiar with a document, then the document must be taken from him").

5 **E1/52.1** *Ibid.* at p. 67.

6 **E1/56.1** Transcript of Trial Proceedings, 29 March 2012 (Trial Day 44), pp. 72-75 (use of S-21 record D108/26.282).

(one of which was contained in a Report on the Execution of a Rogatory Letter). These witnesses were not scheduled to testify before the Chamber. The Chamber held, firstly, that "it is not possible to use documents which are statements of witnesses who will be heard at a later stage";[7] and secondly, that if Pean Khean is "unfamiliar with the witness who made the statements or the subject is not within the framework of the debate, then the Bench will simply rule that questioning will not go on."[8]

III. ARGUMENT

The need for a sufficient nexus between the document and the direct knowledge of the witness

8. The Chamber's prior rulings related to the permissible uses of trial documents with witnesses have focused on whether the witness is either familiar with the document or has personal knowledge that would allow him or her to review and testify about the document. The Co-Prosecutors find support in the jurisprudence of the *ad hoc* Tribunals for a principled approach that examines the sufficiency of the nexus between the witness and the document and whether the witness has the necessary knowledge to testify about the document, irrespective of whether or not the witness recalls previously seeing that document.

9. ICTY jurisprudence has established that a witness may testify about aspects of the contents of a document which the witness has not seen previously, for the purpose of shedding light on the origins and/or content of the document, therefore assisting the Chamber in properly assessing the authenticity, relevance and reliability of that document and, ultimately, in making use of the document in a meaningful way in its overall consideration of the evidence in the case.[9] A witness should not be permitted to view or testify concerning a document where the witness "has no knowledge of or cannot speak to" the subject matter of the document, or the witness "was not in a position to say anything meaningful about it."[10] The underlying consideration, in the Co-Prosecutors' respectful submission, is whether there is a

---

7 **E1/73.1** Transcript of Trial Proceedings, 17 May 2012 (Trial Day 61) at p. 76.

8 **E1/73.1** *Ibid.* at p. 76.

9 *Prosecutor v Radovan Karadžić*, Decision on Guidelines for the Admission of Evidence through Witnesses IT-95-5118-T, ICTY Trial Chamber, 19 May 2010 at para. 11.

10 *Prosecutor v. Radovan Karadžić*, IT-95-5118, Transcript, 6 May 2010 at para. 1952; *Prosecutor v. Slobodan Milosević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic,Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 18 May 2005 at para. 9.

sufficient nexus between the witness and the document to justify putting the document to the witness.[11]

10. As long as a sufficient nexus is established between the origins, form, nature or content of a document and the direct knowledge of witness, the Co-Prosecutors submit that it is appropriate to show the document to the witness. This should, of course, be done without improperly leading the witness, or tainting the witness's direct knowledge with the information contained in the document.

11. Pursuant to the rulings of the Trial Chamber and other international courts, the Co-Prosecutors anticipate using trial documents with future witnesses for at least four specific purposes: (1) to **refresh the memory** of a witness; (2) to **authenticate** a given document *prima facie*; or to aid the Chamber to assess the **weight** that should finally be attributed to that document; (3) to **corroborate** the substance of, or extrapolate from, the substance of the document, based on the witness' direct knowledge; and (4) to test the **credibility** of the witness. Each of these expected uses of documents is justified below with reference to procedural rules established at the international level, to which the Chamber may refer in accordance with Article 33 new of the ECCC Law, as well as in illustrative examples from domestic legal systems.

Refreshing the memory of a witness

12. ICTY and ICC jurisprudence have clearly established that witnesses who demonstrate difficulty in recalling certain persons, places, or events may be shown documents that have been made, adopted or previously referred to by them to refresh their memory. In *Lubanga Dyilo*, for example, an ICC Trial Chamber permitted a witness to bring into the witness box statements she had made, and any other documents prepared by her that would assist in refreshing her memory, because of the lapse in time between the events in question and the trial proceedings – a matter of several years.[12] The Chamber only required that the witness notify the Chamber when she felt she needed to refer to such documents.[13] The Chamber had earlier noted that signed witness statements or taped interviews from which these statements

---

11 *Ibid.*
12 *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, 7 July 2009 at p. 7.
13 *Ibid.*

were derived were both appropriate means by which a witness could refresh her memory.[14] In *Hadžihasanović*, the ICTY Appeals Chamber found that prior statements used to refresh memory need not be admitted as evidence at all.[15] Where a witness' memory has been refreshed, a Trial Chamber can consider the means and circumstances by which that memory was refreshed when assessing the reliability and credibility of the witness' testimony.[16] The Appeals Chamber also permitted refreshing of memory both in cross-examination and examination-in-chief.[17]

13. The use of documents to refresh memory during testimony is well-established in domestic legal systems in the common law tradition. In the early case of *Henry v Lee*, in the jurisdiction of England and Wales, Ellenborough LCJ found that a witness need not have personally produced the document used to refresh his or her memory:

> *If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness.*[18]

14. In *R v Singh*[19] two police officers had a conversation with the accused. One officer made notes of the conversation, and these were reviewed by another officer some 18 hours later, at which time the reviewing officer admitted that he could recall only the general effect of the conversation, but not the words used. The prosecution sought to refresh the officer's memory from the notes at trial. In that instance, the court found that the officer had such a poor recollection of the events at the time it would be impossible for him to separate his independent recollection from the notes he read 18 hours later and accordingly denied the

---

14 *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, 16 January 2009 at pp. 16-29

15 *Prosecutor v Blagoje Simić* et al., Decision on Prosecution Interlocutory appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, Case No. IT-95-9-AR73.6 & IT-95-9-AR73.7. Appeals Chamber, 23 May 2003. at paras. 16, 18.

16 *Prosecutor v Enver Hadžihasanović and Amir Kubura*, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, Case. No IT-01-47-AR73.2, App. Ch.,2 April 2004 at p. 3

17 *Prosecutor v Enver Hadžihasanović and Amir Kubura*, *ibid.*; see also *Prosecutor v Blagoje Simić* et al., Decision on Prosecution Interlocutory appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory, Case No. IT-95-9-AR73.6 & IT-95-9-AR73.7. Appeals Chamber, 23 May 2003 at para. 18.

18 (1814), 2 Chitty 124, cited with approval in *R v B (KG)*1998 CanLII 7125 (Ontario Court of Appeal, Canada) at para. 18. The common law position in England and Wales has been developed and codified in s. 139 of the *Criminal Justice Act* 2003, which provides that the memory of a witness can be refreshed "from a document made or verified by him at an earlier time…".

19 [1976] 15 SASR 591 (Supreme Court of South Australia).

prosecution request. However, the court determined that where a witness *was* in a position to distinguish between his own recollection and the aide-memoire, such a refreshment should be permitted:

> *... a witness may be permitted to refresh his memory from notes which were made at the time ... provided that he either made the notes, or if somebody else made the notes, he read them and found them to be in accord with his then recollection... In my opinion it is not necessary that the recollection and the notes fully coincide. If the witness had some memory independently of the notes, read the notes and recognized those parts of the notes which coincided with his memory as being accurate, then that witness should be allowed to refresh that memory by using those notes on some much later occasion in court...* [20]

15. Before the ICC, screening notes, investigator's notes, or other documents that do not demonstrate the witness' acceptance of the contained evidence, however, are not allowed for the purposes of refreshing the witness' memory.[21] Exceptions were made for unsigned witness statements in cases where the witness clearly agreed with the contained evidence and for documents referred to in the witness statement that the party calling the witness intended to use in examination.[22]

16. The sole purpose of showing witnesses documents in these circumstances is to revive earlier memories (i.e. within their direct knowledge) that may have "grown dim through the passage of time".[23] Witnesses of the Chamber are obliged under oath to "speak only the truth" as to what they have "known, seen, heard and remembered".[24] Given that the current trial tests the veracity of facts dating from more than three decades ago, the Co-Prosecutors submit that affording witnesses the means and opportunity to refresh their own memories will enable them to better uphold their oath and ensure potentially probative evidence is not lost. Permitting this use of documentary evidence further upholds the truth-seeking function of the Chamber without occasioning unfairness to any party.

---

20 *Ibid.* at pp. 593-594.
21 *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript, 16 January 2009 at pp. 24-25.
22 *Ibid.* at p. 25.
23 *R v VanEindhoven*, 2006 NUCJ 12 (Nunavut Court of Justice, Canada).
24 *Criminal Procedure Code of the Kingdom of Cambodia,* Annex.

Authenticating documents prima facie or assisting the Chamber to assess weight

17. A witness may be able to confirm or deny the authenticity and reliability of documents – even one that her or she has not previously seen – by having sufficient direct knowledge to recognise, identify or exclude features of a document such as signatures, handwriting or structural features such as layout, office numbers, distinctive codes or aliases, terminology, addresses, or the signature of the author of the document, if they are otherwise familiar with that person's signature.

18. The use of testimonial evidence to authenticate documents that may not have been personally authored by the witness is supported in the practice of both the *ad hoc* Tribunals and the ICC.

19. In *Delalić* et al., the defence challenged the use of testimony to authenticate documents that a witness had previously marked (though he could no longer identify any such mark on the documents) but that were written by a third party not present for the proceedings.[25] The ICTY Trial Chamber found that there was no requirement that a document be authenticated by its author, as long as there remained sufficient indicia of the witness's ability to provide authentication.[26] Despite the witness's inability to find any markings on the documents presented, the Chamber found him reliable given his knowledge of how the documents had been stored.[27]

20. In *Lubanga Dyilo*, a witness was presented with a letter from the Provincial Director of Migrations to the accused in his position as President of the political group *Union des Patriotes Congolais/Reconciliation et Paix* (UPC/RP).[28] Although the witness had previously been shown the letter and it was formally incorporated into his witness statement, he was neither an author nor a recipient of the letter and no evidence had been led in his witness statement based on the letter.[29] The ICC Trial Chamber permitted the witness to consult the letter for the purposes of establishing it's authenticity, based on the information he was privy to in his own position, as a common type of reporting document within the

---

[25] *Prosecutor v. Zejnil Delalić, et al*, Case No. IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 Jan. 1998 at para. 11.
[26] *Ibid.* at para. 25.
[27] *Ibid.*
[28] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-125, Transcript, 12 February 2009 at p. 27.
[29] *Ibid.* at p. 28.

UPC.[30] The Chamber further permitted the witness to give evidence on the purpose and procedure of the reporting system.

21. In view of the well-founded practice of putting documents to witnesses to establish both authenticity and weight, on the basis of a witness' direct knowledge of a *class of documents* rather than the given document, the Co-Prosecutors submit that witnesses familiar with the standard format of DK documents such as publications (including the Revolutionary Flag and Revolutionary Youth magazines), reports and telegrams should be allowed to review and testify about such documents, irrespective of whether they have previously seen that document. The practice of other international criminal tribunals establishes that a sufficient nexus will exist between the document and the direct knowledge of the witness where the general form of the document is recognisable to the witness and consistent with the classes of documents a witness has previously seen.

Corroborating the substance of documents or extrapolating from such substance

22. The Co-Prosecutors find support both in ECCC proceedings and the practice of other international criminal tribunals for a witness to testify concerning a document that he or she has not seen previously, where the witness has direct knowledge of the persons or events described in the document.

23. This type of use of documents arose in Case 002/01 in the context of S-21 prisoner lists and records whose general form was recognisable to witness Duch, who was allowed to review categories of documents with which he was familiar, even if he did not recall having previously seen each such specific document.[31]

24. In *Lubanga Dyilo*, a witness was presented with a photograph published in a newspaper.[32] Although the witness indicated that he had never before seen the photograph, the Trial Chamber permitted questioning concerning the identification of the individuals depicted in

---

30 *Ibid.* at p. 29.

31 **E1/56.1** Transcript of Trial Proceedings, 29 March 2012 (Trial Day 44) at pp. 72-75.

32 *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-343, Trial Transcript, International Criminal Court, 4 April 2011 at p. 14.

the photograph, including the accused, and the timing of the photograph based on uniforms worn by the photographed individuals. [33]

25. In *Šešelj*, a witness was presented with a letter signed on behalf of the Chief of Police of Herzegovina concerning the activities of paramilitary groups under the command of the accused. Although the witness had never before seen the document, he was permitted to testify on the contents of the document with the Chamber noting that his testimony thus far had already referenced a number of items mentioned in the document. [34]

26. In *Krajišnik*, a witness was permitted to read and comment on a transcript from a session of the National Assembly of Republika Srpska.[35] Although the witness was not present at the Assembly and had not previously seen the transcript, he was familiar with the views of the accused on certain topics and was taken to portions of the transcript to confirm that the accused's statements were consistent with the positions the accused had taken during peace process negotiations.[36]

27. In *Stanišič,* a witness was presented with a document, consisting of guidelines by the Main Staff of the Military Prosecutors Office, of which the witness admitted not having seen before, but stated that he was familiar with the general principles in the document.[37] The witness was permitted to testify about the principles in the document because the witness was a military commander who, as the witness claimed himself, had to be familiar with those guidelines.[38]

28. In the Co-Prosecutors' respectful submission, there are numerous similar scenarios in which the Chamber may find a sufficient nexus between a document and a witness' direct knowledge, and allow testimony to corroborate or extrapolate from the substance of the

---

33 *Ibid.* at pp. 14-16.

34 *Prosecutor v Vojislav Seselj*, IT-03-67-T, Transcript, ICTY Trial Chamber, 2 February 2010 at pp. 15332-34. *See also Prosecutor v. Vojislav Seselj*, Decision on Request to Admit into Evidence Documents Tendered Through Witnesses Visnja Bilic, VS-1067 and Vojislav Dabic, IT-03-67-T, ICTY Trial Chamber, 13 December 2010 at paras. 27-28 [testimony of witness spoke to the relevance, reliability and probative value of the document].

35 *Prosecutor v Momcilo Krajišnik*, IT-00-39-T, Transcript, ICTY Trial Chamber, 24 June 2004 at p. 4292 – 4293.

36 *Ibid.*

37 *Prosecutor v Mićo Stanišić and Stojan Zupljanin*, Case No. IT-08-91-T, Transcript, ICTY Trial Chamber, 2 March 2012, at pp. 26992-93.

38 *Ibid*, at pp. 26994-95.

document. For example, a witness may have participated in a meeting, but not seen the minutes or record prepared of that meeting. In such circumstances, because of the direct knowledge of the witness regarding the event described in the document, the witness should be allowed to view and explain the document and its accuracy in relation to the event. Similarly, a witness may have heard a speech in person or by a radio broadcast at the time it was given, but not previously seen a written publication of that same speech or a transcript of the radio broadcast. In that circumstance, because of the witness' direct knowledge of the underlying event, the witness should be allowed to review the document and confirm whether or not that was the speech the witness saw or heard. In this manner, the Chamber will be in a better position to assess the veracity of both documentary and testimonial evidence. As a further example, a witness may have direct knowledge of the arrest of a given individual without being able to date the arrest or the fate of the individual. This witness may properly be shown an S-21 prisoner list or S-21 confession cover page, for instance, to corroborate the fact of the arrest and the transfer to S-21 of the same individual.

29. Moreover, in the case of witnesses who held positions of responsibility in the CPK or DK government, parties should be allowed to show a witness contemporaneous documents reflecting the establishment of policies, and to ask the witness whether the policies contained in the document were indeed implemented – or not – in the organisation at their level of responsibility. In *Lubanga Dyilo*, a witness was presented with a document that ordered the dissemination of a presidential decree.[39] The witness, having previously been shown the decree itself and indicating that he assisted in its drafting,[40] testified that he did not remember reading the order but knew the individuals who signed it.[41] The witness was able to testify on the normal practice for similar decrees and whether, in his knowledge, this decree was implemented.[42] Although such questioning was allowed by the Chamber, the document itself was not entered into evidence through this witness, as the witness' testimony was based on

[39] *Prosecutor vThomas Lubanga Dyilo*, ICC-01/04-01/06, Transcript, International Criminal Court, 8 April 2011 at p. 18.
[40] *Ibid.* at pp. 15-16.
[41] *Ibid.* at p. 18.
[42] *Ibid.* at pp. 18-20.

his own knowledge as related to similar orders and not on particular knowledge with respect to the document presented.[43]

Testing the credibility of a witness

30. Through its 24 May 2012 Direction,[44] the Chamber has upheld the general principle that documentary evidence may be admitted for purposes of testing the credibility of a witness. Although the Chamber notes that such evidence must adhere to the normal standards for otherwise admissible evidence, the Direction does not specifically speak to the sufficiency of the nexus required between the document and the witness to ensure admissibility. The Co-Prosecutors submit that given a sufficient nexus between a document and the direct knowledge of a witness, any document – including one previously unseen by the witness – may be properly put to a witness for the purpose of assisting the Chamber in assessing the witness' credibility.

31. In *Karadžić*, the ICTY Trial Chamber upheld a similar general principle as this Chamber, finding that documents should not be admitted through a witness if the witness has no knowledge of the document.[45] An exception, however, was recognised for the purposes of testing witness credibility:

> *[t]his general principle does not rule out the possibility of admitting documents that challenge a witness's credibility, including in situations where the witness states that he or she has no knowledge of the document or rejects its contents. In such a context, the fact that the document goes to the witness's credibility may constitute [a] sufficient nexus between the witness and the document for it to be admissible. However, the party tendering the document must also be able to satisfy the Chamber as to the document's authenticity and reliability before it could be admitted.*[46]

32. Witness credibility can be tested by a party pointing to a prior witness statement or other document, including one the witness has not seen before, and affording the witness the

---

43 *Ibid.* at pp. 21-25.

44 **E199** Memorandum to the parties (Directions regarding documents sought for impeachment purposes), 24 May 2012.

45 *Prosecutor v Radovan Karadžić*, Decision on Guidelines for the Admission of Evidence through Witnesses, Case No. IT-95-5118-T, ICTY Trial Chamber, 19 May 2010 at para. 10 (internal citations omitted).

46 *Ibid.* at para. 11.

opportunity to explain any alleged inconsistencies. As noted by the ICTY Trial Chamber in *Popović*:

> *[a]s to the fact that the witnesses in some instances claimed no knowledge of particular documents or even in some cases of the matters described therein, we believe that this does not preclude admission of such documents as a general principle. There [sic] still may be very relevant for assessing the credibility of the witness or other purposes.*[47]

33. Like the ECCC Trial Chamber,[48] the ICTR Trial Chamber has admitted statements of non-testifying individuals used during cross-examination provided they are "necessary to the Trial Chamber's assessment of the witness's credibility and are not used to prove the truth of their contents."[49] The ICTY in *Karadžić* has expanded this standard to allow statements of testifying individuals in certain circumstances.[50]

34. The ICTY has also confirmed that the practice of admitting documentary evidence to test witness credibility serves the fact-finding mission of the courts:

> *confronting a witness with material passages of his or her prior statement allows the witness to explain, comment or elucidate on the existence of the alleged inconsistencies and therefore is respectful of the witness's integrity and enhances the reliability of the testimony.*[51]

IV. REQUEST

35. The uses of documents summarised in Section III are not intended to be exhaustive, but rather to indicate some of the anticipated ways in which the sufficiency of the nexus between a document and the direct knowledge of a witness can justify the use of that document – even

---

47 *Prosecutor v. Vujadin Popović et al.,* Case No. IT-05-88, Transcript, ICTY Trial Chamber, 7 September 2007 at p. 15459 ln. 7-15.

48 **E1/73.1** Transcript of Trial Proceedings, 17 May 2012 (Trial Day 61) at p. 76

49 *Aloys Simba v. Prosecutor*, Case No. ICTR-01-76-A, *Judgment* (ICTR Appeals Chamber), 28 November 2007 at para. 20.

50 *Prosecutor v Radovan Karadžić*, Decision on Guidelines for the Admission of Evidence through Witnesses, Case No. IT-95-5118-T, ICTY Trial Chamber, 19 May 2010. at para. 25(e): "The parties may confront a witness ("witness A") in court with the witness statement or the transcript of prior testimony of another witness ("witness B") from another case before this Tribunal. If witness A denies the content of the evidence put to him or her, or disputes it, witness B' s witness statement or transcript of prior testimony will not be admitted unless and until witness B is brought to give evidence in this case. If witness A confirms or adopts the contents of witness B' s evidence that has been put to him or her, then that part of witness B's evidence can be admitted whether witness B comes to testify or not)."

51 *Prosecutor v. Halilovic*, Case No IT-01/48-T, Decision on Admission into Evidence of Prior Statement of a Witness, ICTY Trial Chamber, 5 July 2005 at p. 3

if previously unseen by the witness – without occasioning unfairness to any party and in pursuit of establishing the truth. The Co-Prosecutors respectfully submit that the four uses of trial documents set out above comply with the intent of the Trial Chamber's previous rulings on this matter; are consistent with the rules and practices of other international criminal tribunals; and should be permitted during the course of proceedings in Case 002/01:

36. The Co-Prosecutors accordingly request the Chamber to clarify that the parties may use trial documents with witnesses for the purposes of:

    a. refreshing the memory of a witness;

    b. authenticating a given document *prima facie*; or to aid the Chamber to assess the weight that should finally be attributed to that document;

    c. corroborating the substance of, or extrapolating from, the substance of the document, based on the witness' direct knowledge; and

    d. testing the credibility of the witness.

as well as other purposes concerning which the Chamber may wish to guide the parties.

Respectfully submitted,

Date	Name	Place	Signature
30 May 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		